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TREASON AND RELATED OFFENSES IN ROMAN AND GERMANIC LAW

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principi magistrorum
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INTRODUCTION

WHEN first I began work on my doctoral dissertation, eventually entitled "The Early History of Treason," under the direction of Professor C. H. McIlwain at Harvard University some thirty years ago, the subject appealed to me as an interesting, though somewhat antiquarian, study in the archaeology of the law. The topic did not appear greatly relevant to the intellectual climate of American life in the decade following the First War. Indeed, treason does not seem to bulk large as an active political principle in the Eighteenth and Nineteenth Centuries. The American and French Revolutions, the movements of liberal reform, and even the American Civil War have not been interpreted widely within the context of a political theory of treason. The treason of Arnold, the conspiracy of Burr, and the machinations of Blount come to mind as expressions of opprobrium; the heroic figures of Mazzini, Kossuth and Garibaldi as symbols of opposition to tyranny though rebels against constituted authority—all equally traitors depending upon the point of view. The War between the States, to employ the euphemism of the South, was for long the War of the Rebellion in the North. The violence of the Nihilists in Imperial Russia, the Dreyfus case, and the fear of Bolshevism in the last days of Woodrow Wilson suggested in their several ways that varied strains of the dark political infection still lurked in the body politic of the world. Yet this black sickness of states had not broken forth in alarming virulence, or at least its dark name had not been spoken widely and openly, since the English Civil Wars and the Restoration when such regicides as Hugh Peter and his fellows were hanged for the death of their king, Charles I.
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Nor did it seem in those days of the 1920's that the time was at hand when a vast traitorous pandemic would sweep the earth, recalling the days of the Caesars when treason, sedition and subversion ran rampant in all their varied forms. Generations pass and the old familiar disease types emerge anew renewing themselves from one era to another. The first son who killed his father to seize his house and treasure was perhaps the first primitive archetypal traitor. Later there is the prince, a son, who kills his father, a king, much as in the dreadful tale told by Gregory of Tours about Sigibert who slew his father, the Ripuarian king, thereby serving the interest of Clovis, king of the Salian Franks. Another stage beyond finds Ganelon, the vassal, who betrays his lord, the emperor Charlemagne. At a higher level of political sophistication treason emerges as the fashionable crime, attaching to the cunning, ambitious politician and the shallow, misguided intellectual, typified by the Cassius and Brutus of Shakespeare's *Julius Caesar*. Along with them far down in the abyss Dante places Judas Iscariot, the disciple who betrayed his master. And at last the ultimate offender, Lucifer, who rebelled against his God through sin of pride and was cast forth from the Kingdom and fell with all Paradise lost to him into the deep icy pit where conscience itself is congealed. Intellectual and spiritual treason represent the final depths of public crime in which the individual sets his personal will against the established legal order, representing the collective wisdom of the race. Indeed, in a large philosophic sense treason underlies all crime, for the ultimate effect of crime is the subversion of society and the death of the state. To violate an injunction of the *Decalogue* was to break a commandment of the first source of authority and to assail society even in doing violence merely to an individual; to transgress the
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Twelve Tables was to offend in some degree the majesty of the Roman people. In its most pathetic and trying situations one can only sympathize with Antigone in her attempt to reconcile her conscience and religious obligation with her duty to her king and political sovereign. At its appalling worst one finds the citizen who accepts his country’s bounty and protection and decides how he may best transfuse its life blood into the veins of its enemy, setting himself up as it were as his country’s judge and executioner. These dark stains of human avarice, ambition, envy, hate and pride are illustrated in the most varied manner in the experience of the ancient world. There is no better place to begin our examination than with the massive edifice of the Roman Law.

ADDENDUM

It is a curious coincidence, that, as the writer revises these few introductory words, he observes the recent publication of Traitorous Hero: The Life and Fortunes of Benedict Arnold by W. M. Wallace (New York: Harper, 1954); The Burr Conspiracy by T. P. Abernethy (New York: Oxford University Press, 1954); and the biography of William Blount by his former student and present colleague, W. H. Masterson, published by the Louisiana State University Press (1954), as well as the detailed study of The Strenuous Puritan: Hugh Peter, 1598-1660, by R. P. Stearns (University of Illinois Press, 1954).

As far as I can discern there is no considerable body of material nor any systematic comprehensive treatment dealing with treason and allegiance in contemporary political thought. There is also little work on treason in past eras which might cast light on contemporary problems. However, it is clear that some recognition of the importance of this distasteful subject is presently occurring to some scholars. I have made casual note of the following recent articles which touch the matter in various respects: S. W. Chapman, “The Right of Revolution and the Rights of Man,” Yale Review, XLIII (1954), 576-588; E. N. Griswold, “Per Legem Terrae,” The American Scholar, XXIII (1954), 405-418, which suggests to me some parallels between congressional investigations and the Roman special quaestiones; L. B. Smith, “English Treason Trials and Confessions in the 16th Century,”
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I hesitate to speak of the historical aspects of the American experience with treason and sedition in the Civil War. However, it is my impression that these events are not commonly examined with reference to a political theory of treason, but I am also convinced that specialists in this field might well turn their attention to an approach along these lines. Perhaps it was the wish to allay bitterness, to banish fear, to forget what could not be changed, that led scholars away from the fundamental issues of political theory that were raised in the rancorous controversial war-time literature. Furthermore, it is perhaps true that this angry subject was largely talked through to its ultimate conclusions by the men for whom it had had an ultimate vital meaning, but its relevance to the issues of the present day is seldom noted. It may well be that there is a place for new studies here.
THE EARLY history of Rome supplies much evidence supporting the theory that treason has evolved gradually from an offense against the family in its primitive origins to an offense against the state regarded as a matured socio-political structure. Very important changes in the content of the crime occur during this transformation from its early private and familial beginnings through the long process of becoming public and its final emergence as the ultimate offense in public law. Rome appears as a state very early, being no mere aggregate of families or clans, nor yet a mere nation or ethnos, but the historical details of this early time are difficult to establish. In fact, dates, names, and events must be considered legendary or accepted with the greatest caution at least until the later part of the fourth century B.C. in the period sometimes called the age of Appius Claudius. Even institutions, such as laws and the governing machinery of the state, must be treated with caution and suspicion in the forms in which they have been recorded by late Roman writers. At its most extreme, some have doubted the existence of the traditional early kings while many have questioned the possibility of establishing more than the roughest sort of historical sequence for this early time.

The two crimes connected with treason that may be asso-

* Sections A and C of this study were presented in a public lecture sponsored by the departments of history and the classical languages of the University of Texas at Austin, Texas, on December 10, 1953.

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Associated assuredly with this period are *parricidium* and *perduellio*. The parricide who kills his parent or other near relative may be found in the earliest human society where punishment was inflicted according to the judgment of the *pater familias*. However, such killings and rebellions against the patriarchal head of the family were probably uncommon in an age when family ties were strong. The *patria potestas* is an outstanding institution in the family government of the primitive Romans. The power of the father represented authority of a semi-public nature, and was almost certainly extended in these early days over the family retainers who may have been unrelated by blood ties but were nonetheless in very close association. Indeed, it seems altogether likely that the semi-paternal relation of patron and client originated in such manner, and that any violation of the mutual obligations imposed by this relationship was considered in much the same light as a violation of the family bond. Under such circumstances homicide became parricide and treasonable. And all such treasons are analogous to the mediaeval *petty treason*, being "an aggravated degree of murder, [where] the murderer owed some special private or domestic allegiance to the murdered."

The oldest legislation relating to parricide is set forth in fragmentary form by Dionysius and Festus and constitutes a part of the so-called *Leges Regiae*. Thus, in the portion of the "Royal Laws" attributed to Romulus and Tatius it is provided that "If a son's wife . . . [here there is a lacuna in the text] . . ., let her be devoted to the deities presiding over parents." That the lacuna covers some sacrilegious act of violence may be inferred from a parallel law of similar structure attributed to Servius Tullius: "If a lad beat a parent, let the lad be devoted to the deities presiding over parents."
Next, in the law commonly designated the “law of Numa,” it is stated that “If anyone has intentionally slain a free man uncondemned, let him be as one who has smitten a parent,” i.e., let him be outlawed (paricidas esto). In its original sense the word paricidas is believed to mean a smiter, if not a killer, of a parent. Thus, a progressive expansion of parricidal action is suggested by the meager legal fragments. First one finds smiting a parent, next killing a parent, probably followed by killing any member of the family or any client, and finally the slaying of any freeman not under condemnation. The murderer is not called a parricide, but he is treated as a person who has incurred the penalty for insult or outrage to a parent. E. C. Clark remarks in this connection: “We have here, as it seems to me, an interesting step in the development of Roman criminal law. It is the employment of a primeval and well-established religious penalty directed against violence within the family, for the prohibition of malicious homicide within the community.” Hence murder became a religious offense, violating sanctions which had attached originally to the family. Finally, special permanent public officers, designated quaestores parricidii, were created to track down murderers, and their functions were extended eventually until they seem to have, as their object, the apprehension of all kinds of criminals.

It is clear that parricide contains rudimentary elements of treason in an age when the family was the chief agency for maintaining authority. Under such conditions, killing or injuring the pater familias would endanger social stability. But, when the state appears and parricide has been extended in meaning to include a variety of homicides, the treasonable aspects of the crime are lost, for the state is a complex organism, the existence of which is not commonly shaken by
isolated homicides. Indeed, the state becomes an instrument to limit family self-help by making the punishment of crime a matter for public authority. In this new situation, treason becomes a crime directed against the state, and among the Romans this crime was designated perduellio. Since a Roman state existed prior to the earliest historical record, no documentary proof can be cited to show that parricidium must have existed before perduellio. “It is on intrinsic grounds of progressive juridical development” that perduellio must be placed later than parricidium, and this evolutionary conception of treason is accepted as a fundamental postulate in this study. The perduellis or perduellio is the “bad warrior,” that is, an enemy of the country in general, especially the enemy within, as opposed to hostis designating an outside enemy.

It must be noted that the word hostis loses its original meaning of stranger and is transformed into an expression referring to the enemy without. Thus, the crime perduellio is an act hostile to the state or country (patria), particularly from the military point of view, and involves the ideas of treason and desertion. It includes all culpable dealings with the enemy and all incriminating acts dealing injury to the state, considered in relation to an external enemy. Among such acts may be mentioned: 1) Desertion which begins from the moment one leaves the camp. Furthermore, any citizen who goes over to an enemy of Rome or even to a country not allied with Rome must be considered a deserter, whether or not he be a soldier in the military service. All such offenders are liable to prosecution for perduellio. Both in the time of the Republic and of the Empire these cases came under the jurisdiction of a military court. In both periods the penalties for desertion were extremely severe.
since the condemned were crucified in republican times whereas the Empire delivered them over to the stake or wild beasts.\textsuperscript{18} Forfeiture of citizenship and loss of civil rights extends to deserters who abandon the person under whose command (\textit{sub imperio}) they are, and to individuals placed under interdiction of fire and water. All such persons suffer a change of condition (\textit{capitis minutio}) through their loss of status as citizens.\textsuperscript{19} 2) \textit{Proditio} is a distinct type of \textit{perduellio} and may be defined as the delivery to the enemy of any city, territory or military force belonging to Rome. It may even involve the handing over of the person of a Roman citizen.\textsuperscript{20} 3) \textit{Aid and comfort}. It is an act of \textit{perduellio} to make any agreement whatsoever with an enemy, relative to furnishing information, advice, or such materials as iron, weapons, and food.\textsuperscript{21} This heading covers both vital information and strategic materials in modern parlance. 4) \textit{Incitation}. When one incites an enemy to begin a war or an ally to revolt, he is guilty of \textit{perduellio}.\textsuperscript{22} 5) \textit{Breach of ban of exile}. It was probably a form of \textit{perduellio} to break the ban of exile by returning to Italy. This ban involved the legal prohibition of food and shelter under the formula of \textit{aquae et ignis interdiction}.\textsuperscript{23} This interdiction of water and fire suggests the primitive Germanic outlawry procedures which declare the offender outside the law (\textit{exlex}), forbid all forms of assistance to the criminal, and usually permit him to be killed on sight like a wolf by anyone who happens upon him.

However, it must not be imagined that \textit{perduellio} was limited to external treason, that is, to dealings with an external enemy. In fact, during the early years of the Republic this term seems to have been applied promiscuously to several varieties of internal treason. The murder of a magistrate and the intent to murder a magistrate are among the gravest
cases of *perduellio.* Assaults on magistrates and possibly usurping the powers of magistrates may have been similarly considered. This seems all the more likely since true magisterial powers such as those held by a consul or praetor were based on the grant of *imperium,* a concept approximating sovereign power. Also, at a very early time it appears probable that the client who failed in his duties to his patron was held guilty of *perduellio* and suspended from the “unlucky tree” (*arbor infelix*) by the secular authorities, while the patron who had treated his dependent fraudulently was devoted to the infernal gods through religious sanctions imposed under the divine law or *fas* which ever accompanies or parallels the human law or *ius.*

In general, attempts to alter the constitution, corresponding to the Athenian *katalysis tou demou* or overthrowing the democracy, did not involve *perduellio* since Roman political theory held that the modification or changing of an existing form of government is legitimate *per se,* although the means employed in achieving that object may violate the laws. This subject involves a most interesting distinction between the Greek and Roman concepts of sovereign power, and so leads necessarily to a brief digression.

Thus, Aristotle’s doctrine of Lordship (*ton kyrion*) implies an organic body politic which cannot be changed save by the destruction of its very fabric and intrinsic nature. Here the state is a life and sovereignty is the source of life. If the *politeuma* or bodily structure, defined and identified by the domination of a particular ruling class, such as democracy or oligarchy, is changed and one class replaces another, the constitution of the *polis* itself is thereby changed or, indeed, terminated. The source of democratic life is not the same as that of oligarchic life. Hence, the constitution or *politeia*
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makes the state what it is and determines its nature, and in turn the *politeuma* or ruling class determines the nature of the constitution. This explains why *stasis*, violent change, revolution is the most deadly disease of states according to Greek modes of political thought, deadly because it destroys that Lordship or vital principle which lends the particular living impulse that identifies a state for what it is. Destroy it and substitute another Lordship and you have another state. For the Greek, sovereignty is almost the personality of the state. But the Roman legal mind finds its source of sovereign power outside the state organism in a rule of law. The *imperium* remains sovereign power and ultimate authority regardless of the faction that controls the state for the time being and bestows this *imperium* on its magistrates. The state and sovereign power are continuous apart from the men who constitute it and exercise its power. McIlwain puts the matter succinctly:

The Greek political notion of a *politeuma* was utterly foreign to the legalistic thinking of Rome. To a Greek, thinking politically, an oligarchy or a king *was* the state; to a Roman, thinking in terms of law, it was "the proper business of the magistrate"—(a king, even, as well as others)—"to understand that he impersonates the state."30

This reference to the *De Officiis* of Cicero upon which Jean Bodin could later base his modern theory of legalistic sovereignty reveals the source of Roman thinking on this vital political subject. The state of Cicero rests upon the bond of law (*vinculum juris*) arising from common consent—its the common bond state, the commonwealth, the republic (*res publica*). Sovereignty is no longer a matter of social and economic control determined by a ruling class, but a legally binding authority under whatever constitutional form.31 Two exceptions to this principle of the legitimacy of existing forms
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of government have been handed down in legal tradition from the early Republic. These declare that any attempt to reestablish the kingdom or to create a magistracy not permitting appeal to the people in the popular assembly (*provocatio ad populum*) shall be deemed *perduellio.*

Thus, the crime embraces a wide variety of offenses directed against the safety and welfare of the state. Also its scope varies at different periods of Roman history. Under the Empire, it is usually limited to external treason, whereas, in the early beginnings of the Roman state, it contained all public offenses entered before the *duumviri perduellionis.* These officers do not seem to have been detectives who tracked down offenders like the *quaestores parricidii* but judges who decided all charges of a treasonable nature.

Livy states: “The *duumviri* are to decide on the charge of *perduellio.* If the accused appeals from their decision, he is to fight them on the appeal. If they win, let his head be veiled; let him be suspended by a halter to a barren tree, and let him be scourged either within or without the sacred bounds of the city (*pomerium*).”

These stringent penalties with religious overtones suggestive of the divine law (*fas*) remind one of similar punishments imposed on comparable offenders among the early Germanic peoples, for Tacitus tells us in the *Germania* that traitors and deserters were hanged from trees, while the cowardly, unwarlike and infamous were cast into the marshes, submerged, crushed, and suffocated beneath a *cratis.*

The close association of infidelity and infamy in primitive societies is noteworthy and persistent in their legal traditions. However, in later times, when *perduellio* had been incorporated into the *crimen laesae maiestatis,* the penalties for this crime become widely diversified, differing according to circumstances. Hanging on the “accursed tree” gave way
to crucifixion, casting to the beasts, and other ingenious punishments of a horrid nature. In general, *perduellio* must be considered the treason typical of early Rome whose identity is eventually lost and merged into the broader field of the crimes against majesty.

The conception of treason dominating the great Roman legal codes is bound up in the word *maiestas*. This word, probably derived from *maius*, the comparative form of the adjective *magnus*, denotes an elevated, a higher position and a certain preëminence of which inferiors must take account—not so much superior power, perhaps, as a most exalted prestige, although the suggestion of force, even military might, commonly lies in the background. The view of the origin of *maiestas* adopted here is primarily that of Mommsen, but it should be noted that his theory is not universally accepted among authorities and should be considered a conjecture lacking definitive proof. Nevertheless, the Mommsen theory carries a high degree of probability within the limits set and is criticized in the main on the ground that it fails to consider all the factors involved and stops considerably short of the final conclusions reached by Erich Pollack in 1908 in an elaborate study on the idea of majesty in Roman Law.

According to Mommsen, the concept of majesty entered the criminal procedure of Rome as a result of political conditions restricting the plebeian leaders, or, at least, the group of political leaders who did not belong to the patrician nobility. These leaders were not classed as magistrates in the Roman community although they resembled these officers. The violation of fundamental plebeian rights and offenses done to their political leaders could not be included within the scope or under the name of *perduellio*, just as a plebiscite could not be a *lex publica* and tribunes could not be magis-
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trates since they lacked the sovereign attributes of imperium. In other words, plebeian officials were not protected by the law of perduellio whose sanctions supported the patrician magistracies. The plebeians then demanded for their constitution and their leaders, the tribunes, the same dignity and the same status as belonged legally to the entire Roman community and its magistrates who possessed the imperium. It is commonly agreed that these ends were achieved at the time of the great revolt of the plebs in 287 B.C. through the Hortensian legislation. And it was in the attempt to secure this equality under the law that one first hears the phrase "diminishing the tribuniciamajesty." This became eventually the crimen imminutae maiestatis, and, when the tribunes of the plebs became the actual dominant officers of the community, the expression persisted although in an expanded sense. Maiestas became associated with the tribunicia potestas, and the crimen imminutae maiestatis came to stand in the same relation to plebeian officers that perduellio did to the patrician holders of the imperium.

Thus, by origin maiestas is opposed to imperium despite the fact that in time both words came to be used more or less interchangeably. Hence, ultimately, not only attacks upon the rights of the plebeians but every injury done the prestige of the Roman state resulted in a criminal prosecution as an offense against the majesty of the Roman people. When this stage in the development of the crime had been reached, perduellio could be distinguished from the "crime of diminishing the majesty of the Roman people" only from a single point of view: namely, every hostile act could be termed crimen laesae maiestatis, whereas on the contrary every crime against majesty could not be called a hostile act. For example, lèse-majesté includes insult as well as injury,
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whereas *perduellio* seems to be limited to harmful acts producing a readily recognizable material hurt. Indeed, *crimen laesae maiestatis* included *perduellio* eventually but had a more extended domain, permitting the use of different rules of procedure and less severe penalties than *perduellio*.\(^40\) This distinction is set forth clearly by Ulpian in the *Digest* as follows: \(^41\)

> He, who dies accused, dies with unimpaired status: for a crime is a closed incident upon the death of the accused. Unless perchance, one shall be accused of *majesty*: for, unless he shall be cleared of this crime by his heirs, his hereditable property shall be confiscated to the treasury. However, it is clear that all accused in accordance with the *Lex Julia maiestatis* are not in that situation, but merely those accused of *perduellio* which is an act directed with hostile intent against the public welfare or the life of the prince: and if anyone be accused according to the *Lex Julia maiestatis* for any other cause, let him be cleared of this crime at death. (Dig. 48, 4,11)

It is evident from the preceding analysis that the history of treason in the Roman state divides naturally into three distinct periods. First, there is the period antedating written legal records and marked by family government wherein the typical treason is *parricide*. Following the emergence of the state, *perduellio* becomes the principal treasonable offense and so remains until the decline of the patrician magistracies when it merges into the *crimen imminutae maiestatis*. Thirdly, the crimes against majesty appear during early republican times before the age of accurate chronological record, and *maiestas* probably originates as a protection for plebeian officials. Its field of application becomes widely extended under the Empire, and the crimes are variously designated: *crimen imminutae maiestatis*, *crimen laesae maiestatis*, or simply *maiestas*. 
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There is no other general expression in Latin denoting crime against the state, and the Greek language has no word corresponding exactly to perduellio and crimen maiestatis. In fact, the Greeks refer to the most important crimes embodied in perduellio through special individual descriptive names, as, for instance, prodosia or external treason. The crimen laesae maiestatis is consistently called asebeia in the Greek sources although it is an expression properly corresponding to the Latin word impietas. The use of asebeia illustrates and belongs to an epoch when crimes against the state were, under the influence of religious ideas, considered as crimes against a monarch placed under divine protection. The introduction of the “god-king” idea from the East attached elements of sacrilege and impiety to the crimes against majesty which were quite foreign to the early native Roman conceptions, and these religious factors further increased the elevation and remoteness of the imperial position, raising the ruler above ordinary social obligations and legal responsibilities, separating him immeasurably from his subjects and surrounding him with an invincible divine authority.

Owing to the lack of authentic legal records throughout the earlier part of Roman history, an account of treason cannot be written in a fully detailed chronological sequence. A number of trials for treason are cited by late Roman annalists and attributed by them to a very early day, but recent study suggests that most of these tales are legendary or the projection of late custom back into the distant beginnings of the Republic. On the other hand, if one views Roman institutional development in its larger aspects, he will be struck by the prevalence of faction or stasis emerging in seditious activities under the general legal designation of seditio. Govern-
mental changes were not accomplished by a gradual, easy evolutionary process but were commonly instituted through violence and rebellion, so that the history of republican Rome is, to a large degree, a history of treasonable attempts against the established order. The moderate and balanced constitutional processes that are sometimes assumed by contemporary scholarship are in fact only an idealized view suggested, for example, by the philosophy of history advanced by Polybius and the political theories of Cicero. Actually republican Rome affords an abundance of evidence in support of the validity of the doctrine of the "relativity of treason," as a fundamental principle in political theory. Treason is treason only when it fails, and even then the treason is seldom acknowledged by the loser; or conversely

Treason doth ne'er succeed; and what's the reason?
When it succeeds, no man dare call it treason.\(^{13}\)

Since this principle is so obvious, Strachan-Davidson believes that tyrannicide is implicitly authorized in the Roman law. It is interesting to note that, according to tradition, the first great change in Roman government followed a revolt against a tyrannical king. This legend asserts that the Etruscan despot, Tarquin, was overthrown and expelled in 509 B.C., whereupon a single tyrant then seems to have been succeeded by a group of tyrannical military magistrates called praetors, who were elected from the body of patrician citizens and possessed the \textit{imperium}, a sort of commission giving supreme military command. Later, the \textit{imperium} was limited to the military sphere (\textit{militiae}) outside the \textit{pomerium} or sacred boundary of the city. These praetors possessed a summary jurisdiction with the right of \textit{coercitio} or arbitrary arrest,\(^{44}\) and were protected by the law against \textit{perduellio}. The abuse of their powers and the refusal to recognize the rights
of the plebeian leaders led to a second revolt, assigned by Livy to 494 B.C. and by Diodorus to 466 B.C. At this time, the plebeian officers designated tribunes were safeguarded by the laws of maiestas if Mommsen is correct. In addition, their authority was based on religious sanctions provided under the leges sacratae, and their person was declared sacrosanct, so that violators were held to be sacer or accursed and were devoted to the infernal deities. Maiestas gave them secular protection; sacrosanctitas, religious protection. It should not be forgotten, however, that the concept of maiestas in its ultimate origins, like sacrosanctitas, derives from the sacred order of the divine law or fas. In any case, as a practical consequence of these political changes, the tribune who began as an exceptional officer of the plebs with extra-constitutional powers now gains increasing authority over all classes in the Roman state.

The most important body of Roman law demonstrably possessing considerable antiquity is contained in the Laws of the Twelve Tables. These appear to have been codified in order to stop the arbitrary definition of the law at the caprice of the patrician magistrates. One cannot assert positively that the technical term, perduellio, was used in the Tables, but they did contain the substance of this crime against the state if the statement attributed to Marcian in the Digest of Justinian be correct. This affirms that “according to the Law of the Twelve Tables, he shall be punished capitally who arouses an enemy or surrenders a city to an enemy.” These laws are commonly assigned to the middle of the fifth century B.C. (ca.450) and considered the work of the famous decemviral commission. The traditional accounts of the long period between 450 and 287 B.C. contain evidence relating to a number of revolts but the information is most untrustworthy. Many
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questions remain to be solved in connection with the alleged legislation of 449 B.C. and of 367 B.C. More credence may be placed in the events associated with Appius Claudius about 310 B.C. This age appears to have been marked by the emergence of factions based on economic friction. Finally, in 287 B.C., a well-authenticated struggle is connected with the last great revolt of the small-farming class. The ensuing epoch extending from 287 to 133 B.C. is distinguished by the long series of struggles with Carthage and the development of the senatorial oligarchy. A number of traditional cases of treason are associated with the Punic wars, but no legislation on the subject is available for this period unless one finds an exception in the senatus-consultum de Bacchanalibus of 186 B.C. which made it essentially a violation of majesty to hold membership in the proscribed Bacchalian associations. 

One notable result of these years of war was the development of an imperial policy and the organization of the provincial system. Furthermore, after the destruction of Corinth in 146 B.C., the Greek city-states were brought face to face with Rome and were compelled to devise some means of entering into a constitutional relationship with her if they were not to remain mere conquered subjects. And, it is probably about this time that they widely adapted Alexander's old expedient of deification to the Republic to which they now owed allegiance, although the cult of Roma seems to have been established at Smyrna as early as 195 B.C. Henceforth the Greek cities deified the city-state, Rome, instead of an individual king or emperor and in this way arose the worship of the goddess Roma in the Hellenistic world. In consequence, the Oriental veneration and deference, so distinctive of maestas in the time of the Empire, now attached itself to the native Roman concept of majesty. When W. S. Ferguson
remarked to the effect that the deification of kings involved the subjection and humiliation of cities as symbolized by the Persian custom of *proskynesis*, he might well have added that emperor-worship under the Roman Empire marked the beginning of the fusion and combination of the concepts of *maies-tas* and *proskynesis*, and of that marriage of Roman and Oriental political theories which caused Mommsen to observe that Egypt, mistress and slave, had become the conqueror of her master, Rome.  

Also, in the course of the second century, magistrates and provincial governors tended to exceed their authority with the result that attempts were made to limit their independent action, as indicated by the creation of the *quaestiones rerum repetundarum* in 149 B.C. The *lex Cornelia de repetundis* which had the object of requiring an accounting from malfeasant and dishonest provincial governors must be regarded as a law directed against maladministration of office rather than treason, although these two crimes have many elements in common and an inevitable tendency to converge. The line that separates the defaulting office-holder and the internal traitor is frequently all too thin when considered from the point of view of philosophic, if not of legal, treason. Besides it is during this century that the Roman senate becomes increasingly tyrannical so that in the words of Pelham it "forfeits its right to govern by its failure to govern well" and so encouraged treasonable, or at the least seditious, attacks upon its authority. The gravest of these assaults were fostered by the Gracchi between 133 and 121 B.C. and may be considered violations of *maiestas* since they involved the illegal usurpation of power by the tribune. The senate retaliated by voting the "last decree" or *senatus consultum ultimum* which authorized the arbitrary and perhaps illegal
arrest of those whom it considered subversive of the general welfare. Senate and tribunes looked upon each other as traitors. Each interpreted the general welfare in the light of his own special interests. Such a plight was occasioned by the prevalence of faction and the lack of a common public authority competent to define the interest of the whole. In turn, this lack made it impossible to define and apply general treason laws that would equally safeguard all interests within the Roman state.

Probably the first *lex de maiestate* was the *lex Apuleia* (ca. 103 B.C.). This was voted in connection with the crimes committed during the Gallic War and, in particular, with the seizure of the treasures of Toulouse. It established the special *quaestio auri Tolosani*, and indicated that such offenses as injuring the tribunes or exciting to disorder should be considered *laesa maiestas*. However, it was an exceptional law creating no permanent *quaestio maiestatis*, and, in this respect, resembled the earlier *lex Mamilia* which repressed the acts of treason of the ambassadors and generals sent against Jugurtha in 110 B.C. The famous trial of Norbanus in 95 B.C. was a trial for *laesa maiestas*, seemingly instituted according to the *lex Apuleia*. In 91 B.C. the *lex Varia* declared those guilty of *laesa maiestas* who, by their advice or assistance, had aroused the *socii* to take up arms against Rome during the Social War. But it was Sulla who established definitively a permanent *quaestio maiestatis* by the *lex Cornelia judiciaria* of 81 B.C., that he might guarantee the maintenance of his new constitution. The law of treason was probably not yet exactly defined, although an extension of *laesa maiestas* to some new cases is apparent. Humbert and Lécrivain have reconstructed this law as follows:

This law is directed against the citizen who deals a blow to the power of the magistrates, and, in particular, to the
right of intercession of the tribunes; against the magistrate who compromises the dignity of the Roman people, who does not maintain the prerogatives of his functions, or who renders himself guilty of assuming excessive powers by making war without the authorization of the people, by leaving his province without authorization of the Senate, or by appropriating another province; against the general who permits the escape of or pardons enemy leaders or pirates taken prisoners; against whomsoever incites troops to revolt or delivers an army to the enemy or usurps the powers of a magistrate. The penalty shall be perpetual exile outside Italy and the *aquae et ignis interdictio*, but there shall be no torture of witnesses.56

This law was often applied during the period of anarchy that followed the death of Sulla, in particular, against the tribune Cornelius in 67 B.C. for having violated his tribunician right of intercession and for having attacked the Senate,57 and against Gabinius in 54 B.C. for having left his province with his troops and waged war on his own account.58

This entire period, leading to the First Triumvirate, was an age of unconstitutional procedure, tyranny, faction, and treason. It was the time of the extraordinary commands when power had passed definitely into the hands of the military leaders.59

From 60 B.C. onward until the foundation of the principate, the constitutional history of Rome becomes so tangled and uncertain that no safe inferences concerning treason may be drawn through a study of the nature of the authority wielded by those claiming to be public officers. Julius Caesar cannot be overlooked, however, because of his introduction of personal rule and the idea of god-kingship. This marked a further step in the Orientalization of the Roman concept of *maiestas*, attaching more firmly to it elements of veneration and deference to supreme authority. Even so it is unlikely that Julius Caesar issued any special *lex Julia de maiestate*. 
The legislation referred to under that title in the Digest was probably the work of Augustus. The outstanding characteristic of all treason legislation well down into the Empire is its lack of clear definition and delimitation. This resulted in prodigious extensions of the crimen laesae maiestatis under the emperors. The crime became not merely an offense directed against the person of the emperor but was susceptible of the widest interpretations, embracing not only the deed but also the mere word and thought or intent. The instigation of the act as well as its execution were alike culpable.

Such legislation was a terrible weapon in the hands of the bad emperors since it was employed as an instrument of their vengeance and gave rise to delation, surveillance and unrestricted accusation with all their attendant evils. Suspicion ran rampant and resulted in rigid enforcement of the laws against illicit associations or any group that might prove a hot-bed of conspiracy. Thus, in the early Empire persons suspected of disloyal and subversive intentions or acts were placed under strict surveillance, while in the later Empire of the dominate the Christians were considered a disloyal element who would not pay allegiance to the divine emperor and who would consequently bear watching. Maiestas ceased to denote primarily the dignity and power of the Roman people and became a conception peculiarly associated with the person of the emperor. The introduction of eastern cults at the time of Elagabalus and of an oriental court by Aurelian pointed the way to the full triumph of Hellenistic despotism in the Roman government. A ruler who was "both lord and god-born" (dominus et deus natus) became an object of reverence to his subjects and could demand their unquestioning allegiance to his supreme authority. It was an authority recognizing no obligations and transcending all laws under
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which the ruler tends steadily to become sole *legis lator* and
the embodiment of the eastern concept of a "living law" or
*lex animata*. Such a monarch must be both worshipped and
obeyed, and treason to him is sacrilege as well.63

B—Under the Empire

At this point it becomes necessary to analyze the legal
codes of the Empire to determine the basic nature of the
crime of *maiestas* in its matured form.64 We are less con-
cerned here with the theory of the concept *maiestas* than with
the content of the crime.65 Six general subdivisions of *maiestas*
may be distinguished in Roman political thought; 1) *Per-
duellio*; 2) Acts contrary to the constitution of the state,
resembling the *katalysis tou demou* found in Athenian law;
3) Acts of maladministration by magistrates; 4) Violation of
civic duties; 5) Personal injuries done to a magistrate or to the
emperor, and 6) Violation of civic religious duties. *Perduellio*
has already been examined and discovered to be the primary
form of treasonable offense in republican times. However,
it does not lose its identity or disappear in the imperial legis-
lation but is now associated with other offenses under the
broader scope of *maiestas*, of which it forms an essential part,
almost a central core as it were. The definition of *perduellio*
remains embedded at the very heart of the imperial *maiestas*
legislation although the actions for *minuta maiestas* and *per-
duellio* are henceforth comprehended under the new *maiestas*
procedures.66 The second group of offenses is not definitely
mentioned in the legal codes, probably because the legal and
constitutional status of the principate itself was long a matter
open to question. However, it is clear from the *Annals* of
Tacitus that attacks upon the imperial authority, intent to
destroy the principate and plots to substitute another for the
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The reigning emperor were considered high treason.\(^6^7\) The third group included all acts whereby magistrates tended to exceed their legal powers, endanger the laws of the state, or exhibit contempt for the dignity of the state.\(^6^8\) Specifically it embraced such crimes as raising troops or directing a war without authorization,\(^6^9\) aiding the escape of a confessed criminal, placing the magistrate’s name on public edifices to the exclusion of that of the emperor,\(^7^0\) and spreading and disseminating false news by inserting it in the public records.\(^7^1\) It may also, be noted that according to Ulpian’s *Disputations* the usurpation of power by a provincial governor was held to be *laesa maiestas*, as, for example, when he left his province with his troops\(^7^2\) or when he remained there and retained his command after the arrival of his successor.\(^7^3\) In the fourth place, the violation of civic duties involved a wide variety of offenses.\(^7^4\) Failure in military duties and desertion from the military service were commonly adjudged to be violations of majesty.\(^7^6\) The absence of a citizen at the time of the census or recruiting might entail a penalty as severe as death with confiscation of goods.\(^7^6\) *Seditio* was considered *laesa maiestas* under the Empire, and was especially aggravated in the case of meetings by night (*coetus nocturni*).\(^7^7\) “Instigators of sedition and of tumult, which result in an uprising of the people, shall, according to their rank, either be hanged upon a gallows, thrown to wild beasts, or deported to an island.”\(^7^8\) The use of the oath (*coniuratio*) to bind the conspirators,\(^7^9\) the use of weapons,\(^8^0\) and fomenting sedition and riots among the soldiers\(^8^1\) were likewise prohibited. Such crimes were repressed summarily and the penalties applied with particular force against the ringleaders. Other aspects of *laesa maiestas* falling in this category were: usurpation of the powers of a magistrate,\(^8^2\) and, by extension, the crimes of counterfeiting\(^8^3\)
and of keeping private prisons; and injurious or defamatory writings (famosi libelli) for which the punishment was exile, deportation or death.

Many of the most typical manifestations of *laesa maiestas* may be found among the injuries done to the emperor or to magistrates. The principle of the inviolability of a magistrate, whether patrician or plebeian, passed from the Republic to the Empire, and was naturally extended to the emperor. The murder or intent to murder a magistrate has been noted previously as one of the gravest cases of *perduellio*.

Thus, assaults and injuries of all kinds done to the monarch naturally became high treason under the principate. And, by extension, even utterances concerning the emperor were held treasonable. Furthermore, the sacred character of the emperors contributed to transform every injury into the crime of *laesa maiestas* by making it an impiety. It is noteworthy that many of these injuries involved no bodily hurt to the emperor but were merely insults or offenses against the imperial dignity. Among these special offenses may be mentioned wearing the imperial insignia, such as clothing of silk and gold dyed with the imperial purple, counterfeiting money bearing the effigy of an emperor, consulting the future in all matters regarding the state and the imperial family by employing divination, soothsayers (*haruspices*) or horoscopes, lack of respect for the images of the emperor, including unseemly acts, real or alleged, committed in the presence or in the proximity of an imperial image, and the act of defacing, melting or destroying a statue of the prince which had been consecrated. Certain rescripts of Severus and Caracalla made it necessary for a number of persons to hide away from proceedings started against them, because they had by mischance thrown a stone which struck a statue of the prince, or because
they had sold a statue of the prince even though it had not yet been consecrated.\textsuperscript{93} Other related offenses were the refusal to swear by the \textit{genius} of the emperor or by his name,\textsuperscript{94} violation of an oath taken in the name of the emperor, or swearing falsely to such an oath, although penalties for this type of offense were generally lighter than for most infractions of \textit{maiestas}.\textsuperscript{95} Still other offenses involved adultery committed with a princess of the imperial family,\textsuperscript{96} and violation of the right of sanctuary attaching to the imperial cult and, later, to the Christian churches.\textsuperscript{97}

Violation of civic religious duties under the Empire was closely associated with personal injuries done to the emperor inasmuch as the monarch himself was deified.\textsuperscript{98} Strange religions were prohibited, if they threatened the public peace and safety by creating disorders, or if their devotees refused to participate in the rites of the imperial cult. This anxiety to maintain public order led to the promulgation of laws establishing the severest penalties for introducing new gods and new cults into the Roman world: death for \textit{humiliores}, exile for \textit{honestiores}.\textsuperscript{99} Later the progress of the foreign religions, especially of Judaism and of Christianity, led the emperors to recognize, repress and punish a new crime, that of violation of the national religion. The profession of Christianity was in itself considered inherently a crime, regardless of the allied crimes with which the Christians were charged, such as debauchery, magic and the possession of evil and dangerous books (\textit{famosi libelli}). In the crime of Christianity Tertullian distinguishes two essential elements: \textit{crimen laesae maiestatis} and \textit{crimen laesae romanae religionis}.\textsuperscript{100} The denial of the state gods brought with it, as a consequence in the case of the Christians, the refusal to participate in the ceremonies of the public cult, to sacrifice to the \textit{genius} of the emperor and
to recognize the divinity of the emperor. And since the Christians would not subscribe to the national religion of Rome and could not establish a national state of their own, they were considered *atheoi*, declared guilty of *perduellio* and were treated as public enemies (*hostes publici*) whether they were Roman citizens or not.\(^{101}\) Conversion to Judaism was, likewise, opposed by the Roman state, while Diocletian issued a decree punishing the Manichaeans with severe penalties. Their leaders were burned at the stake, and their disciples suffered death or were sent to the mines according to their station.\(^{102}\) The Roman government was particularly interested in stamping out the leaders of these religious sects and the apostasy of converts usually procured for them a remission of the penalty. After the complete victory of Christianity, the Christian emperors forbade the pagans, in turn, all public exercise of their cult including sacrifices and meetings and pronounced the penalty of death with confiscation of goods upon those who refused to forsake their pagan gods.\(^{103}\) Finally in A.D. 392 Theodosius and Arcadius declared such offenders guilty of *laesa maiestas*,\(^{104}\) as well as Christians who went over to Judaism.\(^{105}\) And in 386 Valentinian threatened to impose the penalties of violated majesty upon Catholics who disturbed the public peace by their quarrels with the Arians.\(^{106}\)

The *crimen laesae maiestatis* necessarily presumes guilty intent (*dolus malus*)\(^{107}\) and draws little distinction between the intent and the deed. It is left for the judge to examine the circumstances and estimate the exact degree of guilt.\(^{108}\) Accomplices, embraced under the formula *cuius ope consilio*, are punished as well as the prime instigators,\(^{109}\) although generally with less severity. Sometimes failure to reveal plots was punished as complicity, but that was probably not the
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general rule until the later Empire. The penalty was more severe when the guilty person was a soldier, and, in the later period at least, solicitation in favor of the guilty was punished. The lex Julia permitted accusations to be lodged and allowed the actions to be instituted by persons of ill-repute, soldiers and women, while slaves might accuse their masters and freedmen their patrons. In fact, the right of accusation was denied to slaves and freedmen only at rare intervals, as by the emperors Nerva, Tacitus, and, on occasion, Constantine. Delatores and accusers were frequently encouraged by a considerable bounty, levied on the confiscated property, but those who could not prove their accusation were submitted to torture and given the severest punishments. Also torture was freely permitted against the accused without distinction of rank, against the slaves of the accused at times, and, at least in the late Empire, even against the witnesses.

Under the Republic the penalty for treason was very diversified since it was dependent on whether the magistrate classified the crime as capital or non-capital. The tribunes had the authority to inflict fines, and the death-penalty quite disappears in the procedure of the quaestiones perpetuae. The penalty of the lex Cornelia and of the lex Julia was aquae et ignis interdictio, that is, perpetual exile outside the territory of Italy, with death in case the ban was broken. Whoever received an exile on forbidden territory also exposed himself to death under the Republic, and to the penalties of the lex Julia de vi privata under the early empire. The condemned regularly preserved his civic rights and his fortune in republican times but during the imperial era there were considerable changes in the penalties since they could be arbitrarily applied by the emperor, the Senate, and the
new imperial magistrates. From Julius Caesar and Augustus onward *aqua et ignis interdictio* was rendered more severe by adding partial or total confiscation. Tiberius added loss of possessions and civic rights and deportation or internment in a designated place. In addition to simple fines and exile, the death-penalty was inflicted under Augustus and Tiberius by the courts of the emperor and of the Senate. From then on, death was the common penalty, being used and abused by the bad emperors, especially to decimate the senatorial aristocracy. After the time of Septimius Severus violations of majesty incurred death by the sword in the case of *honestiores* while the *humiliores* were burned at the stake or delivered over to wild beasts in the arena. This punishment was accompanied with such ignominious consequences as denial of burial, prohibition of mourning to the parents and friends, and damnation of the offender's memory. Also confiscation of property always existed as an accessory penalty, so that not only the will of the condemned became void but all his acts of alienation and manumission made after he took his criminal resolve were retroactively annulled. Even the dowry of a woman guilty of *maiestas* was confiscated. Furthermore, trials for *laesa maiestas* could not only continue after the death of the accused, but, in the gravest cases, could begin at that time and entail damnation of memory and confiscation of property. However, confiscation would be deferred if the heir proposed to demonstrate the innocence of the deceased. Damnation of memory was but a step removed from attainder of treason since the latter is created by extending infamy from the memory of the deceased to his living descendants. Sulla had such an extension of infamy made to the descendants of the proscribed, and had them excluded from the magistracies, Caesar put an end to
this injustice, and it did not reappear in the early Empire, save during certain intervals in the reigns of Tiberius, Nero and Commodus. In the later Empire a constitutio of Arcadius in 397 abrogated the Theodosian law, permitting children and grandchildren a sixth of the confiscated property, and reëstablished confiscation of the whole. Also it imposed on the offender’s sons infamy, confiscation of the son’s property, and the incapacity to receive or pass on any inheritance. Daughters retained a fourth of their mother’s property while a wife received back her dowry and, under certain conditions, gifts given by her husband. Finally, according to a Novel of Justinian, in cases of the crime of conspiracy against the emperor, the husband of the guilty woman was authorized to repudiate her and keep her dowry, while the wife of the guilty husband was directed to divorce him and to keep her dowry and gifts.

C—In the Barbarian Kingdoms

The next step in the history of Roman public law involves the transmission of Roman legal concepts to the new states arising from the wreckage of the Empire as Roman authority diminished in the provinces and gave way to the rising new barbarian kingdoms. By the beginning of the sixth century a substantial portion of the Roman law, especially the imperial legislation derived from the Theodosian Code, emerges in the Visigothic compilation commonly known as the Breviary of Alaric, of A.D. 506. Here a brief yet fairly comprehensive statement of the Roman law of maiestas, based on the Sentences of Paulus, appears which runs as follows:

I. According to the Lex Julia Maiestatis he shall be held by whose aid and counsel arms have been taken up against the emperor or public authority, or the armies of the emperor have been betrayed: or who has waged war without
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the lawful consent of the emperor, or levied troops, or stirred up disturbance within the army, or deserted the emperor. All such persons shall be perpetually interdicted from fire and water; the more humble (humiliores) shall be cast to the beasts or burned alive while those of higher rank (honestiores) shall be punished capitally. Also this offense rests not on overt act alone but is particularly aggravated by impious (disrespectful) words and maledictions.

II. In any accusation of maiestas inquiry must first be made with what resources, with what faction, and with what agents this crime was committed: for a person accused (guilty) of so great a crime must be punished not because of the pretext of adulation on the part of anyone but on account of the actual deed (acknowledged guilt). Hence, when a judicial investigation of this crime is conducted, no dignity is exempt from torture.142

Thus, one finds that a substantial portion of the republican law of perduellio is retained though adapted to the peculiar role of the emperor as the symbol and personification of the state. In addition, the law of accusations contained in the Theodosian Code is included in the Breviary and bears the caption that “No slave shall accuse his master nor any free-man or household servant his patron save for the crime of majesty.”143 The essential features of this law are best summarized in the Interpretatio of its second section and read as follows:

If a slave shall accuse his master or inform against him in the matter of any crime whatsoever or if any follower or servant or freedman shall do likewise in the case of his patron, let the sword be his punishment immediately at the very beginning of his accusation, since we wish to cut off such a voice, not listen to it: unless perchance his master or patron shall prove to have been involved in the crime of majesty.144

From these two basic laws it is clear that the characteristic and fundamental features of the Roman crime of majesty
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were preserved and transmitted to the later Middle Ages, and very importantly the expression *maiestas* itself appears in these legal statements.

However, a peculiar circumstance emerges when one turns to the Visigothic legislation of the seventh century which is contained in the collection of laws termed the *Forum Iudicium*. Here both the idea of majesty and the word *maiestas* have vanished within the space of a century and a half. Indeed, when the German legal historian, Karl Zeumer, undertook to reconstruct the treason law that had presumably existed in the Code of Euric (ca. 481) which antedates the *Breviary*, he made a similar omission in recognition of the dominant Germanic influence in the public law of the new barbarian kingdoms. This new Germanic element represents a great turning point in political and legal theory and a reversion to customary law of a level comparable to the *Twelve Tables* in Roman law. This return to customary law brings an entire revolution in the concepts of sovereignty and allegiance. Among the Germanic peoples allegiance is regarded as contractual in the sense of involving bilateral rights and obligations which rest in turn upon a pledged troth between a ruler and his people. On the other hand, the Roman concept of majesty involves a deferential allegiance and the veneration of the divine monarch or in Christian terms a monarch who is the appointed vicar of God to rule mankind, and, hence, *legibus solutus*. Such a ruler is recognized to be either outside the state or a symbol of the state, and to repose above the law. Among the Germanic peoples the king is but one of the folk though *primus inter pares*, whereas the emperor of the dominate is a living law enveloped by the nimbus of majesty. As a result, in the imperial law of Rome treason is a supreme violation of majesty but among the Germanic in-
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It is breach of troth, infidelitas, not maiestas. Furthermore, sovereignty which it is treason's purpose to attack resides according to Roman political thought in the legis lator,—under the republic in the populus, under the dominate in the monarch to whom the people have granted their full imperium. Here sovereignty is legislative and to that extent modern; it is Bodin's power to make the law. But in Germanic thinking sovereignty rests in the immemorial custom of the folk which can only be found or determined as a judicial process. Here sovereignty belongs to the Law rather than the Legislator and hence is judicial. The law has been made; now it can only be found. Consequently it is not surprising to discover that in the portion of the Visigothic legislation which is based on Germanic principles and includes the public law there is a complete omission of the majesty laws. In their stead one finds such expressions as scandalum, conturbatio and intendisse proditus, or such descriptive clauses as "to stir wicked thoughts and raise the avenging hand against the person of the prince," "to be involved in the crime of infidelity," and "speaking or acting in anywise against king, folk or native land" (contra regem, gentem vel patriam), culminating in the crime of bausia in the Catalanian Fueros. Only that aspect of maiestas which approximates high treason appears in Germanic law, but there is no evidence to show that there is any derivation from the Roman concept of majesty. Instead, the supreme treason in Germanic thinking is essentially a private breach of faith pledged by man to man. The gravest of treasons is broken troth, Treubruch, infidelitas. In the code of the Ripuarian Franks one reads: "If a man shall be unfaithful (infidelis) to his king, he shall pay with his life, and all his property shall be forfeit to the treasury." There is no inconsistency here since the royal office in its public char-
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acter is made secure by personal contract with the subjects. This principle operates upon both ruler and subject and is no one-way arrangement as is evidenced in that famous dictum of limited monarchy of the Visigoths which states: "Thou shalt be king if thou dost right; but, if thou dost not right, then shalt thou not be king." Here is a definite precursor of the feudal *diffidatio* whereby a vassal could withdraw his pledge and allegiance from a faithless lord.

The Alamannic legislation, probably of the early seventh century, seems to reflect some contact with the Roman law as in an enactment bearing the caption *De eo, qui mortem ducis consiliatus fuerit*, which reads: "If any man shall have plotted the death of the duke and it shall have been proved against him, he shall forfeit his life or redeem it in such manner as the duke or the leaders of the people shall consider suitable." Pollock and Maitland, referring to the evidence of the Anglo-Saxon *Dooms*, state that the idea of conspiracy probably "does not represent any original Germanic tradition, but is borrowed from the Roman law of *maiestas*." Certainly the conspiratorial principle is denounced in the *Digest* under the formula penalizing him "through whose activities a plot shall be entered upon with evil intent (*dolo malo*)." Yet despite some evidence of Roman influence, perhaps through ecclesiastical sources, the general tenor of this legislation makes it clear that this is not *maiestas* resting on a basis of territorial law and state sovereignty. The Bavarian laws of the eighth century reveal the same personal bias which is reflected in breaches of fidelity, such as cases where a son attempts to depose his father through a plot devised by evil men (*ut patrem suum dehonestare voluerit per consilium malignorum*). The element of plotting and machination has Roman overtones, but the concept of royal or ducal office is...
distinctly personal. Thus in the parallel Alamannic legislation reference is made of the son seeking “to possess the realm through theft” (raptum).\textsuperscript{160} Majesty cannot be stolen; it can only descend upon the holder as a bearer of sovereign authority and that authority must accord with law. The Lombard laws which are in the main disappointingly scant in matters of public law reflect a similar combination of Roman veneer overlaying the Germanic core. Thus, in the Edict of Rothair of A.D. 643 it is stated that “If any man has planned by himself or plotted with others against the life of the king (contra animam regis cogitaverit aut consiliaverit), he shall be in peril of his life and his property shall be confiscated,”\textsuperscript{161} and “If any man has invited or introduced enemies within the province, he shall suffer the loss of his life and his property shall be confiscated.”\textsuperscript{162} The first of these laws suggests maiestas in the sense of high treason, and the other perduellio or treason against land and folk. But supplementary provisions dealing with scandalum or riot reveal the personal and customary character of the Lombard law since the seriousness of the offense is dependent upon the presence or proximity of the king and determined by the degree of personal insult or affront.\textsuperscript{163} One new conception of some interest is suggested in the verb cogitaverit which appears to make high treason out of mere “cogitating,” thinking about or planning the king’s death in the mind of the accused, yet accompanied by no overt act.\textsuperscript{164} This trend is symptomatic of a development which culminated in English law with the literal “imagining the king’s death” as a form of high treason.\textsuperscript{165} Parallels for this can probably be found under such emperors as Tiberius and Caligula in the extreme extensions of laesa maiestas to the prophecies of astrologers and soothsayers (mathematici et haruspices) adverse to the imperial health and fortunes.
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Not until one reaches the restored empire of Charlemagne does he again encounter the term *maiestas* and then but infrequently. Thus, in the *Capitulare Ticinense* of A.D. 801 it is stated that those who disobey and desert the army and return home without the command or permission of the king shall be accused of the crime of majesty (*reus maiestatis*), shall be in peril of their lives, and shall have their property confiscated to the royal treasury. This is the offense described in Frankish terminology as *herisliz* or flight from the host. However, the context of this enactment suggests the usual Germanic breach of troth rather than typical Roman *crimen laesae maiestatis*. The primary stress is still laid on infidelity although a more detailed study of the Carolingian capitularies is needed to determine the exact scope of a possible reception of Roman legal and political concepts, accompanying the revival of the Roman *imperium*. There is even a possibility that the consistent omissions of the expression *maiestas* in the Germanic codes resulted from a more or less conscious recognition that the new barbarian kingdoms were mere *regna* outside the Roman *imperium*.

One last bit of evidence supporting the theory of the conscious omission of *maiestas* in barbarian legislation is found in a curious legal source, a corrupt compilation of the late eighth century based on the *Breviary* of Alaric and known as the *Epitome Sancti Galli* or *Lex Romana Curiensis*. Here the excepting clause in the law of accusations derived from the *Theodosian Code* which states that no slave may accuse his master nor any freedman his patron save for the crime of majesty is transformed to read thus: "If any slave shall wish to accuse his master or any freedman his patron, unless, perchance, he can prove that the master himself or the patron himself has blasphemed against God, or unless he can prove said master or patron to be pagans, the persons charged shall
be free of his accusation." However, in this case the basic influences are probably ecclesiastical and not specifically Germanic. In this remote Alpine frontier district of Rhaetia the Christian adapter of the Roman law seems to have substituted blasphemying the Christian God for malediction against the divine emperor which had been an important aspect of *laesa maiestas*. The ecclesiastical Latin word *blasphemare* replaces the legal expression *maledicere*.

What final conclusions can we draw? Clearly the *crimen laesae maiestatis* exercised an important influence in the development of the Germanic law of treason by casting the Germanic ideas in Roman form, and at times adding Roman content although the essentially Germanic spirit is preserved. One cannot admit, however, the presence in strict political theory of a genuine *laesa maiestas*, since majesty implies a deferential allegiance to public authority that is incompatible with the contractual idea implied in *Treibisch* which persists as a unifying principle throughout Germanic customary law. Furthermore, broken troth remains a personal matter whether it be between subject and king or between man and lord. The special interest of the king as leader of his folk and first among his peers is the general welfare of the land, and whatever harms the folk injures the monarch. In a certain sense the process of legal evolution has come round the full circle and returned to the more primitive concepts that characterized the early customary beginnings of the royal laws and the *Twelve Tables*, yet with profound differences, for, while history, even legal history, repeats itself, it never repeats itself in precisely the same way.

**APPENDIX**

A. *Codex Justinianus*, 9, 8, 5 *Ad Legem Iuliam Maiestatis*.

C. *Just.*, 9, 8, 5, is an enactment of Arcadius and Honorius issued
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in A.D. 397. (Cf. C. Th., 9, 14, 3 Ad Legem Corneliam de Sicariis [Pharr, pp. 236-237].) This constitutio is commonly referred to as the Lex Quisquis, so-called from the first word of the preface of the law. This preface states that any person who enters into a criminal conspiracy with soldiers, civilians or barbarians and does this under oath shall be put to the sword as one guilty of maiestas, and his property shall be confiscated to the fiscus, whether he has plotted the death of a member of the Imperial Council and Consistory, or of the Senate, or any other person in the Imperial service. The Emperor is not mentioned specifically but it can scarcely be doubted that the enactment would also cover such acts directed at the Imperial person.

Section one adds the concept of attainder or corruption of blood since the sons of such an offender will be spared their lives although they merit the fate of their father because the example of the father or the inclination to commit his crime is inherited. The infamy of their father will always attach to them and they will always be debarred from holding public office or performing public duties. Their lot in life will be perpetual want; death will be a solace and life a punishment.

The later sections of this constitution place detailed and severe restrictions upon the inheritance and disposition of property. Thus the fourth section declares that emancipations granted after the commission of the crime are invalid. Dowries, donations and all alienations, whether fraudulent or legal, are null and void from the time that the person implicated decided to join the conspiracy. The dolo malo principle is basic here, and in this connection one must not overlook the parenthetical statement introduced into the preface: eadem enim severitate voluntatem sceleris qua effectum puniri iura voluerunt. "The laws are determined to punish the intent to commit the crime with the same severity as the perpetrated act itself."

Of this declaration Kübler says: "Here we find something entirely new and unheard of, for the law of Honorius punishes as high treason not only the completed act, the attempt, and the preliminary acts but the mere intent itself. Neither before nor since has the sentence been laid down with such stark nakedness in any laws of the civilized world. The penalties of the Lex Quisquis permit the most innocent man in the world to be brought to the scaffold." Kübler adds ironically that another new feature consists in the declaration that the beginning of the incompetence of the alleged criminal with respect to the disposition of his property reaches back to the precise point of time at which the idea of committing high treason first came to the traitor's mind, "surely a legislative finesse of the highest order."
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So harsh and unjust was this legislation that Heineccius, a German jurisconsult of early modern times (1681-1741), said that it was written in blood, not in ink. Certainly this unfortunate enactment of the later Empire provides the background from which those dangerous concepts of attainder and corruption of blood in treason cases were transmitted to the English Common Law at the time of the revival of the Roman Law in the later Middle Ages. Cf. B. Kübler, “Maestas,” 554-558, for a detailed examination of this legislation.


1. Lege Iulia maiestatis tenetur is, cuius ope consilio aduersus imperatorem uel rem publicam arma mota sunt exercitusue eius in insidias deductus est; quia iniussu imperatoris bellum gesserit dilectumue habuerit, exercitum comparauerit, sollicitauerit, deseruerit imperatorem. his antea in perpetuum aqua et igni interdicebatur; nunc uero humiliores bestiis obiciuntur uel uiui exuruntur, honestiores capite puniuntur. quod crimen non solum facto, sed et uerbis impis ac maledictis maxime exacerbatur.

2. In reum maiestatis inquiri prius conuenit, quibus opibus, qua factione, quibus hoc auctoribus fecerit: tanti enim criminis reus non obtentu adulationis alicuius, sed ipsius admassi causa puniendus est, et ideo, cum de eo quaeeritur, nulla dignitas a tormentis excipitur.

This text is contained in Huschke-Seckel-Kübler, Iurisprudentiae anteiustinianae reliquiae (Leipzig, 1911), II (1), 156-157.

These two statements concerning maestas in Paulus, Opinions (Sententiae), 5, 29, 1-2, represent an extremely interesting summary of the essential elements of the crime as reflected in the Roman law of the Imperial period. The first section lists the basic treasonable acts of the late Republic as set forth in the Lex Iulia maiestatis and condensed from Ulpian, Marcian and Scaevola, now incorporated in Digest, 48, 4, 1-4. The phraseology is transcribed with little change save that the earlier jurists define the crime to be against the Republic and populus romanus whereas Paulus makes the emperor the prime objective of maestas. There is a significant shift from republican to imperial emphasis in Paulus. A comparison of the several phrases in the first section of Paulus with their counterparts in the Digest reveals these striking parallels, illustrating similarity of content but divergence of emphasis:

Paulus, 5, 29, 1  aduersus imperatorem uel rem publicam arma mota sunt

Digest, 48, 4, 1  quvo quis contra rem publicam arma ferat (Ulpian, De officiis proconsulis, Book VII)
It may be noted further that the *cuius ope consilio* formula of Paulus replaces the usual *cuius dolo malo* formula of the Digest for expressing malicious and evil intent. In addition, Paulus introduces the *aqua e ignis interdictio*, the distinction between *humiliores* and *honestiores* with the differing penalties, and the declaration that the offense must be considered not merely in terms of the overt act but of impious maledictions as well which enhance the heinous nature of the crime.

The second section involves a critical question of translation and interpretation that has proved most troublesome, centering on the clause: *tanto enim criminis reus non obtentu adulationis alicuius, sed ipsius admissi causa puniendus est*. Here I am following my original rendering in Speculum, IV (1929), 79, with some modification. This passage in Paulus should be considered in connection with Digest, 48, 4, 7, 3, quoting from Book XII of the Pandects of Modestinus: *Hoc tamen crimen judicibus non in occasione ob principalis maiestate venerationem habendum est, sed in veritate. “This crime must not be considered as an opportunity for the veneration of the majesty of the emperor; on the contrary, it must be considered in the light of the truth.”* S. P. Scott, *The Civil Law*, Vol. 11, p. 27, renders *in veritate* with the clause "for this should only be done where the charge is true," which gives a very different meaning to the entire statement.
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That this passage has long created difficulties is apparent from the commentary of Dionysius Gothofredus on Digest, 48, 4, 7, 3 (p. 722, n. 60, in the Amsterdam edition of 1663 of the Corpus Juris Civilis) in which he quotes Haloander, a German jurist and legal interpreter: *Non in occasione, id est, non obtentu adulationis*. In other words this great jurist definitely associates the expression in Paul. Sent., 5, 29, 2, with that found in Digest, 48, 4, 7, 3. He then proceeds with the following illustration: In response to a certain man accusing Falanius (cf. Tacitus, Annals, 1, 73) of admitting a certain infamous person among the worshippers of Augustus, Tiberius stated that his father had not been elevated among the gods so that his worship might be turned to the ruin of citizens. And for this reason he gave an opinion to this effect: Judges should not decide rashly that every deed whatsoever done by anyone, is done against the Prince, nor likewise ought they to seize every opportunity zealously with such cagerness and diligence as would be employed in punishing acts against the Prince: for they should not strive to please the Prince and Republic by instances of that sort and diligence of that kind. Gothofredus concludes that not every word or deed directed against the Prince is the crime of majesty. He also makes it clear that judges must base their decisions on the facts of the case and not with the ulterior motive of flattering the emperor and public authorities.

Finally I wish to acknowledge my indebtedness to my long-time friend, Professor Clyde Pharr of the University of Texas, for assistance in connection with this translation problem. He has further been kind enough to permit me to quote his analysis of the relationship between these passages as follows: “In both these passages, the point is made that no person, either accuser or judge, shall accuse anyone of high treason (*maiestas*) in an attempt to curry favor with the emperor, using the accusation simply as pretext (*obtentus*) whereby the accuser may display his devotion to the emperor, by such an act of adulation. The passage from the Digest closely parallels the one from Paulus from which it was probably drived ultimately. *In veritate* of Digest corresponds to *ipsius admissi* of Paulus and may be translated variously: ‘in the light of the truth, according to the actual circumstances, according to the actual facts of the case.’”

This conclusion convinces me that Scott’s translation of *in veritate* (Digest, 48, 4, 7, 3) is in error and that *ipsius admissi causa* in Paulus refers to the actual deed or crime. It also supports Haloander’s identification of *obtentus* with *occasio* in the sense of pretext, opportunity, occasion, which was cited in the commentary of Gothofredus.
CH. II

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IN HIS monograph on high treason Bisoukides has made the pointed observation that the concept of hostile acts against the state is by its very nature fluid and fluctuating because it is so difficult to ascertain the precise objective of such crimes. Indeed, one notes constantly that treason is hard to define because the idea is an elusive one. The course of history through the centuries presents a bewildering kaleidoscopic series of changes in the content of the idea. Moreover, the genius of every people expresses itself in the development of ideas of treason which are peculiarly characteristic of that people, so that here, if anywhere, substance is lent to the concept of a Volksgeist. And similarly the texture of the crime varies with changing times as if in response to a veritable Zeitgeist. Just as the vigorous and active political life of the Greek city-state developed at Athens the typical katalysis tou demou and the majesty of the Roman people the crimen laesae maiestatis, so the Germanic peoples evolved breach of faith or troth—the German Treubruch. And curiously enough one will observe that the Germanic contribution to the general conception of treason adds the last of three vital elements which must be deemed essential in any final classification of treasonable offenses. First in natural historical development came those attempts on the life of the organized group, whether family, community or state, involving the entire nexus of crimes against land and folk embraced in the German concept of Landesverrat. Secondly the matured product of Roman public life was the crimen
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laesae maiestatis in which a single individual came to personify public authority. Treason became an offense against a divine ruler and this phase left its permanent imprint in the element of high treason or Hochverrat. It remained for the Germanic peoples to add the factor of a violated personal pledge and broken allegiance owed by one man to another. Indeed, it is the Germanic view of personality that enters directly into the modern concept of individual civic responsibility rather than the ancient politico-religious expedient of Alexander and Augustus which found expression in deference and veneration, based on group response.

The old problem of whether treason antedates the state arises at the very beginning of any treatment involving the life of the early Germans, since one deals with a people not yet reduced to settled society but still migrating about under semi-nomadic conditions. The situation recalls the state of society in pre-historic Greece and Rome, but the historical data are more reliable because the volume of direct evidence is greater, thanks to the early accounts of Caesar and Tacitus and the established record of the barbarian invasions. The general impression which the Germanic peoples convey as they emerge upon the pages of history is that of a people whose political life represents on the one hand a condition of divided authority, shared among the family-group or other wider group of relatives, and on the other hand the broader control exercised by military chiefs and possibly by hereditary kings. Also these early sources indicate a progressive increase in the powers exercised by the holders of the broader authority. Thus Caesar states that, when a civitas defends itself or wages war, a magistrate is chosen to take command who shall possess powers of life and death, whereas in peace authority rests in no single hand (communis magistratus),
although there are leading men in the regiones and pagi who speak the law among them and settle controversies. Tacitus mentions kings (reges) who are chosen according to their degree of nobility but whose royal powers are by no means unlimited or free of restraint. Also there are leaders (duces) chosen because of their valor but whose military authority depends on the admiration excited by the example they set in battle rather than on any arbitrary powers of command such as inhered in the Roman imperium. Finally in the days of the invasions there appear great chieftains from Alaric to Clovis who lead their people, vast armed hosts, into the lands of the Roman Empire. These men possessed royal powers which concentrated much public authority in the hands of a single individual. Preeminent military ability and the respect it created led in a straight path to political dominance.

Of course, one would like to know more exactly what was the size and political significance of the civitas, regio and pagus which Caesar mentions; whether these divisions were peculiar to a single tribe of Germans or were general in nature; whether Caesar has the usual Roman connotation in mind; and to what later geographical and political divisions of the Germanic peoples these areas correspond. Since because of their lack of concentrated public authority there was obviously no true state among the Germans such as that with which Caesar was familiar, his term civitas may well be general in its implication and refer to a people or tribe without regard to political circumstance. Certainly there were many tribes of Germans, and numerous local differences must be anticipated; yet one discerns various broad general lines of development. In Caesar's day some communities at least had no common public officials in whose hands public authority was concentrated in time of peace. Tacitus one hundred
and fifty years later speaks of kings but is careful to specify that their powers are limited. Possibly they had existed in Caesar's time as well, or again perhaps Tacitus is only speaking of a different tribe of Germans. In any case the central authority has not yet come into existence save for a certain military authority of the duces. Nevertheless, it does begin to assume definite form at some time in the course of the great migrations, perhaps because the tribes were engaged in almost perpetual warfare as they forced their way in and through the Roman Empire. As a result, the most eminent chieftains came to hold practically permanent positions and to assume a political leadership which was closely associated with their military command. When the time came for settling down in more stable communities, it was only natural that these great chieftains (duces) continued to wield those powers which would have been considered most exceptional in an earlier period. The people had become habituated to a special responsible central authority and there was no demand that the successful dux lay down his command now that military activity was abating. Added to this was a growing familiarity with Roman ideas of governmental authority now that contact between the two peoples was established. By the beginning of the sixth century A.D., a settled social life and concentrated public authority have appeared, whereas in the first century B.C. neither existed.

If authority is sufficiently scattered and dispersed until it rests in the hands of a great many individuals or of all, and if all lack a public sense, there is grave doubt whether there be any public authority whatsoever; rather community discipline is then a private matter for individuals or the family or other private group. Nevertheless, no matter how private or small the group, if it possesses a group life or corporate
consciousness, it is a germ from which public life may grow. As soon as the individual is placed under obligations and recognizes, or is forced to recognize, restrictions, the field is prepared for public life. Evidently these early Germans of Caesar's day occupied a position somewhat below the level of a strictly public life. They might coöperate in a common policy under a common authority in time of war, but each family pursued its own private policies in time of peace. Family might fight family and tribe fight tribe without restriction; still they were above the purely private exercise of unrestrained individualism where man fights man at will. Here the kinship group might step in and revenge its injured members; here a group which would be deemed private today intervenes to protect its member and perform a duty of a public character. It was self-help but of the same sort as when a modern state seeks possible redress for the grievances its citizens may have against another state. It is only a matter of proportion and perspective. Just so the corporate life of the early Germans was merely in the way of “becoming public” for as Waitz says rightly: “Aus der Familie erwachsen Volk und Staat.” The family is not only the biological but the political basis as well, and from it spring both state and nation. It is the physical foundation of a race, and it is also a common life which expands into the political community; yet it retains its individuality and does not actually identify itself with either community or state. Conversely the state is no mere aggregation of families and is not essential to their existence. The act which establishes the family is the real or symbolic purchase, originally of the woman herself, later of the protection (mundium) over the woman. And in the private relationship of marriage appears a first step toward a concentrated public authority, for the husband has purchased
the right to maintain the protection or *mundium* over his wife. With the coming of children the authority of the husband and father is established in a household. In the fully developed family, veneration and respect for wisdom lead to the centralization of authority in the hands of an elder member, the patriarch or *Altermann*: *quanto plus propinquorum, quanto maior adfinium numerus, tanto gratiosior senectus; nec ulla orbitatis pretia.*

The circle of the family widens and all recognize the common bond of blood-relationship, or, as Brunner states succinctly, “Der Geschlechtsverband erwächst aus der Hausgemeinschaft.”

The only public policy is the general policy of the family affecting all its members; the family is the only state; and the man without relatives is actually without rights or protection and is outlaw.

It is to this wider circle of relatives, to this union of families that attention must next be turned. In general it consisted of the members of several households who were presumed to be descended in the male line from a common ancestor, although the formation of similar unions of relatives on the female side was not precluded. The interest of the maternal kin or *Spindel* kin in an individual was quite as strong as in the case of agnates; this is evidenced by the peculiar intimacy between maternal uncles and nephews.

The family group or *Geschlecht* is ordinarily designated *Sippe*, a term which involves the collateral meaning of the special “peace” and friendship that prevail within the group, as well as the protection of its members against enemies and the obligation to revenge their wrongs. The expression was used in two different connections: on the one hand as a union of agnates, and on the other as the assembled blood-relatives of a given individual. This latter was evidently a wider circle of relatives than the agnatic union, since each
individual derives his blood from different familial sources, and in this latter sense the *Sippe* was constituted differently for each individual. Thus the natural expansion of the family branched outward into a tangled complex of interlocking associations, each of which felt and understood its own peculiar corporate individuality. Further it must be noted that these groupings exercised some sort of authority and represented in certain respects rudimentary states. It seems most probable that the *Geschlecht, Sippe* or *maegth* in its narrow agnatic connotation is comparable with the Latin *gens* and Greek *genos*, for the limits of all these groups are established at the point where relationship to the deceased ancestor can no longer be established. Still the group is larger than any mere household under the supervision of a single *Altermann*.

The state which is the modern bearer of authority is distinguished by fixed geographical boundaries and established tests of citizenship or membership. It is in no sense an ambulatory affair, whereas these Germanic kin-groups were not only vague in composition but had a disconcerting tendency to wander about and could not be stationed within fixed limits. They might and probably they did usually remain in the same general locality for long periods of time. But they were a nomadic people who were just beginning the process of settling down. The result is that here and there one finds certain patronymic forms in the names of villages (*Dörfer, vici*) which would indicate an area occupied by a certain *Geschlecht* (*genealogia*). Waitz has observed that the village community (*Dorfschaft*) is in no sense an agnatic circle of relatives (*Verwandtschaft*) despite the confusion caused by their occasional designation as *Geschlechter*. This would seem to indicate that somewhere in the settling-down process
a change occurred whereby authority passed from the *Sippe* to a group which recognized a community of interest though not of blood. This must not, however, be considered proof that the *Sippe* never possessed authority, or, as Niebuhr attempted to show in the case of the comparable Latin *gens*, that the *gens* was an artificial organization created by a pre-existing political authority. Political authority was probably evolved in the kin-group, as Brunner and Mommsen hold, and the kin-group was not an artificial creation of political authority. The first corporate group was the family; later extensions reached to wider circles of relatives, and finally, the sense of relationship becoming lost and outsiders entering into the group, a community developed without a sense of kin solidarity. Nevertheless, as long as the sense of common interest and a corporate consciousness were present, the germs of public authority could continue to grow, even within the bounds of a larger public corporation until in the later Middle Ages one finds the gild in the town and the town in the kingdom. However, at this early time the *Geschlecht* formed no part of a larger corporation. It lay within a tribe to be sure, but the tribe was a racial or ethnic grouping whose identity was generally felt and recognized, yet which acted as an united organic group only in unusual circumstances somewhat as modern alliances and ententes of national states have united for special purposes, usually defenses against a common danger real or fancied. Thus one sees the burden of authority passing successively from one social grouping to another by a natural evolutionary process. The household and family (*Hausgemeinschaft, Familie, Geschlecht*) expand into wider circles of relatives (*Sippschaften, Verwandtschaften*) which become communities (*Gemeinde*), and these in turn merge into tribes which
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combine to form an entire people (Volk). The early Germanic peoples were divided into a number of such folk-entities, as Visigoths, Alamanni, Franks and Lombards, and formed a related ethnic group.

In all the foregoing discussion regarding the social and political condition of the early Germanic peoples, it must be borne in mind that we are dealing with questions of great complexity, that the conclusions drawn are in the main inferential and often controversial, and that the subject-matter is commonly ethnological and not strictly historical. A great part depends upon deduction rather than documentation. It is against this problematic background that one reverts to the nature of treason in a primitive people who lacked a developed state organization. Obviously here treason cannot be an act subversive of a public authority which is non-existent, but the general philosophic conception of betrayal and broken faith must be applied to an authority which is in the process of "becoming public." Hence one must seek the life germ whence the state evolved from the family and trace its development through the later expansions of the family into those wider circles which constantly assume more mature political characters until at the end of the period nearly all the Germanic peoples have merged into a single state, the empire of Charlemagne. Corporate life is based on mutual agreement whether consciously understood or not. The family is the basic corporate group. All are united for a common protection, and the life of the group depends on the faithful coöperation of its members. Any act subversive of the corporate life threatens the safety of the individual. The common protection or mundium of the family must be maintained at all costs. Hence acts which assail the corporate life and promise the destruction of the mundium are treason-
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able and constitute a rudimentary form of treason against land and folk (*Landesverrat*). Concretely such offenses would include parricide. Indeed, the killing of the head of the family (*Altermann*) who would personify in varying degrees the authority which supported the *mundium* might be considered high treason (*Hochverrat*) in its embryonic form. The homicide or murder of any man capable of bearing arms or of any woman capable of bearing children might well be a serious blow to the organic social life of the group. Adultery or incest might cause internal sedition within the group and render the physical constitution of the *maegth* uncertain in the case of offspring of indeterminable paternity. Arson was particularly heinous since it broke up the customary habits of social existence by destroying the home or other essential property. The theft of live-stock, especially the horse, and of weapons would leave the individual without means to support or defend himself and his group. This early treason was an elementary primal form which assumes more matured and specialized characters in the progressive codifications known as the barbarian codes or *Leges barbarorum*. But long before the period of the codes, the custom of holding inter-communal assemblies or *Dinge* appears which act authoritatively over a considerable area, and opposition to whose decisions must have constituted a very real sort of treason against land and folk.

However, one will be wholly misled if he supposes that treason among the Germanic peoples was a simple evolution from the broad general concept of crime in the family-group to its specific legal definition in the codes of various Germanic peoples in the earlier Middle Ages. The state was no mere mechanical accretion of subordinate units; one must beware of the alluring theory of an "association of associations" ar-
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articulating with mechanical perfection in all its parts. Just as the *mundium* of the family became complicated by the development of the *Sippe*, so the protective authority of the state becomes complicated by the presence of kings. And the king with his royal family is a figure who reaches back beyond the dawn of Germanic history, for Tacitus mentions kings who are noble though limited in authority. The complete history of the Germanic kingship from the day of Tacitus until the period of the barbarian invasions cannot be traced, but seemingly it becomes involved during this time with the office of *dux* or military chieftain. Yet no matter how weak the king or how fully understood it may be that he is merely the personification of corporate authority, the possibility and even the likelihood is ever present that he may assume for himself and his family a special interest separated from the interest of the community, and under certain circumstances this may become dangerous and opposed to the welfare of the corporate life. Indeed the presence of a limited king suggests the idea of the lack of such limitation, and the tendency in later times was to transform the suggestion into reality, as the *major domus* of Merovingian times evidences, an officer who was not a king in name yet possessed extensive authority in fact. Hence one finds that the sort of treason which was typical *Landesverrat* in the family and in those wider circles represented in the popular assemblies (*Landesdinge*) becomes transformed into high treason when its object is a single individual, the king.26 The treason which had been the attribute of a corporate group now attaches itself to a special interest.27 The earlier conception had involved the idea of a contract to maintain the *mundium* for each individual. The Germans, however, were strongly impressed with the notion of dual obligation which
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would bind the king to rule according to law and custom and the subject to render obedience in return for protection, and it is doubtful how far toward the idea of special interest the Germans might have progressed unaided by Roman influence.

The fact remains that during and shortly after the invasions the Roman conception of *maiestas* attached itself to Germanic law. Allegiance to a king surrounded by *maiestas* is no conditional, contractual matter, but consists in *deference* to irresponsible authority, or, in other words, a special interest controlling the state but lying outside the scope of the operation of its law and custom. Indeed, the fact that the Germans possessed some sort of kings who might easily develop a special interest led to their acquisition of as large an amount of Roman *maiestas* as the Germanic temperament would put up with. Thus Frankish history is scattered with many cases of kings and officials whose authority exceeds the modest limits set by Tacitus. Ducal houses appear whose powers are royal in scope and whose interests are special. When a king personifies public authority and recognizes his duty of protection, he attaches to his special interest the peace of the realm and the king’s peace includes all who are in the king’s *mundium*. Self-help and corporate authority are replaced by the uniform law of the king who acts as trustee for the corporation. The scope of the state widens until the elemental crimes against individuals so dangerous to society in its earlier stages are no longer mortal to organized state life; hence the concept treason now includes high treason or *Hochverrat* as its most significant form. Just as the family gave way to the *Landesdinge* as the center of authority during prehistoric times, so the peace or *mundium* of the land gives way to the king’s peace in the period from Tacitus
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The various manifestations of Landesverrat are still treason, but a higher treason now surmounts them and reflects a further development of political organization which may or may not be an advance. The general rule still holds true that the crimes which may constitute treason differ at different periods according to the conditions of social life and political development.

The foregoing discussion of the Germanic kingship may well have served to cause confusion, presenting as it has two contradictory theories supported by contradicting facts. In the first place one finds a theory of limited royal power supported by evidence from the time of Tacitus to the rois fainéants. But again one discovers a theory of strongly centralized authority upheld by such examples as Alaric, Clovis, Charles Martel and Charlemagne. Perhaps an answer may be suggested. Prior to the barbarian invasions the natural Germanic tendency to untrammeled personal liberty maintained limited monarchy or else no kings whatsoever. Some tribes were probably wholly democratic and had no kings; others elected their kings from certain royal families at their popular assemblies but gave them no real power. However, when danger threatened and it became necessary to concentrate authority in the interests of efficiency, the most capable warrior would be chosen to lead the host, whence he was entitled the leader or dux (Herzog). But the dux was not necessarily the king and probably commonly was not. Thus one discovers the appearance of a dual authority: one permanent but largely fictitious; the other temporary though real while it lasted. Obviously the extensive authority of a dux would constitute a true royal power if it were rendered permanent over any extended period of time, and would completely eclipse the older but empty kingship which after
all was retained perhaps in large measure for religious reasons, as the rex sacrorum at Rome, and represented the survival of an earlier actual power. Lacking direct evidence one must assume that in the long and confused hostilities which accompanied the breaking of the Roman frontier and the irruption into the Empire, able chieftains or generals held an almost permanent control with the result that at the end of this period the people had, in general, become accustomed to resting vast authority in the hands of a single individual. Schröder supports this view when he states that the constitution of the East Germans differs from that of the West Germans because the former lived under kings upon their entrance into history, whereas the communities (Völkerschaf-ten) of the West Germans obeyed no single heads in time of peace, neither a hereditary king nor a chosen prince of the land. This difference, however, loses its basic importance with the passage of time since the new type of kingship gradually became habitual among the West Germans and acquired overwhelming authority in the course of the migrations, whereas the old Germanic kingship reflected only distinction of honor and rank while the center of gravity of the kingdom’s constitution had remained in the popular assemblies. Thus while an older dignity might remain long after it had lost its powers, it stood beside a newer office which possessed the substance of that lost authority. Only in this way may the apparent contradiction be resolved.

At this point it may be recalled that the contractual conception implying a mutual obligation has been cited as typically Germanic, and also that the peculiarly Germanic conception of treason involved the idea of a broken personal pledge (Treubruch, infidelitas). Any attempt to show why these views are true must direct its attention to the office of
The curious ideas of troth and faith common to the Germans center about this office and the institution of the comitatus which was closely associated with it. The duties involved in maintaining the mundium of the family among the primitive Germans must be regarded in the light of a social contract which was not consciously contemplated by the parties concerned. Violation of the interests of society as a whole appeared typically as Landesverrat; it consisted of breaches made internally in organized social life. When the interest of society becomes personified in an individual or when that individual establishes a special interest, attacks upon him constitute typical high treason. Still in both these situations a conscious personal pledge and bond are lacking between authority and its beneficiaries. Treubruch implies the personal element. However, it is impossible to ascertain definitely whether the weak and limited kingship of the early Germans was supported by the contractual allegiance of its subjects, but certainly in the case of the military chieftain men pledged their personal honor in his support in time of war so long as he was valorous and worthy of admiration. What one really has is a contract whereby the leader promises courageous and resolute leadership and his followers pledge to emulate him. Here cowardice and desertion on the field of battle (herisliz) are treason of the basest sort. The ethical implications of Treubruch are probably to be associated with the aggressive impulses; one might say with the sporting spirit of a battle-eager race. Yet the powers which the dux enjoyed were chiefly those of military authority. In times when the tribe was at peace, this peculiar personal contractual relationship was maintained through the medium of the institution known as the following (Das Gefolge, comitatus) wherein a group of warriors pledged loyalty to a prom-
inent chieftain and supported him on his hunting and marauding expeditions, as well as in war. In return the chieftain or lord pledged protection, subsistence and fighting equipment to his followers. However, when the great invasions began and able duces became permanent leaders of their people, such chieftains acquired powers which were royal and were followed by their host which was in a sense a vast comitatus, while within the host would be subordinate leaders with their own chosen followers.

Treason was now much a personal matter of bad faith between follower and leader. Later when the people had settled down, the king would still retain chosen followers to constitute a body-guard whence evolved the various antrustiones, gesithcundmen, húskarlar and hagustaldii of the western Germans. Allegiance here is no mere deference to Roman majesty nor support of a Greek faction, but is the assent of the subject to a contract which is bilateral. Here is no king with all the rights and none of the obligations. Obviously this is a situation looking forward to feudalism, since every dux had his followers even though he were less than the king of his tribe or Volk. Furthermore every petty chieftain was joined to his followers by personal pledges. Hence treason could be committed against any dux or lord, and when the distinction between the dux-king and the duces-lords has been drawn, one finds a Treubruch which is high treason on the one hand, and a Treubruch which is petty treason on the other hand. Throughout all this one discerns many elements reminiscent of the Roman relation of patron and client, but here the military element is predominant. In both instances one cannot mistake the personal nature of the pledge and the consciously assumed obligation which the later ceremony of fealty and homage symbolizes. But the
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combination of land-tenure with the *comitatus* nexus, the resolution of the *dux-king* into a *dominus* and the kingship into an office possessing special interests, and the gradual adoption of the idea of *maiestas* changing allegiance from a contractual to a deferential matter was a process left for the ensuing Middle Ages.

Furthermore, one must observe that *Landesverrat* may also be involved in the idea of *Treubruch*, for treason to the land and folk involves bad faith, though the personal relation is obscured; thus the *Treubruch* in this case is hardly typical. However, when one wishes to evaluate the seriousness of a treason, he must consider the conditions existing between the criminal and the object of his crime. Hence the weightier the obligation the more heinous the offense, but this does not imply that the narrowest and most personal obligations were the most serious, as Epstein suggests. Rather treasons which affect a wider number of individuals as the community or state, or which affect more influential persons as the king, would be more serious than breaches of faith against the narrower circle of the family or a petty lord. Consequently in the absence of a true king whose authority is generally recognized as superior to that of all other *duces* or lords, one can hardly say there is any real high treason, but instead as many petty treasons as there are crimes against lords. This condition, which may not be altogether hypothetical for this early period, was surely realized later when feudal society had developed.

Finally something must be said about the only references to treason that may be found in writers contemporary with the early Germans who treat of their laws and customs. Caesar mentions treason in connection with the *comitatus* quite specifically in an oft-quoted passage. Here one dis-
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covers that when any chieftain in the council offered to act as dux, those who wanted to follow him declared their wish by rising and approving “the cause and the man” and were applauded by the assembled folk, but any men who had pledged their support and then did not follow the dux were counted in the number of deserters and traitors (in desertorum ac proditorum numero), and no further confidence was reposed in them. This statement is decidedly interesting since it presents the conditions of typical Treubruch at such an early date that one must conceive of the entire matter as characteristically Germanic. Also it represents this early Treubruch as a closer approximation to the feudal petty treason than any other form of treason unless it be violations of the Roman relation of patron and client. This is clearly treason to a lord or dux who possesses no mark of royal authority; hence there is no high treason here, although elements of Landesverrat may enter into the breach of troth insofar as the dux is representing the authority of the community and is not acting in a private capacity or when he is not engaged in an enterprise of his own. It is the general implication of the passage that traitors are considered as men who cannot be trusted to live up to personal pledges and obligations which they have voluntarily assumed. Perhaps this affords some basis for the remark of Pollock and Maitland that “the close association of treason against the king with treason against one’s personal lord who is not the king is eminently Germanic.” A curious question arises here as to what attitude would have been taken to an injury done to those early Germanic kings who “reigned but did not govern” in the tribes which possessed kings. One hazards the guess that it would have been less high treason than sacrilege done to a sort of rex sacorum. But the later position of the duces
as kings was defined by the personal Treubruch, and their ducal character as primus inter pares was evinced by the fact that high treason against them was still the personal infidelity mentioned by Caesar which was amendable among some peoples upon the payment of a suitable wer.\textsuperscript{43} Also it should be noted that this sort of action involves Germanic infidelitas and nothing resembling Roman maiestas. An overt act against a Germanic ducal king was often a less serious offense than a word whispered or a malediction uttered against a Roman emperor.

In another passage, comparable in significance to that cited from Caesar, Tacitus observes in his Germania that it is permissible at the popular assembly (concilium) to make accusations and place individuals in peril of their lives by bringing capital charges against them.\textsuperscript{44} He adds that the death penalty is imposed in different ways according to the nature of the crime. Traitors and deserters are hanged from trees while the cowardly, unwarlike, and infamous or effeminate are cast into the marshes beneath a wicker-basket (cratis).\textsuperscript{45} The reason for this difference in the mode of punishment rests on the principle that the criminal acts of traitors should be punished in a manner exposed to the sight of all. In this way the retribution due the traitor might serve as a warning to others. On the other hand, abominable and infamous crimes should be hidden, thereby concealing what was considered too vile and disgraceful for public knowledge. This curious association of the crimes involving infidelity and infamy hardly seems accidental since a similar relationship emerges in the later barbarian codes.

The greatest difficulty in evaluating the testimony of Tacitus results from the fact that he did not define what he meant by proditores, and a certain ambiguity results from that omis-
The difference of opinion to which this has given rise is set forth at some length by Bisoukides. Some assert that by *proditio* is meant a crime which is committed through the breach of a special troth and do not consider it a relatively recent product of Germanic law but a type of criminal act reaching back into a very primitive period. Others, like Knitschky, maintain that *proditio* refers only to the Roman equivalent of *Landesverrat* and that Tacitus has used the word in this Roman sense urging that he would have appended an explanatory statement had he employed *proditio* in other than its usual Roman connotation. In corroboration of this view Bisoukides adds an original theory of his own. He states that it would be misleading to maintain that the mention of the traitor in connection with the deserter rests on pure accident; furthermore desertion is a subordinate species of treason and perhaps the oldest type of treason against land and folk. Also he asserts that the breach of troth occasioned by a follower's desertion of his lord had not been punishable in criminal law, but that such traitors were merely held in general contempt without legal consequence. Knitschky has supported this on the basis of the remark in Tacitus that "it brings life-long infamy and shame to have fled the field of battle surviving one's chieftain." It may also be noted that Beowulf says it is better for the coward and traitor to die than to live a life of disgrace and dishonor. But Bisoukides is unwilling to go the full distance with Knitschky and thinks the difficulty may be solved by taking a midway position in the controversy. He thinks it possible that the condition of troth was standard (*massgebend*) for a certain class of crimes, but that the cases which actually occurred were clearly those now falling under the category of *Landesverrat* in accordance with Brunner's dictum that what the more recent crim-
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inal law calls treason against land and folk was in the older law breach of troth against the community. Thus Tacitus meant *Landesverrat* and has used the word *proditio* accordingly.

However, if one returns to the passage in Caesar concerning treason, he finds that the evidence supports the view that *proditio* is a breach of a special personal troth which goes back into deepest antiquity for it mentions *proditorum* in specific connection with the *dux* and *comitatus*, and Caesar has the advantage of antedating Tacitus by a century or more. The only *Landesverrat* that can be construed from Caesar's passage would be in a case where the *dux* represented the authority of the community. Furthermore, the argument for *Landesverrat* of the Roman type, drawn from the association of the words *proditores et transfugas* in Tacitus, loses its force when faced in Caesar by the earlier and almost identical combination, *desertorum ac proditorum*, which is employed in connection with typical *Treibruch*. On the other hand the punishments differ, for Caesar mentions only the contempt of their fellows whereas Tacitus speaks of hanging in one passage and of disgrace in the other. Again this might indicate two different sorts of treason: one, a clear case of *Treibruch* where a man deserts his chief in the line of battle and survives in disgrace and contempt; the other, desertion as well but punishable with death. Seemingly Tacitus either contradicts himself or else refers to desertion under two different sets of circumstances. A plausible explanation may be advanced for the second alternative. The first instance may relate to simple breach of the personal pledge where a man deserts his chief in a marauding expedition or other privately conducted warfare, whereas the latter case bearing the death penalty may refer to desertion in an inter-
communal or intertribal war where the dux represents the folk and in which case the desertion would constitute Landesverrat as well as the modified form of Treubruch. In general, however, one cannot feel that Knitschky has found perduellio, the Roman equivalent for treason against land and folk (Landesverrat), in Tacitus or that Bisoukides has done more than discover a qualified Landesverrat. Of course, the latter is quite correct when he says it cannot be maintained with certainty that the matter of troth and Treubruch is a specifically and uniquely Germanic institution for Dionysius reports a somewhat comparable relationship between patron and client existing in Rome as early as the time of the kings.54

Also the ancient Greek prodosia had the basic connotation of bad faith, but there was no personal breach of troth of the Germanic type in classical Greek political thought, although something very similar may be found in Homeric times. The later Greek idea of prodosia related to the destruction of the form of government of a state over which some tyrant, for example, had secured control; in a democracy it was inherent in any aspect of stasis or revolutionary activity that would result in the overthrow of the demos (katalysis tou demou).55 Such attacks upon the constitution do not appear in the primitive Germanic legal sources, since the communities of that period lacked a constitutional structure. Likewise they lacked the special protection of a royal criminal law enforced under the king’s peace. There is even evidence that, if the king attacked another, he could be pursued by his fellow-countrymen and killed if taken prisoner by them, a situation which leads back to a very early form of customary law.56 The advanced political structures of Greek constitutionalism and Roman absolutism did not fit the simple conditions of the early Germanic communities;
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but they approached the Greek more nearly than the Roman since the trend of their political theory was in the direction of limitation.

As far as punishment is concerned, treason and desertion belonged to the gravest breaches of the peace and were among the few crimes punished with a capital penalty executed in public. They were generally associated with those offenses which were held especially shameful and dishonorable and in which burial was completed by covering the condemned with mud and dirt. As Tacitus notes, the death-penalty was executed through hanging to trees. In this way the loathing felt for the traitor could be given expression or else linked up with certain religious conceptions. Wilda, however, affirms that the death-penalty was not inflicted in all cases of Landesverrat but only in those where the evil-doer was taken in an overt act. Finally treason against land and folk has always brought an irreparable hostility for the offender and an outlawry which Brunner says must be associated with the death-penalty. The outlaw was called Wolf (Gothic wargs) and hence was condemned to death; indeed, he was probably consecrated or devoted to death on religious grounds reminiscent of the Roman conception of sacer. Schröder explains that the outlaw (útlegh) was accursed and unholy because he had failed to respect the sacredness of human rights, and thus he had forfeited the protection which society could maintain over his person. However, it was the Germanic view that whoever broke the peace had forfeited it for himself with the result that the outlaw had no further claim to the protection which he had enjoyed in the state or society of which he had formerly been a member. The idea of the law is clearly apparent that every man must consider an enemy of the
people as his own personal enemy. The outlaw was thrust out of the community and anyone might kill him without fear of punishment. He was forced to flee into the wilderness. No one dared protect him, house him or feed him (Speisebann) much as in the case of the Roman aquae et ignis interdictio. Whoever assisted him laid himself liable to punishment or the possibility of becoming outlaw also. All traitors were outlaw (exlex), and outlawry was the inevitable concomitant of a wide variety of detestable crimes. The bond of the Sippe which underlies the authority of the state and at one stage of social development constituted the sole public authority would be destroyed completely by unchecked treasons and related offenses. Hence the penalty was of the utmost severity; the wife of the outlaw became as a widow, his children as orphans. His property was unprotected and what he possessed would be partly turned over to the community to serve as restitution for the damage he had wrought and partly given as compensation to those whom he had injured. Later he was denied all rights in property or at law, and finally even his innocent kin were held attainted of his crime.

At this point it may be profitable to turn aside for a brief analysis of certain Scandinavian materials of the later Middle Ages. Although much later in point of time than the general period here under survey, these old Norse sources contain so much that is early from the point of view of ideas that they should not be disregarded, especially since they serve to illustrate many of the political and legal principles now under discussion. Furthermore, the sections dealing with secular law are not greatly influenced by Roman and ecclesiastical traditions; in fact, they represent a very pure Germanic formulation of the customary criminal law. Of
these sources the two most important are the Frostathing law (Frostuthingslög) of the middle thirteenth century and the Gulathing law (Gulathingslög) which may be as much as a century earlier. In both these laws the curious Norse expression, nithingsvig, nithingsverk, is used in connection with such capital offences as high treason, treason against land and folk, housebreaking, arson and murder (morth). Such crimes are shameful acts placing the offender outside both legal and religious protection and involving "strict peacelessness" (die strenge Friedlosigkeit) which means absolute exclusion from the peace of the land. The man who commits arson with hostile intent has violated the fundamental social sanctions, and consequently the usual protection of society is withdrawn from him. He is termed a Brandwolf, deemed unholy and accursed (úheilagr) and placed outside the peace of the land (útleghth). It is interesting to note that the essence of the idea of nithing is shame, and that the Frostathing law states that the greatest nithingsvig is committed when one betrays the land and people away from the king. Here treason against land and folk seems to be integrated with high treason. Just as in the time of Tacitus crimes of infamy were associated with the crimes of infidelity, so here treason is declared to be the greatest act of shame. The traditional connection of these crimes has developed in this strictly Germanic custom until, at last, the ideas of infamy and infidelity are identified in a single crime, treason. The law, then, goes on to say that

if the king accuses any man of treason against the land, he shall appoint from his household a man of equal rank with the accused. . . . This man shall have the king's writ and seal and shall press the charge at a shire-meeting (fylki) of the folk from which the king is absent. It is, also, an act of shame if any man flees from the land in time of war and returns to
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wage war against his own country without having renounced the peace from which he departed.70

Another provision of this law states that

if any man goes away beyond the peace of the land and returns to wage war against his country or against the folk who still remain within the king's peace, whether they be of native or alien birth, such a man shall forfeit his lands and movable property. However, if he wishes to atone for his actions, a helmsman (shipmaster) shall pay forty marks to the king, but each oarsman only three marks. To all those whom they have despoiled they shall pay as much as those who were ravaged can claim under oath.71

In general, it is affirmed that if a man is convicted of a shameful crime (nithingswicg) he shall forfeit his real property, "but no man can at any time forfeit more land than he actually owns."72

The office of king was placed so distinctly beneath the law among the Norse that it was easier according to their legal thinking for a king to be guilty of treason against the land and folk than for any of the people to be guilty of high treason. The king was merely primus inter pares without extraordinary, unlimited authority and care was taken to bind him so that he would respect the law. This end was attained not by placing the king under oath but by pledging the people to avenge any breach of the law made by the king or a lord. Thus it was enacted that

no man shall make an unlawful attack upon another in his home, and, if the king does this, an arrow shall be cut and sent through all the shires (fylken), and every man shall rise up and kill him if he can be caught. And, if he escapes, he shall never again return to the land. And whoever will not rise up against him shall pay a fine of three marks, and a like amount shall be paid by any man who fails to forward the arrow.73

An additional illustration of this principle may be found in
the *Goda* of King Hakon of Norway, relating to an occasion when the king issued a command to the *Landthing* that the entire folk should accept Christianity:

> It is the will of all the countryfolk, spake Asbjörn, to keep the law, that you have established here in the *Frostathing* and that we have here adopted; we wish to follow you in all things and to keep you as our king, so long as a single one of us, countryfolk, here present in this *Thing*, remains alive, if you, O king, preserve moderation and only ask of us such things as we can grant you, and as are not impossible for us. However, if you press these matters with such impetuosity and if you try force and violence on us, then we, countryfolk, determine to forsake you in all things, and to take for ourselves another lord, as is our right, who shall hold in freedom to the faith that is dear to us. Now, O king, you shall choose between these alternatives before this *Thing* comes to an end.\(^{74}\)

Although the section of the older *Gulathing* law, enumerating the various *nithingsverke*, does not include the crime of treason, several references to this offense may be found in the law.\(^{75}\) Thus in one place *Landesverrat* is associated with murder (*morth*) and breach of oath to keep the peace, and it is stated that one may clear himself of this crime through an oath taken by twelve oath-helpers.\(^{76}\) And again it provides that "if anyone fares forth from our land . . . he has the right to return whenever he wishes, so long as he is not a member of a band of enemies to our king."\(^{77}\) But if a man has joined such a hostile band, then clearly he has forfeited the peace of the land and become *friedlos* and has placed himself outside the law (*utlagr*). In yet another place the *Gulathing* law asserts that

if a man who was once sent hence into outlawry returns to the land bringing true war tidings, he shall be allowed the right of habitation though he had formerly been outlawed. But if a man brings war tidings that are not true, he shall
be outlawed even though he has already been allowed the right of habitation.

Then it adds that if the token arrow sent forth through the *fylken* to summon the farmers to repel raids shall go out into their homes, all to whom it comes must muster on shipboard within five days.

But if anyone stays quietly at home, he shall be outlawed, for at such a time both thegn and thrall shall go forth.

Finally it declares:

If a hostile force invades the land and the king, fearing that men are likely to fail him, demands hostages from us, we have no right to refuse the demand. But whoever does refuse is (by that fact) guilty of treason.78

This legislation suggests a form of treason against land and folk that stresses the obligation of the folk to defend the land against hostile raids and to prevent the spread of false reports which might endanger the security of the land, but it also makes clear the responsibility of the king to lead and command even if he must take hostages to ensure the successful defense of the land.

Further, the attachment of the Norse people for the sea colors much of this legislation and has a bearing on the manner in which treason may be committed. This is evident in a law concerning treason against land and folk which runs as follows:

If anyone makes ready a longship in some part of the countryside and does not make known the destination whither he will fare . . . and if (the men who sail the ship) renounce the peace and fare forth to ravage this region, then they are *nithing*; but if they harry elsewhere then they are outlaw but not *nithing*. And, if they fare forth and do not renounce the peace, then they are outlaw and *nithing* as well and forfeit every penny's worth of their goods, no matter where they harry.79
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High treason, as well as \textit{Landesverrat}, is suggested in the law which states:

If you point the ship southward along the shore, and a man deserts the ship while it is faring southward and while the king is fighting to defend the land, then he is outlaw and may regain the peace by the payment of forty marks. If, however, the helmsman (shipmaster) deserts, he is outlaw in every respect.\textsuperscript{80}

Approximately contemporary with these laws are the Swedish Westgötalag and Ostgötalag. The former sets forth that “it is a shameful act for a man to carry his shield across the boundary and wage war upon his own land, and that such a man forfeits his land and peace and shall lose his possessions.” It is an irredeemable offense both for him and his followers.\textsuperscript{81} The latter defines the penalties for \textit{Landesverrat} even more exactly:

If one chances upon a man who leads a band of strangers into his own land; and, if he bears his shield across the boundary, if he wages war upon his own land, if he burns, if he binds the people and carries them off; and, if he shall be convicted of these things upon evidence, then he shall forfeit his life and all that he possesses in the land and in the province. And of his property one-third shall go to those who have suffered injury, another third shall go to the king, and the last to the folk.\textsuperscript{82}

Similarly one reads in the Danish law of King Erik:

This shall men, also, know, that no man may renounce his land. Furthermore, if one fares forth from the realm and joins an army of strangers in an expedition against his own land and harries that land, then shall that man forfeit to the king every penny that belongs to him in the land, both landed property and other possessions. For men call that the crime of bearing the war-shield against the realm.\textsuperscript{83}

Later one hears that the Frisians led those guilty of treason to their land and folk northward to the strand and drowned them in the sea.\textsuperscript{84}
In early Scandinavian political thought, kings and princes are justified only when they perform the definite service of protecting their people. As is the case among the Greeks, the duty of the ruler is to rule well, and he who rules badly is an incompetent or tyrant whom the people are obligated to remove. But, in addition, the Germans were a people whose political and legal thought expressed itself in terms of "rights." Hence this right to forsake the bad king is defined in the laws themselves, and is frequently set forth in other writings. The skald, Sighvater, sings: "Red gold serves oftentimes to redeem plunderers from the courageous king; but (this time) the monarch refused it; he had the heads of these wicked men cut off with his sword; his trusty warriors hastened the revenge for the robbery: thus should the land be protected"; and then again: "This proved his might best, for, with a sharp sword, the guardian of the land cleft the skull of many a Viking." In the Fagrskinna one reads of the jarl Erlingr:

When Erlingr was in Tunsberg, he learned that they (Vikings) were harrying to the east. Then he went eastward to seek them and captured Fridrek and Bjarni with two ships; and he had Fridrek bound to an anchor and thrown overboard; and Bjarni was hanged and no man troubled himself about it.

Nevertheless, despite this general recognition that the king should be subordinate to the law and actively maintain the law, examples may be cited of rulers who were quite despotic. The case of King Harold Fairhair of Norway, related in the Icelandic Egils-saga recalls the capricious disregard for earlier custom and precedent that may be found among the early Merovingian kings of the Franks. Thus one reads that King Harold was very careful, when he had gotten new peoples under his power, about barons and rich landowners,
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and all those whom he suspected of being at all likely to raise rebellion. Every such man he treated in one of two ways: he either made him become his liege-man, or go abroad; or (as a third choice) suffer yet harder conditions, some even losing life and limb.87

High treason immediately assumes greater importance when kings appear who, in large measure, disregard customary “rights.” Such rulers are bound to incur much unpopularity and to be held up to the folk as tyrants by the freedom-loving barons. It is true that the king may intend to enforce the peace of the land more thoroughly by consolidating the land in his own hands, but this was what the great barons least desired since it would interfere with their freedom to plunder and harry when and where they pleased. Rights were insisted on, even when their loss might mean greater peace, for these Northmen were, in no sense, a peace-loving folk. These kings felt the insecurity of their position and sought to compel fidelity. Thus in the Egils-saga King Harold suspects his powerful baron, Thorolf, and says: “Great pity is it Thorolf should be unfaithful to me and plot my death.”68 Thorolf denies that he is a traitor or has shown disloyalty to the king.66 Later, after the king has caused the death of Thorolf, Thorolf’s brother, Grim, comes to the king. But the king has to guard himself against disaffected individuals like Grim and the latter may not come within the hall before the king so long as he or his twelve followers are armed. They must enter weaponless, so six go in while the other six remain without and keep the weapons.69 Thus here are careful regulations for the prevention of high treason and the punishment of the traitor is death if one may judge by the fate of Thorolf.

In the Gulathing law the homicide of parents, children, brother or sister—all forms of parricide—incurs “strict peace-
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lessness,” while in the Frostathing law “the slayer, even though demented, shall leave the land as an outlaw and never return to the realm.”\(^{91}\) In ancient times this crime seems to have been almost unknown.\(^{92}\) King Magnus considered that one who committed such an act must be insane.\(^{93}\) The killing of a husband by a wife, or of a wife by a husband was regarded in the same light as parricide by the church, although it must be remembered that, from the point of view of Germanic law, husband and wife did not stand on the same plane of equality. The woman was in a state of dependence on her husband which gave him the right to punish her or even to inflict the death-penalty on her if he had secured the consent of her relatives. The wife pledged faith and fidelity to her husband, so that any crime committed by her against her husband appeared as treason against her lord.\(^{94}\) It is extremely probable that this early Germanic conception of a wife’s allegiance to her husband had much to do with the definition of petty treason in the later Common Law of England where killing or plotting the death of a husband by his wife was held petty treason along with killing or plotting the death of a lord by his vassal. In regard to this crime the Frostathing law states:

If a wife slays or betrays her husband in a crime that she commits with another man, then may the kinsmen of the slain man accept no redemption-money from her, and let them maim her or slay her as they wish. Her property, however, shall be used to pay a full wergeld if she struck the death-blow, but only a half wergeld if she counselled the slaying. From the property of him who struck the death-blow, the kinsmen of the slain man receive a full wergeld, and the king receives what remains both in land and movable property; the slayer, however, becomes an outlaw forever.\(^{95}\)

Some Norse laws, it is true, do punish the husband, as well
as the wife, for such slayings on the ground that they have committed a breach of the pledged troth of wedlock (Ehebruch) or have sought to commit it, and this is an inexpiable crime. The Ostgötalag states that “if a wife murders her husband, or a husband his wife, then he shall be broken on a wheel or rack (geradebrecht) if he has done it, and she shall be stoned if she has done it.” But laws relating to Ehebruch of this sort provide generally that if the husband can demonstrate that he wished only to correct his wife, he shall not be punished as a “spouse-murderer” (Gattenmörder) but shall pay wergeld for her as for any other homicide.\(^9\)

These slayings were envisaged from various angles in Germanic law according to the circumstances; they were considered either petty treason or Ehebruch when the wife was the offender, and either Ehebruch or homicide when the husband was the offender. It does appear quite certain, however, that Ehebruch approximates Treubruch only in the case where the wife commits the criminal act. The personal troth which the wife owes the husband lies at the basis of petty treason, just as in the case of the personal troth which the vassal owes to his lord.\(^8\) Petty treason implies a reciprocal relationship involving mutual bonds and obligations; yet here the wife and vassal seem to incur a heavier responsibility of loyalty commensurate with their inferior status, so that the punishment for breach of troth weighs more harshly upon them. The husband and lord seem to have a more favored position though perhaps counter-balanced by greater obligations in the way of protection and sustenance. Probably some comparable equation or proportion between benefits and duties exists in the case of high treason as between king and subject. This aspect of the mediaeval development of the crimes of high treason and petty treason has never
been subjected to a systematic and critical examination, but it cannot be disregarded in any consideration of the basic nature of homage and fealty. At this point Germanic law brings us to the frontiers of feudal law.

APPENDIX—PETTY TREASON

The crime of petty treason has never been explored in detail although significant observations on this topic may be found in the great basic histories of English Law. The central importance of this crime becomes apparent when one notes its intermediate position serving as a connecting link between the concepts of broken faith or Treubruch inherent in Germanic custom and the feudal concepts of fealty and ligeance. Legally it represents the dividing line at which the felonies are distinguished from the treasons. (Sir Matthew Hale, I, 179, notes that “all treasons include felony.”) As the power of the state increases and the position of the king is enhanced by his becoming supreme lord of the realm, the king is set apart from all lesser lords. The relation of lesser lords to him is that of subject, not of vassal; offenses against him become breaches of allegiance rather than of homage; and the treasons against lesser lords are carefully differentiated as petit treason from high treason against the king. Petty treason becomes an archaic survival from a day when broken troths or faith with all lords (domini) were alike treasons until at last it was abolished as a special offense in 1828 by statute George IV, c. 31, 2, being reduced to a felony of the rank of murder.

Nevertheless, this trend of distinction between the treasons was already apparent in the twelfth century, as Pollock and Maitland point out (II, 504, with notes 1 and 2): “In the twelfth century another wave of Romanism was flowing. The royal lawyers began to write about laesa maiestas, to paint in dark colours the peculiar gravity of the crime, to draw a hard line between the king and mere lords. But they could not altogether destroy the connexion between vassalship and treason; men were not yet ready to conceive a ‘crime against the state.’ Petty treason perpetrated against a lord was but slowly marked off from high treason perpetrated against the king; and in much later days our law still saw, or spoke as if it saw, the essence of high treason in a breach of the bond of ‘ligeance.’”

Although he discusses laesa maiestas in some detail, Bracton does not specifically mention petit treason in his De Legibus et Consuetudinibus Angliae of the mid-thirteenth century. However, in
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f.105 (ed. G. E. Woodbine, 1922, II, 299) he does state that "those who plot against the lives of their lords shall be burned with fire" which is an adaptation from Digest, 48, 19, 28, 11, De Poenis. Pollock and Maitland (II, 504, n.2) cite Britton, 1, 40, as perhaps "the first writer who talks expressly of high (or rather, great) and petty treasons; with him to 'procure' the death of one's lord is great treason, and one is hanged and drawn for forging one's lord's seal or committing adultery with his wife." Therefore, with Britton the distinction between grand treason and petit treason is not between crimes against the king and those against a lord, but between differing types of offenses against lords.

However, Sir Matthew Hale in his Pleas of the Crown, I, 378-379 (1st Amer. ed., 1847, I, 377) notes that falsifying the lord's seal and committing adultery with his wife or daughter (Fleta, 1, 22; Britton, c.8) are omitted from the great statute of treason, 25 Edward III (1352), stat. 5, c.2, 10, which now defines the crime as "when a servant slayeth his master, or a wife her husband, or when a man secular or religious slayeth his prelate to whom he oweth faith and obedience." The independent identity of petty treason is still maintained, but a significant change has occurred, for, as Hale sets forth, "The killing of a master or husband is not petit treason, unless it be such a killing, as in case of another person would be murder," i.e., it must be no mere case of manslaughter, and again, "If a wife conspire to kill her husband, or a servant to kill his master, and this is done by a stranger in pursuance of that conspiracy, it is not petit treason in the servant or wife, because the principal is only murder, and the being only accessory, where the principal is but murder, cannot be petit treason." Pollock and Maitland stress that henceforth (after 1352) treason against any other person than the king is petty treason, that servant does not mean vassal nor does master mean lord, and that the killing must be actual and not merely compassing to kill. High treason against the king is now sharply distinguished from petty treason against masters and husbands. By the fourteenth century Holdsworth, op. cit., III, 287, declares four distinct ideas have emerged in the statute of Edward III to constitute the basis for the offense of high treason: "a) the idea of treachery; b) the idea of a breach of the feudal bond; c) the idea that the duty to king as king is higher than the feudal duty to a lord; d) an admixture of ideas taken from the Roman law of laesa majestas."

In general, see Sir Matthew Hale, Historia Placitorum Coronae. The History of the Pleas of the Crown, with notes by Sollom Emlyn
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For Scandinavian parallels in this connection, see Uplandslag, c. 15, 1 (Von Schwerin, p. 140) which states that if a man kills his rightful lord, whether the lord be rich or poor, that man shall be brought before the thing or assembly and racked on the wheel, and his land and goods shall be divided into thirds and shared among the king, the accusers, and the hundred (Hundertschaft). On the personal relationship between husband and wife relative to petty treason, see Pollock and Maitland, op. cit., II, 436.
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In the opinion of the author the chief raison d'être for these studies arises from the scarcity of materials, descriptive and interpretative, accessible to American students which deal with these aspects of political and legal theory. This is especially true of such work in the English language. The most readily available text-books on the Roman law are devoted to an examination of the private civil law. Offenses against the state and the public criminal law generally are either treated cursorily and neglected, or entirely ignored, save in a very small number of special studies which will be noted shortly. On the other hand, continental European scholars, chiefly German and French with some Italian contributors, have produced an extensive literature in this field. For the comparable area in Germanic customary law there is almost a complete lacuna in American and British scholarship which is fortunately corrected by important works of continental scholars. However, these European materials are often highly specialized and not well-known in this country. Also, they are in large measure works of the nineteenth century which tend to be disregarded by contemporary scholars or considered obsolete. This position is ordinarily not well taken since these studies, for the most part, represent fundamental research in the primary sources and have proved substantial in high degree. The present century, however, has not supplemented these investigations with comparable advances in constitutional and legal history. Therefore, it has seemed desirable to collect in short monographic studies
some of the fundamental data of these fields with rather heavy documentation. Much of the evidence is controversial and the facts alleged not altogether easy to substantiate. The author lays claim to no special originality in the presentation of this factual data although he does believe that the interpretation represents an independent approach.

The history of treason is much easier to investigate in the Roman law than among the highly complex and confusing Greek and Germanic materials. In the first place, a great treatise of widely accepted authority is available in the monumental *Römisches Strafrecht* of Theodor Mommsen (Leipzig, 1899). Secondly, numerous Roman legal remains have been preserved and have been carefully studied by generations of scholars, analyzed, classified in an orderly manner, and made accessible to the modern investigator. The most serious exception to this generally fortunate situation relates to the early Republican and so-called Regal periods of Roman history. Even here some legal materials are available, but questions concerning their precise authenticity involve great difficulties of interpretation and application. These very early legal sources are the *Leges Regiae* and the fragments of the *Laws of the Twelve Tables*. They throw some light upon the relation of the family to the early state, upon parricide as a form of treason, and upon the early history of perduellio. Well-edited texts of these laws may be found in C. G. Bruns, *Fontes iuris romani antiqui* (7th ed., by Otto Gradenwitz [Part I—Leges et Negotia], Tübingen, 1909); Paul F. Girard, *Textes de droit romain* (3rd ed., Paris, 1903); P. E. Huschke, *Iurisprudentia antejustiniana* (6th ed., newly edited by E. Seckel and B. Kübler, Leipzig, 1911). In addition to Mommsen's *Strafrecht*, two secondary treatises should be noted which are extremely useful in the study of this early period.
These are E. C. Clark, *History of Roman Private Law* (Part III, Regal Period) (Cambridge: University Press, 1919), and A. H. J. Greenidge, *Roman Public Life* (London: Macmillan, 1911). Clark is valuable for his discussion of the relation of *parricide* to *perduellio*, while Greenidge indicates the constitutional significance of many legal concepts. Mommsen is indispensable for his presentation of an important theory concerning the origin of the idea of *maiestas*. To these may be added several papers in the *Studi in onore di Salvatore Riccobono* (Palermo, 1936), Vol. II: especially “Imperium” by M. Radin; “Zur Infamie im römischen Strafrecht” by E. Levy; and “Paricidas esto” by F. Leifer.

As a rule, the legal ideas of the later Republic have been transmitted to modern times in two ways. Either extracts from republican legislation were incorporated in the great codes and the juristic literature of the late Empire, or the prevailing legal practice of the Republic has been set forth in the *Orations* of Cicero. A very complete account of treason in the late Republic could be written from the speeches of Cicero alone. Other literary sources are less valuable although Livy, Diodorus Siculus, and Dionysius of Halicarnassus should be examined closely. The accounts of these historians extend into the regal and republican eras and must be used with care for the earliest times in connection with which they narrate much traditional and legendary matter. A great convenience in the use of classical literature, lacking a generation ago, is the Loeb Classical Library in Greek or Latin text with English translation, published in London by William Heinemann, Ltd. and in this country by the Harvard University Press. The Orations of Cicero most relevant to this subject are the *De Re Publica* and *De Legibus* (trans., C. W. Keyes, 1928); *De Oratore* (trans., E. W. Sutton, 1942);
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Good secondary works are available to expedite investigations in this field. In addition to Mommsen, there is a very substantial article on maiestas by Humbert and Lécrivain in Vol. III (Part II) of Daremberg and Saglio, Dictionnaire des antiquités grèques et romaines (Paris, 1904) which has been followed at many points in this study. This article is documented with numerous citations that serve as a useful guide to the literature of the subject but they must be verified with extreme care. In many respects Humbert’s study is a résumé of Mommsen’s discussion in the Strafrecht, but it adds some new material and, at times, criticizes Mommsen. It may be noted that, for those preferring to read French, a translation of the Strafrecht has been prepared under the title Le droit pénal romain and is published as Volume XVIII in the Manuel des antiquités romains, edited by Mommsen, Marquardt and Krüger (Paris, 1907). In addition, Lécrivain has a short article on perduellio in Vol. IV (Part I) of Daremberg and Saglio’s Dictionnaire. Finally both Mommsen and Humbert must be reconsidered and compared with the more recent independent study, ‘Maiestas,’ by B. Kübler in Pauly-Wissowa-Kroll, Real-Encyclopädie (Stuttgart, 1928), XXVII, 542-559, which
Literature on Treason in Roman Law cites many less obvious sources and contains an extended analysis of the *Lex Quisquis*. Two additional monographic studies should be mentioned that deserve careful attention. The first is J. L. Strachan-Davidson, *Some Problems of the Roman Criminal Law*, 2 vols. (Oxford: Clarendon, 1912), which presents important views relating to *perduellio* and the *senatus consultum ultimum*. It also examines in some detail the relation of religion to law, including the problems associated with *sacratio*, *sacri legium*, and the *aquae et ignis interdictio*. The second of these works is P. M. Schisas, *Offences against the State in Roman Law* (London: University of London Press, 1926) of which Part I, pp. 3-15, provides a brief analysis of *perduellio* and *maiestas*. The balance of the book is a detailed procedural study, heavily documented and not duplicated elsewhere. It is one of the few distinguished contributions in this field in English. Another significant recent study is C. H. Brecht, *Perduellio: Eine studie zu ihrer begrifflichen Abgrenzung im römischen Strafrecht bis zum Ausgang der Republik* (Munich, 1938). The older secondary works have been supplanted largely by Mommsen’s *Strafrecht*. Nevertheless, the pre-Mommsen treatises should not be entirely overlooked. G. Geib, *Geschichte des römischen Criminalprocesses bis zum Tode Justinian’s* (Leipzig, 1842), pp. 50-66, contains an especially good study of *perduellio*. In addition, there are W. Rein, *Das Criminalrecht der Römer von Romulus bis auf Justinianus* (Leipzig, 1844), pp. 504-597, and A. W. Zumpt, *Das Criminalrecht der römischen Republik* (Berlin, 1865-1869), I (2), 324-338, on *perduellio*; II (1), 226-264, 376-392, on *perduellio* and *maiestas*. P. E. Huschke, *Die Multa und das Sacramentum* (Leipzig, 1874), should be noted in its relation to public offenses.

As their titles indicate, many of the secondary works men-
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tioned above deal with the legislation of the Imperial period. However, the large quantity of legal materials, readily accessible in the great codes, makes it both feasible and desirable to gain fresh impressions directly from the sources in the investigation of treason under the emperors. This task is rendered the more easy because Mommsen has classified the various aspects of treasonable offenses in the Strafrecht and provided invaluable documentation for the different categories directing his reader to the appropriate sections of the Corpus Juris Civilis, Codex Theodosianus, and Sententiae of Paulus. In the Corpus Juris the Code and Digest are fundamental. The best modern edition is that of Mommsen-Krüger-Schöll-Kroll, recently re-issued for the entire Corpus (Berlin: Weidmann, 1954). However, interesting and often valuable suggestions may be obtained by comparing recently edited texts with early editions representing late Renaissance scholarship. In many respects the work of Dionysius Gothofredus (Denis Godefroi, 1549-1621) has never been surpassed. In this study the Corpus Juris of Gothofredus has been used in the Geneva edition of 1619 and the Amsterdam edition of 1663. The marginal notes in these older editions commonly constitute a running commentary upon the text and give sixteenth and seventeenth century interpretations of the Roman law. Such notes afford points of view and angles of approach to the subject that would be missed entirely if one confined himself to modern studies. The early writers, also, have prepared many special treatises dealing with limited fields or particular aspects of the Roman law. Among these special topics maiestas has not been slighted, for a column of goodly length containing the names of writers on majesty and related crimes may be found in the Bibliotheca realis iuridica of M. Lipenius (Leipzig, 1746), I, 354-355, with the
Supplement of G. A. Jenichen, II, 268-269. However, research should be pursued, in the main, in the most recent and best authenticated texts, using the old editions for occasional comparison and for the suggestions they contain. A notable aid for expediting research in the Code is a product of contemporary scholarship entitled Vocabularium Codicis Iustiniani [Pars prior. Pars Latina], (Prague, 1923), by Robert Mayr. This lists a large number of references, relating to treason, under the word maiestas. The Theodosian Code should be used in the Mommsen-Meyer edition (Berlin, 1905), reprinted, 1954, although the older edition of G. Haenel (Bonn, 1842), including the Gregorian and Hermogenian Codes, may be used for purposes of comparison. The Mommsen edition contains in the Introduction, pp. xiii-xxvii, a most serviceable list of cross-references, relating titles in the Codex Theodosianus to the appropriate parallel title in the Codex Iustinianus, while similar cross-references, printed with the text, may be found relating the Theodosian Code to the Breviary of Alaric. As in the case of the Justinian legislation, valuable reference may be made to the old texts of the Codex Theodosianus, edited by Jacobus Cujacius (Jacques Cujas, 1522-1590), and Jacobus Gothofredus (Jacques Godefroi, 1587-1652) with commentaries. A convenient text of the Sentences of Paulus is available in the Huschke-Seckel-Kübler, Iurisprudentia anteIustiniana, II (1), and in Girard's Textes, pp. 356-431.

In no respect has modern scholarship advanced the opportunities for research more than by the production of accurate translations of the source materials of the classical period. As the nineteenth century advanced the establishment of definitive texts through competent collation and textual criticism, so the twentieth century is providing scholarly translations of
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many of these texts. However, this work has proceeded rather more slowly with the juristic literature than with the classical belles-lettres. Nevertheless, one great achievement completed recently has been the translation into English of the entire *Theodosian Code and Novels and Sirmondian Constitutions*, with commentary, glossary, and bibliography (Princeton University Press, 1952) by Clyde Pharr, now research professor of classical languages at the University of Texas, and associates. The author of this monograph can testify from his own experience how greatly the investigation of these recondite legal sources has been facilitated by the work of Dr. Pharr, when he recalls the slow process of dredging through the massive Mommsen text of the *Codex Theodosianus* in the preparation of his doctoral dissertation thirty years ago. *The Ecclesiastical Edicts of the Theodosian Code* by William K. Boyd (Columbia University Press, 1905) was one of the few studies completed in this country making use of this legal material which was also relevant to the study of treason. The Sixteenth Book of the Code, covering the religious offenses, supplements in many ways the Ninth Book dealing with offenses against the state. Another great step in advance may be anticipated with the completion by Dr. and Mrs. Pharr of the translation of the entire Justinian legislation in the *Corpus Juris Civilis* upon which they are presently engaged. It should be noted, however, that the Justinian material may now be utilized in a translation by S. P. Scott. This work is entitled *The Civil Law*, including the *Twelve Tables*, the *Institutes* of Gaius, the *Rules* of Ulpian, the *Opinions* of Paulus, the *Enactments* of Justinian, and the *Constitutions* of Leo, in 17 vols. (Cincinnati: Central Trust Co., 1932). Scott's rendering is not altogether satisfactory and should be checked critically for the treason legislation in the *Code, Digest* and *Opinions*
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(Sententiae) of Paulus. Many of Scott's long essay-type notes accompanying the translated text are useful historical summaries containing information not readily obtained elsewhere.

The historical literature of the Imperial period supplements the juristic literature in many important respects and must not be neglected. For the problem of maiestas the indispensable works are the Annals of Tacitus and the Lives of the Caesars by Suetonius among Latin authors, and the Roman History of Cassius Dio in Greek. These works fill in gaps left by the theoretical expositions of the jurists and the pragmatic statements of the imperial constitutions by providing specific cases that may be used to illustrate the prevailing situation. For these historical materials the text and translations of the Loeb Classical Library may again be recommended although the older translations of Tacitus and Suetonius in Bohn's Classical Library are also useful. The Latin text of the Annals by Henry Furneaux, 2 vols. (2nd ed., Oxford: Clarendon, 1896) with voluminous notes is excellent. The Greek text of Cassius Dio (trans., E. Cary, Loeb, Vols. IV-IX, 1916-1927) is invaluable from the closing years of the Republic, supplementing the accounts of Tacitus and Suetonius with much additional material. These literary materials of the Empire are filled with numerous cases of violated majesty, so that an independent study of treason could be based on them alone, as, indeed, has been done in considerable measure for the reign of Tiberius. Here mention should be made of R. S. Rogers, Criminal Trials and Criminal Legislation under Tiberius [Philological Monographs Published by the American Philological Association, No. VI] (Middletown, Conn.: The Association, 1935), and C. E. Smith, Tiberius and the Roman Empire (Baton Rouge: Louisiana State University Press, 1942), especially Ch. VIII on the Lèse-Majesté Prosecu-
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tions. Various articles and studies by the distinguished Italian scholar, E. Ciaceri, dealing with the problem of *maiestas* under Tiberius, should also be consulted. Other important treatments of *maiestas* dealing with special areas within the late Republican and Imperial periods may be found in various chapters of the *Cambridge Ancient History*, notably Ch. VI (Sulla) in Vol. IX (1932) by Hugh Last and Ch. XIX (Tiberius) in Vol. X (1934) by M. P. Charlesworth. Standing in a class by itself is the monograph by the late Frederick H. Cramer, entitled *Astrology in Roman Law and Politics* [Memoirs of the American Philosophical Society, Vol. 37] (Philadelphia: The Society, 1954), together with his article on “Bookburning and Censorship in Ancient Rome,” *Journal of the History of Ideas*, VI (1945), 157-196. At the time of his death abroad last September he was engaged in research continuing his previous studies with a view to a supplementary work on *Astrology in Roman Law and Politics from Diocletian to Justinian I*. His loss in this peculiar field of Roman Law will not be remedied readily. An important complementary study, dealing with the subject of magic, is Clyde Pharr, “The Interdiction of Magic in Roman Law,” *Transactions of the American Philological Association*, LXIII (1932), 269-295. Among more extensive interpretive works none gives more adequate attention to the place of *maiestas* in the general framework of Roman thought than the recent *Civilization and the Caesars* by C. G. Starr (Ithaca: Cornell University Press, 1954).

Finally a number of highly specialized monographic studies by German scholars should be noted: P. J. A. Feuerbach, *Philosophisch-juridische Untersuchung über das Verbrechen des Hochverraths* (Erfurt, 1798); J. Weiske, *Hochverrath und Majestätverbrechen, das Crimen majestatis der Römer* (Leip-
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zig, 1836); J. Zirkler, *Die gemeinrechtliche Lehre vom Majestätsverbrechen und Hochverrath* (Stuttgart, 1836); J. F. H. Abegg, "Zur Geschichte des römischen *crimen majestatis*," *Archiv des Criminalrechts* (Neue Folge), 1853 (Zweites Stück), pp. 205-238; W. E. Knitschky, *Das Verbrechen des Hochverrats* (Jena, 1874), pp. 17-41, on "Das römische *crimen majestatis*"; P. Bisoukides, *Der Hochverrat: eine historische und dogmatische Studie* (Berlin, 1903), pp. 6-33, on the Roman Law; and Erich Pollack, *Der Majestätsgedanke im römischen Recht: eine Studie auf dem Gebiet des römischen Staatsrechts* (Leipzig, 1908). I have not seen I. Brunner, *Das Majestätsverbrechen und die Majestätsgesetze bis auf die Zeit des Tiberius* (Aarau, 1877), listed by C. E. Smith, or Meents' *Die Idee der Majestätsbeleidigung* (Berlin, 1895), listed by Bisoukides. However, the greater part of this material has been used and, to some extent, synthesized in my study on "The Idea of Majesty in Roman Political Thought," *Essays in History and Political Theory in Honor of Charles Howard McIlwain* (Cambridge, Mass.: Harvard University Press, 1936). pp. 169-198.
Chapter IV

THE LITERATURE ON PUBLIC LAW
IN GERMANIC CUSTOM

The study of treason in Germanic law is more difficult than in the case of the Roman law since the Germanic materials have not been classified and arranged in a systematic, accessible manner. With the single exception of G. A. Davoud-Oghlou, *Histoire de la législation des anciens germains*, 2 vols. (Berlin, 1845), no extensive commentaries and few bibliographical aids are available to expedite research in the barbarian codes. Moreover, the compilation of Davoud-Oghlou is not only old but its value is impaired by a complex arrangement which makes the process of locating references to the codes both slow and difficult. Nevertheless, it contains many shrewd observations and close definitions not readily discovered elsewhere and should not be neglected. It must be emphasized that the only certain method to follow in investigating the *leges barbarorum* involves a careful examination of every law, so that no matters, relevant to the subject at hand, may be overlooked. This means that many hours must be spent in a research that yields all too often a very slight return. However, one cannot satisfy himself with a mere reading of the titles or captions of these laws. Many suggestions concerning treason may be found incidentally under topics that have little direct relation to public offenses. Thus, if one scans superficially or is guided by outward appearances alone, he will neglect or lose sight of many significant details. A number of good accounts and descriptions of the chief Germanic legal sources have been prepared, of which the most satisfactory may be found in F. C. von...
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The most satisfactory general treatise on Germanic legal history is Brunner’s well-known *Rechtsgeschichte*, using Vol. I in the second edition (Leipzig, 1906) and the revised and expanded Brunner-von Schwerin, Vol. II (Leipzig, 1928), while Schröder’s *Lehrbuch* in the revised and enlarged Schröder-von Künssberg sixth and seventh editions affords a concise survey for reference purposes within this field. Both these works provide good starting-points from which one may begin a study of treason in the Germanic family group (*Sippe*) and an investigation of the nature of public authority.
in the incipient state, but they should be compared with the views presented in volume one of the *Deutsche Verfassungs geschichte* (3rd ed., Berlin, 1880) by Georg Waitz and volume three of the *Deutsche Rechtsgeschichte* (Brunswick, 1872) by Heinrich Zoepfl. Contemporary sources, dealing with treason and the state in this early time, are limited to a few references in Caesar’s *Commentaries on the Gallic Wars* and to certain parts of the *Germania* of Tacitus. Special difficulties of interpretation are encountered here, arising from the use of the Latin language in the description of Germanic institutions. However, for Tacitus an indispensable aid may be found in the analytical commentary of Rudolf Much, *Die Germania des Tacitus* (Heidelberg, 1937), together with the Loeb Series text (trans., William Peterson, 1914). For the period of settling-down following the great migrations, Brunner and Schröder are standard authorities, and in this study the writer inclines to accept their theory of the “ducal king” and to view him as the agent for exercising public authority that is most characteristic of this age. However, their treatment of this period should be supplemented by reading Fus tel de Coulanges, *Histoire des institutions politiques de l’ancienne France*, 6 vols. (5th ed., Paris, 1926), especially Vol. II entitled “L’invasion germanique et la fin de l’empire.” Also one should consult G. von Below, *Der deutsche Staat des Mittelalters*, vol. I (2nd ed., Leipzig, 1925), and Karl von Amira, *Grundriss des germanischen Rechts* (Part 5 in Paul’s *Grundriss der germanischen Philologie*) (3rd ed., Strassburg, 1913). Felix Dahn’s *Die Könige der Germanen*, 12 vols. (Munich, Würzburg and Leipzig, 1861-1909) provides an invaluable series of special studies, treating each of the different Germanic tribes and kingdoms separately. A. von Halban, *Das römische Recht in den germanischen Volksstaaten*, 3
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vols. (Breslau, 1899), is more valuable on matters of national origins and social background than for public law, but may be consulted with advantage on many points of interpretation. A considerable amount of material, relating to the early family and the origins of the state that is equally applicable to all the Germanic peoples, may be found in the first two volumes of Sir William Holdsworth, *A History of English Law* (4th ed., London, 1936), while portions of Pollock and Maitland's *The History of English Law before the Time of Edward I*, 2 vols. (2nd ed., Cambridge, 1923) possess even greater general value because of the stimulating suggestions regarding broad questions of legal theory and the historical development of legal institutions. Also much of Bishop William Stubbs' *Constitutional History of England*, Vol. I (5th ed., Oxford, 1903), is helpful in a general study of Germanic political and legal institutions. Finally attention must be directed to the first three chapters of Julius Goebel, Jr., *Felony and Misdemeanor*, Vol. I (New York: The Commonwealth Fund, 1937), which reflects views, on the whole critical, of the established positions of Wilda, Waitz, Brunner and Beyerle regarding the problem of the Germanic "peace." It is an excellent corrective, discouraging sole reliance on these earlier works although by no means refuting them. Probably the most comprehensive bibliographical survey is found in the *Cambridge Mediaeval History* (Vol. V, 1926), pp. 921-936, in connection with the splendid article by H. D. Hazeltine in Ch. XXI (Roman and Canon Law in the Middle Ages), pp. 697-764.

Only a few brief general studies have been made concerning treason in Germanic law. Of these, although old, one of the best is still that of W. E. Wilda, *Das Strafrecht der Germanen*, Vol. I of the uncompleted *Geschichte des deutschen Strafrechts* (Halle, 1842), pp. 984-992, entitled "Missethaten
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gegen das Gemeinwesen und den König als Haupt desselben.” Next in value one must rate the section on “Landes- und Hochverrat” in Brunner-von Schwerin, II, 881-886. Wilda emphasizes throughout the essentially Germanic character of the concept of Treubruch and supplies, in addition, a most valuable compendium of source materials. Brunner inclines to stress Roman contributions to Germanic law, including the transmission of the Roman idea of maiestas. He has the advantage of giving an extremely clear and readable account. Waitz, likewise, leans toward a Roman interpretation of treason in his Verfassungsgeschichte, Vol. 2 (I), 185 et seq., and Vol. 2 (II), 291. Pollock and Maitland’s History of English Law contains some general considerations of treason in Germanic Law in connection with the specific treatment of treason in Anglo-Saxon law. They, too, indicate the influence of the Roman concept of maiestas upon the legal principles expressed in the Dooms. Dahn’s Könige has a few short notes on treason or related public offenses for each of the different Germanic tribal groups. An extremely good and relatively recent analysis of the various types of treason in Germanic law may be found in Rudolf His, Geschichte des deutschen Strafrechts bis zur Karolina (Munich and Berlin, 1928), pp. 113-118. Additional remarks concerning treason among the primitive Germans and in the leges barbarorum, may be found in the previously mentioned monographs of Knitschky and Bisoukides. Several doctoral dissertations in German universities have dealt with this subject also. Among these may be noted M. Haidlen, Der Hochverrat und Landesverrat nach altdeutschem Recht (Tübingen diss., Stuttgart, 1896), which contains a fairly extended summary of treasonable offenses in the various barbarian codes; Otto Kellner, Das Majestätsverbrechen im deutschen Reich bis zur Mitte des 14. Jahr-
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hunderts (Halle-Wittenberg diss., Halle a. S., 1911), which leans rather heavily on Waitz but with considerable added documentation; Albert Caflisch, *Der Landfriedensbruch* (Bern diss., Bern, 1923), treating briefly the Germanic peace and feud based largely on Wilda and Waitz; and Hans Nelson, *Der Landesverrat* (Cologne diss., Cologne, 1929), touching on the Germanic concept of infidelity and its relation to the Roman idea of majesty. In general, however, these dissertations are slender and disappointing, adding little to the great legal and constitutional histories of the Germanic peoples by Wilda, Waitz, Brunner and Schröder.

The chief collection of sources for the study of treason in Germanic law is contained in the section of the *Monumenta Germaniae Historica*, devoted to *Leges*. The folk-laws of nearly all the continental Germanic tribes have been edited for this great compilation. It is a truly monumental demonstration of the talent of the nineteenth century for the critical editing and establishment of texts. Most of these laws are, also, available in the same texts but more convenient format, in the *Fontes iuris Germanici antiqui* . . . *ex monumentis Germaniae historicis*. Another useful, although older and less accurate, text of the leges barbarorum may be obtained in Ferdinand Walter’s *Corpus juris Germanici antiqui*, Vol. I (Berlin, 1824). If Walter’s text is used for any matter of significance, it should be checked carefully against the text in the *Monumenta* or other comparable text of recent scholarship. In addition to these more general collections of source-materials, there are some special collections relating to particular Germanic tribes. Also Wilda’s *Strafrecht* should be mentioned in this connection, because it cites important selections from a number of obscure and inaccessible sources, particularly Scandinavian materials. The value of Wilda’s
work is not limited to its excellence as a secondary work by any means, for, since it is based directly on the original sources and quotes them extensively, it serves, in a measure, to remedy the lack of a systematic reference book in this field, which is almost complete save for the compilation of Davoud-Oghlou.

It is not the purpose of this bibliographical sketch to survey in detail the literature (especially the secondary works) relating to each of the several Germanic folk-laws. However, it may be useful to point out certain facts regarding the primary texts. The two chief legal monuments of the Visigoths are the *Lex Romana Visigothorum* or *Breviary* of Alaric, and the *Leges Visigothorum* or *Forum Judicum*. The best available text of the *Breviary* is in the old edition of Gustav Haenel (Leipzig, 1849). To facilitate research in the *Breviary* it is well to follow the cross-references in the Mommsen edition of the *Theodosian Code* which relate the titles in the *Breviary* to the corresponding titles in the *Codex Theodosianus*. Another aid to research is Max Conrat, *Breviarium Alaricianum. Römische Recht im fränkischen Reich in systematischer Darstellung* (Leipzig, 1903), which provides a systematic topical arrangement of the material in the *Breviary*. The best text of the *Leges Visigothorum* is found in the magnificent edition of Karl Zeumer in the *Monumenta* (Legum Sectio I, Tomus I) (Hanover and Leipzig, 1902), which also includes the reconstructed text of the *Code* of Euric. A Zeumer text (*Leges Visigothorum antiquiores*) is also contained in the *Fontes* (1894) while an older text is available in Walter's *Corpus*. Both these sources contain much material relevant to treason, *maiestas*, *infidelitas*, *scandalum*, and related offenses, and must be worked through very carefully. Another source, containing a few significant definitions bearing on treason, is the
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tio I, Tomus II, Pars I) (Hanover, 1892). However, little material, relating directly to treason, may be discovered in these codes, and only a few notes, dealing with public offenses, are contained in Dahn’s König, Vol. XI (Die Burgunden) (Leipzig, 1908). Special treatises on the Burgundians and their legislation may be found in the bibliography of K. M. Fischer, The Burgundian Code [Translations and Reprints, Third Series, Vol. V] (Philadelphia: The University of Pennsylvania Press, 1949), pp. 97-102.

Little material is available for the later Vulgar Roman or Romance legislation of which, the most important example is the Lex Romana Raetica Curiensis or Epitome Sancti Galli. The text of this compilation is edited by Karl Zeumer in the Monumenta (Legum Tomus V) (Hanover, 1889). Its implications for public law are examined in F. S. Lear, “Blasphemy in the Lex Romana Curiensis,” Speculum, VI (1931), 445-459. Unfortunately the general significance of this material in public law is touched only tangentially in the exhaustive work of Ernst Levy, West Roman Vulgar Law: The Law of Property, published by the American Philosophical Society at Philadelphia in 1951.

The Swabian-Bavarian area of Germanic custom is illustrated by the Alamannic and Bavarian codes. The Leges Alamannorum are an important source for the study of treason and infidelity in Germanic law, but, save for Davoud-Oghlou, no systematic guide exists to expedite research in this legislation. Fortunately this code is arranged in an orderly fashion so that the general topic sought can usually be found without great difficulty although it is often necessary to read through a considerable quantity of irrelevant matter in establishing details. The best text of the Alamannic Code is edited by Karl Lehmann in the Monumenta (Legum Sectio I, Tomus V, Pars
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I) (Hanover, 1888). An older text is contained in Walter’s Corpus, and in the original folio edition of the Monumenta (Legum Tomus III) by J. Merkel. The Bavarian laws are closely related to the Alamannic which they resemble both in form and content. However, the Bavarian laws are more extensive and at the same time less systematic than the Alamannic. As a result, they are correspondingly more difficult for research purposes. Nevertheless, they contain much material relating to the entire problem of treason and infidelity in Germanic law and must be read with care. Many valuable suggestions and ideas may be derived through comparing the provisions in both laws that deal with similar subjects. The old Monumenta edition of the Lex Baiwariorum by J. Merkel (Legum Tomus III) (Hanover, 1863) has been supplanted by the new Monumenta edition of Baron Ernst von Schwind, (Legum Sectio I, Tomus V, Pars II) (Hanover, 1926). Both these editions, however, are inferior to the splendid text of Konrad Beyerle (Munich, 1926), which is accompanied with a translation, an historical survey of the manuscript traditions and previous editions, critical analysis of the laws, glossary of old Germanic terms, and photographic reproductions of the entire Ingolstadt MS upon which this text is based. This is one of the finest examples of recent German scholarship in the field of Germanic law. The old edition in Walter’s Corpus is still useful and relatively authentic since it is based, in part, on Mederer’s collation of 1793 which employed the Ingolstadt MS. Any scholar working in this area should check his conclusions with the discussion of public offenses in Dahn’s Könige, Vol. IX (Part I: Die Alamannen) and Vol. IX (Part II: Die Baiern) (Leipzig, 1905). Eduard Osenbrüggen, Das alamannische Strafrecht im deutschen Mittelalter (Schaffhausen, 1860) has a few references to treason in early Alamannic law,
but is chiefly devoted to a later period and the origins of Swiss law. For critical comment on the Bavarian legislation, one should consult E. von Schwind, "Kritische Studien zur Lex Bajuvariorum," Neues Archiv, XXXI (1906), 399-453; XXXIII (1908), 605-694; XXXVII (1912), 415-451; Bruno Krusch, Die Lex Bajuvariorum (Berlin, 1924); and the review of the Krusch study by Franz Beyerle, Zeitschrift der Savigny-Stiftung für Rechtsgeschichte (Germanistische Abtheilung), 45 (1925), 416-457. The laws of the Ripuarian Franks which have many significant resemblances to the Alamannic and Bavarian codes contain few important references to public offenses. The Lex Ribuaria has been edited, together with the Lex Francorum Chamavorum by Rudolf Sohm, in the Fontes and the Monumenta (Legum Tomus V) (Hanover, 1882), pp. 185-268, with glossary on pp. 277-288 by K. Zeumer. A survey of the public law in this area of Germanic custom may be found in F. S. Lear, "The Public Law of the Ripuarian, Alamannic, and Bavarian Codes," Medievalia et Humanistica, II (1944), 3-27.

In addition to the Ripuarian laws, the most important Frankish materials are the highly controversial Salic Law which may be as early as the fifth century and the later Capitularies of the Merovingian and Carolingian periods. Unfortunately Frankish law contains little material bearing directly on treason, although in the Capitularies some important references are made to such offences as herisliz and scandalum and significant inferences may be drawn concerning allegiance and sovereignty. These are questions that center about the transmission of the concept of maiestas from Roman to Frankish law and the impact of maiestas upon Germanic ideas of fidelity. No specific provisions concerning treason and very little that may be described as public law
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can be found in the Salic Law. The chief importance of the Salic Law for contemporary scholarship revolves about extremely difficult and highly controverted problems of chronology, authenticity and textual criticism. These matters are discussed in an extensive symposium contained in the Neues Archiv for the years 1914-1919 and including such specialists on Germanic law as Mario Krammer, Bruno Krusch, Claudius Freiherr von Schwerin, and Ernst Heymann. A further survey of literature of the Salic and Ripuarian problem is found in a paper by Baron von Schwerin, entitled "Germanische Rechtsgeschichte" and published in Forschungen und Fortschritte (20 May 1941), 165-168. A still later phase of the Salic question is developed in a long study entitled "Lex Salica, I and II," by Simon Stein in Speculum, XXII (1947), 118-134; 395-418. Here Stein asserts that the Salic Law is presumably a forgery of the ninth century and reflects certain legal norms of the period in which it was constructed. He alleges further that the Ripuarian, Alamannic and Bavarian codes may also be Carolingian forgeries. These articles constitute an interesting piece of detective work in historical and textual criticism, taking the reader behind the scenes into the editorial sanctum of the legal section of the Monumenta Germaniae Historica. It reveals the technical difficulties and deficiencies of this editorial work but is far from convincing in its generally critical attitude toward the Leges as edited in the Monumenta. More conventional comment and discussion of the Salic Law may be found in the Rechtsgeschichte of Brunner and Schröder and the standard histories of Frankish political institutions. The only secondary work, treating the matter of treason in the Salic Law in any detail is the somewhat old and little known L'organisation judiciare, le droit pénal et la procédure pénale de la Loi Salique (2nd ed., Brussels and Paris, 1882),
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by J.-J. Thonissen. A useful text is the Lex Salica, edited by Heinrich Geffcken (Leipzig, 1898). The earlier capitularies are collected in the Capitularia regum Francorum, edited by Alfred Boretius in the Monumenta (Legum Sectio II, Tomus I) (Hanover, 1883). The older Monumenta edition of 1835 in folio (Leges Tomus I) was reprinted in 1925, together with the supplementary enactments, Tomi primi supplementa constitutiones et acta Regum Germanicorum (1837) in Monumenta (Legum Tomus II, Pars I). Most of these sources are, also, available in Walter's Corpus. Some valuable suggestions concerning treason among the Franks may be obtained in Dahn's Könige, Vol. VII (Die Franken unter den Merovinger) (Leipzig, 1894-1895) and Vol. VIII (Die Franken unter den Karolinger) (Leipzig, 1897-1900). Special attention must be directed to the article by M. Lemosse, entitled "La Lèse-Majesté dans la Monarchie Franque," in Revue du Moyen Âge Latin, II (1946), 5-24. This study analyzes the problem of maiestas in the capitularies and its reception into Frankish law. There is one respect in which the Frankish sources differ materially from those of the other Germanic groups. The reason for this is the existence of an important literary source, the Historia Francorum of Gregory of Tours. An accurate evaluation of this work relative to treasonable offenses can be made only on the basis of a detailed examination of the entire text with special reference to maiestas, scandalum, and various descriptive features. The old work of Paul Roth, Geschichte des Beneficialwesens (Erlangen, 1850), contains a discussion of several cases of treason, occurring in the Frankish kingdom during the Merovingian period, which is based heavily on Gregory. Also one must not overlook another old book, J. W. Loebell, Gregor von Tours und seine Zeit (2nd ed., with additions by F. Bernhardt, Leipzig, 1869), for
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The Frisian and Saxon laws are less important for their direct contributions in the study of treason than for certain more general provisions relating to public law, notably the special *paces*. The most acceptable text of the *Lex Frisionum* has been edited by Karl Freiherr von Richthofen (Leeuwarden, 1866); also by von Richthofen in *Monumenta* (Legum, Tomus III) (Hanover, 1863). Some discussion of treasonable offenses among the Frisians may be found in R. His. *Das Strafrecht der Friesen im Mittelalter* (Leipzig, 1901). A good recent text of the Saxon laws, together with the Thuringian laws, is available in the *Fontes* in the *Leges Saxonum et Lex Thuringorum*, edited by Baron von Schwerin (Hanover and Leipzig, 1918). These laws are much more carefully annotated than the texts of the other *leges barbarorum* in earlier editions, published previously in the *Monumenta* and *Fontes*. In fact, von Schwerin's notes constitute the only set of cross-references, aside from Davoud-Oghlou, available for these Germanic legal codes. He has seen fit fortunately to prepare notes for his text which relate many titles in the Saxon and Thuringian laws to the corresponding titles in the other *leges barbarorum*. These references are incidental to other purposes of the editor and are necessarily incomplete, but they do provide one of the few aids, yet devised, to facilitate and expedite research in the tangled mazes of the folk-laws. The main secondary work, touching upon treason in the Saxon laws, is Baron von Richthofen's old treatise, *Zur Lex Saxonum* (Berlin, 1868), while for the Thuringian law one may use Dahn's *Könige*, Vol. X (Die Thüringe) (Leipzig, 1907). There is also an earlier text of these codes, *Leges Saxonum* and *Lex
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Angliorum et Werinorum, hoc est Thuringorum, by K. de Richthofen and K. F. de Richthofen in the Monumenta (Legum Tomus V).

The most important legal materials of early mediaeval Italy are the Edict of Theodoric and the so-called Lombard laws. These have been edited in Walter's Corpus and in the Monumenta. Very few provisions of the Edict have any relation to treason, but its broader significance for public law generally has not been explored sufficiently. The best text is that of F. Bluhme in the Monumenta (Legum Tomus V) (Hanover, 1875). The only secondary work of importance, dealing with crimes against public authority in the Edict of Theodoric and Ostrogothic law, is Dahn's Könige, Vol. IV (Edictum des Theoderichs) (Würzburg, 1866). The Lombard legislation represents a very important and, in many respects, unique area of Germanic custom. Important evidence concerning treason and the related offense of scandalum is contained in the Edict of Rothair with some supplementary data in the laws of Liutprand and Ratchis. For years the standard text of the Leges Langobardorum has been the edition of F. Bluhme in the Fontes and Monumenta (Legum Tomus IV) (Hanover, 1869), although many scholars consider the preferable text to be that of Guido Padeletti in the Fontes juris italici medii aevi, Vol. I (Turin, 1877), published under the title Edictum regum langobardorum. Recently the Lombard legislation has been republished on the basis of the Bluhme text revised with translation in German, topical summary of the contents, and glossary, by Franz Beyerle under the title, Die Gesetze der Langobarden (Weimar, 1947). Eduard Osenbrüggen, Das Strafrecht der Langobarden (Schaffhausen, 1863), should be consulted on the subject of treason in the Lombard laws. Additional suggestions may be obtained in Dahn's Könige,
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The Anglo-Saxon legislation contains much material relevant to the study of treason, including provisions relating to petty treason and the royal wergeld. The most nearly definitive text of the Anglo-Saxon Dooms may be found in F. Liebermann, *Die Gesetze der Angelsachsen*, 3 vols. (Halle, 1903-1916). This work makes these texts in the Anglo-Saxon tongue accessible by providing an excellent German translation, and, in addition, supplies a most valuable and convenient glossary of Anglo-Saxon terms that are commonly encountered in these laws. There is also the older, but still useful, *Die Gesetze der Angelsachsen* by Dr. Reinhold Schmid (2nd ed., Leipzig, 1858) with Anglo-Saxon and Latin texts, and German translation, and *Ancient Laws and Institutes of England* by B. Thorp, published by the Public Records Commission in 1840 with the Anglo-Saxon and Latin texts, English translation, and glossary. Thorpe’s rendering into English is inadequate in many respects and is now generally supplanted by two useful recent works: F. L. Attenborough, *The Laws of the Earliest English Kings* (Cambridge: University Press, 1922), and A. J. Robertson, *The Laws of the Kings of England from Edmund to Henry I* (Cambridge: University Press, 1925) which contain the edited Anglo-Saxon texts, an adequate English translation, and extensive notes in commentary upon the various specific laws. A valuable discussion of treason in Anglo-Saxon law may be found in Pollock and Ma
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Land's *History of English Law* to which may be added scattered references in Holdsworth and Stubbs. A somewhat detailed examination of this area is contained in the study by F. S. Lear, entitled "Treason and Related Offenses in the Anglo-Saxon Dooms," *The Rice Institute Pamphlet*, XXXVII (1950), 1-20.

The Scandinavian laws have been the most inaccessible of all Germanic legal sources to students not versed in the archaic tongues of the North countries. A generation ago Wilda's *Strafrecht* and *Das altnorwegische Vollstreckungsverfahren* (Munich, 1874) by Karl von Amira were practically indispensable as guides to research in this material. They are still extremely useful as foundation studies. In these works a large number of provisions from the various Scandinavian laws, dealing with treason and public offenses, are cited in German translation. The most important of these laws are the Norwegian Gulathingslög and Frostathingslög, the Swedish Westgotalag and Ostgotalag, and the Danish laws of King Erik. Additional secondary works of value, treating the general field of offenses against public authority in Scandinavian law including outlawry and "peacelessness," are F. P. Brandt, *Forelaesninger over den norske Retshistorie*, Vol. II (Kristiania, Oslö, 1883), Konrad von Maurer, *Altisländisches Strafrecht und Gerichtswesen [Vorlesungen über alt-nordische Rechtsgeschichte*, Vol. V] (Leipzig, 1910), and Andreas Heusler, *Das Strafrecht der Isländersagas* (Leipzig, 1911). More recently a work has appeared which facilitates the study of these materials very greatly. This is a translation into English of the Norse Gulathing law and Frostathing law, found in L. M. Larson, *The Earliest Norwegian Laws* [Columbia Records of Civilization Series, No. XX] (New York: Columbia University Press, 1935). Another more extensive
series of aids has been made available through the translation into German of a wider range of Scandinavian legal material in the *Germanenrechte [Schriften der Akademie für deut-
sches Recht]*. This series contains not only renderings into German by Rudolf Meissner of the Frostathing law (Vol. 4: Weimar, 1939) and the Gulathing law (Vol. 6: Weimar, 1935), but also the old Norwegian Law of the Following (*Hirthskrá*) by Meissner (Vol. 5: Weimar, 1938), the Swedish *Westgötalag* and *Uplandslag* by Baron von Schwerin (Vol. 7: Weimar, 1935), the Danish laws including *Erichs seeländisches Recht* by Baron von Schwerin (Vol. 8: Weimar, 1938), and the Icelandic laws by Andreas Heusler (Vol. 10: Weimar, 1937). Also it should be noted that one can hardly obtain a complete grasp of the problems of public law among the early Scandinavian peoples without having recourse to the Saga literature. A valuable source for this material is the *Fagrskinna—Kort-
fattet norsk Konge-saga*, edited by P. A. Munch and C. R. Unger (Christiania, Oslø, 1847). Among the various sagas, the *Egils-saga* is particularly significant because of its reference to conspiracy as a form of treason. This has been translated from the Icelandic by the Rev. W. C. Green (London, 1893), under the title of *The Story of Egil Skallagrimsson*.

A few concluding remarks should be written concerning English translations of the Latin texts of the *leges barbarorum*. Here no project is in progress nor, indeed, has ever been made in the way of a comprehensive plan for turning into English the entire corpus of Germanic law. In this field there is nothing comparable to the Pharr translations of the Roman law material, or even with Scott’s translation of the *Corpus Juris Civilis*. Nevertheless, some work has been completed in this direction. The Visigothic *Forum Judicum* has been translated under the title of *The Visigothic Code* (Bos-
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ton, 1910) by S. P. Scott. As is the case with his work in the Roman law, Scott’s Visigothic translation is inadequate and should be checked independently against Zeumer’s text in any matter of importance. However, his annotation often contains valuable historical and interpretative matter that is very difficult to uncover elsewhere. The work should not be discarded but used with caution. Selections from the Visigothic laws may also be found in the Germanenrechte (Vol. 11: Weimar, 1936) in the Zeumer text with German translation by E. Wohlhaupter under the title, Gesetze der Westgoten. It is unfortunate that most of these extracts are from the Antiqua which is relatively easy to read, whereas the highly complex and difficult royal enactments are omitted. The old Spanish and Latin texts of the Fueros and Fazañas of Leon, Castile, Navarre, Aragon and Catalonia are contained in Germanenrechte (Vol. 12: Weimar, 1936), with German translation by E. Wohlhaupter, under the title, Altspanisch-gotische Rechte. The Burgundian Lex Gundobada was translated here at the Rice Institute by Katherine Fischer and published by the University of Pennsylvania Press in the Third Series of Translations and Reprints (Vol. V, 1949). The same code was published in the de Salis text with German translation by Franz Beyerle in the Germanenrechte (Vol. 10: Weimar, 1936) under the title, Gesetze der Burgunden. The Lombard legislation has been translated with exhaustive introduction, commentary and bibliography by Katherine Fischer in her unpublished Cornell University dissertation (1950), entitled A Study of the Lombard Laws. This useful piece of work should be published and made available to a larger number of scholars since the Lombard material is central in any detailed consideration of the barbarian codes. These laws are available in the Bluhme text with German
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translation and glossary by Franz Beyerle under the title, 
_Die Gesetze der Langobarden_ (Weimar, 1947). The Alamannic and Bavarian group of laws have been translated under my direction with an introductory sketch in the unpublished Rice Institute master’s thesis (1941) of Floy King Rogde. There is no other work in English dealing with this legislation within my knowledge. An excellent German translation of the Bavarian law is contained in the previously mentioned work, _Lex Baiuvariorum_ (Munich, 1926) by Franz Beyerle. The minor codes remain untranslated into English, save for extracts from the Salic Law in E. F. Henderson, _Select Historical Documents of the Middle Ages_ (London and New York, 1892), pp. 176-189, and O. J. Thatcher and E. H. McNeal, _A Source Book for Mediaeval History_ (New York, 1914), pp. 14-26. The related codes of Vulgar Roman Law, such as the _Breviary, Papianus, and Lex Romana Curiensis_, also are not translated save for the citations contained in them from such translated sources as the _Theodosian Code_ and _Sentences_ of Paulus. However, additional texts with German translation by K. A. Eckhardt may be found in the _Germanenrechte_ for the _Pactus Legis Salicae_, the Salic _Extravagantes_ and _Novellae_, and the _Pactus Alamannorum_ (Vol. 1: Weimar, 1935); the _Lex Salica_ and _Lex Ribuaria_ (Vol. 2 [I]): Weimar, 1934); and _Lex Alamannorum_ and _Lex Baiuvariorum_ (Vol. 2 [II]): Weimar, 1934). The results of this literary survey show that the large constructive research projects in Germanic customary law belong to the era of the establishment of texts and the pursuit of constitutional history. There still remains a vast reservoir of social and economic data that has never been adequately assessed but which will require the most discriminating judgment to interpret and evaluate. The philological and linguistic difficulties are very considerable in
the utilization of this material but the most baffling questions are those which arise from the intellectual climate itself within which the barbarian mind functioned, and had its being.

As I bring this survey to a close, there appears in *Speculum*, XXX (1955), 92-96, an important review by Luitpold Wallach of Rudolf Buchner, *Die Rechtsquellen*. Beiheft to Wattenbach-Levison, *Deutschlands Geschichtsquellen im Mittelalter: Vorzeit und Karolinger* (Weimar: Böhlaus, 1953). In a bibliographical supplement to *Die Rechtsquellen* Wallach points out several matters of particular interest for Germanic public law. First, the long-awaited edition of the *Salic Code* by K. A. Eckhardt has been published under the title, *Lex Salica: 100 Titel Text*, in *Germanenrechte, Neue Folge: Westgermanisches Recht*, 1953. Secondly, two significant articles are cited refuting the Stein theory that the *Lex Salica* is a post-Carolingian forgery, a conclusion which comes as no surprise to this writer. Thirdly, Wallach indicates considerable new publication in the Visigothic, Lombard and Frankish areas which, however, appears peripheral to this study. In addition, this number of *Speculum* notes the publication of the new edition of the *Lex Ribuaria* by Franz Beyerle and Rudolf Buchner in the *Monumenta (Leges Nationum Germanicarum, Tomus III, Pars II)* (Hanover, 1954), supplanting the old edition of Rudolf Sohm. Mention should be made also of the recent publication of H. Conrad, *Deutsche Rechtsgeschichte* (Band I: Frühzeit und Mittelalter, 1954).
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2. Cf. Ibid., pp. 262-263.


4. Girard, Textes, for Leges Regiae, 4, 1: si parentum puer verberit ast olle plorassit parem . . . puer divis parentum sacer esto.

5. Girard, Textes, for Leges Regiae, 2, 12: si qui hominem liberum dolo sciens morti duit, paricidas esto. Cf. Festus (F. 221) Parrici in Clark, op. cit., p. 590, n. 35. For a detailed examination of this problem, see Franz Leifer, “Paricidas Esto,” in Studi in onore di Salvatore Riccobono (Palermo, 1936), II, 101-145, stressing the sacral, religious connotation of this law. The observation has been made that paricidas may mean “an avenger of blood” and so reflects the existence of the blood-feud among the early Romans. Cf. H. F. Jolowicz, Historical Introduction to the Study of Roman Law (Cambridge: University Press, 1932), p. 324, who suggests that parricide came to refer to the murder of relatives only at a later time in connection with the horrible punishment of the sack. Cf. Digest, 48, 9, 9 pr De Lege Pompeia de Parricidiis which cites the Twelfth Book of the Pandects of Modestinus as follows: According to ancient practice it has been established as the penalty for parricide that the guilty person be scourged until bloody with rods, then sewed in a leather sack with a dog, cock, viper and ape, and finally cast into the depths of the sea. Jolowicz thinks that “the original meaning of parricidium [as blood-feud] was forgotten, and its supposed connection with pater gave it the narrower significance.”


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8. See Bruns, *Fontes*, p. 35, for XII Tab., 9, 4, and *ibid.*, p. 10, n. 1 for Festus (P. 221) *Parrici*.


14. See Daremberg et Saglio, *Dictionnaire des antiquités grècques et romaines*, article 'Maiestas' by G. Humbert and Ch. Lécrivain (Paris, 1904), III (2), 1557, for analysis which is followed here in the main.

15. Note the various circumstances under which the military crime of desertion is defined in *Digest*, 49, 16, 3 *De Re Militari*.

16. *Digest*, 48, 4, 2 *Ad Legem Iuliam Maiestatis*; 49, 15, 19, 8 *De Re Militari*; Paulus, Sententiae, 5, 29, 1 *Ad Legem Iuliam Maiestatis*.

17. Cf. *Digest*, 49, 16, 3 *pr De Re Militari*, commanding the governor of a province to send back a deserter to his own commander.

18. *Digest*, 49, 16, 3, 10 *De Re Militari*; 48, 19, 38, 1-2 *De Poenis*.

19. *Digest*, 4, 5, 5, 1 *De Capite Minutis*.

20. *Digest*, 48, 4, 3 *Ad Legem Maiestatis* contains what is probably the earliest reference to *perduellio* in Roman Law. Here Marcian cites from the Twelve Tables as follows: Lex XII tab. iubet eum, qui hostem concitaverit quive civem hosti tradiderit, capite punire. Cf. Bruns, *Fontes*, p. 85. Also see *Digest*, 48, 4, 4; 48, 4, 10 *Ad Legem Iuliam Maiestatis*; Paul., Sent., 5, 29, 1.

21. *Digest*, 48, 4, 1, 1; 48, 4, 4; *Codex Justinianum*, 4, 41, 2 Quae Res Exportare Non Debeant, for a late prohibition against sales to the barbarians (Marcian, a. 455-457), providing them with weapons; 4, 63, 2 *De Commerciis et Mercatoribus* (Valentinian, Valens and Gratian, a. 374?) prohibiting the furnishing of gold to barbarians; *Codex Theodosianus*, 9, 40, 24 *De Poenis* (Honorius and Theodosius, a. 419) [translation by Clyde Pharr, Princeton University Press, 1952, p. 258], prohibiting the building of ships for barbarians (*C. Just.*, 9, 47, 25).
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22. *Digest*, 48, 4, 1, 1; 48, 4, 3; 48, 4, 4; 49, 15, 7, 1 *De Captivis et De Postliminio et Redemptis et Hostibus*; Paul., *Sent.*, 5, 29, 1.


26. See A. H. J. Greenidge, *op. cit.*, p. 8, and T. Mommsen, *op. cit.*, p. 566, with n. 1; also Max Radin, "*Imperium, *" in *Studi di onore di Salvatore Riccobono*, II, 21-45, for an important interpretation of the concept of *imperium*.


34. Livy, 1, 26, for the case of Horatius: *duumviri perduellionem iudicent*; si a *duumviris provocarit, provocatione certato*; si vincent, *caput obnubito*; infelici *arbori reste suspendito*; verberato vel *intra pomerium vel extra pomerium*.

35. Cf. Tacitus, *Germania*, c. 12. The word *cratis* refers to a contrivance resembling a basket or crate made of woven interlaced flexible branches—perhaps osier.


39. See Hugh Last in *Cambridge Ancient History*, IX (Cambridge, 1932), 160-161, on relation of *minuta maiestas* to *perduellio*.

40. See B. Kübler, “Maiestas,” 544-45, on relation of *crimen perduellionis* to *crimen laesae maiestatis* and his analogy of the circles.

41. *Digest*, 48, 4, 11: *Ulpianus libro octavo disputationum*. Is, qui in reatu decedit, integrī status decedit: extinguitur enim crimen mortalitāte. nisi forte quis maiestātis reus fuit: nam hoc crimine nisi a successoribus purgetur, hereditas fisco vindicatur. plane non quisque legis Iulīae maiestātis reus est, in eadem condicione est, sed qui perduellionis reus est, hostilī animo adversus rem publicam vel principem animatus: ceterum si quis ex alia causa legis Iulīae maiestātis reus sit, morte crimine liberatur.


45. See *McIlwain Essays*, pp. 171-172.


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Tacitus, *Annals*, 2, 85; and Suetonius, Tiberius, 36. Also note Cicero, *De Legibus*, 2, 8, 19: Separatim nemo habessit deos neve novos neve advenas nisi publice adscitos; privatim colunto, quos rite a patribus cultos acceperint.


50. A. D. Nock, *C. A. H.*, X, 489, says “Augustus would have smiled in a puzzled way if he had been informed that he had introduced Pharaonic divine monarchy at Rome.”

51. Cf. Strachan-Davidson, *op. cit.*, I, 240-245, where Cicero is cited to show that the senate acted legally in issuing a *senatus consultum ultimum*. The senate declared its enemies to be *perduelles*, and “the *perduellis* has by his own act placed himself in the position of a foreign enemy, and so has ceased to be a citizen.” Then the senate “simply passed a decree ‘that the consuls were to see to it that the state took no harm,’ and the consuls thereupon put in full exercise their full power against those who had constituted themselves *hostes*.” But Greenidge, *op. cit.*, p. 281, refutes this argument, stating that “though common sense might interpret certain overt acts as a sign of war against society, no degree of treason could *ipso jure* make a citizen into an enemy unless that treason had been proved in a court of law.” Cf. Daremberg et Saglio, *op. cit.*, III (1), 652-653; III (2), 1556.


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don: Heinemann, 1942), 2, 107, referring to the trial of Norbanus under the lex Appuleia and the necessity for strict definition of the crime of maiestas minuta.


59. See A. E. R. Boak, “The Extraordinary Commands from 80 to 48 B.C.: A Study in the Origins of the Principate,” American Historical Review, XXIV (1918), 1-25. This significant study is a definitive contribution to this subject and has never been supplanted.


61. This principle is established under the formula dolo malo. Cf. Digest, 48, 4, 1, 1; 48, 4, 3; 48, 4, 7, 3; Tacitus, Annals, 3, 38: bellum adversus nos volverat. See F. Schulz, Principles of Roman Law (Oxford: Clarendon, 1936), pp. 45-46, on actio de dolo, in which dolus may be defined as malicious misrepresentation, malicious deception, and “every kind of malicious act to the disadvantage of another person.” See C. G. Starr, op. cit., pp. 75-77, on extension of maiestas in the early empire, pp. 122-124, on the continuation of these trials under Tiberius, and p. 127 on their abolition by Claudius.

62. See the detailed examination of this problem for the reign of Tiberius in R. S. Rogers, Criminal Trials and Criminal Legislation under Tiberius (Middletown, Conn.: American Philological Association, 1935). It must be concluded that violations of maiestas were not primarily acts of the republican faction.
according to F. B. Marsh, *The Reign of Tiberius* (London: Humphrey Milford, 1931), pp. 63, 116, 166, n. 2, referring to Tacitus, *Annals*, 4, 9. However, see Cassius Dio, *Roman History* [Loeb Series, Vol. VII, 1922], 57, 24, 1-4, on Cremutius Cordus who wrote a history of the achievements of Augustus but was charged with praising Cassius and Brutus therein without due regard to Caesar and Augustus; also Tacitus, *Annals*, 4, 34, for a longer account of the same incident; and Cassius Dio, 67, 12, 4, on Mettius Pompsianus who was put to death by Domitian because 'he had excerpted and was wont to read the speeches of kings and other leaders that are recorded in Livy,' besides having a map of the world painted on the walls of his bedchamber. Such incidents would seem to indicate grave concern regarding interest in republican ideals and heroes, and the significance of the Roman past generally. Also note C. E. Smith, *Tiberius and the Roman Empire* (Baton Rouge: Louisiana State University Press, 1942), pp. 166-181, for 'Lèse Majesté Prosecutions under Tiberius' (Ch. VIII). Advocacy of the republican ideal also seems to have played a part in the persecution of the philosophers. Cf. C. G. Starr, *op. cit.*, pp. 129-130, on the Pisonian conspiracy and Thrasea Paetus, and p. 141, on Junius Rusticus and Herennius Senecio.


64. This section of the essay constitutes in the main a revised analysis of portions of the article on *Maiestas* by G. Humbert and Ch. Lécrivain in Daremberg et Saglio, *Dictionnaire des antiquités grécoques et romaines* (Paris, 1904), III (2), 1557-1561, together with a detailed re-examination of the documentation. Humbert's article covers much the same ground as the exhaustive treatment of this aspect of Roman public law found in T. Mommsen, *Römisches Strafrecht* (Leipzig, 1899), pp. 538-594, which is also extant in French translation in T. Mommsen, J. Marquardt and P. Krüger, *Manuel des antiquités romaines* (Paris, 1907), XVIII (2), 233-302 (Le droit pénal romain by T. Mommsen). Both Mommsen and Humbert should be reviewed in the light of the excellent independent study, 'Maiestas' by B. Kübler in Pauly-Wissowa-Kroll, *Real-Encyclopädie* (Stuttgart, 1928), XXVII, 542-559.
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Also see P. Bisoukides, Der Hochverrat (Berlin, 1903), pp. 20-33; and especially Mason Hammond, The Augustan Principate (Cambridge: Harvard University Press, 1933), pp. 172-176, with detailed references in notes 11-33. These data are notably valuable and complete for the reigns of Augustus and Tiberius.

The most recent treatment of maiestas may be found in F. H. Cramer, op. cit., pp. 251-253. Although this is only a brief summary, it represents an interesting and, in some respects, unique analysis of the crime, especially identifying "second degree" maiestas for ordinary cases as distinguished from high treason. I think, however, high treason should be classified as perduellio rather than proditio which is a more restricted term. R. S. Rogers, op. cit., p. 207, in his classification of the various types of maiestas actions in the reign of Tiberius uses the term "quasi-maiestas" in the borderline case of Clutorius Priscus. The excellent new book by C. G. Starr, cited above, is exceptional in respect of the considerable attention devoted to maiestas and treason cases in imperial Rome.

65. On the majesty legislation in the imperial period, see B. Kübler, 'Maiestas,' 550-558.

66. See Digest, 48, 4, 11, and 48, 4, 3, for Marcian’s definition attributed to the Twelve Tables. Digest, 48, 4, 1, gives the basic definition of maiestas but the particulars specified relate for the most part to the republican perduellio legislation.


69. Digest, 48, 4, 3 Ad Legem Iuliam Maiestatis; Paul., Sent., 5, 29, 1; Cassius Dio, Roman History [Loeb, Vol. VI, 1917], 54, 3, for case of Marcus Primus.

70. Digest, 48, 4, 4; 50, 10, 3, 2 De Operibus Publicis; 50, 10, 4; C. Th., 15, 1, 31 De Operibus Publicis [Pharr, p. 426]. Cf. the famous case of the poet Cornelius Gallus noted in Cassius Dio, 53, 23, 5-7.
71. Digest, 48, 4, 2.
73. Digest, 48, 4, 2.
75. Digest, 48, 4, 3.
76. Cf. Daremberg et Saglio, op. cit., III (2), 1558 with n. 18.
77. Cf. reference in Livy, 39, 15, 12, to nocturnal gatherings of the Bacchanalian worshippers for republican antecedents.
78. Paul., Sent., 5, 22, 1 De Seditiosis; Digest, 48, 19, 38, 2 De Poenis; C. Just., 9, 30, 2 De Seditiosis et His Qui Plebem Audent contra Publicam Quietem Colligere.
79. Digest, 48, 4, 4 (jureiurando); 48, 19, 16 pr. (coniurationes); C. Just., 9, 8, 5 pr Ad Legem Iuliam Maiestatis (sacramenta).
80. Digest, 48, 4, 1, 1.
81. Digest, 48, 4, 1, 1; 49, 16, 3, 19-20 De Re Militari; C. Just., 9, 8, 5 pr.
82. Digest, 48, 4, 3.
83. C. Th., 9, 21, 9 De Falsa Moneta (Valentinian, Theodosius, and Arcadius, a. 389, 392) [Pharr, p. 243].
84. C. Th., 9, 11, 1 De Privatis Carceris Custodia (Valentinian, Theodosius, and Arcadius, a. 388) [Pharr, p. 235].
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87. *Digest*, 48, 4, 1, 1.

88. See B. Kübler, ‘Maiestas,’ 551. Cf. Paul. *Sent.*, 5, 29, 1: quod crimen non solum facie, sed et verbis impii ac maledictis maxime exacerbatur; also Tacitus, *Annals*, 2, 50 (case of Appuleia Varilla charged with having spoken irreverently of Augustus), and 6, 47 (case of Albucilla impeached of impiety toward Caligula); 1, 73; Cassius Dio, *Roman History* [Loeb, Vol. IV, 1916], 44, 5, 3, stating that if anyone insulted Caesar by deed or word, that man should be an outlaw and accursed. Tacitus, *Annals*, 1, 73, cites the famous case of Falanius or Faianius (see Appendix B) who was charged with having admitted an infamous mimic, named Cassius, to a collegium in his house dedicated to the cult of Augustus, and with having transferred a statue of Augustus in the sale of his gardens. These acts were regarded as impious insults to the divinity of Augustus. Cf. R. S. Rogers, *op. cit.*, pp. 8-9.

89. C. Just., 1, 23, 6 *De Diversis Rescriptis et Pragmaticis Sanctionibus* (Leo, a. 470), on the illegal possession of purple dye for parchment use; 11, 9 (8), 4 *De Vestibus, Holoveris et Auratis, et de Intinctione Sacri Muricis* (Theodosius, a. 424), declaring it laesa maiestas for anyone to have possession of clothing dyed with the Imperial purple; Cassius Dio, *Roman History* [Loeb, Vol. V, 1917], 49, 16, on Caesar's orders that no one should wear the purple dress except the senators who were acting as magistrates.

90. Paul., *Sent.*, 5, 25, 1 *Ad Legem Corneliam Testamentariam*; C. Th., 9, 21, 5 and 9 *De Falsa Moneta* (Constantius, a. 343; and Valentinian, Theodosius, and Arcadius, a. 389, 392) [Pharr, p. 243].

91. Paul. *Sent.*, 5, 21, 3 *De Vaticinatoribus et Mathematicis*; 5, 23, 17 *Ad Legem Corneliam de Sicariis et Veneficiis*; C. Th., 9, 16, 3-4 and 7 *De Maleficiis et Mathematicis et Ceteris Similibus* (Constantine, a. 321-324, 317-319; Constantius, a. 357; and Valentinian and Valens, a. 364) [Pharr, pp. 237-38]; Cassius Dio, *Roman History* [Loeb, Vol. IX, 1927], 79, 4, 7, on the prophecy of an African seer (*mantis*) that Macrinus would replace Antonine (Elagabalus) on the imperial throne (A.D. 217); Tacitus, *Annals*, 4, 52, on the charge levied by Domitius Afer against Claudia Pulchra of ‘witchcraft and spells’ against the emperor, Tiberius; also 12, 52; 16, 14. See R. S. Rogers,
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op. cit., p. 16, on Libo's plot against Tiberius, Cf. Speculum, IV (1929), 82, and notes 3 and 4, and especially the excellent article by Clyde Pharr, "The Interdiction of Magic in Roman Law," Transactions of the American Philological Association, LXIII (1932), 269-295, which analyzes the religious background of this type of public offence. The definitive treatment of these crimes as an aspect of maiestas legislation is F. H. Cramer, op. cit., pp. 232-283 (Part II—Astrology in Roman Law until the End of the Principate). This study gives a detailed discussion of all the more notable cases, drawing heavily on the literary records, especially the Annals of Tacitus, the Lives of Suetonius, and Dio's Roman History. It does not interpret the juristic literature as fully.

92. Cf. Tacitus, Annals, 1, 74, on the case of Granius Marcellus under Tiberius who was charged with placing his statue higher than those of the Caesars and with removing the head of Augustus from a statue even though it was replaced with the head of Tiberius; 3, 70, on the case of Lucius Ennius who was charged with converting a silver effigy of Tiberius to other purposes; Cassius Dio [Loeb, Vol. VIII], 67, 12, 2, on the case of a woman who was put to death for undressing in front of an image of Domitian; and especially Suetonius, Tiberius, 58, which repeats the charges about removing the head of Augustus from his statue, adds charges concerning beating a slave or changing clothes near a statue of Augustus, and makes further amazing charges against carrying a coin or signet ring bearing the emperor's effigy into a comfort station or brothel (nummo vel anulo effigiem impressam latrinae aut lupanari intulisse). Gothofredus in note 64 (violatis statuis) on Digest, 48, 4, 7, 4 (Amsterdam edition of 1663), cites a comparable instance under Caracalla: Quidam etiam damnatus fuit ab Antonino Caracalla, quod urinam eo loco fecisset, in quo statuae et imagine Principis erant. (Cf. Antoninus Caracalla, V, 7, in Scriptores Historiae Augustae, trans. by D. Magie [Loeb Series, Vol. II: London, 1924], which adds that men were condemned to death for removing garlands from the busts of the Emperor or for wearing such garlands about their necks as a fever preventive.) Similar extravagances may be multiplied which suggest the tone of circumstances under which the maiestas legislation was executed. This final extraordinary example is cited in Seneca, De Beneficiis, trans.
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J. W. Basore [Loeb, Vol. III of Seneca’s Moral Essays] (London: Heinemann, 1935), 3, 26, 1-2. In this case a devoted slave removed hastily from his master’s finger a ring bearing the portrait of Tiberius upon noting that his master had taken up a chamber-pot and was being observed by an informer.

93. Digest, 48, 4, 5-6; 47, 10, 38; 48, 4, 1, 1. See B. Kübler, ‘Maiestas,’ 552. Cf. Suétónius, Tiberius, 58, for various related offenses associated with statues and effigies of Augustus.

94. Cf. Suétónius, Gaius, 27; Cassius Dio, Roman History, 44, 6, 1, requiring that oaths be taken by Caesar’s Fortune (Tyche); 44, 50, 1, on oaths by Caesar’s Health and Fortune (Hygeia and Tyche).

95. Digest, 12, 2, 13, 6 De Iuristurando, sive Voluntario, sive Necessario, sive Iudiciali. Cf. Tacitus, Annals, 1, 73; 3, 36; Cassius Dio, Roman History [Cary, Vol. VII (1924)], 57, 9, 2, on perjury after swearing by the Fortune of Augustus.

96. Cf. Tacitus, Annals, 1, 53 (case of Sempronius Gracchus under Augustus); 3, 24 (case of Decius Silanus under Augustus): nam culpam inter viros ac ianias vulgatum gravim nomine laesarum religionum ac violatae maiestatis appellando clementiam maiorum suasque ipse leges egrediebatur; 4, 44 (case of Julius Antonius under Augustus); Cassius Dio, Roman History, 58, 24, 5, for charge of adultery with Livilla; Suétónius, Augustus, c. 27, for case of Quintus Gallius.

97. C. Just., 1, 12, 2 De His Qui ad Ecclesias Confugiant, vel Ibi Exclamant (Honorius and Theodosius, a. 409): si quisquam contra hanc legem venire temptaverit, sciat se ad maiestatis crimen esse retinendum.


99. Paul., Sent., 5, 21, 2; also cf. Digest, 48, 19, 30 De Poenis; Cassius Dio, 52, 36, relative to strange religions, magicians, and false philosophers.

100. See T. Mommsen, op. cit., p. 567 with n. 2, citing Tertullian, Apologeticus, cap. 10, 24, 27, 28, 35; also McIlwain Essays, pp. 196-197.


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103. See G. Humbert, 'Maiestas,' III (2), 1559.

104. Note in general C. Th., 16, 10, 12, 1 De Paganis, Sacrificiiis, et Templis, and especially C. Th., 16, 10, 12, 1, issued by Theodosius, Arcadius and Honorius on Nov. 8, 392, for laesa maiestas [Pharr, pp. 472-75]; also C. Just., 1, 11, 7 De Paganis, Sacrificiiis et Templis (Valentinian and Marcian, a. 451).

105. C. Th., 16, 8, 19 De Judaicis, Gaelicolis, et Samaritanis (Honorius and Theodosius, a. 409) [Pharr, p. 469].

106. This would appear to be the purpose of C. Th., 16, 1, 4 De Fide Catholica (Valentinian and Arcadius, a. 386) [Pharr, p. 440].


108. Digest, 48, 4, 7, 3, where judges are named: Hoc tamen crimen a judicibus non in occasionem ob principalis maiestatis veneracionem habendum est, sed in veritate (cf. Paul., Sent., 5, 29, 2 for similar principle); 49, 16, 3, 12-13 De Re Militari for examples of judicial discretion; C. Th., 9, 14, 3 Ad Legem Corneliam de Sicariis (Arcadius and Honorius, a. 397) involves degree of attainder [Pharr, p. 236], as does C. Just., 9, 8, 5 Ad Legem Iuliam Maiestatis.

109. Digest, 48, 4, 1, 1-3; C. Just., 9, 8, 5, 6 (Arcadius and Honorius, a. 397): Id, quod de praedictis eorurnque filiis cavimus, etiam de satellitibus consciis ac ministris filiisque eorunt simili severitate censemus.

110. Cf. C. Just., 9, 8, 5, 7; C. Th., 9, 14, 7 [Pharr, pp. 236-237].

111. Digest, 48, 4, 7, 4: Crimen maiestatis facto vel violatis statuis et imaginibus maxime exacerbatur in milites.

112. C. Th., 9, 14, 3, 1 Ad Legem Corneliam de Sicariis (Valentinian, Valens and Gratian, a. 397) [Pharr, p. 236].

113. Digest, 48, 4, 7, 1-2: Servi quoque deferentes audiuntur et quidem dominos sos: et liberti patronos; 48, 4, 8: In quesionibus laesae maiestatis etiam mulieres audiuntur; C. Th., 9, 6, 2 Ne Praeter Crimen Maiestatis Servus Dominum vel Patronum Libertus vel Familiaris Accusat (Valens, Gratian and Valentinian, a. 376) [Pharr, p. 230]. Cf. Tacitus, Annals, 2, 30, on torture of Libó's slaves (also see The Works of Tacitus [Oxford Translation], London, 1914, I, 73, n. 1); 3, 22, on
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the refusal of Tiberius to permit the torture of the slaves of Aemilia Lepida; 3, 67, on the delivery in sale of the slaves of Gaius Silanus to the city-steward so that they might be examined by torture.

114. Cf. C. Th., 9, 5, 1, 1 Ad Legem Iuliam Maiestatis (Constantine, a. 314; 320-323 [Pharr, p. 230]. Cassius Dio, 68, 1, 2, on Nerva’s prohibition against slaves and freedmen lodging complaints against their masters.

115. C. Just., 9, 8, 5; Tacitus, Annals, 4, 20; 4, 30, on rewards to informers.

116. C. Th., 9, 5, 1; C. Just., 9, 8, 3.

117. Paul., Sent., 5, 29, 2: Nulla dignitas a tormentis excipitur; C. Th., 9, 5, 1; 9, 35, 1 De Quaestionibus (a. 369) [Pharr, p. 250]; C. Just., 9, 8, 4. Tacitus, Annals, 11, 22, on torture of the Roman eques Cneius Novius; 15, 56, on the threat of torture made to Antonius Natalis in Piso’s conspiracy; 16, 20, on the death of the ex-praetor, Numicius Thermus, and the torture of his freedman under Nero; Suetonius, Domitian, c. 8, on torture of witnesses in case involving the charge of incontinence against Cornelia, the head Vestal.

118. C. Just., 9, 8, 6, 1 (ed., Krüger), 9, 8, 7, 1 (ed., Gothofredus): In hoc item crimine, quod ad laesam maiestatem imperatoris pertinet, etiam in caput domini servos torqueri; 9, 41, 1 pr De Quaestionibus. Cf. C. Th., 9, 5, 1; C. Just., 9, 8, 3. In addition, see C. Th., 9, 6, 2; Digest, 48, 4, 7, 2; Paul. Sent., 5, 13, 3 De Delatoribus: Damnati servi, sive post sententiam sive ante sententiam dominorum facinora confessi sint, nullo modo audiantur, nisi forte reos deferant maiestatis; also G. Humbert, ‘Maiestas,’ III (2), 1560.

119. Digest, 48, 18, 1, 1-2 De Quaestionibus.

120. On penalties, see T. Mommsen, op. cit., pp. 590-594.


122. Digest, 48, 19, 28, 14 De Poenis: Ita et in custodiis gradum servandum esse, idem princeps [Hadrian] rescrispsit, id est ut, qui in tempus damnati erant, in perpetuum dannarentur, qui in perpetuum damnati erant, in metallum dannarentur, qui in metallum damnati id admiserint, summo supplicio adficerentur. Cf. Cassius Dio, 38, 17, 7, on decree of exile against Cicero.

123. Paul., Sent., 5, 26, 3 Ad Legem Iuliam de Vi Publica et Privata.
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124. Cf. Cassius Dio, 57, 22, 5, on Tiberius’ prohibition of right to make a will in case of persons interdicted from fire and water.


126. Tacitus, *Annals*, 3, 28; 4, 21 (case of Cassius Severus under Tiberius); 42 (case of Votienus Montanus under Tiberius); 6, 18 (case of Considius Proculus and his sister, Sancia, under Tiberius), cited by G. Humbert, 'Maiestas,' III (2), 1560.

127. Suetonius, *Augustus*, 51; Tacitus, *Annals*, 1, 72; 4, 21; 6, 18. *Digest*, 48, 19, 24 *De Poenis*, requires that statues of those who have been relegated or deported for violations of majesty shall be removed.

128. These were mostly cases involving adultery with women of the imperial family. See note 96 supra.

129. Paul., *Sent.*, 5, 29, 1; *C. Just.*, 9, 8, 5 pr.; *Institutes*, 4, 18, 3 *De Publicis Iudiciis*: cuius poena animae amissionem sustinet, et memoria rei etiam post mortem damnatur. Note also Tacitus, *Annals*, 16, 21-35, for famous case of Thrasea Paetus and his son-in-law, Helvidius Priscus, under Nero.

130. Paul., *Sent.*, 5, 29, 1: his antea in perpetuum aqua et igni interdictio; nunc vero humiliores bestiis obiciuntur vel vivi exurantur, honestiiores capite puniuntur.

131. *Digest*, 11, 7, 35 *De Religiosis et Sumptibus Funerum et Ut Funus Ducere Liceat*, associates those who would destroy their country with those who would kill their parents and children (i.e. parricides): eum, qui ad patriam delendam et parentes et liberos interficiendos venerit, while *Digest*, 3, 2, 11, 3 *De His Qui Notantur Infamia*, associates mourning for enemies and traitors with mourning for suicides—not those who kill themselves because they are tired of life but because they have a bad conscience. Cf. *Digest*, 28, 3, 6, 7 *De Inusto Rupto Irrito Facto Testamento*, which states that if anyone takes his life because he is tired of living or because his health is poor or because, like certain philosophers, he seeks popular applause and notoriety, such wills shall be in effect. The reference to the sensation-creating philosophers suggests the type illustrated by the death of Peregrine recounted in Lucian (*The Works of Lucian*, trans. H. W. and F. C. Fowler,
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132. Digest, 28, 3, 6, 6-11; 40, 9, 15 pr. Qui et a Quibus Manumissi Liberi Non Fiat; C. Just., 9, 8, 5 pr. and 4 (Arcadius and Honorius, a. 397); C. Th., 9, 42, 2 and 4 De Bonis Proscriptione seu Damnatorum (Constantius and Julian, a. 356 and 358) [See Pharr, pp. 259-260]. Digest, 31, 76, 9 De Legatis et Fideicommissis, states that a legacy may be received from a legatee if the testator was convicted of treason after the legacy has been paid and if the memory of the deceased has become infamous.

133. Digest, 48, 20, 3 De Bonis Damnatorum: Quinque legibus damnatae mulieri dos publicatur: Maiestatis, vis publicae, parricidii, venefici, de sicariis.

134. C. Just., 9, 8, 6, of the Gothofredus edition, based on Basilics, 6, 36, and omitted as not authentic in the Mommsen-Krüger edition, is explicit on these points. It states that a man may be declared guilty of majesty after his death and his property confiscated. Action may be taken after a man's death; the memory of the deceased may be damned; his property may be seized from his heirs. He who is involved in this crime can neither sell nor manumit nor alienate nor release a debtor. His slaves may be put to the torture that they may testify against him. And from the time that he began to plot (subiit cogitationem) he shall be deemed worthy of punishment on account of the plot. This post-Justinian statute would appear to be an accurate summary of the earlier legislation, notably as set forth in C. Just., 9, 8, 5.

135. Digest, 48, 4, 11; 49, 14, 22 pr. De Iure Fisci; Institutes, 4, 18, 3 De Publicis Iudiciis.

136 Cf. extension of this principle to inheritances in C. Th., 9, 42, 6 [Pharr, p. 260].

137. This more sophisticated legal connotation of infamy is treated in detail by Ernst Levy, "Zur Infamie des römischen Strafrechts," in the Riccobono Studies, II, 77-100. Thus, Digest, 3, 2, 22 De His Qui Notantur Infamia, states that blows with rods do not constitute infamy but rather it is the reason (causa) for which the punishment is merited that determines infamy. This reason is explained in Digest, 48, 1, 7 De Publicis Iudiciis: A sentence for every crime does not render a man infamous but only such as involve public prosecutions and judgments.
Infamy does not result from condemnation for a crime which is not the subject of a public prosecution, save for certain specified offenses as theft, robbery with violence, and injury. Even here we are not completely removed from the primitive relation of infamy to infidelity, since the public significance of the offense bears on the problem of the offender's allegiance to the state. The citizen or subject owes obedience and allegiance to the law of the state; he has broken the law; he is unfaithful and hence infamous.

138. Cf. Humbert and Lécrivain, 'Maiestas,' III (2), 1560-61. See Tacitus, Annals, 5, 9 (6, 4 ed. Furneaux), on capital punishment of the children of Sejanus under Tiberius; Suetonius, Tiberius, 61, on the attainder of relatives in the case of Sejanus; Nero, 36, on the banishment and death of the children of the conspirators in the plots of Piso and Vinicius under Nero. The general statements of the law, prohibiting such attainder, may be found in Digest, 48, 19, 20 and 26 De Poenis.

139. C. Just., 9, 49, 10 De Bonis Proscriptorum seu Damnatorum (Theodosius and Valentinian, a. 428), and C. Th., 9, 42, 23 (Honrius and Theodosius, a. 421) [Pharr, p. 263] which abrogate C. Th., 9, 42, 8, 3 (Gratian, Valentinian and Theodosius, a. 380) [Pharr, p. 261]. See Appendix A on C. Just., 9, 5, 5 Ad Legem Iuliam Maiestatis.


144. C. Th., 9, 6, 3 (L.R.V.C. 9, 3, 2) Interpretatatio: Si servus dominum aut amicus vel domesticus sive libertus patronum accusaverit vel detulerit cuisslibet criminis reum, statim in ipso initio accusationis gladio puniatur: quia vocem talenm extingui volumus, non audiri, nisi forte dominum aut patronum de crimen maiestatis tractasse probaverit.


146. See Lex Visigothorum, ed. K. Zeumer in Monumenta Germaniae
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*Historica, Leges, Sectio I, Tomus I* (Hanover and Leipzig, 1902), Praefatio, p. xiii.


151. *Illinois Law Review*, XXXIV (1940), 566.


159. *Lex Baiuvariorum* (ed. Beyerle), 2, 10, 1 *De Filiiis Ducum St Protervi Fuerint*. 
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160. L. Alam., 35, 1 De Filio Ducis, Qui contra Patrem Suum Sur-

rexerit: aut per raptum regnum eius possedere.


162. Ed. Roth., 4: Si quis inimicus intra provincia invitaverit aut in-
troduxerit, animae suae incurrat periculum et res eius infiscentur.


164. P. Bisoukides, Der Hochverrat (Berlin, 1903), p. 43: "Der

Gegensatz des ‘cogitare’ zum ‘consiliare’ besteht offenbar darin,
dass das erstere die von einer einzelnen Person ausgehenden,
das letztere dagegen die von mehreren geplanten Angriffe
gegen das Leben des Königs umfasst."

ou ymaginer la mort ire Seigneur le Roi, and 2 Bracton, 258:
Si quis ausu temerario machinatus est in mortem domini
regis. See Sir James FitzJames Stephen, A History of the
Criminal Law of England (London, 1883), II, 248-249; 266-
267; Pollock and Maitland, op. cit., II, 503-504.

166. See M. Lemosse, "La Lèse-Majesté dans la Monarchie Franque,"
Revue du Moyen Age Latin, II (1946), 5-24, which lends sup-
port to the views expressed in this study regarding the omiss-
ion of maestas in the Germanic legislation.

167. Capitulare Ticinense (a. 801), c. 3.

168. Frankish herisliz is the equivalent of NHG Heer zu lassen.

169. Lex Romana Raetica Curienis, 9, 3 (Lex Romana Visigothorum,
Codex, 9, 3, 2 Interpretatio [ed. Zeumer]): Si quis servus
dominum suum aut libertus patronum suum acusare voluerit,
nisi forsan probare potuerit, quid ipse dominus aut ipse
patronus contra Deum blasphemasset, aut paganus eos probare
potuerit, de tale acusatione licenciam habeant.

170. Speculum, VI (1931), 453.

Chapter II—THE IDEA OF FIDELITY IN GERMANIC
CUSTOMARY LAW

1. P. Bisoukides, Der Hochverrat (Berlin, 1903), p. 3: "Der Begriff
der feindlichen Handlungen gegen den Staat als solchen, der
sogenannten Staatsverbrechen, ist von jeher ein sehr schwank-
kender gewesen, weil das Objekt des Verbrechens ein sehr
bestimmbares ist." Also note Pollock and Maitland, The His-
tory of English Law before the Time of Edward I (2nd ed.,
Cambridge: University Press, 1923), II, 502: "treason is a
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Crime which has a vague circumference, and more than one centre.”

2. Cf. Hugh Last, Cambridge Ancient History (Cambridge, 1932), IX, 297, who notes that “the nature of treasonable action . . . varies with the nature of the constitution,” and that treasonable crimes “differ greatly in gravity according to their constitutional setting.”

3. Caesar, Commentarii de Bello Gallico, 6, 23: Cum bellum civitas aut illatum defendit aut infert, magistratus qui ei praesint, ut vitae necisque habeant potestatem, deliguntur. In pace nullus est communis magistratus, sed principes regionum atque pagorum inter suos ius dicunt, controversiasque minuunt.


8. Ibid., I, 60. Cf. C. H. McIlwain, The Growth of Political Thought in the West (New York: Macmillan, 1932), 63-66, on the Aristotelian koinonia. This theoretical Greek koinonia has a suggestive relevance to the empirical Germanic Sippe or family-group.

9. Ibid., I, 61.

10. Tacitus, Germania, c. 20: “the more relations a man has and the larger the number of his connections by marriage, the more influence has he in his age; it does not pay to have no ties.”
13. H. Brunner, op. cit., I, 112. The blood-relatives are designated variously as Freunde, Holde, Gätlinge, Gestippen, Sippen and Magen (whence the Anglo-Saxon maegth).
14. See Sir William Holdsworth, A History of English Law (4th ed., London: Methuen, 1936), II, 36, on maegth. Paternal and maternal relatives shared rights and duties, as dividing a wergeld or sustaining a feud, in the proportion of two-thirds and one-third respectively. Since there was no blood relationship between husband and wife, each remained in his own maegth. It was a recognized association for social purposes and to some extent possessed a “common aim and will.” Cf. F. Liebermann, Die Gesetze der Angelsachsen (Halle, 1903-16), Glossary in second half of Vol. II, 651-655, on Sippe (sibb, cynn, maeg, maegsib, maegd, maeglagu, magas).
15. The curious Sippe or maegth, containing both Speer and Spindel kin in the cases of specific individuals, seems to lack any counterpart in antiquity.
17. See Pauly-Wissowa, Real-Encyclopädie, on gens and patria potestas, for views of Mommsen and Niebuhr.
18. Observe H. Brunner, op. cit., I, 119: “Das Geschlecht hatte gewisse öffentlich-rechtliche Funktionen, die bei entwickelteren Verhältnissen als Aufgaben der Staatsgewalt erscheinen. Ursprünglich auf die agnatische Sippe beschränkt, sind sie schon lange von der Zeit, da unsere Quelle darüber zu sprechen beginnt, auf andere Blutsverwandte, schliesslich auf die Verwandtschaft überhaupt ausgedehnt worden,” and further, “Das Geschlecht war der älteste Friedensverband, er verbürgte seinen Genossen den Frieden, indem er die an ihnen begangenen Rechtsverletzungen rächte, das angegriffene Mitglied verteidigte.” Cf. G. Waitz, op. cit., I, 84; “Doch geht man zu weit, wenn man auch in späterer Zeit noch die Dorfschaft und die Familie zusammenfallen lässt, die Dorfgenossen zugleich für Familiengenossen hält, die Beziehungen dieser zu einander aus dem Zusammenhang der Familien ableiten, wo von Dorfgenossen oder Nachbarn die Rede ist, Verwandte oder Geschlechtsverwandte annehmen will, etwa das Erbrecht, das jenen beigelegt zu werden scheint, auf solche Weise zu erklären gedenkt.”
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19. Cf. H. Brunner, *op. cit.*, I, 117-118; G. Waitz, *op. cit.*, I, 90, on the *Gilden*. One must also remember that the *Sippe* like the Greek city-state was a "life" which was not limited to political activity but embraced the economic, military, religious and legal phases of society. The *Sippe* involves functions that lie outside and beyond the political *koinonia*. Thus the *Geschlecht* or *Sippe* becomes the *fara* or *fyrd* when considered as a division of the host or army. It seems likely that, considered as an area of residence, it becomes the *Dorf* or *vicus*.

20. Sir Paul Vinogradoff, *op. cit.*, I, 353, on contemporary difficulty in the enforcement of international law.

21. Sir William Holdsworth, *op. cit.*, II, 38, 44-45: "As the state gained in strength it suppressed the *maegth* if it attempted to stand against the law [of the state]; and it invented other means to secure the preservation of the peace," but the old idea lived on and, while these primitive principles gave place to others, they were never wholly eradicated but were often recognized and regulated. "Thus . . . it regulated the occasions upon which recourse might be had to the feud. It regulated the amount of the wergeld. It required a man who had no kin to find himself a lord."

22. Note that the earliest Germanic protective group of which there is definite knowledge is more complex than the theoretical simple family. It is the *Sippe* or *maegth* whose membership varies for each individual and which is an empirically established entity based on social experience.

23. See Bisoukides, *op. cit.*, 34: "Wer nun die Verbandssicherheit gefährdet, indem er seine verbrecherische Tätigkeit nach dieser Richtung hin entfaltet, bricht in schimpflicher Weise die geschuldete Treue, er is Verräter in diesem Sinne."

24. Parricide of this sort may also well be one of the roots whence the mediaeval petty treason sprang. Cf. W. E. Wilda, *Geschichte des deutschen Strafrechts*, I (*Das Strafrecht der Germanen*) (Halle, 1842), 984: "In den ältern Zeiten tritt mehr der Verrath an Land und Volk hervor, während der Verrath gegen den König erst allmählig als ein gleichsam gegen das Gemeinwesen selbst undmittelbar gerichtetes Verbrechen in bestimmter Weise sich darstellte und gewissermassen an dessen Stelle trat."


an Land und Volk, teils aus dem Gesichtspunkte der Untreue gegen den König bestraft.” Also see F. S. Lear, “The Public Law of the Ripuarian, Alamannic, and Bavarian Codes,” *Medievalia et Humanistica*, II (1944), 15, and 22-25, on the problem of the transfer of treasonable and other related offences from the popular to the ducal causes. This represents a further stage in the process of the attraction and absorption of *Landesverrat* into the area of high treason, in part through the medium of a ducal or royal “peace.”


See Rudolf His, *Geschichte des deutschen Strafrechts bis zur Karolina* (Munich and Berlin, 1928), 113-118, for a good short analysis of the various types of treason (*Verrat*, old Swedish, *forratha*), including the relation of *Landesverrat* (old Norse, *landrad*) to *Hochverrat* and *Herrenverrat* (A.-S., *hlæford-searu*, *hlæford-swice*); also the relation of *Verrat* generally to the *Majestätswerbren* (crimen *laesae maiestatis*).


The best survey of the objections to the Wilda-Waitz-Brunner theory of a legal public “peace” and the literature connected therewith may be found in Julius Goebel, Jr.,
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Felony and Misdemeanor (New York: The Commonwealth Fund, 1937), I, 7-25. Goebel denies the existence of a primitive folk peace or state of quiet constituting a legal concept of public order, although he apparently admits the growth of special protections and interests which find expression in the special paces of the leges barbarorum. Cf. Illinois Law Review, XXXII (1937), 387, for my review of Goebel on this topic; also my study in Medievalia et Humanistica, II (1944), 22-27, on the relation of the popular to the ducal causae and the types of paces or Frieden involved.


31. Cf. Schröder-von Künsberg, op. cit., 32-36, on Gaufürst (satrapa, furisto) and Gaukönig (regalis, subregulus) who were also probably Richter (iudices); also on Herzog (dux, herizogo, heretoga).

32. Cf. H. Brunner, op. cit., I, 180-195, on "Die Gefolgschaft"; Schröder-von Künsberg, op. cit., 36-40, on "Das Gefolge" (comitatus); G. Waitz, op. cit., I, 236-293; and K. von Amira, Grundriss, 187-191, on "Gefolgschaft und Vassalität." For a similar theory of this development, note P. Bisoukides, op. cit., 34: "Wenn aber die antiken Staaten ihre Strafberechtigung
gegen die ihre Existenz bedrohenden Handlungen aus dem Begriffe der Feindseligkeit ableiteten, so legte man in den germanischen Völkerschaften einen anderen Gedanken zu Grunde. Nach germanischer Auffassung ist der Mensch als Mitglied eines Verbandes, dessen Schutz er genießt, zur Treue und Anhänglichkeit an denselben verpflichtet. Wer nun die Verbands sicherheit gefährdet, indem er seine verbrecherische Tätigkeit nach dieser Richtung hin entfaltet, bricht in schimpflicher Weise die geschuldete Treue, er ist Verräter in diesem Sinne.” See Bede, Historia ecclesiastica, 5, 10: Non enim habent regem iidem antiqui Saxones, sed satrapas plurimos suae genti praepositos, qui ingruente belli articulo mittunt aequaliter sortes, et quemcumque sors ostenderit, hunc tempore belli ducem omnes secuntur, huic obtemperant; peracto autem bello rursum aequalis potentiae sunt satrapae.

33. Cf. Schröder-von Künssberg, op. cit., 31, on an entire people forsaking its troth to a king who had abused his authority or who had appeared to be accursed by the gods. This view implies a contractual relationship between the primitive Germanic kingship and the people (Volk), and is not irreconcilable with the position taken in this study.


35. This is also the end result of Germanic legal development as reflected in the Carolingian capitularies. See Brunner-von Schwerin, op. cit., II, 886.

36. See W. Wilda, op. cit., I, 984-985.

37. See P. Bisoukides, op. cit., 37: “Der Treubruch stellt sich nunmehr tatsächlich als ein Gattungsverbrechen” which includes high treason, treason to the land and folk, and other crimes such as petty treason; also Brunner-von Schwerin, op. cit., II, 881: “Was das neuere Strafrecht als Landesverrat bezeichnet, war in älteren Rechte Treubruch gegen das Gemeinwesen.”

38. Compare this theory of the relation of Treubruch and Lande-
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sverrat with that advanced by P. Bisoukides, op. cit., 35. W. Wilda, op. cit., I, 988, speaks of high treason as not only depriving a king of his power and seeking his deposition, but also separating him from the land and people which have been under his authority. Here there seems to be a certain integration of the concepts of Hochverrat and Landesverrat.


40. Caesar, Comm. de Bell. Gall., 6, 23: Atque ubi quis ex principibus in concilio dixit se ducem fore, qui sequi velit profiteantur, consurgunt ii qui et causam et hominem probant suumque auxilium policentur, atque a multitudine conlaudantur; qui ex his secuti non sunt in desertorum ac proctororum numero ducuntur omniumque his rerum postea fides derogatur. See M. Haidlen, Der Hochverrat und Landesverrat nach altdeutschem Recht [Inaugural-Dissertation] (Stuttgart, 1896), 4-10.


43. See F. S. Lear, “Treason and Related Offences in the Anglo-Saxon Dooms,” The Rice Institute Pamphlet, XXXVII 1950), 6-7, on the problem of a royal weergeld in Germanic law.

44. Tacitus, Germania, c. 12: Licet apud concilium accusare quoque et discrimen capitis intendere. distinctio poenarum ex delicto. proctoro et transfugas arboribus suspendunt, ignavos et imbelles et corpore infames caeno ac palude, inicta insuper crate, mergunt. diversitas supplicii illuc respicit, tamquam sclera ostendi oporteat, dum puniuntur, flagitia abscondi. For a detailed interpretation of this passage, philological and legal, see Rudolf Much, op. cit., 146-150.

45. Regarding this especially horrible form of punishment, see R. Much, op. cit., 149, who suggests that it was, in the main, considered appropriate for women, and that it was regarded as most disgraceful when applied to men, being used in the cases of effeminates and weaklings. Cf. Lex Gundobada Burgundionum, 34, 1: se qua mulier maritum suum, cui legitime est iuncta, dimiserit, necetur in lute. Much cites additional instances from the old Norse laws. However, there are
examples of similar punishments and the use of the *cratis* in early Roman history, as recorded by Livy, 1, 51: *novo genere leti, deiectus (Turnus) ad caput aquae Ferentiae crate superne injecta saxisque congestis mergeretur*, and 4, 50: *quos necari sub crate iusserat.*

46. This controversy is explained in Bisoukides, *op. cit.*, 34-36.

47. *Ibid.*, 35. However, C. H. Knitschky, *Das Verbrechen des Hochverrath* (Jena, 1874), 4, says: “Denn unter proditores zunächst nur Landesverräter zu verstehen, ist um so gerechtfertiger, als auch den Römern der Ausdruck im dieser Bedeutung geläufig war.”


52. This theory accords with the general view taken in this study as far as Bisoukides’ *standardized troth* corresponds to that *Treubruch* mentioned above (n. 38) which was *Landesverrath* and therefore untypical because it lacked the full personal relation. Cf. Bisoukides, *op. cit.*, 35: “es ist wohl möglich, dass das Verhältnis der Treue für eine Verbrechensgattung massgebend gewesen war.”


54. See Dionysius of Halicarnassus, *The Roman Antiquities*, Vol. I, trans. E. Cary [Loeb Series] (London: Heinemann, 1937), 2, 10, for a remarkable description of the relation between client and patron among the early Romans. He states that it was impious and unlawful for both patrons and clients to be found in the number of each other’s enemies, and that, whoever was convicted of such association, was guilty of treason (*prodosia*) according to the law sanctioned by Romulus. Dionysius adds that such a person “might lawfully be put to death by any man who so wished as a victim devoted to the Jupiter of the infernal regions (Dis or Pluto). For it was cus-
Treason among the Romans, whenever they wished to put people to death without incurring any penalty, to devote their persons to some god or other, and particularly to the gods of the lower world.”

55. See Bisoukides, op. cit., 36, n. 1.
56. Frostuthigslög, 4, 50.
58. See G. Waitz, op. cit., I, 424.
59. W. Wilda, op. cit., I, 986. Bisoukides states that this is an arbitrary assertion for which he can find no substantiating evidence (p. 36, with n. 1).
64. See Schröder-von Künssberg, op. cit., 85-86, for the difference between Volksfeindschaft and the faidosus against a Sippe. Cf. in general, H. Brunner, op. cit., I, 221-231, on the feud (faida).
Notes

noiwegische Gefolgschaftsrecht (Hirthskrá) (Weimar, 1938); by Baron von Schwerin, Band 7, Schwedische Rechte: Älteres Westgötalag, Uplandslag (Weimar, 1935). Andreas Heusler, Das Strafrecht der Islandersagas (Leipzig, 1911), is disappointing in its failure to deal with treasonable offences as such, although it has significant references to such topics as inviolability (Unverletzlichkeit), accursedness (Unheiligkeit), “peacelessness” (Friedlosigkeit), banishment (Landesverweisung), outlawry (Acht), blood-feud (Fehde), and revenge (Rache).

66. Cf. K. von Amira, Voll., 19, Larson, op. cit., 423, defines nithing crime (nithingsvág) as follows: “A crime, usually murder, committed under such circumstances and by such methods as to give the criminal the character of a nithing (a mean, infamous, treacherous person). Nithing deeds usually led to permanent outlawry.” Also see K. von Amira, Grundriss, 233-234, on Böswilligkeit.

67. In general, see K. von Amira, Voll., 11-45, on die strenge Friedlosigkeit; K. von Amira, Grundriss, 229-240, on Friedensbruch; M. Haidlen, op. cit., 10-14.

68. Ibid., 20.


72. Frost., 4, 4 [Larson, 258; Meissner, 4, 62].

73. Frost., 4, 50 [Larson, 278; Meissner, 4, 88; Wilda, I, 989]. Cf. Frost., 4, 51-52 [Larson, 278; Meissner, 4, 89; Wilda, I, 989, n. 2], stating that if a farl commits such an offense, the arrow shall be sent forth through four fylken, and if a baron does this, the arrow shall be sent forth through two fylken.


75. Cf. K. von Amira, op. cit., 21, 24-25. Von Amira notes that Gulathingslög, 178, which lists the nithingsverke and corre-
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sponds to Frostuthingslög, 4, 4, contains no reference to treason, whereas Frost., 4, 4, contains no reference to homicides caused by striking with sticks and stones, to the killing of thieves under certain circumstances, and to the robbing of bodies on a battlefield, all of which are contained in Gula., 178. Von Amira, then, says that, although the Frostuthingslög is more recent than the Gulathingslög, it cannot be maintained from the omissions in the former law that the old strenge Friedlosigkeit was being weakened. Rather the addition of treason in the Frostuthingslög indicates that the circle of nithingswerke was widened in the period between 1150 and 1225. However, when considered from the general point of view of the history of treason among the Germanic peoples, the failure of the Gulathingslög to list treason among the nithingswerke does not imply a recent extension of the idea of nithing or shame to treason. The association of infamy with infidelity is as old as Germanic law itself.

76. Gulathingslög, 132 [Larson, 121; Meissner, 6, 97]. Cf. Frost., 15 [Larson, 399; Meissner, 4, 248]; and Gula., 312 [Larson, 198; Meissner, 6, 182]; also Frost., 2, 46 [Larson, 244; Meissner, 4, 42]; and Gula., 23 [Larson, 51; Meissner, 6, 20-21], which involve church law relative to the breaking of a sinful oath if it concerns treason and to the denial of burial in hallowed ground to traitors (Königsverräter).

The Norwegian Hirthskrá or Law of the Following (Gefolgschaftsrecht) of the thirteenth century indicates the procedure where the king reproaches a duke (13, 3) or a jarl (17, 3) or a freeman (Landherr, baro) (20, 1-2) with treason or faithlessness (Verrat oder Untreue, Landesverrat oder Falschheit). In any case, the charge shall be made with circumspection and restraint. Here taking the twelve-fold oath seems to be replaced with the opportunity for the person charged to be judged according to law with the counsel of responsible men (mit dem Rate guter Männer nach dem Gesetz), twelve in number for the Landherr. Cf. Hirthskrá, 3, 1-2, on Landesverrat for failure to perform certain requisite duties for the king.

77. Gula., 148 [Larson, 126; Meissner, 6, 97].

78. Gula., 312 [Larson, 197-198; Meissner, 6, 181-182].

79. Gula., 314 [Larson, 198-199; Meissner, 6, 182-183].


81. See Westgotalag, trans. von Schwerin, 7, 22, who renders landvist
Notes

as Landverbleib rather than Frieden which is given by W. Wilda, op. cit., I, 985, quoting Westgötalag, I, 4, with further reference in I, 985, n. 3.

82. Ibid., 985-986, quoting Ostgötalag, Ethz., c. 30. Also note Uplandslag, c. 15 [Von Schwerin, 140], in the section on Mannheiligkeit dealing with matters whose sanctity must be respected, which states that “if any man bears a hostile shield against the all-powerful king or against the realm in which he himself was born, he has thereby forfeited his neck (i.e., his life) if he be captured, and in addition he must lose his land and goods whether he be captured or not.” Then follows a statement of the procedure to be followed against such a traitor including judgment by twelve responsible men.

83. Ibid., I, 985, quoting K. Erichs seinländisches Recht, 2, 31. This enactment is numbered 2, 27, in the translation by Baron von Schwerin in the Germanenrechte (Band 8, Dänische Rechte) (Weimar, 1938), pp. 46-47. Here the clause, thet callae maen awgskiold fórrth a rikit, is rendered merely “Denn das nennt man Landesverrat,” although he points out on p. 47, n. 2, that the literal meaning is “das nennen die Leute einen feindlichen Schild gegen das Reich geführt.” It is the same expression employed above in Uplandslag, c. 15 [Von Schwerin, 140]. The theme is extended from traitorous hostile attack (feindlichen Schild) to treasonable malicious counsel (mit üblem Rat) in Knut’s Law of the Following (Gefolgschaftsrecht), c. 2 (Germanenrechte, Band 8, p. 195). After stating that all men must render their lord full troth and obedience and observe all his commands (c. 1), it proceeds to state: If it happens that there be a more dangerous and shameful troth-breaker (Treubrecher) and if he commits a Judas-act against his lord through evil counsel, then he forfeits his life and all his goods.


85. K. von Amira, Voll., 24, quoting Snorri, Olafs s. ens helga, 177.

86. Ibid., 24, quoting the Fagrskinna, 205. See Fagrskinna—Kortfattet norsk Konge-saga, edited by F. A. Munch and C. R. Unger (Christiania [Oslo], 1847).


88. Egils-saga, ch. 13. The idea of plotting the death of a ruler is probably as old as kings themselves; hence the presence of the terms consiliatus and machinatus in the leges barbarorum does not in any sense constitute absolute proof of the intro-
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duction of these conceptions from the Roman Law. It is very possible that the Latin words were merely applied to pre-existing Germanic ideas. However, the statements dealing with the Roman concepts of plotting and machination in the Roman codes might suggest and so lead to the formulation of their Germanic counterparts in the leges barbarorum.

89. Egils-saga, chs. 14-16.
90. Egils-saga, ch. 25.
91. Cf. Gula, 32 [Larson, 60; Meissner, 6, 30]; Frost., 4, 31 [Larson, 271; Meissner, 4, 79-80].
95. Frost., 4, 35 [Larson, 272; Meissner, 4, 81].
97. See Appendix on Petty Treason.
98. For the examination of problems connected with feudalism and for the relation of the concept of fealty to vassalage, there is no better point of departure than the foundation articles by Carl Stephenson which appeared in the American Historical Review as follows: “The Origin and Significance of Feudalism,” XLVI (1941), 788-812; “Feudalism and Its Antecedents in England,” XLVIII (1943), 245-265; “The Problem of the Common Man in Early Mediaeval Europe,” LI (1946), 419-438. These articles have been reprinted recently in Mediaeval Institutions: Selected Essays, edited by Bryce D. Lyon (Ithaca: Cornell University Press, 1954), pp. 205-233; 234-260; 261-284. In these truly splendid background studies the late Professor Stephenson analyzes the relevant aspects of the theories of Roth, Waitz, Brunner, Guilhiermoz, Dopsch, von Below, and many others. In the opinion of the writer the evidence of the public law, set forth in the leges barbarorum, supplements and confirms the conclusions which were reached by Stephenson through an evaluation of factors, chiefly social and economic. It seems certain that Stephenson has charted the course which will prove most fruitful for subsequent research in this area. One must also consider the views advanced in Charles E. Odegaard, Vassi and Fideles in the Carolingian Empire [Harvard Historical Monographs, XIX] (Cambridge: Harvard University Press, 1945), which gives much consideration to semantic features involving the meaning of the terminology.