

## THE DEATH OF HORATIA

Central to any understanding of archaic Roman criminal law is the trial, as recorded by Livy, of Horatius for killing his sister. It is not just that the case raises so many legal issues; the jurisdiction of the father (*paterfamilias*) and of the king, the institution of a separate state procedure with two judges (the *duoviri*), the right of appeal to the people, the scope of the crime of *perduellio* (usually roughly translated as 'treason') and of *parricidium*, murder, and the use of sacral punishment. But also, on the ability to determine how accurate for the period of King Tullus Hostilius is this account of law and legal procedure will depend our wider appreciation of the reliability of the sources. It must be admitted that almost all modern scholars regard Livy's account as quite untrustworthy.

There are, as we shall see, three apparent oddities which must be explained in Livy's tale. First, why is the charge against Horatius for killing his sister, *perduellio*? Secondly, why is he not accused of *parricidium*? Thirdly, why do the *duoviri* perversely decide that the law under which the process is established compels them to convict the accused whether he is guilty or innocent. If these three peculiarities make no sense for the archaic period and a sensible explanation can be produced of how they came to be inserted later into the tradition, then we would be entitled to claim that the episode, in Livy's account, is so corrupt that little can be deduced from it for the state of early law. But if, on the other hand, sense can be made for the archaic period of these apparent peculiarities and if no satisfactory explanation can be given of why they would all have been inserted later into the tradition, then it is plausible to claim that the episode in Livy does reflect conditions in the regal period and that we should treat the legal details of the story as *prima facie* accurate unless the contrary can be shown.

Livy certainly will not have invented the details but must have found them in his sources, whose pedigree will not be considered in this paper.<sup>1</sup> At the moment it is enough to notice that the peculiarities do not appear in the other ancient writers who refer to the episode. According to Festus, s.v. *Sororium tigillum*, Horatius was charged with *parricidium*, and nothing is said to indicate that the *duoviri* considered they would have to convict even an innocent man. For Dionysius of Halicarnassus, 3.22 the charge was again *parricidium*, and the *duoviri* are not brought into the story at all. For Florus, 1.1.3.6., the crime committed by Horatius was *parricidium*.<sup>2</sup> Their testimony rather favours Livy's historical accuracy. What seem peculiarities to us in the tradition recorded by Livy were also apparently incomprehensible to these classical writers (or their sources), hence they were excised. We can understand that details that were accurate but came subsequently to seem peculiar were cut out by some later writers. But we cannot so easily assert that later writers invented absurd details which were inserted into the tale and accepted. A principle akin to *difficilior lectio* creates a presumption supporting the Livian tradition. A further strong argument in favour of the Livian version is that the trial of Rabirius in 63 B.C.

<sup>1</sup> But see, e.g., P. G. Walsh, *Livy, his Historical Aims and Methods* (Cambridge, 1961), pp. 110 ff.

<sup>2</sup> See also *Auctor de viris illustribus* 4.9; Valerius Maximus, 6.3.6; 8.1. *absol.* 1; *Schol. Bob. Cic. Mil.* 7; Zonaras, 7.6.4.

for *perduellio* was patterned on a view of the law akin to that given in Livy's account of the trial of Horatius.<sup>3</sup>

But it is high time to recount Livy's tale. In the reign of the third king of Rome, Tullus Hostilius (762–640 B.C.), a state of war existed between the Romans and the inhabitants of Alba Longa. In view of the common threat from the Etruscans, a plan was devised to avoid the destruction of the Roman or Alban power while determining which city should have dominion over the other. Each army contained triplet brothers, the Horatii on the Roman side, the Curiatii on the Alban, and it was decided that each set should fight for his city. The three Curiatii were killed and one of the Horatii survived, thus giving victory to the Romans. The armies marched home. Livy continues:<sup>4</sup>

In the van of the Romans came Horatius, displaying his triple spoils. As he drew near the Porta Capena he was met by his unwedded sister, who had been promised in marriage to one of the Curiatii. When she recognized on her brother's shoulders the military cloak of her betrothed, which she herself had woven, she loosed her hair and, weeping, called on her dead

<sup>3</sup> See below, p. 446. This rejection of the version of Festus is a powerful argument against the recent claim by R. A. Bauman, *The Duumviri in the Roman Criminal Law and in the Horatius Legend* (Historia Einzelschrift 12, Wiesbaden, 1969), that the jurisdiction of the *duoviri* was not confined to cases of *perduellio*.

<sup>4</sup> 1.26.2. Princeps Horatius ibat, trigemina spolia prae se gerens; cui soror virgo, quae desponsa uni ex Curiatiis fuerat, obvia ante portam Capenam fuit, cognitoque super umeros fratris paludamento sponsi quod ipsa confecerat, solvit crines et flebiliter nomine sponsum mortuum appellat. 3. Movet feroci iuveni animum comploratio sororis in victoria sua tantoque gaudio publico. Stricto itaque gladio simul verbis increpans transfigit puellam. 4. 'Abi hinc cum immaturo amore ad sponsum,' inquit, 'oblita fratrum mortuorum vivique, oblita patriae. Sic eat quaecumque Romam lugebit hostem'. 5. Atrox visum id facinus patribus plebique, sed recens meritum facto obstabat. Tamen raptus in ius ad regem. Rex ne ipse tam tristis ingratusque ad vulgus iudicii ac secundum iudicium supplicii auctor esset, concilio populi aducato 'Duumuiros' inquit, 'qui Horatio perduellionem iudicent, secundum legem facio.' 6. Lex horridi carminis erat: 'Duumviri perduellionem iudicent; si a duumviris provocarit, provocacione certato; si vincent, caput obnubito; infelici arbori reste suspendito; verberato vel intra pomerium vel extra pomerium.' 7. Hac lege duumviri creati, qui se absolvere non rebantur ea lege ne innoxium quidem posse, cum condemnassent, tum alter ex iis 'Publi Horati, tibi perduellionem iudico' inquit. 'I, lictor, colliga manus.' 8. Accesserat lictor

iniciebatque laqueum. Tum Horatius auctore Tullo, clemente legis interprete, 'Prouoco' inquit. Itaque provocacione certatum ad populum est. 9. Moti homines sunt in eo iudicio maxime P. Horatio patre proclamante se filiam iure caesam iudicare; ni ita esset, patrio iure in filium animadversum fuisse. Orabat deinde ne se quem paulo ante cum egregia stirpe conspexissent orbum liberis facerent. 10. Inter haec senex iuvenem amplexus, spolia Curiatorum fixa eo loco qui nunc Pila Horatia appellatur ostentans, 'Huncine' aiebat, 'quem modo decoratum ovantemque victoria incedentem vidistis, Quirites, eum sub furca vinctum inter verbera et cruciatus videre potestis? quod vix Albanorum oculi tam deforme spectaculum ferre possent. I, lictor, colliga manus, quae paulo ante armatae imperium populo Romano pepererunt. 11. I, caput obnube liberatoris urbis huius; arbore infelici suspende; verbera vel intra pomerium, modo inter illa pila et spolia hostium, vel extra pomerium, modo inter sepulcra Curiatorum; quo enim ducere hunc iuvenem potestis ubi non sua decora eum a tanta foeditate supplicii uindictent? 12. Non tulit populus nec patris lacrimas nec ipsius parem in omni periculo animum, absolveruntque admiratione magis virtutis quam iure causae. Itaque ut caedes manifesta aliquo tamen piaculo lueretur, imperatum patri ut filium expiaret pecunia publica. 13. Is quibusdam piacularibus sacrificiis factis quae deinde genti Horatiae tradita sunt, transmisso per viam tigillo, capite adoperto velut sub iugum misit iuvenem. 14. Id hodie quoque publice semper refectum manet; sororium tigillum vocant. Horatiae sepulcrum, quo loco corruerat icta, constructum est saxa quadrato.

lover's name. It enraged the fiery youth to hear his sister's lamentations in the hour of his own victory and the nation's great rejoicing. And so, drawing his sword and at the same time angrily upbraiding her, he ran her through the body. 'Begone', he cried, 'to your betrothed, with your ill-timed love, since you have forgot your brothers, both the dead and the living, and forgot your country! So perish every Roman woman who mourns a foe!'

Horrid as this deed seemed to the Fathers and the people, his recent service was an off-set to it; nevertheless he was seized and brought before the king for trial. The king, that he might not take upon himself the responsibility for so stern and unpopular a judgement, and for the punishment which must follow sentence, called together the council of the people and said: 'In accordance with the law I appoint duumvirs to pass judgement upon Horatius for treason.' The dread formula of the law ran thus: 'Let the duumvirs pronounce him guilty of treason; if he shall appeal from the duumvirs, let the appeal be tried; if the duumvirs win, let the lictor veil his head; let him bind him with a rope to a barren tree; let him scourge him either within or without the pomerium.' By the terms of this law duumvirs were appointed. They considered that they might not acquit, under that act, even one who was innocent, and having given a verdict of guilty, one of them pronounced the words, 'Publius Horatius, I adjudge you a traitor; go, lictor, bind his hands.' The lictor had approached and was about to fit the noose. Then Horatius, at the prompting of Tullus, who put a merciful construction upon the law, cried, 'I appeal!' And so the appeal was tried before the people. What influenced men most of all in that trial was the assertion of Publius Horatius, the father, that his daughter had been justly slain; otherwise he should have used a father's authority and have punished his son, himself. He then implored them not to make him childless whom they had beheld a little while before surrounded by a goodly offspring. So saying, the old man embraced the youth, and pointing to the spoils of the Curiatii set up in the place which is now called 'the Horatian Spears', he exclaimed, 'This man you saw but lately advancing decked with spoils and triumphing in his victory; can you bear, Quirites, to see him bound beneath a fork and scourged and tortured? Hardly could Alban eyes endure so hideous a sight. Go, lictor, bind the hands which but now, with sword and shield, brought imperial power to the Roman People! Go, veil the head of the liberator of this city! Bind him to a barren tree! Scourge him within the pomerium, if you will—so it be amidst yonder spears and trophies of our enemies—or outside the pomerium—so it be amongst the graves of the Curiatii! For whither can you lead this youth where his own honours will not vindicate him from so foul a punishment? The people could not withstand the father's tears, or the courage of Horatius himself, steadfast in every peril; and they acquitted him, more in admiration of his valour than from the justice of his cause. And so, that the flagrant murder might yet be cleansed away, by some kind of expiatory rite, the father was commanded to make atonement for his son at the public cost. He therefore offered certain peculiar sacrifices, which were thenceforward handed down in the Horatian family, and, erecting a beam across the street, to typify a yoke, he made his son pass under it, with covered head. It remains to this day, being restored from time to time at the state's expense, and is known as 'the Sister's Beam'. Horatia's tomb, of hewn stone, was built on the place where she had been struck down.<sup>5</sup>

The precise meaning of the word *perduellio* and the scope of the crime are both subjects of doubt. We need not, however, at the present, examine all aspects of *perduellio*: it will be enough to show that Horatius' conduct can reasonably be explained, for early law, as a form of that offence.

It seems to be accepted that the word derives from *duellum*, an old form of *bellum*, war, warfare, with the prefix *per-*. The exact force of *per-* is not so certain, but it is either simply intensive or else intensive with the implication of wickedness. Thus, *perduellio*, etymologically, should indicate either particularly fierce war or particularly wicked war.<sup>6</sup> Greater etymological precision is probably not possible, nor would it for us necessarily be helpful.

<sup>5</sup> Translation by B. O. Foster, *Livy* 1 (Loeb Classical Library, London, Heinemann, 1919), pp. 91 ff.

<sup>6</sup> See e.g. C. H. Brecht, *Perduellio* (Munich, 1938), pp. 120 ff.

The scope of the crime of *perduellio* is a matter of much dispute particularly because there are very few recorded instances. The trial of Rabirius in 63 B.C. was a revival of the procedure.<sup>7</sup> A sensible approach to the problem is taken by Brecht who argues very properly that we ought not to assume as cases of *perduellio* instances of wrongful behaviour which are not so termed. He divides treason into instances where the wrongdoer joins with external enemies of the state to its disadvantage, and instances where the wrongdoer attacks the condition of the state without joining external enemies. The first he calls 'Landesverrat', the second 'Hochverrat', and only the second does he regard as *perduellio*. He maintains that in the Roman criminal law of the time of the XII Tables there was not only *parricidium* and *perduellio* but also the further crime of treason, *proditio*. Among other differences from *perduellio*, *proditio* did not give right to an appeal to the people, and the punishment was secular not sacral.<sup>8</sup>

Whether or not Brecht's distinction is plausible in general,<sup>9</sup> it does not really fit the further text which interests us most, Dionysius of Halicarnassus, 2.10.3.

For both patrons and clients alike it was impious and unlawful to accuse each other in law-suits to bear witness or to give their votes against each other or to be found in the number of each other's enemies; and whoever was convicted of doing any of these things was guilty of treason by virtue of the law sanctioned by Romulus, and might lawfully be put to death by any man who so wished as a victim devoted to the Jupiter of the infernal regions.<sup>10</sup>

I have already argued elsewhere for the broad accuracy of the ancient tradition on the laws of the kings.<sup>11</sup> Part of the argument—which directly concerns this text—is the existence of an unexpected pattern of similarity between the Roman provisions on patron and client and those of English mediaeval feudal law. Our present text declares that particular wrongful acts between patron and client were *προδοσία*, treason; in medieval law to plot against the life of one's lord was petty treason, and only gradually was petty treason marked off from high treason.

Although the treason in the text is against private individuals it obviously has much in common with *perduellio*, even in Brecht's restricted view of that crime; the penalty of death is sacral, not secular.<sup>12</sup> On the other hand, the type of offences listed do rather look like adhering to the enemy and so bring the wrong close to Brecht's concept of *proditio*. The exact nature of the client's (or patron's)

<sup>7</sup> See e.g. R. M. Ogilvie, *Commentary on Livy, Books 1–5* (Oxford, 1965), p. 114; A. H. M. Jones, *Criminal Courts of the Roman Republic and Principate* (Oxford, 1972), p. 35; W. B. Tyrrell, *Legal and Historical Commentary to Cicero's Oratio pro C. Rabirio perduellionis reo* (Amsterdam, 1978), pp. 35 ff.

<sup>8</sup> *Perduellio*.

<sup>9</sup> For the expression of serious doubt see D. Daube, *JRS* 31 (1941), 180 ff.

<sup>10</sup> Translation by E. Cary, *Dionysius of Halicarnassus, Roman Antiquities* 1 (Loeb Classical Library, London, 1968), pp. 343 f. *κοινῇ δ' ἀμφοτέρους οὔτε δαίον οὔτε θέμις ἦν κατηγορεῖν ἀλλήλων ἐπὶ δίκαις ἢ*

*καταμαρτυρεῖν ἢ ψήφον ἐναντίαν ἐπιφέρειν ἢ μετὰ τῶν ἐχθρῶν ἐξετάζεσθαι. εἰ δέ τις ἐξελεγχθείη τούτων τι διαπραττόμενος ἔνοχος ἦν τῷ νόμῳ τῆς προδοσίας, ὃν ἐκύρωσεν ὁ Ῥωμύλος, τὸν δὲ ἀλόντα τῷ βουλομένῳ κτείνειν ὅσων ἦν ὡς θῦμα τοῦ καταχθονίου Διός.*

<sup>11</sup> 'Roman private law and the *leges regiae*', *JRS* 62 (1972), 100 ff.

<sup>12</sup> Dionysius' use of Greek makes it impossible to determine whether terminologically he was thinking of *perduellio* or *proditio*. *Προδοσία* is etymologically connected with the latter, but that fact is not helpful since it is also a natural translation of *perduellio*.

offence and the available process is very much open to doubt,<sup>13</sup> but need not here be determined: it is enough for us that in a situation where a particular duty of obligation existed between one private citizen and another and where a vital part of the relationship was the subordination of one to the other a serious offence against the duty could be named treason. This text of Dionysius is the sole one where a name of any kind is ascribed to the wrong.

I should now like to conjecture that just as the idea of treason could apply to a serious breach of obligation by a citizen to the state (or king) or by a *cliens* to a *patronus*, so likewise it could apply in another situation where there was a particular duty of obligation between one private citizen and another, where a vital part of the relationship was the subordination of one to the other, and where serious breach, never given a name in the sources, gave rise to a sacral penalty of death. What I have in mind is, of course, a serious offence by a member of the household against the *paterfamilias*.

That a sacral death penalty was established in early law for striking the *paterfamilias* appears from Festus, s.v. *Plorare* who gives as the wording of a law of Romulus and Tatius 'Si nurus . . . sacra divis parentum estod.'; and of a law of Servius Tullius, 'Si parentem puer verberit ast olle plorassit parens, puer divis parentum sacer esto.' That, at least according to tradition, laws were passed indicates that what is in issue is not simply the father's domestic jurisdiction and right of punishment.<sup>14</sup> Further precision of the procedure envisaged is not necessary here. The striking of the *pater* cannot have been the only domestic offence punishable by an external process. Indeed, Plutarch<sup>15</sup> records that a husband who sold his wife was to be sacrificed to the gods of the underworld. It is very reasonable to suppose that killing a person subject to one's own *paterfamilias* was in the same category of a domestic offence punishable by an external process. It may be worth observing that in the English statute of treasons of 1350 (25 Edw. 3, s. 5 c. 2) it is treason for a wife to slay her husband.

Horatius' slaying of Horatia could have been treated, it is generally agreed,<sup>16</sup> as the public crime of murder, *parricidium*. It could have been punished, as Livy in his account makes plain, by the *paterfamilias* acting domestically. It could also—I think we can accept—be punished by a public process as a wrong against the father. And it seems a reasonable conjecture—on the direct analogy of a wrong by a client against a patron—that the wrong could be treated as treason. In so far as one might, following Brecht, attempt to distinguish here between *perduellio* and *proditio*, Publius Horatius' conduct would amount to the former: he did not adhere to his father's enemies.

Whatever the external procedure normally was for such a domestic offence, Tullus Hostilius used the state procedure for treason, *perduellio*, and for this he had a particular reason: the procedure gave the accused the right of appeal to the people.

Indeed, if it can be accepted that Horatius' conduct can be regarded as treason *vis-à-vis* his *paterfamilias*, then the whole episode in Livy makes sense, and all the

<sup>13</sup> For views expressed see Brecht, *Perduellio*, pp. 31 ff.

<sup>14</sup> See already T. Mommsen, *Römisches Strafrecht* (Leipzig, 1899), pp. 567 f. For the father's domestic jurisdiction see now,

A. Watson, *Rome of the XII Tables* (Princeton, 1974), pp. 42 ff.

<sup>15</sup> *Romulus* 22.

<sup>16</sup> But not by Ogilvie, *Commentary*, pp. 114 f: cf. below, pp. 442 f.

problems can be resolved, on the well-known principle of 'passing the buck'.

Horatius slays his sister. Time elapses during which Horatius *pater* could have exercised his domestic jurisdiction but does not.<sup>17</sup> (Hence the claim of the *pater* later that he would have used his father's authority if his daughter had not been justly killed.) The people bring Horatius before the king for trial. The obvious charge is *parricidium*, but this the king would probably have to hear and decide for himself. There was no provision here for the appointment of *duoviri* and, above all, none for an appeal to the people. So the king 'passes the buck' and has Horatius accused—plausibly I have argued—of *perduellio* and brings into action the state procedure for that crime. Livy stresses the king's reluctance to accept responsibility for the verdict and the punishment: 'Rex ne ipse tam tristis ingratusque ad vulgus iudicii ac secundum iudicium supplicii auctor esset . . .' The *duoviri* in turn 'pass the buck' as best they can. They cannot find that Horatius has not slain his sister—it is only too well known that he has. So they hold, quite perversely, that the wording of the statute means that they cannot acquit even an innocent man. Hence their verdict which they intend to be understood as indicating nothing of their own view of the case or of the procedure. The 'buck' stops with the people.

On this view the episode has to be seen not as illustrating the most appropriate law and process available for sororicide, but as reflecting political reality and expediency. Horatius is a hero, and no one wishes to take responsibility for having him put to death. But he has also behaved abominably in killing his sister; and the publicity of his act and the horror it aroused demands his trial and punishment. The tension between the treatment merited by the hero Horatius and that deserved by the savage Horatius results in curious dance-like steps just within the limits of the juridically possible. The whole people has to be implicated in any judgement.

This version of the events has in its favour, I suggest, psychological verisimilitude. But it is also supported by the absence from the Roman tradition of evidence of a right of appeal in the regal period for *parricidium*.<sup>18</sup> Modern scholars, in fact, are adamant that no right of appeal for *parricidium* existed so early.<sup>19</sup> Indeed, one might conjecture that part of the reluctance to accept the historicity of the law and procedure outlined in the story of Horatius is precisely the belief that since no appeal existed for *parricidium* none could have existed for *perduellio*. There seems actually to be no evidence for the procedure available for a trial for *parricidium* in the time of the kings. Occasional texts—apart from those relating to Horatius—indicate that *quaestores* existed as early as the kings.<sup>20</sup> But they

<sup>17</sup> For Festus, s.v. *Sororium tigillum*, Horatius *pater* absolved his son.

<sup>18</sup> The Roman tradition that *provocatio* existed under the kings may derive from that right for *perduellio*. Cicero, *pro Milone*, 3.7; Livy 1.26.6; Festus, s.v. *Sororium tigillum* all refer to the case of Horatius. Cicero, *de re publica*, 2.31.54, though couched in general terms, could derive from sources concerned only with one offence.

<sup>19</sup> One strand of scholarly opinion in fact holds that even later when it did exist

*provocatio* was directed against the *coercitio* of magistrates, not against the decisions of judges: see e.g. W. Kunkel, *Untersuchungen zur Entwicklung des römischen Kriminalverfahrens in vorsullanischer Zeit* (Munich, 1962), pp. 24 ff. Against the view that *provocatio* was not known in the duumviral process see R. A. Bauman, *Duumviri*, pp. 1, 13 ff.

<sup>20</sup> D.1.13.1 (Ulpian, *sing. de off. quaest.*); Tacitus, *ann.* 11.22. But see e.g. T. Mommsen, *Römisches Staatsrecht* 2, 3rd edn. (Leipzig, 1887), 523 ff.

need not refer to *quaestores parricidii* since it can be disputed whether such *quaestores* were the original.<sup>21</sup> Even if *quaestores parricidii* did then exist, it by no means follows that they acted as judges rather than investigators of a murder. This, indeed, following an etymology from *quaesitores*, is usually seen as the original rôle of *quaestores parricidii*.<sup>22</sup> In the absence of other known machinery of justice, the king himself—as the text of Livy suggests—would have to take responsibility for the trial.<sup>23</sup> If Tullus Hostilius wished to give Horatius the right of appeal, and also, probably, if he wished to avoid responsibility for the trial and the punishment, the charge had to be *perduellio*, not *parricidium*. A trial for *parricidium*, though legally appropriate, was not in the political interests of the king.

(For the king's attitude another sentence of Livy is instructive, though it is not directly related to our main theme: 'Tum Horatius auctore Tullo, clemente legis interprete, "Provoco" inquit.' The translation I have adopted from Foster seems too weak: 'Then Horatius, at the prompting of Tullus, who put a merciful construction upon the law, cried, "I appeal!"' Why, if Tullus simply suggested the appeal, is he described as a mild interpreter of the law? 'Auctore Tullo', it seems to me, is reminiscent of a legal phrase like *auctore tutore*. The king is giving the appeal his *auctoritas*, he is backing the appeal. In this sense he is the *clemens legis interpret*, making it apparent that he favours the granting of the appeal. Tullus is playing a very canny political game.)

A different explanation that is very ingenious but not in the end persuasive is produced by Ogilvie for the failure to bring a charge of *parricidium*.<sup>24</sup> Horatia, he asserts, was herself a criminal, guilty of *proditio* because she had mourned an enemy. Hence, he says, she was *accusanda* and *damnanda*, and so Horatius' offence was that of forestalling the due processes of the law by executing a criminal who had not yet been sentenced to death, and therefore the crime fell within the scope of *perduellio*. Ogilvie produces three texts—D.3.2.11.3; 11.7.35; Suetonius, *Tiberius* 61—to support his proposition that ancient law forbade the mourning of an enemy. But the passage from Suetonius is hardly relevant—it relates to a prohibition by the Emperor Tiberius made to meet a particular political need and which does not concern an enemy, but specifically *capite damnati*. The two Digest passages<sup>25</sup> say 'non solent lugeri . . . hostes', 'it is not the custom to mourn the enemy' and 'minime maiores lugendum putaverunt eum . . .', 'our ancestors did not think a person should be mourned . . .', and may mean only that the requisites demanded for mourning are not and should not be observed where the deceased is an enemy. They do not indicate that any such mourning was actually a crime, even less that it was the crime of *proditio* or was punishable by death. Likewise, I think it correct to

<sup>21</sup> See, e.g., K. Latte, 'The Origin of the Roman Quaestorship', *Transactions of American Philological Association* 67 (1936), 24 ff., who, however, accepts a date in the mid-fifth century for the introduction of the quaestorship.

<sup>22</sup> See e.g. M. Kaser, *Das altrömische Ius* (Göttingen, 1949), pp. 53 f.

<sup>23</sup> In a primitive monarchy it would seem natural, as Jones says, for the king to act as judge. Indeed, Jones who believes that

Horatius was tried for *parricidium* suggests that the trial was by the king: *Criminal Courts*, p. 43. Valerius Maximus, 8.1. absol. 1, who does not record the charge against Horatius does make Tullus the judge.

<sup>24</sup> *Commentary*, pp. 114 f. see also A. Magdelain, 'Remarques sur la Perduellio', *Historia* 22 (1973), 405 ff. at p. 409, and the authors he cites, n. 13.

<sup>25</sup> I would accept that the passages are indicative of an old practice.

state that there is no evidence for any period that to kill someone who is not dangerous but who might be charged with a capital offence was not considered murder. Nor does such a suggestion seem to me personally to be plausible. Again I have found no evidence that to take the law into one's own hands was ever considered to be treason. One would expect that if killing a person who had committed a capital offence was not to be murder, then the behaviour would either not be criminal or would give rise only to a relatively minor charge.

The *duoviri* had to give their verdict. But they wriggled out of any responsibility for it by claiming that a verdict for condemnation was necessary under the statute and that they could not absolve even an innocent accused.<sup>26</sup> Now, whatever the wording of the statute, the opinion of the *duoviri* must be considered as contrary to the meaning of the law; and must be regarded as deliberate misinterpretation. The accuracy of Livy's wording will be considered in a moment, but first we must look at the trial for *perduellio* of Gaius Rabirius in 63 B.C. Labienus, responsible for the prosecution, urges that Cicero is attempting to abolish the ancient procedure for *perduellio*.<sup>27</sup> Cicero, in turn, claims that Labienus is cruelly attempting to restore a frightful ancient procedure and punishment and declares 'Is this the man who dares to style himself a friend of the people and me an enemy of your interests, though he has hunted out all these cruel punishments, this cruel language, not from what you and your fathers can remember but from the records of the Annals, of the archives of the Kings'.<sup>28</sup> Rabirius, like Horatius, might rather have been charged with murder, but for political reasons Julius Caesar preferred the trial should be for *perduellio*. The precedent in the annals, the archives of the kings, can only be that of Horatius<sup>29</sup> and, to paraphrase A. H. M. Jones,<sup>30</sup> Cicero's argument implies that others besides himself believed that the trial of Horatius was for *perduellio*; and that that trial had at least some of the features, e.g. *provocatio*, mentioned by Livy. To our immediate purpose Cicero claims 'this friend of the people has brought it about without your consent [i.e. the people's] not that a Roman citizen should be put on trial, but that a Roman citizen should be condemned to death without his case being heard': 'hic popularis a Ilviris iniussu vestro non iudicari de cive romano sed indicta causa civem Romanum capitis condemnari coegit'.<sup>31</sup> From the reports of the trials of Horatius and Rabirius it appears that the verdict of the *duoviri* in trials for *perduellio* is automatically that of 'guilty'. The most plausible explanation is that for the latter case the former, in this regard too, has come to serve as a precedent. Hence, the failure of the *duoviri* to reach a verdict on the actual merits of the case seems to have been an integral part of the story of Horatius.

Cicero provides considerable support for Livy's accurate recording of the

<sup>26</sup> Livy's words here cannot square with the view most recently propounded by Tyrrell, *Commentary*, pp. 19 ff. that the *duoviri* were not judges and were appointed when the culprit's guilt was self-evident.

<sup>27</sup> Cicero, *pro Rabirio perduellionis* at e.g. 3.10.

<sup>28</sup> 5.15. 'Hic se popularem dicere audet, me alienum a commodis vestris, cum iste omnis et suppliciorum et verborum acerbitates non ex memoria vestra ac patrum

vestrorum sed annalium monumentis atque ex regum commentariis conquisierit. . . '

<sup>29</sup> We should not be misled by Cicero's ascription of the law to Tarquinius Superbus; 4.13. He wishes to portray Labienus as wicked as possible hence the claim that the statute on which Labienus builds his case is the work of the worst of the kings.

<sup>30</sup> *Criminal Courts*, p. 10.

<sup>31</sup> 4.12.



tradition of the wording of the *lex* and the surrounding procedure: "I, lictor, conliga manus" "Caput obnubito, arbori infelici suspendito" in *pro Rabirio*, 4.13. Naturally the wording has been modernized.<sup>32</sup> It has, however, been claimed that the *lex horrendi carminis* is a relatively late product of the annalists' fantasy or of contamination.<sup>33</sup> But the arguments for this do not seem convincing. For K. Latte the formulation must be relatively late because 'verberato vel intra pomerium vel extra pomerium', the drawing of a distinction between beating inside or outside of the *pomerium*, makes sense only when the right of a magistrate to punish inside the *pomerium* was already limited; thus, he says, it presupposes the *lex Valeria* or something similar.<sup>34</sup> But the clause need have nothing to do with any aspect of a magistrate's powers. The emphasis on *intra pomerium* or *extra pomerium* is rhetorical, based on the disgrace that will accrue in either case.<sup>35</sup> I am not sure that I understand the objections of J. Bleicken<sup>36</sup> as to the accuracy of the tradition of the wording. The *lex* says 'duumviri perduellionem iudicent'; and Bleicken insists that the main proponent of the veracity of the wording, Brecht, had shown that 'iudicare aliquid alicui' was the prosecution formulation of a magistrate *sine imperio*. But that fact by itself, I feel, cannot exclude the use of 'iudicare aliquid alicui' in a different context. Again, Bleicken says that in the apparent *lex, certare* (which indicates a conflict, necessarily here between the appellant and the *duoviri*) can only be used in the sense that the people decides between the judgement of the magistrate and the justification of the appeal, and he asks rhetorically whether an old statute can use such language? One might rhetorically ask 'Why not?' Bleicken followed by Magdelain,<sup>37</sup> also stresses that the legislator could not have omitted from the *carmen* the mode of nomination of the *duoviri* and other procedural matters, and that the omission cannot have been due to excision by Livy. But I am not persuaded that an early legislator laying down the duties of judicial officers would necessarily set out the mode of appointing these officers: we may be expecting a degree of completeness foreign to archaic legislators. (It should not be forgotten that in fact we have exceedingly little information on the structure of early Roman laws. What we have suggests a different approach from our own as to what ought to go into a law.<sup>38</sup>) If he did, such a clause might well not be included in Livy's sources, direct or ultimate, which would be primarily concerned only with matters affecting the Horatian episode. Livy, too, to heighten the speed of the drama could well excise what was not immediately relevant.<sup>39</sup>

It has not been my intention in this paper to attempt the elucidation of all aspects of law and procedure in the case of Horatius. Rather I have wanted to

<sup>32</sup> See e.g. Brecht, *Perduellio*, pp. 157 f.

<sup>33</sup> See e.g. Kunkel, *Untersuchungen*, p. 22 n. 50, following Latte and Bleicken.

<sup>34</sup> *RE supp.* 7, s.v. Todesstrafe, 1599 ff. at 1614.

<sup>35</sup> Though it does not affect the argument of this paper I accept the view of W. A. Oldfather that the penalty envisaged was death by beating and then suspension of the corpse, and not crucifixion: 'Livy 1.26 and the Supplicium de More Maiorum', *Transactions of American Philological Society* 39

(1908), 49 ff.

<sup>36</sup> 'Ursprung und Bedeutung der Provo-cation' *ZSS* 76 (1959), 324 ff. at p. 335.

<sup>37</sup> 'Remarques', p. 412.

<sup>38</sup> Thus, the XII Tables regulate aspects of the legal process, but have nothing on the forms of action; legislate on both *mancipatio* and *stipulatio* but set out the forms of neither; etc.

<sup>39</sup> Also against Bleicken on this point see Bauman, *Duumviri*, pp. 13 ff; Tyrrell, *Commentary*, p. 16.

explain how the apparent oddities in the story could make sense and could fit into a setting during the period of the kings. There is otherwise no evidence which must lead us to a later date for the law and procedure in the episode. What, however, is the greater purpose of the story? Ogilvie sees it as the paradigm case of *perduellio*.<sup>40</sup> He may be correct, but it is not a typical case of *perduellio* and the difficulties that modern scholars have in accepting the episode as involving *perduellio* must count against his explanation. I would propose something rather different. The episode is the paradigm not just of one major criminal offence and the appropriate procedure, but of criminal jurisdiction and procedure in general, and especially of the overlap of competing jurisdictions. Thus, the father could have judged Horatius for treason against him, but he did not do so. The king could himself have tried Horatius for murder. Instead he opts for the charge of treason and invokes the procedure appropriate for *perduellio* against the state rather than that—more particularly in point—against the *pater*. The *duoviri* use their jurisdiction abusively, leaving the field which is quite unoccupied to the jurisdiction of the people.

So far as possible I have avoided discussing scholarly views on the later insertion of the Horatian legend. Partly I wished to give as simple as possible an exposition of how the case could fit into the early framework. This exposition should stand alone. Partly, since no one could easily discuss all the views propounded, I wished to avoid the charge of selectivity. What does seem to be the case, though, is that authors who reject the story as a later invention do not feel called upon to account for all the details of the story. Two examples, one of a Roman lawyer, the other of a Roman historian, may suffice as illustrations.

For V. Arangio-Ruiz,<sup>41</sup> the falsification of the annals was to satisfy the pride of the family of the Horatii who competed with the gens Valeria for the honour of being responsible for the *provocatio ad populum*. The true source of *provocatio*, he suggests, was the *lex Valeria* of 300 B.C. But in the interest of the gens Horatia was invented the *lex Valeria Horatia de provocatione* of 449 B.C., and the supporters of the Valerii in turn envisaged a statute of P. Valerius Publicola in the first year of the Republic, 509 B.C. Further back, for a law voted in the public assembly, one could not go. But, says Arangio-Ruiz, a final return to the offensive was made by the Horatii who pretended that under King Tullus Hostilius our Horatius exercised the *provocatio ad populum*. But, I submit, Horatian family pride would not seem to be boosted by the claim that a Horatius, slayer of his sister, was even the first—not stated in any surviving version of the story—to make use of a right of appeal invented by another. A further difficulty is the lack of distinction or power of the Horatii—hence their inability to affect the tradition of the annalists—after 300 B.C. which, on Arangio-Ruiz's view (as the date of the *lex Valeria*) must be the *terminus post quem* for any tampering with the relevant parts of the annals. The last serious Horatius was the military tribune of 378 B.C.,<sup>42</sup> and for the first century B.C. the political distinction of the gens rested on a *legatus* in Africa in 43 B.C.<sup>43</sup> Nor does this theory of Arangio-Ruiz explain why the trial was for *perduellio*, and was not for *parricidium*, or why the *duoviri* blatantly misinterpreted the law.

<sup>40</sup> *Commentary*, p. 115.

<sup>41</sup> *Storia del diritto romano* 7th edn. (Naples, 1957), pp. 2 ff.; cf. Brecht,

*Perduellio*, p. 131.

<sup>42</sup> Livy, 6.31.1, 5.

<sup>43</sup> Cicero, *ad fam.* 12.30.7.

According to A. H. M. Jones,<sup>44</sup> in 63 B.C. Julius Caesar wished for various political reasons to have Rabirius charged with *perduellio*, not *parricidium*. Hence the precedents had to be tampered with, and Horatius' trial, actually for murder, had to be converted into one for *perduellio*. But Jones does not attempt to explain how Caesar's watchful contemporaries could accept the falsification. Cicero, consul in that year, who defended Rabirius seems not to have questioned the accuracy of the annals. Nor do the Horatii appear to have expressed surprise at this modification of their family tradition. Moreover, why in the falsification do the *duoviri* claim they would have to condemn even an innocent man? If it be suggested that this had been part of the original story and referred to *parricidium* we are left with an even bigger puzzle. The judges' behaviour was never part of a precedent for *parricidium*, but was for *perduellio* once Horatius' trial was made to be for the latter crime. But why then did the judges of Rabirius feel they had to follow this precedent which, since it had only just been invented, could never have been used in other previous trials for *perduellio*? The difficulty becomes insurmountable when we realize that Caesar himself was one of the *duoviri*, and, according to Suetonius,<sup>45</sup> Caesar's bitter hostility to Rabirius when he passed sentence was much in Rabirius' favour in the eyes of the populace.<sup>46</sup>

A further view, that of A. Magdelain, also requires mention because he claims that it is precisely the inability of the *duoviri* to absolve under the law that shows the law is a later fabrication, just because it is legally inept.<sup>47</sup> The *duoviri*, he thinks, were an expedient for having the choice of condemnation or absolution depend upon the people; and the beauty of the story would have been spoiled if one of the *duoviri* had absolved Horatius. So far this might seem plausible, but I cannot follow him when he says 'On the other hand it would have been inelegant to let the *duoviri* spontaneously pronounce a condemnation. For the affair to be necessarily brought before the people, it was proper that the law obliged the magistrate to condemn.' A successful appeal to the people from a spontaneous and unfettered condemnation by the *duoviri* would, it seems to me, illustrate even more fittingly that the ultimate decision rested with the people. Moreover the wording of the *lex horrendi carminis* as we have it in Livy does not seem to compel a condemnation. 'Duumviri perduellionem iudicent' does not necessarily imply that there must be a finding of guilty: 'Let the *duoviri* hear a case of *perduellio*.'<sup>48</sup> The taking of that clause, presumably in conjunction with the next, by the *duoviri* as meaning they had no choice but

<sup>44</sup> *Criminal Courts*, pp. 43 f.

<sup>45</sup> *Divus Iulius*, 12.

<sup>46</sup> I am indebted to a letter from my friend Mr. Robin Seager for this further argument: 'But what is also important is surely this: it was never on the cards that proceedings would have been allowed to reach a conclusion, and it's highly unlikely that even those who initiated them ever meant that they should be pushed through to the bitter end. Therefore the details just weren't

important enough to have been invented ad hoc: they already existed and could be taken over, since they were convenient enough: if Caesar cared (which I doubt), he could condemn without incurring odium since he could say he had no choice and without anything drastic following from it, since appeal was inevitable.'

<sup>47</sup> See the entry *iudico* in *Oxford Latin Dictionary* 4 (Oxford, 1973), 979.

<sup>48</sup> 'Remarques', p. 413.

to condemn is arbitrary. What we need from any explanation of the behaviour of the *duoviri* is why they voluntarily and unnecessarily interpreted the statute as not giving them power to absolve.<sup>49</sup>

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<sup>49</sup> I am grateful to Professors Neil McCormick and R. M. Ogilvie and Mr.

Robin Seager for their helpful criticisms.