

The Mechanism of Designating a *Homo Sacer*

This talk argues that the mechanism of becoming a *homo sacer* in archaic Rome proceeded through normative legal pathways, namely a formal conviction, rather than by instantaneous designation at the moment of the crime. While the character of early Roman law is inextricable from its religious context, the issue of capital punishment was among the Romans' foremost anxieties as suggested by the immediacy during the transition to Republic of the passing of the *lex Valeria de provocatione* in 509 BCE. While some view the phrase '*sacer esto*' as referring to a form of curse by which the transgressor immediately forfeits his life to the divine, this stems from an application of pollution that is unsupported by sources discussing the punishment. Rather, this paper demonstrates that this designation was applied to the transgressor following formal conviction, after which the religious penalty of the crime was realized. The argument proceeds through examination of the legalistic vocabulary employed in sources discussing the process, particularly Dionysius of Halicarnassus and Festus.

Mommsen (1899), Fowler (1911), and Strachan-Davidson (1912) insist that any capital punishment, even those of a religious nature such as the *homo sacer*, would necessarily proceed through a trial. This conclusion, however, primarily stems from Festus' definition of *homo sacer* as "one whom the people have condemned on account of a crime" (...*quem populus iudacavit ob maleficium*, Festus, 424 L.). Fowler tentatively suggests the possibility of a trial, but affirms the function of *sacer esto* as a curse by which the transgressor was made 'taboo.' Bennett (1930) argues that *sacer* proceeded from a trial, but almost exclusively utilizes Festus 424 L. His argument, however, goes too far in equating any capital punishment to a designation of *sacer*.

Despite these, the understanding of *sacer* as an instantaneous, extrajudicial designation persists. Liebeschuetz (1979) understands *sacer esto* as a curse protecting social relations. Agamben (1998) notably coopts the term for his biopolitical framework of the ‘bare life,’ which is extrajudicially designated as outside of the divine and legal spheres, deviating from the previously discussed legal conviction. Following these, Beek (2012) emphatically claims that *sacer* was applied immediately and circumvented any trial or formal sentencing.

Working from Marcianus’ pronouncement in *Dig.* 1.8.6.3 that the public must declare something *sacer* rather than a private individual, the same must apply both to places and people. While Festus 424 L. supports this, Dionysius of Halicarnassus’ contributions have not been thoroughly analyzed. Mirroring *Serv. ad Aen.* 6.609, Dionysius claims that any client who injures his patron ἔνοχος ἦν τῷ νόμῳ τῆς προδοσίας, ὃν ἐκύρωσεν ὁ Ρωμύλος, τὸν δὲ ἀλόντα τῷ βουλομένῳ κτείνειν ὄσιον ἦν... (is subject to the law of betrayal which Romulus ratified, and that it was permitted for anyone wishing to kill him once convicted, *Rom. Ant.* 2.10.3). Words such as ἔνοχος, νόμος, and κυρώω generate a legal context, which frames the participle ἀλόντα in its legal meaning. Although ἀλίσκομαι frequently refers to being captured, Dionysius utilizes it here as the Attic, legal term referring to being convicted of a crime. The aorist participle requires the reading that the transgressor was first convicted and then killed as a *homo sacer*. Dionysius similarly frames Numa’s pronouncement that anyone who moves boundary stones would be *sacer* in a legal context through his use of νομοθετέω at 2.74.

Dionysius’ account alongside Festus attests a mechanism of designating someone as *sacer* as proceeding from normative legal pathways rather than an instantaneous designation. Other crimes resulting in designation as a *homo sacer* such as aspiration of kingship as discussed by Livy 2.8.2 and Plut. *Publ.* 12.1 will also be examined in their legal contexts. This talk seeks to

achieve a more accurate understanding of the *homo sacer* so that its influence on the development of capital punishment may be better understood.

Works Cited

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