

***Lex Oppia*: An Ancient Example of the Persistence of Emergency Powers**

1. Introduction.

The legal framework of society represents a social contract. It formalizes rules of conduct for both the governed and the state. Since, as John Locke wrote, “it is impossible to foresee and so by laws to provide for all accidents and necessities that may concern the public,” this social contract is incomplete.¹ In a democratic society, the legislative process provides a clear vehicle with which to renegotiate. However, “in some governments the law-making power is not always in being and is usually too numerous, and so too slow for the dispatch requisite to execution.”² That is, in times of emergency, this deliberative process may not be adequate to the task. How, then, ought the state to respond to crises for which existing law is insufficient?³

¹Locke ([1689] 2010), p. 308. Alexander Hamilton, in *The Federalist Papers*, also made this point: “[It] is impossible to foresee or define the extent and variety of national exigencies, or the correspondent extent and variety of the means which may be necessary to satisfy them” (Hamilton *et al.* [1787-88] 2006, p. 142, italics in original).

²Locke, *op. cit.*, pp. 307-308.

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This question, particularly in the wake of the September 11 attacks, has been the subject of considerable debate. One approach, advocated by Aoláin and Gross (2006) and Gross (2003), involves no explicit increase in government power, but allows government officials, when they deem it to be in the public interest, to openly flout existing law and face the consequences *ex post*. In this extra-legal model, the legislature may choose to indemnify the agent after the fact, but this is hardly assured. This view recognizes that there are instances in which government action outside the law may be appropriate, but explicitly granting additional power to the state in times of emergency may prove problematic.

Another approach is to simply reject the very premise of the question. This view holds that there is no need for the government to hold additional power in

³In *The Social Contract*, Jean-Jacques Rousseau argues that “[i]f ... the peril is of such a kind that the paraphernalia of the laws are an obstacle to their preservation, the method is to nominate a supreme ruler, who shall silence all the laws and suspend for a moment the sovereign authority” (Rousseau [1762] 2010, pp. 108-109). One example of this response to emergencies comes from Rome, where the Consuls (generally following a *senatus consultum*) had the ability to nominate a temporary dictator.

times of crisis; existing constraints on government power should not be relaxed in response to cries of necessity. Implicitly, it is assumed that the cost to society of granting extraordinary power to government in times of crisis is sufficiently high as to never be worthwhile. In Lobel (1989) this corner solution is dubbed the “absolutist” view. In Aoláin and Gross (2006) and Gross (2003) it is referred to as the “business as usual” model.

A related view, advocated by Dyzenhaus (2006), is that the government should always act within the confines of the law, but allows for the possibility of additional powers when circumstances demand. This can be accomplished, for example, via laws that allow for rights to be abrogated when the government declares an emergency. Such legislation would legally declare government power to be context-dependent.

Akerman (2004), however, notes that “[u]nless careful precautions are taken, emergency measures have a habit of continuing well beyond their time of necessity.”⁴ Gross (2003) argues that this is, in part, due to the difficulty in differentiating between emergency and normalcy. Indeed, Gross (2003) and Lobel (1989) argue that this difficulty has led to a blurring of the line between the two. Additionally, once power has been granted to the government, officials may see an incentive to perpetuate the declaration of

⁴An example of particular interest is the “Impuesto Extraordinario y Temporal de Apoyo a los Acuerdos de Paz” (IETAAP) in Guatemala. This tax accompanied the peace accords of 1996 and, as the name states, was expressly intended to be temporary. However, it continues to this day under the name “Impuesto de Solidaridad.” For additional details see http://independent.typepad.com/el_independent/2008/08/guatemala-impue.html.

emergency well beyond the actual crisis. Current events in Egypt and Algeria, among many other examples, lend substantial weight to this argument.⁵ Emergency legislation may also persist, even when the crisis has unambiguously passed, if alternative rationales can be found.⁶ This paper illustrates an interesting example of this phenomenon from antiquity in which the Roman Senate debated repeal of a sumptuary law.

This law, called the *Lex Oppia* and passed in 215 BC,⁷ came as a direct response to the devastating defeat of the Roman legions commanded by the Consuls Gaius Terentius Varro and Lucius Aemilius Paullus at Cannae. The purpose of the *Lex Oppia* was to curb excessive female expenditures at a time when the coffers of the city treasury were depleted and, as such, can be seen as a piece of restrictive sumptuary legislation. The legislation was passed at a time when Rome was in dire financial straits and was designed to shift any available funds towards the defense of the city. In the years following the passage of the *Lex Oppia*, Carthage was unequivocally defeated and the rationale for the law would seem to have disappeared. The law’s defenders, however, implemented a new narrative. No longer was the law designed to help fund a defeated and insolvent ar-

⁵For a substantial list of examples, we refer the reader to Gross (2003).

⁶For example, in response to the energy crisis in the 1970’s, the United States implemented a national speed limit of 55 miles per hour, in order to reduce the consumption of fossil fuels. Once the crisis had passed, the justification had become that the reduced speed limits saved lives. This claim is investigated in Lave (1985).

⁷Unless otherwise noted, all dates are BC.

my; rather it was designed to protect the virtue of Roman women.

The remainder of the paper is organized as follows. Section 2 provides the background against which the *Lex Oppia* was passed, and describes the initial purpose of the law. Section 3 illustrates the changing circumstances in Rome which provided the later rationale for the law. Section 4 discusses the debate in the Roman Senate regarding repeal. Section 5 concludes.

2. Background of the *Lex Oppia*: The Second Punic War and the Battle of Cannae.

In 218, in response to Carthaginian inroads into the previously independent Iberian peninsula, the 16-year Second Punic War commenced. This war would end with a decisive victory for Rome and the systematic dismantling of the Carthaginian empire. During the early years of the war, however, this outcome was far from certain. For nearly eight years Hannibal, following his dramatic and famous crossing of the Alps, rampaged through the Italian peninsula winning key victories and eliminating Roman consuls. Meanwhile, in 214, on Rome's eastern frontier, what would later be termed the First Macedonian War broke out, with Rome also facing off against King Philip V's Macedon.

The disasters of the Second Punic War reached a climax with the Roman defeat at Cannae, in which a numerically superior Roman force was soundly defeated by Hannibal's army. Sources differ on the number of casualties, with a reported range of 48,000 to 70,000 Romans and 5,700 to 8,000 Carthaginians killed.⁸

⁸Poly. *Hist.* 3.117. See also Liv. 22.49, App.

This was not a defeat that happened in a remote corner of the world or even a defeat on the border. Rather, the defeat happened in the heartland of Italy, less than 250 miles from Rome. Panic subsequently swept the city. Simply put, the effect on the Roman psyche was dramatic. The ancient historian Livy succinctly captures the panic enveloping the city as rumors spread that Hannibal was at the gate:

At no time, the city being unharmed, had there been so great a fear and tumult with the walls of Rome. I will neither describe the situation nor reduce the cold reality by attempting to recount the small facts. The loss of the consul and army at Trasumennus the previous year, it was no longer wound added to worse wound but rather a continuing calamity. When it was announced that that the two consuls and their two armies were lost, there was now neither any Roman camp nor any commanders nor any soldiers; Apulia, Samnium, and almost all of Italy were controlled by Hannibal.⁹

It was in this state of fear that the *Lex Oppia* was passed. The law targeted women, stating that they could no longer wear more than an ounce of gold or overly colorful garments, and banning women's use of carriages within a mile radius of the city, excepting during religious festivals.¹⁰ In practice, this law probably

Hann. 4.25, Plut. *Fab. Max.* 16.8.

⁹Nunquam salua urbe tantum pauoris tumultusque intra moenia Romana fuit. Itaque succumbam oneri neque adgrediar narrare quae edisserando minora uero faciam. consule exercituque ad Trasumennum priore anno amisso non uolnus super uolnus sed multiplex clades, cum duobus consulibus duo consulares exercitus amissi nuntiabantur nec ulla iam castra Romana nec ducem nec militem esse; Hannibalis Apuliam, Samnium ac iam prope totam Italiam factam (Liv. 22.54).

¹⁰Liv. 34.1.

had little effect—it is doubtful that, with rumors of Hannibal at the gate, many women were cruising in carriages through the streets of Rome ornamented in gold and draped in fancy fabrics.¹¹ It was, however, now Roman law. Moreover, it was a law that remained for decades and appears to have been a law to which adherence was expected.¹² Why was it not eventually rescinded or, at least, ignored?

¹¹Indeed, in the later debate to repeal the *Lex Oppia*, Valerius asked rhetorically, “At this time, were the women so finely dressed that the *Lex Oppia* law was needed to restrain them?” (Tali tempore in luxuria et ornatu matronae occupatae erant, ut ad eam coercendam Oppia lex desiderata sit?) (Liv. 34.6).

¹² It is, of course, supposition to believe that the law was enforced, but Livy records a rather massive protest against the law: “The matrons could be kept home neither by the influence, authority, or edict of their husbands. They blocked all the roads in the city and all the entrances to the forum, begging the men as they entered the forum that, given the state's prosperity—all men having their fortunes rise daily—the women should likewise be allowed to have restored to them their former adornments. This crowd of women was enlarged every day, for they had gathered from the towns and outlying districts. Besides this, they then boldly approached and asked the consuls, praetors, and magistrates [for a repeal].” (Matronae nulla nec auctoritate nec verecundia nec imperio virorum contineri limine poterant, omnis vias urbis aditusque in forum obsidebant viros descendentes ad forum orantes, ut florente re publica, crescente in dies privata omnium fortuna matronis quoque pristinum ornatum reddi paterentur. Auebatur haec frequentia mulierum in dies; nam etiam ex oppidis conciliabulisque conveniebant. Iam et consules praetoresque et alios magistratus adire et rogare audebant. Liv. 1.) This level of public demonstration seems unlikely if the law was generally ignored.

The war with Hannibal, after all, had ended in a great Roman triumph and the wealth now flooding into the city negated the need for wartime austerity measures. The answer is that the conservative party in Rome subtly redefined the narrative surrounding the need for the law. Though the *Lex Oppia* was formerly adopted to meet the political necessities of the time, it was maintained in order to address another issue that the creators of the law had likely neither foreseen nor created: the law as a bulwark against the Greek assault on traditional Roman values.¹³

3. The Hellenizing Influence.

Following the defeat of Carthage, the Hellenistic world succumbed to Rome and became incorporated as Roman territories. This led to a rather unexpected outcome—as Rome went from a city perpetually threatened to the city in control of the Mediterranean and Aegean Seas she was flooded with peoples, goods, and customs from the new provinces. The oft-discussed Hellenizing of Rome was noted by the Romans themselves—wrote Horace: “Captive Greece captured her wild conqueror and brought arts to rustic Rome.”¹⁴ Rome, however, was not only introduced to new arts but also to new modes of consumerism and leisure, many of which were seen as lascivious. Eventually, in the words of one modern observer, “Greek vices, hitherto unknown in Rome, now became naturalized there.”¹⁵ Many Romans seem to have agreed:

¹³Tac. *Ann.* 3.34.

¹⁴Graecia capta ferum uictore cepit et artes/intulit agresti Latio (Hor. *Ep.* 2.1.156-157).

¹⁵Duruy (1890), p. 276.

Foreign luxury from Asia was [first] brought into the City by the army. First selected and brought to Rome were brass fittings, expensive garments for covering, bed curtains and other textiles, what was held to be splendid furniture [such as] one-legged tables and alters. Then female lutists and harpists and delightful parties were added to banquets. The banquets themselves, likewise, were undertaken with greater care and expense. The cooks, who, to previous generations of Romans, were the least important of slaves (both in financial worth and actual use) began to be valued, and what had been a service began to be considered an art. Nevertheless, those indulgences, which were noted at that time, were [only] the seeds of future luxuries.¹⁶

Polybius also made reference to this increase in “debauchery” and linked it to Greece.¹⁷ The conservative Roman element became increasingly reactionary to this import of Greek culture.¹⁸ Indeed,

¹⁶[L]uxuriae enim peregrinae origo ab exercitu Asiatico inventa in urbem est. ii primum lectos aeratos, vestem stragulam pretiosam, plagulas et alia textilia et, quae tum magnificae suppellectilis habebantur, monopodia et abacos Romam advexerunt. tunc psaltria sambucistriaeque et convivalia [alia] ludorum oblectamenta addita epulis; epulae quoque ipsae et cura et sumptu maiore adparari coeptae. tum coquus. vilissimum antiquis mancipium et aestimatione et usu, in pretio esse et, quod ministerium fuerat, ars haberi coepta. vix tamen illa, quae tum conspiciebantur, semina erant futurae luxuriae. (Liv. 39.6.)

¹⁷Poly. *Hist.* 32.11.

¹⁸Observe, for example, the erection of the virtuous Venus *Verticordia* (Ov. *Fast.* 4.160 and V. Max. 8.15 ext. 12) and the numerous other pieces of sumptuary legislation passed by the Senate. A complete listing of these laws is precluded by space limitations but, for those so interested, consult Macrobius 3.17.2-13, which contains the most exhaustive an-

even a number of Rome’s literary elite became suddenly concerned with Roman family values. Ennius, the father of Latin poetry, lamented the decline of *moribus-antiquis*, upon which rested the glory of Rome,¹⁹ and the satirist Juvenal, writing much later, looked back sadly stating that, “since Roman poverty perished, no sin or crime of iniquity has been absent.”²⁰

4. The Repeal.

If the *Lex Oppia* was passed in a climate of Carthage-inspired fear, fear of Hellenization was the climate which almost saw the law maintained indefinitely. In 195, twenty years after its passage, Lucius Valerius proposed the repeal of the *Lex Oppia*, his opposition to it being: “Those laws which are made in peace are, for the most part, abolished during war, while those laws which are made in war are abolished by peace; such it is the management of a ship, some tools are necessary in good weather while others are needed in unfavorable conditions.”²¹ In the case of the *Lex Oppia*, the rationale for the law had long since ceased, as it had been passed with the specific intent of protecting the state from a specific Carthaginian threat.

cient documentation of Roman sumptuary laws in the late Republican period.

¹⁹Enn. *Ann.* 156.

²⁰[N]ullum crimen abest facinusque libidinis ex quo/paupertas Romana perit (Juv. 6.294-295).

²¹Quae in pace lata sunt, plerumque bellum abrogat, quae in bello, pax, ut in navis administratione alia in secunda, alia in aduersa tempestate usui sunt (Liv. 34).

Hannibal was in Italy, he was the victor at Cannae; he already held Tarentum, Arpi, and Capua; he was seen as preparing to move his army to the city of Rome, which was deserted by her allies. We had no soldiers as reinforcements, no sailors to man the navy, and no money in the treasury. Slaves used as soldiers were purchased on credit from their owners, who were to be repaid at the conclusion of the war. At the same time, the tax collectors said they would purchase food and other materials for the war on consignment, payment also to be made at the conclusion of the war. We [private citizens] put slaves to the oar, the number of which was based on an appraisal of our property by value, and paid for them with our own money. All gold and silver were given for the use of the public, following the pattern borne of all the Senators. Widows and orphans brought their money to the public treasury and we were careful to not keep more than a little silver or gold in our homes.²²

The law, claimed Valerius, was obviously intended to expire with the threat of Carthage. Other measures undertaken for the public good had already been re-

²²Hannibal in Italia erat, uictor ad Cannas; iam Tarentum, iam Arpos, iam Capuam habebat; ad urbem Romam admoturus exercitum uidebatur; defecerant socii; non milites in supplementum, non socios nauales ad classem tuendam, non pecuniam in aerario habebamus; serui quibus arma darentur ita ut pretium pro iis bello perfecto dominis solueretur emebantur; in eandem diem pecuniae frumentum et cetera quae belli usus postulabant praebenda publicani se conducturos professi erant; seruos ad remum numero ex censu constituto cum stipendio nostro dabamus; aurum et argentum omne ab senatoribus eius rei initio orto in publicum conferebamus; uiduae et pupilli pecunias suas in aerarium deferebant; cautum erat quo ne plus auri et argenti facti, quo ne plus signati argenti et aeris domi haberemus (*ibid.*).

pealed—slaves were no longer put into the army, private citizens no longer supplied rowers nor money to contractors for public services.

To whom is it not apparent that the use of every private citizen's money for the public good, which was ordered by law, was only to happen so long as the state's need and distress, the causes of the law, remained?²³

Moreover, in the words of Valerius, the *Lex Oppia* was a "new law." It did not date from the kings, nor was it built along with the walls of the city. It also did not hearken back to the Roman constitution—the law was not "canonized by the ten jurists charged with writing Roman Law on the Twelve Tablets."²⁴ No, the law dated to the relatively recent consulship of Fabius and Sempronius.²⁵

Valerius' proposal was met by stiff opposition, the chief of which was Cato Maior, or as he was otherwise known, Cato the Censor. According to Livy's account, Cato gave an impassioned defense of the *Lex Oppia*. He appears to have taken an extremely serious view of the dangers of repealing the law and implored the Senate to maintain it and thus avoid giving women too much power. Indeed, while lamenting that Roman husbands had lost control of their wives,²⁶ he

²³Cui non apparet inopiam et miseriam ciuitatis, [et] quia omnium priuatorum pecuniae in usum publicum uertendae erant, istam legem scripsisse tam diu mansuram quam diu causa scribendae legis mansisset? (*ibid.*).

²⁴Ab decemuiris ad condenda iura creatis in duodecim tabulis scripta (*ibid.*).

²⁵*Ibid.*

²⁶Cato Maior was not the only Roman to link

made a passing reference to Lemnos as a possible example of feminine power taken too far.²⁷ He also accused the sponsors of the repealing legislation of being treasonous because, if the law were to be repealed the women of Rome would demand the ability to “review all laws concerning women, which your fathers used to hinder their recklessness and through which the women were placed under the control of men.”²⁸ If allowed, these legislative recalls would not have been exercised with an eye towards protecting the Republic. Rather, the women would be solely concerned

... that they might shine in gold and purple ... so that they might ride carriages during holidays and on ordinary days, riding through the city as if triumphant over the conquered and abolished laws and also over the vote which they have stolen from us, so that there would be no check on their spending and luxury.²⁹

repeal of the *Lex Oppia* to the decline of patriarchal power in Rome. In a speech to the Senate centuries later, Severus Cæcina complained: “[Women] who, having been restrained by the *Lex Oppia* and other laws now are set free from chains and they rule [Roman] homes, courts, and armies” ([Q]uae Oppiis quondam aliisque legibus constrictae nunc vinclis exolutis domos, fora, iam e exercitus regerent. Tac. An. 3.33).

²⁷An island off the coast of Asia Minor inhabited by women who, according to the *Argonautica* of Apollonius, slaughtered the entire male population (Apollon. 1.609).

²⁸Recensete omnia muliebria iura, quibus licentiam earum adligaverint maiores vestri per quaeque subiecerint viri ... (Liv. 34.3).

²⁹Ut auro et purpura fulgamus...ut carpentis festis profestisque diebus, velut triumphantes de lege victa et abrogata et captis et ereptis suffragiis vestris, per urbem vectemur; ne ullus modus sumptibus, ne luxuriae sit (*ibid.*).

In other words, women obsessed with luxury might be able to seize control of the state. Previous to this era of growing empire, in Rome, according to Cato, “there was no indulgent luxury [which needed] to be curbed.”³⁰ In this new epoch, however, it was not only the women who stood in need of restraint but also public officials.³¹ From where was this avarice and luxury, which have been the “pestilences that destroy all great empires,” coming?

Daily the fortune of the Republic becomes better and happier and the empire thrives. Now that we have passed into Greece and Asia, which are filled with all the enticements of iniquity, and we have even touched the treasure of kings, I am more greatly terrified that these debaucheries will capture us rather than we them. Dangerous, believe me, are the statues from Syracuse, which were taken to this city. I now hear too many people reverently praising the ornaments of Corinth and Athens and ridiculing the clay rooftop icons of the Roman gods.³²

According to Cato, then, the empire-toppling threats of avarice and luxury sprang from Greece. The *Lex Oppia*,

³⁰Nulla erat luxuria, quae coereretur (Liv. 34.4).

³¹*Ibid.*

³²Avaritia et luxuria...quae pestes omnia magna imperia everterunt...[H]aec ego, quo melior laetiorque in dies fortuna rei publicae est imperiumque crescit—et iam in Graeciam Asiamque transcendimus omnibus libidinum illecebris repletas et regias etiam adtrectamus gazas, eo plus horreo, ne illae magis res nos ceperint quam nos illas. infesta, mihi credite, signa ab Syracusis illata sunt huic urbi. iam nimis multos audio Corinthi et Athenarum ornamenta laudantis mirantisque et antefixa fictilia deorum Romanorum ridentis (*ibid.*).

while not intended to stop a Hellenistic wave could, if rigorously enforced, provide a solid line of defense.

At no time did Cato evidence unease that the rationale for the law had long since faded. It made no difference if that was not the intent of the law's framers. Of course Gaius Oppius had not intended that the law stop Greek influence. Greek influence did not exist as a threat at that point. "In the same way a disease must be known before a cure discovered, so too are desires prior to the laws which limit them."³³ It was not important that the rationale for the law was no longer in existence. The law aimed at stopping Hannibal might also stop Hellenism. The cure was in hand, and there was no need for reevaluation, debate, or a vote.

5. Conclusion.

Gross (2003) and Lobel (1989) both note that, because the lines demarcating emergency and normalcy have become increasingly blurred, emergency laws often remain in force well beyond the crisis that was their genesis. Gross (2003) argues in favor of an extra-legal model of emergency response, in part to deal with the observed persistence of emergency laws.

It is important to note that there are other mechanisms through which emergency laws might persist. In particular, once a law has been passed in response to a crisis, government officials may simply find an alternative justification for the law, in order to perpetuate it. This point adds weight to the argument in favor of the extra-legal model. The debate over

³³Sicut ante morbos necesse est cognitos esse quam remedia eorum, sic cupiditates prius natae sunt quam leges, quae iis modum facerent (*ibid.*).

the repeal of the *Lex Oppia* is a fascinating example of this phenomenon from antiquity. Long after the initial justification for this sumptuary law had passed, proponents found a new justification, and the law remained in force for many years.

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