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Title:	“You shall not kill: Hierarchies of norms in Ancient Rome“
Published in:	Numen: International Review for the History of Religions Leiden: Brill
Volume:	39 (1)
Year:	1992
Pages:	58 - 79
ISSN:	0029-5973

Numen, Vol. XXXIX, Fasc. 1

YOU SHALL NOT KILL. HIERARCHIES OF NORMS IN ANCIENT ROME[1]

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Summary

Different kinds of norms regulate the problem of killing in Rome, custom and law being the most important of them. This survey is extended by an analysis of the exceptions to the general ban on killing: capital punishment, killing in sacred contexts and in war. Religion plays a specific legitimizing role in offering models of killing as well as in enciphering hierarchic structures of the Roman society. Stories like the one of the Horatii (Dion. H. 3,12-22) offer an insight into the processes of legitimization and their changing patterns. Furthermore, *exempla* literature is an important instrument of reflecting—and teaching—the solution of conflicts of norms by narrative hierarchization.

1 Horatii (Dion. H. 3, (2-) 12-22)

1.1 It is war.—Romans and Albans hold their positions for weeks, but they do not want to fight. They are tired of war and they know that a coalition of enemies is waiting to attack any victor and to remove his supremacy. As in Augustan times Dionysius of Halicarnassus reports these incidents of the regal time, a federation is agreed upon. Despite a lot of arguing however, there is no agreement about to whom the leadership shall belong. To bring the dispute to an end they decide to resolve the matter in a duel. Since the Alban leader rejects a duel of the commanders, they decide that the duel will be conducted by three pairs of fighters.

Highly qualified volunteers are numerous. The Alban leader takes refuge by appealing to "heavenly" criteria. Two sets of triplets of the same age present a clear choice. Their mothers, twins themselves, have been married to a Roman, Horatius, and an Alban, Curiatius. Starting conditions could not be more equal. Their military feats qualify them as well. The proposal suppresses dissent and is accepted by all. However, the Roman leader points out the close relationships. They are cousins. Any blood guilt would be with the commanders. The objection is turned down. The Alban

triplet definitely consents, the Roman brothers demand to consult their father beforehand. He does not wish to decide, but is happy to hear about the positive decision of his sons, who do not want to appear less courageous than their Alban cousins. Glory is to be preferred over kinship.

I shall omit details of the slaughter that follows. Suffice it to say that one, Horatius, alone survives. He takes the spoils of his dead cousins and hurries towards Rome, towards his father. Outside the city gates he spots his sister. It is not correct to leave the house, but the love to her brothers, he presumes, might excuse this behavior. Far from true! Betrothed to one of the Alban Curiatii, perceiving her gifts as spoils in the hands of the triumphant brother, she bewails her fiancée's death and curses her brother. He stops her protestations with his sword; a noble deed, as seen by the father. The father declines any funeral, fulfills his vows for the son and organizes a banquet. The whole army, in fact the whole city, is feasting. Soon, however, some important citizens denounce the killing of the girl as producing blood guilt, a killing without due process. The anger of the gods is imminent. The father denies any guilt. The killing was a punishment, which a father could inflict. The king does not know what to do. Even the acquittal by the people cannot overcome the religious scruples. The solution is provided by the priesthood of the *pontifices*. They apply the lustral ritual, usual, as Dionysius tells us, for unintentional killing: Sacrifices are performed and Horatius is lead through an arch called *tigillum sororium*—the etiological point of reference of the whole story.

1.2 The legend does not convey reliable information about early Roman history, but it tells us a great deal about attitudes towards killing:

— Killing is no problem in war.

— It is to be minimized between allied states, but even here it is a legitimate form of producing a decision.

— In war, the commander has to order to kill, he is the one who takes the responsibility, which might become "guilt" under special circumstances.

— Kinship is a hindrance to kill, even across borders.

— The *pater familias* is the highest judge of his family, he might even inflict capital punishment on his children.
— Religion might make killing both a problem and provide religious rites to remove such problems.
I shall try to analyze these observations within a systematic frame of reference.

2 "You shall not kill!" — Norms concerning killing in Roman morals

2.1 A theory of norms starts with a description of the different kinds of norms, their respective claims to authority, their patterns of legitimation and sanction, and the corresponding institutions. This approach defines society as a whole as the object of research.[2] Thereby it is possible to analyze the range of religious influences within a larger cultural frame.[3] "Ethics", then, is defined as a developed form of systematized reflection on human action. It is identical neither with religion nor with the "morality". The latter is used to address the sum of ethically relevant (this is defined by one's own preconception) norms and institutions controlling human action. The fundamental concept is the term "norm" as defined by Wilhelm Korff: "Norms are regulations of human interpreting, organizing and arranging; their claim to authority provides the occasion for acceptance, consent and obedience."[4]

2.2 Already in the early Republic, the norms of the "Twelve tables" show positive, formulated law. They do not only allow or forbid but also define sanctions and their institutional guarantees. As a body of law they dominate the jurisdiction of the Republic; jurisprudence is dominated even longer. Lawful killing is defined by this early collection of laws, for example in self-defence against a thief (*XIItab.* 8.12 f.) or in eliminating deformed children (4.1). There is, furthermore, a procedure for offering compensation in the case of negligent killing (8.24a). In several cases capital punishment is fixed or the "cursing" (*sacratio capitis*), that lifts the control on killing. However, as seen by Cicero, capital punishment is applied to very few crimes. Every lawyer of imperial times would have agreed, knowing the long catalogue of punishable crimes of his own time.[5] Execution is legal only after condemnation (9.6). There is no

regulation concerning murder: capital punishment is not fixed before a *lex Cornelia de sicariis et veneficiis*, a Sullan law on murder and poisoning of 80 B.C. This law, however, does not aim at private conflicts but at public security.[6] The sanction is certainly older. Already Romulus is said to have regarded premediated killing as murder (*parricida*), even if the Greek authority, Plutarch, wonders at the missing sanction.[7] Plutarch's astonishment is not necessary. The missing explicit sanction is just an example of the close connection of law to the second fundamental section of norms: custom. This is a phenomenon found in many societies.

2.3 Custom comprises norms which regulate large areas of human action by general practise and group pressure. By the time of the Twelve tables they are not different from laws either in contents or by their claim to authority.[8] By the Republican tradition they are often formulated as *leges regiae*, laws of regal times. The *pater familias* is allowed to kill his son (Dion. H. 2.26.4) or his wife, if she has committed adultery or drunk wine (2.25.6). If somebody has sold his wife, he shall be sacrificed to the lower gods (Plut. *Rom.* 22.4). Those assaulting their parents or mothers-in-law will become *sacer* (cursed), likewise anybody who digs out a boundary stone (Dion. H. 2.74.3). In particular, "custom" regulates life within the *familia*. This is a quasi-autonomous jurisdictional unit practicing sanctions as severe as capital punishment.

Law develops into a separated system by the institutionalization of courts and the establishment of an order of jurisprudents since the second century B.C. This process is not furthered by the development of police forces, unknown to the Republic.[9] Even then, for the most parts, reasons for legal norms are given by referring to existent norms. They are differentiated from custom which is responsible for the generally valid ban on killing. Such a prohibition must be assumed on general anthropological grounds.[10] Implicitly the ban is visible in the Twelve tables, which regulate the permission of killing in special cases.

2.4 The harsh disapproval of new group morals, of people with different sets of norms, demonstrates the functioning of custom.

Such groups quickly arouse suspicion that they fall short of the high standards of loyalty and predictibility expected in Roman social behavior. Disapproval is articulated by political leaders in terms of "inner security". These politics have consequences: Nightly gatherings are prohibited in advance (*XIItab.* 8.26), new religious groups, adherents of Bacchus or Isis for instance, are to be suppressed, the supposedly Pythagorean books of Numa are burnt, Greek philosophers or astrologians are expelled.[11]

2.5 Even for the societies of classical antiquity "fashion" as "temporary custom" should not be ignored.[12] Without a closer analysis of the underlying political and conceptual constellations the use of the term "fashion" certainly implies a deficit, but such a description of the phenomena on the levels of norms is useful for systematic analysis. Examples are differences concerning the frequency of certain crimes. Politically motivated murder comes "into fashion" during the last third of the second century B.C. There are differences in how offences are prosecuted and punished. Capital punishment gets "out of fashion" during the last fifty years of the Republic: the outcry is correspondingly loud when the Catilinarians were executed. Only in the regime of Augustus does it become fashionable again. The military running the gauntlet, however, (*fustuarium*), ending always with the death of the offender, remains outdated. Its application by exceptionally tough generals like Lucius Apronius is the more effective.[13]

2.6 Any, even rudimentary, ethical formulation of "life" as a value, corresponding with the ban on killing, is missing, likewise the corresponding value attitude (virtue) of "preserving life". Regarding the many exceptions to the ban, we should not expect such a value or value attitude. "Life", taken as individual existence, is not significant.[14] It is important only instrumentally. The general has to survive his victory to earn the glory: The hero's death of antiquity is a Greek, not a Roman invention.[15] The owner's property is damaged, if his slave is killed. There is no discussion of "fundamental values" in Rome, despite all reminiscences to be found in Cicero or the Stoic tradition. [16] Within a theory of norms "fundamental values" should not be understood

in terms of their contents but their function. It is not sufficient that for some values absolute authority is claimed. Instead, a canon, a supposedly complete and irreducible system of values of super-positive validity must be formulated. Its reformulation as positive law (human rights) is on demand. Usually such a process occurs in pluralistic societies characterized by increasingly incompatible morals.[17]

3 "You shall kill"—The social construction of the exceptions

It is at the place of execution and on the battlefield that killing is not only accepted but demanded by society or its political representative. Nevertheless, what seems to be without problems in one sector of norms, may be troublesome in another. The story of Horatius demonstrates that with regard to kinship. The analysis of the constitutional and ritual construction of the exceptions to the fundamental ban on killing above the level of *familia* may help to see how the hierarchization of conflicting norms is working.

3.1 The most famous Roman form of execution, the crucifixion, is only exceptionally applied on Roman citizens. In general, and especially during the Republic, it is used for slaves and foreigners.[18] Besides hanging, which is mentioned in the Twelve tables for a few crimes, beheading was the usual method. Historical examples, however, are not available for the Republic. The ritual (not necessarily sacral) apparatus is worth noticing. In contrast to Greece[19] the execution of Roman citizens takes place in the public in the classical construction.[20] A signal of fanfares invites the community. The place of executions is outside the *pomerium*. In his speech for Rabirius Cicero names the *campus Martius*. He deals, however, with an exceptional situation. Sources from the empire indicate a place outside of the Porta Capena.[21] The execution proper is preceded by a flagellation with rods. This element is to be interpreted as a "sacral supplementary punishment".[22] During the Republic, it is never used as a punishment in itself,[23] but regularly occurs before executions and as punishment for Vestals.[24] The act of killing probably was accomplished by lictors under the supervision of the *tresviri capitales*.[25] The delinquent is beheaded with an axe

carried by the lictors as a symbol of the magistrates' power (at least outside Rome). As Gladigow remarks, "in the Mediterranean world the axe ... is the sacral weapon par excellence ... the instrument of legitimate killing".[26]

Three points should be noticed:

a) The large apparatus to stage-manage the execution has already been mentioned.

b) The place lies outside the sacral borderline of the city (*pomerium*): Here the executioner has to dwell; executions in military camps take place outside the walls as well.[27]

c) The act is politically safeguarded by publicity and the legitimation of the acting figures. The *capitales* are elected by the people, the lictors are directly dependent on the highest magistrates, who themselves are elected likewise.

In contrast to, or analogy with, other forms of execution this element of political legitimation very clearly shows the central principles of construction. We may compare the late Republican reflecting[28] on the throwing down of delinquents from the Tarpeian rock. In principle this is thought as a form of private self-help.[29] In the public arena it is used by those magistrates that have no adminstrative personnel, namely the tribunes of the people. They have to throw down the delinquents with their own hand from that edge of the Capitoline hill which faces away from the city.[30] The executions of at least elevated members in a society which in its coherence is as precarious as the Roman needs a maximum of institutional and staged consent. Wherever this is missing, executions cannot be performed except secretly: by strangulation in the dungeon.[31] Understandably such executions are affected by the odium of political murder. This is true for Cicero's handling of the Catilina affair—and he had to pay for it once his majority was lost. The same holds true for the emperors. Due to their military power they can afford it: The statal terror of the dictature is able to (temporarily) establish an "internal security" the Republic was incapable of producing.[32] In contrast to the execution of Roman citizens, slaves or prisoners-of-war are eliminated by a contemptible *carnifex* or—with a new apparatus—lacerated in an amphitheater for the entertainment and solidarization of the society which takes its seats according to ranks.[33] The military execution

of citizens—soldiers beheading with swords, officers demanding suicide—is part of the general militarization of the society. It demonstrates the emperor's monopoly on punishment[34] as well as his basis of power—the army.

3.2 A special form of executions are those cases in which the religious system itself demands the killing. All the three cases which might be thought of can be shown to be constructed as exceptions.

a) The elimination of hermaphrodites or deformed children is demanded for the procuration of prodigies in several instances. In the Roman view it is applied to beings who might be killed because of the father's right to decide on the life of his children anyway. To expose these persons to the sea even avoids a direct act of killing.

b) The execution of the *virgines Vestales* as well as of their "seducer" is construed as the family business of the Pontifex Maximus. He flagellates the male offender with his own hands and within the *pomerium* till death. This form of execution is not known otherwise. [35] To bury the female alive at the inner border of the *pomerium* again avoids a visible act of killing.

c) This would hold true for the only attested human sacrifices of the Republic if they could be proved historically. Pairs of Celts and Greeks are said to have been buried alive.[36] Furthermore—and more important for our line of thought—the victims are foreigners. The Roman society can imagine sacrifices of members only in prehistoric times (transformed by now) or by volunteers.[37]

3.3 Killing in war produces a double problem. In order to destroy the enemy the Roman participants must be allowed to kill. On the other hand this excessive slaughtering must not affect their own society.[38] Furthermore the commander must have the right to discipline his troops even by capital punishment to guarantee the instrumentality of the army without any restrictions. Thereby all the civil rights valid in Rome, especially the right to "provocation" against a death sentence, the right to appeal to the people, is rendered naught. This is accomplished in three ways.[39]

a) *Domi*, the city of Rome especially within the *pomerium*, and *militiae*, the area of martial law outside of Rome, are differentiated

by a bundle of rituals and regulations. Outside, most of those institutions that compensate for magisterial power are missing.

b) The soldier is not allowed to kill by the simple fact of being drafted. He is enabled to do this by the military oath (*sacramentum*) only, which binds him to the commander in absolute obedience.[40] He is not *allowed* to kill, but *must* kill if ordered to do so.

c) The radical dependence on the commander is reflected by sumptuous rituals of legitimation, departure and arrival. They are focussed on his person and help to define his exceptional position. In a most visible way this is demonstrated by the triumph: The leader of the enemy has to go just in front of the commander's cart. As soon as the procession and the triumphator reach the bottom of the Capitol hill the captured leaders are led to the *Tullianum*, a subterranean dungeon nearby. There they are strangled.[41] The triumphator does not start to ascend to the Capitol until the execution is reported. Only then do sacrificing and feasting start. The unusual method of killing and the "timing" within the complex ritual reveal the intention. The anonymity of the executioner and the invisibility of the act of killing are coordinated with the visible stop of the triumphator: It is this human Iuppiter who is staged as the author of the act. This is not conceived as responsibility, but power (*imperium*) and glory (*gloria*).

4 The rôle of religion

The examples suggest a summary of the rôle of religion for the system of Roman morals in five paragraphs.

a) Roman religion does not directly take part in a discourse on killing.[42]

b) As has been shown for the commander, religion offers legitimation, which in the case of killing exceeds its general performance for all magistrates.

c) For special forms of overriding the ban on killing, e.g. executions, a ritual framework is offered. Its legitimizing and controlling function, however, should not be exaggerated.[43] Neither beheading nor fighting are sacral acts, sacrifices.[44] The same holds true for the mass slaughter in the amphitheaters. Occasion and framework are sacral, we are talking about *ludi*, games, i.e. complex rituals for a

god, a *divus* or *genius*. The killing itself, however, is not understood as a sacrifice. Usually, it is not performed as a simple execution but organized as a competition, as bloody as possible, or as a mythological scene implying a deadly end.[45] Nevertheless, on the whole the executions draw on forms of mythical killings or on the religious and legitimate killing of animals.

d) By classifying certain events as prodigies[46] which might demand the elimination of human beings for a ritual "procuration", Republican Roman religion helps to constitute a "moral community". By pronouncing who might be endangered by the anger of the gods, religion defines the generally obliging morals as group morals.[47] Any orientation that directly appeals to individual action is not given. The group morals of the so-called oriental religions, which originate or spread in the Roman empire, will achieve this. In contrast to Roman[48] religion, they can employ the incentives of a personal soteriology.[49]

e) The close relationship of religion and social structure, of law and custom, is demonstrated by the *sacer-esto*-formula, a curse declaring someone outlawed. This formula is tied to crimes that affect fundamental social relationships: a husband selling his wife (Plut. *Rom.* 22, see above); a child beating his parents or parents-in-law (Fest. 260.7-11 L); a patron harming his client (Serv. *Aen.* 6.609); a neighbor digging up a boundary post (Dion. H. 2.74.3); and—beyond the time of the Twelve tables—a patrician directly or indirectly eliminating a tribune of the people (Liv. 3.55). The society acknowledges how serious such crimes are. It declares the delinquent *sacer*, i.e. property of a god in terms of sacral law. As it is practiced in animal sacrifice, the property might be transferred by killing.[50] Everybody is allowed to kill the *homo sacer* without fear of punishment. However, there is no positive legal qualification for such an act (*fas*). It is even excluded by the wording of the regulation. Any adhortation of private killing or official prosecution is lacking.[51] Thus it is difficult to build a theory of sacrifice as the original form of execution on this evidence. Normally, the offender would not be killed. In all the cases the harmed one is in an inferior position: wife; old parents; client; a small neighbor, threatened by the hunger for land of a person with power; the *plebs*, whose representative has been murdered. In such conflicts only, the defi-

nition of the norm would be comprehensible if we keep in mind that the Roman legal system is based on self-help. The laws are intended to guarantee a sort of social security. They are valid even if they could not be enforced. Powerful persons are integrated by Roman society, they are appealed to, but not fought. Judging by the restrictive use of capital punishment by the Twelve tables, the discrepancy between the seriousness of the offence and the punishment in these cases is high. It demonstrates that the killing by the harmed one (and nobody else would be interested) is not really intended. The legal trick of the *sacer esto*, i.e. to define a massive, automatically valid punishment,[52] enables society to express fundamental values even where law is suppressed by power and to do this without risking civil war.

5 The example of the Horatii

5.1 The Latin version of the legend by Livy (1.24-26) and the Greek by Dionysius of Halicarnassus differs but in details. These include a point of paramount interest, the piacular sacrifice for murder. Dionysius conceives of it as a lustration (3.22.6). The model is taken from the myth of Orestes rather than any cultic reality of Greece.[53] In fact, he declares it to be a standard institution for unintentional killing in Rome. But there is no trace of such a lustration whatsoever. We only find the offer of a ram to the relatives of the victim.[54] Nor is there a trace in Livy. He speaks of an *expiatio* or *piaculum*, a piacular sacrifice. This, however, is the father's business (and turns into a tradition of the *gens*, 1.26.12 f.). It is not the business of the offical Roman religion.[55]

5.2 Apart from these differences Livy and Dionysius show a remarkable common trait in their discussion of the piacular sacrifice. This must be due to a common model, probably written by the annalist Valerius Antias in Sullan times. The connection of the triple duel and the murder of the sister and lustral rites is hardly more ancient. It is part of the bloody political struggle since the times of the Gracchi.

This dating of the legend[56] could be argued only summarizingly. The story of the triplets' duell might exist even without the motif of the

murder of the sister. Aitiologically, then, it would motivate the epithet *Trigeminus*, borne by some Curiatii.[57] Furthermore, as Dionysius reports (3.22.10), it motivates a law ordering the public alimentation of growing up triplets. The original core of the legend depends on the Curiatii only. The motif of the triplet's duel with the Horatii is logically, although not necessarily chronologically, secondary. Horatius Cocles, one of the most eminent examples of Roman virtue, is known as a victorious warrior. Therefore it is difficult to imagine a victor of the Curiatii's and Horatii's duel other than a Horatius. But this is explicitly denied by Livy. In his introduction of the episode he reports of the contradictoriness of his sources as far as the ethnological origin of the families is concerned (1.24.1). Thus inconsistency with regard to the victors is implied, too.[58] The tradition on the duel is neither for certain ancient nor solid.[59]

What political interests might lurk behind the legend? The Horatii were politically important families during the first half of the fifth century. The only direct conflict with the consul Marcus Horatius Barbatus and Lucius Valerius Potitus opposed a prolongation of the consular power of the *decemviri legis scribundis*: Publius Curiatius Fistus Trigeminus is known to have been one of them in 451.[60] Thereafter the Curiatii are seen as representatives of the plebeians with a Publius being a tribune of the people in 401 B.C. Nevertheless both of the families must not be judged archetypical representatives in the conflict of orders. Important laws defending the tribunate bear the name of Horatii, *leges Valeriae Horatiae*.

It is in the times of the Gracchi that the legend is plausible as an instrument of political struggle. There are no patrician Horatii any longer, but their glory is alive. On the other side the patrician background of the Curiatii has fallen into oblivion. The plebeian family is politically active, namely the tribune of 138 B.C., Caius Curiatius, an abominable person for every patrician (see Cic. leg. 3.20). Now the pairing (and the victor) is interesting—and disputed. The introduction of a Sicinus as ancestor of the mother demonstrates the party interests in the ongoing process of reworking the tale. By his staying in Alba he is in particular connected with the Curiatii. The Sicinii clearly belong to the plebeian-tribunician part, by the time of the Horatii as well as at the end of the Sullan era (Cn. Sicinus). The moral disqualification of the

defeated Curiatii, who had shown no regard to kinship characterizes the version of Dionysius.

The plebeian-popular party would not have appreciated this patrician-senatorial[61] version of the legend. But this new version did not simply change winners and losers. The senatorial party drove home its point even further. Perhaps inspired by the epitheton *Curiatius* of the god Ianus (which might have been used to prove the priority of the Curiatii in Rome), they came upon the *tigillum sororium*. If *Ianus Curiatius* denotes one part of the victims, *Iuno Sororia* serves to construe the other, the killed sister (*soror*). This is the step most interesting for the historian of religion. The battlefield is not the only place to justify the killing of one's own blood. Not only cousins in war, but even a sister in peace might be killed *under particular circumstances*. The particularity of the circumstances cannot be discussed in legal terms, but in terms of public interests and prestige. Religion legitimates the superseding of law. The arch of the *tigillum* serves for a lustration *ad cautelam* only. To put it in another way, the common weal is more important than the individual welfare. This is a maxim practiced on the Gracchi just shortly before. It is this version, reduced to the optimatic point of view, which is preserved by the tradition.

Valerius Antias handed down, perhaps completed,[62] the process. He is writing for his patrons, the Valerii, and shows sympathy for Sulla.[63] He is interested in legends and religious material. Livy mistrusts him (see Liv. 30.19.11) but used him nevertheless. Livy excuses himself at the beginning that his "heart" will decide concerning the different versions in his sources (1.24.11). This could be a hint to Antias. The inserted treaty ceremony of the fetials certainly stems from Valerius Antias. Here, a "M. Valerius" figures as the first fetial known by name.[64] Although the whole story does not seem extremely unified, probably Antias already shows this conglomerated form. The main argument is the parallel course of action in Dionysius and Livy. It is obscured by omissions in both of them and fairly large additions by the Greek author. The conspicuous omission of the fetials in Dionysius for instance (which in Livy enable us to identify Antias) is due to the fact that in contrast to his Latin writing colleague, Dionysius has already treated the fetials in an independent, systematic chapter at the end of the preceding book. They are, how-

ever, not totally missing. Dionysius mentions the sacrifices of the oath in a *praeteritio*-formula and a short description (3.9.5; 3.18.2).

5.3 Given the dating, the legend of the Horatii and its "purification of a murderer" is part of a development that might be termed a sacralization of judicial and politically motivated murder. In its first phase, the beginning of the "Roman revolution", the following events can be listed: the extradition of an unpopular general, put in forms of fetial law in the 130s B.C.;[65] the invention of archaic precedents of the *senatus consultum ultimum*, an instrument for the state of emergency;[66] the repetition of the burying alive of Vestals and pairs of Celts and Greeks, practiced a hundred years before in the context of the second Punic war;[67] the gladiatoral games, which have been employed by privates only for more than a century, began to be organized on an official basis. Whereas regular executions of Roman citizens fall into disuse, in a sacral framework death becomes acceptable. At the same time killing is practiced a thousandfold in civil war, proscriptions[68] and political murder.

The second phase of (often archaizing) sacralization corresponds to the second phase of the Roman revolution and the establishment of the military dictatorship termed "Principate". The successful strategy is further improved. Political murder becomes practical by militarization and sacralization. Mass executions become a source of legitimation. Soldiers turn into hangmen. Caesar causes two mutineers to be sacrificed like the annually sacrificed "Trojan horse" (*October equus*). Many executions are sure of general agreement. These are stage-managed, legitimized by ritual and sacral forms. At the games they stage mass executions of captives, slaves or underclass criminals in military or mythological costumes, while the general public frenetically applaudes and a few (like Seneca) lament, nobody resists the slaughter. The time-honoured form of individual execution is used for famous "scapegoats", an astrologer for instance (Tac. *ann.* 2.32), less spectacularly for some of the small fry. People who are really important die inconspicuously.

5.4 Texts like the story of the Horatii are not made to legitimize just a single case. They are part of the genre of *exampla*,[69] they are

pieces transmitting norms for educational purposes. Important value-oriented attitudes are visualized in dramatic form. The traditions are usually complex. The same example may be differently told by different authors. A basic corpus of tales can be found in historiography and rhetorical reference books. Many short allusions, in oratory for example, prove the presence of these examples. Single tales need not to be retold but can be alluded to and evoked by mere names.

The transfer of norms into dramatic structures makes the presentation of conflicting norms possible. The conflict is solved by a practiced hierarchization of norms. The breaking down into sequences of action needs no systematized principles of decision. Wherever a theoretical formulation of hierarchies embracing the relevant range of norms is not possible or teachable, dramatic hierarchization is of paramount importance. Our legend gives a clear picture of the structure of this type of solution. The conflicting norms are stressed by the construction of extreme plots. Thus these norms are lifted on a level of general principles, they are independent of contigent elements of the story. Cousins fight each other, a brother kills his sister. The criteria of the decision are clearly presented: In his statement, the father of the murderer as well as victim effectively puts side by side the martial merits and their symbols and the steps of the execution. The state and its salvation come first. The people acquit the son by referring to his bravery (*virtus*), not to law (Liv. 1.26.11 f.). Livy lays stress on this fact, it is emphasized by the purifying rituals, too. Not rigorism but complexity forms the framework of this kind of moral education: The story still cares about limits. It is the sister, not the father, who is going to be killed. She dies *in front* of the gates, not within the *pomerium*. There is no royal charter for returning soldiers.

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[1] Revised version of a paper read at the congress of the German Association for the History of Religion on March 5th, 1991 at Munich. I wish to thank the participants in the discussion and especially Dr. Ch. Auffarth and Prof. B. Gladigow (Tübingen) for stimuli and criticism. I am grateful to Prof. E. T. Lawson for improvement of the English text. Remaining mistakes are mine. The following abbreviations have been used: ANRW: *Aufstieg und Niedergang der römischen Welt: Geschichte und Kultur Roms im Spiegel der neuen Forschung*, ed. by H. Temporini, W. Haase, Berlin: de Gruyter, 1972-. KP: *Der Kleine Pauly: Lexikon der Antike*, ed. by K. Ziegler, W. Sontheimer, München: Artemis, 1964-1975 (Repr. 1979). RAC: *Reallexikon für Antike und Christentum*, ed. by Th. Klausner, E. Dassmann et al., Stuttgart: Hiersemann, 1950-. RE: *Paulys Realencyclopädie der Classischen Altertumswissenschaft. Neue Bearbeitung*, ed. by G. Wissowa (Kroll, Mittelhaus, Ziegler), Stuttgart: Druckenmüller/Metzler, 1893-1980. Abbreviations of journals according to *L'année philologique*.

[2] Fundamental lines of the approach are to be found in the chapters on norm and institution theory by W. Korff in: A. Hertz et. al. (edd.), *Handbuch der christlichen Ethik 1*, 2nd ed. (1978), Freiburg/Gütersloh: Herder/Mohn, 1979, 108 ff., espec. 114-125. 168-176. In detail: Korff, *Norm und Sittlichkeit: Untersuchungen zur Logik der normativen Vernunft* (Tübinger Theologischen Studien 1), Mainz: Grünewald, 1973 (2nd, newly introd. ed. Freiburg: Alber, 1985); see H. Schelsky (ed.), *Zur Theorie der Institution* (Interdisziplinäre Studien1), Düsseldorf: Bertelsmann, 1970.

[3] An attempt: F. B. Bird, "How Do Religions Affect Moralities? A Comparative Analysis", *Social Compass* 37 (1990), 291-314; a broader perspective is offered by D. Chidester, *Patterns of Action: Religion and Ethics in a Comparative Perspective*, Belmondt, Ca.: Wadsworth, 1987.

[4] Handbuch (n. 2), 117.

[5] Cic. *rep.* 4.12. Capital punishment is fixed for harmful magic (8.1), clandestine harvest (8.9), grand arson (8.10), military treason (9.5) and corruption in court (9.3). Capital punishment for slaves caught in larceny (8.14) implies different punishment for different social classes, a principle characterizing imperial law. A reconstruction of the Twelve tables is presented by K. G. Bruns (ed.), *Fontes Iuris Romani antiquii*. Post curas Th. Mommseni editionibus quintae et sextae adhibitas septimum ed. O. Gradenwitz, Tübingen: Mohr, 1909, 15-40 (*Fontes*), and S. Riccobono (ed.), *Fontes Iuris Romani Antejustiniani 1: Leges*, 2nd ed., Firenze: Barbèra, 1941, 21-75 (*FIRA*).

[6] *Fontes* 92; more exactly it is punishable to move about in arms preparing robbery or murder; see W. Kunkel, *Untersuchungen zur Entwicklung des römischen Kriminalverfahrens in vorsullanischer Zeit* (Abhandlungen Bayerische Akademie der Wissenschaften, phil.-hist. Kl. NF 56), München: Akademie, 1962, 64-67.

[7] Plut. *Rom.* 22.4; see Paul. Fest. 247.19-24 L. Popular etymologies, deriving the term from *pater* or *parens*, shape the understanding in antiquity. Today, the most current etymology starts from **pāso-kaidā (s)*, "murderer of a close relative" (A. Walde, *Lateinisches etymologisches Wörterbuch*, 3rd newly rev. ed. by J. B. Hofmann, Heidelberg: Winter, 1938, 2.253; *Oxford Latin Dictionary*, ed. by P. G. W. Glare. Oxford: Clarendon, 1982, s.v.), but it is far from certain (A. Ernout, A. Meillet, *Dictionnaire étymologique de la langue latine: Histoire des mots* 2, 4ième ed. rev., corr., augment. d'un index, Paris: Klincksieck, 1960, s.v.). Kunkel (n. 6), 39 f., is right to denounce the etymological approach: The institution of the *quaestores parricidii* proves that *parricidium* is to be understood as murder generally.

[8] In general: F. Tönnies, *Die Sitte* (Die Gesellschaft 25), Frankfurt a.M.: Riklen & Loening, 1909, bes. 17; Korff, Handbuch (n. 2), 118. Max Weber's concept of custom is too restricted. It is sharply separated from customary law and thought to be without every form of sanction and authority except a disapproval not binding (*Rechtssoziologie*. From the manuscript ed. and introd. by J. Winckelmann [Soziologische Texte 2], 1960, 2nd rev. ed., Neuwied: Luchterhand, 1967, 80-96, espec. 80). If different forms of norms are accepted, the theory of punishment must be enlarged to cover phenomena outside the jurisdictional system, too. See M. Ignatieff, "State, civil society, and total institutions: A critique of recent social histories of punishment", *Crime and Justice: An Annual Review of Research* 3 (1981), 153-192. The author challenges the view that there is something like a statal monopol of legitimate exercise of force (186).

[9] See W. Nippel, *Aufruhr und "Polizei" in der römischen Republik*, Stuttgart: Klett-Cotta, 1988. See Kunkel (n. 6), 71-79, for the *tresviri capitales*.

[10] See H. Kelsen, *Vergeltung und Kausalität: Eine soziologische Untersuchung*, Den Haag: Stockum, 1941, 56: In general primitive societies guarantee the life of their members by the most severe sanctions. For the ethological fundaments of the *intraspecies* inhibitions to kill see e.g. I. Eibl-Eibesfeld, *Krieg und Frieden aus der Sicht der Verhaltensforschung*, 2nd ed., München: Piper, 1986; for the history of religion the problem of lifting the inhibition has been dealt with by B. Gladigow, "Homo publice necans: Kulturelle Bedingungen kollektiven Tötens", *Saeculum* 37 (1986), 150-165 (with many bibliographical references).

[11] These decisions are usually interpreted within the concept of "religious policy" or "tolerance". Thereby the paradox cannot sufficiently be removed that foreign gods are introduced without any difficulty whereas their adherents are prosecuted. See H. Cancik, "Rom", in: H. Haag (ed.), *Bibellexikon*, 2nd newly rev. and enl. ed., Einsiedeln: Benziger, 1968, 1482-8; H. Nesselhauf, *Der Ursprung des Problems "Staat und Kirche"* (Konstanzer Universitätsreden 14), Konstanz: Universitätsverlag, 1975; J. North, "Religious toleration in Republican Rome", *PCPhS* 25 (1979), 85-103 (Bacchanalia).

[12] Korff, Handbuch (n. 2), 122 f., argues much too evolutionistically, but his concept of fashion is large enough, to cover ancient societies.—If in the following text I shall speak of the capital punishment coming "out of fashion" the inherent difficulty of any *argumentum e silentio* in periods of scarce sources should be kept in mind. Anyway, the proposition is valid for the upper echelons of society only (cf. Kunkel [n. 6], 78).

[13] Tac. *ann.* 3.21. Tacitus' words should not be misunderstood. He approves of a severe handling of the band of soldiers. For the running of the gauntlet in early modern times see H.-M. Möller, *Das Regiment der Landsknechte: Untersuchungen zu Verfassung und Selbstverständnis in deutschen Söldnerheeren des 16. Jahrhunderts* (Frankfurter Historische Abhandlungen 12), Wiesbaden: Steiner, 1976, 234-259.

[14] See Gladigow, "Naturae deus humanae mortalis: Zur sozialen Konstruktion des Todes in römischer Zeit", in: G. Stephenson (ed.), *Leben und Tod in den Religionen: Symbol und Wirklichkeit*, Darmstadt: Wissenschaftliche Buchgesellschaft, 1980, 119-133. He demonstrates this in analyzing the funeral rituals of the Republican upper class. Differences to the empire as well as to Greece are analyzed, too.

[15] See C. W. Müller, "Der schöne Tod des Polisbürgers oder 'Ehrenvoll ist es, für das Vaterland zu sterben'", *Gymnasium* 96 (1989), 317-340; Rüpke, "Wege zum Töten, Wege zum Ruhm: Krieg in der römischen Republik", in: H. von

Stietencron, J. Rüpke (edd.), *Die Geschichtlichkeit des Krieges und der tötende Mensch* (forthcoming).

[16] For Cicero: H.-Th. Johann, *Gerechtigkeit und Nutzen: Studien zur ciceronischen und hellenistischen Naturrechts- und Staatslehre*, Heidelberg: Winter, 1981; M. Ducos, *Les romains et la loi: Recherches sur les rapports de la philosophie grecque et de la tradition romaine à la fin de la République*, Paris: Belles Lettres, 1984; K. M. Girardet, *Die Ordnung der Welt: Ein Beitrag zur philosophischen und politischen Interpretation von Ciceros Schrift de legibus* (Historia Einzelschriften 42), Wiesbaden: Steiner, 1983.

[17] The human rights discussion is the focus of these processes. For a historical and systematic introduction see J. Schwartländer (ed.), *Modernes Freiheitsethos und christlicher Glaube: Beiträge zur juristischen, philosophischen und theologischen Bestimmung der Menschenrechte* (Entwicklung und Frieden 24), München/Mainz: Kösel/Grünewald, 1982.

[18] Mommsen, *Römisches Strafrecht* (Systematisches Handbuch der deutschen Rechtswissenschaft 1.4), Leipzig: Duncker & Humblot, 1899, 918-921 (capital punishment in general 910-944); K. Latte, "Todesstrafe", *RE* Suppl. 7 (1940), 1599-1619, see 1616. N. Hyldahl; B. Salomonsen, "Hinrichtung", *RAC* 15 (1989), 342-365, do not present anything new. Death penalty during the passage to a Christian regime is dealt with by Cancik, "Christentum und Todesstrafe: Zur Religionsgeschichte der legalen Gewalt", in: H. von Stietencron (ed.), *Angst und Gewalt: Ihre Präsenz und ihre Bewältigung in den Religionen*. Mit Beiträgen von ..., Düsseldorf: Patmos, 1979, 213-251.

[19] Latte, Todesstrafe (n. 18), 1618.

[20] Tac. *ann.* 2.32: *more prisco*. With this expression Tacitus seems to emphasize a practice exceptional for the Principate. The execution of the Catilinarians was not carried through in the public: Sall. *Catil.* 55, one of the densest descriptions of such an execution: *Postquam, ut dixi, senatus in Catonis sententiam discessit, consul optumum factu ratus noctem quae instabat antecapere, ne quid eo spatio novaretur, tresviros quae supplicium postulabat parare iubet. (2) ipse praesidiis dispositis Lentulum in carcerem deducit; (3) idem fit ceteris per praetores. est in carcere locus, quod Tullianum appellatur, ubi paululum ascenderis ad laevam, circiter duodecim pedes humi depressus; (4) eum muniunt undique parietes atque insuper camera lapideis fornicibus iuncta; sed incultu tenebris odore foeda atque terribilis eius facies est. (5) in eum locum postquam demissus est Lentulus, vindices rerum capitalium, quibus praeceptum erat, laqueo gulam fregere. (6) ita ille patricius ex gente clarissuma Corneliorum, qui consulare imperium Romae habuerat, dignum moribus factisque suis exitum invenit. de Cethego, Statilio, Gabinio, Caepario eodem modo supplicium sumptum est.*

[21] Mommsen, Strafrecht (n. 18), 914. The formulation of the *lex regia* (Liv. 1.26.6)—*... caput obnubito, infelici arbori reste suspendito, verberato vel intra pomerium vel extra pomerium*—presupposes (against Mommsen) a place outside. This regulation is delimited only for a part of the flagellation.

[22] Gladigow, "Die sakralen Funktionen der Liktoren: Zum Problem von institutioneller Macht und sakraler Präsentation", *ANRW* I.2 (1972), 295-314.

[23] Cf. M. Fuhrmann, "Verbera", *RE* Suppl. 9 (1962), 1589-97.

[24] Dion. H. 2.67.3; s. Mommsen, Strafrecht (n. 18), 919, n. 1.

[25]See Kunkel (n. 6), 71-79; Mommsen, Strafrecht (n. 18), 915, espec. n. 1: There are no direct pieces of evidence. Livy (1.26.7 f. 11) presupposes such a procedure in his description of Horatius' trial. The most important argument is provided by the rods (*fasces*) and axe (*securis*) usually carried by the lictors as symbols of power. According to Plutarch (*Publ.* 6) the lictors of the commander afflict the

death penalty in military camps (see Rüpke, *Domi militiae: Die religiöse Konstruktion des Krieges in Rom*, Stuttgart: Steiner, 1990, 92, with bibliographical references). Originally the *capitales* had been appointed by the praetor. Since 242 B.C. they are elected. Within the *cursus honorum* they are part of the *vigintiviri*, the group of introductory offices. See Mommsen, *Römisches Staatsrecht* (Handbuch der römischen Alterthümer), 3rd ed., Leipzig: Hirzel, 1887, 2.1, 594-8; for the executioner (*carnifex*) 1.327 f. The importance and the large range of independent activities of the *tresviri* had been demonstrated by Kunkel against Mommsen.

[26] Gladigow, Liktoren (n. 22), 307, n. 84.

[27] Cic. *Rab. perd.* 15 (Henker); Hyg. *met. castr.* 56; cf. Rüpke, Domi militiae (n. 25), 170, n. 39; 182.

[28] Cf. Mommsen, Strafrecht (n. 18), 932.

[29] The (infrequent) flinging down of a *virgo vestalis* by the Pontifex maximus must be put into this category: The penal relationship is construed as internal to the "family" and therefore private (see below).

[30] See Liv. 6.20.12; Dio 58.15.3; further references in Mommsen, Strafrecht (n. 18), 931-4.

[31] Cf. in the description of the execution of the Catilinarians (cited in n. 20) how much haste, security and the missing publicity are stressed.

[32] Caesar, who did without it after his military victory, was murdered.

[33] See K. M. Coleman, "Fatal Charades: Roman Executions Staged as Mythological Enactments", *JRS* 80 (1990), 44-73. Therefore the ban on any involvement of persons of the higher echelons of society is important. It might obscure the clearcut social differences. A relevant decree of the senate of A.D. 19 is analyzed by W. D. Lebek, "Standeswürde und Berufsverbot unter Tiberius: Das SC der tabula Larinas", *Zeitschift für Papyrologie und Epigraphik* 81 (1990), 37-96.

[34] Other forms fall into disuse or are abolished.

[35] See above and Gladigow, Liktoren (n. 22), 310; H. Cancik-Lindemaier, "Kultische Privilegierung und gesellschaftliche Realität: Ein Beitrag zur Sozialgeschichte der virgines Vestae", *Saeculum* 41 (1990), 1-16, espec. 10-12.

[36] See K. Latte, *Römische Religionsgeschichte* (Handbuch der Altertumswissenschaft 5.4), München: Beck, 1960, 256 f. Latte points to possible relations with the Vestals' "incests". Comprehensive: F. Schwenn, *Das Menschenopfer bei den Griechen und Römern* (Religionsgeschichtliche Versuche und Vorarbeiten 15.3), Gießen: Töpelmann, 1915. Gerhard Radke interpretes the whole institution of the *virgines Vestales* as a permanent storage of victims for virgin sacrifices, which might be necessary especially in a crisis ("Acca Larentia und die fratres Arvales: Ein Stück römisch-sabinischer Frühgeschichte", *ANRW* I.2, 432; id. "Vesta", *KP* 5 [1975], 1228 f.).

[37] S. Ov. *fast.* 3.329-344 for Numa's sacrifice expiating lightnings (cf. Arnob. 5.1 following Valerius Antias) or the interpretations of the ritual of the *Argei*, where puppets made of straw are precipitated into the Tiber (see Latte, Religionsgeschichte [n. 36], 412-4.

[38] Many arguments in favor of death penalty refer to the "right" of killing in war: The respective crimes are interpreted as acts of civil war against the society. Thereby adequate mechanisms of repression appear to be necessary. See Cancik, Todesstrafe (n. 18).

[39] For Roman military law see E. Sander, "Das Recht des römischen Soldaten", *RhM* 101 (1958), 152-191. 193-234; id., "Das römische

Militärstrafrecht", *RhM* 103 (1960), 289-319; id., "Militärrecht", *RE* Suppl. 10 (1965), 394-410; C. E. Brand, *Roman Military Law*, Austin: Texas University Press, 1968; J. H. Jung, "Die Rechtsstellung der römischen Soldaten: Ihre Entwicklung von den Anfängen Roms bis auf Diokletian", *ANRW* II.14, 882-1013. For the provocation: J. Martin, "Die Provokation in der klassischen und späten Republik", *Hermes* 98 (1970), 72-96. For details of the following see Rüpke, Domi militiae (n. 25), ch. 3, 4.5 and 16.

[40] See Cato, *ep. ad Marc.*, in Cic. *off.* 1.36 and Plut. *q.R.* 39. Cf. Sall. *Catil.* 9.4: *... quod in bello saepius vindicatum est in eos, qui contra imperium in hostem pugnaverant quique tardius revocati proelio excesserant, quam qui signa relinquere aut pulsi loco cedere ausi erant.*

[41] Cic. *Verr.* 5.77; Ios. *bell. Iud.* 7.153-5. Place and procedure are the same as with the Catilinarians (see above, n. 20).

[42] This hypothesis should be assured by further research. Unfortunately, nearly no work on intellectual or literary discourse in Roman religion has been done. For our problem Cicero's position towards the institution of the fetials might be typical, when he is discussing the topics of dominion and just war. The systematic framework is derived from Greek, namely Stoic philosophy. On this basis Roman institutions are interpreted and (sometimes) idealized. See Rüpke, Domi militiae (n. 25), 117-122, with further reading. Add S. Clavadetscher-Thürlemann, *Polemos Dikaios und Bellum iustum: Versuch einer Ideengeschichte*, Zürich: Juris, 1985, and (with an evolutionary rather than historical image of the Republic) Mauro Mantovani, *Bellum iustum: Die Idee des gerechten Krieges in der römischen Kaiserzeit* (Geist und Werk der Zeiten 77), Bern: Lang, 1990.

[43] Judging by the *ludi*, for the modern analyst it is difficult to determine how far such events were seen as specifically religious ones by contemporaries. This has to be considered in any talk on the "legitimizing function" of religion.

[44] If Plutarch tells us that he who has sold his wife "is being sacrificed" (θύεσθαι), this is, I suppose, just a careless expression for the declaration of being *sacer* (see below). A slaughter of 300 members of Perusia's leading class by Augustus on an altar of *divus Iulius*, performed on the Ides of March (40 B.C.), is reported by Cassius Dio (48.14.4) and Sueton (*Aug.* 15, with doubts remaining: *scribunt quidam*). This is nothing but an invention of propaganda. It is based on the cruelties of the pillage of this Etruscan township (R. Syme, *The Roman Revolution*, corr. repr. [1939], Oxford: Oxford University Press, 1952, 212; E. Kraggerud, "Perusia and the Aeneid", *SO* 62 [1987], 83; the story is accepted by A. Heuß, *Römische Geschichte*, 4th enl. ed., Braunschweig: Westermann, 1976, 231). The earliest notice is found in Seneca (*clem.* 1.11.1: *... post Perusinas aras et proscriptiones*). Those closer to the events do not seem to know this tradition (Prop. 2.1.29; Vell. 2.74.4), even if an earlier origin must be suspected.

[45] See Coleman (n. 33).

[46] Implications for foreign policy are analyzed by B. MacBain, *Prodigy and Expiation: A Study in Religion and Politics in Republican Rome* (Collection Latomus 177), Bruxelles: Latomus, 1982; cf. Gladigow, "Konkrete Angst und offene Furcht: Am Beispiel des Prodigenwesens in Rom", in: Stietencron (n. 18), 61-77.

[47] It would not be difficult to list further examples. For a general appreciation of the phenomenon see Bird (n. 3).

[48] There is no convincing terminological differentiation covering geographical as well as social and functional aspects. It might be expected from studies on "local religion". The term "syncretism" does not describe the problem but blurs it.

[49] Cf. Bird (n. 3); Gladigow, "Unsterblichkeit und Moral: Riten der Regeneration als Modelle einer Heilsthematik", in: id. (ed.), *Religion und Moral*, Düsseldorf: Patmos, 1976, 99-117, argues against an exceedingly theological concept of soteriology.

[50] A definition in terms of sacral law: Fest. 424.5-13 L: *At homo sacer is est, quem populus iudicavit ob maleficium; neque fas est eum immolari, sed, qui occidit, parricidi non damnatur; nam lege tribunicia prima cavetur, "si quis eum, qui eo plebei scito sacer sit, occiderit, parricida ne sit." Ex quo quivis homo malus atque inprobus sacer appellari solet.* Cf. Rüpke, Domi militiae (n. 25), 79 f. The analogy of animal sacrifice is worked out by Gladigow, "Ovids Rechtfertigung der blutigen Opfer: Interpretationen zu Ovid, fasti I 335-456", *AU* 14.3 (1971), 19-21.

[51] Already Mommsen, Strafrecht (n. 18), 937 f., was sceptical with regard to the practical realization.

[52] By similar procedures canonical law sanctions important areas (sacraments, hierarchy), where prosecution might be difficult or impossible.

[53] See W. Burkert, *Griechische Religion der archaischen und klassischen Epoche* (Religionen der Menschheit 15), Stuttgart: Kohlhammer, 1977, 137-9 and s.v. "Mord"; unfortunately Burkert does not say that all his references concern the mythical figure of Orestes. Purification rituals are dealt with by R. Parker, *Miasma: Pollution and Purification in Early Greek Religion*, Oxford: Clarendon, 1983.

[54] *Leg. reg.* Numa 13; *XIItab.* 8.24a. For discussion see Kunkel (n. 6), 40-42: The wording suggests that it is neither a piacular sacrifice nor a compensation but the offer of a vicarious object for blood feud, which is killed instead of the offender (41).

[55] One should not connect the pontiffs' piacular sacrifice described by Tacitus (*ann.* 12.8), which is performed in a grove of Diana, with the Horatii. The theme of this sacrifice is "incest" and virginity.

[56] Differently dated by [F.] Münzer, "Horatius, 2)", *RE* 8.2 (1913), 2322-7; followed by H. G. Gundel, "Horatius. 1.", *KP* 2 (1967), 1217; "Die ganze Erzählung trägt in Sachgehalt und Komposition sehr alte Züge und war spätestens im 3. Jh. v. Chr. fester Bestand der röm(ischen) Tradition geworden."

[57] E. g. P. Curiatius Fistus Trigeminus, consul 453 B.C., and two C. Curiatii Trigemini known as *monetales* (moneyer) in the third quarter of the 2nd century B.C.

[58] Surely the Romans, whoever they were, did win. Any version telling of victorious Albans would have exclude a continuation including the murder of a sister and the *tigillum*. Such a variant would still further my argument.

[59] In his argumentation Münzer (n. 56) keeps quiet about these differences, which are visible even in Propertius (3.3.7). The new edition of Ennius' *Annales* by O. Skutsch (*The Annals of Q. Ennius*, Oxford: Clarendon, 1985) withdraws the possibility to argue with Ennius' reference to the duel. The only fragment (123 = 129 Vahlen) still referred to the fight would far better fit to Horatius Cocles (274 f.). A reference to an earlier event depends on the correct manuscript tradition of the book number used by Festus in citing the verse. Whereas Festus gives *II*, Cocles is dealt with in book 4. Additionally Propertius' list of Ennius' themes is not in accordance with such a story in the annals.

[60] These and the following dates are given according to T. R. S. Broughton, *Magistrates of the Roman Republic* (American Philological Association: Philological Monographs 15.1-3), 3 vols., New York/Atlanta: Philological Association/Scholars Press, 1951-1986; Gundel, Horatius (n. 56); id., "Curiatius", *KP* 1 (1964), 1343.

[61] The terms are a bit anachronistic. They should help to clarify the lines of the struggle as the simplified model of parties should do (a thoroughgoing critique by Ch. Meier, *Res publica amissa: Eine Studie zur Verfassung und Geschichte der späten römischen Republik*, 2nd ed. [1966], Frankfurt a.M.: Suhrkamp, 1980).

[62] In his books *de inventione*, finished about 86 B.C., Cicero tells the story of the Horatii (2.2.78-86) as an example for juridical reasoning. The version is very close to Livy, perhaps Cicero and Antias used the same model. However, the whole complex of the lustration and the *tigillum* is missing. It might be suppressed as being without any juridical value. Given Valerius' antiquarian interests, an expansion by the annalist is equally possible. In the rôle of the prosecutor, Cicero stresses the missing trial before the killing of the sister, in the rôle of the defence counsel, he stresses the crime to stand up for the enemy against the own people.

[63] R. M. Ogilvie, "Livy", in: E. J. Kenney (ed.), *The Cambridge History of Classical Literature 2: Latin Literature*, Cambridge: Cambridge University Press, 1982, 461. Comprehensive: [H.] Volkmann, "Valerius". 98)", *RE* 7A,2 (1948), 2313-2340. His list of fragments does not include any passage of Livy, book, 1.

[64] Cf. for a detailled analysis of the sources Rüpke, Domi militiae (n. 25), 100 f. P. de Francisci, *Primordia Civitatis* (Pontificum Institutum utriusque Iuris; Studie e documenta 2), Roma: Apollinaris, 1959, 616, and R. M. Ogilvie, *A Commentary on Livy: Book 1-5*, Oxford: Clarendon, 1965, 14, assume Antias on account of the name as well. The literary versions of the Horatius legend written after Livy and Dionysius offer no clue concerning the earlier sources (Münzer [n. 56], 2324).

[65] Not without invention of precedents. See Rüpke, Domi militiae (n. 25), 110 f. 115 f.

[66] See B. Rödl, *Das Senatus Consultum Ultimum und der Tod der Gracchen*, Diss. Erlangen 1968; J. Baron Ungern-Sternberg von Pürkel, *Untersuchungen zum spätrepublikanischen Notstandsrecht: Senatusconsultum ultimum und hostis-Erklärung* (Vestigia 11), München: Beck, 1970; Nippel (n. 9), 84-94. 219.

[67] Probably 114 B.C. See Latte, Religionsgeschichte (n. 36), 256, n. 4, and above, 3.2.

[68] It is difficult to classify the proscriptions (82/1 and 43 B.C.). In legal terms the killing is legitimized—for Sulla *post factum* only (cf. F. Hinard, *Les proscriptions de la Rome républicaine* [Collection de l'École Française 83], 1985, 67)—by the declaration of a state of emergency. Although permanently supplemented, lists of names intend to give an aura of legality and planned official prosecution to the slaughter. Attempts to establish a certain formality of the act of killing are visible only in a few instances (43-45). The most important facts and a judicious interpretation are given by Fuhrmann, "Provocatio", *RE* 23.2 (1959), 2440-4.

[69] See e.g. C. J. Skidmore, *Teaching by Examples: Valerius Maximus and the exempla Tradition*, Diss. Exeter 1988. Cf. in general: D. Mieth, "Narrative Ethik", *Freiburger Zeitschrift für Philosophie und Theologie* 22 (1975), 297-326.