

## *Res Sanctae* in Gaius and the Founding of the City

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Gaius, *Institutes* 2.2–3, 8–9.<sup>1</sup> Summa itaque rerum divisio in duos articulos diducitur: nam aliae sunt divini iuris, aliae humani. Divini iuris sunt veluti res sacrae et religiosae. . . . Sanctae quoque res, velut muri et portae, quodammodo divini iuris sunt. Quod autem divini iuris est, id nullius in bonis est, id vero quod humani iuris est plerumque alicuius in bonis est; potest autem et nullius in bonis esse.

The main division of things ranges them under two headings, some things being subjects of divine law, others of human law. Examples of subjects of divine law are things *sacrae* and *religiosae*. Things *sanctae*, such as city walls and gates, are also subjects of divine law, to a certain extent. Something governed by divine law is no man's property. But that which is the subject of human law is for the most part someone's property, though it is possible for it to be owned by nobody.

Gaius' explanation of *res divini iuris* leaves unanswered two questions. What does Gaius mean when he calls city walls and gates *res sanctae*, and, if city walls and gates, being *res sanctae*, are the subjects of divine law, why only "to a certain extent"?<sup>2</sup> I propose to answer these queries through reference to the Latin language, Roman jurisprudence, and Roman legend.

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<sup>1</sup> Ed. Krüger and Studemund. Cf. D.1.8.1 pr.

<sup>2</sup> Other discussions of *res sanctae* leave these questions unanswered. See, e.g., J. A. C. Thomas, *Textbook of Roman Law* (Amsterdam 1976), 128.

## I.

In its classical idiom, Latin called something *sanctus* that was inviolate, i.e., something secured by *sanctitas*, where *sanctitas* meant the state of being protected by a “religious sanction.”<sup>3</sup> Etymologically, so much makes sense: the Latin adjective *sanctus* and noun *sanctitas* (and their various cognates) were formally derived from the verb *sancire*, whose primary meaning was “to ratify solemnly” an agreement or law.<sup>4</sup> One can envisage how a sacral color would be part and parcel of the meaning of *sancire*, especially when the word was used by a people so heavily invested in ritual and formality and even more so at those times when Rome’s priests and lawyers (and civil and religious law) were largely indistinguishable.<sup>5</sup>

The *OLD* confirms the religious element of the words, and we find much the same when we examine the less empirical but equally informative Roman tradition of folk etymology.<sup>6</sup> Without overly anticipating the next section of our paper, let us note the words of the jurist Marcianus, who wrote that *sanctum autem dictum est a sagminibus: sunt autem sagmina quaedam herbae, quas legati populi Romani ferre solent, ne quis eos violaret, sicut legati Graecorum ferunt ea quae vocantur cerycia* (D.1.8.8.1–2).<sup>7</sup> (“*Sanctum* is derived from *sagmina*, these being certain herbs usually carried by legates of the Roman people to secure them

<sup>3</sup> See *OLD*, s.vv. *sanctus* 1 and *sanctitas* 1.

<sup>4</sup> See *OLD*, s.v. *sancio*. In his fourth book of poems, devoted to Roman etiologies, Propertius etymologically plays with all of these words (as well as the cognate Sabine adjective *sancus*) when he describes Hercules’ foundation of the Ara Maxima following his unseemly violation of the grove of the Bona Dea: see Prop. 4.9.71–72. Catullus had previously manipulated *sanctus* in an erotic context when he referred to the *aeternum hoc sanctae foedus amicitiae* (Catull. 109.6) he hoped to share with his mistress. See generally D. Ross, *Style and Tradition in Catullus* (Cambridge 1969) for a now classic discussion of Catullus’ eroticization of Roman political language.

<sup>5</sup> Cult and ritual (rather than belief) have long been the focus of discussions of Roman religion. G. Wissowa, *Religion und Kultus der Römer* (Munich 1902) was the source of this concentration, and it has more recently and dynamically been considered in M. Beard, J. North, and S. R. F. Price, *Religions of Rome* (Cambridge 2000).

<sup>6</sup> *OLD*, s.v. *sanctus* 2: “(of things associated with the gods or religion in any way under divine protection) Holy, sacred.” Id., s.v. *sanctitas* 1: “The state of being protected by religious sanction, sacrosanctity.” Id., s.v. *sanctitas* 2: “Observance of duties imposed by religious sanction.”

<sup>7</sup> *OLD*, s.v. *sagmen*: “A bundle of grass torn up with its earth, by which the Fetiales were rendered inviolate on foreign soil.”

against outrage, just as the legates of the Greeks carry what are called ‘cerycia.’”) Marcianus’ “curiosa etimologia” adverts to the priestly roots (sc. the Fetiales) of *sanctus* even as his mention of *sagmina* emphasizes the importance of ritual in merging Roman secular necessity with national religion.<sup>8</sup>

To be sure, what was *religiosus* in Rome often coincided with what was *sanctus*. Although we lack what Festus, the second-century AD lexicographer, wrote in his entry on *sanctus* in *De Significatu Verborum*, we do have his definition of *religiosus*, and this is worth quoting in view of its obvious relevance:

Religiosus est non modo deorum sanctitatem magni aestimans sed etiam officiosus adversus homines; dies autem religiosi, quibus nisi quod necesse est nefas habetur facere . . . . <Religiosum ait> esse Gallus Aelius, quod homini ita facere non liceat, ut, si id faciat, contra deorum voluntatem videatur facere. . . . Inter sacrum autem et sanctum et religiosum differentias bellissime refert: sacrum aedificium consecratum deo, sanctum murum qui sit circum oppidum, religiosum sepulcrum, ubi mortuus sepultus aut humatus sit satis constare ait; sed item ratione quadam et temporibus eadem videri posse, si quidem quod sacrum est, idem lege aut instituto maiorum sanctum esse putat, ut violari id sine poena non possit. Idem religiosum quoque esse, quoniam sit aliquid, quod ibi homini facere non liceat; quod si faciat, adversus deorum voluntatem videatur facere. Similiter de muro et sepulcro debere observari, ut eadem et sacra et sancta et religiosa fiant, sed quo modo <<quod>> supra expositum est, cum de sacro diximus. (F.278)

*Religiosus* is something not only contemplating the gods’ sanctioning of something important, but indeed implies a positive duty [*officiosus*] against men; moreover, *religiosi* days are those on which it is considered *nefas* to do something unless it is necessary . . . . Aelius Gallus says that *religiosus* is something that is not allowed to a human to do in such a way that, if he should do it, he seems to behave against the will of the gods. . . . Gallus also says, ever so preciously [*bellissime*], that there are differences among *sacer*, *sanctus*, and *religiosus*: thus a *sacer* building is one consecrated to a god; a city wall which surrounds a town is *sanctus*; a tomb is *re-*

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<sup>8</sup> P. Bonfante, *Corso di Diritto Romano*, 2:1 (Milan 1966), 50 n.3.

*ligiosus* where a dead man has been entombed, or where he has been buried, Gallus also says that that is *religiosus*.<sup>9</sup> Likewise, the same things can be seen by a certain analysis and consideration of timing: if indeed something is *sacer*, one thinks that the same thing has then been made *sanctus* by a law or institution of the *maiores*, in order that it not be able to be violated without punishment. One also thinks that the same thing is *religiosus*, since it is something that it is not permitted to a man to do there, because if he should do it, he would seem to act against the will of the gods. Similarly, this must be noted about the city wall and the tomb, i.e., how these same things become both *sacer* and *sanctus* and also *religiosus*, but in the way that was explained above when we spoke about the *sacer*.

Festus makes clear that for the Romans, something *sanctus* could fundamentally not be violated without punishment and that such punishment was likely to be religiously appropriate. Although he acknowledges the late Republican jurist Gallus' discriminations among *sanctus*, *religiosus*, and *sacer*, Festus' qualification of them (sc. *bellissime*) may suggest that such precision was not a part of common parlance and that the average fellow would probably use the three words interchangeably.

Linguistically speaking, we may say then that a *murus* was *sanctus* and a *porta sancta* when the abuse of either was to be vindicated; this was so irrespective of whether the sanction itself was imposed by human edict or divine will. Our linguistic examination also points us in the direction of explaining why Gaius qualifies himself by saying that city walls are subject to divine law "to a certain extent": to the extent that *muri* and municipal *portae* were subject to divine law (and thus not open to human ownership), we may speculate that they had been made so by extrinsic human actions and commands like laws and the *mos maiorum*.

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<sup>9</sup> Cf. G.2.4–5: *Sacrae sunt quae diis superis consecratae sunt; religiosae quae diis Manibus relictiae sunt. Sed sacrum quidem hoc solum existimatur quod ex auctoritate populi Romani consecratum est.* ("Sacred things are those which have been consecrated to the Olympian gods; religious things are ones which have been left for those in the Underworld. But indeed, a thing on its own, which has been consecrated by virtue of the authority of the Roman people, is also thought to be sacred.")

## II.

A number of juristic comments throw light on the meaning of *sanctus* and explain why a *murus* should have had legal qualification as a *res sancta*. Before turning to these comments, however, let us first offer a variorum of the prohibition itself:

D.1.8.11 (Pomp. 2 *var. lect.*). Si quis violaverit muros, capite punitur, sicuti si quis transcendet scalis admotis vel alia quolibet ratione.

If anyone shall have trespassed on the city walls, he suffers capital punishment; for example, if he climbs over them by the use of ladders, or by any other means.

D.43.6.2 (Hermogen. 3 *epit.*). In muris itemque portis et aliis sanctis locis aliquid facere, ex quo damnum aut incommodum irrogetur, non permittitur.

To do something against city walls and likewise gates and other *sancta loca*, as a result of which damage or detriment results, is not permitted.

D.48.13.13(11) (Ulpian 68 *ed.*). Qui perforaverit muros vel inde aliquid abstulerit, peculatus actione tenetur.

Whosoever shall have breached the city walls or absconded with anything from them, is considered by his action as having defrauded the State.

D.1.8.8.2 (Marcian. 4 *reg.*). In municipiis quoque muros esse sanctos Sabinum recte respondisse Cassius refert, prohiberique oportere ne quid in his immitteretur.

In municipal towns as well, Cassius tells us that Sabinus rightly held that the walls are under a sanction, and that no one ought to be permitted to cast anything at them.

D.1.8.9.4 (Ulpian 68 *ed.*). Muros autem municipales nec reficere licet sine principis vel praesidis auctoritate nec aliquid eis coniungere vel superponere.

The walls of a municipal town are not even allowed to be repaired without the authority of the Emperor or the Praeses, nor may anything be united to them or laid upon them, save on the same condition.

D.43.6.3 (Paul 5 *sent.*). Neque muri neque portae habitari sine permissu principis propter fortuita incendia possunt.

Neither city walls nor gates may be used for housing without permission of the emperor for fear of accidental conflagrations.

These then are instances of the prohibition in Roman law against violating the sanction protecting the city wall. Whether or not each of the preceding proscriptions explicitly calls a city wall *sanctus*, every one makes clear that violating it occasioned merited retribution.

But let us briefly leave aside the *muri*, for we are not without instances in which the jurists also defined *sanctus* qua *verbum legale*, and these definitions may help us gain independent purchase on the word's application to the city wall.

Ulpian provides us with a legalistic definition:

D.1.8.9.3 (Ulpian 68 *ed.*). *Proprie dicimus sancta, quae neque sacra neque profana sunt, sed sanctione quadam confirmata: ut leges sanctae sunt, sanctione enim quadam sunt subnixae. Quod enim sanctione quadam subnixum est, id sanctum est, etsi deo non sit consecratum: et interdum in sanctionibus adicitur, ut qui ibi aliquid commisit, capite puniatur.*

The word *sanctus* is used in a special sense to denote things which are neither sacred nor profane, but are protected by some kind of sanction; thus the term *sanctus* is applied to statutes, because they derive their force from a particular sanction. *Whatever is maintained by some particular sanction is sanctum, even though it be not consecrated to a god;*<sup>10</sup> and sometimes it is added in the terms of the sanction itself that whosoever offends in respect of the object in question shall be capitally punished. (emphasis added)

Although Ulpian's definition is self-proving (*quod enim sanctione quadam subnixum est, id sanctum est*), it nonetheless confirms what we have already said about *sanctitas* and reiterates implicitly Gaius' statement that *res sanctae* were only subjects of divine law "to a certain extent": they could, like statutes, be sanctified simply by being possessed of a state-imposed, secular sanction

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<sup>10</sup> Per contra, Gaius in the entry s.v. *sacer* in the *Vocabularium Iurisprudentiae Romanae: sacrae sunt quae deis superis consecratae sunt* ("Sacred things are those which have been consecrated to the Olympian gods"). See also R. Batiza, "Roman Law in the French and Louisiana Civil Codes: A Comparative Textual Survey," *Tul. L. Rev.*, 69 (1995), 1606.

(which in Gaius' limited conception would make them unsusceptible to private ownership).<sup>11</sup>

That the civil aspect of *sanctitas* can merge with a sacral one recalls the word's etymological origins and allows us to revisit Marcianus' legates. We know that these were *sancti* because, while performing a secular duty, they carried the sacerdotal *sagmina* that made them inviolate. Marcianus also tells us that, generally speaking, "the word *sanctus* is used of whatever is defended and guarded against wrong or damage at the hands of men" (D.1.8.8). The quality of inviolacy Marcianus emphasizes finds prominence in another jurist's explanation of the sanctity of Roman legates. Pomponius writes:

D.50.7.18(17) (Pomp. 37 *Quint. Muc.*). Si quis legatum hostium pulsasset, contra ius gentium id commissum esse existimatur, quia sancti habentur legati. Et ideo si, cum legati apud nos essent gentis alicuius, bellum cum eis indictum sit, responsum est liberos eos manere: id enim iuri gentium convenit esse.

If anyone had abused a legate of the enemy, it was thought that this had been done in contravention of the *ius gentium*, since legates are considered *sancti*. And to be sure if when the legates of some nation were among us, war with them was forbidden, this was held to be because they remained free; it was fitting for the *ius gentium* that this was so.

Pomponius says not a word about holy herbs or ritual, and this makes sense insofar as one would not have expected all the communities which Roman legates visited to appreciate the sanctifying (and priestly) import of *sagmina*, as Marcianus had it. What all nations will have apprehended, however, was the utilitarian value of having their legates considered inviolate and the reciprocal concomitant of treating another state's diplomats so: how else could *negotium civile* be conducted between two warring nations? For this reason, Pomponius adverts to the *ius gentium* rather

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<sup>11</sup> Cf. Festus' remark that something can be *sanctus* either by law (*lege*) or Roman custom (*instituto maiorum*) and Paul's comment on servitudes (D.39.3.17.3): *sed loco sacro vel religioso vel sancto interveniente, quo fas non sit uti, nulla eorum servitus imponi poterit* ("In a sacred or religious place or one with a sanction intervening, which it is not *fas* to use, no servitude over these may be imposed").

than the *ius divini iuris*, and here again we see how *res sanctae* were not always subject to the latter.<sup>12</sup>

We have seen the Digest's proscriptions against violating a city's walls. We have also discussed how the jurists defined *sanc-tus*, and what they meant in legal terms when they called something such. We know now what the Romans meant when they called a city wall *sanctus*. It remains to be seen, however, whether we can answer why they characterized it so.

### III.

An answer to this question can be found through cultural enquiry, and it is interesting to note that insofar as the jurists did explain why a *murus* was *sanctus*, they too did so through extralegal explanations. We start our enquiry, as the historians, poets, and jurists did, with the Founding of the City.

Two of the surviving and better known variants of Rome's foundation emerge from rather different sources: Livy's in book one of his 142-volume *Ab Urbe Condita*, and Ovid's in book four of his elegiac poem on the Roman calendar, the *Fasti*, which has rightly been called "[t]he most sustained poetic meditation upon

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<sup>12</sup> Pomponius also reports (*ibid.*) the consequence of violating the *sanc-titas* of legates:

Itaque eum, qui legatum pulsasset, Quintus Mucius dedi hostibus, quorum erant legati, solitus est respondere. Quem hostes si non recepissent, quaesitum est, an civis Romanus maneret: quibusdam existimantibus manere, aliis contra, quia quem semel populus iussisset dedi, ex civitate expulsisse videretur, sicut faceret, cum aqua et igni interdiceret. In qua sententia videtur Publius Mucius fuisse. Id autem maxime quaesitum est in Hostilio Mancino, quem Numantini sibi deditum non acceperunt: de quo tamen lex postea lata est, ut esset civis Romanus, et praeturam quoque gessisse dicitur.

With respect to the man who had beaten a legate: Quintus Mucius used to hold that this man be surrendered to the enemy to whom the legates belonged. If the enemy refused him, it was asked whether he would remain a Roman citizen: it seemed to certain people that he should retain his status, to others not, since the person the people once had ordered to be surrendered, seemed to have been excommunicated from the citizenry. Mucius treated the situation just as when he inflicted the punishment of exile. Publius Mucius seems to have been of the same mind. Nonetheless, the matter was seriously considered in the case of Mancinus Hostilius, whom the Numantini did not receive when he had been handed over to them: in Hostilius' case, a law was passed, such that he would remain a Roman citizen, and it is said that he even [later] held the praetorship.



Roman ritual.”<sup>13</sup> In view of the importance of these passages to my task, I quote them here in full:

Livy 1.6.3–7.3. Ita Numitori Albana re permissa Romulum Remumque cupido cepit in iis locis ubi expositi ubique educati erant urbis condendae. Et supererat multitudo Albanorum Latinorumque; ad id pastores quoque accesserant, qui omnes facile spem facerent parvam Albam, parvum Lavinium prae ea urbe quae conderetur fore. Intervenit deinde his cogitationibus avitum malum, regni cupido, atque inde foedum certamen, coortum a satis miti principio. Quoniam gemini essent nec aetatis verecundia discrimen facere posset, ut dii, quorum tutelae ea loca essent, auguriis legerent, qui nomen novae urbi daret, qui conditam imperio regeret, Palatium Romulus, Remus Aventinum ad inaugurandum templa capiunt. Priori Remo augurium venisse fertur, sex vultures, iamque nuntiatio augurio cum duplex numerus Romulo se ostendisset, utrumque regem sua multitudo consalutaverat: tempore illi praecepto, at hi numero avium regnum trahebant. Inde cum altercatione congressi certamine irarum ad caedem vertuntur; ibi in turba ictus Remus cecidit. Vulgatio fama est ludibrio fratris Remum novos transiluisse muros; inde ab irato Romulo, cum verbis quoque increpitans adiecisset, “sic deinde, quicumque alius transiliet moenia mea,” interfectum. Ita solus potitus imperio Romulus; condita urbs conditoris nomine appellata.

The Alban state being thus made over to Numitor, Romulus and Remus were seized with the desire to found a city in the region where they had been exposed and brought up. And in fact the population of Albans and Latins was too large; besides, there were the shepherds. All together, their numbers might easily lead men to hope that Alba would be small, and Lavinium small, compared with the city which they should build. These considerations were interrupted by the curse of their grandsires, the greed of kingly power, and by a shameful quarrel which grew out of it, upon an occasion innocent enough. Since the brothers were twins, and respect for their age could not determine between them, it was agreed that the gods who had those places in their protection should choose by augury who should give the new city its name, who should

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<sup>13</sup> See D. Feeney, *Literature and Religion at Rome* (Cambridge 1998), 123.

govern it when built. Romulus took the Palatine for his augural quarter, Remus the Aventine. Remus is said to have been the first to receive an augury, from the flight of six vultures. The omen had been already reported when twice that number appeared to Romulus. Thereupon each was saluted king by his own followers, the one party laying claim to the honour from priority, the other from the number of the birds. They then engaged in a battle of words and, angry taunts leading to bloodshed, Remus was struck down in the affray. The commoner story is that Remus leaped over the new walls in mockery of his brother, whereupon Romulus in great anger slew him, and in menacing wise added these words withal, "So perish whoever else shall leap over my walls!" Thus Romulus acquired sole power, and the city, thus founded, was called by its founder's name. (Loeb translation)

Ovid, *Fasti* 4.807–858. Ipse locus causas vati facit. Urbis origo | venit. ades factis, magne Quirine, tuis! | iam luerat poenas frater Numitoris, et omne | pastorum gemino sub duce volgus erat. | contrahere agrestes et moenia ponere utrique | convenit: ambigitur, moenia ponat uter. | "nil opus est" dixit "certamine" Romulus "ullo: | magna fides avium est, experiamur aves." | res placet. alter adit nemorosi saxa Palati, | alter Aventinum mane cacumen init. | sex Remus, hic volucres bis sex videt ordine. pacto | statur, et arbitrium Romulus urbis habet. | apta dies legitur, qua moenia signet aratro. | sacra Palis suberant: inde movetur opus. | fossa fit ad solidum, fruges iaciuntur in ima | et de vicino terra petita solo. | fossa repletur humo, plenaque imponitur ara, | et novus accenso fungitur igne focus. | inde premens stivam designat moenia sulco; | alba iugum niveo cum bove vacca tulit. | vox fuit haec regis: "condenti, Iuppiter, urbem | et genitor Mavors Vestaque mater, ades; | quosque pium est adhibere deos, advertite cuncti. | auspibus vobis hoc mihi surgat opus. | longa sit huic aetas domitaeque potentia terrae, | sitque sub hac oriens occiduusque dies." | ille precabatur, tonitru dedit omina laevo | Iuppiter, et laevo fulmina missa polo. | augurio laeti iaciunt fundamina cives, | et novus exiguo tempore murus erat. | hoc Celer urget opus, quem Romulus ipse vocarat, | "sint," que "Celer, curae" dixerat "ista tuae, | neve quis aut muros aut factam vomere

fossam | transeat: audentem talia dede neci.”<sup>14</sup> | quod Remus  
ignorans humiles contemnere muros | coepit et “his populus”  
dicere “tutus erit?” | nec mora, transsiluit. rutro Celer occu-  
pat ausum; | ille premit duram sanguinolentus humum. |  
haec ubi rex didicit, lacrimas introrsus obortas | devorat et  
clausum pectore volnus habet. | flere palam non volt exem-  
plaque fortia servat, | “sic” que “meos muros transeat hostis”  
ait. | dat tamen exsequias nec iam suspendere fletum |  
sustinet, et pietas dissimulata patet; | osculaque applicuit  
posito suprema feretro | atque ait “invito frater adempte,  
vale!” | arsurusque artus unxit. fecere, quod ille, | Faustulus  
et maestas Acca soluta comas. | tum iuvenem nondum facti  
flevere Quirites; | ultima plorato subdita flamma rogo est. |  
urbs oritur (quis tunc hoc ulli credere posset?) | victorem  
terris impositura pedem.

The subject of itself furnishes a theme for the poet. We have arrived at the foundation of the City. Great Quirinus, help me to sing thy deeds. Already the brother of Numitor had suffered punishment, and all the shepherd folk were subject to the twins. The twins agreed to draw the swains together and found a city; the doubt was which of the two should found it. Romulus said, “There needs no contest. Great faith is put in birds; let’s try the birds.” The proposal was accepted. One of the two betook him to the rocks of the wooded Palatine; the other hied at morn to the top of the Aventine. Remus saw six birds; Romulus saw twice six, one after the other: they stood by their compact, and Romulus was accorded the government of the city. A suitable day was chosen on which he should mark out the line of the walls with the plough. The festival of Pales was at hand; on that day the work began. A trench was dug down to the solid rock; fruits of the earth were thrown into the bottom of it, and with them earth fetched from the neighbouring soil. The trench was filled up with mould, and on the top was set an altar, and a fire was duly lit on a new hearth. Then pressing on the plough-handle he drew a furrow to mark out the line of the walls: the yoke was borne by a white cow and snow-white steer. The king spoke thus: “O Jupiter, and Father Mavors, and Mother Vesta, stand by me as I found the city! O take heed, all ye gods whom piety bids summon! Under your auspices may this my fabric rise! May

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<sup>14</sup> Cf. also the political import of Verg. *G.* 4.90.

it enjoy long life and dominion over a conquered world! May East and West be subject unto it!" So he prayed. Jupiter vouchsafed omens by thunder on the left and lightnings flashing in the leftward sky. Glad at the augury, the citizens laid the foundations, and in a short time the new wall stood. The work was urged on by Celer, whom Romulus himself had named and said, "Celer, be this thy care: let no man cross the walls nor the trench which the share hath made: who dares to do so, put him to death." Ignorant of this, Remus began to mock the lowly walls and say, "Shall these protect the people?" And straightway he leaped across them. Instantly Celer struck the rash man with a shovel. Covered with blood, Remus sank on the stony ground. When the king heard of this, he smothered the springing tears and kept his grief locked up within his breast. He would not weep in public; he set an example of fortitude, and "So fare," quoth he, "the foe who shall cross my walls." Yet he granted funeral honours, and could no longer bear to check his tears, and the affection which he had dissembled was plain to see. When they set down the bier, he gave it a last kiss, and said, "Snatched from thy brother, loath to part, brother, farewell!" With that he anointed the body before committing it to the flames. Faustulus and Acca, her mournful hair unbound, did the same. Then the Quirites, though not yet known by that name, wept for the youth, and last of all a light was put to the pyre, wet with their tears. A city arose destined to set its victorious foot upon the neck of the whole earth; who at that time could have believed in such a prophecy? (Loeb translation)

Livy and Ovid were contemporaries: both lived through the same civic turmoil, the fall of the Republic and rise of the Principate, and each was active in and pointedly attuned to Roman political life at a time when neglecting or participating in it could prove equally dangerous.<sup>15</sup> Such observations need saying insofar as they advert to the complexity of any Roman discussion of Rome's foundation and above all to the fratricide that attended it. There was nothing casual or extemporaneous in such writing, least of all

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<sup>15</sup> Ovid especially (his banishment by Augustus is well known, as is his legal experience, which included service as a *iudex* on the centumviral court): see E. J. Kenney, "Ovid and the Law," *Yale Classical Stud.*, 21 (1969), 241–63.

at a time when the memory of recent civil wars remained fresh in the minds of contemporary Romans.<sup>16</sup>

The accounts in Ovid and Livy differ among themselves and even internally (Livy, for instance, offering two versions, one of which tends to exonerate Romulus). Each account, however, ends with Remus' death, and each portrays Romulus' *mens rea* in a different light. What is important for our purposes is to note that in both the *fama vulgatio* of Livy and Ovid's own telling, Remus' death follows his violation of a wall which had been made *sanctus*. How do we know the *murus* was *sanctus*? In a *fortiori* terms, the *murus* was so because Remus' violation of it was followed by capital retribution.<sup>17</sup> With Livy we can only do so much, but in Ovid more. Let us consider the *Fasti* account in the light of our foregoing linguistic and jurisprudential discussions.

First, Romulus has performed the rituals necessary to found a city, and these will have made the foundation ditch a *locus sacer*, a place subject to divine *sanctitas*.<sup>18</sup> Second, Romulus himself has ordered Celer to punish anyone who breaches the walls, and this in turn will have established *sanctitas* at public law.<sup>19</sup> Here we recall Festus:<sup>20</sup>

[O]ne thinks that [something] has . . . been made *sanctus* by a law or institution of the *maiores*, in order that it not be able to be violated without punishment. One also thinks that the same thing is *religiosus*, since it is something that it is not permitted to a man to do there, because if he should do it, he would seem to act against the will of the gods.

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<sup>16</sup> Sc. the Social Wars, the Sullan and Marian proscriptions, the Catinarian conspiracy, the Perusine War, the wars between the Caesarians and Pompeians, the battles between Sextus Pompeius and Octavian then those between Octavian and Antony. Of course the Social Wars of ca. 90 BC and the Sullan and Marian proscriptions in the 80s and 70s will have also been recalled.

<sup>17</sup> Cf. D.1.8.11 (Pomp. 2 *var. lect.*). Cf. M. Grant, *Roman Myths* (London 1971), 122: "It was very wrong and sacrilegious of [Remus] to do this, since, as every reader of Greek mythology was well aware, contempt for the sanctity of walls attracted severe and merited retribution." (The myths referred to are of Poemandus and Leucippus, and Oeneus and Toxeus.)

<sup>18</sup> Cf. Varro *Rust.* 2.1.10 and *Ling.* 5.143 and Plut. *Quaest. Rom.* 27. See also P. Bonfante (note 8), 50: "La santità si ritiene derivare dalla solennità religiosa con cui si compieva così la fondazione della città . . ."

<sup>19</sup> Cf. Diod. Sic. 8.6.2., where Romulus says, "I order before all the citizens that he be punished who tries to scale these walls."

<sup>20</sup> Quoted above, pages 50–51.

Festus' lexical definition helps where Gaius' property-oriented one founders. When Remus overleaped Rome's founding fortifications, he vitiated what was *religiosus* and *sanctus*. Although this act did not also violate an "institution of the *maiores*" — such an institution will not likely have existed before the *maiores* themselves, although obviously the twins came from existing societies, and there were Greek precedents — there is reason to think that the proscription against violating a *murus sanctus* came to become an institution of Rome's forebears by virtue of the Romulean edict.<sup>21</sup>

We can say so much without discounting the presumptive role played by fundamental ideas about the sacred precinct (sc. *templum*) and city limits (sc. *pomerium*) and the generally religious nature of liminality in Rome.<sup>22</sup> The reason we can do so is that the fratricide had no rival for the Romans as the cultural event par excellence, a prehistorical moment with pride of place in the cultural consciousness.<sup>23</sup> Romulus' triumph over Remus was a myth as familiar to the Romans as Cain and Abel are in Judaeo-Christian culture. The primal murder was an atomic part of Rome's self-conception, an indissoluble element of her founding, and a fraught event which evoked wonder, agony, and endless politicization in later years.<sup>24</sup> Roman and Greek writers of quite

<sup>21</sup> Bonfante (note 8), 50, suggests a different reason: "È probabile che anch'esse in origine si reputassero proprietà dell'*Iupiter terminalis* o anche, direi, dell'eroe semidio, fondatore delle città e della *gens* . . ."

<sup>22</sup> Gods in Rome were associated with doors (e.g., Janus) and city walls (e.g., Cybele at Verg. *Aen.* 6.784–787), such that, notwithstanding Romulus' particular command, Remus' actions could already be seen as insulting and sacrilegious. See, e.g., *Oxford Classical Dictionary*, 3rd ed., s.v. *pomerium*, and Bonfante (note 8), 50, on *agri limitati*.

<sup>23</sup> Romanists discuss this event too frequently to make citation of specific instances worthwhile in an article of this length, but it is worth singling out T. P. Wiseman's monograph, *Remus* (Cambridge 1995), 9–13 and C. J. Bannan's *The Brothers of Romulus: Fraternal Pietas in Roman Law, Literature, and Society* (Princeton 1998).

<sup>24</sup> A pained but by no means unique discussion appears in Hor. *Epod.* 7.17–20: *sic est: acerba fata Romanos agunt | scelusque fraternae necis, | ut immerentis fluxit in terram Remi | sacer nepotibus cruor* ("It is so: a bitter fate pursues the Romans, and the crime of a brother's murder, ever since blameless Remus' blood was spilt upon the ground, a curse upon posterity"). Horace's account here is put in the mouth of a Roman lamenting the civil wars, presumably between Sextus Pompeius and Octavian (rather than Antony and the latter). See A. Cavarzere, *Il Libro degli Epodi* (Venice 1992), 163; cf. S. Commager, *The Odes of Horace* (New Haven 1962), 181:

different eras and genres would write about it differently as they sought to recount and analyze the *aetia* of the waddle-and-daub village that would one day rule the world. We are surely within our rights to assume that every Roman jurist, certainly every pagan one, knew the story intimately.<sup>25</sup>

How did the jurists use it? We previously quoted Pomponius' words in D.1.8.11. We now continue where we left them:

Nam cives Romanos alia quam per portas egredi non licet, cum illud hostile et abominandum sit: nam et Romuli frater Remus occisus traditur ob id, quod murum transcendere voluerit.

For citizens of Rome are only allowed to leave the city by passing through the gates; taking any other way is the act of an enemy and obscene. In fact, Remus, the brother of Romulus, was put to death, so tradition says, because he desired to climb over the wall.

Pomponius' words analogize the requirements which ordinary Roman citizens faced when leaving the city to those conditions Romulus imposed upon its founding. His lawyerly footnote, *traditur*, is a metajudicial allusion that situates his own writing well within the traditions of classical historiography and its myriad accounts of Rome's founding. We see then that Rome's original sin was relevant to the perennial sanction guarding city walls. In this diachronic account, Pomponius sustains the conflation of the secular (*hostile*) with the religious (*abominandum sit*) in order to reflect the circumstances of the fratricide, which Pomponius duly mentions in his next sentence. Having said so much, Pomponius does not argue that the prohibition against violating a *murus* was in place *because* of the fratricide itself and its reception by later Roman culture, which would have put the founding myth to use

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[T]he tragedy of Rome's history lies in the fact that punishment not only fits the crime but is the crime—for what is civil war but expanded fratricide? Civil war, while punishing an original *scelus*, likewise perpetuates it; thus the *scelesti* of the seventh Epode . . . are those contemporaries bent on renewing the past.

Horace's words also complexly draw on the Greek iambic tradition of "blame poetry." See D. Mankin, *Horace: Epodes* (Cambridge 1995), 6–9.

<sup>25</sup> Other ancient examples, by no means exhaustive and often at least as famous, include Cic. *Rep.* 2.5, 2.11; Prop. 4.4.73–78, 4.6.43–44; Ov. *Fast.* 2.127–134, 5.451–474; *Met.* 14.772–777; Diod. Sic. 8.5–6; Dion. Hal. 1.86.

as a tradition sanctifying an obvious municipal need (viz. the protection of a city's walls against internal and external enemies). This may have been beyond the purview of an aphoristic jurist citing the event as an *exemplum*, but it is my explanation of the phenomenon of the *murus sanctus*.<sup>26</sup>

Let us consider it by the lights of Plutarch's *Roman Questions* 27:

Why do they consider all walls sacred and holy, but not the gates? Is it because, as Varro writes, the wall must be considered holy in order that men may fight and die manfully in its defense? For this reason Romulus is supposed to have killed his brother, because he tried to leap over a holy place which must not be trodden, and to make it a profane thoroughfare. But it was impossible to consecrate the gates, through which, among many other necessary burdens, the bodies of the dead are carried. Therefore the original founders of a city plough over all the land they are going to build on, yoking a cow and a bull;<sup>27</sup> and when they are tracing the line of the walls in measuring the site of a gate they raise the ploughshare, and so carry the plough over, considering the ploughed land holy and inviolable.

In this paragraph Plutarch does something curious: he rationalizes Romulus' murder of Remus ("For this reason . . ."), which traditionally occurred on April 21, 753 BC, in accordance with contemporary Roman law and its mural sanction ("Why do they consider all walls . . .").<sup>28</sup> This kind of reasoning is typical of aetiology and is also why Plutarch can say the gates were *not* under sanction in contravention of the jurists;<sup>29</sup> the cultural matrix of Rome's founding and to a lesser degree the religious quality of enclosed space, which will have been Plutarch's primary concerns, made the later portal sanction irrelevant (even allowing for the dangers posed by a *limen*); and the author himself, being less

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<sup>26</sup> It scarcely needs saying that it is irrelevant whether the fratricide ever "happened." Rome's founding was essentially prehistorical for the later Romans themselves, and its primary import in Roman society had typically to do with its political significance. This was especially so during the civil wars of the first century BC. A grossly incomplete but exemplary list of instances will include Hor. *Epod.* 1, 7, 9, 16; *Carm.* 1.2.21–52; 1.21.13–16; 1.35.29–32, 33–40; 2.1.29–36; 2.7; Verg. *G.* 1.491–509.

<sup>27</sup> Cf. Varro *Rust.* 2.1.10 and *Ling.* 5.143 and Ov. *Fast.* 4.819–820.

<sup>28</sup> Plutarch was born by AD 50 and died ca. AD 120.

<sup>29</sup> See D.43.6.2 (Hermogen. 3 *epit.*); D.43.6.3 (Paul 5 *sent.*).



a jurist than a public intellectual, may have felt free to disregard the legal niceties of *res sanctae*<sup>30</sup> or the practical value, from an administrative point of view, of having gates and walls under equal sanction.

*Pace* Plutarch, I offer my own “Roman Question”:

*Why do they consider city walls and gates sacrosanct? Is it because the prehistorical fratricide was so much a part of Roman culture that later writers used it to “prove” that Roman city walls were sancti in order to satisfy obvious mundane needs? For this reason the concept of sanctitas is supposed to have been found as useful in provincial municipia as it was in the Caput Mundi and as much for gates as for muri. Therefore, we might say that a prosaically strategic fortification, the murus, found itself fortified by a mytho-historical precedent: its sanctitas was in the fratricide. Then, when the instrumental value of sanctitas became apparent, the gates received its benefits in turn. How so? Not through legend, but rather by a simple extension of the base meaning of sanctus: quod enim sanctione quadam subnixum est, id sanctum est.*

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<sup>30</sup> Cf. H. J. Rose, *The Roman Questions of Plutarch* (Oxford 1924), 181.