

Law, Society, and Justice in Colonial Mexico City, Civil and  
Ecclesiastical Courts Compared, 1730-1800

By

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## Abstract

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This dissertation centers on the administration of criminal justice by the civil and ecclesiastical high courts of Mexico City during the Bourbon reform era of 1730-1800. Highlighting the principles of adjudication at work in the courts, and with special emphasis on the historical origins and text of the law itself, this study compares the theory and practice of criminal justice across civil and ecclesiastical forums for crimes of sexual violence, marital infidelity and premarital sex, and cases related to the contentious issue of ecclesiastical privilege and asylum.

The period under review was a high point of judicial reform for the Bourbon monarchy in Spain that sought to shift authority over public morality away from the church judiciary and to the civil courts. Rather than uncovering partisan rivalry between these two tracks of justice during an era of reform, or that ecclesiastical justice was subsumed by an energized civil judiciary, this study finds both courts operating as partners within a unified system of justice, despite significant shifts to procedural law and jurisdiction. The church and civil courts assumed discrete responsibilities according to royal directives, pooled resources, shared information, and largely respected jurisdictional boundaries according to jointly shared and classic traditions of law that emphasized a fair, equitable, and “honorable” (*recta*) administration of justice.

This study builds on traditions of scholarship for the colonies that either emphasizes the theoretical foundations of colonial law, termed *derecho indiano*, or uses trial records to detail a history of human agency for marginalized groups like Indians, Afromestizos, and colonial women. Situated within a thematic shift towards a “new legal history” that is interested in the day-to-day work of judicial officials and the details of criminal processing, it offers a fresh perspective on the history of colonial justice by taking seriously the study of Mexico City’s church and civil courts together and identifying commonalities in judicial philosophies, due process, and shared traditions of legal principles across the two forums.

## Acknowledgements

While my name appears on the title page as author, this designation hides substantial contributions of time and energy by others that helped me bring this project to fruition. I would like to take a moment to thank some of these individuals personally.

I am honored to be the final Ph.D. student of William B. Taylor. Our relationship as student and mentor is an unusual one as it stretches back fifteen years. Dr. Taylor led my first course at U.C. Berkeley in 1998, when I was still attending Diablo Valley College, a community college in Pleasant Hill, CA, through a program that allowed aspiring transfer students to take select courses at UC-B. Dr. Taylor was then in his first year at Berkeley after arriving from Southern Methodist University. I remember the first day of History 8A (“History of Colonial Latin America”) in one of U.C. Berkeley's trademark oversized and darkened amphitheaters. As Dr. Taylor opened the course with a rich survey of Mexican *altiplano* geography, somewhere in the hall two young men began quietly talking and laughing together. Calmly, Dr. Taylor paused his lecture, straightened his tall frame, and in a booming and startling voice instructed the students to cease talking or leave. It was the first of his many signals that good scholarship is a serious enterprise.

After transfer and in my penultimate year of undergraduate study in 2004, Dr. Taylor shepherded me through my first taste of rigorous historical research, the forty-page thesis project required of all Berkeley history undergraduates. Through many quiet afternoons at the large wooden tables of the old Bancroft Library he patiently guided me through my first decipherings of crabbed notarial handwriting and court procedure, gently correcting my fumbling translations and encouraging my halting efforts at interpretation.

Later, during my first years as a graduate student, Dr. Taylor supplied me and my cohort with summer travel grants from his own research funds so that we might gain early facility with the archives and enjoy first-hand experiences with the cultures we studied. These research trips were one of the great joys of my graduate experience. My first visit to Mexico City in 2006 coincided with the disputed election of Mexican president Felipe Calderón, and the efforts by populist challenger Andrés Manuel López Obrador and his followers to overturn the election by full vote recount. I will never forget a walk along the three-mile blockade of Mexico City's Paseo de la Reforma by protestors, many of them families, who chanted, marched, and sung in the streets, even through nightly rains and hail. These summer trips were formative experiences that opened my eyes to the essential role young scholars play as observers, ambassadors, and guides for their peers at home.

In all the years I have known him, Dr. Taylor has always prioritized his role as teacher, reserving only summers and pre-dawn mornings for his own work. The school year was for his students (he once mentioned that he averaged more than two hundred letters of recommendation each year). Though an appointment for office time was usually necessary due to a long line of scholars seeking guidance, Dr. Taylor's always greeted us

at his desk by name and with a warm smile, as if was a perpetual delight to see each one of us. He always allowed us every moment of our appointed time to resolve our most pressing issues, be it a struggle over some aspect of historical interpretation or a simple bureaucratic snafu.

In my second year of graduate study, I was assigned to be a graduate student instructor for Dr. Taylor -- to his undergraduate students he referred to us as his co-teachers. He organized weekly meetings to talk through our progress in the course, and during one meeting he related a story regarding his approach to office hour meetings with students. A few years prior, he and his wife had acquired a Weimaraner puppy, and the puppy needed to be able to travel with them during the summers. The puppy also needed a quiet place to sleep at night. On the advice of a dog trainer, Dr. Taylor and his wife purchased a wire dog crate, which they outfitted with a host of doggy amenities -- a warm blanket, new and fun toys, delicious treats. There were only happy times for the puppy in the crate, Dr. Taylor explained, and this was how he thought the professor's office should also be. There should be only happy times in the office -- students should be seen, their concerns heard, and they should leave with an overarching sense of sincere kindness, interest, courtesy, and care.

It is with great gratitude and humility that I accept these lessons and take them into my new profession. I count myself lucky to have experienced such a mentor.

There are many others: Among my committee, Margaret Chowning has often been the mother hen to this lost chick. Her home is a warm and welcome place for conversation, and she has always been positive and enthusiastic about my efforts, however bumbling they might seem. Dr. Chowning is also a truly gifted writer and editor, and she parsed through endless drafts of my early work, helping me isolate the strongest threads of logic and argument. Similarly, despite her stature as a pioneering academic, Rosemary Joyce remains as playful and eager as her graduate student colleagues, and she is a tireless advocate on their behalf. I credit Dr. Joyce with introducing me to the disputed "field" of legal anthropology.

While studying at Berkeley, I aspired to be like my veteran graduate student colleagues -- Vera Candiani, Rus Sheptak, Brianna Leavitt-Alcantará, Sylvia Sellers-García, Sean McEnroe, Paul Ramírez -- each uniquely different in personality and research topic, but sharing a common goal of collegiality and good, clear writing. My graduate student cohort of Bea Gurwitz, Chuck Witschorik, Melisa Galván, and Kinga Novak were generous and thoughtful collaborators and a steady source of empathy. Graduate secretary Mabel Lee is a departmental treasure.

In Mexico, I had the great fortune to experience the sparkling intellect and wit of Jorge Traslosheros, a key source of inspiration for this project. It was during his reading seminars at the UNAM and in quiet afternoon talks near his home that *Profe* Traslosheros encouraged me to think of the principles underlying Spain's medieval legal codes not as vestiges but as still the pulsing heart of modern Western legal practices. My UC-B colleague and good friend Jessica Delgado was an essential early ambassador for me in

Mexico City and her help during my first archival forays into the AGN and AHAM opened up the troves of documents that comprise the heart of this project. It was a sad day when I exhausted the AHAM archive of all possible useful documents, as coordinators Marco Antonio Pérez Iturbe and Berenise Bravo Rubio offered no end of kindness to me and my family during our year-long stay in Mexico City. Miranda Romero made the *Casa de Dragones* my family home over the course of three summers, and Thomas Jordan and Nick Berry were my inexhaustible cultural co-explorers on excursions into “deep” Mexico. In particular, I reserve a special message of thanks to the staff of the Office Depot near the UNAM for their help during some especially desperate times. I also wish to thank the committees of UC-MEXUS and the Fulbright-Hays Doctoral Dissertation Research Award. Without their generous gifts of institutional support, this project would not have been possible.

At home, Brent Hamby offered sage perspective as well as a crucial outlet of martial arts training to counter hours of mental effort. During the last years of writing and editing, my colleagues at Head-Royce School, especially Nancy Feidelman, Laura Krier, Corey Turoff, and Owen Von Kugelgen often overburdened themselves to lighten my load and help me meet the competing demands of daily teaching and scholarship.

The isolation of historical research and writing was only truly saved by a restorative of family. My mother, Janet, my great champion, urged me to push this project to completion. My brothers and sisters, Kathleen, Kristin, Mark, Elizabeth, Grant, and Kyle always offered their encouragement, even as they had little idea of how I spent my days. Arnold, Sherry, Jason, and Christine Sacher endured my distracted presence during summer vacations and holidays. I owe the greatest debt to my wife, Kim, who facilitated my goals by moving three times, from Canada to Berkeley, from Berkeley to Mexico City, and back again, twice rebuilding her professional life in the process. The research and writing of this project also coincided with the birth of our daughter Emerson, who was raised a Mexico City *güera*, and she has always given me the best reason to set aside books, laptop, pens, and paper.

To all of these people, I offer my sincerest thanks.

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## *Introduction*

Historians have long noted the centrality of religion in the making of the colonial Mexican legal system. Until the last decades of colonial rule, the ideology of the Spanish crown considered church and civil courts to be loosely co-equal partners in a larger project to maintain order and promote Catholic orthodoxy. In the colonial context, this partnership was reflected in the operation of three court systems: the civil courts, the ecclesiastical courts, and the Mexican arm of the Spanish Inquisition. Rich traditions of scholarship have used civil and Inquisitional court records to describe how legal systems functioned in colonial Mexico, detailing how various groups -- Indians, women, Afromestizos -- have interacted with them. By contrast, there has only been occasional interest in church judicial bodies other than the Inquisition, despite their pervasive influence in colonial Mexican communities.

This study furthers our understanding of colonial justice by clarifying the relationship between civil and church judicial authority for the later colonial period. By employing methods that cut across disciplines, and by rethinking the nature of law and legality in the colonies, it helps complete a picture of colonial Mexican legal culture by focusing on three core issues: institutional jurisdiction, comparative legal procedure, and foundational legal philosophies. In close comparisons of civil and ecclesiastical case law and legal practices, these issues are defined for the sixteenth through early eighteenth centuries, a period of relative administrative stability, and then tracked through the second half of the eighteenth century, when legal institutions were refashioned by powerful royal reforms. By drawing attention to the church courts and placing them alongside their better-known civil and Inquisitional counterparts, my intention is to offer a fresh interpretation of the legal history of late colonial Mexico.

The extensive legal history literature for colonial Mexico has tended towards some specific thematic and methodological approaches that have prioritized theories of *derecho indiano* and social histories of marginalized groups. Early studies of colonial law in the 1920s-1950s centered on the sources and texts of post-Conquest colonial legislation, tracing a genealogy of the philosophies and practices originating from customary antecedents from the Iberian peninsula and their adaptation to New World populations and experiences. Scholars were particularly attentive to discourses of cross-cultural contact, colonial policy, and representations of metropolitan identity in the major texts of administrative law like New Laws of the Indies (1542), and the political implications of and theological underpinnings for papal concessions like the royal *Patronato* (1508), which transferred the power of appointment of archbishops, bishops, and their delegates in the Indies to the Spanish Catholic monarchs.<sup>1</sup> Scholars of the 1970s-1980s built upon these theoretical foundations for Spanish colonial jurisprudence, but mostly departed from the institutional and intellectual history of the earlier period,

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<sup>1</sup> Major titles from this period that inform this study include: Manuel María Ortíz de Montellano, *Génesis del derecho mexicano: historia de la legislación de España en sus colonias americanas y especialmente en México* (México: Tip. de T. González, 1921); Ricardo Levene, *Introducción a la historia del derecho indiano* (Buenos Aires: V. Abeledo, 1924); José María Ots y Capdequí, *Manual de historia de derecho español en la Indias y del derecho propiamente indiano* (Buenos Aires: Editorial Losada, 1945); Mario Góngora, *El estado en el derecho indiano: época de fundación, 1492-1570*, (Santiago de Chile: Universidad de Chile, 1951); and the volumes of the *Anuario de Historia del Derecho Español*, which began publication in 1924.

instead shifting to a social-historical approach that prioritized case records and recorded testimony to recover the voices of marginalized groups, interpreting how they interacted with one another and navigated the mechanisms of law.<sup>2</sup> For a time, with this shift to social history, institutional history as a subfield fell somewhat out of fashion.

Recent historical study has shown renewed interest in the work of legal institutions. Scholars are again taking seriously the day-to-day work of the officials who administered justice in Spain's colonies, and have stepped beyond using court cases and trial records primarily as mediums through which to recover the voices of past actors.<sup>3</sup> Taking cues from a well-established field termed "legal anthropology," these studies have closely scrutinized legal processes in a range of settings and studied how the various participants in a trial -- complainants, witnesses, advocates, judges -- interacted to create "legal meaning" ...through a struggle to interpret how legal principles apply in concrete situations."<sup>4</sup> Informed by the work of previous generations of scholars, this trend in scholarship has effectively bridged a divide between *external* studies of the laws and institutions, and *internal* studies of human agency. This study fits well within this "new legal history," but also seeks to advance it by attending to the judicial practices of civil and ecclesiastical courts and their officials together, in the same place and time.

While integrated within the larger trajectory of colonial legal history, this dissertation perhaps best connects with the work of Charles Cutter, Gabriel Haslip-Viera, and Brian Owensby. These authors have written rich histories of colonial legal practices, but have identified only a limited role for the church judiciary. Cutter has studied the "legal culture" of the northern colonial borderlands and focuses especially on how civil magistrates regulated domestic relations by promoting compromise and reconciliation to opposing parties -- part of a larger argument about the autonomy enjoyed by colonial judges.<sup>5</sup> Though the northern frontier was very different than the urban heart of colonial

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<sup>2</sup> Major works from this period that combine legal and social histories of colonial Latin America include: Magnus Mörner, *La corona española y los foráneos en los pueblos de indios de América* (Stockholm: Almqvist & Wiksell, 1970); Stuart B. Schwartz, *Sovereignty and Society in Colonial Brazil: The High Court of Bahia and Its Judges, 1609-1751* (Berkeley, CA: University of California Press, 1973); Ramón A. Gutiérrez, "Marriage, Sex, and the Family: Social Change in Colonial New Mexico, 1690-1846." Ph.D. diss., University of Wisconsin, 1980; and Ramón A. Gutiérrez, *When Jesus Came, the Corn Mothers Went Away: Marriage, Sexuality, and Power in New Mexico, 1500-1846* (Stanford, CA: Stanford University Press, 1991).

<sup>3</sup> Recent examples of this trend include: Lauren Benton, "The Legal Regime of the Colonial South American World," *Journal of World History*, vol. 11, no. 1 (2000); Charles R. Cutter, *The Legal Culture of Northern New Spain: 1700-1810* (Albuquerque, NM: University of New Mexico Press, 2001); Michael C. Scardaville, "Justice by Paperwork: A Day in the Life of a Court Scribe in Bourbon Mexico City," *Journal of Social History*, vol. 36, no. 4 (2003), 980-981; Víctor Gayol, *Laberintos de justicia: Procuradores, escribanos, y oficiales de la Real Audiencia de México* (Mexico: El Colegio de Michoacán, 2007), 2 vols.; Brian Owensby, *Empire of Law and Indian Justice in Colonial Mexico* (Stanford, CA: Stanford University Press, 2008); Martin A. Nesvig, *Ideology and Inquisition: The World of the Censors in Early Mexico* (New Haven, CT: Yale University Press, 2009).

<sup>4</sup> Laura Nader, *Harmony and Ideology: Justice and Control in a Zapotec Mountain Village* (Stanford, CA: Stanford University Press, 1990), 121, as quoted in Owensby, *Empire of Law and Indian Justice*, 12; also Nader, *The Life of the Law: Anthropological Projects* (Berkeley, CA: University of California Press, 2002); Susan Kellogg, *Law and the Transformation of Aztec Culture, 1500-1700* (Norman, OK: University of Oklahoma Press, 1995); *History and Power in the Study of Law: New Directions in Legal Anthropology*, June Starr and Jane F. Collier, eds. (Ithaca, NY: Cornell University Press, 1989).

<sup>5</sup> Cutter, *The Legal Culture of Northern New Spain*.

Mexico, Cutter nonetheless offers little sense of the work of ecclesiastical judges in these matters, even though regulating the family was one of the church courts' primary functions. Similarly, Haslip-Viera delves deeply into how enlightenment ideology impacted judicial practice in late colonial Mexico City, but only for civil judicial practice; the church courts and its officials were not taken as a point of reference, despite their regular involvement in the lives of urban residents.<sup>6</sup> Owensby analyzes several types of seventeenth-century Indian legal claims to draw out connections between Indians and the courts, but he makes no mention of the *provisorato de Indios* in his study, even though this central church court had wide authority over Indians.<sup>7</sup> By studying ideology and procedure across both the civil and ecclesiastical jurisdictions of colonial Mexico, this dissertation completes a new, horizontal picture of colonial criminal justice.

### **Geographic, Institutional, and Temporal Boundaries**

The Archdiocese of Mexico defines the territorial limits of this study. Located in the heartland of the Viceroyalty of New Spain, it encompassed large urban centers, rural agricultural estates, and diffuse, sparsely populated Indian hamlets that generated legal records from a wide range of social contexts. Its center was Mexico City, the major seat of power and authority for civil and religious judicial institutions and systems of administration. The archdiocese also corresponded to, though was not coterminous with, the territorial jurisdiction of the royal *Audiencia* of Mexico, offering opportunities for comparative work on civil and ecclesiastical high courts within a discrete geographical context and the colony's great capital city.<sup>8</sup> The civil courts include the criminal arm of the royal *Audiencia* of Mexico, known as the *Real sala del crimen*. This court served as the highest court of appeals for cases within the territory of the *Audiencia* of Mexico, hearing and adjudicating appeals from municipal and local tribunals, but it also had primary jurisdiction over all criminal matters that occurred within a five-league radius of its offices (*casos de corte*). In conjunction with the viceroy, the high judges or *oidores* of the *Real sala del crimen* acted as the direct representatives of the king's judicial authority

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<sup>6</sup> Gabriel Haslip-Viera, *Crime and Punishment in Late-Colonial Mexico City, 1692-1810* (Albuquerque: University of New Mexico Press, 1999)

<sup>7</sup> In Owensby's discussions of Indian conceptions of criminal behavior, guilt, and punishment, for example, he writes about how Spanish jurists at the time considered crime to be a breach of public peace. Individual behavior was seen as connected to the larger social good, and punishment was intended to correct bad examples and restore order to the community. To explain this idea, Owensby identifies the moral reasoning exhibited in a series of criminal cases heard before the General Indian Court. However, the General Court was only one of several specialized courts operating in Mexico City with jurisdiction over Indians, and overseeing public morality was not its primary function. With this in mind, the *provisorato de Indios* for the Archdiocese of Mexico, also located in Mexico City, might have been a better locus for this aspect of his investigation, as this was a central church court with wide authority over Indians in matters related to moral behavior and public order. Well into the eighteenth century, and with the backing of the crown, the diocesan *provisoratos* had primary jurisdiction over 'public and scandalous sins' like aberrant sexual activity, public drunkenness, and gambling. Their officials mediated domestic disputes, and even adjudicated select homicide and robbery cases. See, Owensby, *Empire of Law*, 167-211.

<sup>8</sup> For a thorough treatment of the territorial and administrative contours of the archdiocese of Mexico, see William B. Taylor, *Magistrates of the Sacred: Priests and Parishioners in Eighteenth-Century Mexico* (Stanford, CA: Stanford University Press, 1996), pp. 27-47.

for secular criminal matters arising in the *Audiencia* of Mexico.<sup>9</sup> Cases heard before the General Indian Court and the Royal Mint are also employed when they better correspond to the jurisdictions of the church for the topics covered in this project, and as these courts were also headed by *oidores*, they offer consistency with regards to personnel and court practices, if not with institutional bodies.

For the ecclesiastical courts, the primary point of reference is the *audiencia*, or high court of the Archbishopric of Mexico. To avoid confusion with the royal civil *audiencia*, and to follow contemporary usage, I will be calling this ecclesiastical high court the *provisorato*. From its establishment by Mexico's first archbishop Juan de Zumárraga in 1528, this central forum was charged with the goal of "defending the faith," "reforming customs," and controlling "public and scandalous sins," which came to include matters that also fell under the purview of the civil judiciary, such as robbery, crimes of illicit sex, public drunkenness, and gambling. The archdiocesan *audiencia* was headed by the archbishop as the superior ecclesiastical judge, and he divided the responsibilities into three central courts, each with an appointed judge acting as the bishop's proxy, along with many smaller local and regional courts. In the archbishopric offices of Mexico City, the central courts were the *Provisorato de Españoles*, *Provisorato de Indios y Chinos*, and the *Juzgado de Testamentos, Capellanías, y Obras Pías*.<sup>10</sup> Collectively, these courts were known as the archdiocesan *Provisorato Eclesiástico*.

In part, the two main forums at the heart of this study were selected because of their similarity as the highest level judicial institutions fashioned by royal order. Established in the sixteenth century they soon standardized their practices and in the eighteenth century both the archdiocesan *provisorato* and *Real sala del crimen* experienced periods of limited turnover among officials, even as the *audiencia* of Mexico as a whole underwent a transition from creole to peninsular appointments.<sup>11</sup> Cases that originated in the civil and ecclesiastical high courts were also generally marked by swift communication and complete investigations, since most of the officials involved in criminal matters, the archbishop and his *provisores* and the *oidores* for the royal *audiencia*, were in close geographical proximity. The offices of the *Real sala del crimen*, for example, lay only a few blocks from the Archbishop's palace and offices at the urban heart of the capital city.

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<sup>9</sup> Pilar Arregui Zamorano, *La Audiencia de México según los visitadores, Siglos XVI – XVII*, (Mexico: Universidad Nacional Autónoma de México, Instituto de Investigaciones Jurídicas, 1981), 171-172. Ethelia Ruíz Medrano, *Gobierno y sociedad en Nueva España: segunda audiencia y Antonio de Mendoza* (Mexico: El Colegio de Michoacán, 1991), 93..

<sup>10</sup> An excellent explanation of the origins, mission, and divisions within the archdiocesan *provisorato* can be found in Jorge E. Traslosheros, *Iglesia, justicia, y sociedad en la Nueva España: La audiencia del arzobispado de México, 1528-1668* (Mexico: Editorial Porrúa, 2004).

<sup>11</sup> The archdiocesan *provisorato* for example, was governed by only two archbishops between 1768 and 1800, Francisco Antonio de Lorenzana (1766-1771) and Alonso Núñez de Haro y Peralta (1772-1800), and the tenure of *oidor* Eusebio Ventura Beleña of the *Real sala del crimen*, a notable jurist who figures into several case studies, lasted sixteen years. For a close analysis of the nature of *audiencia* appointments during the eighteenth century, see Burkholder, Mark A. and D. S. Chandler, *From Impotence to Authority: The Spanish Crown and the American Audiencias, 1687–1808* (Columbia: University of Missouri Press, 1977); and Burkholder, Mark A. and D. S. Chandler, *Biographical Dictionary of Audiencia Ministers in the Americas* (Westport: Greenwood Press, 1982).

In contrast to much recent work on the ecclesiastical judiciary, this study does not include a close analysis of the Mexican Inquisition. Though, like the diocesan *provisoratos*, the Inquisition was charged with controlling orthodoxy with regards to Catholic practices, it policed only the most extreme crimes against the faith, and thus skewed towards the sensational. The Inquisition also had no jurisdiction over Indians, a group that constituted the majority of New Spain's colonial population, and the totality in many communities. By contrast, it was the ecclesiastical judges of the *provisorato* and their delegates, the *jueces eclesiásticos*, who most regularly promoted peace and order within colonial communities and thus developed a closer working relationship with royal civil tribunals and secular judicial officials.

The temporal boundaries for this study roughly correspond to the decades between 1730 and 1800. This was a time of sweeping policy changes by the Spanish monarchs, referred to in scholarship as the Bourbon Reforms, through which, among its other intentions, the crown altered a traditional balance between church and state in the colonial judiciary in the name of increased efficiency and control.<sup>12</sup> In clusters of measures the Bourbon monarchs sought to create a single track of justice that expanded the authority of the civil courts at the expense of their ecclesiastical counterparts, especially in the areas of "public and scandalous sins." Over the course of the eighteenth century the question of who would regulate public morality became a point of confrontation between church and crown and during the 1770s and 1780s royal decrees sharply curtailed the church courts' ability to try cases of public and scandalous sins, transferring much of this authority to civil magistrates. In light of this study's attention to the jurisdictional and jurisprudential connections between church and state, the reform period offers an especially fruitful terrain for tracking continuities and changes in comparative court practices.

### *Methodology*

The practice of casuistry in early-modern Spanish criminal law receives close attention in this dissertation. Generally speaking, casuistry refers to moral and ethical reasoning based on the details of individual cases rather than according to fixed rules. In the context of early-modern Spanish criminal jurisprudence, casuistry was the expected mode through which judges, as trained experts, applied moral reasoning to resolve difficult "cases of conscience" like those arising with allegations of predatory violence or sexual transgression, in which circumstances like consent, motive, setting, and character suggested degrees of guilt and innocence. According to royal mandates for "justice aided by conscience," judges were required to consult the statutes of written law, but should depart from it when the circumstances of cases did not match them, or when an

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<sup>12</sup> Some primary points of reference for the Bourbon Reform era in New Spain in this study include: Stanley J. Stein and Barbara H. Stein, *Apogee of Empire: Spain and New Spain in the Age of Charles III, 1759-1789* (Baltimore: Johns Hopkins University Press, 2003); Josefina Zoraida Vázquez, *Interpretaciones del siglo XVIII mexicano: el impacto de las reformas borbónicas* (Mexico: D.F., 1992); David A. Brading, "Government and Elite in Late Colonial Mexico," *Hispanic American Historical Review*, vol. 53, no. 3 (1973), 389-414; D. A. Brading, *The First America: The Spanish Monarchy, Creole Patriots, and the Liberal State, 1492-1867* (New York: Cambridge University Press, 1993); Augustín Guimerá, ed., *El reformismo borbónico: Una visión interdisciplinaria* (Madrid: 1996); William B. Taylor, *Magistrates of the Sacred*, 13-20; Enrique Tandeter and Jorge Hidalgo Lehuédé, eds., *Procesos americanos hacia la redefinición colonial* (Paris, 2000).

alternative resolution to written law might better bring about a “good and equitable” outcome, in accordance with natural law principles and practices brought to fruition in the seventeenth-century by scholars like Francisco Suárez.<sup>13</sup> Within Spanish legal practice, this process was described as *arbitrio judicial* or *arbitrio del juez*, which, far from denoting arbitrariness, was a discrete method that entrusted judges with the responsibility to employ trained faculties of legal and moral reasoning and rely on wisdom gained through experience in the courts to propose punishments that might justifiably depart from written law. More than simply a “flexibility in authority” enjoyed by Spanish colonial administrators who sometimes departed from written mandates in favor of local customs, or an arbitrary employment of the long-studied colonial administrative dictum, “I obey but I do not execute [the law]” (*obedezco pero no cumplo*), in the context of the colonial criminal courts, deviations from the written law based on individual case circumstances was a principle built into the very fabric of Spanish jurisprudence.<sup>14</sup>

Long appreciated by scholars of Roman jurisprudence and by Latin American historians, close analysis of casuistic practices and *arbitrio judicial* has only recently become a point of departure for North American scholars studying the legal culture of the Spanish colonies.<sup>15</sup> Within this project, casuistry and *arbitrio judicial* serve as an organizing principle, and the chapters that follow balance a study of the written law -- the *sciencia* and *doctrina* of positive law, which served as a necessary and authoritative reference for decisions made on the basis of *arbitrio judicial* -- with special attention to the modes of reasoning employed by judges in the cases themselves. Accordingly, while this study occasionally discusses incidences of crime in aggregate, it primarily rests upon case studies.

To ground case studies within the specific statutes of Spanish American jurisprudence, each chapter begins with a close analysis of the *sciencia* and *doctrina* of the written law, with special emphasis on ordinances compiled during the medieval era. Historians have rightly emphasized the use of the royal *Fuero Juzgo* (1241) and *Siete Partidas* (1265) as touchstones for legal studies of the early-modern era, as these comprehensive legal compilations, developed during the thirteenth-century “Revolution in Law,” contained rich and detailed statutes regarding criminal theory and trial procedure that, once legitimized by royal mandates in the early-modern period, became the blueprint and model for practices in all of Spain’s criminal courts.<sup>16</sup> A focus on medieval antecedents like the *Siete Partidas* and *Fuero Juzgo* is also fruitful in the context of a comparative study of civil and ecclesiastical courts, because, as Joseph O’Callaghan, Jerry Craddock and other scholars of medieval legal history have demonstrated, much of the actual content of the laws in the *Siete Partidas* was derived

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<sup>13</sup> Victor Tau Anzoátegui, *Casuismo y sistema: Indagación histórica sobre el espíritu del Derecho Indiano* (Buenos Aires: Instituto de Investigaciones de Historia del Derecho, 1992), 40-57. These ideas are reiterated in Brian Owensby, *Empire of Law and Indian Justice in Colonial Mexico* (Stanford: Stanford University Press, 2007), 44-47

<sup>14</sup> John Leddy Phelan, “Authority and Flexibility in the Spanish Imperial Bureaucracy,” *Administrative Science Quarterly*, vol. 5, no. 1, Special Issue on Comparative Administration (June, 1960), 47-65..

<sup>15</sup> Tau Anzoátegui, *Casuismo y sistema*; Cutter, *The Legal Culture of Northern New Spain*; Owensby, *Empire of Law*.

<sup>16</sup> Harold Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Harvard University Press, 1983); Francisco Tomás y Valiente, *Manual de historia del derecho español* (Madrid, 1979).

from Scripture and contemporaneous canon law sources, which put them in harmony with medieval and early modern canon law codes like Gratian's *Decretum* and the decrees of the Council of Trent.<sup>17</sup> Colonial case law often cited medieval statutes directly, as many of them were not significantly revised nor updated in later Spanish legal compilations.

### *Sources*

The sources for this dissertation treat both “law in theory” and “law in practice,” as the principle of *arbitrio judicial* requires. For written theory, the larger compilations of the civil and ecclesiastical traditions are my main sources. For the civil setting, these compilations include the previously mentioned *Siete Partidas* and *Fuero Juzgo*, as well as the later *Nueva recopilación de Castilla* (1567), the *Recopilación de leyes de los reinos de las Indias* (1680), which was developed specifically to govern Spain's overseas territories, and the *Novísima recopilación de España* (1804), the final major compilation of the Spanish monarchs before colonial independence. I supplement these major works with laws of New World origin, also called *derecho indiano criollo*. They include legislation issued by Royal officials and institutions: viceroys, *audiencias*, governors, *corregidores*, and *alcalde mayores*, all offices that had local jurisdiction over the crimes under consideration in the chapters that follow.

The major compilations of canon law consulted likewise originate in the medieval era. Gratian's foundational *Decretum* (1150) is a first point of reference for canon law, followed by decrees of regional Catholic councils of medieval Europe, the Council of Trent (1545-63), and colonial Mexico's third and fourth provincial synods (1585, 1771). Also included are important points of *derecho canónico indiano*, including papal Bulls with local application and decrees produced by the Mexican archbishops, which were often collated into reference works for ecclesiastical judges.

For “law in practice,” I draw on criminal cases from centralized archives located in Mexico City. For the colonial period, most criminal records for this territorial and administrative jurisdiction appear in two major repositories, both located in the capital city. The first is the smaller and more focused Archivo Histórico del Arzobispado de México (AHAM), which contains records for the archdiocesan Provisorato from the colonial and national periods. The collection *Episcopal*, which is comprised of the documents that were generated by the four branches of the *Cámara de Gobierno* of the archbishop, including the *provisorato*, proved especially useful. Many of these papers were confiscated during the anti-clerical reforms of the 1850s and then were ultimately incorporated into the national archives as part of a sweeping project under Mexican President Sebastián Lerdo de Tejada in the 1870s, but the AHAM *Episcopal* collection retains substantial criminal trial records, as well as collated reference works (*libros de gobierno*) that describe the activities of the *provisorato* in aggregate, and pastoral visit (*visita*) records of the diocesan prelates who toured colonial Mexican communities,

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<sup>17</sup> Joseph F. O'Callaghan, “Alfonso X and the Partidas,” in Robert I. Burns, S.J., ed, *Las Siete Partidas: The Medieval Church, The World of Clerics and Laymen*, vol. 1 (University of Pennsylvania Press, 2001), xxx-xli. See also the short introductory essays in Jerry R. Craddock, *The Legislative Works of Alfonso X, el Sabio: A Critical Bibliography*, Research Bibliographies and Checklists, 45 (London: Grant and Cutler, 1986)

which offer insights into the general concerns of the archbishops with regards to criminal behavior in those communities.<sup>18</sup>

The second main source for records is the vast Mexican national archive, the Archivo General de la Nación (AGN). This study draws criminal records primarily from three substantial multivolume documentary collections, or *ramos*. The *ramo Criminal* skews to case records from the array of civil courts that operated in Mexico during the viceregal period—the *Real sala del crimen*, municipal, military, the *Acordada* (define very briefly)—but also includes a scattering of cases from the archdiocesan *provisorato* and regional ecclesiastical courts. These are divided into themes such as “crimes against life and bodily integrity” (*delitos contra la vida e integridad corporal*), crimes against “the state” (*al patrimonio*), and “crimes against custom and public order” (*a las costumbres y al orden publico*).<sup>19</sup> The collection *Bienes Nacionales* was primarily formed out of the confiscated records from the AHAM and for the purposes of this study contains criminal court cases heard in the *provisorato* as well as correspondence between the archbishop and his delegates, the royal *Audiencia*, and the viceroy. Last, the diffuse collection *Indiferente Virreinal* contains records that were never formally catalogued in the other collections, including records would be more appropriately included in *Criminal* and *Bienes Nacionales*. As a final supplement, the dissertation pulls select documents from the holdings at the Biblioteca Nacional de México, in Mexico City, the Archivo General de Indias, in Sevilla, Spain, and holdings within the Latinoamericana collection of the Bancroft Library at UC Berkeley.

### *Introduction to Chapters*

The text is organized thematically, beginning with two chapters that isolate the work of civil and ecclesiastical magistrates and build toward chapters that bring the church and state courts together. Chapter One concerns the reformed royal mint of Mexico City from 1730 to 1800. Through a discussion of theft cases at the mint, it introduces the process of colonial criminal law, its procedures, and punishments, and also the reasoning method of *arbitrio judicial*. The chapter focuses on the nature of criminal sentencing for the early years at the mint, during which time the first superintendent, acting in a new capacity, departed almost immediately from strict royal orders for capital punishment for instances of theft, and instead imposed a range of lighter, alternative sentences that still realized the crown’s desired goal of minimizing theft.

Chapter Two turns to theft of silver devotional items in churches as a counterpoint to theft of coin. Written law described theft from churches as sacrilegious theft, *hurto sacrilego*, grouping it with theft of royal coin as forms of *hurto calificado*, “qualified” theft for which Spanish law mandated a death sentence as a corrective example to others. This chapter explores the Scriptural and canon law bases for discussions of *hurto sacrilego* in Spanish civil codes, and focuses on the terms of sentences that the

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<sup>18</sup> For a guide to the archival holdings at the AHAM is, *Guía de documentos del Archivo Histórico del Arzobispado de México*, Gustavo Watson Marrón, comp. (Mexico, D.F.: Archivo Histórico del Arzobispado de México, 2004).

<sup>19</sup> An excellent guide to the *ramos Criminal* and *Bienes Nacionales* is the *Guía general de los fondos que contiene el Archivo General de la Nación* (Mexico: Dirección de Difusión y Publicaciones del Archivo General de la Nación, 1981).

archdiocesan *provisores* rendered to convicts. Taken together with the findings of the first chapter, Chapter Two shows that, like the superintendents at the royal mint, officials in the archdiocesan *provisorato* also employed *arbitrio judicial* and moderated their sentences, eschewing the repressive forms of punishment mandated by law in favor of rehabilitative penitence that attended to the moral deficiencies of convicts (*pena espiritual saludable*), and public acts of admonishment and contrition that restored order to local congregations (*escarmiento*).

Chapters Three and Four analyze in a more integral way how the civil and ecclesiastical courts together resolved instances of illicit sexual behavior. Chapter Three focuses on the mixed-*fuero* crimes of sexual violence (*rapto*, *estupro*, and *violación*) that civil and ecclesiastical courts of the late colonial period regularly heard and resolved. This chapter compares the criminal theory and procedure at work in the different courts, and finds that during trial proceedings magistrates, lawyers, and complainants sought evidence of a woman's consent to sex, characterized as *malicia*, which signified an intent to act on desires for intercourse and by extension, corrupt moral character. In both forums, evidence of *malicia* formed the basis for claims that women were complicit in intercourse and their alleged assailants were thus innocent of sexual violence, and in both forums these allegations of *malicia* were directed at girls as young as eight years old.

Chapter Four centers on crimes of illicit but consensual sexual relationships, especially adultery, concubinage, and broken marriage promises (*ilícita amistad*). Through the study of consensual sex practices, the chapter explores the relationships between the high courts of Mexico City at a time of judicial reform, as the crown circulated decrees concerning the prosecution of adultery and concubinage that gave new powers of jurisdiction and authority to the civil courts. A close study of trial records produced by the archdiocesan *provisorato* and *Real sala del crimen* during a period of royal reform does not reveal the expected jurisdictional rivalry among the courts. Rather, in matters of illicit consensual sex civil and ecclesiastical magistrates maintained a mostly peaceful, mostly conciliatory partnership in accordance with royal directives to stamp out "public and scandalous sin." Evaluations of this partnership anticipate the final chapter on adjudication of, and reforms to, ecclesiastical immunities and asylum in churches by violent criminals. Chapter Five explores the many stages of reform for church asylum by the Roman popes and Spanish monarchs and measures their effects in Mexico City's courts. This chapter finds a complicated and sometimes contentious relationship between the high courts of the *provisorato* and *Real sala del crimen* in the reform of church privileges that alternates between genteel diplomacy and acute discord. A well-documented case study concludes the chapter, showing how *oidores* for the *Real sala del crimen* strategically reinterpreted tenets of canon law to maximize civil jurisdiction over asylum claims and justify secular authority over the sacred space of the church.

Taken together, the five chapters in this study suggest the importance of interpreting the criminal justice system in late colonial Mexico with greater attention to the relationships between civil and ecclesiastical justice, and with greater attention to judicial practice and the law and legal principles. Despite a host of jurisdictional and procedural reforms during the eighteenth century, the civil and ecclesiastical courts functioned as a mostly unified system of criminal justice, not two discrete tracks, nor with a preeminent civil judiciary subsuming its counterpart -- the stated objective of

Spain's modernizing royal advisers. Through prescribed due process, the two forums utilized a nearly identical set of procedures. To reason through evidence, both courts drew from the same pool of written sources, which were grounded in Scripture, ancient Roman antecedents, and canon law traditions of moral theology. Both forums also often proposed the same or similar resolutions for crime, according to shared principles that prioritized productive rehabilitation of convicts and reconciliation within communities. Finally, with few exceptions, this work occurred through diplomatic and collaborative relationships with one another, and with close adherence to due process at all levels, not through the corrupt and arbitrary, or abusive methods claimed by contemporary and modern critics.

## Chapter One: *Authority and Flexibility in the Administration of Justice: The Royal Casa de Moneda in Mexico City, 1730-1810*

Mined silver from the Americas was the lifeblood of the Spanish imperial economy. During the colonial period, vast quantities of silver ore were drawn from the mines of northern and central Mexico--Guanajuato, Pachuca, Zacatecas, San Luis Potosí. Nearly all of this silver ore was extracted under the high heat of furnaces or transformed into an amalgam with mercury, refined into pure silver, the king's share removed, and the remainder molded into bars bearing the royal stamp. In time, and through the hands of various legal and extralegal intermediaries, the majority of this stamped silver eventually ended up in the only mint in New Spain before 1810, the royal *Casa de moneda* in Mexico City. From its founding in 1535, the Mexican royal mint was the major endpoint for the flows of silver from the centers of silver mining, feeding an incessant demand for coinage as a means of exchange. The mint regulated the purity of this coinage against attempts to alter the internal purity (*ley*) and overall weight (*peso*) through adulteration with lead and other alloys. With the use of intricate, specially designed dies and stamps shipped from Castile, the royal mint also regulated the physical integrity of the coinage against counterfeiting. Within the colonies, Spanish coin was one of the most important symbols of the sovereign. It represented a royal guarantee for purity and value backed by the integrity and reputation of the monarchy.<sup>1</sup>

Not surprisingly, amidst great efforts by the Bourbon monarchs in the eighteenth century to streamline administration in the Americas, to increase oversight and regulation and above all to draw valuable silver from their colonial outposts, the *Casa de moneda* became a prime target for reform. Until the 1730s, the mint operated on royal concession by private financiers who purchased their posts from the crown and produced coinage on a small scale. This system was tolerated under the Hapsburgs and resulted in what scholars studying circulation of coinage in the Spanish territories have referred to as a monetary "age of confusion."<sup>2</sup> At times, skeptical merchants on both sides of the Atlantic refused to accept stamped Spanish coins for fear that they were counterfeit or adulterated. Exchange rates fluctuated widely across Europe and the Americas along with the perceived value of Spanish silver. The king found it necessary to regularly replace dies and stamps to replace older, suspect forms of coinage, often at a loss, to restore confidence in the currency. The resolution of the War of Spanish Succession in 1714 provided an impetus for wholesale reform of Spanish coin production, first on the Iberian peninsula and then in the Americas as the newly established Bourbon state sought to resolve its war debts and enhance its authority in its Spanish territories with a powerful symbol of sovereignty.

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<sup>1</sup> In a departing memorial from 1736, the viceroy of Peru, José de Armendáriz y Perurena noted of imperial coin that "aunque sí la moneda no requería este u otro metal, sin embargo ha sido bien que en ella la excelencia que le presta la materia acompañe el valor que le da el cuño: por esto es la imagen más adornada que tienen los príncipes, y consistiendo en ella la mayor regalía de dominio y la mayor fe de la república, viene a ser el sacramento político de la majestad." Memoria de gobierno del marqués de Castelfuerte (1736), cit. por G. Céspedes del Castillo, "Economía y moneda en los reinos de Indias bajo Carlos III," en Carlos III y la Casa de la Moneda (Madrid, 1988), 65.

<sup>2</sup> Andrew J. Stanley McNickle, *Spanish Colonial Coins of North America, Mexico Mint* (Mexico: Sociedad Numismática de México, 1962), 5.

In 1728, king Philip V issued a lengthy set of *ordenanzas*, instructions calling for the organization of a new royal mint in New Spain, modeled on the new mints in Sevilla and Madrid and run not by financiers but by direct political appointees. The many officers for this new institution were to operate with complete independence from all other Spanish administrators in the New Spain, save for direct intervention by the viceroy. As part of these new instructions, the royal mint would have its own judicial tribunal, one dedicated to ensuring the stable functioning of the mint and administered by the new office of Superintendent.

This chapter centers on the judicial activities at the new tribunal of the Mexican mint. It takes as its documentary base case records of theft of silver at the mint that were adjudicated by the first Superintendent, José Francisco Veitia, and centers on them for two reasons that are pertinent for the larger goals of this dissertation. First, the cases offer a strong basis for comparisons with ecclesiastical theft law and judicial procedure in the criminal court of the archdiocesan offices in Mexico City, especially adjudication of cases of theft of church silver in the archdiocesan court, which is the subject for the next chapter. Second, and more importantly, cases of theft from the mint offer a useful point of entry into key themes and concepts in the historiography of Spanish criminal justice: Bourbon absolutism; modernization and reform; flexibility in authority; and discretion, judicial will, and moral reasoning in legal decision making, and so forms an important interpretive anchor for this project, as a whole.

Within a criminal law historiography for colonial Mexico, Michael Scardaville points to generations of historians and nineteenth-century liberal and Positivist critics who have asserted that “the Bourbon authorities in Mexico City and throughout the colony maintained a criminal justice system that was corrupt, arbitrary, abusive, and showed little respect for due process of law. According to this perspective, the absolutist Bourbon state embraced oppressive criminal legal practices as one of the principal means of controlling the popular groups, upholding public order, and ultimately sustaining the state's authority through coercion and fear.”<sup>3</sup>

From this point of view, the mint would appear to offer an ideal setting for examining Bourbon absolutist repression. For one, the mint represented a major investment by the Bourbon monarchy to control its colonial finances. The crown supplied huge sums of money for the creation of a modern, centralized, factory-like

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<sup>3</sup> Michael Scardaville, “(Hapsburg) Law and (Bourbon) Order: State Authority, Popular Unrest, and the Criminal Justice System in Bourbon Mexico City,” vol. 50, no. 4 (1994), 503. Scardaville details an extensive historiography regarding the coercive and abusive nature of the criminal justice system in Bourbon Mexico City, which was a primary point of reference for this study including: Gabriel Haslip-Viera, *Crime and Punishment in Late Colonial Mexico City, 1692-1810* (Albuquerque, 1999); José Arturo Yáñez Romero, *Poilcía mexicana* (Mexico City, 1999); Juan Pedro Viqueira Alban, *Propriety and Permissiveness in Bourbon Mexico* (Wilmington, 1999); and Colin M. MacLachlan, *Criminal Justice in Eighteenth Century Mexico: A Study of the Tribunal of the Acordada* (Berkeley, 1974). For more balanced understandings of criminal justice in the viceregal capital, Scardaville suggests José Sánchez-Arcilla Bemal, “La administración de justicia inferior en la Ciudad de Mexico a finales de la época colonial. I. La punición de la embriaguez en los Libros de Reos (1794-1798),” *Cuadernos de Historia del Derecho* 7 (2000): 309-453 and Teresa Lozano Armendares, *La criminalidad en la ciudad de Mexico, 1800-1821* (Mexico City, 1987). For overviews of the eighteenth- and nineteenth-century critiques of colonial Mexican legal practices, Scardaville suggests Robert Buffington, *Criminal and Citizen in Modern Mexico* (Lincoln, 2000), 9-37 and 111-118 and Jaime del Arenal Fenochoio, “Instituciones judiciales de la Nueva España,” *Revista de Investigaciones Jurídicas* 22 (1998): 9-41.

structure that operated according to principles of efficiency, control, and hierarchy, hallmarks of the larger Bourbon reforms. Two, to a degree, the political legitimacy of the monarchy was tied to its ability to control theft and corruption at the mint, and the crown historically pursued these crimes with great determination, or, some have opined, great cruelty.<sup>4</sup> Theft laws reflect the royal commitment for control of production and circulation of coinage. Theft and embezzlement at the mint were treason, *Lesá magestad*, and should be punished to the extreme. By law, any person, elite or peasant, man or woman, young or old, was to be put to death for stealing from the mint, without exception. Three, the officers who were responsible for meting out justice in the theft cases that lay at the heart of this chapter were among the king's most powerful and important political appointees, including an *oidor* for the *Audiencia* of México and the viceroy of New Spain. They were the king's most powerful legal representatives, mouthpieces for royal will, and, according to contemporary accounts and more modern historiography, officers responsible for repressive attempts to control criminal behavior in the colonies.

Though the theft cases examined here originated from these variables, they do not culminate in a predictable conclusion. The superintendents and viceroys punished theft at the mint with less severe sentences than the death penalty recommended by the written royal directives, selecting corporal punishment, stints of coerced labor, fines, and exile in place of capital punishment, and they did not uniformly render these sentences. Rather, the sentences varied according to the details of each case and no act of theft resulted in a capital sentence.

We cannot make sense of this discrepancy between expected and actual outcome by turning to recent historiography about variable sentencing and judicial flexibility. These were not isolated magistrates in far-flung regional provinces that bent royal laws to fit the exigencies in their territories.<sup>5</sup> The mint was located within the walls of the viceregal palace in Mexico City. It was built, quite literally, into the seat of royal power in the colonies. It was also headed by one of the king's *oidores*, not a poorly trained petty magistrate. Nor were these sentences examples of the well-known and long studied legal principle "Obedezco pero no cumplo," (I obey but I do not execute [the law]). The mint's officials never directly invoked this particular form of discretion in judicial decision-making. Case records suggest that the superintendents and viceroys rendered their sentences according to a conception of Spanish justice that modern scholars have attributed to an earlier era, before the dynastic change of the Bourbons, and before the push to reform. The medieval Iberian monarchs' approach emphasized a good, just, and equitable outcome that might or might not conform to written law, and this philosophy carried over into the natural law traditions of Spain's early-modern era. Although the mint used modern hierarchical management and systems of production, in matters of justice its administrators continued to act according to much older considerations of the rights of subjects and the responsibilities of kings.

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<sup>4</sup> Jaime Sainz Guerra, "Moneda y delincuencia: siglos XVI al XVIII" en *Anuario de Historia del Derecho Español*. Homenaje a Francisco Tomás y Valiente, LXVII, 1997, pp. 1619-1630. Francisco Tomás y Valiente, *El derecho penal de la monarquía absoluta: Siglos XVI, XVII, XVIII* (Madrid: Edit. Tecnos, 1969).

<sup>5</sup> Charles R. Cutter, *The Legal Culture of Northern New Spain: 1700-1810* (Albuquerque: University of New Mexico Press, 2001).

Cases from the mint give us a means to reconsider a historiography about the administration of criminal justice in the colonies that emphasize Bourbon rigor and inflexibility. In spite of a rhetoric and imagery of absolutism, especially with regards to criminal justice, the officials in this central royal institution largely respected the rights of the king's subjects.<sup>6</sup> They offer a means for rethinking the prevailing notion of criminal judicial administration in Mexico City in particular, and the late colonial state, in general. Even during a period that we typically associate with an ever expanding Bourbon state, and a growing repression in criminal justice and sentencing, the individuals charged with imposing the king's will in this central institution remained sensitive to critical issues of justice and sovereignty that harkened back to the Middle Age, a form of "justice balanced by conscience," in which *derecho*, or a prudent, merciful, and reasonable evaluation of the circumstances of a case triumphed over *ley*, the fixed written laws.<sup>7</sup>

This chapter focuses especially on the first years of the reformed mint, a period in which substantial precedents for the new institution were not yet in place, which meant that the mint administrators drew from other forms of legal authority, such as custom, training in moral reasoning, and finely tuned moral conscience to reason through the theft cases. Before turning to the cases, this study first outlines the procedural and administrative structure of the mint, to place the details of the theft cases into context, which will aid an interpretation of Superintendent Veitia's first decisions.

### *From Workshop to Proto-Industry*<sup>8</sup>

In contrast to the original *Casa de moneda*, which was smaller in scale, almost artisanal in production, the reformed mint was to be modern, factory-like and almost completely vertically integrated. It would not just be the site where silver coinage (and to

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<sup>6</sup> For a sample of monographs published in English since 1990, see Helen Nader, *Liberty in Absolutist Spain: The Habsburg Sale of Towns, 1516-1700* (Baltimore, 1990); Nicolas Henshall, *The Myth of Absolutism: Change and Continuity in Early Modern European Monarchy cit?*

<sup>7</sup> This study supports the findings of historian Michael Scardaville. Studying how the local judiciary processed cases of debt, spousal abuse, vagrancy and theft among the poor in late colonial Mexico City, Scardaville finds that hearings were fair and sentences were appropriate and swift. "Based on Roman and medieval precedents," he says, "not Enlightenment notions of penal reform, court procedures were generally impartial and predictable, even in the thousands of informal hearings conducted in the nine Bourbon-era municipal tribunals. The magistrates generally respected the defendants' rights and conducted the hearings in accordance with rules of evidence. As representatives of royal will, the judges thus fulfilled their traditional duties of dispensing justice with, as one late eighteenth-century viceroy stated, much "prudence and precaution in order to ...avoid grievances and unjust mistreatment." In this way, Scardaville says that "Hapsburg Law" was preserved even amidst a push for "Bourbon Order." See Michael C. Scardaville, "(Hapsburg) Law and (Bourbon) Order: State Authority, Popular Unrest, and the Criminal Justice System in Bourbon Mexico City," *The Americas*, Vol. 50, No. 4. (April, 1994), pp. 501-525.

<sup>8</sup> Information about the construction of and coin production process at the new mint in Mexico City is primarily drawn from four sources: Pilar González Gutiérrez, *Creación de casas de moneda en Nueva España* (Alcalá, Spain: Servicio de Publicaciones, Universidad de Alcalá, 1997); *Las casas de moneda en los reinos de las Indias, Vol. 1*, Gonzalo Ánes Alvarez y Guillermo Céspedes, eds. (Mexico: Museo Casa de Moneda, 1996); Peter Bakewell, *Silver Mining and Society in Colonial Mexico: Zacatecas, 1546-1700* (New York: Cambridge University Press, 1971); *Ordenanzas para el gobierno de la labor de monedas, que se fabricaren en la real casa de moneda de México, y demas de las Indias* (Mexico: José Antonio de Hogal, 1771), Bancroft Library, UC Berkeley, Colección de varios papeles, vol. 2, no. 3.

a lesser degree gold) was produced from already refined bullion. It was to be a clearinghouse for silver in its various forms. It would accept the purest silver bullion, of the type that had already been refined, verified, and stamped by the royal *cajas* in the major mining centers of Zacatecas, Guanajuato, and San Luis Potosí. But, it could also receive the uncertified, though still mostly pure *rescate* silver from the array of unregulated sources, such as *pepena* mines on Indian lands and the clandestine smelting houses on the outskirts of the big cities, which was purchased at a discount by independent dealers (*mercaderes de oro y plata*) and brought in bulk to the mint to be finished (*afinado*), certified, taxed, and transformed into coinage.

The 1728 *ordenanzas* that regulated this new institution declared three clear objectives that illustrate a Bourbon focus on modernity, efficiency, and control at the new mint. First, the mint was to regulate the intrinsic properties of its coinage by closely monitoring the prescribed ratio of pure silver to impurities. Second, it was to guarantee the extrinsic, physical qualities of the coin, its thickness, symmetry, shine, stamp, and above all, the new ridged edging (*cordoncillo*), which would make the coins more difficult to counterfeit, and less susceptible to physical disfigurement.<sup>9</sup> Last, the new officials were to take the utmost care in tracking the total weight of silver from entry to egress throughout the coinmaking process, scale to basket, bar to coin, foundry to stamp, to reinforce the public image of this new centralized financial institution, and encourage silver merchants in the far-flung northern provinces to bring their silver to the mint, pay their taxes, and avoid the clandestine outlets that siphoned Spanish silver overseas.

To meet the demands for centralization and consistent high-volume production of high-quality coin the workforce at the mint would expand dramatically. It would transform the small-scale workshops for coin production into a single, complex, proto-industrial operation. No longer would the skilled artisans like the assayer (*ensayador*) and founder (*fundidor*) handle actual silver. Instead they would become high-level managers who delegated production to large teams of skilled workers who would refine the silver and press it into coin.

It took three years (1731-1734), and some 450,000 pesos for laborers to expand the original *Casa de moneda* building, which occupied the northwest corner of the viceregal palace, one long block from the *Plaza Mayor*. Under direction of royal architects, workers demolished houses on either side of the existing construction to create space for the great brick ovens, heavy wooden wheels, stone mills, and modern French-designed stamping presses (*hileras de volantes*) that would be imported from Spain. Upon the building's completion, its high rose-hued walls were smoothly integrated into the vast quadrangular footprint of the viceregal palace, spanning an impressive 120 *varas* (354 feet) to the north and 167 *varas* (460 feet) to the west. Contemporary observers noted the building's balance of strength and beauty, a combination of architectural

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<sup>9</sup> Gonzalo Anes Álvarez makes the useful distinction between the internal and external value of coinage. Internal value referred to "la ley de metal, la talla de las monedas, su peso - derivado de la talla, y su valor, bien sea *intrínscico*." Extrinsic value referred to, "el valor legal de la moneda acuñada," which was its relative value in the marketplace, based on law and perception. The crown tried to ensure that these two values were as close as possible. The integrity of the crown was seen as very much tied to the perceived "extrinsic" value of its coinage, which was very much related to its "intrinsic" internal value "ley and peso". Maintaining the value of the coinage was tantamount to maintaining the prestige or reputation of the crown. *Las casas de moneda en los reinos de las Indias, Vol. 1*, Gonzalo Anes Álvarez y Guillermo Céspedes, eds., 41.

simplicity and solidity that reflected the royal instructions for perfect symmetry and proportions in the modern royal factories. At the center of the mint's impressive central facade, the sculpted figure of an armed king Philip V reminded those below that the mint was now a royal enterprise.

Security, efficiency, and above all control were principles that were also clearly expressed in the building's design. The lone public entrance to the mint lay behind a heavy cedar door that was studded with massive bronze nails and guarded by members of a special detachment of the royal guard and a porter who noted all entries and exits. Reaching the production area meant passing through a long, narrow passageway that opened into an wide central patio encircled by supply rooms for stores of wood and coal, the stables and granary, and the offices and bunkhouse for the royal guard. The more important technical and administrative offices were segregated and secured upstairs by remote staircases, while the two main production wings of the mint, the sites where precious metal was stored and worked, were isolated by narrow corridors that offered only a single entrance and exit. All of the heat-intensive production facilities responsible for refining and forging silver were arranged around a second *patio del fuego*, while the assaying offices that would produce the intrinsically pure blanks for making coin, and stamping house that would produce the actual coinage, were arranged around a separate third patio. The central vault that held all the silver from production, occasionally reaching as much as one million pesos, was secured in a far corner of the mint. Called the *arca de las tres llaves*, the vault was sealed with a complex locking mechanism that required three keys to open, and these keys were worn at all times by three specially designated officials.

Maintaining physical control of silver after it entered the mint was a complicated calculus of careful accounting, crosschecking, and doublechecking. When the owners of precious metals brought them to the mint to be turned into coinage, the porter guided them to office of the head accountant (*contador*), who, in conjunction with the *balanzario* in charge of the royal scales, would weigh the metal and examine its purity. The *balanzario* stamped the bars with a hammer, certifying that all the pieces were ready to be taken to the foundry (*casa de fundición*), and took note of all the physical characteristics, including overall weight, purity, and any identifying physical features such as color, markings, or visible defects. Laborers then transferred the silver by handbasket to the foundry where it was weighed and measured before it entered the ovens to be refined to royal standards for coinage. After the refining process was complete, the resulting mass was again weighed and noted. Books of tables explained the expected loss of metals through the production cycle, as slow, 10-12 hour cycles of heating and cooling removed the many impurities--lead, zinc, nickel, cobalt, antimony, arsenic--and gradually raised the silver content, until the desired alloy of pure silver (*metal fino*) and copper (*liga*) was achieved. After the refining process was complete, the silver, now formed into dull, oxidized, thimble-shaped *rieles*, was transferred to the presses (*casa de grabado*) where it would be stretched and cut into unstamped circular blanks (*cospeles*), and brought to a high shine through alternating processes of high heat, and caustic acids, vinegars, salts, and urine. The silver was weighed before and after it was cut into blanks, and weighed again at the stamping house (*casa de volantes*) before and after it was pressed into finished coin. All of the remnants, cuttings, and damaged or discarded blanks were gathered together and weighed, to ensure that the resulting coinage plus the

remnants weighed the same, or within tolerable limits, to the mass of silver that entered. It was generally accepted that any excessive loss of silver during the production cycle was due to theft, and often, incidents of theft were discovered through accounting alone.

In time, the mint grew into a smoking, thrumming hive of more than five hundred specialized *operarios* and *obreros*, working around the clock to meet the high production demands and maintain the delicate processes of metallurgy. Precious materials circulated continuously through the various sections of the mint, at all hours, and the facility employed numerous means of direct oversight to discourage theft. A corps of *guardamateriales* kept a careful account of the various storehouses, tools, and supplies. Three *guardacuchos* and their assistants were assigned to the rooms that housed the official royal stamps. Corps of *guardavistas* supervised the workers as they carried handbaskets, lockboxes, and bags of the various forms of silver--bullion, blanks, cuttings, coinage--from office to office. *Guardas de noche* kept track of the tools and lockboxes after many of the workday processes were over, monitored the quiet interior of the mint, and kept the doors and exterior walls secure from intruders. The highest-level officials, the treasurer, head accountant, assayer, and founder lived on the premises with their families, to better oversee the operations.

At the very top of this hierarchy was the new office of Superintendent. This office represented an absolute centralization of authority, charged by the king with overseeing all matters "governmental, economic, managerial, and providential" (*governativo, economico, directivo, and providencial*) at the mint.<sup>10</sup> No matter should be too insignificant to escape his notice. At all times, the superintendent carried on his person one of the three keys that unlocked the door to the central vault. Each day, he was expected to take handful of coins into his hands and inspect them for quality. He made all appointments to lesser posts, without interference from above, and he personally executed all purchasing agreements for tools and supplies. All these other functions were subordinate to his role as judge, however. In the instructions for the new mint, the superintendent's official title was listed as *Juez conservador y superintendente general*, and his judicial functions were detailed first, owing to the prestige and relevance that the administration of justice traditionally held in the function of Spanish government. In the judicial context, he had absolute authority over civil and criminal judicial cases unless a civil lawsuit exceeded four thousand pesos in value, or if a criminal matter resulted in a death sentence, the only instances that required consultation with the members of the royal *audiencia* or the viceroy.<sup>11</sup> The *audiencia* and viceroy were explicitly prohibited from hearing or interfering in "any matter that falls within the competence of the Superintendent's jurisdiction."<sup>12</sup> All of this centralization of administrative and judicial authority was intended to ensure that production would not be interrupted, as above all,

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<sup>10</sup> *Ordenanzas para el gobierno de la labor de monedas*, Bancroft Library, UC Berkeley, folio 12.

<sup>11</sup> In many ways this collaborative arrangement mirrored that of the checks and balances between the Viceroy and the Royal Audiencia. In this system, executive authority rested in the person of the Viceroy, who had to consult in the most heinous matters with a collegial group of magistrates, who would also serve to limit his fiscal and juridic power. In this way, the government of New Spain radicó in the viceroy, but it was overseen, assessed, and controlled by the *oidores* of the Real Audiencia. See José Soberanes Fernández, "Tribunales Ordinarios," in *Los tribunales de la Nueva España: antología*, José Soberanes Fernández, ed., Mexico, UNAM, 1980, pp. 46-49.

<sup>12</sup> *Ordenanzas para el gobierno de la labor de monedas* (1771), Bancroft Library, UC Berkeley, folio 22. "negocio alguno, que compete a la jurisdiccion del Superintendente."

the superintendent was expected to keep the stamps turning. Accordingly, unlike in the other criminal tribunals New Spain, criminal appeals from the royal mint could not be brought before the Council of the Indies in Spain, owing to the long delays in trading correspondence across the Atlantic. Sentences could be appealed to the viceroy, but the decision of the viceroy was final.<sup>13</sup> The superintendent was assigned a legal staff composed of a trained legal assistant (*asesor letrado*), a bailiff (*alguacil*) who supervised the mint's jail, and two royal scribes who carried out most of the actual legwork in an investigation, such as securing and questioning the witnesses, receiving the confessions, and reading out sentences. The jail in the *Casa de moneda* was a single room on the lower floor of the main patio, near the guardhouses and granary for the stables. It was both the office for the bailiff and the holding area for accused criminals. It was also where most of the steps in the trial process occurred.

### ***Developing Precedents: The Tenure of Superintendent José Francisco Veitia, 1731-1738***

On September 2, 1731, an *oidor* from the *Audiencia* of Mexico, José Francisco Veitia became the first superintendent of the new royal mint. It is a sign of the seriousness with which the crown considered the judicial responsibilities of this new institution that they assigned an *oidor* to be the very first superintendent. Working in conjunction with the viceroy, the ten *oidores* at work in the offices of the *Audiencia* of Mexico in the capital city were considered more than simply the king's direct legal representatives in New Spain. In the political thinking of the early modern period, *oidores* were identified as the very physical embodiment of the king's judicial authority, and they were expected to conform to the highest ideals of judicial decision making.<sup>14</sup> As summarized in the *Novísima recopilación de Castilla* (1804), the legal compilation for peninsular Spain that distilled or replicated many earlier collections of royal law, Spanish law decreed that by administering an "upstanding" or honorable (*recta*) administration of

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<sup>13</sup> The 1771 ordenanzas explain it thus, "(H)aviendo en lo Criminal Sentencia pronunciada de muerte natural, quiero...que para obviar el perjuicio, que puede seguirse, á la parte, del dilatado recurso á mi Consejo de las Indias, á la imposibilidad de seguirlo, y la necesaria demóra, con que llegarían las confirmaciones, ó revocaciones de las Sentencias; conviniendo la mas prompta y justa satisfaccion de las partes, y la vindicta pública, en el breve castigo de los Reos, que merecieren pena Capital, que el Superintendente, oíga las tales apelaciones, para el propio Virrey, y este las resuelva, con voto consultivo del Acuerdo, en las materials Civiles, y en las Criminales, con el de la Sala del Crimen, con la prevencion, de que en los casos, que en una, y otra especie, sean muy notables, dé cuenta, el citado mi Virrey, con justificacion, al referido mi Consejo de las Indias, de las determinaciones, que tomare, sin suspender su execucion." *Ordenanzas para el gobierno de la labor de monedas* (1771), Bancroft Library, UC Berkeley, Capítulo V.

<sup>14</sup> On public ceremonies in late seventeenth-century Mexico City, Alejandro Cañeque writes that when the *oidores* of the *audiencia* of Mexico were gathered together as a group in public ceremonies, "they were constituted in a 'body' endowed with royal power....the *oidores* were reinforcing their image as depositories of the king's power....It was clear to everybody that when the *oidores* were ceremonially congregated together as an *audiencia*, they experienced a symbolic transformation of an extraordinary nature: Rather than representing the king, the *oidores* as a group became the king himself." Cañeque, *The King's Living Image* (New York: Routledge, 2004), 141-142. José Soberanes Fernández, "Tribunales Ordinarios," 48-49. All of the rights and responsibilities of the *oidores* are clearly delineated in the *Recopilación de leyes de los reinos de las Indias*, Book 2, Título 16, "De los presidentes y oidores de las audiencias y chancillerías Reales de las Indias."

justice, *oidores* conferred upon the king's subjects the monarch's "paternal love and care" and engendered "satisfaction and tranquility."<sup>15</sup> *Oidores* were to perform their duties without any promise of enrichment, "free of love or hate," with "honesty," "honor," and "fidelity to the king," and without "deviating from truth or justice."<sup>16</sup> In his seventeenth-century masterwork, *Política indiana*, the political theorist Solórzano y Peireira suggested that *oidores* proceed in their work with "study and deliberation," "concision and clarity," and "motivations" (*ánimo*) that were "free from ire, hatred, or friendship." "He [the *oidor*], acting in God, (and) in his conscience and prudence, should offer his vote and give his counsel (*votar y aconsejar*) informed by good and dispassionate reason," Solorzano wrote.<sup>17</sup> To ensure that *oidores* would remain free from influence and the temptations of graft and bribery, they were not allowed to hold outside offices for pay. They were appointed for life, and awarded a generous fixed salary, rather than depending on fees for services rendered, which was the case for many other magistrates. In addition, a substantial sum of money was set aside to provide for the *oidores*' widows and children upon their death.<sup>18</sup>

As magistrates, the *oidores* for the *Audiencia* of Mexico were responsible for all appeals of judicial decisions from lower courts throughout the whole of New Spain, and acted as the intermediaries for higher appeals to the king's Council of the Indies. Theirs was the court of first instance for *casos de corte*, i.e. criminal cases that arose within Mexico City and within a distance of five leagues in radius, and in all cases in which the interests of the crown or its officials were directly involved. Apart from their judicial duties, the *oidores* served as a sort of consultative council to the viceroy, in much the same way as the Council of the Indies stood in relation to the king of Spain. They also had a degree of legislative power to issue ordinances of local application that were subject to royal approval. In this way, *oidores* were a critical component of the division of royal authority in Spanish imperial government.<sup>19</sup> As with other posts of this magnitude, *oidores* were directly appointed by the king, or his council of the Indies. For many, the post was considered the culmination of a long career as a royal adviser,

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<sup>15</sup> *Novíssima recopilación de Castilla*, Tomo 2, Título 11, Ley 7, "Debiendo yo aplicar por todos los medios posibles mi paternal amor y cuidado á mis vasallos hallen en la recta administración de justicia la satisfacion, tranquilidad, y ventajas que de ella se siguen; mando á mis Ministros, se dediquen muy especialmente al cumplimiento de sus obligaciones en este importante asunto, dando con la mayor brevedad curso á las dependencias que estan á su cargo, y conteniéndose cada uno en lo que pertenece á su empleo."

<sup>16</sup> *Novíssima recopilación de Castilla*, Tomo 2, Título 11, Ley 1, "Los pleytos que ante nos vinieren los libremos, lo mas aina y mejor que pudieremos, bien y lealmente, por las leyes de los fueros y derechos, y ordenanzas de vuestros Reynos; y que por amor ni por desamor, ni por miedo, ni por con que nos den ni prometan, que no desviaremos de la verdad ni del derecho: otrosí, que no rescebiremos don, tierra, ni acostamiento, ni mercedes de ningun Grande, ni Consejo ni Universidad, por pleyto ni provision, ni de hombre alguno que nos las diesen por ellos: y si los así hicieremos, Dios Todo poderoso nos ayude en este mundo á los cuerpos, y en el otro á las ánimas; y si no, él nos lo demande mal y caramento." Ley 4, "Ley 4, "Mandamos á los Presidentes y Oidores, que hagan tratar y traten á los pleyteantes y Abogados y Procuradores con la honestidad que deben ser tratados, y los honren según que cada uno lo merece ó mereciere; y si alguno de los Oficiales de la Audiencia tratare mal á los litigantes, los castiguen de manera que á ellos sea castigo y á otros escarmiento."

<sup>17</sup> Juan de Solórzano y Periera, *Política Indiana* (Mexico: Matheo Sacristan, 1736), Tomo 2, 135.

<sup>18</sup> *Novíssima recopilación de Castilla*, Tomo 2, Título 11, Ley 6-8, 15, 17.

<sup>19</sup> Clarence Haring, *The Spanish Empire in America* (New York: Harcourt, Brace, and World, Inc., 1947), 110, 122-127.

especially if the appointment was to the prestigious *Audiencia* of Mexico, part of the viceregal court and the most politically influential of the eight colonial *audiencias*.<sup>20</sup>

We know very little of the new superintendent Veitia's background. Generally, however, *oidores* were culled from the ranks of the *alcaldes del crimen*, ministers who adjudicated criminal cases for the *Real sala del crimen*, the criminal court of the royal *audiencias*.<sup>21</sup> This meant that Veitia likely had significant experience in adjudicating criminal cases before becoming Superintendent at the mint. His experience would be critical in these first years, because though the mint was modeled on those in Spain, it was a new colonial institution. Veitia could draw from a detailed set of instructions from the king, but there were no stable institutional precedents to guide him, such as in other longstanding courts in Mexico City like the General Indian Court or the local municipal tribunals. Rather, informed by his years of experience as an *oidor*, Veitia would establish the procedural and retributive precedents for this new royal enterprise.

Soon, this chapter will turn to an examination of these early decisions, but before doing so, and in order to place Superintendent Veitia's decisions into an appropriate interpretive frame, it is important to outline an important principle of flexibility and individual discretion with regards to individual decision making that was integral to Spanish law: *arbitrio judicial*, or judicial "will." This principle, little studied in modern historical literature, was central to Spanish legal thinking, and was comprised of a range of interconnected modes of thinking and reasoning about criminal cases that well-trained judges were expected to employ in their work. It was central to the casuistic, case-based Spanish legal system.

Spanish law of the early modern period drew extensively from the early legal codes of the Roman Empire such as the fourth-century *Codex Theodosianus* and the sixth-century *Corpus Iuris Civilis*. Roman law was designed to be adaptable to the particular needs of the diverse regions of the empire, and the Spanish kings of the medieval period integrated Roman principles of adaptability into comprehensive legal codes, the *Siete Partidas* and *Fuero Juzgo*, in order to stimulate cohesion and generate political influence among the varied territories of the Iberian peninsula.<sup>22</sup> These principles were preserved in the later legal compilations of the early modern Spanish imperial monarchs who sought to extend this influence to an array of diverse peoples and territories, especially those in the New World.

As Brian Owensby explains, Roman law clearly distinguished between two legal concepts--*ius*, or what was considered "just," and *lex*, or what was duly promulgated by law, usually in a written form. *Ius*, or justice, and not *lex*, or what was lawful, was the goal in the resolution of legal disputes. It was well understood by Roman legislators that *ius* did not arise from a mechanical application of written law alone. The search for justice necessarily involved human agency, and especially human reasoning. It was less

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<sup>20</sup> Haring, *The Spanish Empire in America*, 120.

<sup>21</sup> Soberanes, *Tribunales de la Nueva España*, 121.

<sup>22</sup> Joseph F. O'Callaghan, "Alfonso X and the Partidas," in Robert I. Burns, S.J., ed, *Las Siete Partidas: The Medieval Church, The World of Clerics and Laymen*, vol. 1 (University of Pennsylvania Press, 2001), xxx-xli.

a science and specific methodology, than, as Celsius described it, an applied "art of the good and the equitable."<sup>23</sup>

In Spanish law the term *derecho* came to replace *ius*, without losing the spirit of the original, just as *ley* replaced *lex*. In legal documents of the Spanish monarchs, just as in its Roman antecedents, the primary emphasis was always on *derecho*, the process of arriving at justice, rather than on the written law alone, *ley*. Although judges had an obligation to the letter of the law, at the end of the day, they were supposed to find a just outcome according to the particular details of each case. It was not to be an exercise in arbitrariness, though such an approach was open to abuse. Rather, Owensby states, judges arrived at a just outcome (*derecho*) by virtue of "a principled and disciplined search for the particular truth of each case on its own terms by appeal to relevant authorities, and in light of experience."<sup>24</sup>

This emphasis on reasoning was especially pronounced when there was no obviously applicable law. It was in these moments that judges were expected to call upon their training and well developed faculties of reasoning and impose their will, through *arbitrio judicial*, upon the proceedings, finding a just resolution for a dispute based on careful interpretation of the facts, which might depart from written law. As the great legal scholar of the nineteenth century, Joaquin Escriche, put it: "not having [available to them] law nor legitimate custom, and equally lacking recourse to analogy [which was forbidden as a reasoning device in criminal cases]...a judge, to fix his determination, seeks the help of reason."<sup>25</sup>

Trained *razón* in the absence of written law lay at the heart of *arbitrio judicial*. Judges arrived at a just outcome, Escriche wrote, via "the profound study of *derecho*, trying to penetrate the spirit of the laws [with local application] (*patrias*), examining the doctrine of our learned scholars whom with great experience explained, interpreted, and glossed the laws, nurturing their spirits with the teachings of the classic works of universal legislation or natural law, and searching at times for examples or precedents of sentences given by wise tribunals" to resolve any doubts.<sup>26</sup>

Victor Tau Anzoátegui studied Spanish and American legal manuals of the sixteenth through eighteenth centuries, and found that, in aggregate, the manuals suggested that in the absence of clear written law, judges should rely on five finely tuned faculties: *sciencia*, or substantial awareness of the relevant books and laws; *experiencia*, both in the exercise of their duties, and in their knowledge of the local politics and demographics; *entendimiento agudo*, a "keen understanding" that reflected innate talent for law combined with experience, which together allowed them to accurately apply the

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<sup>23</sup> These ideas are raised by Owensby in *Empire of Law*, 44-47. See also, Victor Tau Anzoátegui, *Casuismo y sistema: Indagación histórica sobre el espíritu del Derecho Indiano* (Buenos Aires: Instituto de Investigaciones de Historia del Derecho, 1992), 40, 53, 57.

<sup>24</sup> Owensby, *Empire of Law*, 47.

<sup>25</sup> no habiendo ley ni costumbre legitima, y faltando igualmente el recurso de la analogia, fuerza será que el juez, para fijar su determinacion, busque el auxilio de la razón y de la equidad natural."

<sup>26</sup> Joaquín Escriche, *Diccionario razonado de legislación y jurisprudencia* (Madrid, 1847), Tomo I, 646, "Arbitrio del juez," "al estudio profundo del derecho, procurando penetrar el espíritu de las leyes patrias, examinando la doctrina de nuestros autores con larga experiencia las explicaron, interpretaron, y glosaron, fecundando su espíritu con la lectura de las obras clásicas de legislación universal o derecho natural y buscando á veces los ejemplos ó precedente de sentencias dadas por tribunales sabios entre los puntos en que recaen sus dudas."

law according to the details of each case; *rectitud de conciencia*, or integrity of conscience, which was comprised of ethical, moral, and religious virtues; and *prudencia*, a type of "discretionary knowledge" (*conocimiento discreativo*), that gave them the ability to recognize when and how to act in a given case, and when and how to refrain from acting.<sup>27</sup> Writing in 1785, Lorenzo Guardiola y Sáez imagined that judges employed the interpretive skills and reasoning of a physician, "[They] must hear both parties, without letting go of first impressions, recognizing their defenses, in law, and according to the circumstances of the incident: crime and considering the cause, the person, place, time, quality, quantity, and effect, as a good doctor considers [these elements] when curing serious diseases."<sup>28</sup>

Certainly, drawn from legal primers, the terms outlined above represent an ideal for judicial decision making, but they also offer clues for how to close the significant interpretive gap between the expected outcomes in the early theft cases that Superintendent Veitia adjudicated, based on an unequivocal royal mandate for a death sentence, and the actual outcomes, which were Veitia's varied sentences of corporal punishment, shaming, and public works labor. As the cases that follow will illustrate, the superintendent was faced with a significant moral dilemma. The royal mandate for a capital sentence in all theft cases was based on a resolute royal imperative to control crime related to coin production and circulation. Veitia had a responsibility to obey the king's commands and eliminate theft at the mint. But, the superintendent had before him a string of cases of theft that involved no more than a few pesos, and in important details the cases did not readily conform to royal law. The case records suggest he used forms of legal reasoning very much like those suggested by legal primers. Veitia had to choose a course of action that would best resolve his competing responsibilities as reasonable and merciful royal judge and as exacting administrator of the mint.

This next section begins with the very first case he tried, and then moves through a selection of cases in chronological order. Although Spanish judges weren't required to offer the reasoning behind their decisions, and evidence of Veitia's actual reasoning is thin, by analyzing these theft cases as a group, clear patterns of *arbitrio judicial* emerge.

### *Antonio de Zúñiga*

On the afternoon of January 18, 1733, in one of mint's stamping houses, a group of five workers assisted *acuñador* Pablo de Gojne to press a mass of silver blanks into finished specimens of the famed Spanish silver *reales de a ocho*.<sup>29</sup> When they had finished, the workers gathered the finished coin into a handbasket for weighing and delivery for the final preparations before the coin left the mint and entered circulation. Ordinarily, this was an uneventful procedure that took place many times during the day. This time, the guard in charge of accounting, the *guardacuña* Juan de Gamero,

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<sup>27</sup> Anzoátegui, *Casuismo y sistema*, 488.

<sup>28</sup> Lorenzo Guardiola y Sáez, *El corregidor perfecto, y juez exactamente dotado de las calidades necesarias y convenientes para el buen gobierno económico y político de los Pueblos y la más recta administración de justicia en ellos*, (Madrid, 1785), 100. "debe oír a ambas Partes, sin dejarse llevar de las primeras impresiones, admitiendoles sus defensas, conforme a derecho, y atendiendo a las circunstancias de los hechos: y en los delitos considerando la causa, la persona, el lugar, el tiempo, la calidad, la cantidad, y el efecto, según así lo considera el buen Médico para curar las graves enfermedades."

<sup>29</sup> AGN, Criminal, Vol. 602, exp. 3, fjs. 29-48.

announced that the basket of coins weighed exactly one peso less than it did at entry. Production in the stamping house halted and a guard was quickly dispatched to notify Superintendent Veitia. A physical count of the coin confirmed the loss, and Veitia ordered that everyone present in the stamping house at the time of the theft, workers, guards, and supervisors, be sequestered, interrogated, and searched for the missing coin.

As the interrogation unfolded, Antonio de Zúñiga, a Spaniard who turned one of the spoked arms of the stamping presses, mentioned quietly to the guard Gamero that a fellow assistant on the stamping press, Juan Baptista de Hoyos, had taken the missing silver. However, as the workers stripped and shook out their clothing, Gamero and the other guards discovered that Zúñiga, and not his *compañero*, had hidden a coin in the instep of his left shoe. Zúñiga was arrested and led to the mint's ground floor jail, and the other guards and workers, potential witnesses to the crime, were assembled for questioning. Several workers reported seeing Zúñiga quietly take a coin into his hand after it had fallen from the presses rather than return it to the production baskets.

The superintendent's scribe, Sebastián López, gathered together the witness testimony into a folder of documents, and took them to Veitia's office. These documents served as the evidentiary *sumaria*, or initial summary investigation, which, according to fundamental Spanish civil legal procedure, helped the superintendent justify any further procedural steps. With the crime confirmed by corroborating witnesses, Veitia asked López to walk the few short blocks to the offices of the *audiencia*, to find a legal advocate to represent Zúñiga, an advocate for the poor (*procurador de pobres*) who would have his fees paid by the crown. The scribe was then to return to the mint and go to the prisoner's cell to document the man's confession.

In the context of a criminal matter like this, confession did not serve the same purpose as the Christian sacrament, in that it was not aimed at helping Zúñiga atone for sin and achieve reconciliation with God. Here, confession was an opportunity for the accused to frankly discuss the circumstances of the crime, admit or deny guilt, and appeal to the judge for clemency. It was also an important opportunity for a knowledgeable scribe to engage in a probing dialogue with a suspect about the details of the crime, and through careful questioning unmask criminal intent and expose other crimes or accomplices.<sup>30</sup>

In his cell, Zúñiga admitted to the scribe that while working with the presses he had taken a coin from the floor and concealed it inside his shoe. This was an important first step in establishing a case against Zúñiga. Deliberation was a critical part of establishing criminal intent, separating accident from forethought. López asked Zúñiga if the coin was on the ground, didn't he know that he wasn't supposed to handle it, except to return it to his supervisor, the *acuíñador* Goyne? Zúñiga answered that while he was aware of this general rule, he was struck by the unusual workmanship on the coin in question, and he took it so that he could examine it more closely in the privacy of his

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<sup>30</sup> Of course, it is problematic to suggest that as a group notaries acted according to the high standards set out for their profession. According to Kathryn Burns' study of early modern notaries in Europe and the Americas, confession just as easily provided opportunities for corrupt scribes to manipulate the facts of a case and perpetrate fraud. The "clear constructedness of the early modern notarial record, its cultural exclusivity, and the doubts contemporaries entertained about [notaries]," together suggests the slippery nature of what Burns calls "notarial truth." See Kathryn Burns, "Notaries, Truth, and Consequences," in *The American Historical Review*, 110:2, April, 2005, 350-380.

home. The plan was to return the coin to the mint a day or so later and simply mix it back in among the other silver *reales*. The scribe grew more aggressive with his questioning: If you knew you had taken the coin, he asked him, why then did you accuse your *compañero*, Hoyos, of taking it? Zúñiga answered that at other times he had observed coins fall from the presses, and at the time the coin in question had gone missing, Hoyos was the individual closest to the stamp. Perplexed by this answer, the scribe pressed Zúñiga. Wasn't this an inconsistent and malicious accusation? You accuse a fellow worker, but the coin was in your shoe when you made your accusation. Deliberative malice (*malicia*), or knowing desire to do wrong, was a characteristic that could heighten the seriousness of a crime and call for an increased sentence. This confession became part of the growing stack of documents that would guide the superintendent as he rendered his judgment.

Later that same day, the advocate who was assigned to defend Zúñiga, the *procurador* Balthazar de Vidaurra, entered the mint with several written requests. He asked to confer with his client, and also for a time extension of a few days so that he could familiarize himself with the details of the case. He also asked the scribe to compile a report of the laws that applied to theft of silver coin from the mint. Vidaurra then asked for some evidence the superintendent had notified Zúñiga of the laws and resulting punishments before the crime occurred (*notoriedad*). If Zúñiga was ignorant of the law it would not absolve him of crime, but it could help to mitigate his sentence.<sup>31</sup>

The scribe, López, consulted reference works in the superintendent's library and found provisions from the 1567 *Nueva recopilación de Castilla*, as well as viceregal *ordenanzas* published in 1583 and reaffirmed in 1594. The laws from the *Nueva recopilación* were unequivocal, the scribe intimated in his report. Neither coinmakers, their assistants, nor any other person could remove from the royal mint any coinage, without it first having been tallied by the appropriate officials, "under punishment that they are killed for this and lose all of their property."<sup>32</sup> In addition, ordinance 42 of Viceroy Lorenzo Suárez de Mendoza's, *Ordenanzas para la Real Casa de Moneda de ésta Nueva España* (1583), stated that "coinmakers deliver the worked coinage in its entirety, without missing the slightest bit...and that the aforementioned Treasurers and *Alcaldes* of the mint punish [those who steal] according to the laws and ordinances." This ordinance was specifically reiterated in an *Auto de visita* issued by the king's representative Pedro de Gálvez, who was sent to inspect coin production in the colonies in 1594. Gálvez stated that in criminal matters at the mint, punishment should occur "with all punctuality," and that the ministers should "preserve, fulfill, and execute" all the applicable laws and their respective punishments.<sup>33</sup>

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<sup>31</sup> Escriche, *Diccionario razonado*, Tomo 3, 167-168, "Ignorancia."

<sup>32</sup> Unless otherwise noted, all subsequent quotations come from the case record for AGN, Criminal, Vol. 602, exp. 3, fjs. 29-48, "Algun obrero, ni monedero ni otra persona alguna no pueda sacar, ni saque de las dichas casas de moneda, moneda alguna, de las dichas monedas de oro y plata, y vellon antes de ser del todo acabada y librada por nueva Tesorero y ensayador y Maestro, y Guardas, y escrivano so pena que lo maten por ello, y pierda todos sus bienes."

<sup>33</sup> The second point of law came from a printed set of directives titled "Ordenanzas para la Real Casa de Moneda de esta Nueva España declarada por el Exmo. Sr. Conde de Coruña, Virrey que fue de esta Nueva España." Ordinance 42 stated, "que los acuñadores entreguen la moneda labrada enteramente, sin que falte cosa alguna de ella...y que el dicho Thesorero y Alcaldes de la Casa los castigasen conforme a las leyes y ordenanzas." Y despues por el capitulo quatro de ordenes dadas por el Sr. Dn. Pedro de Galvez en su auto

As for the question of *notoriedad*, the scribe explained that on numerous occasions, in public speeches to the assembled worked and in written notices to them, the new superintendent had made the law very explicit, instructing all mint employees that they must proceed in their labors "with the loyalty, legality, and purity that all should observe in the manufacture of silver, as much as for the grave capital punishment [that is recommended] for those who participate in whatever manner of extraction of coinage or silver."<sup>34</sup> Specifically, in an address from the ceremony for dedicating the new mint, just a few months before Zúñiga committed his crime, and with Viceroy Juan de Acuña in attendance, Veitia ordered that the individuals that were responsible for cutting and pressing coin, under no pretext nor motive should permit, consent to, or tolerate that any coin, whether finished or unfinished, fragment or cutting, be taken from this royal house, without having all of this coin weighed and measured according to royal standards, under penalty of the life and confiscation of the property of those who, to the contrary, commit, tolerate, or assist [in these criminal actions].<sup>35</sup> López indicated that a transcript of this very clear, formal notice was visibly posted on the door to the stamping houses.<sup>36</sup>

From this report *Procurador* Vidaurra mobilized his defense, which rested on three key claims. First, he argued, the cited laws were inapplicable. The law from the 1567 *Nueva recopilación de Castilla* and the viceregal ordinances referred to instances in which an individual actually removed coin or silver from the mint. The law clearly stated, "that no person take (*saque*) from the royal mints any of the gold, silver, or *vellon* (a lesser-used coinage made from an amalgam of copper and silver), without it first being

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de visita proveido en veinte y cinco de febrero de 1594, mandó que el Thesorero tuviere mucho cuidado de hacer que los Acuñaadores entregasen la moneda labrada enteramente, sin que faltase cosa de ella aunque dijessen que se les descontasen por sus salarios conforme a los dispuesto por el Sr. Conde de Coruña en la ordenanza que hizo executando con toda puntualidad las penas, las quales dichas ordenas se guarden, cumplan, y executen como se han referido y con sus penas."

<sup>34</sup> "con la fidelidad, legalidad, y pureza que todos devian observar en el manejo de la plata, a si por las graves penas capitales que ay contra los que yncurren en qualesquiera extraccion de monedas o plata que para ella se dispone, en qualesquiera forma que se halle."

<sup>35</sup> "a las personas que cooren con el cargo de cortar y acuñar dichas monedas que con ningun pretexto ni motivo permitan, consientan, ni toleren que moneda alguna sellada o no sellada, ni fracmento, o cortadura se sisalla salga ni saque de esta dicha Real Cassa sin estar todo esto moneda pesado y reensaiado al peso y ley que su Magestad manda pena de la vida y confiscacion de los vienes del que lo contrario hiziere, tolerare o dispensare."

<sup>36</sup> The passage in bold was underlined in the case record: "Siendo presente al ynicio de acuñar por Bolante el Exmo. Sr. Marques de Casafuerte, Virrey Governador y Capitan General de esta Nueva España y Presidente de dicha Real Audiencia, los Ministros y oficiales maiores de dicha Real Cassa y otros muchos republicanos de la primera distincion para asistieron a su excelencia con dicho Sr. Juez Superintendente y en onor de su Magestad y Celebridad de excito feliz de obra tan de su Real agrado y de veer complasido el celo dicho Sr. Exmo Virrey a cuio cuidado y desbelo sea devido el progreso de semejante util, y profiquo servicio se rrepartieron las primeras monedas que se acuñaron en el primer Bolante para nuestras y alegria del pueblo sin haverse antes reensaiado en conformidad de la Ley que por esta vez se dispenso en honor de tanto nombre y Magestad como representava el acto, y no deviendo pazar de aqui esta dispensa en observansia de la citada Ley y ordenanzas de esta Real Cassa, **mandava y su SSa. mando se notifique a las personas que corren con el cargo de cortar y acuñar dichas monedas que con ningun pretexto ni motivo permitan, consientan, ni toleren que moneda alguna sellada o no sellada, ni fracmento, o cortadura se sisalla salga ni saque de esta dicha Real Cassa sin estar todo esto moneda pesado y reensaiado al peso y ley que su Magestad manda pena de la vida y confiscacion e los vienes del que lo contrario hiziere, tolerare o dispensare**, y pongase un tanto de este auto a la puerta de los Bolantes y asi lo proveio, mando, y firmo."

counted and weighed."<sup>37</sup> In this instance, no silver ever left the *Sala de volantes*, let alone the *Real casa de moneda*, proper.<sup>38</sup> The hateful and onerous (*odiosa y pena*) capital sentence associated with this law should be narrowly restricted only to those matters to which it refers, "which signifies the physical and material act of taking coin outside of the royal mint, and moving it from one plate to another, which is the proper and rigorous signification of the work 'saque.'"<sup>39</sup>

Consummation was necessary here, Vidaurra argued, just as it was necessary in the crime of *rapto*, or abducting a woman from her home, typically for sexual purposes. If, during an investigation of a *rapto* case, authorities discovered that the aggrieved woman was not actually taken from her home, if the physical act of taking her from one place to another did not occur, then there was no crime of *rapto*, and by consequence, "one cannot impose on the accused the punishment for a *raptor*."<sup>40</sup>

Really, Vidaurra argued, put into appropriate context, the true purpose of the law was to keep bad money from circulation because what the law treated had "no other end but that imperfect coin does not leave to the public, or that the owner of the silver or the silver merchant take the silver without the prerequisite of its having been weighed and measured such that he would incur in the punishment of the law."<sup>41</sup> And, the letter of the law referred to the responsibility of the *acuñador* to deliver all the coins he has produced, "which was clearly something very distant from this current matter."<sup>42</sup>

For the second part of his defense, Vidaurra argued that in the tradition of Spanish civil law, proper notification (*notoriedad*) was essential for any new law to take effect. If the superintendent and his superiors had clearly designated theft from the mint as a

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<sup>37</sup> "Ninguna persona *saque* de las reales casas de moneda alguna de las de oro, plata o vellon, antes de ser de el todo acabada y librada."

<sup>38</sup> "[E]n el presente caso, es haversele aprehendido de la moneda a mi parte en la oficina de los bolantes, no ha la sacado de la Real Casa, ni aun si quiera de dicha oficina."

<sup>39</sup> "que significan el hecho fisico y material de sacar la moneda fuera de la Real Casa, y contrectarla de un lugar a otro...que este es el proprio y riguroso significado de aquella palabra *saque*, que contiene la ley fuera de que tampoco habla esta serca de los hurtos de la moneda hechos dentro de la Real Casa, que es la materia que se versa, sino solo en el supuesto de que se saque sin haverse librado y acavado de el todo aunque no haiga mas prohibicion para sacarse que la de dicha ley, y aunque la extraccion sea licita ex alio capite." With regards to punishment, the terms *odiosa* and *pena* referred specifically to a capital sentence. The terms of both Roman and Spanish criminal law state that when penal law recommends a capital sentence, the law should be applied according to a very narrow interpretation. In other words, there should not be any doubt with regards to the applicability of the law, since a human life hung in the balance. See Esriche, *Diccionario razonado*, Tomo 4, 157-159, "Interpretacion," which reads, "Las leyes penales y todas las demás que sean odiosas, han de interpretarse estrechamente *en caso de duda*, y no deben extenderse fuera de los casos y personas para que se han dado. *Intepretatione leguna pana mollieade sunt potius quam asperandce*: ley 42, tít. 19, lib. 48, D. *In ambiyuis rebus humanioreu sez ten tiara seqli oporleí*: ley 10, tít. 5.º, lib. 34, D. *la yenalibus causis beaiynius interpretandum est*; reg. 155, tít. 17, lib. 50. D. *Odia restringi, et furores conveait ampliari*; 15, *de reg. jur. in 6*. Se ha dicho *en caso de duda*; pues si las palabras y la intencion de la ley odiosa ó penal son tan claras que no admiten interpretacion, habrá de observarse la ley con toda exactitud, por mas dura y rigurosa que parezca : *Quod quiden perquam durum est; sed ita lex scripta est*. V. *Arbitrio de juez* en la parte que trata de la *Analogía*."

<sup>40</sup> "y por consecuencia no puede imponerse al delincente la pena de Raptor."

<sup>41</sup> "Por que a lo que se percive no es otro el fin sino que la moneda no salga imperfecta al público, y assi aunque el dueño o mercader de plata la sacara sin el requisito de estar acavada de el todo y librada parece que incurriera en la pena de la ley"

<sup>42</sup> "Tampoco puede adaptarse la ordenanza por que esta prohíbe que los acuñadores dexen de entregar enteramente todo el dinero que se les diere a acuñar, y esto es cosa muy distante de el negocio,

special form of theft that merited a death sentence, Zúñiga had not been properly notified. The man had only worked at the mint for a month, and so clearly was not present for the superintendent's announcement, and as Zúñiga was also illiterate, he could not read any posted announcements.<sup>43</sup>

Last, the *procurador* pointed to statements he had collected from a number of Zúñiga's close friends and acquaintances who testified that although he was a good person, "of good customs, without any vices, and reputed to be man who obeyed the law (*hombre legal*) and who can be trusted (*de confianza*)," he was also thought to have certain defects, and "limited capacities, manifested through a narrow range of aptitudes, [such that he is] an incapacitated man, simpleminded, or demented."<sup>44</sup> Spanish law explicitly forbid capital punishment for individuals who were thought to be incapable of understanding the immorality of their actions (*sin razón*).<sup>45</sup>

Vidaurre concluded his defense and it was added to the collection of evidence that the scribe gathered and submitted to the superintendent for review. Two days later, after considering the relevant materials, Veitia issued his sentence. He declared that he had reflected on the malicious intent (*malicia y dolo*) with which Zúñiga accused his co-worker, and the frivolous (*frívola*) excuse that he gave for making this accusation during his confession, as well as the damning testimony of the various direct eyewitnesses, and Zúñiga's clear and full confession. But, Veitia stated that he balanced this information with the written argument by the procurador, and the allegations of Zúñiga's disabilities.<sup>46</sup> Finally, Veitia ordered a two-part sentence: Zúñiga would be taken from the jail and brought to the main patio of the mint. There, he would be stripped from the waist up, and

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<sup>43</sup> "Respecto de mi parte el hurto de la moneda a un hurto simple y no calificado; y la rason es que las leyes estatudos, ordenanzas, y constituciones, no ligan aun subditos ni tienen fuerza hasta el dia en que se promulgan ya hazen notorias, es assi que a mi parte no se ha intimado, ni se intima en el tiempo que estubo trabajando tal ordenanza, ni tal ley, por es como consta de la prueba que tiene dada, y por publico y notorio en esta Real Casa, lo alego, havia entrado a trabajar de peon como un mes antes de hverse le aprehendido el peso, y como se percive de la certification y testimonio puesto por Phelipe Vello Lira Escrivano Real, el auto de Vssa, en quanto se sirvio de mandar con pena de la vida que no se sacase moneda alguna de la Real Casa fue a dos de Abril del año proximo pasado, y la notoridad en el mismo dia: luego es ebidente que a esto reo no de le hizo...hasta de alli a ocho meses y mas no entro en la Real Casa, y aunque se certifica que dicho auto esta fixado, no se induce de a que la notoriedad que eran menester dos cosas."

<sup>44</sup> "de buenos costumbres, sin ningun vicio, y reputado por hombre legal, y de confianza...muy poca capacidades manifestado por sus pocas alcances al ser hombre yncapaz, de razon simple, o demente"

<sup>45</sup> "a havido ocasiones en que a estado el susodicho tan alborotado que por acciones ha puesto a el testigo la inteligenica de que se aya algo dementado, y que continuamente en su cassa y en la consideracion de los que lo han comunicado reputado por un hombre simple y en muchos ocasiones incapaz de razon que esto es lo que sabe y puede dezir." Various passages from the *Siete Partidas* make clear this determination regarding insanity. *Siete Partidas*, *Partida* 7, tit 10, ley 10. See Escriche, *Diccionario razonado*, Tomo 3, 942, "Loco."

<sup>46</sup> "Haviendo visto estos autos y causa criminal fulminada di oficio de la Real Justicia y por declaracion de Dn. Pablo Goyne Acuñaador de la nueva moneda en dicha Real Casa, contra Antonio de Zuñiga español que le asistia yleria al bolantes donde se acuña la dicha moneda, por haversele aprehendido dentro del zapato una moneda del pesso de ocho reales de plata, la misma que le havia faltado al mencionado acuñador al tiempo de la entrega, por peso y quenta que era de su cargo: la malicia y dolo con que el referido Antonio de Zuñiga acusso de este hurto a Juan Baptista de Hoyos su compañero en dicho Bolante: la frivola disculpa que dio desta acusacion maliciosa: la combiccion y confesion hecha de plano por el enunciado reo: ynformacion summaria hecho demas dicho por los testigos del plenario: con lo deducido y alegado por por su procurador Balthazar de Bidaurre, en hombre de su parte cerca de su vida y costumbre, y de la amenia que dize haver padecido con lo demas que debio veerse."

exhibited as a powerful didactic example of the penalties for criminal behavior through an hour of *vergüenza*, public shaming with a crier (*pregonero*) announcing his crime to his fellow workers "so that to all he would serve as an example" (*para que a todos sirva de ejemplo*). He would also be permanently denied work at the any royal mint, and he was ordered to pay all legal costs.<sup>47</sup> A short letter from the scribe at the end of the case confirmed that the punishment occurred the very next day.

Turning to an examination of the sentence, all of its terms and evidence of the superintendent's reasoning in fashioning it as he did constitute a mere two paragraphs of a long thirty-page document that is mostly comprised of witness testimony and pro forma acknowledgement of procedural steps related to the case. By law, Spanish judges were discouraged from justifying their sentences in writing. As a result, there is little further direct evidence of the type of reasoning that Veitia engaged in during sentencing. That said, it is possible to tease out reasoning for these sentences by comparing the terms of the sentence to the applicable laws on which they were based. Veitia's terse declaration of sentence obscures two of his important determinations.

First, the superintendent had to make a clear decision as to the type of theft act that he thought occurred. Spanish criminal law distinguished between two forms of theft (*hurto*), a larger category of *hurto sencillo*, which was general, uncomplicated property theft, and a narrower category of *hurto calificado*, which was property theft that the law set apart as especially serious in light of the location where the theft act occurred or the type of person or object that was targeted. The law that formed the basis for the 1567 *Nueva recopilación de Castilla*, cited by the scribe in his report, and the later 1730 *ordenanzas* for the royal mint was a line from the seventh *Partida*, that singled out as perpetrators of *hurto calificado*, "the King's officials who guard the treasury."<sup>48</sup> When Veitia made his opening address to the mint's workers some months earlier that no one should take materials from the mint under penalty of death, he was reaffirming a traditional interpretation that theft of funds from the royal treasury was a type of *hurto calificado*, punishable by death, and not the lesser *hurto sencillo*.

The *procurador*, Vidaurra, raised the question of whether Zúñiga's actions should be interpreted as *hurto sencillo* or *hurto calificado* on the basis of *notoriedad*. Viadurra argued that Zúñiga was unaware of the severe repercussions for stealing coinage and implied that the superintendent was responsible for the worker's ignorance of the law because the superintendent had only made this announcement once, before Zúñiga was employed at the mint. As a result, the superintendent's insistence in his inaugural speech that the crime was punishable by death carried no legal force since for a new law to

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<sup>47</sup> "Fallo: Atento a los autos y meritos de la causa a que me refiero que debo condenar y condeno a el dicho Antonio de Zuñiga a que de la carcel donde se halla sea sacado por el Patio Principal de la dicha real cassa de moneda desnudo de medio cuerpo arriba y puesto a la vergüenza por tiempo de una hora y a voz de pregonero que publique su delicto, para que a todos sirva de ejemplo: y condenandolo como asimismo lo condeno en perpetua privacion de oficio exercicio en dicha real cassa de moneda mando salga de ella, pagando las costas de esta causa en que tambien lo condeno, y por esta mi sentencia difinitivamente jusingando asi lo pronuncio y mando."

<sup>48</sup> The definitive law for *hurto calificado* was and remained the medieval *Siete Partidas*. The law that was the basis for the royal ordinances of 1730 was *Partida 7*, título 14, ley 18, which stated, "oficiales del Rey que toviere dél algunt tesoro en guarda, ó que hobiese de recabder sus pechos ó sus derechos." The *hurto calificado* laws of the *Siete Partidas* were preserved in all the most important iterations of Castilian law into the nineteenth century. See, especially, Book 12, título 14, ley 1 of the *Novíssima recopilación de Castilla*.

apply, Spanish law required clear evidence of *notoriedad* well before a criminal act occurred.<sup>49</sup>

It is unclear if this particular argument regarding *notoriedad* swayed the superintendent. Judging by the terms of the recorded sentence it seems clear that despite Veitia's initial insistence during his inaugural speech that theft from the mint was *hurto calificado*, which he based on a robust written tradition, he ultimately decided in this case that Zúñiga should be punished according to the lighter recommendations for *hurto sencillo*. Into the nineteenth century, and with surprisingly few alterations in form or content, the seventh of the *Siete Partidas*, entitled "De las penas," was the primary guide for Spanish magistrates when determining the terms of punishment. The *Partidas* decreed that in cases of all *hurto*, convicted thieves should suffer two types of punishment, "pena de pecho...[and]...pena de castigo, [or] escarmiento."<sup>50</sup> The object of *pena de pecho* was to reimburse the victim of theft for losses he or she incurred as a result of the theft, financial restitution that could reach three to four times the value of the stolen item. *Pena de castigo*, or *escarmiento* was a retributive punishment that involved both bodily pain and humiliation for the victim, often delivered publicly, as a demonstrative spectacle and deterrent to future theft, generating fear both in the convict and in the viewing public. For *hurto calificado*, bodily pain and humiliation were joined in a single event, a public execution. By contrast, for *hurto sencillo*, the deterring *pena de castigo* was separated into two elements, the bodily pain of corporal punishment, and the humiliating exhibition of *vergüenza*, or public shaming.<sup>51</sup> In written law, the punishment for *hurto calificado* was absolute, punishable by death with very narrow justifiable allowances for a judge to deviate from the written law. In cases of *hurto sencillo*, by contrast, the exact type and severity of punishment was a *pena arbitraria* that was up to the discretion of the judge. Whipping was the most common form of corporal punishment, and convicts were typically assigned between one hundred and two

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<sup>49</sup> The following is derived from the defense statement written by *Procurador Viadurra*, "Lo segundo, que cuando se consediera extencion de la ley y la ordenanza, contra la regla de derecho, o lo que es mas, quando terminantemente hablaran en el caso aun entonces quedaba reducido respecto de mi parte el hurto de la moneda a un hurto simple y no calificado; y la rason es que las leyes estatudos, ordenanzas, y constituciones, no ligan aun subditos ni tienen fuerza hasta el dia en que se promulgan ya hazen notorias, es assi que a mi parte no se ha intimado, ni se intima en el tiempo que estubo trabajando tal ordenanza, ni tal ley, por es como consta de la prueba que tiene dada, y por publico y notorio en esta Real Casa, lo alego, havia entrado a trabajar de peon como un mes antes de hverse le aprehendido el peso, y como se percive de la sertificacion y testimonio puesto por Phelipe Vello Lira Escrivano Real, el auto de Vssa, en quanto se sirvio de mandar con pena de la vida que no se sacase moneda alguna de la Real Casa fue a dos de Abril del año proxime pasado, y la notoriedad en el mismo dia: luego es ebidente que a esto reo no de le hizo, puesto hasta de alli a ocho meses y mas no entro en la Real Casa, y aunque se certifica que dicho auto esta fixado, no se induce de a que la notoriedad que eran menester dos cosas; la una que lo huviera estado en el tiempo en que el reo entro a trabajar, o en el posterior, y esto no se percive la certification, y la otra que supiera leer, para poderserssionarse de sus contenidos, pero es tanta su incapacidad que ni aun a so save."

<sup>50</sup> *Las Siete Partidas, Partida 7*, tit. 14, ley 18, "Los furtadores pueden seer escarmetados en dos maneras: la una es con pena de pecho: et la otra es con escarmiento que les facen en los cuerpos por el furto ó el mal que facen," y "escamentar los furtadores públicamente con feridas de azotes ó de otra guisa en manera que sufran pena et vergüenza."

<sup>51</sup> *Las Siete Partidas, Partida 7*, tit. 14, ley 18, "Otro si deben los judgadores quando les fuere demandado en juicio, escarmentar los furtadores públicamente con feridas de azotes ó de otra guisa en manera que sufran pena et vergüenza."

hundred lashes, and corporal punishment had to stop short of mutilation or death.<sup>52</sup> *Vergüenza* typically involved tying an individual to a tree or pole, often in outlandish dress and tall conical hat, and sometimes affixing ornaments to the convict's body that directly related to the crime. In addition to corporal punishment and *vergüenza*, by the time the *Nueva recopilación de Castilla* was compiled in 1567, the *pena de castigo* for *hurto sencillo* also included a four- to ten-year term of service in the royal navy, on a public works project, or at Spain's maritime fortifications.<sup>53</sup>

When determining sentence for Zúñiga, Veitia did not have to address the issue of financial restitution. The stolen coin was recovered without incident, effectively fulfilling the *pena de pecho*. For the *pena de castigo*, rather than the execution required for *hurto calificado*, Zúñiga was ordered to endure two hours of *vergüenza* in the main patio of the mint, "so that to others he would serve as an example." Zúñiga did not, however, receive a sentence of corporal punishment, nor was he assigned a stint of public works labor, which leads to Superintendent Veitia's second important determination.

The Superintendent had to address substantial allegations that Zúñiga was demented. Legally, a person who was demented was unable to commit crime, in the truest sense of the word, because they lacked the ability to distinguish between right and wrong (*sin razón*).<sup>54</sup> Veitia's decision to render only a partial *pena de castigo* appears to be an example of judicial mercy according to the doctrine of *miserabilis*. As Brian Owensby notes, "in Spanish law, *miserabilis* was a juridical condition that stretched back to Constantine and was rooted in Scripture. The doctrine of *miserabilis* was an obligation of a prince to give special protections to certain people whose helplessness inspired compassion." These included, among others, widows, orphans, the young, and, significantly, the demented, whose limited mental capacities rendered them less able to understand their actions and more susceptible, as was noted in the *Siete Partidas* noted, to "suffering wrong or violence from others more powerful than they were."<sup>55</sup> According to the testimony of those who knew Zúñiga best, the man was *sin razón*. Veitia likely ordered a period of shaming, since this would still offer an important example to deter the other workers from contemplating theft. Zúñiga was, perhaps, spared corporal punishment, because whipping a feeble-minded man might have seemed cruel to the people the superintendent was trying to impress. Applying corporal punishment in this matter could have had the undesirable consequence of undermining the legitimacy of Veitia's authority.

The most important element of this case is that by rendering the sentence he did, Veitia laid the groundwork for a specific line of interpretation with regards to theft cases. At least according to the details of this particular case, attempted theft, unsuccessful theft, or theft by an individual who was *sin razón* was not treasonous *Lesá magestad*. Rather, it

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<sup>52</sup> *Las Siete Partidas, Partida 7, tit. 14, ley 18*, "Otro si deben los judgadores quando les fuere demandado en juicio, escarmentar los furtadores públicamente con feridas de azotes ó de otra guisa en manera que sufran pena et vergüenza; mas por razon de furto non deben matar nin cortar miembro á ninguno."

<sup>53</sup> *Nueva recopilación de las leyes de Castilla*, lib. 12, tit. 14, leyes 1-2.

<sup>54</sup> Escriche, *Diccionario razonado*, Tomo 2, 651, "Demente, "El que ha perdido el juicio, ó tiene trastornada la razon, hasta el extremo de no conocer la moralidad de sus acciones." Tomo 3, 942, "Loco," "El loco no comete verdadero delito, porque le falta el conocimiento y la voluntad; y así es que si comete algun acto perjudicial, no incurre en las penas establecidas por las leyes."

<sup>55</sup> Owensby, *Empire of Law*, 55; also Borah, *Justice by Insurance*, 80;

was more like other, ordinary forms of property theft and should be punished accordingly.

*José Manuel de Castilla (1733)*

On the morning of April 29, 1733, three months after the conclusion of the Zúñiga investigation, Domingo Pardo, a *guardavista* in the mills of the royal mint was passing through the coin production patio when he saw hidden in a pile of sawdust two small pieces of cut, but unstamped silver blanks.<sup>56</sup> Pardo quickly went to find his direct supervisor, the *fiel de moneda* Alonso García Cortés, who suggested that to root out the individual who had placed the silver under the stairs, Pardo should hide behind a small grain store, which would offer him a direct line of sight of the sawdust pile. To increase the likelihood of catching a suspect, García ordered another guard to also quietly observe the sawdust from a different vantage point. From there the two men could observe all activity on the main patio.

At midday, as the bells of the nearby cathedral tolled, and as the workers began filing out of the mill rooms for their midday meal, Pardo watched millworker José Manuel de Castilla, descend the stairs. The sawdust pile was near the spot where the millworkers left their coats, cloaks, and hats before heading upstairs to work, and Pardo watched Castilla gather up his cloak and hat, and while doing so, also gather up the pieces of silver. Pardo confronted Castilla, demanding to inspect his bags and clothing. Castilla consented, removed his cloak and jacket, and as he did so a large of piece of silver fell to the floor. He was immediately arrested and led to a holding cell.

Superintendent Veitia entered the mint's jail with his scribe, López. Castilla stood with his neck locked in thick wooden stocks. The attending guard removed the stocks and López began to write down Castilla's declaration. The superintendent read the statement by García, the *fiel de moneda*, formally accusing Castilla of his crime. In his response, Castilla admitted to taking the pieces of silver as he was working with the mills and presses that morning. While turning the arms of the presses he spied the two pieces of silver resting on the mill machinery. Castilla quietly moved them to the floor and pushed them out of sight for safekeeping. Later, between eleven and twelve that day, he left the millroom to throw out the buckets of water that were used to fashion coin and quietly gathered up the silver pieces with him. After reaching the bottom of the stairs, he placed the two pieces of silver in the pile of sawdust, near the pile of cloaks, and then returned to work. Then, at midday, when he arose from his work to go and eat with the other men, Castilla went back downstairs to the sawdust pile, put on his cloak and jacket, and took the larger of the two pieces of silver with him, leaving the smaller one, he said, because he did not have time to secure them both under his clothes.

Already, this case exhibits fewer ambiguous circumstances than the earlier case involving Zúñiga. Castilla openly confessed to stealing the pieces of silver. He clearly performed the theft act in plain view of several attending guards who offered substantial and detailed witness testimony, and, unlike Zúñiga, he succeeded in removing the silver from the mill house, if not from the mint itself. Castilla also was not incapacitated by any mental infirmities. Veitia appeared relatively assured of Castilla's guilt, ordering his scribe to go to Castilla's house, confiscate the man's belongings and catalogue them in a

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<sup>56</sup> AGN, Criminal, Vol. 602, exp. 5, fjs. 57-79.

ledger with their approximate value. Then, he was to return and formally record Castilla's confession.

Back at the mint, and during his confession, Castilla again confirmed that he took the two pieces of silver. López asked the worker if he had ever previously taken any silver, and Castilla answered no, only those two pieces that the scribe and Superintendent had shown him when they collected his initial statement. López raised the issue of a third piece of silver found buried in the pile of sawdust: How can we believe that you only took those two pieces, he asked Castilla? The worker replied that he did not know anything about a third piece of silver, and he certainly didn't take it. López asked him if he could think of anyone else, a co-worker, perhaps, who might have taken it, urging him to scour his conscience and tell the truth. Castilla reaffirmed that he did not have any other details to share. At the conclusion of the confession, Castilla asked López to assign him a *procurador de pobres* to defend him. The superintendent consented to this request, and later that same day, Balthasar de Vidaurra, the *procurador* from our earlier case, arrived to visit Castilla.

After reviewing the gathered witness testimony and confession, Vidaurra constructed a defense that more closely matched the precise circumstances of the incident involving Castilla. First, he noted, this was a spontaneous rather than deliberative act, for which Castilla had openly and fully confessed. Both of these factors should lessen the punishment (*temperarse las penas*). Second, Castilla stole only a small quantity of silver and so this was not some major crime worthy of the rigors of applied law. Third, this was a solitary event. There was no evidence that Castilla had committed any previous or subsequent crime, and the silver had been entirely recovered so there was no unresolved debt. Fourth, the bumbling manner with which Castilla carried out his theft and the ease with which he was caught by the guards suggests that he was a novice criminal, unaccustomed to stealing. Finally, according to the extensive testimony of various friends and coworkers, Castilla had earned a reputation for being a good man (*hombre de bien*) with honest public habits (*buenas costumbres y proceder*). His actions, the *procurador* implied, were uncharacteristic.

This time when developing a sentence, Superintendent Veitia had to consider a set of circumstances that was far closer to those for which Spanish law and his own inaugural address prescribed capital punishment. Just as in the previous case record, Veitia's decision was contained in a terse and direct single paragraph that defies easy mining for evidence of judicial reasoning. The superintendent did, however, offer many more details about the type and scope of punishment. Taking into account the *procurador's* presentation, the confession, and the witness testimony, the superintendent ordered a program of punishment that resembled Zúñiga's, but harsher. Castilla would be taken from his holding cell to the main patio, and mounted upon a horse. He was to be stripped nude from the waist up and then circulated through the mint while a crier audibly publicized his crime. Castilla would be affixed to a pole in the central patio for an hour of *vergüenza* "so that he would serve as an example to the other workers," and like Zúñiga he would be prohibited from seeking any further work at any of the royal *Casas de moneda*.<sup>57</sup>

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<sup>57</sup> Unless otherwise noted, all quotations come from the case record for AGN Criminal, Vol. 602, exp. 5, fjs. 57-79. "para que sirve de ejemplo a los demás"

Unlike Zúñiga, Castilla was additionally ordered to endure two hundred punitive lashes with a whip, which would occur on the main patio before his hour of *vergüenza* commenced. Afterward, Castilla would be sent off for a four-year term of unpaid labor at a Spanish maritime *presidio*, at a location of the viceroy's choosing. Upon conclusion of the declaration of the sentence, López asked Castilla if he understood its terms. Castilla, distraught, appealed to the superintendent for mercy, asking him to revoke or amend its terms by virtue of the superintendent's innate good and merciful nature (*bien y merced*). The record contains no evidence of a response to this plea for mercy.

The next day, Viceroy Juan de Acuña y Bejarano sent a notice confirming the order for two hundred lashes and *vergüenza* in the central patio of the mint, because "this was the territory that fell within the private jurisdiction of the superintendency."<sup>58</sup> Castilla was to leave with the very next departure of the Spanish military fleet to perform his labor term at the *presidio* on the Isla de Carmen, just off the coast of the Yucatán peninsula in modern Campeche.

Castilla's advocate, Vidaurra, appealed to the superintendent that "with all due respect to the determination given by [Veitia] in this case, which serves to condemn [Zúñiga] in a punishment of two hundred lashes...and four years at a *presidio*..." he should consider "voiding [the sentence] or at least substitute [another for it] or revise it" because of the aforementioned circumstances Vidaurra mentioned in Castilla's defense.<sup>59</sup> Veitia answered that though he acknowledged the request from the *procurador* to revoke or revise Castilla's sentence, the viceroy himself had already approved all of its terms, which meant the sentence was final. The scribe, López, reported that the next day the program of punishment was carried out in full, and soon after royal administrators on the Isla de Carmen acknowledged Castilla's arrival at the *presidio*.

As previously noted, there were fewer extenuating circumstances in Castilla's case than in Zúñiga's, which might help to naturally mitigate his sentence, either on the basis of Veitia's determination of the facts, or by the terms of Spanish criminal law. Castilla's was a much more straightforward example of a reasoned, considered criminal act. The heavy pieces of silver the man stole, while not constituting some great fortune, were still of far greater value than the single *real* Zúñiga concealed in his shoe. Veitia had a strong incentive to punish Castilla to the fullest extent of the law, to reinforce the royal prerogative as a newly appointed official, and to promote his position as the consistent, unyielding, and ultimate authority at the mint. Only nine months earlier he had declared that if caught, thieves would face the ultimate punishment. How would it look, then, if he did not follow through with this commitment not to tolerate theft? With all of these factors at work, with such a demonstrable example of premeditated theft, and in light of royal Spanish directives it is surprising that Veitia did not sentence Castilla to death.

Veitia's decision reinforces the interpretation that he abandoned categorizing theft of small quantities of silver by the mint's workers as *hurto calificado*. It suggests that Veitia did not take any steps in the intervening months to reestablish, either through oral decree or formal written notice, that theft from the mint was punishable by death. More

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<sup>58</sup> "por ser el territorio que compete a la privativa jurisdicción de la Superintendencia de ella"

<sup>59</sup> "con el respecto que devo de la determinacion dada por V.S. en esta causa, en que servir de condenar a dicho reo en la pena de doscientos asotes en la forma de justicia, y quatro años de un *presidio*, con lo demas perjudicial que contiene a que me refiero, para que V.S. se sirva so dicho respecto de anularla, o a el menos revocarla suplirla, y enmendarla por agravios."

importantly, Viceroy Acuña, whom at the mint's opening and in a show of support, stood alongside Veitia as he made his original inaugural address to the assembled workers about *hurto calificado* for theft of coin, here confirmed in writing both the terms of the reduced sentence, and the superintendent's authority to craft it as he did. In this way, the viceroy confirmed his support for royal policy with regards to the hierarchy of authority at the mint by confirming the centralization of royal authority in the office of Superintendent, while at the same time undermining seemingly unequivocal royal directives for capital sentences in cases of theft of coin.

### *Matheo Antonio (1733)*

On the eighth of August of that same year, Veitia was visited by the *guardacuño* Juan Gamero, and his assistant, Joseph Gonzales de Guevara.<sup>60</sup> Earlier in the day, the two guards received a basket of finished coin from the *acuñador*, Augustín de Guzmán, who operated one of the mint's stamping machines. The two guards weighed and counted the basket's contents and found a peso missing. Searching around the presses did not turn up the coin, so they conducted a person-by-person search of the workers in the press room. They asked a young mulatto, Matheo Antonio, to remove his clothes and hat. As Antonio did so, the guards spied hidden in the thick braids of his hair a shiny silver peso. The guards arrested Antonio as the worker expressed his shock and professed his innocence.

Unlike the previous investigations, which began the same day and were completed in no more than a week, Antonio remained in the mint's jail for more than two weeks before any further steps were taken in his case. On August 31, at Veitia's urging, the scribe, López, went to Antonio's cell to record his confession. Recounting the events of August 8, Antonio recalled being told by the guards to disrobe and having his clothes searched. When he removed his hat at the guards' urging, all of a sudden he heard people crying out, "There it is! There it is!" Antonio recalled that Gamero, the *guardacuño*, said accusingly, "you took it," but at the time, did not know to what Gamero was referring. In response, López replied that it makes no sense that you were not aware of the crime since the guards announced the purpose of the search before they began. Antonio explained that he was woken up just prior to the search. He was unable to sleep the night before, and so had arrived for work very tired and he was asleep at a table when the guards made their announcement. It was only after the guards removed the coin from his hair that he pieced the events together. Antonio said he imagined that while he was asleep, someone must have hidden a coin in his hair. The scribe asked if he ever had any bad relations or garnered any ill will with any of the other workers in the press room. Antonio could not think of any, though he did recall that he had left to use the bathroom, and when he returned, one of the other workers called out to him him "come here," in an offhand (*floxó*) manner, but Antonio ignored the comment and resumed his work. López reminded Antonio to tell the truth, and scour his mind for any details about this or any other theft. The man replied simply that he did not put the peso in his hair and he did not know who did, since he presumed it was done while he was sleeping.

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<sup>60</sup> AGN, Criminal, Vol. 602, exp. 7, fjs. 93-106.

Six long weeks later, another *procurador*, Juan Colombres, arrived to offer Antonio a formal defense of the charges. Colombres reviewed the statements and witness testimony and offered a defense that rested on two points. First, Colombres argued, young Matheo Antonio was only twenty years old, and thus a minor (*menor*). Though the law regarding theft from the mint was supposed to apply without regards to age, Spanish criminal law generally offered reduced sentences for convicts younger than twenty-five years old, because they lacked the fully developed reasoning capacities of an adult. Second, Colombres spoke of Antonio's reputation for strong character. Antonio said that in addition to his work at the mint, he was a tailor at a local shop in the city, and also occasionally worked as a coachman. Antonio did not drink, nor did he have any other sort of vice. He took a job at the mint to earn extra money on the festival days and evenings after his regular work as a tailor was over. Colombres also presented detailed testimony from a fellow tailor and coworker, who claimed that in the six years the two had worked together, "making clothes for gentlemen like the esteemed Superintendent," he never heard of Antonio taking any of the valuable fabrics, brocades, or buttons in their workshop. One of Antonio's former employers, an elderly Spaniard, said he had given the young man the run of his house during his four years of employment, and Antonio had fulfilled his duties "well, fully, and without incident."<sup>61</sup>

It was obvious, Colombres declared, that when Antonio, who was tired from laboring during the day, fell asleep at the table, his coworkers decided to play a trick on him and put a peso in his hair, "to scare and embarrass him" (*para mortificarle*). Taking into account the month-and-a-half that Antonio had been in prison for just a single peso, he had endured more than enough punishment in light of the alleged crime.<sup>62</sup>

Vetia, reading through the collected testimony and information regarding the crime, and taking into account Colombres' spirited defense, ordered that Antonio should be removed from his cell, placed atop a mule, and paraded through the mint while a crier announced his crime to onlookers. Like Castilla, he would then be whipped, though at a reduced number of one hundred lashes. Then, he would be tied to a post in the main patio for two hours of *vergüenza*. Afterward, he would be set free, but he would be prohibited from seeking work as an *operario* at any of the royal mints. Unlike Castilla, Antonio was not sent to labor at a maritime presidio, nor was his property confiscated.

In this case, lacking a clear and full confession, and having to reckon instead with claims of innocence and framing by coworkers, Veitia had to assess both Antonio's guilt and the criminality of the circumstances in this case. In his legal manual *Política para los corregidores* (1597), Jerónimo Castillo de Bobadilla elaborated on the fundamentals of sentencing that were laid out in the *Siete Partidas*. He stated that in order for an act to be considered criminal, the individual committing the act had to exhibit three characteristics: *voluntad*, *libertad*, and *malicia*. An individual had to perform a criminal act of his or her own volition (*voluntad*). It could not result from accident or from the acute effects of dementia. It had to be done freely, without threat of violence or other forms of coercion (*libertad*). And, there had to be evidence of intent to do wrong, termed *malicia*, taken from the Latin, *malus*, or "bad". Without any of these three elements, Bobadilla warned, "there is no criminality" (*no hay criminalidad*). Specifically, it

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<sup>61</sup> Unless otherwise noted, all quotations come from the case record for AGN Criminal, Vol. 602, exp. 7, fjs. 93-106. "governando y corriendo a su cargo con toda la casa....bien completo, y sin problemas."

<sup>62</sup> "bastante penitencia para compurgacion del delicto por constar estar restituído el peso."

excluded from criminality acts that occurred while one was sleeping. In these instances, Bobadilla stated, the suspect might have to offer reparations for damage done, but he or she would not face any criminal penalties.<sup>63</sup> Antonio's *procurador*, Colombres, advanced the argument that lacking *voluntad*, *libertad*, and *malicia*, Antonio did not commit a crime.

The superintendent appeared unmoved by this defense and by Antonio's testimony. No other workers testified to the malice of a coworker, or the coin's accidental appearance in Antonio's hair. His defense and claims of innocence were entirely based on conjecture, his own and that of his advocate Colombres, and the supporting testimony of character witnesses. Antonio's substantial sentence of corporal punishment and *vergüenza* appears to be based on a lack of evidentiary support for claims of innocence. The superintendent did not, however, confiscate Antonio's belongings, nor did he send him to labor on a presidio.

This time, the incomplete sentence suggests that Antonio fell into an ambiguous position between two legal interpretations of age, with regards to theft. The 1567 *Nueva recopilación de Castilla* listed two laws related to punishment for theft using age as a factor for determining sentence. The first law, taken from the *Nueva recopilación de Castilla* in 1567, recommended that thieves "more than twenty years old" (*mayor de 20 años*) should be punished with *vergüenza* and four years of service on the Spanish fleet, the *galeras*, for the first instance of theft. A second law followed the first, published in 1582, that extended this punishment to "all those older than seventeen," stating that they should also be punished with whipping, *vergüenza*, and six rather than four years of service on Spain's maritime *galeras*. The *Nueva recopilación de Castilla* also carefully noted that *hurto sencillo* was subject to *pena arbitraria* that could vary according to a judge's interpretation of the circumstances surrounding the theft, the type of theft, the value of the stolen item, whether this was one of multiple cases of theft by that individual, or a case of recidivism, and the *calidad*, or status according to age, ethnicity, or social rank of the person who committed theft.<sup>64</sup> Here, Veitia appeared open to the possibility of reducing Antonio's sentence on the basis of his age, on the hazy *criminalidad* of the coin's appearance in his hair, or perhaps on the basis of the favorable reports by friends and acquaintances about his character. It appears that Veitia chose a middle ground with regards to the *pena de castigo* that prioritized a public exhibition of bodily pain, humiliation, and shame, and reinforces an interpretation of Veitia's reasoning in the case as that of considered *arbitrio judicial*.

### ***Juan de Torres (1738)***

On May 10, 1738, during the last year of Veitia's tenure as Superintendent, Juan de Torres, a worker who was part of the team adding ridged edging to the coins, one of the final key steps of the coin stamping process, was arrested for stealing handful of silver blanks from the production baskets.<sup>65</sup> By this time, the process of searching the workers was not something that took place only when theft was suspected, but now took

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<sup>63</sup> Jerónimo Castillo de Bobadilla, *Política para corregidores y señores de vasallos en tiempo de paz, y de guerra* (Madrid, 1704), Vol. 2, 121.

<sup>64</sup> *Nueva recopilación de las leyes de Castilla*, lib. 12, tit. 14, leyes 1-5

<sup>65</sup> AGN, Criminal, Vol. 602, exp. 14, fjs. 158-163.

place whenever a shift ended and workers left for the day, or whenever silver was delivered for accounting. On this day, a *guardavista*, Joaquín Plazoala, was conducting a search. He heard something heavy and metallic clatter to the floor, near where Torres, was standing. He asked Torres about the noise, and the man replied that it was a large metal buckle (*ebilla*) from the bag he had slung over his arm.<sup>66</sup> Torres bent down to retrieve the buckle, and as he did so, the guard Plazoala noticed that Torres held a number of coins in his hand, "that advertised the crime (*malicia*) of theft."<sup>67</sup> Plazoala called for another guard and together they searched Torres' clothes and belongings. Torres was carrying in his hand a small blue bag, and within this bag he had what Plazoala described as a "porción" of unfinished silver blanks. Plazoala took hold of a nearby worker and told him that he would have to act as a witness in this matter. The guards then counted the unfinished coins and found that they totaled, by weight, forty-four pesos.

While Torres was led to a holding cell in the mint's jail, a scribe recorded statements from the available witnesses, and offered a physical description of the bag and its contents. Later that day, the scribe returned to document Torres' confession. Torres openly admitted to taking the coins, saying he tried to evade detection as he left the workshop by leaving the buckle on the floor and placing the small bag of coins underneath. He said he hoped that no one would notice the buckle so that he could be examined by the guard, who had a reputation for searching workers thoroughly, and then quickly return and retrieve it and the bag of coins without anyone noticing. Unfortunately, the guard witnessed his attempt to evade detection, and took hold of him with coins in hand.

In a departure from the previous cases, this record reflects a streamlined procedure with no defense offered by a *procurador*, nor any testimony from character witnesses, like Torres' friends, family, and acquaintances. In just eight handwritten pages, the case record moved in rapid fashion from eyewitness accounts of Torres' criminal behavior and his declaration, to the superintendent's announcement of sentence, and sentencing occurred only two days after Torres' arrest. Having read through the collected packet of supporting materials from the opening *sumaria* investigation, which Veitia said "confirmed the crime of hurto," the superintendent noted the full confession of the accused. Owing to the *naturaleza*, or obvious character of this criminal act, "which should be punished as a lesson for the other workers at the mint," Juan de Torres should be taken from the jail, placed upon a packhorse, stripped nude from the waist up, and decorated with a necklace made from the stolen coins. He would be given two hundred lashes while being led through the patios and hallways of the mint, as a *pregonero* publicized his crime. Afterwards, he would be tied to a post (*una aldabilla*) in the middle of the main patio until midday, for a long period of *vergüenza*. Then, he would be returned to his prison cell. Notably, there was no mention of a labor sentence. Later, Superintendent Veitia added an addendum to his sentence, noting that having read through the case record more closely, he realized that Juan de Torres was a minor (*de*

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<sup>66</sup> The *Diccionario Real Academia española* defines *ebilla* as a buckle, and *ebilla* is the term that is consistently used throughout the case. I interpret this to mean it was a large piece of metal, perhaps to be used as a clasp to seal a cloak or as part of a larger bag or backpack. *Diccionario de la lengua española de la Real Academia*, 22<sup>nd</sup> edition, Vol. 1 (Madrid: Real Academia Española, 2001), "Ebilla".

<sup>67</sup> Unless otherwise noted, all quotations come from the case record for AGN, Criminal, Vol. 602, exp. 14, fjs. 158-163, "Que advertida la malisia de hurto"

*menos edad*). As a result, after being punished in the manner described above, Torres would be released to his relatives.

Here, in the final sentence Veitia offered before retiring as Superintendent, we find confirmation of his original determinations regarding the interpretation of theft of coin as an example of *hurto sencillo* rather than *hurto calificado*. Torres, unlike his predecessors, stole a significant amount of coinage, forty-four pesos, which was more than double his monthly wage, and more than ten times the value of any previous example of theft. Despite the high profile of his arrest, Torres received only corporal punishment and *vergüenza*, and Veitia showed him additional mercy, granting Torres his release when he learned of the man's status as a *menor*.

### *Conclusions*

Taken together, these cases suggest that Superintendent Veitia consistently rejected the interpretation of theft of royal silver from the mint as *hurto calificado*, a decision that carried with it a number of ramifications. For centuries, royal written law offered clear and consistent guidance with regards to the categorization of and punishment for *hurto calificado*, and threats of capital punishment for theft from the royal treasury, which included the mint, had been a centerpiece of the broader monetary policy of the Bourbon monarchy. These guidelines were integral to royal instructions for the reformed mint, and Superintendent Veitia reiterated them word-for-word in his written pronouncements of mint policy in Mexico City. Despite these examples of clear guidance, only some months after the new mint began its operations, and on the basis of the details from the first handful of theft cases, Superintendent Veitia quietly set a different policy at the mint, that this form of theft was not *hurto calificado*, but more closely resembled the general property theft category *hurto sencillo* and should be punished accordingly. Where Spanish law stated that the law was to be followed without exception, Veitia found what he considered to be justifiable exceptions and modified his sentence accordingly. He did so not on the basis of any formal appeal to a higher authority, which we might imagine given the importance of the mint in royal affairs, but simply on the basis of his own individual reasoning through the facts of the theft cases. This departure from written directives established a clear precedent. In none of the later theft cases at the mint, some forty-three cases in the subsequent seventy years after Superintendent Veitia left office was an individual convicted of theft put to death. Discussions of *hurto calificado* would surface from time to time, but the applied sentence always remained close to Veitia's original recommendations.

It is not only instructive to note that Superintendent Veitia modified the sentences, but also where and how. These crimes not only occurred within the walls of the viceregal palace, but within the mint. Theft or embezzlement from this facility, more than any other colonial institution, directly threatened the crown's financial interests and the monarchy's prestige as guarantor of monetary value and guardian of merchant accounts. As to how the Superintendent modified the sentences, when the criminality of an act of theft was a question by virtue of the variable *circunstancias* of youth, claims of dementia, or evidence of otherwise strong moral character, Superintendent Veitia removed certain elements like corporal punishment or unpaid service to the king, but always retained a form of humiliating *vergüenza* as a deterring *pena de castigo*, all consistent with

principles of *arbitrio judicial* outlined in legal manuals. In the context of the mint, these decisions appear to reflect a type of pragmatism. With deterrence as the ultimate goal, Veitia ordered a measured form of punishment when criminality was not decisively established to reinforce the perception that that theft would not be tolerated. At the same time, he suggested a greater severity of sentence, though still restrained, in cases where criminality was more evident. Few could argue with the result. During Veitia's eight-year tenure there were only six documented cases of theft, and three of these took place during the first year, and only seventy-one documented cases of theft occurred in the seventy-five year lifetime of the mint.

This measured and compassionate search for “good and equitable” outcome was the defining principle of *arbitrio judicial* -- a royal mandate for a just and “honorable” (*recta*) resolution to a case that superseded the sometimes competing mandate for judges to follow the letter of the law. Based on these decisions it is clear that there was room for discretion, measure, and mercy with regards to royal law in formal policy at the highest levels of imperial government and not only through obvious mechanisms like *obedezco pero no cumplo*, but also through the reasoning method *arbitrio judicial*.

Finally, in addition to casting light on the operation of justice at the mint, the cases detailed here also serve to justify the methodology employed for the rest of this project – attention to the mandates of written law, combined with a close examination of the details individual case records, rather than attention only to criminal statistics in aggregate. This casuistic approach, which lays at the heart of early-modern Spanish law, forms the analytical pattern for the remaining chapters of the dissertation.

## Chapter Two: *Hurto Sacrilego: Sacrilegious Theft in the Context of the Late-Colonial Archdiocesan Court of Mexico City*

On September 10, 1769 the local priest and ecclesiastical judge (*juez eclesiástico*) for the small mountain village of Real Minas de Sultepec, Manuel Joaquín de Acuña, wrote to the archbishop of New Spain, Francisco Antonio de Lorenzana, to report that he had arrested a young *mestizo*, Pasqual Dorotheo, on suspicion of stealing the silver crown that adorned the beloved statue of the Virgin of the Rosary in Sultepec's central church.<sup>1</sup> Two days earlier, a local silver merchant had come to see the priest to report that one of his employees had received a few pieces of unusual silver, mottled with alloys and impurities as if they had been crudely smelted in a fireplace or woodstove, rather than in a true smelting furnace. As the merchant described the transaction, it appeared increasingly suspicious. Dorotheo had visited the merchant accompanied by a well-known independent silver trader, Joseph Estrada, who negotiated a price for the silver pieces as Dorotheo hovered nearby. After Estrada received his handful of pesos for the adulterated silver, he gave them to Dorotheo, who in turn purchased one *real* of the raw, intoxicating cane brandy *aguardiente* and gave it to Estrada along with six silver pesos, a seeming payoff for his services.

In his letter, Father Acuña reported to the archbishop that he had interrogated Dorotheo three times. Twice, Dorotheo flatly denied stealing any of the missing silver objects, claiming first to have stumbled upon the silver scattered in a field, under a tree, and then accusing a longtime acquaintance of the theft. After the priest ordered the acquaintance held for questioning, and he in turn denied the theft and confirmed that Dorotheo had stolen the silver, the priest interrogated the recalcitrant suspect again, this time applying the lash (*poner cuestión de azotes*). Under this pain and pressure, Dorotheo finally admitted to climbing a ladder and entering the church's sacristy by breaking a window. In fact, he admitted, the Virgin's crown was only his latest in a string of thefts of religious objects that began with the silver crown and small silver handbasket that adorned the figure of the Nazarene Jesus, also from the parochial church, and included the silver chalice and paten from a chapel in the nearby Indian barrio called Cuadrilla. Dorotheo explained that he crushed the precious items with a rock to mask their identity and took them to the workshops of a few small artisanal smelters to be melted down into unidentifiable silver blanks.

Among the multitude of criminal case records in Mexico's colonial archives, Dorotheo's act of theft offers an example of a rare and notable form of crime termed *hurto sacrilego*, or sacrilegious theft. The previous chapter centered on theft of silver from the reformed royal mint in mid-eighteenth century Mexico City, and its adjudication in the mint's new special tribunal, thereby establishing an important theoretical and procedural baseline from which to compare the judicial practices of ecclesiastical judges in the archdiocesan criminal court of Mexico City. The present chapter turns to the theft of silver devotional objects, like the Virgin's crown, from churches and other holy sites in the archdiocese, as a counterpoint to the theft of silver coin and criminal processing in the court of the royal mint. Through study of the theft of holy objects this chapter explores

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<sup>1</sup> AGN, Bienes Nacionales, vol. 62, exp. 50, "Causa criminal seguida sobre hurtos sacrilegos."

what Victor Tau Anzoátegui called the "competing moral orders" of civil and religious law in the Spanish territories.<sup>2</sup>

Coinage and sacred silver objects shared important connections. Though they projected a different symbolic meaning, they were fabricated from the same precious metal from the storied mines of central and northern New Spain. Mexico City was an important waystation for the flows of silver from the mines to other points in the colonies and to Europe, as silver coin was the only form of currency truly acceptable for general use, and until the 1780s the only mint in New Spain was in the capital city. Mexico City was also the artistic capital of silversmithing. Although there were important regional centers for silversmithing, notably Guadalajara, Oaxaca, San Luís Potosí, and Zacatecas, the guild workshops of Mexico City, grouped together on *calle* San Francisco, just blocks from the royal mint, fabricated most of the important gold and silver religious objects used in colonial Mexican churches.<sup>3</sup>

Both forms of processed silver also expressed value as a means of exchange. Precious silver items in churches, the chalices to hold the consecrated wine for the Mass, monstrances to hold the consecrated host, altar and processional crosses, were subject to careful accounting in church inventories and all devotional objects crafted from silver and gold bore hammered stamps that marked their authenticity, one stamp that designated the workshop where the items were crafted, another for the region where they were produced, a third for the mark of the royal assayer who guaranteed their purity, and finally, and importantly, the stamp of the taloned eagle or the high-walled lacustrine tower that symbolized that the royal taxes on silver and gold had been paid.<sup>4</sup> Yes, these items were focal points for Catholic devotion, but, like coin, they were also tantalizing repositories of value.

More importantly, as this chapter will explore in detail, apart from any material and economic connections, the theft of coin and theft of devotional objects were closely linked in Spanish civil and canon law under the rubric of *hurto calificado* or "qualified" theft. As we saw in Chapter One, according to the written sources, this designation obligated civil magistrates to render a death sentence to convicted thieves, and it also so obligated ecclesiastical judges. This study explores the course of criminal processing in the archdiocesan *provisorato* for cases of sacrilegious theft on the basis of written statutes, the essential *sciencia* and *doctrina* that guided Spanish judges in the civil and ecclesiastical courts as they assessed the circumstances of crimes and rendered just sentences. In tandem with the previous study of theft of coin at the mint, the sacrilegious theft cases that form the basis for this chapter offer a promising entry point for comparing civil and ecclesiastical judicial procedure and reasoning, process and outcome, in the colonial Mexican setting.

Two key questions asked about theft of silver coin are asked again here. First, how was the theft of silver objects treated in written law? A first section outlines how

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<sup>2</sup> Victor Tau Anzoátegui, *La ley en América hispana: del descubrimiento a la emancipación* (Buenos Aires: Academia Nacional de la Historia, 1992), 132.

<sup>3</sup> Cristina Esteras Martín, *Marcas de platería hispanoamericana: Siglos XVI-XX*, Madrid, 1992, pp. ix-xx. See also, Gauvin Alexander Bailey, *Art of Colonial Latin America*, London, 2005, 185. For an example of the viceregal ordinances that governed silverwork in New Spain, see *Ordenanzas de el nobilísima arte de la platería* (Mexico, Herederos de J.J.G. Carrascoso, 1715), UC Berkeley, Bancroft Library Collection.

<sup>4</sup> Esteras Martín, *Marcas de platería hispanoamericana*, p. xx.

Spanish civil and canon law reference works explained the sacrilegious nature of theft of holy objects and the process for adjudicating it in the courts, with a special emphasis on the legal-philosophical anchor for Spanish criminal law, the *Siete Partidas*. Spain's civil laws with regards to sacrilegious theft were unique to the Catholic world, in that they were a first point of reference for all of Spain's criminal courts, both civil and ecclesiastical.<sup>5</sup> They are also unique because the content of these laws, contained in the bedrock *Siete Partidas* and reiterated in subsequent legal codes, explain in detail the special, transcendent qualities of ecclesiastical property and the ramifications for its theft, in a way that connected together the divine law of Scripture and the natural law of medieval legal scholars. These laws closely corresponded to the canon law statutes of the Council of Trent and the decrees of the subsequent provincial synods in colonial Mexico, thereby justifying their use as a point of reference in Mexico's ecclesiastical courts.

The second question asks how the ecclesiastical courts applied the written law, and this section centers on sentencing as the culminating event of a criminal investigation. The previous chapter showed how, in the earliest years, the judges of the royal mint wrestled with royal mandates that called for the death sentence for theft of even the smallest amounts of Spanish coin from the mint, according to the *hurto calificado* laws. When faced with instances of theft of small quantities of silver, the judges for the mint chose to apply their discretion through the casuistic legal process of *arbitrio judicial*, or judicial discretion. This process allowed judges to depart from the written mandates if, in light of their trained reason and wisdom of experience, doing so brought about a more just and "honorable" (*recta*) outcome to a case than that suggested by written statutes. The case studies explored in this chapter show how ecclesiastical judges employed *arbitrio judicial* in a similar manner to the superintendents at the mint, and foreshadows by ecclesiastical judges' application of *arbitrio judicial* in other contexts like cases of sexual violence and illicit sexual relationships, which are explored in later chapters. Here, in the context of sacrilegious theft, ecclesiastical judges bypassed the mandates for a capital sentence prescribed by the written law, and instead sentenced thieves to periods of exile and labor, public exhibitions of penance, and a regular program of spiritual renewal through confession, communion, and prayer. Exploring these sentences in light of early-modern criminal theory suggests that the shift in the civil courts to a moderation of sentences during the late-colonial period also occurred in the the archdiocesan *provisorato*, as the archbishop and his *provisors* prioritized rehabilitation through pious acts over the repressive forms of correction available and mandated to them, like corporal punishment or capital sentences.

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<sup>5</sup> Pedro Murillo Velarde and Joaquín Escriche explain the preeminence of the *Siete Partidas* for crimes of theft in Spanish civil and ecclesiastical courts of law. See Pedro Murillo Velarde S.J.'s 1741 canon law reference work, *Curso de derecho canónico hispano y indiano*, Alberto Carrillo Cázares, trad. (Mexico, UNAM: 2005), specifically, libro 5, título 18, entitled, "De los hurtos," pp. 163-170. Also, Joaquín Escriche, *Diccionario razonado de Legislación y Jurisprudencia* (Madrid: 1831), Tomo III, 156, "Hurto." Murillo Velarde does discuss the provisions of the twenty-fourth session of the Council of Trent (1563) regarding theft from churches by priests, writing, "Si el clerigo es sorprendido y convicto de hurto grande o repetido debe ser depuesto de la orden y del oficio clerical...que si, ni entonces se arrepiente, debe ser excomulgados; si finalmente, es incorregible debe ser entregado al brazo secular."

## *Part One: Theft of Coin and of Religious Silver in a Comparative Perspective*

In the dense forest of rules, precedents, procedures, and regulations that comprised Spanish criminal law, theft law was one of the stoutest oaks, and for good reason. In its many guises, theft was, historically, the most common form of crime in Spain and its territories.<sup>6</sup> In its earliest written forms, the sixth-century *Lex visigothum* and thirteenth-century *Fuero Juzgo* and *Siete Partidas*, Spanish property theft law took root in the straightforward seventh of God's Ten Commandments not to steal (*no hurtarás*).<sup>7</sup> In time, theft law became one of the most heavily parsed, scrutinized, and revised by early modern legal scholars, comprising whole treatises, or lengthy sections of influential reference works. Spanish theft legislation was thick with commentary and analysis, since it was meant to exhaust all possible permutations. Did the theft occur during the day or at night? Was it quiet and sneaking, or open, forceful, and violent? Did the victim catch the thief in the act, or was it discovered much later? Did the theft occur in the home, or on the highway? Were the effects muted, or did they generate widespread terror or scandal? These factors altered the sentencing prescription that the various legal treatises recommended to magistrates.<sup>8</sup>

Theft of silver coin and theft of holy objects were two varieties termed *hurto calificado*, which, as we saw in Chapter One, was not the uncomplicated theft (*hurto sencillo*) of everyday personal property, but symbolized “qualified” theft that Spanish law isolated by virtue of characteristics related to the location, type of person, or object that was targeted.<sup>9</sup> *Hurto calificado* from churches included, simply, all “thieves that steal from a church or from another religious site something holy or sacred,” but specifically referred to devotional objects rather than theft from the almsbox.<sup>10</sup> As we have seen, theft of coin fell under provisions that prohibited royal officials from stealing or otherwise misappropriate funds from the royal treasury, but there were others.<sup>11</sup> Theft

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<sup>6</sup> Francisco Tomás y Valiente, *El derecho penal de la monarquía absoluta, siglos XVI-XVII-XVIII*, (Madrid, 1969), 249. Teresa Lozano Amendares, *La criminalidad en la ciudad de México, 1800-1821* (Mexico, D.F., 1987), 46.

<sup>7</sup> The *Constituciones del arzobispado de Sevilla* (1709) explain the relationship between the seventh commandment and the sin of theft, stating that “El septimo mandamiento es no hurtar. La substancia deste mandamiento es, que todo aquello que uno tuviere, que sabe de cierto que no es suyo, por qualquier via que lo aya avido, pecca si lo tiene, i no lo restituye lo mas presto que pueda, i si tuviere duda si es suyo o no informese de quien lo sabe, i consulte Letrados, i siga lo que le dixeren hombres doctos, i tenidos portales. Lo mismo a de hazer quando tuviere offendido a algun proximo con palabra afrentosa o infamandole, como se dira en el mandamiento que se sigue.” *Constituciones del arzobispado de Sevilla: hechas y ordenadas* (Sevilla: Librería Española y Extranjera, 1862), 121.

<sup>8</sup> A full, early detailing of these provisions can be found in Murillo Velarde’s, *Curso de derecho canónico hispano y indiano*, libro 4, título 18, “De los hurtos,” pp. 163-170. Like many legal scholars of the early-modern era, Murillo Velarde draws heavily from the extensive stipulations of the *Siete Partidas*, *Partida 7*, tit. 14, ley 18, entitled “Qué pena merecen los robadores y furtadores.”

<sup>9</sup> Murillo Velarde, *Curso de derecho canónico*, libro 4, título 18, p. 170, “En las *Partidas*, el hurto es *simple*, cuando no es afectado por ninguna otra circunstancia agravante. *Calificado*, cuando tiene anexa una circunstancia agravante.”

<sup>10</sup> *Siete Partidas*, *Partida 7*, título 14, ley 18, “Ladron[es] que furtase de alguna egleſia ó de otro lugar religioso alguna cosa santa ó sagrada.”

<sup>11</sup> *Siete Partidas*, *Partida 7*, título 14, ley 18, “[O]ficial[es] del rey que toviese dél algunt tesoro en guarda, ó que hobiese de recabdar sus pechos ó sus derechos, et que furtase ó encubriese dello á sabiendas, ó el judgador que furtase los maravedis del rey o de algunt concejo demientra que estudiase en el oficio.”

from inside or within a short distance of the king's palace and its "rastró," the administrative offices of his court, was also *calificado*.<sup>12</sup> In those Spanish territories where it was part of customary law, *abigeato*, or the theft of livestock was punishable by death.<sup>13</sup> If someone stole items under the pretense of assisting a homeowner whose house was on fire, taking something while extinguishing the fire, or helping salvage personal property, the thief would be put to death.<sup>14</sup> Stealing from the poor, in general, was designated *calificado*, and so too, was stealing any essential tool, machinery, or musical instrument that might render a person unable to practice their vocation.<sup>15</sup> Finally, a soldier or officer who stole from his fellows should also be given a death sentence.<sup>16</sup> Any of these characteristics found to be part of the theft act significantly augmented the gravity of the crime, marking it as *calificado* and requiring judges to issue a capital sentence to convicted thieves and any accomplices.<sup>17</sup> This stern sentence far exceeded the program of prison, remuneration, corporal punishment, and convict labor that judges typically applied for other forms of theft.

There is an underlying logic for the *calificado* categories that might justify a capital sentence. The previous chapter explained how theft of silver coin had the potential to undermine public faith in the institutional integrity of the royal mint. This was a place where merchants were encouraged to bring their silver to have it formally taxed and transformed into coin, which, in turn, would help to stimulate the colonial economy by keeping silver freely circulating, and, more importantly, provide the crown with steady revenue from silver taxes and a surcharge for coin production. A capital sentence was part of a larger project to protect the financial interests of the crown, and regulations regarding royal coin, including a capital sentence for theft of coinage from Spain's mints, though they were never employed at the reformed royal mint in Mexico City were nonetheless reiterated in legal manuals into the nineteenth century.<sup>18</sup> Laws that rendered capital sentences for stealing from the poor and protected the ability of farmers, artisans, and artists to sustain their livelihood fit within broader protections for the king's weakest subjects. The responsibility of the king to protect the poor *miserables* within his dominions was an enduring refrain within Spanish civil and criminal law, more

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<sup>12</sup> *Siete Partidas, Partida 7, título 14, ley 18, "[T]ambien hurto calificado el cometido en la córte ó su rastró,."* This provision was revised and expanded in lib. 12, tit. 14, ley 1 of the *Novíssima recopilación de las leyes de España* (1804).

<sup>13</sup> *Siete Partidas, Partida 7, título 14, ley 18, "El abigaeto, el hurto de ganados o bestias, incurria en la pena de muerte se tenia la costumbre de hacer hurtos de esta clase."*

<sup>14</sup> *Siete Partidas, Partida 7, título 14, ley 18, "El hurto cometido en una casa incendiada por los que aprentan acudir a prestar socorro para la extincion del incendio o para salvar los efectos que en ella se encuentran."*

<sup>15</sup> *Siete Partidas, Partida 7, título 14, ley 18, "El hurto hecho a personas necesitadas, especialmente si estas en su razon quedaren reducidas a la indigencia."*

<sup>16</sup> *Siete Partidas, Partida 7, título 14, ley 18, "El hurto o robo de valor de 200 rs. Vn. arriba cometido por el soldado dentro del cuartel, casa de oficial, dependiente de ejercito, o la del paisano en que este alojado."*

<sup>17</sup> *Siete Partidas, Partida 7, título 14, ley 18, "[Á] quien fuere probado que fizo furto en alguna destas maneras, debe morir por ende él et todos quantos dieron ayuda ó consejo á tales ladrones en facer el furto, ó los encubriesen en sus casas ó en otros lugares, deben haber aquella misma pena."*

<sup>18</sup> Juan Saínz Guerra, "Moneda y delincuencia: Siglos XVI al XVIII," in *Anuario de historia del derecho español* (1997), 1619-1630.

generally.<sup>19</sup> Capital sentences for theft among soldiers promoted peace and tranquility within a body that secured the king's position against threats from rivals at home and abroad. In the context of these different forms of theft, and though it was severe, the king's mandate for a capital sentence was clear and justifiable.

In the context of sacrilegious theft, laws prohibiting stealing from the king's court and his treasury joined with *calificado* laws punishing theft from churches in that both regulations protected sacrosanct sites and items that were symbols of royal authority -- the king's palace and God's church, sovereign currency and sacred objects. Fundamental reference works like Juan de Hevia Bolaños's *Curia Philippica* (1603) linked theft of coin and theft from churches as treason, against the king for stealing from his coffers (*Lesamagestad humana*) and against God for robbing a house of worship (*Lesamagestad divina*). Hevia Bolaños included sacrilegious theft as one of a handful of crimes that fell under the denomination of mixed *fuero*, a designation with regards to legal jurisdiction meant that cases of sacrilegious theft could be heard before either secular or ecclesiastical judges, since it touched on matters involving both the civil and ecclesiastical *fueros*.<sup>20</sup> The next section explores the nature of *hurto sacrilego* as expressed in Spanish criminal theory, and its relationship to the broader category of *hurto calificado*, to explain why Spanish law codes mandated a capital sentence.

### **Hurto sacrilego within the *Siete Partidas* and Future Spanish Legal Compilations**

A single line from the seventh *Partida* set the punishment for *hurto sacrilego*: "thieves that steal from a church or from another religious site something holy or sacred...should die for this." This punishment was not significantly revised or updated in the later major collections of the early-modern era (1500-1800), including those for peninsular Spain such as the *Nueva recopilación de las leyes de Castilla* (1567) and the *Novísima recopilación de las leyes de España* (1804), or in the major compilations for Spain's overseas territories, especially the *Recopilación de las leyes de los reinos de las Indias* (1680). These early modern collections of laws contained pages of detailed

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<sup>19</sup> Brian Owensby notes that, "[a]n idea stretching back to Constantine and rooted in scripture, the doctrine of *miserabilis* held that certain people, whose helplessness inspired compassion, enjoyed special protection as "personas miserables"--wretched persons...At its core, the doctrine expressed a concern for those who wandered the wilderness of the world without a protector, people such as orphans, who lacked fathers, and widows who lacked husbands--all those, as *Las Partidas* noted, who 'may suffer wrong or violence from others more powerful than they.'" Brian Owensby, *Empire of Law and Indian Justice in Colonial Mexico* (Stanford: Stanford University Press, 2008), 55.

<sup>20</sup> Juan de Hevia Bolaños, *Curia Philippica* (1604), cited in Joaquín Escriche, *Diccionario razonado de Legislación y Jurisprudencia* (Madrid: 1831), Tomo III., 666, "Juicio Secular, Eclesiástico, Militar, Etc." According to Hevia Bolaños, criminal trials were defined such that, "Llámase *juicio secular*, por contraposición á *juicio eclesiástico*, el que se sigue sobre asuntos temporales ó profanos ante los jueces y tribunales que ejercen la jurisdicción secular o civil; y se dice *juicio eclesiástico* aquel en que se ventilan ante un juez o tribunal eclesiástico causas meramente espirituales que por su naturaleza están sujetas al conocimiento de la Iglesia ó bien causas temporales de los clérigos que por concesion ó privilegio pertenecen al mismo conocimiento. Denomínase *juicio de fuero mixto, mixti fori*, aquel en que conoce de la causa cualquiera de los jueces eclesiástico o secular que la previniere." Writing of sacrilegious theft in 1741, Murillo Velarde notes that, "[y] se el reo fuese laico puede actuar la iglesia ante juez laico o eclesiástico, porque tal fraude es casi una especie de sacrilegio, y por lo tanto pertenece al foro mixto." Murillo Velarde, *Curso de derecho canónico*, vol. 3, pp. 120,

instructions for erecting churches, appointing clerics to ecclesiastical offices, administering the sacraments, regulating the tithe, and reckoning with idolators, but they did not mention theft of holy objects, instead incorporating the provisions of the *Siete Partidas*.<sup>21</sup> The Mexican provincial synods of 1585 and 1771 likewise offered extensive, revised provisions for the types of holy objects that could occupy a place in a church, and discussions of how to protect and conserve them, but did not mention the consequences for stealing them.<sup>22</sup>

At first glance, this lack of significant revision in early-modern legal texts from the medieval antecedents of the *Siete Partidas* appears to be an anomaly within the context of a more broadly European legal culture that was preoccupied with commentary and revision, ignited by the Papal Revolution of the thirteenth century and sustained by the outflows from the major centers of legal learning in Bologna, Salamanca, Vienna, and Heidelberg, and precipitating the celebrated works of influential early-modern Spanish legal scholars like Diego de Covarrubias y Leyva and Francisco Suárez.<sup>23</sup> In this context, it was the medieval theft laws of the *Siete Partidas* that remained the first point of authority in the influential Spanish and Spanish-American

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<sup>21</sup> *Siete Partidas*, *Partida* 7, título 14, ley 18, "Ladron[es] que furtase de alguna iglesia ó de otro lugar religioso alguna cosa santa ó sagrada..."[Á] quien fuere probado que fizo furto en alguna destas maneras, debe morir por ende él et todos quantos dieron ayuda ó consejo á tales ladrones en facer el furto, ó los encubriesen en sus casas ó en otros lugares, deben haber aquella misma pena." These terms are implicitly reinforced in the Nueva recopilación de Castilla (1567), and the *Novísima recopilación de las leyes de España* (1804), based on a pragmatic issued by King Charles I in 1552. The terms of libro 12, tit. 14, ley 1 of the *Novísima recopilación* entitled, "Pena de los ladrones, y su conmutacion en la de galeras, con las calidades que se expresan," replicates the terms of the pragmatic stating, "en los hurtos qualificados, y robos y salteamientos en caminos ó en campos, y fuerzas y otros delitos semejantes ó mayores, los delinguentes sean castigados conforme á las leyes de nuestros Reynos." By using the phrasing, "conformé á las leyes de nuestros Reynos," in reference to *hurto calificado*, the *Novísima recopilación* implicitly perpetuated the terms of the *Siete Partidas* mandating a capital sentence." The *Recopilación de las leyes de los reynos de las Indias* (1680) also implicitly preserved the terms of the *Siete Partidas* by not including provisions for *hurto calificado*, thus allowing Castilian law to govern the American territories. In Juan de Solórzano y Pereira's *Política indiana* (1618), he discusses capital punishment for royal officials stealing from the treasury, stating, "En las Indias, los oficiales reales son castigados con la pena capital y con la confiscacion de todos sus bienes, si roban algo de las arcas reales confiadas a su cuidado," but does not discuss theft of holy objects. Solórzano y Pereira, *Política indiana*, lib. 6, cap. 15.

<sup>22</sup> Book 5 of the decrees of the Third Mexican Provincial Synod (1585) offers detailed terms for crimes like simony, heresy, usury, concubinage and assault, and explicitly discusses punishments in título 9, entitled, "De las penas," but makes no reference to sacrilegious theft. Similarly, libro 1, título 18 of the synod's decrees discusses the type and scope of holy objects used in churches, but similarly makes no reference to theft. The decrees of the Fourth Mexican Provincial Synod contain an order that, "cuiden los Curas de no permitir a los Indios sacar los ornamentos de la Yglesia para sus Capillas, pues solo siendo costumbre lo permitiran, y nunca para adorno de sus Casas, pues es mucho el detrimento que padecen por andarlas manoseando, y ajando los Indios, y causa dolor el ver que en algunas Yglesias Parroquiales cortados los ornamentos, quitadas las bordaduras, é Imagineria, y todo esto por fiarse los Parrocos, y Vicarios de los Naturales, y no registrar los Cajones para ver si esta todo con la decencia, y aseo devido." See, libro 3, tit. 9, ley 3, "De la conservación de las cosas de la Yglesia, su enagenación, ó no," *Concilio Provincial Mexicano Cuarto: celebrado en la ciudad de México el año de 1771* (Querétaro: Imprenta de la Escuela de Artes, 1898), Bancroft Library Collection, UC Berkeley.

<sup>23</sup> Harold Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Harvard University Press, 1983), 120-165; Francisco Tomás y Valiente, *Manual de historia del derecho español* (Madrid, 1979), 36-71.

legal texts of the sixteenth through eighteenth centuries.<sup>24</sup> Even after independence from Spain in the nineteenth century, during the era of fierce Spanish and national Mexican anticlericalism that saw ardent calls for the divestment of church property and a limited role for the church as a landholder and creditor, Spanish legal experts continued to draw from the statutes contained in the *Siete Partidas*.<sup>25</sup>

Part of the reason for the enduring nature of the *Partidas*' legislation, as written, had to do the structure of Spanish law, more generally. Spanish written law applied according to a hierarchy that set a fixed order for its application.<sup>26</sup> Prior to 1680, the laws of Castile governed all Spanish territories.<sup>27</sup> Castilian legislation preserved a hierarchy from the earlier *Leyes de Toro* (1505), which affirmed a Castilian normative system that began with the *Ordenamiento de Alcalá de Henares* (1348), followed by the municipal charters, or *fueros* that governed some Spanish political districts, then the medieval *Fuero Real* (1255), and finally the *Siete Partidas*. After the publication of the *Recopilación de leyes de los reinos de las Indias* in 1680, this same hierarchy applied in Spain's overseas territories, as this text included a provision that established the order and sources so that questions that were not fully covered or provided for in subsequent decrees would be decided in accordance with the general laws of Spain. None of the Castilian codes or local *fueros* touched on sacrilegious theft with any depth and the 1680 *Recopilación de leyes de los reinos de las Indias* really only approached completeness with regards to administrative law in the colonies. It was quite limited with regards to criminal statutes and was only used as a sparing supplement to other compilations that did emphasize criminal law.<sup>28</sup>

The *Siete Partidas* also remained influential due to its comprehensive treatment of theft, more generally. Theft occupied a full title in the seventh *Partida* with sixteen separate substantial essays that offered detailed explanations for the many variations of the crime. Sacrilege, which included *hurto sacrilego*, also spanned a full title of the first *Partida*, including twelve essays bearing such specific titles as the "nature and etymology" of sacrilege, "modes of committing sacrilege," "objects," and "penalties." There was also an entire title in the first *Partida* devoted to "inalienable church property," which was comprised of twelve essays dedicated to defining church property and regulating its divestment. The seven books of the *Partidas* were holistic in nature, and were deliberately written and organized as a complete, interdependent, and totalizing

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<sup>24</sup> See, for example, extensive discussions of the *Siete Partidas* in Jerónimo Castillo de Bobadilla's *Política para corregidores* (1597), Hevia Bolanos' *Curia Philipica* (1603) the Enlightenment-era *Curso de derecho canónico español y americano*, by Pedro Murillo Velarde (1741), and A.X. Pérez y López's *Teatro de la legislación universal de España e Indias* (1791).

<sup>25</sup> Jan Bazant, *The Alienation of Church Wealth in Mexico: Social and Economic Aspects of the Liberal Revolution, 1856-1875* (Cambridge University Press, 2008). Joaquín Escriche's *Diccionario razonado de Legislación y Jurisprudencia* (1831), and Justo Donoso's *Instituciones de derecho canónico americano* (1852).

<sup>26</sup> One of the best treatments of this Spanish legal "hierarchy" can be found in John Thomas Vance, "The background of Hispanic-American law: Legal sources and juridical literature of Spain," Ph.D dissertation, Catholic University of America, 1937. See also Charles Cutter, *The Legal Culture of Northern New Spain, 1700-1800* (University of New Mexico Press, 1995), 31-32.

<sup>27</sup> The compilation of Castilian law that generally applied in the colonies was the *Nueva recopilación de Castilla*, published in 1567.

<sup>28</sup> Vance, "The background of Hispanic-American law," 121; Owensby, *Empire of Law*, 174-175.

legal system, offering a uniform code of law with universal applicability.<sup>29</sup> As a result of this comprehensive detail, and in contrast to the other codes, the *Siete Partidas* justifiably remained the source of first instance with regards to ecclesiastical property and sacrilegious theft in the criminal courts of Spain and its colonies.

Theft laws from the seventh *Partida* were closely associated with laws regarding ecclesiastical property from the first *Partida*. These laws included a substantial collection from the third title of the first *Partida*, "Concerning the Holy Trinity and the Catholic Faith," which defined and set the terms for the care and divestment of all ecclesiastical property. In keeping with the holistic system of the *Siete Partidas* the matters of Catholic faith in first *Partida* merged with the "accusations and wrongful acts what men commit, and for which they receive punishment," in the seventh *Partida*.<sup>30</sup> A set of laws from the first *Partida* defined ecclesiastical assets according to type, monetary value, and intrinsic holy properties, and in reference to these statutes, a second set of laws from the seventh *Partida*, explained the punishment for stealing them.

In the first *Partida*'s discussions of the types of ecclesiastical goods, the authors took great care to note small portable pieces of substantial value, the "precious property, which should be conserved, such as the vessels made of gold, of silver, ornaments, jewelry of high regard" in all manner of religious sites, from urban cathedrals, rural parish churches, convents, monasteries and private chapels.<sup>31</sup> The "precious property" of a typical parish church included, at a minimum, a chalice to hold the sanctified wine for communion, thick woven vestments for a priest, and an altar cross.<sup>32</sup> It would likely include a monstrance to secure the consecrated bread of Christ and a paten to display it. More affluent parish churches contained scalloped silver bowls for pouring baptismal waters over the heads of the faithful, candlesticks of varying size, tall processional crosses, incense holders. These fundamental items "equipped" (*se equiparán*) the church,

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<sup>29</sup> Alfonso García Gallo suggests that the *Partidas* is a monument, unlike any other contemporary European work of law, to the *ius commune* derived from Roman, canon and feudal law. In his judgment, the *Partidas* occupies in the field of thirteenth-century law the place held by the *Summa theologica* of Thomas Aquinas in theology. See, García Gallo, "El Libro de las leyes de Alfonso el Sabio: del *Espéculo* a las *Partidas*," *Anuario de Historia del Derecho Español* 21-22 (1951-1952): 345-528. Robert A. MacDonald says of the *Siete Partidas* that they "represent an encyclopedic and systematic integration of definition, prescription, explanation, and amplification of materials from many sources--classical and contemporary, canonical and secular, Roman and Castilian, legal and literary--in different languages," MacDonald, "Law and Politics: Alfonso's Program of Political Reform," in *The Worlds of Alfonso the Learned and James the Conquerer*, ed. Robert I. Burns, S.J. (Princeton, N.J.: Princeton University Press, 1985), 181.

<sup>30</sup> The seventh *Partida* is entitled, "Los acusaciones y malfetrías que los hombres hacen, por las que merecen recibir pena."

<sup>31</sup> *Siete Partidas*, *Partida* 1, tit. 14, ley 1, "bienes muebles preciosos, que pueden se conservados, como los vasos de oro, de plata, los ornamentos, las alhajas de gran estimación." These categories of objects are explained with great detail in Murillo Velarde, *Curso de derecho canonico*, Tomo III, 118, "De las cosas de la Iglesia".

<sup>32</sup> *Siete Partidas*, *Partida* 1, tit. 10, ley 6, states, "He who builds [a church] must carefully observe two things, namely: to have it complete, and properly arranged; and this applies to the building as well as to the books, vestments, chalices, and everything else necessary for the honor and service of the church." *Partida* 1, tit. 4, ley 65, states, "Priests must keep clean, and in order, the churches and all other things necessary for the service of God in them, as, for instance, the chalices, the crosses, the vestments in which they conduct the service and all the cloths with which they adorn the altars and the walls," In *Las Siete Partidas: The Medieval Church: The World of Clerics and Laymen*, Samuel Parsons Scott, trans., Robert I. Burns, S.J., ed. (Philadelphia: University of Pennsylvania Press, 2001), 40-44.

according to the *Siete Partidas*, allowing the resident priest to carry out his regular liturgical responsibilities of delivering the mass and communion and the more infrequent sacraments, like baptism or marriage.<sup>33</sup> The umbrella laws of the *Siete Partidas* were general enough to include any object that decorated, and thereby enhanced the bare structure of a church or monastery, giving it "a special utility or splendor," such as, "the relics of the Saints, such as the whole body, or the head, the arm, the hand, the foot, or whichever thing of this type. Equally, the libraries, at least the most abundant, and sometimes each one of the books."<sup>34</sup>

The *Siete Partidas* explained how these precious objects functioned within a broader monetary economy. Church silver and jewels, the most valuable forms of church property, were the product of the beneficence of the community of Christians that funded sculpture, altars, and silverwork in churches through tithe, donation by lay brotherhoods such as guilds and *cofradías*, and private endowment, and the *Siete Partidas* acknowledged that these items bore significant monetary value and could be used as a means of exchange to procure other needed things, though only for a handful of narrow purposes, and only as a last resort.<sup>35</sup> Precious items could be sold to raise money if the church badly needed repair, or if other items were needed to administer the sacraments.<sup>36</sup> They could be sold to fund essential improvements or renovations of the church.<sup>37</sup> Or, if money was needed to feed the poor in times of want, to bury the faithful, or dedicate temples, a bishop could authorize the sale of precious objects.<sup>38</sup> In all cases, bishops and

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<sup>33</sup> *Siete Partidas, Partida 1, tit. 14, ley 1*, "los bienes de esta clase se equiparán a los inmuebles en cuanto a la presente prohibición."

<sup>34</sup> *Siete Partidas, Partida 1, título 14, ley 1*, "dan a la iglesia o al monasterio una especial utilidad o esplendor, como las reliquias insignes de los Santos como el cuerpo íntegro o la cabeza, el brazo, la mano, el pie o cualquier cosa de esta clase. Igualmente las bibliotecas, por lo menos las muy abundantes, y algunas veces cada uno de los libros." This title is explained with greater detail in Murillo Velarde, *Curso de derecho canonico*, Tomo III, "De las cosas de la Iglesia," 118.

<sup>35</sup> *Siete Partidas, Partida 1, título 14, ley 1*. "Sin embargo, se permite la enajenacion de los bienes eclesiásticos, ya sean raíces, ya muebles preciosos, y aun de los consagrados y benditos, por causa de necesidad, utilidad y piedad. Así que, pueden enajenarse, dichos bienes: 1., para pagar las deudas que la Iglesia hubiere contraído y no pudiese satisfacer de otro modo; 2. para redimir de cautiverio á los parroquianos que no tuviesen otros medios de conseguir su libertad; 3. para dar de comer á los pobres en tiempo de hambre; 4., para hacer, reparar, ó mejorar algun templo; 5., para comprar terreno con objeto de hacer o aumentar el cementerio; 6. para comprar o adquirir otros bienes que sean mas útiles á la Iglesia."

<sup>36</sup> Murillo Velarde, *Curso de derecho canonico*, Tomo III, 118, drawing from *Partida 1, tit. 14*, explains, "Cuando, por ej., hay necesidad de reparar una iglesia que amenaza ruina, o de comprar vasos sagrados para la decencia del culto, y la razon es que la necesidad no tiene ley...Y no basta la necesidad del rector, a no ser que la iglesia no le diera una congrua sustentación. Esta necesidad debe ser absoluta y que de otro modo no se pueda remediar. Debe probarse y debe comenzar por la enajenación de las cosas de menos valía, y no consagradas." These and further terms explained in the notes below were echoed in the later decrees of the 1585 and 1771 Mexican Provincial Synods.

<sup>37</sup> Murillo Velarde, *Curso de derecho canonico*, Tomo III, 118, citing *Partida 1, tit. 14*, "Y no basta que la enajenación se considere útil para la iglesia y no sea dañosa, sino que es absolutamente necesario que la situación de la iglesia se mejore, por lo menos en cuanto al modo y las circunstancias, al grado que sea mejor enajenar la cosa que retenerla....Y entonces sin solemnidad se podrán enajenar tales bienes, como vemos frecuentemente que los cálices, algunos vasos de plata, y ornamentos sagrados, cuando están deteriorados se cambien por otros nuevos sin solemnidad."

<sup>38</sup> Murillo Velarde, *Curso de derecho canonico*, Tomo III, 118, citing *Siete Partidas, Partida 1, tit. 14*, "La tercera causa es la piedad, v. gr., para la redención de los cautivos, por la cual también los vasos sagrados pueden empeñarse o entregarse...A esto se equipara la guerra que hace contra los infieles y heréticos, por lo

their delegates were designated only as the custodians of church property. Divestment of this property from the church required formal consensus among the community and church leadership, and even the king was bound to reimburse the church “entirely, without any diminution (in value)” if he had to sell church property to respond to civic emergencies.<sup>39</sup>

But the church assets protected by provisions of Spanish law were, first and foremost, sacred objects. Apart from material and economic considerations, the *Siete Partidas* considered devotional objects, especially the items regularly used in Catholic liturgy to be “sagrados ornamentos.”<sup>40</sup> Much of what made these items sacred, the first *Partida* explained, was the holy properties conferred upon them by the blessings of consecration, and their role in the miraculous events that occurred during the ritual of the Mass. The first *Partida* noted the critical importance of the Mass among the regularly observed Catholic rites, and went into great detail about the items that were needed to perform the ritual properly.<sup>41</sup> To be used in the Mass, the various tools had to be blessed

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cual se puede dar alguna parte de los réditos o de los dones eclesiásticos a los príncipes, como en España se dan a los reyes varios donativos concedidos por el pontífice. También esta enajenación se hace para socorrer las necesidades de los pobres, para edificación de templos y para sepultura de los fieles,” *Siete Partidas, Partida 1, tit. 14, Ley 1*. For a further explanation, see Murillo Velarde, *Curso de Derecho Canónico*, vol. 3, p. 118.

<sup>39</sup> “Mas aun en estos casos, para que sea válida la enajenación, es indispensable que preceda la deliberación del capítulo, cabildo ó comunidad con su Prelado; ley 63., tit. 18, Part. 3; Fuero Juzgo, lib. 5, tit. 1; Fuero Real, Lib. 1, tit 5, Part. 1, tit. 14, Nov. Recop. lib. 1, tit. 5. La plata de las Iglesias pueden tomarse por el Rey en caso de necesidad para atender á las urgencias del Estado “con tanto despues la restituya enteramente sin alguna disminución”, ley 8, tit. 5, lib. 1 Nov. Recop.

<sup>40</sup> *Siete Partidas, Partida 1, tit. 4, ley 64*, states, “Priests must keep clean, and in order, the churches and all other things necessary for the service of God in them, as, for instance, the chalices, the crosses, the vestments in which they conduct the service and all the cloths with which they adorn the altars and the walls.” *Partida 1, tit. 4, ley 65* goes on to say, “Those precious things which the Holy Church keeps in order and reverences, as the preceding law stated, are called ornaments...[a]nd they must not be removed from the places where they are kept in order to earn anything by means of them, or for the purpose of selling them, for no one can obtain Holy things for a price, and therefore they cannot be sold, since no one can give in exchange for them any thing of equal value. And although in temporal matters manything is considered worth the price it is sold for, this is not the case with spiritual objects.” In *Las Siete Partidas: The Medieval Church: The World of Clerics and Laymen*, Samuel Parsons Scott, trans., Robert I. Burns, S.J., ed., 40-44.

<sup>41</sup> *Siete Partidas, Partida 1, tit. 4, ley 67*, “Among all the sacraments, the greatest and most holy is that of the body of our lord Jesus Christ, which is consecrated during mass: for if the other sacraments assist man in being saved, this one bestows upon him the grace of God, and maintains him in good standing.” *Siete Partidas, Partida 1, tit. 4, ley 52*, “A priest should not consecrate the body of Our Lord Jesus Christ when he says mass, without having at hand three things, namely: bread, wine, and water. The bread, which is called the Host, must be made of wheat flour mixed up with water alone, without yeast or any other substance whatsoever; and the priest must make it in a very cleanly manner. He must not put wine alone into the chalice, but water also, and must mix them both together. This is done because blood and water issued from the side of Our Lord Jesus Christ when they struck him with the lance. He must use more wine than water. This bread really is changed into the body of Our Lord Jesus Christ, and the wine and water into his blood, by the power of God and by the holy words that the priest repeats, which Our Lord Jesus Christ spoke on Holy Thursday when he took bread and wine and said to the Apostles: “This is my body and my blood,” and when the priest says these words, he must raise the Host that the people may see it, and all must kneel down and raise their hands to heaven and say: “I adore Thee, O, Jesus Christ, and I bless Thy Holy Name, because Thou hast redeemed the world by Thy body and by Thy blood.” *Siete Partidas, Partida 1, tit. 4, ley 53*, “The priest must mix water and wine in the chalice when he wishes to consecrate the body of Our Lord Jesus Christ, and this is done for the following reason: By the wine, the Holy Church

by a priest and thus formally dedicated to bringing about a holy communion between God and his faithful.<sup>42</sup> The climactic event of the Mass was the sanctification of the Eucharist, "when they consecrate the body and blood of Our Lord Jesus Christ," and thereby 'bestow upon [man] the grace of God.'<sup>43</sup> It was during this ritual, the *Partidas* emphasized, that the "miracle [and] marvelous thing both to men and nations" occurred in which the bread "was really changed into the body of our lord Jesus Christ, and the wine and water into his blood."<sup>44</sup> It was at this moment of transubstantiation that "God actually sends his angels there to receive the prayers of the people," the experience of communion among sincere believers, God, and his angels was brought to fruition, and the *sagrados ornamentos* used in the ritual of the Mass were validated for their role in effectuating this communion.<sup>45</sup>

Consecration, by which I mean setting items apart as dedicated to God through a blessing or other performative utterance, was the critical link between these broader Catholic practices and the *Partidas*' laws regarding devotional objects.<sup>46</sup> The practices of consecration outlined in the first *Partida* emulated those of Scripture.<sup>47</sup> Just as the consecration of the original Temple of Jerusalem by King Solomon transformed the temple into a divinely ordained House of God, so consecration acts by Spanish prelates would transform the inert clay, wood, and stone of bare structures into equally holy sites

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understands the blood of Our Lord Jesus Christ, and by the water, the Christian people; and thus, when water is mingled with the wine, it signifies that faithful Christians are united to him in belief. Wherefore, the priest should not make this Sacrament unless with both wine and water, for, if he should make it with wine and not mingle water with it, it would signify that Our Lord was separated from his people; or if water alone without wine were used, it would mean that the Christian people were beginning to be separated from him, and therefore the sacrifice must be made with both wine and water." In *Las Siete Partidas: The Medieval Church: The World of Clerics and Laymen*, Samuel Parsons Scott, trans., Robert I. Burns, S.J., ed., 38-47.

<sup>42</sup> By communion, I refer both to the holy sacrament and to "fellowship" and "shared participation in a mental and emotional experience." See the Oxford English Dictionary, Second Edition (Oxford University Press, 1989), p. 442, "Communion."

<sup>43</sup> *Siete Partidas, Partida 1, tit. 4, ley 47*, and *Siete Partidas, Partida 1, tit. 4, ley 52*. See footnote 38 for the full text of these laws.

<sup>44</sup> *Siete Partidas, Partida 1, tit. 4, ley 52*. On the nature of miracles see, *Siete Partidas, Partida 1, tit. 4, ley 47*, "What Difference Exists Between Things Which Are Done by Nature, and Those Accomplished by Miracles," and *Siete Partidas, Partida 1, tit. 4, ley 63*, "What Things Are Necessary to a Miracle in Order to Render it Genuine." In *Las Siete Partidas: The Medieval Church: The World of Clerics and Laymen*, Samuel Parsons Scott, trans., Robert I. Burns, S.J., ed., 46. [why such a long reference here, above, and below when you have already cited this work several times?]

<sup>45</sup> *Partida 1, tit. 4, ley 58*, "What the Mass is, and Why It is so called" "The service which priests perform when they consecrate the body and blood of Our Lord Jesus Christ, is called the mass. The mass means something sent, and so it is named...because God actually sends his angels there to receive the prayers of the people." In *Las Siete Partidas: The Medieval Church: The World of Clerics and Laymen*, Samuel Parsons Scott, trans., Robert I. Burns, S.J., ed., 38-40.

<sup>46</sup> For a thorough explanation of performative acts, see J. L. Austin, *How to do Things with Words*, Second Edition (Harvard University Press, 1975); and John Searle, *Speech Acts: An Essay in the Philosophy of Language* (Cambridge University Press, 1970).

<sup>47</sup> *Siete Partidas, Partida 1, tit. 5, ley 23*, Consecration of a bishop, for example, must occur "[I]n imitation of the first archbishop in Jerusalem, who was St. James the Apostle, styled The Just; and whom they called the brother of our Lord Jesus Christ, because he resembles him, and who was the son of the sister of the Holy Virgin Mary. He was consecrated by St. Peter, the chief of the Apostles, and there were with him at the consecration St. James the elder, and St. John his brother."

worthy of hosting the sacraments, including the miracle of the Mass.<sup>48</sup> Consecration transformed ordinary wool garments into the special vestments that were “necessary for the service of the church, and unsuitable for any other use,” such that they should be burned if they became tattered, as “what is set apart (by consecration) for the service of God should not afterward serve for any other purpose.”<sup>49</sup> Consecration elevated the intrinsic worth of the precious but otherwise ordinary metals in “chalices, silver vessels and sacred ornaments,” such that “no one can give in exchange for them anything of equal value.”<sup>50</sup> It was through consecration that a church became a sanctified space with special protections for all of its contents, and stealing from a church became not just a moderate sin of ordinary theft, but a grave sin and capital crime that the *Partidas* justified as worthy of a death sentence.

The concepts elucidated in the *Siete Partidas* regarding the intrinsic holy properties of consecrated ecclesiastical property aligned with the principles expressed in contemporaneous canon law. Joseph O’Callaghan, a medievalist who studied the legislative works of the court of the Alfonso X, has noted the influence of the canons of the Fourth Lateran Council on the development of the *Siete Partidas*.<sup>51</sup> In 1215 Pope Innocent III convoked the Council primarily to address papal involvement in the Crusades, but the very first canon offered a clear perspective on the “Exposition of the Catholic Faith and of the dogma of Transubstantiation.” Here, Innocent III declared,

In which there is the same priest and sacrifice, Jesus Christ, whose body and blood are truly contained in the sacrament of the altar under the forms of bread and wine; the bread being changed (transsubstantiatio) by divine power into the body, and the wine into the

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<sup>48</sup> See *Siete Partidas*, *Partida* 1, tit 9, leyes 1, 2, 3, 14, and 15 for an elaborate articulation of this genealogy. See also Chapter Five, p. 245 of this dissertation for an elaboration of the consecration ceremony for churches.

<sup>49</sup> *Siete Partidas*, *Partida* 1, tit. 4, ley 64, In *Las Siete Partidas: The Medieval Church : The World of Clerics and Laymen*, Samuel Parsons Scott, trans., Robert I. Burns, S.J., ed., 40-44.

<sup>50</sup> *Partida* 1, tit 4, ley 65. “Concerning the Relics of the Saints, and How They Should be Honored and Cared For”: “Those precious things which the Holy Church keeps in order and reverences, as the preceding law stated, are called ornaments. But those to which the greatest honor is shown (with the exception of the body of Our Lord Jesus Christ), are the relics of the Saints whose bodies were canonized, which means that they were declared to be Saints. This cannot be done except by the Holy Church of Rome, and, above all relics, those of Our Lord Jesus Christ, and those of his mother, Holy Mary, should be preserved with the greatest care. All these relics must be kept in a clean and highly honorable place, they must be treated with the greatest respect, and kept under lock and key so that no one can steal them, or take them, to have them in his possession, or obtain them in any other way without the consent of those who have charge of them. And they must not be removed from the places where they are kept in order to earn anything by means of them, or for the purpose of selling them, for no one can obtain Holy things for a price, and therefore they cannot be sold, since no one can give in exchange for them anything of equal value. And although in temporal matters anything is considered worth the price it is sold for, this is not the case with spiritual objects, wherefore anyone who sells the latter commits mortal sin, and is guilty of simony.” In *Las Siete Partidas: The Medieval Church: The World of Clerics and Laymen*, Samuel Parsons Scott, trans., Robert I. Burns, S.J., ed. (Philadelphia: University of Pennsylvania Press, 2001), 40-44.

<sup>51</sup> Joseph F. O’Callaghan, “Alfonso X and the Partidas,” in Robert I. Burns, S.J., ed, *Las Siete Partidas: The Medieval Church, The World of Clerics and Laymen*, vol. 1 (University of Pennsylvania Press, 2001), xxx-xli. [Now you give us the citation in a different long form!] See also the short introductory essays in Jerry R. Craddock, *The Legislative Works of Alfonso X, el Sabio: A Critical Bibliography*, Research Bibliographies and Checklists, 45 (London: Grant and Cutler, 1986).

blood, so that to realize the mystery of unity we may receive of Him what He has received of us..<sup>52</sup>

Though there is no language in the Fourth Lateran Council decrees regarding sacrilegious theft, there is congruity between the Fourth Lateran council and the drafters of the *Siete Partidas* with regards to respectful treatment of consecrated ecclesiastical property for its role in the transubstantiation miracle of the Mass. Canon 19 of the Fourth Lateran Council titled “[C]hurches, church vessels, and the like must be kept clean” reads, in part, “There are also [some] who not only neglect to keep the churches clean but also leave the consecrated vessels, vestments, palls, and corporals so unclean that sometimes they are a source of aversion... We command also that the aforesaid churches, vessels, corporals, and vestments be kept clean and bright. For it is absurd to tolerate in sacred things a filthiness that is unbecoming even in profane things.” This compares with *título 4, ley 64*, of the first *Partida*, entitled “Priests must keep the Churches, and all the Other Things Which are Necessary for the Serving of God, Clean,” which reads, in part, “For, since the body of Our Lord Jesus Christ is consecrated in the church, it is proper that all the things which are necessary for the service should be very clean and in good condition.” The foundational canon law of the Fourth Lateran Council and the laws of the *Siete Partidas*, produced during the thirteenth-century legal revolution in Europe, emphasized the miraculous process of transubstantiation through the Mass and necessitated careful treatment of the consecrated objects used to produce the miracle, establishing harmony with regards to ecclesiastical property between these two emergent tracks of written law.

This early harmony between canon law and Spanish civil law concerning the special nature of and protections for devotional objects endured in the Spanish Peninsula and its overseas territories into the early-modern era. The Council of Trent (1545-1563) firmly defended the miracle of transubstantiation as a core dogma in counter to fierce critiques by Protestant theologians. In doing so, the Council reinforced the connections between established canon law and Spanish civil law on matters of ecclesiastical property by fortifying the *Partidas*' special emphasis on the miracle of the Mass and the inviolability of the church and its contents, giving these issues an expanded set of legal, spiritual, and philosophical justifications. The Tridentine decrees regarding transubstantiation were central to the teachings of the church throughout the Spanish Empire and as previously discussed, in law the *Siete Partidas* remained an unquestioned written legal and theological justification for the king's power as a Catholic monarch. In subsequent centuries, as other matters of ecclesiastical immunity, privilege, and faith ignited contention among jurists, the special protections for devotional objects and adherence to doctrinal interpretations of the miracle of transubstantiation avoided controversy and competing interpretations. Well into the nineteenth century in these matters, the written forms of Spanish civil law and broader canon law retained this symmetry.

Close analysis of various statutes within the *Siete Partidas* bring to light some contradictions with regards to the formal mandate for a death sentence for sacrilegious theft. These contradictions offer a path to understanding the moderated sentences passed down for instances of sacrilegious theft in our case studies, which is the topic of the next

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<sup>52</sup> John Evans, *Statutes of the Fourth General Council of Lateran* (London, 1843), Canon 1., 28.

section. In explicit terms, the seventh of the *Siete Partidas* unequivocally stated in its treatment of crime and punishment that, “[t]hieves that steal something sacred from a church or other holy site should die for this and all that give counsel or assistance to such thieves in carrying out this theft, or those who hide them in their houses or other sites, should have the same punishment.”<sup>53</sup> This phrasing was preserved in subsequent Spanish legal codes, however the law mandating a capital sentence conflicts with other laws in the *Siete Partidas* regarding sacrilege and sacrilegious theft. In the first *Partida*, título 5, ley 33, entitled “What Sins Are Great and Very Heinous In Their Nature, and What are Moderate Sins,” the authors of the *Siete Partidas* list as “sins of moderate importance,” adultery, fornication, false testimony, and suggestively, robbery, theft, and sacrilege. The “[g]reat sins...such as are very heinous as the Holy Church defines them,” included “killing a man knowingly, willingly, and intentionally, committing simony while in orders, or being a heretic,” but there is no mention of sacrilegious theft.<sup>54</sup> Later, in the first *Partida*’s extensive discussion of the nature of and punishment for sacrilege, the drafters note that, “[s]acrilege is committed...by stealing or by removing by force something sacred from a holy place, such as for instance, where anyone steals or forcibly removes chalices, crosses, vestments, or any of the ornaments or other property which belong to the church,” and when outlining the “[p]enalties for those who commit sacrilege,” the authors note that, “[e]xcommunication and fine are the two penalties which the Church inflicts upon those who commit sacrilege,” but make no mention of a capital sentence.<sup>55</sup> The only reference to a capital sentence for sacrilege appears in the single line from the seventh *Partida* (*Partida 7*, tit. 14, ley 18), noted above. Excommunication was prescribed by the tenets of canon law, yet it was the provisions from the seventh *Partida*, mandating a death sentence, which were preserved in subsequent legal treatises and reference manuals as the requisite punishment for sacrilegious theft.

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<sup>53</sup> *Siete Partidas*, *Partida 7*, tit. 14, ley 18. “Ladron[es] que furtase de alguna iglesia ó de otro lugar religioso alguna cosa santa ó sagrada...debe morir por ende él et todos quantos dieron ayuda ó consejo á tales ladrones en facer el furto, ó los encubriesen en sus casas ó en otros lugares, deben haber aquella misma pena.”

<sup>54</sup> *Siete Partidas*, *Partida 1*, tit. 5, ley 33, “Pecados muy grandes y muy desmedidos son según disposición de la Iglesia: matar hombre a sabiendas o de grado, o hacer simonía en orden o ser hereje. Y los medianos pecados dicen que son estos, así como adulterio, fornicación, falso testimonio, robo, hurto, soberbia, avaricia, que se entiende por escasez, saña de mucho tiempo, sacrilegio, perjurio, embriaguez continuadamente, engaño en dicho o en hecho, del que viene mal a otro.”

<sup>55</sup> *Siete Partidas*, *Partida 1*, tit. 18, ley 2, “Hácese sacrilegio de cuatro maneras: la primera es cuando mete manos airadas en clérigo o en hombre de religión, bien sea clérigo o lego, o varón o mujer; la segunda forzando o hurtando cosa sagrada de lugar sagrado, como si alguno forzase o hurtase cáliz o cruz o vestimenta o alguno de los ornamentos o de las otras cosas que hay en la iglesia a servicio de ella, o quebrantase las puertas, horadase las paredes o el techo para entrar en la iglesia a hacer algún daño, o si diese fuego para quemarla; la tercera es cuando hurtan o fuerzan cosa sagrada de lugar que no es sagrado; y esto sería como si alguno tomase a hurto o a fuerza cáliz o cruz o vestimenta y otros ornamentos que fuesen de la iglesia o estuviesen en otra cosa como endepósito; la cuarta es hurtando o forzando cosa que no sea sagrada de lugar sagrado, así como si alguno hurtase o forzase pan o vino o ropa u otras cosas que pusiesen algunos hombres en la iglesia por guarda, así como en tiempo de las guerras cuando llevan sus cosas a las iglesias, que no se las hurten ni se las roben. Y hay diferencia entre hurto y robo, pues hurto es lo que toman a escondidas, y robo lo que toman declaradamente, por fuerza;” *Siete Partidas*, *Partida 1*, tit. 18, ley 4, “Excomunion y pecho de aver son dos penas que pone la Yglesia a los que fazen sacrillejo.”

The next section of this chapter turns to an evaluation of the sentences handed down for sacrilegious theft in Mexico City's archdiocesan *provisorato*, and as we will see, capital sentences were not included among them. It may be that despite the preservation of the capital sentence mandate from the *Siete Partidas* in subsequent iterations of Spanish law, local customary practices reflected the internal inconsistencies in the *Siete Partidas* and judges thereby mandated a penalty more in line with canon law, that is, excommunication, fine, or other, lesser penalties.

### ***Part Two: Incidence and Sentencing for Sacrilegious Theft in the Archdiocesan Provisorato of Mexico City***

The first half of this chapter grappled with a complicated legal and historical context for sacrilegious theft law in the Spanish empire. This second half pairs this law in theory with a discussion of law in practice, beginning with a reflection on the total number of available case records for sacrilegious theft in colonial Mexican archives and discussing the low total number of cases as a reliable indicator of incidence of theft. While emphasized in written law, from all appearances, instances of sacrilegious theft rarely appeared in the courts, and this section explores the reasons for this apparent low incidence of the crime. The chapter then concludes with close study of a selection of complete sacrilegious theft cases, focusing especially on the terms of sentences issued by the *provisorato* as a salient point of comparison for theft of coin from the mint.

#### ***Incidence of Sacrilegious Theft during the Late-Colonial Period***

This dissertation originated with a goal of a direct "apples-to-apples" comparative methodology of a range of crimes that arose in the central civil and ecclesiastical courts of colonial Mexico City during the late-colonial period, but the initial goals of this chapter, to compare theft of holy objects against a baseline of theft of royal coin, have been frustrated, to a degree, by a relative dearth of records for sacrilegious theft. The chapter emerges after more than a year of research in the major repositories of colonial criminal records for this territorial and administrative jurisdiction for the criminal categories that comprise the heart of this dissertation, including theft, sexual crimes, and contested claims for ecclesiastical immunity and asylum. In the interest of breadth and context, research for this study also included a survey of records for other categories of crimes like homicide, assault, and public drunkenness in order to gain a fuller sense of the overall activities of the various colonial courts. Casting a wide net, this research turned up just fourteen case records for sacrilegious theft for all time periods, and only four full trial records with a sentence attached.<sup>56</sup> The impetus for the

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<sup>56</sup> For the colonial period, most criminal records for this territorial and administrative jurisdiction appear in two major repositories, both located in Mexico City. The first is the smaller and more focused Archivo Histórico del Arzobispado de México (AHAM), which contains records for the archdiocesan Provisorato from the colonial and national periods. The second is the vast national Mexican archive, the Archivo General de la Nación. In the latter archive, criminal records are predominately found in three substantial multivolume documentary collections. The collection *Criminal* skews to criminal records from the array of civil courts that operated in Mexico during the viceregal period—the *Real sala del crimen*, municipal, military, the *Acordada*—but also includes a scattering of cases from the archdiocesan *provisorato* and regional ecclesiastical courts. *Bienes Nacionales* was primarily formed out of records from the AHAM that

structure of this chapter was the nuance of the written law, outlined in Part One, and the close connections between the laws associated with the theft of devotional objects and the laws regarding theft from the royal mint in Mexico City. This relative lack of case records, while frustrating some of the larger goals for this study, nevertheless offers insights into the incidence of sacrilegious theft in the colonial context, more generally.

First, the small number of cases for sacrilegious theft does not appear to be a statistical anomaly. The research for this chapter suggests comprehensive recordkeeping by the archbishop's notaries during the eighteenth century, and no obvious deficiencies with regards to the maintenance of the archdiocesan archive during the colonial period. Óscar Mazin notes the longstanding directive from the Mexican archbishops for a general completeness with regards to the archdiocesan archives, and trial records culled from the archives for the archdiocesan *provisorato* typically include instructions from the archbishop or his proxies to archive a complete copy of each trial record.<sup>57</sup> Whether it was in the form of full trial records, correspondence, decrees, or fragments of cases, the *provisorato* produced hundreds of records for sexual crimes, idolatry, witchcraft, heresy, blasphemy, assault, and fraud, yielding the basis for substantial studies by other historians whose work relies on stable, quantifiable data.<sup>58</sup> Furthermore, if we isolate from the research for this dissertation only the records produced by the *provisorato* during the colonial period there do not appear to be any glaring temporal gaps or territorial omissions. Significant underrepresentation of sacrilegious theft records relative to other crimes seems unlikely.

Sacrilegious theft also does not appear to be a crime that was grossly undiscovered or underreported during the colonial era. Minor religious crimes, like failing to fulfill religious obligations, appearing drunk in public, committing fornication, or some other deliberate, but minor offense against public decency could be quietly settled locally by the parish priest or other magistrate in ways that would not generate a record.<sup>59</sup> In the case of sacrilegious theft, priests were obligated to inform the bishop if a church or other holy site was robbed, and to bring the matter to the attention of the

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were confiscated during the anti-clerical reforms of the 1850s and then were ultimately incorporated into the national archives as part of a sweeping project under Mexican President Sebastián Lerdo de Tejada in the 1870s. Last, the diffuse collection *Indiferente Virreinal* contains records that were never formally catalogued in the other collections, including records that would be more appropriately included in *Criminal* and *Bienes Nacionales*.

<sup>57</sup> Óscar Mazin, *Catálogo de un fondo eclesiástico mexicano: la arquidiócesis de México, 1538-1911* (Mexico: CONDUMEX, 2004), 21. Richard Greenleaf notes that by the eighteenth century the actions of the "ordinary" officials of the archdiocesan Provisorato, which included the Provisor, the Promotor Fiscal, and also their team of notaries, were infringing upon the jurisdiction of the Holy Office of the Inquisition in Mexico to the degree that the Mexican Inquisitors from the latter institution petitioned the Inquisitor General in Spain asking, in effect, for an order to "cease and desist." See Greenleaf, "The Inquisition and the Indians of New Spain: A Study in Jurisdictional Confusion," *The Americas* (22:2, 1965), 138-166.

<sup>58</sup> A sampling of cases includes: Patricia Seed, *To Love Honor and Obey: Conflicts Over Marriage Choice, 1574-1821* (Stanford, 1988); Traslosheros, *Iglesia, justicia y sociedad en la Nueva España; Testaments of Toluca*, Catarina Pizzigoni, ed. (Stanford: Stanford University Press, 2007); William B. Taylor, *Magistrates of the Sacred: Priests and Parishioners in Eighteenth Century Mexico* (Stanford: Stanford University Press, 1996); Jessica Delgado, "Sacred practice, intimate power: laywomen and the church in colonial Mexico," Ph.D dissertation, UC Berkeley, 2008.

<sup>59</sup> Jorge Traslosheros and others identify the *foro interno* of the confessional as a key site for the resolution of criminal behavior, in which absolution of sin occurred orally and by symbolic act without leaving a record. See Traslosheros, *Iglesia, justicia, y sociedad en la Nueva España*, 171.

archdiocesan court, as the bishop held primary jurisdiction over all matters of sacrilegious theft. We do not know if all priests complied with the mandate to inform the bishop immediately; in our opening case, Pasqual Dorotheo only came to the attention of the archbishop and his delegates after his third successful robbery of a church. That said, as a category of crime, sacrilegious theft was more likely than many other types to leave a documentary trace. We can reasonably conclude that while the archival holdings for sacrilegious theft are incomplete in *absolute* terms and do not account for every instance of sacrilegious theft, *relative* to other forms of religious crime, sacrilegious theft was an infrequent event.

The infrequency of sacrilegious theft cannot be explained according to the deterring effect of any formal mechanisms for surveillance like a standing guard, or daily, painstaking accounting, as at the royal mint in Mexico City. At the mint, cadres of specialized guards circulated among the grounds to ensure that no coin disappeared into a worker's pockets, shoes, or even mouths and hair. At the end of each shift, mint laborers were subject to a close inspection of their person, clothing, and belongings. In addition, redundancy was built into the layers of accounting, checking and crosschecking of inventory to minimize the loss of silver. By contrast, at a church, a sacristan and his assistants might live in residence nearby, and they would watch over the priest's vestments, the chalice, monstrance, and other items regularly used in services, but these service items were often out of sight, and there is no record of any sort of standing guard, however informal, for the alms box, statuary, chapels, or altar.

Most churches would be secured after the evening prayer service with a heavy wooden door and an iron bolt lock, but the available theft cases suggest just how easily a sealed church could be entered. In 1736, in Malinalco, a mountain town some twenty leagues (seventy miles) from Mexico City, close to the revered holy Sanctuary of Chalma, an Indian teenager, José Ramírez, confessed to his priest that he had scaled a wall of Malinalco's Augustine monastery compound from an alleyway, and wormed his way into the church through a partially open window.<sup>60</sup> Once inside, he found and broke open a box containing a chalice and paten, which he gathered into a bag along with a candlestick. No one witnessed Ramírez's scramble into the church. There was no one waiting inside to deter him, and no one saw the young man escape. It was only one week later that a neighbor noticed Ramírez handling the unusual, precious objects outside the boy's humble home and alerted the parish priest. Pastors were expected to keep running inventories of the church fabric and have them available for inspection by pastoral visitors and pastoral visits were to be undertaken at least once during a bishop's tenure, but parish priests' occasional failure to comply with the bishop's mandate to report instances of theft to the bishop, as evident in Pasqual Dorotheo's case that opened this chapter, suggest that priests may have occasionally avoided reporting theft out of embarrassment, hope for a local resolution that did not involve the bishop, or fear of reprisal.<sup>61</sup>

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<sup>60</sup> AGN, Criminal, vol. 682, exp. 4, fjs. 161-175, "Sobre ladrón sacrilego."

<sup>61</sup> The Fourth Mexican Provincial Synod of 1771, for example, included among its decrees in libro 3, tit. 11, ley 4, that "En cada Yglesia Parroquial debe haver un Archivo en que se guarden todos los Libros Parroquiales, los instrumentos pertenecientes a la Yglesia...y con inventario formado de todas que debe hacer el Notario; y no haviend, el mismo Parroco; ni se podra sacar instrumento alguno sin expresa licencia del Obispo, ó su Vicario general, anotando el día mes, y año en que se sacare," and, libro 3, tit. 11, ley

Perhaps the most likely explanation for an apparent low incidence of sacrilegious theft is also the simplest one: given their choice of targets, thieves seldom singled out holy sites. In comparison to other forms of property theft, stealing from a church or other holy site was a highly visible act that commanded attention. When a thief stole an item from a church, such as a chalice, an altar or processional cross, or the crown from a sculpture, he or she took something that was likely well known, and easily identified within the community. Devotional items were powerful repositories for individual and collective experiences of a lived Catholic faith.<sup>62</sup> They were visible during prayer, brought out for the sacraments, during the regular cycle of the liturgical calendar, on feast days, and during times of famine or epidemic. Many items that adorned shrines, chapels, and simple *hermitas*, the beloved images that inspired worship, such as reliquaries to house slivers of bone and locks of hair from favored saints or painstakingly crafted altars, statues, and paintings of Christ, God's angels, the saints, and the Virgin Mary commemorated miraculous apparitions and divine presence. Removing an object from a church both diminished the sites of worship and removed well-known elements from a carefully considered devotional panorama. Legal texts referred to the effects of sacrilegious theft in terms of damage (*daño*) and injury (*injuria*) both to the church and the community.<sup>63</sup> If the *daño* was severe enough it would render a church unusable as a host for the sacraments, and could necessitate a re-consecration ceremony by a bishop.<sup>64</sup> We can imagine the *injuria* to a church, like the damage to the Nazarene Jesus in the parish church of Sultepec, crackling like a shockwave through a community, sparking outrage among the laity and animating a search for the culprit. As we remember from our earlier cases, a network of the faithful Christians unearthed both Pasqual Dorotheo and José Ramírez. This type of risk would not exist when stealing ordinary objects from an individual or a private home.

Relatedly, it would be hard for a thief to dispose of a stolen devotional item, which would need to be broken down because of its notoriety and familiarity. Although there was a robust market in pawned silver in a cash poor region like eighteenth-century New Spain, and an extensive network of formal and clandestine silver traders and dealers existed especially in mining centers and the capital city, disposing of stolen objects was no easy task, since, according to Spanish law any silver traders, dealers, and metalworkers found to be involved in the traffic of church silver would face an equal punishment to that of thieves, and apart from any criminal sentence, sacrilegious acts carried with them, *ipso facto*, a sentence of excommunication.<sup>65</sup> Adding to the risk, in an

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6, "Además del Archivo que debe en cada Parroquia, según esta arriba mandado para colocar allí todos los instrumentos tocantes a la Yglesia, Capillas, dotaciones, y Aniversarios, havra en la Sacristia una Tabla de las Fiestas, y Aniversarios con expresion de los Fundadores, y días en que se han de celebrar, y esta tabla ha de estar firmada por el Obispo, ó su Visitador, y el Notario, y si el Obispo ó su Visitador no huviese ido á Visita, por el Parroco, y Notario." *Concilio Provincial Mexicano Cuarto: celebrado en la ciudad de México el año de 1771*, UC Berkeley, Bancroft Library Collection.

<sup>62</sup> For a detailed example of this phenomenon in the colonial Mexican context, see William B. Taylor, "Image and Immanence," in *Shrines and Miraculous Images: Religious Life in Mexico Before the Reforma* (Albuquerque: University of New Mexico Press, 2010), pp. 15-62.

<sup>63</sup> Joaquín Escriche, *Diccionario razonado de legislación y jurisprudencia*, tomo 3, 156.

<sup>64</sup> Murillo Velarde, *Curso de derecho canónico español y americano*, vol. 4, título 18, "De los hurtos."

<sup>65</sup> See Marie Francois, "Cloth and Silver: Pawning and Material Life in Mexico City at the Turn of the Nineteenth Century," *The Americas*, Vol. 60, No. 3, Special Issue on Material Culture (Jan. 2004), pp.

altered form, silver from church objects would no longer show any mark of having been taxed. Without a treasury stamp, the silver reverted back to what was known as a *rescate* state. This considerably reduced the silver's value on the open market, regardless of its purity, because untaxed *rescate* silver was notoriously difficult to trade.<sup>66</sup> To illustrate this point, when he sold the silver from the crown of the Virgin of the Rosary, Pasqual Dorotheo received just twelve pesos for six *marcos* of silver, less than half of the value by weight of taxed silver. Compare the lure of this reduced value to the lure of stealing Spanish coin, which occurred regularly at the mint, despite the many mechanisms for control and surveillance. If a would-be thief managed to elude detection and emerge from the walls of the mint his coin would be immediately useable, virtually indistinguishable from any other coin, and undiminished in value. The next section explores the nature of the sentences offered in instances of sacrilegious theft, which must have formed an essential part of the calculus that deterred would-be thieves, but now, the complicated logistics of transporting a sacred silver object undetected, and then transforming into something useable, tradeable, and of satisfactory value alone must have been a deterrent.

### ***Sentencing for Sacrilegious Theft in the Archdiocesan Provisorato***

The final section of this chapter turns to a study of two sentences that appeared in the four complete trial records for the available sacrilegious theft cases. The sentence for José Ramírez, the Indian teenager who stole the chalice and paten from the Augustine monastery in Malinalco, is not closely analyzed because despite a rich report concerning the details of his crime, his sentence consisted only of a single line, in which the *provisor* noted Ramírez's young age, ordered that he confess his sins to the parish priest in Malinalco, and remitted him to his parents.

### ***Mexico City (1766)***

On October 31, 1766, the *provisor* for the archdiocese of Mexico, Joseph Becerra Moreno, stood in the Metropolitan tribunal and reviewed a case of sacrilegious theft involving Francisco Martínez and Mariano Joseph Yáñez, two mestizo residents of Mexico City who openly confessed to having stolen candlesticks and several silver jars from the church for the Congregation of the Oratory for Saint Philip of Neri in the capital city.<sup>67</sup> According to Becerra, the evidence gathered during the summary investigation (*sumaría*), and the full confession by both men were more than sufficient to convict them of sacrilegious theft, and if the "rigors of law" were followed to the letter, the two men's actions should be considered among the most egregious examples. Their having taken and "abused...for personal gain, and with such sinful violence" items that were dedicated to God and his divine cult caused a great insult (*agravio*) to the church, Becerra wrote,

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325-362; Peter John Bakewell, *Silver Mining and Society in Colonial Mexico: Zacatecas, 1546-1700* (New York: Cambridge University Press, 1971), 182-185; *Partida 1*, tit. 18, ley 4, "Excomunion e pecho de haber, son dos penas que pone la Iglesia á los que facen sacrilegio."

<sup>66</sup> Bakewell, *Silver Mining in Colonial Mexico*, 182.

<sup>67</sup> AGN, Indiferente Virreinal, caja 2557, exp. 43, fjs. 1-20. Unless otherwise noted, the succeeding direct quotes come from this document.

thereby justifying “the most severe sentence, in accordance with the law.”<sup>68</sup> However, Becerra continued, there was also reason to grant the two suspects mercy. The gravity of this act of sacrilege should be balanced with the criminals' full confession and the fact that they had returned the stolen objects in full, though one candlestick had already been dismantled, and one of the four silver jars had been melted down into silver ingots. Still, the *provisor* insisted that punishment was necessary to “restore” and “offer satisfaction” to the church and its congregation for their losses, and to provide for the “spiritual welfare” (*provecho espiritual*) of the two men. He therefore recommended a two-fold sentence: First, for one year, the two men were ordered to work without pay for one of the church construction projects in the archdiocese, or on another labor of the archbishop's choosing. During this time, they were to receive no wages, only the food necessary to sustain them. This would offer restitution to the church, in the form of labor, as well as provide an instructive example for others through their visibility as convict laborers. Second, “for the purposes of medicinal, spiritual, [and] healthful penitence,” for their sins, before leaving prison the two men were ordered to offer a full confession and take communion as the first step in reconciling with with God and the Church. Then, during the first two months of their sentence, they were to again confess and take communion eight times, and for the remaining ten months, do so once per month. Additionally, for a period of six months, each day they were to get down on their knees and offer a prayer of devotion by saying part of the rosary to the Virgin Mary.<sup>69</sup> They must recognize the gravity of their sins, the *provisor* warned them, for if they again committed theft, they would be returned to prison and the written mandates of the law would be applied to them, to the letter.<sup>70</sup>

### *Sultepec (1769)*

Pasqual Dorotheo was taken into custody in June, 1769, and by the time *provisor* Miguel Cervantes formally issued his sentence, it was December 1770, some fifteen months later.<sup>71</sup> During the intervening period Dorotheo remained in the public jail in Sultepec, where, as he complained once in a letter to the archbishop, he endured miserable conditions that took a serious toll on his health. Of the three complete

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<sup>68</sup> "Este mirado en rigor de derecho, debería ser uno de los muchos, que para el caso tiene establecidos, en satisfaccion de el agravio inferido a el lugar sagrado, abusando de lo dedicado a Dios, y su culto, para su propios usos, con tan torpe violencia...demanda pena severa, conforme a las reglas establecidas por derecho."

<sup>69</sup> "Pero atendiendo a su llana confesion, y aver de hecho verificado enteramente la restitucion de lo extrahido: mirando a el mismo tiempo, con la pena a la satisfacci3n de el Lugar ofendido, el provecho espiritual de estos Reos. Se servirá, V.S., de condenarlos a que sirvan por espacio de un año, en una de las fabricas de Yglesias, o en otro destino que sus Prelados les dieren en ellas sin salario alguno, y solo con la calidad de darles de comer lo preciso...Por via de penitencia medicinal, espiritual, saludable les imponemos la de que, antes de salir de la pricion donde estan, se confiecen generalmente de sus culpas, y comulguen y por los dos primeros meses haian de confesar y comulgar ocho días, y en los demas restantes una vez a el mes. Por seis meses, rezando diaramente una parte del Rosario de la Santissima Virgin nuestra Señora"

<sup>70</sup> "Aperciviendoles seriamente que en caso de reincidencia al trabajo que se les impudiere y a cumplir con dichas penitencias medicinales, se restituiran a dicha pricison, y se procedera en su contra a lo que huviere lugar en derecho."

<sup>71</sup> AGN, Bienes Nacionales, vol. 62, exp. 50, "Causa criminal seguida sobre hurtos sacrilegos." Unless otherwise noted, the succeeding direct quotes come from this document.

investigations, Dorotheo exhibited the most resolute criminal behavior. He committed multiple acts of sacrilegious theft targeting several holy sites in and around the mining region of Sultepec. During his interrogation he also perjured himself, a matter that, by law, should increase the severity of his sentence. When Cervantes issued his sentence, he wrote of the overwhelming evidence against Dorotheo contained in the investigation by the parish priest in Sultepec and in the gathered witness testimony. Despite this, during three direct interrogations, the man “contradicted and perjured himself at every step,” and, when given the chance, could not offer any evidence to back his claims to innocence.<sup>72</sup> His crimes were grave ones, Cervantes wrote, and evidence against him recommended that the *provisorato*, “impos[e] on him, with great rigor, the punishments established against such criminals.”<sup>73</sup> However, the *provisor* took into careful consideration the fifteen months that Dorotheo had already spent in prison, and thus rather than impose further criminal sentence, crafted a course of spiritual rehabilitation that included Dorotheo’s public exhibition as a sinner during the Eucharistic Liturgy of the Mass in Sultepec, and to a set of pious exercises that would help Dorotheo atone for his sins and effectuate his communion with the congregation of Sultepec and his reconciliation with the Catholic faith.

Cervantes ordered that on the first available Sunday, Dorotheo attend Mass in the parish church of Sultepec and appear standing before the entire congregation wearing a rope (*soga*) around his neck. As the congregation participated in the rites of the Eucharist, with Dorotheo before them, the priest was asked to center the Offertory song, the moment the bread and wine were introduced to the parishioners, around a doctrinal talk that “reflect[ed] on the gravity of the sins committed by Dorotheo,” which, the *provisor* explained, would bring his soul into turmoil (*confusión*) and offer a lesson and example (*escarmiento*) to the rest of the congregation. With the conclusion of the Offertory prayer, and with the priest’s reflections on Dorotheo’s sins now at the center the Communion rite, the priest would begin the Eucharistic Prayer during which the offerings of bread and wine were consecrated in Sultepec’s church as the living body and blood of Christ. As the congregation together performed the Eucharistic Prayer, and for a period from when the Sanctus hymn was sung together by the congregation until the consecrated bread and wine were consumed by the parishioners during the Communion rite, Dorotheo would remain on his knees. Dorotheo would then rise before the congregation and remain standing as an example until the priest had led them through the Concluding Rites of the Mass.<sup>74</sup>

Once the Mass was over, Dorotheo would begin a term of eight years of exile, for a distance of twenty leagues in circumference around Sultepec and Mexico City, and he was ordered to pay all court fees. Cervantes then ordered as a restorative prescription of “penitential medicine” (*penitencia medicinal*) that during the first three months of his exile, Dorotheo was to locate a priest, offer his confession, and take communion “many

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<sup>72</sup> “dice que siendo constante de los actuado y confesado por el mismo Reo repetidas veces, bien que contradiciéndose y perjurándose a cada paso.”

<sup>73</sup> “con el maior rigor impondiéndosele las penas establecidas contra semejantes malhechores”

<sup>74</sup> “en la primera Dominica asista con sogá al cuello en la Parroquia de Zultepec todo el tiempo que durase la misa maior, y permanezca de pie junto a la ultima grada del Presbitero a excepcion desde el sanctus hasta el consumir, que se hincara de rodillas mandiendo que el cura al tiempo del ofertorio haga una platica doctrinal en que pondere la gravedad de los excesos del Reo para que a este sirva de confusion y a los oyentes de escarmiento.”

times.” Then, for the period of six months, every Friday he was to get down on his knees and say part of the rosary to the Virgin Mary.<sup>75</sup> As in the earlier case involving Martínez and Joseph Yáñez, the *provisor* warned Dorotheo that if he committed any further theft or failed to complete his program of spiritual exercises, he would be returned to prison and would then be judged in full accordance with the law.

### *Reflections on Sentencing for Sacrilegious Theft and Conclusions*

In the cases included in this chapter, all convicts avoided capital punishment (or other possible punishments) prescribed by law unless they failed to complete the program of restorative and rehabilitative spiritual exercises awarded by the *provisor*. The course of these cases and the terms of their sentencing in the *provisorato* provide a means for reflecting on the nature of criminal punishment during the late-colonial period, more generally.

The legal historian Francisco Tomás y Valiente describes penal law of early modern Spain (1500-1800) as inherently repressive rather than rehabilitative. The true objective of Spanish penal law, he writes, was to inspire a collective fear that was neither too light as to be ineffective, nor too excessive as to undermine the credibility of those in power.<sup>76</sup> We can see references to this philosophy in the cornerstones of Spanish penal law. The *Siete Partidas* said in justification for publicly executed capital sentences, that "justice should be meted out in a public display (*paladinamente*), that for what [convicts] had done they should die; because the crowd that sees the punishment, or hears of it, consequently become fearful, or receives a lesson, as the *Alcalde* or public crier announces before them the crimes for which [the convicts] are being killed."<sup>77</sup> Later, in his sixteenth-century instructional manual to district governors, Jerónimo Castillo de Bobadilla explained, "the execution of justice engenders fear, and fear keeps away evil thoughts and restrains wrongful actions."<sup>78</sup> Recent scholars of colonial Mexico have made note of the naturalistic metaphor of seventeenth-century Spanish jurist Gerónimo Ceballos, who wrote that public exhibitions "have the effect of lightning, which, striking to punish one, frightens many; and so with one blow, it serves as an example and punishment."<sup>79</sup>

Faith in the deterring and purifying effect of a punitive public spectacle was not limited to the civil setting. In the sixteenth century Dominican priest and Scholastic theologian Domingo de Soto, King Charles V's representative at the Council of Trent,

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<sup>75</sup> "asi mismo condenara su justificacion al referido Pascual en ocho años de destierro, veinte leguas en contorno de Zultepec, y de esta corte, y en las costas de autos tasadas conforma a Arancel por el Notario Publico, imponiendole por penitencia medicinal que en los tres meses primeros confiese y comulgue otras tantas vezes y por espacio de seis meses todos los viernes una parte de rosario a Nuestra Señora puesto de rodillas."

<sup>76</sup> Francisco Tomás y Valiente, *El Derecho penal de la Monarquía Absoluta: Siglos XVI-XVIII* (Madrid, 1986), 121.

<sup>77</sup> *Siete Partidas*, *Partida Paladinamente* debe der fecha la justicia de aquellos, que hobieren fecho porque deban morir; porque los otros, que lo vieren, o lo oyeren, reciban en de miedo, o escarmiento, diciendo el Alcalde, o el pregonero ante las gentes los yerros por que los matan.

<sup>78</sup> Bobadilla, *Politica para los corregidores*, Lib. II, cap. XIII, nums 4-5, t. I, 374, "la execución de la justicia engendra miedo, y el miedo aparta los malos pensamientos y refrena las malas obras."

<sup>79</sup> Cutter, *Legal Culture of Northern New Spain*, 133; Owensby, *Empire of Law*, 171.

wrote that only “through the fear and awe of law,” oriented to the public good, “might the virtuous live calmly and in peace.”<sup>80</sup> As the priest and canon law scholar Pedro Murillo Velarde wrote in the opening lines to the section “On Punishment” of his 1741 treatise on canon law in Spain and the Americas, “that it was necessary to establish torture, and punishment,” as corrective measures in the criminal courts, “so that for the person that love does not inspire, fear stifles.”<sup>81</sup> In the colonial setting, ecclesiastical judges were warned to punish “public and scandalous sins” that might encourage others to wrongful behavior by processing them in the courts. According to Jorge Traslosheros, applying public punishment through the *foro externo* of the ecclesiastical courts, rather than in the privacy of the *foro interno* of the confessional was a means for judges to directly and simultaneously attend to the negative publicity and temptation of scandalous sins.<sup>82</sup>

In the sacrilegious theft cases analyzed in this chapter, all were resolved after the year 1730, which might shed light on the nature of the prescribed sentences. Several scholars of civil criminal law in the Spanish territories have pointed out that by this time, capital sentences in all courts were falling into disuse, to be replaced by stints of unpaid labor on Spain's maritime fortresses, or on public works projects in the major urban centers like Mexico City.<sup>83</sup> The previous chapter discussed how in the Mexico City mint, which opened in 1731, capital punishment was never used, though written law required it, and even public exhibitions of shaming (*vergüenza*) and corporal punishment gradually disappeared in the court of the mint in favor of less demonstrative sentences of exile and stints of unpaid labor in textile mills and on public works.

Three of the complete cases included in this chapter occurred during the term of Archbishop Francisco Antonio de Lorenzana. Traslosheros describes the offices of the *provisorato* as creations of the Mexican bishops, different for each diocese, and thus capable of reflecting, in personnel as well as organization, the personality, philosophy, and discretion of its authoritative head.<sup>84</sup> The *provisorato* comprised just one division within the vast bureaucratic offices of the archdiocese and represented just one of the archbishop's many responsibilities, and we find, not surprisingly, that the archbishop's delegates, the *provisor* and his assistants who reviewed the cases, discussed the intricacies of the law, and recommended a sentence to the archbishop. However, it was the archbishop who ultimately reviewed all sentences, offered his written approval, or, on occasion modified the sentence to his liking.

Returning to the “competing moral orders” highlighted in the introduction to the chapter, William Taylor has written about the period from the arrival of Archbishop Lorenzana in 1766 through the meetings of the Fourth Provincial Council in 1771 as a “high point in the conceptualization of the priest as a loving teacher,” rather than as a stern judge. The “instruments of fear, judgment, and punishment,” were deemphasized in

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<sup>80</sup> Domingo de Soto, *De Justitie et Jure*, cited in Owensby, *Empire of Law*, 171.

<sup>81</sup> Murillo Velarde, *Curso de derecho canónico español y americano*, vol. III, 241, “que fue necesario establecer tormentos y penas, para que a lo que no impulsa el amor, los reprima el temor.”

<sup>82</sup> Traslosheros, *Iglesia, justicia y sociedad en la Nueva España*, 77. There is a deeper discussion of the distinction between the *foro interno* of the confessional and the *foro externo* of the ecclesiastical criminal courts in chapter 3, pp. 189-190.

<sup>83</sup> Amendares, *La criminalidad en la ciudad de México*; Colin MacLachlan, *Criminal Justice in Eighteenth-Century Mexico: A Study of the Tribunal of the Acordada* (Berkeley, CA: University of California Press, 1975); Cutter, *The Legal Culture of Northern New Spain*.

<sup>84</sup> Traslosheros, *Iglesia, justicia y sociedad en la Nueva España*, 45.

Lorenzana's reordering of priestly responsibilities. Instead, priests were to guide the laity with "benevolence, patience, and great charity, even if that love was met with ingratitude." In a 1772 circular to priests, Lorenzana's successor, Alonso Núñez de Haro y Peralta (1772-1800), pointedly urged love and moderation in punishment.<sup>85</sup> Just as the previous chapter discussed moderation of sentences by the superintendent at the mint as part of a general shift in penal law in the civil courts, so too in the archdiocesan *provisorato* the sentences in the handful of complete cases of this chapter primarily center on concerns for the spiritual health of convicts and the restoration of congregations. Only Pasqual Dorotheo, our lone example of especially incorrigible behavior, received anything resembling a retributive form of punishment – eight years of exile – but the emphasis of his sentence was on a public display of chastisement and contrition, which rectified the *daño* and *injuria* to the church and restored order to the congregation, and a separate program of "spiritual, penitential, healthful medicine," which attended to Dorotheo's salvation. Perhaps this program of punishment, which reappears in later chapters discussing crimes of illicit sexual behavior, reflect the changing philosophies of the Mexican church noted by Taylor and others. In late-colonial Mexico City, in the context of what the written law described as the gravest act of sacrilege, the moderating practices of the church courts coincided with those of the civil courts, as church made rehabilitation, in the form of spiritual salvation through penitential medicine, the primary focus of its penal law.

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<sup>85</sup> Taylor, *Magistrates of the Sacred*, 161-162.

### Chapter Three: *Corrupting Malicia and Sexual Violence in Colonial Mexico City Courts*

The two chapters that follow move to a study of criminal processing for illicit sexual behavior in the civil and ecclesiastical criminal courts of Mexico City and its close surrounding territories. According to the religious and administrative goals of a distant king of Spain, regulating sexual activity in the American territories was a central focus of royal and church officials during the colonial period. In the context of a colonial enterprise in which native people engaged in sexual behavior and lived in relationships that often departed from Spanish norms, the two majesties, crown and church, publicized a clear vision for the proper expression of sexual behavior. While this was done through traditional, internal channels, such as the Catholic liturgy, the catechism, and the confessional, and also through widely circulated royal decrees concerning the control of “public and scandalous sin,” the Spanish crown and church in the Americas also stamped a vision for proper sexual norms through the civil and ecclesiastical criminal court systems. Because both colonial civil courts and ecclesiastical courts regularly tried sexual crimes across three centuries of Spanish rule, this project turns to them to answer broader questions about whether both civil and ecclesiastical courts utilized the same sources, started from the same moral and philosophical underpinnings, followed the same types of legal procedures, and similarly punished criminal behavior.

The first of the two chapters centers on crimes of sexual violence, primarily rape, but also other forms of sex that typically implied physical or psychological coercion, denoted by three formal Spanish legal terms: *rapto*, *estupro*, and *violación*. The second chapter centers on illicit forms of consensual sexual relations, including adultery, concubinage, and cases involving broken marriage promises. In the civil and ecclesiastical Spanish law of the colonial period, as in the law for much of Catholic Europe, any manner of sexual relations outside of wedlock was considered sinful, and some forms of extramarital sex, especially those involving violence, resulted in legal sanctions by the criminal courts.<sup>1</sup>

The key issue that separates these two categories of crimes in law, and also the key variable that forms the basis for separating this study of illicit sex into two chapters, is that of consent of the female party to sex. In the grouping of sexual crimes that occupies this chapter, *rapto*, *estupro*, *violación*, women were generally recognized as unwilling victims of crime. In the consensual sexual relationships at the heart of the next chapter, crimes of *incontinencia*, *concubinato*, and *ilícita amistad*, women were considered active participants subject to criminal prosecution.<sup>2</sup>

Isolating consent as a variable in these crimes has not been an arbitrary decision to distinguish among cases and give structure to a study. Definitions of consent to sex were key distinguishing features in the written law, and across the various courts of the two tracks of colonial justice a judge’s search for signs of consent was the primary factor

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<sup>1</sup> This chapter offers a deeper analysis of the importance to the crown and church of controlling extramarital sex in the colonial territories, and the methods for doing so in the next chapter.

<sup>2</sup> As this chapter will discuss with greater depth on pp. 11 and 42-45, age of the female victim was an important evaluative component that, in connection with an analysis of her personal habits and public reputation, determined her degree of criminal culpability.

that gave shape to criminal investigations, and dictated the evidence needed to justify a verdict.

Apart from its influence with the courts, whether or not a woman was found to be consenting also had social ramifications for both the alleged assailant and his victim.<sup>3</sup> If a judge decided that sex was a non-consensual product of physical force or psychological coercion, penalties could increase significantly for men. Convicts faced fines of up to one half of their total assets, threats of capital punishment, painful forms of corporal punishment, lengthy terms of exile, and stints of unpaid labor on a public works project or maritime presidio. If women were virgins at the time of intercourse, men had the additional responsibility to provide them and their families with a substantial dowry in recompense for the loss of prestige associated with a woman's loss of virginity.

Women's public reputations also could be at risk in sexual violence trials. In a society in which female chastity shaped public perceptions of family honor and personal virtue, women were expected to preserve their virginity until marriage.<sup>4</sup> Often, a woman's ability to find and keep a marriage partner depended upon the presumption that she was a virgin.<sup>5</sup> In a sexual economy in which few opportunities existed for women to become financially self-sufficient, the inability to attract a marriage partner could fundamentally alter a woman's chances to acquire financial security by adulthood.<sup>6</sup> Apart from any charges of crime and sin that they might face, women that consented to sex outside of wedlock, whom freely gave away the "precious jewel" of their virginity, to use phrasing found in civil and ecclesiastical procedural manuals as well as that utilized by the Spanish colonial judiciary, were often referred to as corrupt (*corrupta*), second-hand (*usado*), and, thus, unfit marriage partners, especially if they were born into non-elite families.<sup>7</sup> If, however, judges found evidence that women did not consent to sex, and especially if trial investigations demonstrated that men applied physical force, the

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<sup>3</sup> While men were also occasionally targeted for sexual violence, in both the written law and in the cases reviewed for this chapter, women were the primary victims of sexual violence. As such, this chapter centers on the perspective of women as targets for sexual violence, and men as their assailants.

<sup>4</sup> In *Public Lives, Private Secrets*, Ann Twinam suggests that historians exaggerate the degree to which women were stigmatized by charges of sexual corruption, and that "it is time to put an end to the "virgin bride myth"; however, the case studies at the heart of this chapter suggest that the potential for stigma was a real one, especially for non-elite women. See Twinam, *Public Lives, Private Secrets: Gender, Honor, Sexuality, and Illegitimacy in Colonial Latin America* (Stanford University Press, 1999), especially pp. 35-45.

<sup>5</sup> Women who aspired to enter a convent, the other path in colonial New Spain to financial security and "protection" from threats to their chastity, were also required to be virgins. In his 1737 treatise of moral theology, Francisco Larraga, utilized the term "la muger corrupta por copula," in a discussion of the conditions under which women could become nuns. According to Larraga, women that were knowingly "corrupted" by illicit intercourse could not take the veil, while women who were forced to have sex (*si por fuerza fue conocida*) retained the ability to become nuns. See Francisco Larraga, *Addiccionario al Promptuario de theologa moral* (Madrid, 1737), folio 346.

<sup>6</sup> Silvia Arrom, *The Women of Mexico City, 1790-1857* (Stanford University Press, 1985), 18.

<sup>7</sup> Susan Socolow writes on this topic, "A man could earn honor by conforming to the social ideals of his status group while a woman could jeopardize it through the frailties of her flesh. According to prevailing ideas, women were divided into the "virtuous" and the "shamed," with the dividing line between these two groups closely linked to female sexuality. In theory there were no gray areas in this moral code, and any woman who sought sexual pleasure outside of marriage was the same as a prostitute." Susan Midgen Socolow, *The Women of Colonial Latin America* (Cambridge University Press, 2000), 8.

courts referred to women as wronged victims rather than willing participants.<sup>8</sup> They, and their families, were entitled to financial compensation, and within communities the victims of sexual violence could find their marriage prospects undiminished.<sup>9</sup>

If consent to sex was such a decisive element in these cases, it was also an elusive target for probing judges who sought to uncover the truth. The actions at the center of these cases often took place in private, away from witnesses, so there was typically little objective evidence from which to form conclusions. Self-interest clouded the formal statements of alleged victims and their assailants, often rendering the statements unreliable as evidence. Judges were also challenged to determine what constituted force and consent in a given case, since many forms of coercion were morally questionable, but not necessarily criminal.

The structure for this chapter originated with a search for a strong basis for comparison across ecclesiastical and civil courts. Did judges in these separate tracks of justice appeal to the same laws in making their determinations? Did they follow the same investigative practices to uncover evidence of coercion and consent? Were the crimes punished in a similar manner? Did the different courts conceive of consent to sex in the same way? This chapter poses these questions through a comparative study of two major legal forums, the archdiocesan *Provisorato*, the entity that adjudicated criminal matters for the Mexican archbishop, and its corollary branch of the royal *audiencia* in Mexico City known as the *Real sala del crimen*.

The chapter is organized into three sections: a first section that explains the written law concerning sexual violence, a second section that analyzes sexual violence procedure and case law from late-colonial Mexico City, and a third section that uses case studies to reckon with the complicated dynamics of prosecutions for child rape. The first section studies historical conceptions of sexual violence, coercion, and consent as they were expressed in both the most fundamental broadly European and more narrowly Spanish criminal law sources. The most-cited European sources in the colonial civil and ecclesiastical court records were Gratian's *Decretum* (1140), canon law's textbook for criminal theory and procedure, and the original laws and later glosses, or commentary; the medieval-era Spanish *Fuero Juzgo* (1241); and the *Siete Partidas* (1265). All three sources were touchstones for later study of criminal law in the major centers of Europe, and in Spain and the Americas they remained vital reference works into the nineteenth century.<sup>10</sup> All three sources were also part of a deeper tradition in Western Europe that sought to create far-reaching, holistic legal systems that wove together principles and

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<sup>8</sup> Asunción Lavrin notes that "When nonconsenting women were raped, their innocence spared them from sin, while the man not only sinned but committed a crime." See Asunción Lavrin, "Sexuality in Colonial Mexico: A Church Dilemma", in *Sexuality and Marriage in Colonial Latin America*, Asunción Lavrin, ed. (University of Nebraska Press, 1992), 73

<sup>9</sup> Twinam, *Public Lives, Private Secrets*, 40.

<sup>10</sup> Within the context of studies of medieval sexuality and nascent canon law of the twelfth century, James Brundage calls Gratian's *Decretum*, "a reasoned, analytical textbook that remained the basis for the teaching of canon law in the schools and universities throughout the remainder of the Middle Ages. Indeed Roman Catholic canonists continued to use the *Decretum* as an authoritative collection until the beginning of the twentieth century. Medieval and modern canonistic treatments of sexual behavior were thus grounded largely on positions and ideas that church leaders found in Gratian's work." See, James A Brundage, "Sex and Canon Law," in *Handbook of Medieval Sexuality*, James A. Brundage and Vern L. Bullough, eds. (New York: Routledge, 1999), 33-51.

dogma from divine law of the Old Testament and the laws of the Roman emperors Constantine and Justinian. The first part of this chapter explains a recurring theme across the early sources of church and civil law: female chastity, which included, but was not limited to, female virginity, was fiercely protected by law because it represented a firm basis for social stability. This section explains how this principle is reflected in the distinctions among the three main criminal categories of sexual violence: *rapto*, *estupro*, and *violación*.

The second section moves to a study of legal procedure in *provisorato* and *Real sala del crimen* cases that alleged violent rape in order to understand how colonial era judges investigated these cases. As noted earlier, most cases of alleged rape turned on allegations of force and an assumption that the victim did not consent to sex. This section tries to make sense of how judges characterized and uncovered evidence of force, violence, and consent, and explains the types of evidence judges utilized in light of the evidentiary difficulties of limited forensics and often ambiguous eyewitness testimony. Drawing from studies of consent theory from the modern Western legal tradition, this section centers on the argument that colonial judges construed consent to sex as what modern scholars refer to as a theory of “hybrid consent,” which necessitated: 1) external signs of consent, such as a nod of the head, a smile, or embrace, and 2) a woman’s simultaneous and relevant mental state of consent to sex. Several case examples illustrate that colonial era judges based their decisions on evidence that both of these expressions of consent -- the sign and the will -- co-existed, and that neither the one, nor the other alone was enough to establish guilt.<sup>11</sup>

The chapter moves finally to an examination of the crime of child rape. For reasons of their isolation in the home or on family farms, often little parental oversight, and vulnerability due to youth, poor young girls were regular targets for sexual predators during this period.<sup>12</sup> Here, a pair of case studies explores how judges determined the role of consent to sexual relations on the part of children in cases that alleged child rape. These two case studies, one each from the archdiocesan *Provisorato* and the *Real sala del crimen*, show that civil and ecclesiastical judges from these central courts utilized a development-based standard of valid consent for children, and that children were not automatically presumed to be immature and, therefore, innocent by virtue of their young age. Judges scoured records involving children for signs that the children exhibited *malicia*. In the general context of criminal cases, *malicia* referred to a knowing, deliberate intent to do wrong. In the context of sexual crimes cases involving children, *malicia* represented knowledge acquired prematurely about illicit sexuality and sex acts, which was often triggered by immoral living conditions, and which corrupted the child’s innocence and moral character. Evidence of *malicia* acquired through testimony regarding a child’s behavior or character formed the basis for allegations that boys and

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<sup>11</sup> John Kleinig, “The Nature of Consent,” in *The Ethics of Consent*, Wertheimer and McCullough, eds., 6.

<sup>12</sup> In her regional study of sexual crime in late-colonial Nueva Galicia, Carmen Castañeda García found that in cases alleging violent rape, victims were typically nineteen years old or younger. Carmen Castañeda García, *Violación, estupro y sexualidad: Nueva Galicia, 1790-1821* (Mexico: Editorial Hexogono, 1989), 43. Susan Socolow writes that sexual crimes against children were typically committed by family, friends, acquaintances, or neighbors. The victims were typically poor women, living either in cities or in rural areas. Most crime was committed in the home, suggesting a limited social milieu for women, and most reported crimes were interclass, indicating limited social mobility for women and rigid class boundaries. See, Socolow, *The Women of Colonial Latin America*, 147-150.

girls fully understood the ramifications of their actions when having sex.

### ***Part One: Legal Origins and Theory for Crimes of Sexual Violence in the Spanish Context***

As discussed in Chapter One, the *Siete Partidas* of Spanish King Alfonso X (1252-1284) remained the first point of reference for criminal philosophy and procedure in the colonial era. A single passage in the influential seventh *Partida* that discussed “all of the...wrongful acts (*maleficios*) that men do, and the punishment they deserve for them,” summed up its treatment of sexual coercion by abduction, force, or violence (*fuerza*) in a single, two-paragraph section, entitled: “Concerning those that force [intercourse with] or abduct virgins, nuns, or widows who live honestly” (*De los que fuerzan o llevan raptadas vírgenes o las mujeres de orden o las viudas que viven honestamente*).<sup>13</sup>

Here, the *Partidas* expressed concern for protecting the physical and emotional well being of virgins, nuns, and widows, who “live a good life in the houses of their fathers” (*facen buena vida en sus casas de sus padres*). The *Partidas* protected these women from sexual predators (*forzadores*) who looked to “gain access” (*aceso a*) to these women either through force (*fuerza*) or fraud (*engaño*). Forcing any of these women to have intercourse was “a great crime and wrongdoing” (*yerro et maldade muy grande*), the *Partidas* explained, because these were women who “live honestly in the service of God and the well being of the world” (*viven honestamente a servicio de Dios et a bienestanza del mundo*), and because this type of act “brought great dishonor to the parents of the girl who was forced [to have intercourse]” (*facen gran deshonor a los parientes de la muger forzada*).

If a court established guilt of sexual force through trial (*probado en juicio*), the *Siete Partidas* called for the harshest of sentences. The accused should be put to death and have all of his personal property liquidated and given to the victim's family in trust.<sup>14</sup> For the women to enjoy legal protections, including financial reimbursement, they had to be of good public habits (*vivir honestamente*), hence an explicit focus on virgins, nuns, and widows. For all women who fell outside of these categories there was no financial component to a sentence, and though the perpetrator should still be punished, he would not face a capital sentence. In these cases, the actual punishment would be left up to the reasoned discretion of a trained judge (*arbitrio judicial*).

While the *Siete Partidas* remained the foundational authority for criminal law in the Spanish territories throughout the colonial era, by 1650, colonial civil and ecclesiastical judges cited canon law sources in concert with the *Partidas*. One document cited in case records for colonial Mexico City and also by modern scholars of sexuality in colonial Latin America was a widely circulated legal treatise published by canon law scholar Fray Gabino Carta in 1653 that explained how the physical and spiritual

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<sup>13</sup> *Partida VII, Título XX, Ley 1-3.*

<sup>14</sup> *Partida VII, Título XX, Ley III:* “Qué pena merescen los que forzaren o rabiaren alguna de las mugeres sobredichas, et los ayudadores dellos.” The text reads, “Rabiendo algunt home muger virgen, o viuda de buena fama, o casada o religiosa, o yaciendo con alguna dellas por fuerza, sil fuere probado en juicio, debe morir por ello: et demas deben seer todos sus bienes de la muger que asi hobiere robada o forzada...ca estonce los bienes del forzador deben seer del padre et de la madre de la muger forzada.”

phenomenon of lust, one of the seven deadly sins, manifested itself in forms that could be reduced to a typology of seven types: fornication, adultery, incest, rape, abduction for sexual purposes, sins against nature, and sacrilegious sexual behavior.<sup>15</sup> Among these sins, Carta identified rape and abduction for sexual purposes, as the most representative forms of illicit sex that included possibilities for sexual violence. Carta further organized the crimes of rape and abduction under three distinct terms, those of *rapto*, *estupro*, and *violación*, terms that did not appear in the *Siete Partidas*, nor in the other medieval era sources. By the colonial period (1500-1800) Spanish judges in Europe and the Americas conducted nearly all criminal trials of coerced sex according to the terms *rapto*, *estupro*, and *violación*. As the next section will explain, these terms retained the central logic of the earlier, more general *Siete Partidas*, but the differentiation among the terms more accurately reflected the range of circumstances and types of coercion that actually occurred, in contrast to what the *Siete Partidas* described simply as *fuerza*, or force. These circumstances centered especially on variables such as the abduction of women for sexual purposes, the loss of the physical state of virginity during extramarital sex, and the presence or absence of her consent to sex.

### ***Rapto***

In the closest analog to modern Western legal categories, the early-modern Spanish term *rapto* indicated circumstances that we today describe as kidnapping. At its core, *rapto* meant to steal a woman from the family home and hide her away in another location. Writing in the eighteenth-century, the Spanish priest and canon law scholar Pedro Murillo Velarde defined *rapto* as, “the violent abduction of an honest woman, whatever status she may be, and her transfer from her own home to a morally diverse location (*un lugar moralmente diverso*) with the aim of engaging in illicit sex (*de ejercer la lujuria*) or, also, of contracting marriage.”<sup>16</sup>

As Murillo Velarde explains, cases of *rapto* included a strong presumption that the abduction was for purposes of sexual intercourse or clandestine marriage, but abduction of a woman for ransom was also characterized as *rapto*. The two necessary and sufficient conditions of *rapto* were that the victim was a woman, and that her abduction involved her physical transport from one distinct location to another.<sup>17</sup> Once a criminal action satisfied these basic conditions, other conditions determined the extent of punishment, such as the woman’s consent to the abduction (and possibly, to sex), and the extent, if any, of violence and physical injury. The term *rapto*, unlike the modern terms rape or kidnapping, did not necessarily denote a lack of consent or the presence of physical violence, and men could be convicted of *rapto* even if their target was willing to travel with them.<sup>18</sup> Also influential for the purposes of sentencing was whether the victim

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<sup>15</sup> For an effective explanation of the moral theology of Fray Gabino Carta, see Asunción Lavrin, “Sexuality in Colonial Mexico: A Church Dilemma,” in *Sexuality and Marriage in Colonial Latin America*, Asunción Lavrin, ed. (Lincoln: University of Nebraska Press, 1989), 50-51.

<sup>16</sup> Pedro Murillo Velarde, *Curso de derecho canónico español e indiano* (Mexico, 1741), Vol. 3, 133, “La toma violenta de una mujer honesta, de qualquier estado que sea, y su traslado de su lugar propio a un lugar moralmente diverso, con objeto de ejercer la lujuria o, también, de contraer matrimonio.”

<sup>17</sup> Justo Donoso Vivianco, *Instituciones de derecho canónico americano* (Paris: Librería de Rosa y Boret, 1852),

<sup>18</sup> Murillo Velarde, *Curso de derecho canónico*, Vol. 3, 134, “El rapto puede ser hecho consintiniéndolo la

was under the age of twelve, between the ages of twelve and twenty-three, or over the age of twenty-three, in that, in general, a woman's (or girl's) age determined her degree of culpability. In general, Spanish law treated women, as a group, as less capable of reasoned decision-making, and, in the context of sexual crime, younger women, especially *menores* under the age of twenty-three, were thought to be especially incapable of offering informed consent or warding off abduction.<sup>19</sup>

The law also required judges pursuing a *rapto* conviction to determine the victim's public character. For the law to protect them, women had to demonstrate that they carried with them a reputation of good public habits, that is, they were *de buena fama*, which meant, among other things, that peers and leaders in the community considered them to be chaste, obedient to authority figures, and regular in their observations of the Catholic liturgical calendar. *Rapto* law did not protect women of low moral character (*de mala vida*) such as prostitutes (*rameras*), nor punish the men who victimized them because "*rapto* requires violence, and public prostitutes are not considered to suffer violence"<sup>20</sup>

Critically, men were the only ones who were charged with *rapto*. If the abduction was consensual, such as in cases of clandestine marriage, women would not face charges of *rapto*, but judges were ordered to send them into corrective reclusion (*depósito*), where they would live under the close observation and guidance of a responsible male authority figure, such as a priest, an extended family member or family friend, or another high-ranking member of the local community.

In Spanish law of the colonial era, punishment for *rapto* was as severe as in its earlier medieval examples, such as the *Siete Partidas*. According to Murillo Velarde, during the early modern era, standard practice held that "a *raptor* of a honest widow, or of a virgin, or of a bride, or of a nun, or even, of their own betrothed (*propia prometida*), is punished, certainly, with the death penalty, which accomplices also incur; and if the *raptada* is a nun, the *raptor's* property shall be delivered to the monastery from which the *raptor* took her. He who steals away another woman different from those previously mentioned is punished according to the reasoned analysis of the judge (*arbitrio judicial*), conforming to the circumstances of time, place, and person."<sup>21</sup>

### *Estupro*

The term *estupro* first entered codified Spanish law with the publication of the

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muchacha, si se hace con la oposición de los padres, y a causa de ejercer la lujuria, aunque después no se verifique la cópula con la raptada, aun entonces, se comete el crimen de rapto, si es llevada de su lugar a otro moralmente diverso; que si es trasladada de un cuarto otro, o alejada unos pasos de la vía publica, no será rapto sino estupro, en cuanto a las penas en que se incurre."

<sup>19</sup> The relationship between age and culpability for crime and sin is more fully explored in this chapter on pp. 151-152.

<sup>20</sup> Murillo Velarde, *Curso de derecho canónico*, Vol. 3, 133, "Rapto requiere violencia y no se considera la pública meretriz sufra violencia."

<sup>21</sup> Murillo Velarde, *Curso de derecho canónico*, Vol. 3, 133, "el raptor de una viuda honesta, o de una virgen, o de una desposada, o de una religiosa, más aún, de la propia prometida, es castigado, ciertamente, con la pena de muerte, en la que incurren también los que a sabiendas proporcionan auxilio; que si la raptada era monja, también los bienes del raptor son entregados al monasterio, de donde el raptor se sacó. El que roba a otra diferente de las mencionadas, es castigado al arbitrio del juez, conforme a las circunstancias de tiempo, de lugar, y de personas."

compendium the *Leyes de Toro* in 1505, and the definition outlined in the *Leyes de Toro* remained the fundamental legal touchstone in Spanish civil and canon law reference works of the colonial era. Royal legal advisers crafted the *Leyes de Toro* in 1505 to resolve the many inconsistencies and contradictions that had developed in Spanish secular law since the publication of the *Siete Partidas* in the thirteenth century. Even though the earlier *Siete Partidas* never referred to coerced sex as *estupro*, the *Leyes de Toro* drew from many central principles outlined in the *Siete Partidas* discussion of “*fuerza*” and extramarital sexual relations when defining the term and offering methods for its resolution in the courts. The *Leyes de Toro* defined *estupro* specifically as the act of sexual coitus that involved taking the virginity (*desafloramiento*) of a young, unmarried woman (*doncella*), or sex with a widow of sound moral character (*viuda de buena fama*).<sup>22</sup>

Though the *Leyes de Toro* preserved the *Siete Partidas*' inclusion of nuns and widows who were *de buena fama* as possible victims of *estupro*, in practice the term nearly always referred to young *doncellas* who lost their virginity before marriage, whether consensual or through force or fraud. The eighteenth-century Spanish priest and theologian Francisco Lárraga typifies discussions of *estupro* in eighteenth-century legal practice, writing of the term that, “He who through force, through fraud, fear, or lies creates consent in copulation with a *doncella*, without a promise to marry, is obligated to marry her, endow her, or ensure that she marries well. The reason is because he creates damage to the *doncella*, against [principles of] justice.”<sup>23</sup>

*Estupro* committed by a layperson constituted a mixed *fuero* crime (*de fuero mixto*), which meant that court proceedings and punishment could be carried out equally by either a civil or ecclesiastical judge. The remedies offered by the *estupro* laws of the *Leyes de Toro*, as well as all subsequent Spanish legal sources, centered on two modes for resolution. The first was reimbursement to the victims and their families for the financial costs associated with the woman's loss of virginity, which, in Spanish society, was often a core condition for arranged marriage partnerships. The proposed punishment for men who were found guilty of *estupro* was the payment of a dowry that was understood to be both a fine, and remuneration to the girl and her family for taking the girl's virginity. As the Spanish legal scholar Hevia Bolaños explained in 1604, “virginal integrity being a type of dowry or pledge of inestimable value, he who unjustly takes it should compensate [the victim] to the degree possible, in punishment and disgust for the crime.”<sup>24</sup>

Payment to the victimized woman was not a dowry in the strictest sense, though judges always referred to the fine by the Spanish term for dowry, *dote*, and ordered men to “endow” the victim (*dotarla*). The victim would not have to return the dowry, even if she never married, and payment was to go to the woman's family, and not to the victim

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<sup>22</sup> *Teatro de la legislación universal de España e Indias: Por orden cronológico de sus cuerpos y decisiones no recopiladas*, Antonio Javier Pérez y López, compilador (Madrid, 1797), Tomo XIV, 316, “Estupro.”

<sup>23</sup> Lárraga, *Addicionario al Promputario*, 348, “El que por fuerza, por fraude, miedo, o mentira hizo consentir en la copula á la doncella, sin promessa de matrimonio, está obligado á casarse con ella, a dotarla, o procurar que case bien...La razon es, porque hizo daño a esta doncella contra justicia.”

<sup>24</sup> Juan de Hevia Bolaños, *Curia Philipica* (Madrid, 1790), Tomo I, Part. 3, Fol. 232, “siendo la intergridad virginal una especie de dote o prenda de inestimable valor, debe el que injustamente la quitó compensarla del modo que sea posible en pena y odio del delito.”

herself, even though, as Lárraga noted, “he who committed *estupro* does not injure [the father of the victim]...the injury that he creates is done to the daughter.”<sup>25</sup> The courts mandated payment in cases in which the victim or her family was exceptionally wealthy, or in cases in which a woman already had a substantial formal dowry established by her father. The amount of the dowry was up to the discretion of the judge, and it was usually based on an assessment of the ability of the assailant to pay his victim, along with an evaluation of the woman's social standing and relative wealth, the key determinants for the type of husband she might have attracted if the crime of *estupro* had not occurred. Some legal commentators wrote that that *doncellas* from noble families, or women who were especially beautiful or talented should be given a larger dowry because these characteristics would have given the women the ability to marry into more financially advantageous situations than other women.<sup>26</sup> The general explanation for the amount of a remunerative dowry was that the woman should be able to “marry well” (*case bien*), which asked judges to consider in their judgments such factors as familial wealth and social standing.<sup>27</sup>

The second mode of resolution was strong encouragement by civil and ecclesiastical judges for the individuals involved in the sexual relations to marry. This happened in all courts, but especially in the context of ecclesiastical courts like the archdiocesan *provisorato*, in which men and women involved in an act of *estupro*, whether it was consensual or non-consensual, were pressured to marry to help remove the stain of sin. This mode of resolution of sin and reconciliation with God was firmly supported by Vatican decree. Writing in 1561, Pope Gregory XIII said of the matter, “that a layperson who commits *estupro* with a virgin, is excommunicated, or punished corporally, [or] confined to a monastery if he refuses to take [his victim] for his wife, but if he agrees to marry her, is freed from all punishments recognized for this sentence. And, the same is true of the sentence given by a secular judge, who condemns an *estuprador* to corporal punishment, in case he does not agree to marry.”<sup>28</sup> Lárraga confirmed this view in the eighteenth century, writing that “if with a promise to marry [a man] deflowers [a *doncella*], he should marry her, and does not fulfill his duty (*no cumple*) by endowing her, if the promise to marry was not feigned.”<sup>29</sup>

In light of Western legal conventions, which form a sharp distinction in criminal law between consensual and non-consensual sex, *estupro* is an alien term. By the terms of Spanish law, sex could be consensual, yet civil and ecclesiastical judges still referred

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<sup>25</sup> Lárraga, *Adiccionario al Promptuario*, 348, “aunque el que estupro hizo injuria al padre de la muger, que estupro, no le hizo daño, que el daño se lo hizo a la hija.”

<sup>26</sup> Pedro Murillo Velarde attributes this commentary to the influential sixteenth century Spanish legal scholar, priest, and theologian Francisco Suárez. See Murillo Velarde, *Curso de derecho canónico*, Vol. III, 178.

<sup>27</sup> For example, discussing the “injury” done to the victim and her family by an *estuprador* Francisco Lárraga writes that, “...que al padre se le hizo la injuria (of *estupro*), y el daño, porque tiene que aumentar la dote, para que case igualmente bien.” Lárraga, *Adiccionario al Promptuario*, folios 348-349.

<sup>28</sup> Murillo Velarde, *Curso de derecho canónico*, Vol. 3, 147. “...que el laico que estupro a una virgin, sea excomulgado, o corporalmente castigado y, a empellones confinado en un monasterio si se niega a tomarla por mujer, pero si contrae matrimonio con ella, sea librado de todas las penas comprehendidas en esta sentencia. Y lo mismo es acerca de la sentencia dada por el juez secular, que condena al estuprador a penas corporales, en caso de que no contraiga matrimonio.”

<sup>29</sup> Lárraga, *Adiccionario al Promptuario*, folio 347, “si con promessa de matrimonio la defloró, debe casarse con ella, y no cumple con dotarla, si la promessa no fue fingida.”

to the act as *estupro*, and still required the payment of a dowry and resolution of the sin through marriage. Spanish law spoke of the “violence” done to the state of virginity, as a critical shaping element for the crime of *estupro*. If sexual intercourse took place outside of marriage, the loss of the state of virginity, even if it was consensual, represented an inflicted violence for which a man was ultimately responsible.<sup>30</sup> Lárraga explained that if a *doncella* consented to intercourse without the man applying coercive physical force, offering threats, or telling lies, the man had no legal obligation to the *doncella*, “because the obligation to restitution is born with the violation of justice, and to the injury done to another: he who copulates with a *doncella* that consented voluntarily, without an intervening promise to marry, nor any other thing, creates no injury.”<sup>31</sup> This theory aside, in practice, ecclesiastical and civil court judges in colonial Mexico still applied considerable pressure on men and women accused of consensual *estupro* to marry, men were still often ordered to pay a remunerative dowry, and in the context of the ecclesiastical *provisorato* both parties could expect orders to perform spiritual exercises or submit to a period of reclusion, as penance to rectify the sin of extramarital sex.

### *Violación*

In contrast to the precise terms *rapto* and *estupro*, which referred to very specific sets of circumstances, *violación* was a blanket term that covered all other forms of coerced sex that did not involve the deflowering of a *doncella* or her physical abduction. The nineteenth-century Spanish legal scholar Joaquín Escriche defined *violación* as “the [sexual] violence that is done to a woman to abuse her, against her will,” without making reference to any particular class of women, or any other circumstances. Escriche went on to note that, “[t]he proof of this crime is very difficult, such that some legislators have prohibited admitting complaints of violence that are not evident and real.”<sup>32</sup> Punishment for *violación* was typically a matter set by casuistic *arbitrio judicial*, in which the judge could apply a sentence according to the particular characteristics of the crime, rather than by appeal to a generalized “rule of law,” as was meant to be the case with *rapto* and *estupro*.

In early-modern Spanish legal theory, *rapto*, *estupro*, and *violación* were the three legal terms that referred to all possible instances of sexual violence. To sum up the differences among these different terms, *violación* was the only category of crime for which both force and coitus were essential. *Rapto* included a strong presumption that the abduction was for, or involved sex, but sex was not necessary for a *rapto* conviction. *Estupro* centered largely on a woman’s loss of virginity, and on her perceived character and habits as a woman *de buena fama*. In practice, consent and violence were secondary

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<sup>30</sup> As Lárraga explains, “La doncella no es dueño de su virginidad, luego se le hace injuria, aunque consienta que se la viole, y por consiguiente se ha de hacer la restitución, porque la obligación de la restitución nace de la injuria hecha a otro.” See Lárraga, *Adiccionario al Promptuario*, folio 347.

<sup>31</sup> Lárraga, *Adiccionario al Promptuario*, folio 347. “sin fuerza, ni nada de lo dicho consintió la doncella, a nada está obligado el que la desfloró, porque la obligación de restituir nace de la violacion de la justicia, y de la injuria hecha á otro: el que tuvo copula con la doncella, que consintió voluntariamente, sin intervenir palabra de matrimonio, ni otra cosa, no hizo injuria ninguna.”

<sup>32</sup> Escriche, *Diccionario razonado de legislación y jurisprudencia*, Tomo 7, “Violación”, “Volacion es la violencia que se hace a una mujer para abusar de ella, contra su voluntad. La prueba de este delito es tan difícil, que algunos legisladores han prohibido admitir quejas de violencia no siendo evidente y real.”

concerns that could help a judge determine the extent of punishment, but they were not necessary for conviction, for financial compensation, nor pressure for the parties to marry.

The distinction among these different legal terms raises interpretive questions about their origins and formulation in law. In light of modern Western legal practice, which has no analogs for the terms *rapto* and *estupro*, why wouldn't abduction count as a crime distinct from rape, with rape figuring as an accompanying circumstance, and a separate crime, rather than as a joint, first-order legal category, as with the term *rapto*? Alternatively, why would abduction for the purposes of forced sexual intercourse fall under the same precise legal designation (*rapto*) and with the same punishment, as an abduction for the purposes of ransom? In the English common law tradition, for example, kidnapping for abduction and the act of rape were interpreted as separate crimes, and if they occurred together, the two actions figured together as a compound crime with two separate charges, and upon conviction, two separate punishments.<sup>33</sup> In the case of *estupro*, why was there a particular emphasis on the physical state of virginity as a core condition for the type and degree of punishment?

While the comprehensive civil and canon law manuals that form the foundation for this chapter are useful guides -- Murillo's *Curso de derecho canónico español e indiano*, and Lárrega's *Addicionario al Promptuario de theologia moral*, are particularly detailed -- they do not offer concrete explanations for these distinctions in law, and no specific etymology exists for the terms *rapto* or *estupro* in the available literature on modern or medieval Spanish legal history. There exists, however, a robust scholarship on medieval sexuality and the historic conceptions of the crime of rape, and modern medievalist scholars have concluded that the criminal category of rape as it appears in the Western legal tradition -- essentially, the forced genital penetration of a woman for purposes of sexual gratification -- originated from two primary sources: the Hebrew law of the Old Testament, and the public violence laws of ancient Rome.<sup>34</sup> With this thread of scholarship in mind, and to understand how and why Spanish law distinguished between *rapto*, *estupro*, and *violación* as it did, the next section of this chapter turns to a study of the foundational source material for Spanish legal sources. For crimes of sexual violence, these foundational sources included the divine law of the Old Testament and the public violence laws of late-Republican and Imperial Rome.

### *The Law of the Deuteronomic Code*

The two most cited Old Testament sources in Western law, of which canon law sources like Gratian's *Decretum* and Spanish codes like the *Siete Partidas* and *Fuero Juzgo* form a part, were the books of Deuteronomy and Exodus, especially the sections of those books known as the Deuteronomic Code, which was the name given by academics

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<sup>33</sup> See, for examples of this theory, Anna Clark, *Women's Silence, Men's Violence: Sexual Assault in England, 1770-1845* (New York: Pandora, 1987), Chapter 3; Martin Ingram, *Church Courts, Sex and Marriage in England, 1570-1640* (New York: Cambridge University Press, 1990), 129-133; L. Stone, *The Family, Sex, and Marriage in England, 1500-1800* (London: Weidenfeld & Nicolson, 1977), 326.

<sup>34</sup> James A. Brundage, *Law, Sex, and Christian Society in Medieval Europe* (University of Chicago Press, 2009); also, *Handbook of Medieval Sexuality*, James A. Brundage and Vern L. Bullough (New York: Routledge, 1996).

to the law code within the Book of Deuteronomy. The code contained the laws proclaimed by Yahweh (God) to the Israelites through his proxy Moses, in which he asked them to follow and observe in exchange for their possession of the Promised Land of Canaan. As detailed in Deuteronomy and Exodus, these instructions included ordinances for civil and criminal law, including directives regarding found property, runaway slaves, prostitution, kidnapping, and sexual offenses. Within Hebrew practice these ordinances came to be known as the Parshah, which in modern Jewish traditions is recited in weekly Torah readings that remind followers of Hebrew laws governing civil and domestic life.<sup>35</sup>

Thirteenth-century textbooks on law generated during the “Revolution in Law” in the major centers for legal study like Bologna and Salamanca included citations and commentaries on the Hebrew law and practices of the Deuteronomic Code.<sup>36</sup> In commentaries concerning sexual violation early scholars pointed to Deuteronomy, Chapter 22 and Exodus, Chapter 15 as the clearest expressions of divine law with regards to forms of coerced sexual intercourse.

The verses of Deuteronomy 22:13-19 raise the issue of the centrality of the physical state of virginity in marriage among the Israelites. As stated in a modern translation, “If a man takes a wife and, after sleeping with her, dislikes her and slanders her and gives her a bad name, saying, ‘I married this woman, but when I approached her, I did not find proof of her virginity,’ then the young woman’s father and mother shall bring to the town elders at the gate proof that she was a virgin. Her father will say to the elders, ‘I gave my daughter in marriage to this man, but he dislikes her. Now he has slandered her and said, ‘I did not find your daughter to be a virgin.’ But here is the proof of my daughter’s virginity.’ Then her parents shall display the cloth before the elders of the town, and the elders shall take the man and punish him. They shall fine him a hundred shekels of silver and give them to the young woman’s father, because this man has given an Israelite virgin a bad name. She shall continue to be his wife; he must not divorce her as long as he lives.”<sup>37</sup> In this passage, we find conceptual bases for early-modern law regarding *estupro*, namely, that proof of the presence or absence of the physical state of virginity was a central variable that dictated the methods for discerning guilt of men and women and the scope of punishment, as well as the basis for a payment of a remunerative dowry to the victim’s parents.

Two further sections of the Deuteronomic Code raise the issues of a remunerative dowry and marriage between aggressor and victim as means to resolve a rape conviction, both of which closely correspond to later discussions on the subject in the *Siete Partidas* and written canon law. Deuteronomy 22:23-24 states that, “[i]f a man happens to meet a virgin who is not pledged to be married and rapes her and they are discovered, he shall pay her father fifty shekels of silver. He must marry the young woman, for he has violated her. He can never divorce her as long as he lives.” Exodus 22:15-16 similarly

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<sup>35</sup> Michael D. Coogan, *A Brief Introduction to the Old Testament: The Hebrew Bible in Its Context* (Oxford University Press, 2009), 149-151.

<sup>36</sup> The phrasing “Revolution in Law” is a reformulation of the title to Harold Berman’s classic book, *Law and Revolution* that discusses the birth of modern Western civil and canon law traditions in the thirteenth century. See Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Cambridge, Mass: Harvard University Press, 1983).

<sup>37</sup> *The Holy Bible: New International Version* (London: Hodder and Staughton, Ltd., 2011). Deuteronomy 22:13-19.

states that “[i]f a man seduces a virgin who is not pledged to be married and sleeps with her, he must pay the bride-price, and she shall be his wife. If her father absolutely refuses to give her to him, he must still pay the bride-price for virgins.” Later Spanish law of the *Partidas* and *Leyes de Toro* echo the central modes for the resolution of sexual violence stated in Deuteronomy 22:23-24 and Exodus 22:15-16, that is, a remunerative dowry and marriage between alleged victim and her assailant.<sup>38</sup>

Similarly, Deuteronomy 22:22 offers a blueprint for the severe penalties declared in later Spanish law like the *Siete Partidas* and *Fuero Juzgo* for *estupro* and *rapto*, stating “[i]f, however, the charge [of premarital sex by a woman] is true and no proof of the young woman’s virginity can be found, she shall be brought to the door of her father’s house and there the men of her town shall stone her to death. She has done an outrageous thing in Israel by being promiscuous while still in her father’s house. You must purge the evil from among you.”<sup>39</sup>

Taken together, the parallels between the verses that form the Deuteronomic Code and the later formulations of sexual violence laws in the *Siete Partidas* and other medieval sources reinforce an interpretive consensus put forth by Jerry Craddock and Antonio García y García, among others, that the drafters of medieval Spanish law looked to Scripture as an authoritative example.<sup>40</sup>

### ***Raptus, Stuprum, and the Leges de Vi***

As detailed in chapters one and five of this dissertation, Roman law similarly provided vital examples for the drafters of Western legal canons of Europe, which included both civil and canon law, and early Roman codes also figured centrally into the fundamental Spanish legal compendiums, the *Siete Partidas* and the *Fuero Juzgo*.<sup>41</sup> As the following section will explain, in the context of crimes of sexual violence, Roman law distinguished between two forms of sexual crime that had great bearing on both the early civil and ecclesiastical law of medieval Spain and later, the laws governing the Spanish colonial territories. These were the crimes of *raptus* and *stuprum*.

### ***Raptus***

During the Roman Empire, the term *raptus* designated a broader set of personal property laws that covered an array of objects, both significant and mundane. In this

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<sup>38</sup> *The Holy Bible: New International Version*, Exodus 22:15, Deuteronomy 22:23-24.

<sup>39</sup> *The Holy Bible: New International Version*, Deuteronomy 22:22.

<sup>40</sup> Jerry R. Craddock, “The Legislative Works of Alfonso X, el Sabio: A Critical Bibliography,” *Research Bibliographies and Checklists* 45 (London: Grant and Cutler, 1986); Antonio García y García, “Tradición manuscrita de las *Siete partidas*,” in his *Iglesia, sociedad, y derecho* (Salamanca: Universidad de Salamanca, 1985)

<sup>41</sup> As Robert I. Burns notes in his discussions of the origins of the *Siete Partidas*, “Since Europe (of the Middle Ages) saw itself as a continuation of Ancient Rome, especially of the Christian phase of the empire, and had preserved in Christianity’s previously primitive stages some echo of Roman law, it used as its instrument of revival Justinian’s *Corpus iuris civilis*, especially the principles, interpretations, and methods perceived in the fifty books of its *Digest*.” Robert I. Burns S.J., “The Partidas: Introduction,” in *Las Siete Partidas: The Medieval Church: The World of Clerics and Laymen*, S. Samuel Parsons Scott, ed. (University of Pennsylvania Press, 2001), xi-xxx.

category of law, to steal furniture was to commit *raptus*, just as it was to steal livestock, and, significantly, just as it was to steal women, since Roman law categorized objects, livestock, women, and children all as forms of familial property. In this context, the term *raptus* signified a simple, private crime of personal property theft that occurred between two parties and could be resolved in isolated lawsuits aimed at financial remuneration to the injured party.

In the fourth century CE, Emperor Constantine (311-337 CE) amended Roman law to designate *raptus* not as a private crime between isolated parties, but as a broader crime against the republic, with the idea that theft of personal property undermined peaceful relations among Roman citizens, and thereby threatened the social stability of the empire. As a result, Constantine's proposed punishment for *raptus* was a severe one - it was a crime against the state, punishable by death.<sup>42</sup>

Later, Emperor Justinian (527-565 CE), who initiated the drafting of the comprehensive legal code, the *Corpus Iuris Civilis* (529 CE), further narrowed and refined the types of criminal behavior covered by *raptus* law, removing simple property crime from this legal designation. Beginning with the *Corpus Iuris Civilis*, the term *raptus* referred only to crimes against women, and, significantly, only unmarried women, widows, and nuns, and denoted stealing away these categories of women from the family home, or, in the case of nuns, from monasteries. Though the law strongly suggested women were stolen for the purposes of sexual violation, sex did not have to occur for a charge of *raptus*. Fundamentally, the Justinian formulation of *raptus* retained connotations of damage to familial pride and property loss, suffered by male heads of household when a wife or daughter was stolen away from the family home, which was signified by the earlier, more general formulation of *raptus*, but it singled out the loss of women in a new formulation of *raptus*, and elevated it above that of simple loss of mundane property, which was renamed *rapina*. From the laws of Roman Emperor Constantine, Justinian's *Corpus Iuris Civilis* retained the death penalty and confiscation of property for convictions for *raptus*, while simple property crime reverted to the earlier formulation of law, before the changes by Emperor Constantine, in which resolution for theft occurred through simple jailing of suspects, lawsuits adjudicated in the courts, and financial remuneration to the affected party.<sup>43</sup>

### *Stuprum*

*Stuprum* was the other major category of Roman law connected to crimes of sexual violence. In Roman law, the term *stuprum* referred broadly to all forms of criminal fornication, but it carried with it an important connotation of defilement of body, dishonor of person, disgrace to family and, ultimately, shame. The term *stuprum*, a natural antecedent for the later Spanish word *estupro*, implied the use by one person of another's body for the purposes of sexual gratification, and in turn suggested that the victim was defiled, dishonored, and disgraced by this action. Latin etymologist J.N. Adams defines *stuprum* as, "the defilement, affected by illegitimate sexual relations,

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<sup>42</sup> James A. Arieti, "Rape and Livy's View of Roman History," in *Rape in Antiquity: Sexual Violence in the Greek and Roman Worlds*, Susan Deacy and Karen F. Pierce, eds. (London: Swansea, 1997), 209-231.

<sup>43</sup> Justinian, *Codex Iustinianus*, in *Corpus Iuris Civilis*, ed. Theodor Mommsen, Paul Krueger and Rudolf Schoell, 3 vols. (Berlin: Weidmanns, 1877-95), vol. 2, Book IX, titulus xiii.i, 'De Raptu Virginum', 378.

which was considered to taint the blood of the ‘passive’ partner, willing or unwilling, in intercourse.”<sup>44</sup> *Stuprum* did not exclude the possibility that force was involved, but neither did it explicitly imply force. Rather, the term was neutral with regards to the circumstances under which the sex occurred.

Like *raptus*, *stuprum* originally signified a private crime between two parties, and was resolved in the context of simple, private lawsuits but in the later years of the Roman Republic, Emperor Augustus (then Octavian) designated *stuprum* as a public crime against the state and married it with a larger body of laws for prosecuting public violence. Known as the *Leges de vi*, these laws were developed in late Republican Rome as a response to the extraordinary violence of the social and civil wars of that era (32-30 BCE). *Raptus* and *stuprum* both became part of the *Leges de vi*, which were aimed at the preservation and welfare of the *Res Publica*. Emperor Augustus' rationale for a package of moral legislation centered on controlling sexuality like *stuprum* was to maintain the security and strength of Roman society.<sup>45</sup> Importantly for all classes of later European law, and as with *raptus*, the *stuprum* laws of late-Republican and Imperial Rome established the classes of women who could be defiled by an act of *stuprum* as only nuns, virgins, and widows. *Stuprum* laws controlling sexual violence did not apply to prostitutes nor other women of low moral character. In this way, the public reputation of the women in question became intimately connected with applicability of law.

In 1140, the canon law scholar Gratian integrated Roman practices regarding *raptus* and *stuprum* into his comprehensive treatment of canon law, the *Decretum*. In this work, Gratian linked acts of sexual violation with acts of abduction. Gratian borrowed the term *raptus* from the Roman original, but explained that while not every abduction of a woman constituted *raptus*, every rape of a woman had to involve her abduction, and the woman's abduction had to involve her physical conveyance from one distinct location to another. It was not enough for a woman to be moved a little way off of the street; the abduction had to be performed with the intention of hiding the woman away in another isolated location.<sup>46</sup> In Gratian's view, only this type of abduction, when conjoined with an act of forced genital penetration, demonstrated the necessary criminal will to justify its categorization as *raptus*.

In his writings, Gratian often utilized the term *raptus* interchangeably with *stuprum* when referring to circumstances that today call to mind the term “rape.” Corrine Saunders suggests that this could be because Roman law employed both *raptus* and *stuprum* to signify pollution through illicit sexual relations.<sup>47</sup> Significantly, Gratian's discussions of *raptus* and *stuprum* left open the possibility for consent on the part of a woman, and as a result, whether the woman consented to her abduction became an issue in canon law that was distinct from the earlier Roman model of *raptus*. According to James Brundage, Gratian's discussions of *raptus* and *stuprum* became the fundamental basis for canon law treatments of sexual violence of the subsequent centuries, including discussions during the sixteenth-century Council of Trent, including the Tridentine “Decree Concerning The Reform of Matrimony,” which included as its sixth chapter,

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<sup>44</sup> J.N. Adams, *The Latin Sexual Vocabulary* (London: Duckworth, 1982), 103.

<sup>45</sup> James A. Arieti, “Rape and Livy's View of Roman History,” 209-231.

<sup>46</sup> Brundage, “Sex and Canon Law,” in *Handbook of Medieval Sexuality*, Brundage and Bulloughs, eds., 40.

<sup>47</sup> Corrine J. Saunders, *Rape and Ravishment in the Literature of Medieval England* (New York: D.S. Brewer, 2001), 34-35.

“Punishments Against Abductors.”<sup>48</sup>

Taken together, Hebrew law combined with the Roman and early medieval canon law discussions of the core legal terms *stuprum* and *raptus*, on which later Spanish terms *estupro*, *rapto*, and *violación* were based, suggest that the theft of a woman, and her virginity, constituted a theft of familial property and resulted in the corruption of family and society, and defilement of the victim. All of these characteristics called for severe penalties and necessitated financial remuneration of the victim’s family, and, if possible, marriage between the victim and her assailant to facilitate a reconciliation with God and remove any stain of sin. A second conclusion suggested by the earlier Roman law, which undergirded the later formulations of the *Siete Partidas* and *Leyes de Toro*, was that the control of illicit sex, especially the defilement of women *de buena fama*, such as virgins, nuns, and widows, was closely associated with the preservation of social order.

### ***Part Two – Rapto, Estupro, Violación in Practice***<sup>49</sup>

The preceding sections have explained how a woman’s consent to illicit sexual activity had legal consequences insofar as the categorization of the crime is concerned, and also with regard to the punishment both men and women received. In this way, a woman’s consent to sex was morally and legally transformative, in that in the context of sexual relations, the presence or absence of a woman’s voluntary, informed, and competent consent dictated how the courts interpreted and then adjudicated the sexual encounter.<sup>50</sup> The introduction also touched briefly upon the evidentiary difficulties associated with sexual violence cases, in that many of the legally determinative events, the events that would determine the type of crime and extent of punishment, took place in private, away from direct eyewitnesses.

The purpose of the previous section was to explain the origins and logic of the law. This section is concerned with explaining the functioning of the law in practice,

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<sup>48</sup> See, Brundage, “Sex and Canon Law,” in *Handbook of Medieval Sexuality*, Brundage and Bullough, eds., 39-42. Also, *The Council of Trent: The Canons and Decrees of the Sacred and Oecumenical Council of Trent*, J. Waterworth, ed. and trans. (London: Dolman, 1848), 201-202.

<sup>49</sup> This chapter originates from more than 200 full and fragmented cases culled from the documentary collections at the AGN and AHAM. This section does not discuss judicial procedure and practices as they relate to the instance of these crimes in aggregate. In the course of research, I did not uncover any sort of comprehensive or overly reliable aggregate recordkeeping across both forums (though it likely exists). I have drawn my conclusions from the cases that I alone collected, and for my discussions of theory and procedure I gravitated to the richer, more detailed cases, though they all shared the same procedural basics. I recognized early the difficulty in arriving at strong aggregate totals for my crimes and forums, which is part of the reason why this chapter, and this dissertation as a whole, hews so closely to case studies.

<sup>50</sup> The phrasing “morally transformative” is derived from John Kleinig’s discussion of modern theories of consent to sex in the legal context, in which explains in detail in his essay on “The Nature of Consent”: “Although consent figures quite importantly in certain formalized contexts – especially the law – it draws its strength in those contexts from the sense that I have characterized as morally transformative ... the position that I articulate and defend here is that there is always an expressive dimension to consent—that consent must be signified—and that only if consent takes the form of a communicative act can the moral relations (between two parties) be transformed....Consent is a social act in which (party) A conveys something to (party) B—something that, once communicated, now gives B a moral right or entitlement that B previously lacked.” John Kleinig, “The Nature of Consent,” in *The Ethics of Consent*, Wertheimer and McCullough, eds., 3-25.

especially in light of the precise actions and circumstances associated with the criminal terms *rapto*, *estupro*, and *violación*. It begins by exploring the principles of consent to sex evident in early modern Spanish procedural law, an inquisitorial model based on Roman practices that was developed in Gratian's *Decretum* (1140) and refined for Spain in the thirteenth-century *Fuero Real* and *Siete Partidas* and its American territories in the *Recopilación de leyes de los reinos de las Indias* (1680).<sup>51</sup> Then, drawing from a body of cases, the section moves to a discussion of the precise procedural steps colonial judges, both civil and ecclesiastical took to compensate for the evidentiary difficulties associated with crimes of sexual violence, and to meet the standards of proof for coercion and consent as set out in criminal procedural law.

### *Consent to Sex in Spanish Colonial Procedural Law*

A survey of canon and civil law procedural manuals from the colonial era suggests three core principles for determining consent to sex on the part of an alleged victim of sexual assault.<sup>52</sup> First, judges had to determine whether or not the victim was an agent capable of offering valid consent, which was dependent upon the victim's capacity for reasoning. Judges were instructed first to look to the age of the victim to assess the capacity for reasoning. Twelve for girls and fourteen for boys was the age at which courts considered boys and girls to be of sufficient maturity to comprehend the significance of and repercussions for their actions.<sup>53</sup> If capabilities for sound reasoning due to youth were not an issue, judges were instructed to evaluate other personal characteristics. For men and women to be agents capable of offering valid consent, their intellectual faculties could not be limited by advanced age, cognitive handicaps, insanity, nor could they have their perceptions and judgment altered by intoxicants. Without the faculties of sufficient reason, which were dependent on conventional intellectual development and a clear capacity for reasoning, consent of men and women, boys and girls would not be considered valid in Spanish civil and ecclesiastical courts of law.

Second, in addition to an evaluation of the victim's capacities to express consent, Spanish courts assessed whether or not the person had the accompanying and relevant mental state that signified their consent. Spanish procedural sources described this mental state according to the term *voluntad*, taken from the Roman *voluntas*, which directly translates as "will," "desire," "intention," and "purpose." Without evidence of representative *voluntad* or mental desire to commit crime and sin, the body's actions were considered independent of desire, and the person could not thus be held blameworthy.<sup>54</sup>

Canon procedural law sources from the early modern era similarly discussed the necessary unity of the body and the will in generating sin (the root of all crime) and for

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<sup>51</sup> See, *Medieval Church Law and the Origins of the Western Legal Tradition: A Tribute to Kenneth Pennington*, Wolfgang P. Müller and Mary E. Sommar, eds., especially Part III, "Canonistic Doctrine in Practice: Courts and Procedures, ca. 1140-1500," 201-289, and Francisco Tomás y Valiente, *El derecho penas de la monarquía absoluta: siglos XVI-XVII-XVIII* (Madrid: Ed. Tecnos, 1969), 156.

<sup>52</sup> The procedural manuals surveyed for this section include Juan de Hevia Bolaños' *Curia Philipica* (1605); Pedro Murillo Velarde's *Curso del derecho canónico español y indiano* (1741); Justo Donoso's *Instituciones de derecho canónico americano* (1852). Other sources include Joaquín Escriche's *Diccionario razonado*, and the text of the *Siete Partidas*.

<sup>53</sup> *Siete Partidas*, Partida 6, tit. 19, ley 4

<sup>54</sup> Hevia Bolaños, *Curia philipica*, Tomo III, Parte III, "Juicio criminal," 232.

producing the necessary circumstances for assigning blame and guilt. Murillo Velarde cites Pope Boniface VIII's *Sixth Book of the Decretals*, also known as the *Liber Sextus*, or the *Sexto* in the Spanish context (1294-1303), and its explanation of the sources of criminal sexual behavior. In the *Sexto*, Pope Boniface explained criminal sexuality (*lujúria*) as a product of three modes of human experience: suggestion (*sugestión*), delight (*delectación*), and consent (*consentimiento*). According to Pope Boniface, all sin arose from the three integrated modes of *sugestión*, *delectación*, and *consentimiento*. *Sugestión* was the "seed" (*semilla*) of sin planted in the intellect by the Devil, or other evil spirit (*hecha por el diablo*). This was a process that took place spontaneously, and independent of human decision making, and so its appearance alone was insufficient for assigning guilt or blame. Taking delight (*delectación*) in the pleasures of the flesh at the suggestion of sin by the devil could also be an involuntary act, provided that there was sufficient evidence that the body's engagement in sinful behavior was not a calculated decision.

The key ingredient, according to the *Sexto*, was knowing consent to sin (*consentimiento*), a product of the human soul, which acted as final judge and arbiter over the vulnerable mind and mercurial body. As the *Sexto* reminded its readers, "As the evil spirit suggests sin in the mind if enjoyment and delight in the sin does not follow then sin has not been committed in the absolute, but when the flesh begins to luxuriate, then sin begins to be born. However, if one reaches deliberate consent, one knows that sin has been consummated. In suggestion we find the seed of sin, in enjoyment of sin its development, and in consent its consummation ... the flesh without the soul cannot commit sin."<sup>55</sup>

Third, it was not enough for a target of sexual coercion to embody the mental state of consent or dissent. For her consent to have bearing on which laws and punishment might apply she had to communicate this mental state to her assailant, and it had to be communicated according to a commonly understood sign, what modern theorists have described as a "culturally defined grammar of consent."<sup>56</sup> Spanish procedural manuals like Juan de Hevia Bolaños's *Curia philípica* (1604) explained that consent could be stated and conscious, or it could simply mean the absence of objection, which included evidence that women did not engage in verbal or physical resistance.

The initial burden of proof as to rape or sexual violation lay with the afflicted women. If a woman, or her family, alleged that a man had stolen her virginity, she had to have the support of material witnesses. Her word, alone, was not enough to guarantee a conviction. As Murillo Velarde explained in his discussion of *estupro*, "to the woman who has alleged that she has been known (carnally) and impregnated by someone, it is incumbent upon her to prove what she says. If she cannot prove anything, although she has testified (to these facts), she is not to be believed, because testimony from a single person cannot be believed. And the defendant is acquitted even if nothing has been

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<sup>55</sup> Murillo Velarde, *Curso de derecho canónico*, Vol. III, *Cómo el espíritu maligno sugiero el pecado en la mente, si no se sigue ninguna delectación del pecado, no ha sido cometido el pecado en absoluto, pero cuando la carne empieza a deleitarse, entonces el pecado empieza a nacer. Pero, si llega a consentir deliberadamente, se sabe que el pecado se ha consumado. En la sugestión se encuentra la semilla del pecado, en la delectación se hace el desarrollo, en el consentimiento la consumación,* or, put simply, "...la carne sin el alma no puede deleitarse.

<sup>56</sup> John Kleinig, "The Nature of Consent," in *The Ethics of Consent*, Wertheimer and McCullough, eds., 18.

proven.”<sup>57</sup> Women also needed to provide evidence that they offered resistance to a sexual attack to avoid charges of complicity.<sup>58</sup> That said, in the *Curia philípica*, Hevia Bolaños wrote that if a man admitted to non-consensual sex with woman, and that woman claimed to be a virgin (a characteristic that would heighten the gravity of the crime) it was up to their alleged assailants to prove otherwise:

if a women who has a reputation for being honest is known carnally by a man and he confesses that he knows her carnally, but denies that she was a virgin, or although he affirms that she was a virgin denies having carnal knowledge of her through violence or fraud; and she, instead, affirms that she was a virgin and her assailant gained carnal knowledge of her through pain or fraud, for her exists the presumption that she was a virgin, and that she was seduced by the *estuprador*, and to him (the assailant) corresponds the responsibility to prove his accusation (with regards to her virginity), and if he fails to prove this, credit is given to the girl (for her story), even without a trial (*juramento*) and, therefore, the *estuprador* is condemned to marry her or give her a dowry. But if it appears, by select witnesses, that she was deflowered by another or that she is of ill repute, and is not held to be a virgin, do not give credit (to her testimony), although sworn, because in this way, women easily disregard the written law.<sup>59</sup>

Consent, coercion, and virginity, then, were the key variables that civil and ecclesiastical judges had to establish when trying a case. To do this, and with limited available forensic evidence and eyewitness testimony, judges followed a predictable and clearly defined set of procedural steps, referred to in early modern procedural manuals and in cases themselves as the *religión del juramento*, which, if followed faithfully, should elicit the truth and form the foundation for a conclusive verdict of guilt or innocence.<sup>60</sup> This procedure, based on the inquisitorial model developed in the twelfth and thirteenth centuries was, with minimal variations, the same across ecclesiastical and civil courts, and judges referred to it as a *religión* because it was a reliable process that conformed to the highest ideals for establishing truth through law. Following the *religión del juramento* included attention to the law in theory, the *sciencia* and *doctrina* of manuals and reference works, but it also included attention to a prescribed set of investigatory measures that were expected to elicit the validity of truth claims regarding

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<sup>57</sup> (a la mujer que afirma haber sido conocida y embarazada por alguno, le incumbe probar lo que dice. Si no prueba nada, aunque lo jurara, no se le cree, porque no se cree el testimonio de uno solo. Y se absuelve al reo aun si nada probara.)

<sup>58</sup> Socolow, *The Women of Colonial Latin America*, 153.

<sup>59</sup> Juan de Hevia Bolaños, *Curia philípica*, Tomo III, Parte III, Juicio Criminal, 232, “...Si una mujer que tiene fama de honesta es conocida por un hombre y éste confiesa que la conoció, pero niega que ella fuera virgen, o, aunque afirma que era virgen, sin embargo, niega que la haya conocido con violencia o dolo; ella, en cambio, afirma que era virgen y que fue conocida con dolo o violencia, como a favor de la muchacha existe la presunción de que fuera virgen y de que haya seducida por el estuprador, a éste le corresponde probar su afirmación, que si falla en la prueba, se da crédito a la muchacha, aun sin juramento y, por tanto, el estuprador es condenado a que se case con ella o que la dote. Pero si consta, tambien por testigos selectos, que ella fué desflorada por otro o que es de mala fama y que no es tenuta por virgen, no se le dé crédito a ella, aunque jure, porque de tal suerte, las mujeres desprecian fácilmente le ley del juramento.”

<sup>60</sup> A good discussion of the theological rationale for the *religion del juramento* can be found in the 1770 treatise by Domingo De Soto, *Tratado de cómo se ha de evitar el abuso de los juramentos* (Madrid: Blas Roman, 1770), 12-32.

allegations of *rapto*, *estupro*, or *violación*.

### **Religión del Juramento for Rapto, Estupro, and Violación**

As with all types of criminal matters, a sexual violence case opened with a formal complaint to a judge by an individual alleging a crime.<sup>61</sup> Known as the denunciation (*denunciación*), in the context of sexual crimes cases, this initial complaint presented immediate interpretive difficulties for judges. On the basis of a denunciation for sexual violence and coercion, and according to the *religión del juramento*, judges and their proxies -- typically parish priests who received complaints on behalf of the diocesan *provisorato*, lieutenants to local administrators (*theniente del gobernador/corregidor*), or notaries for the *Real sala del crimen* if the alleged crime fell within the five-league territorial jurisdiction of the *Real sala* -- had to assess that some type of criminal activities had in fact occurred. Some forms of illicit sex, fornication among consenting non-virgins for example, were morally reprehensible, but they weren't necessarily criminal.<sup>62</sup>

Then, investigators and judges had to gauge that if a sexual crime occurred, which type of crime it was. If a girl was a virgin and alleged losing her virginity to a neighbor, the crime should be categorized as *estupro*, whether or not the relationship and intercourse was consensual. If an investigation revealed that the neighbor transported the girl from her home to a nearby barn for the purposes of having sex, then the crime should be categorized as *rapto*, with different evidentiary demands and heightened consequences for the alleged abductor. Every step in the investigatory process was geared toward uncovering evidence confirming that a criminal act occurred, what it was, and whether the perpetrator was guilty of a crime.

Once a judge amassed sufficient evidence to reasonably suggest that the facts alleged in the denunciation had occurred, the *religión del juramento* obliged colonial judges to complete a thorough investigation and trial, termed a *juicio plenario*. The intention of this deeper investigatory process was to gather sufficient evidence, in writing, to justify a judge's recommendation for innocence or guilt and punishment. The *juicio plenario* began with a notary recording a more substantial declaration from the alleged victim than that of the initial *sumaria* investigation. In addition to recording a detailed list of alleged events, the notary also took care to record any details regarding potential witnesses and signs of struggle that would shed light on the attitude of the woman at the time of the alleged attack.

Ordinarily, a notary collected the initial declaration from the accused perpetrator

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<sup>61</sup> In her regional study of colonial Nueva Galicia, Carmen Castañeda finds that in the majority of her *estupro* cases, 16 of 34, the mother of the girl initiated a case with a formal complaint. A father more often made the denunciation in the case of child victims of *violación*, 6 of 34. In the context of the larger tribunals, and especially the civil tribunals, denunciations arrived at the court on the basis of complaints from the victim's family. See Steve Stern, *The Secret History of Gender: Women, Men & Power in Late Colonial Mexico* (Chapel Hill: University of North Carolina Press, 1995).

<sup>62</sup> Castañeda found a high degree of correlation between accusations/denunciations for *estupro* and women from elite Spanish families in colonial Nueva Galicia. She attributes this correlation to the desires of elite families to protect the public reputations of their daughters, something that was possible if the daughter lost her virginity against her will. Castañeda, *Violación, estupro y sexualidad*, 91.

from his jail cell. Usually, by the time an investigation moved to the stage of a *juicio plenario*, a judge would have ordered the alleged perpetrator be held in jail to prevent escape. A notary would visit the jail and record the accused's statement, reading to him the denunciation against him with all of its attendant allegations of violence or coercion, and record the accused's initial response. This would be a liminal moment for the alleged perpetrator, because he did not typically have an advocate representing him, and in those cases in which judges included a review of the facts of the case when justifying a verdict, they often referred to these statements as examples of unvarnished evidence.

Colonial jurists acknowledged that the most important issue to determine in a case alleging sexual violence, was evidence of said violence. Many men accused of *violación* or *estupro* would admit to having had sex with the victim, but deny that the sex was forced. It would then be up to the judge to reconcile the conflicting accounts.

Once a notary recorded the initial declaration from each side, the judges would turn to amassing objective evidence that would corroborate or refute the allegations set forth in the initial declarations, and, also to gathering any forms of evidence that might suggest either a woman's consent or her resistance to sex. Just as in modern forensic practice, physical examinations of the victims formed a logical first step. In the cases under consideration for this chapter, women were typically placed *en depósito* soon after the facts of the declaration were established, which meant that they were put into a home under the watchful eye of female keepers to prevent influence from outsiders. In these confines they were examined, typically by a midwife (*matrona*) who had experience with assisting childbirth and had received scientific training about the female anatomy, or by a court-appointed surgeon who was trained in obstetrics. For all victims, the *matronas* or surgeons examined them for signs of recent sexual activity, and whether the woman's genitalia showed signs of forced penetration. In their reports, surgeons sometimes acknowledged that it was difficult to distinguish among the inflammation, abrasions, and signs of trauma that might occur with consensual sex, especially in cases in which the women were virgins, and those that might occur with forced penetration.

*Matronas* and surgeons also sought physical evidence of the loss of virginity to corroborate *estupro* claims and procedural manuals suggest an ongoing debate about what constituted proof of the loss of virginity. Writing in 1605, Hevia Bolaños explained the physical alteration that came with the loss of virginity in the modern sense, that is, a broken hymen offered definitive proof of penetration of the female sexual genitalia. Two centuries later, priest and canon law scholar Murillo Velarde wrote that while many legal scholars believed intact virginity to consist in "a certain small membrane that is found in the entrance to the vagina and is called the hymen,...[other, more recent scholars] deny this, and say that the virginal '*claustro*' (literally, "cloister") consists in the fleshy membranes that so tightly envelop it as to appear almost as a cutaneous ligament and, therefore, that virginity is lost through the opening or through the distention of the parts that close the feminine '*claustro*,'" even if the hymen remained intact.<sup>63</sup>

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<sup>63</sup> Murillo Velarde, *Curso del derecho canónico*, Vol. III, 234, "El estupro, también como la simple fornicación, casi con los mismos modos, presunciones y conjeturas con que es probado el adulterio, a lo que hae que señalar que, aunque la virginidad conforme al algunos, consiste en cierta pequeña membrana que se encuentra en la entrada de la vagina y se llama himen, sin embargo, muchos niegan ésto y dicen que el claustro virginal consiste en las membranas carnosas que lo envuelven tan apretadamente que aparece casi como un ligamento cutáneo y, por tanto, que la virginidad se pierde por la apertura o por la distensión

In addition to inspecting the women's genitalia, the *matronas* or surgeons would also inspect their arms, legs, nails, and clothing, looking for blood, torn clothing, and other visible signs of struggle. Sometimes, depending on the circumstances of an alleged attack, the courts would contract a surgeon to inspect the accused man for similar signs of consummation of the sex act and marks of struggle, such as an abraded penis or scratch marks on his body and neck. In addition, notaries inspected the sites of crime looking for broken or misplaced furniture, broken windows, and torn or bloody bedding, especially if the woman alleged that she offered substantial physical resistance.

Once a notary gathered this fundamental objective information, a judge ordered him to round up potential witnesses, who typically did not view the attack first-hand, and interrogate them with regards to their knowledge about the facts recorded in the initial declarations, and also ask them questions about their recollections regarding any screaming, shouting, loud banging, or other signs of struggle.

Often, none of these early procedural steps elicited sufficient evidence to convincingly support the conflicting allegations of either the victim or his alleged perpetrator. In these cases, the judge would order a *careo*, a face-to-face meeting between the accused and the victim in the presence of a notary and the judge, during which the notary read aloud the conflicting declarations of alleged facts, and both parties would have a chance to respond to them. In the *careo*, the attending judge could hear the responses to the statements in arguably more favorable conditions to elicit the truth, or at the very least, to resolve conflicting or contradictory testimony. At the same time, the judge could also read the body language of both sides, and written reports on the affect of the two parties were often included as support for a judge's determination with regards to guilt or innocence.

The nineteenth-century legal scholar Joaquín Escriche acknowledged arguments against the efficacy of the *careo*, saying that it privileged those who could effectively think and speak on their feet over those who were, by nature, more timid, but he ultimately believed that a skilled judge would be able to effectively interpret the testimony and body language of the two parties, and ask leading questions that could reliably elicit the truth in the face of competing statements.<sup>64</sup> *Careos* were ordinarily only used to resolve contradictions between witnesses statements, and seldom to have victims of crime confront their assailants, however, in the sampling of sexual crimes cases at the heart of this chapter, a judge called for a *careo* between the victim and her alleged attacker in roughly four out of every ten cases, and always when there were few or no eyewitnesses to the attack.

In the context of sexual crimes cases, lawyers (*procuradores* and *defensores*) were especially influential figures, since there was often limited witness testimony and only circumstantial objective evidence of force and consent to sex. In both the

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de las partes que cierran el claustro femenino. Pero esta inspección debe ser hecha por mujeres obstetricas y con la mayor decencia posible.”

<sup>64</sup> As Joaquín Escriche writes of doubts concerning the *careo*, “Hay algunos autores que desprueban el careo, suponiendo que este medio da la victoria al mas sereno, astuto, o descarado sobre el tímido, inexperto o inadvertido; pero el juez con su presencia debe alentar al ingenuo y contener al engrañoso; y de todos modos por las preguntas, respuestas, y réplicas, por el semblante, la sorpresa y la turbacion, y por otras circunstancias que ocurren en este género de lucha, podrá venir mas bien en conocimiento de la verdad. Lo cierto es que en muchos casos no se presenta otro arbitrio mas sencillo para desvanecer o aclarar las contradicciones.” Escriche, *Diccionario razonado*, Tomo II, 210, “Careo”.

archdiocesan *provisorato* and the *Real sala del crimen*, the appearance and availability of a lawyer in a case was almost a given, and ordinarily, but not always, lawyers appeared only to offer a defense for the accused. This is because the judge or one of his assistants, the archdiocesan *promotor fiscal* or civil *fiscales* or notaries, performed many of the functions of a prosecuting attorney.

Within the cases surveyed for this chapter, lawyers often presented some of the most important information about a case, and often presented pointed challenges to the finer points of the law and with the available evidence. The lawyers, more than the eyewitnesses or declarants, were able to pinpoint small details that might swing a judge's interpretation towards coercion on the part of the alleged attacker or consent on the part of the victim. Because these arguments were lengthy, sometimes spanning a third or a half of the total pages of a document, they often compelled a response by the judge or attorneys for the other side.

Of course, the defense arguments of a *procurador* must be read carefully, with an eye for hyperbole and exaggeration. The task of a *procurador* was to offer a strong defense against any charges, which meant that they sometimes constructed elaborate defenses out of relatively minute facts, and sometimes the defenses had only a tenuous link to the facts at hand. That said, because a *procurador's* goal was one of persuasion, to influence the way that a judge interpreted the events and evidence, there is a basis for which these statements can be viewed as reliable. Since the *procuradores* sought to persuade, the legal scenarios they constructed in defense of their clients had to be plausible. With this in mind we can approach the content of a lawyer's statement with a certain degree of faith and trust, and often the content of a judge's decision reflects a close attentiveness to the issues raised by the *defensores* and *procuradores*.

In the cases under study for this chapter, the *procuradores'* key defense was to allege that a woman was corrupted by *malicia*, which in this case referred to a knowing and genuine desire for illicit intercourse. Since the proper channel for sexual behavior lay within the constraints of marriage, alleging a woman's desire for extramarital sex was an effective strategy. If a woman showed signs of desire for illicit sex, this would effectively refute any allegations of coercion or force and transform the woman from a passive victim to a powerful agent capable of stimulating sexual desire in men. As the case studies that follow will illustrate, *procuradores* employed standard tropes to reinforce the perception that, like Eve, colonial women were prone to tempt others into sins of lust.

### ***Part Three: Estupro inmaturo: the Crime of Child Rape in Context***

With legal theory and procedural law established for trials for sexual violence, this chapter now moves to a pair of case studies involving the rape of young girls. These studies allow us to examine the practices at the court level with greater attention to detail, and also highlight contrasts between how civil and ecclesiastical courts resolved important issues regarding consent to sex, coercive force, and the role of the local environment in stimulating *malicia*. The cases also suggest several ways of rethinking the common crime of child rape in the colonial context.

Susan Socolow has suggested that the category of child rape was one that

existed primarily for children from the age of fifteen onward.<sup>65</sup> The two case studies that follow show that the courts examined possibilities for valid consent to sex on the part of children as young as eight years old, and that this examination centered on two factors: 1) a evaluation of a girl's physical readiness for intercourse, denoted by the observation by *matronas*, judges, and *procuradores* that the girl had the "ability" or "capacity to receive a man" (*capaz de aceptar varón*), which was based on her progress with regards to physical development, and 2) her emotional readiness for sex, which could be influenced by her home environment, including the practices of peers, friends, and neighbors, the example set by parental role models, and possibilities for intervention by priests or other influential figures.

In the case records reviewed for this chapter, and especially in the cases examined here, discussions of a girl's emotional readiness for sex by court officials were intertwined with discussions concerning her readiness for marriage. Since intercourse was an integral part of marriage, any discussion about her intellectual and emotional readiness for sex necessarily involved a discussion about her readiness for marriage. Here, the chapter argues that in deciding cases of non-consensual sex in children, colonial judges utilized a development-based standard of valid consent in children, one that was very different from a strictly age-based standard of consent in children that is common modern practice. Judges scoured records of children for evidence that they had been corrupted by *malicia*, just as this same search occurred in cases involving adults, and judges decisions turned on their decisions regarding the presence or absence of *malicia* in children.

As we will see, considerations concerning the presence of *malicia* in children cut across tribunals. The case studies that follow suggest that at least in the case of child rape, colonial judges equally assessed the probability of this quality of *malicia* emerging in young girls, and analyzed whether evidence of *malicia* was substantial enough to support the interpretation that in the context of a sex act, her *malicia* transcended natural barriers of age, which judges and *procuradores* expressed with the phrase *la malicia suple la edad*, or "*malicia* substitutes for [the limitations of] age." These cases suggest that court officials believed that young children could validly consent to sex through the influence of learned behavior. This approach contrasts with modern Western practice with regards to statutory rape, in which age alone figures as the critical factor determining a man's culpability. In the context of cases heard in the colonial courts of Mexico City, a girl's age and capacity for informed consent were fluid, largely due to the influence of corrupting *malicia*.

### **Menor Edad, Lujuria, and Malicia in Spanish Law**

Spanish property law offers a clear framework for understanding the relationship between emotional and intellectual development in children and their capacities for offering valid consent, and many of the ideas and terminology set out in property law were also used in sexual assault cases arising in the archdiocesan *provisorato* and *Real sala del crimen*. The threshold for valid consent in children in Spanish property law and in criminal cases lay in the developmental transitions from infancy to adulthood at

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<sup>65</sup> Socolow, *The Women of Colonial Latin America*, 153.

twenty-five-years old, the age at which Spanish law considered men and women to have reached emotional and intellectual maturity. Prior to reaching adulthood, children and adolescents passed through a series clearly defined developmental stages. These stages included *infancia*, the period from birth to the age of seven; *próximo á la infancia*, the ages from seven to ten-and-a-half; *próximo a la puberdad*, the ages of ten-and-a-half until fourteen years of age for boys; and ten-and-a-half to twelve years old for girls. Minor (*menor*) status began at the ages of fourteen for boys and twelve for girls, and lasted until the age of twenty-five.

Prior to reaching *menordad*, the courts considered children to be *impúber*, or pre-pubescent, and in legal settings *impúber* status carried with it a host of restrictions, both for individuals and for court officials. Those in the stage of *impuberdad* were unable to marry, could not write a will, were unable to freely dispose of property or sign a binding contract, and within criminal law *impúber* children could not be punished according to the same standards that applied to adults. As legal scholar Castillo de Bobadilla wrote in 1597, court-mandated punishments for children had to be moderated and take into account “their knowledge, their habits, and their age, provided they had passed ten-and-a-half years old,” which was the threshold age for applying punishment of any kind.<sup>66</sup>

The *Siete Partidas* explicitly discussed the stages of *infancia* and *próximo a la infancia* in writings on punishment standards, stating that up to the age of ten-and-a-half for boys, and nine-and-a-half for girls, children were exempt from punishment because they were “incapable of malice or harm.”<sup>67</sup> For children who reached the stage of *próximo a la puberdad*, up to age twelve for girls, and age fourteen for boys, they were liable for punishment only for the most serious criminal categories of robbery, theft, and homicide, but not crimes related to sexual pleasure (*lujuria*), which would include both consensual sexual intercourse and acts of rape because “such a sin does not fall on them” (*non cae aun tal pecado en él*).<sup>68</sup> For crimes of *lujuria*, in addition to whether or not children had sufficient intellectual development to signal the capacity for *voluntad*, it was also unclear whether they had sufficient physical capabilities to match any intentions to satisfy sexual desires. Thus, according to the written law, children had to have left infancy, even the prolonged notion of infancy suggested by the terms *próximo á la infancia*, and to have entered puberty to be held responsible for their actions. These considerations in the written law, which also emerged in case records, suggest that the court had to take into account important changes in physical, mental, and emotional development associated with puberty.

Earlier discussions concerning *voluntad* suggested that the body and the will had to work in tandem for any action to fulfill the criteria of *sugestión*, *delectación*, and *consumación*. The intentional spirit had to function in concert with the body to generate

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<sup>66</sup> Castillo de Bobadilla, *Política para corregidores*, Vol. II, 132. “sus conocimientos, á sus hábitos, y a su edad, con tal que esta pasase de diez años y medio.”

<sup>67</sup> Partida 7, tit. 1, ley 9

<sup>68</sup> Partida 6, tit. 19, ley 4. “Fuese menor de 14, no podrie seer acusado de tal yerro nin de otro de luxuria, por que non cae aun tal pecado en él: et por ende si él ficiese consciencia deste yerro en juicio, non serie valedera ni ha por que demandar restitucion por razon della. Mas de todos los otros yeros, asi como de homicidio, o de furto o de los otros semejantes que ficiéis, non se puede escusar por razon que es menor solo que sea de edad de 10 1/2 arriba quando lo face, porque el mozo de tal tiempo tenemos que es mal sabido, et que entiende estos males quando los face.”

sin and crime. We would think, then, that Spanish law's hard and fast line with regards to other legal issues, such as the disposal of property and readiness for marriage, would carry over into the law's treatment of *lujuria*, that is, that children making the signs associated with soliciting sex lacked the necessary emotional and intellectual development, and thus the necessary will (*voluntad*), and so merely pantomimed the behavior of others.

However, in cases involving child rape, tropes from adult cases regarding *malicia* and corruption of spirit were also applied to young children. The case studies that follow illustrate that if a court demonstrated that a young girl showed signs of *malicia*, which could come from observing the example of the parents, neighbors, and friends, this corruption could transcend the natural limitations of age (*la malicia suple la edad*). If a girl was shown to be physically capable of having sex, she might also be mentally capable of orienting her mind and body to the sex act due to the presence of *malicia*, such that her communicative signs were not merely the empty gestures of an innocent child, but actually constituted an physical manifestation of mature desire for sex. These underlying concepts concerning the relationship between the age of valid consent and the influence of corrupting *malicia* will become clearer through a treatment of *estupro* cases involving two girls, María Luisa Francisca and María Olaya.

### *María Luisa Francisca*<sup>69</sup>

On February 22, 1756, in the former highlands mining town of Real Minas de Tasco, outside of Mexico City, the local parish priest and ecclesiastical judge Joseph Espino Barros prepared to interview a young *mulata* girl María Luisa Francisca about a possible sexual attack the girl claimed to have endured.<sup>70</sup> The day before, María's mother had come to see the parish priest to formally complain to him about an attack on her daughter by a neighbor boy, Joseph Leiba.

In her initial declaration, María explained that she had been sent to the store by her mother to buy candles so that her family could celebrate the oration of Our Lady of the Candelaria with the rest of the community in Tasco. Some ways down the road, she was accosted by her neighbor and friend, Leiba, who grabbed her and pushed her off the street, through an alley between two houses, and into a ravine. There, the girl alleged, the boy held her down and covered her mouth with one hand. He told her that he would kill her if she made a sound, and then he raped her. Despite this warning, the girl said she resisted the boy's advances, and even cried out to the Virgin Mary for help. Afterward, Leiba told her that if she told anyone about what had happened he would find her and kill her, and then he then left her in the ravine, alone and bleeding. The girl gathered herself up, climbed up to the road and walked to a nearby fountain where she washed her body and rinsed her bloody clothing. She then continued on to the store, like her mother had asked and bought the candles for that night's vigil.

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<sup>69</sup> In the case studies that follow, which emerge from Mexican archives as lengthy handwritten documents, the proceedings are included in a paraphrased format, unless direct quotes are necessary, to preserve a narrative flow and to avoid the grammatical issues associated with direct translations from the eighteenth-century Spanish of colonial court notaries. Transcriptions for many of the paraphrased sections, and all direct translations, are included in the footnotes.

<sup>70</sup> AGN *Criminal*, Vol. 624, exp. 1, fjs. 1-37.

For three days, María Luisa hid the evidence of the attack from her mother. On the fourth day, as they were working around the house together, María's mother noticed fresh bloodstains on the girl's skirt. When she asked her daughter to undress, María's mother saw continued bleeding from the girl's vagina. She pressured María into telling her the story of the attack, and then went to communicate the story to the parish priest.

At the conclusion of María's initial declaration, the parish priest and *juez eclesiástico* Espino Barros asked his notary to record some basic information about the girl's physical appearance and approximate age. The notary noted that the girl had recently lost a tooth and had another one coming in, which were taken as signs that she was still very young. Her mother could not remember when María was born, and so the notary estimated the girl's age at eight years old. A subsequent search for the María's baptismal record turned up a single line, buried within Tasco's baptismal books for *mestizos, mulatos, coyotes, y negros*: October 31, 1745, "I solemnly baptized María Luisa, mestiza, daughter of unknown parents." (*Baptizé solemnemente a María Luisa, mestiza, hija de padres no conosidas*), which made the girl ten-and-a-half at the time of the attack, within the developmental stage of *próximo a la puberdad*, which the laws stated exempted her from culpability for *lujuria*.

The priest ordered the girl into protective seclusion in Real Minas de Tasco under the care of a local midwife who conducted a physical inspection of the girl and reported the details to the parish priest. The girl's vagina was sore and bleeding, the *matrona* stated, "not the lips of the pudendas, but inside, on the parts above and there to one side, and it was still emitting blood, because it was scratched (*de rajó*) such as when you scratch a delicate part with a fingernail."<sup>71</sup> The *matrona* also concluded that María was no longer a virgin, and though the girl was young, the midwife reported that she was physically capable of sexual intercourse without endangering her life (*capaz de recibir la parte del mozo que llegó a ella, sin peligro de morir*).

After he was arrested and brought to the ecclesiastical jail for questioning by the notary, the young man, Joseph Leiba, a twenty-year-old *castizo*, also born and raised in the Real Minas de Tasco, gave an alternative account of the events that day. He said that he had just stepped outside to urinate and when he finished and headed back inside, he saw María walking down the road and greeted her. They chatted briefly and as he was leaving she asked him if he would give her two reales. "With the occasion of temptation by the devil" (*Con la ocasión lo tentó el diablo*), he gave her the two reales with the hope of convincing her to have sex with him. He asked her directly if she wanted to have sex with him (*¿María, quieres que hagamos la picardías?*). She freely agreed, Joseph said, and so the two walked behind his house and climbed down into the darkness of the ravine so that could not be seen by passersby. Leiba stated that immediately after they reached the bottom of the ravine, María began to kiss and embrace him, telling him, "my body is yours," and in the midst of their passionate embrace, she said, "you are the master of my *partes*."<sup>72</sup> When they had finished María asked him to take her away with him, but he refused and walked away, citing the long work day he had to complete with his father.

There were no witnesses to the event, and so, for at least these initial stages of the

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<sup>71</sup> "no el labio de las pudendas, sino adentro, por la parte arriba, y aca un ladito, y todavia hecha sangre, porque de rajo como quando rajan con la uña un parte delicada."

<sup>72</sup> "allí tenia que ya era lugar y era suyo su cuerpo' y estandola gozando le dijo 'que ya el era dueño de sus partes'".

case, the two competing declarations constituted the sum total of the available evidence. The *juez eclesiástico* ordered that all the materials be sent to the *Provisor for Indios and Chinos* in Mexico City, who in turn transferred them to his adviser, the *Promotor Fiscal* Pereda. Pereda would act as the lead prosecutor and decide the course of the case and the next steps.

In the subsequent case record, drafted in Mexico City, Pereda included a set of initial observations about the case, which are instructive, as they tell the story of what he considered to be the major facts and events of the case. The *promotor fiscal* acknowledged having read both the denunciation for sexual assault, and the subsequent confession by the boy. He noted that the boy admitted to intercourse with María, but that it was consensual and voluntary, which Pereda viewed as doubtful, given that these were not the “actions and expressions of someone so young,” and because the testimony of the *matrona* was sufficient to allege that physical violence had occurred.<sup>73</sup> On the other hand, Pereda noted that although the girl alleged this was forced intercourse, she did not complain about it when she returned home. Rather, it was only days after the alleged assault, and only when the girl’s mother noticed blood on her clothes that the issue came to light.

On the basis of his assistant, Pereda’s recommendations, the archdiocesan *provisor*, Miguel de Cervantes, sent instructions back to Tasco. He asked that a notary record another, more formal confession by Leiba, and that an attorney (*curador*) be present for the confession to represent the boy and ensure the confession was recorded according to the principles of the *religión del juramento*. Afterward, the ecclesiastical judge should initiate a *careo*, bringing the girl and boy together in one room under questioning, to gauge the accuracy of the details of their respective declarations. To ensure that family members could not influence the proceedings of the *careo*, they were not to be allowed inside. Only the boy, girl, priest, and notary should be present. Cervantes signed his orders and returned them by courier to priest in Tasco.

One week later, in his opening to the formal confession in the case record, the notary listed the charges as “*estupro inmaturo*, with aggravated violent assault.”<sup>74</sup> In response to standard questions regarding his personal and criminal history, Joseph admitted that he was arrested once before, for illicit but consensual sexual relations with a local widow (*incontinencia y mala amistad*), and that Tasco’s *alcalde mayor* had imprisoned him. Leiba also admitted to having resisted his arrest for the current matter, striking the man who was trying to arrest him and injuring him.

Turning to the events regarding María Olaya, Leiba acknowledged that he knew the girl. They lived nearby and talked and played as neighbors do. He acknowledged that he should not have slept with her, but that he was tempted by the devil (*lo tentó el Diablo*). At no time, however, did he force or commit violence toward her.

The notary was aggressive in his questioning, trying to assess the possibility for violence, and to elicit a verbal misstep or contradictory statement, asking him tauntingly, “Why did you dare to commit violent force [against María], without fear of God and his justice....this young girl, only ten years and six months of age...You took her down to the ground in the ravine, grabbing her by her braids,” telling her, “be quiet, and do not shout,

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<sup>73</sup> “acciones, y expresiones de alguien de tan cortos años.”

<sup>74</sup> “estupro inmaturo, con el agregado de la violencia presumpta”

because if you cry out I will kill you.”<sup>75</sup> The notary suggested to him that the claim that the girl initiated sex, which the notary termed as her *malicia*, was a doubtful one, since “[*malicia*] is improbable in a girl little more than ten years old.”<sup>76</sup>

He did not force María, Joseph replied. Yes, he took her virginity (*la perdío*), but it was not forced (*sin haverle hecho fuerza*) nor did he bribe her (*ni hechole oferta alguna*). She did not shout, she did not resist, and she did not invoke the virgin, as she had stated in her declaration, Joseph said, and he denied saying to her that she could not tell her mother. She voluntarily gave up her virginity (*voluntariamente se dexo perder*), and when they had finished, she said to him “her body was his” (“*su cuerpo era suyo*”). Yes, he knew that María was young and physically “incapable of the act” (*incapaz del acto o acceso*), and yes, he gave her two *reales* “but I followed the passions of my appetite [for sex].”<sup>77</sup> Joseph implored the court to take pity on him and asked for mercy.

The notary went on to question Leiba about the details of his encounter with María, trying to tease out evidence of violence. What means did he take to keep her quiet? None, Leiba responded. How long had you known María and what were the nature of your interactions? I had only brief, insubstantial interactions with her, Leiba replied, greeting her when I passed by, as polite neighbors will. María would often wait at my house to see if I could play with her, but I never condescended to play with her, nor try to spend time with her in any way. That said, he implored the court to recognize his deeper feelings for the María. His attraction to her stemmed from a deeper desire to marry her, something he had spoken about with a friend. His desire for sex with her stemmed solely from temptations by the Devil. When he saw the opportunity, when María asked him to give her two *reales*, he took it, and this was something he now deeply regretted. Leiba expressed his profound remorse for his actions (*sumamente arrepentido*) and would never commit another similar crime. Now with the sin of sex behind him, he turned to a goal of saving up enough to marry María, something he told a friend about the day after their encounter (a possible corroborating witness). The notary asked him, why then such strong allegations of violence from the family. He replied that he did not know if they wished ill on him (*quieren mal a este reo*).

The next day, María and Joseph Leiba were brought together in a courtroom for the purposes of hearing a *careo*, but the meeting was inconclusive as both denied the statements of the other. The girl emphatically denied accepting anything in exchange for sex, and especially not the two *reales* that Leiba claimed she did. The ecclesiastical judge reported to Cervantes that as a result of the *careo* he was no further advanced toward a resolution.

Soon after, Joseph’s assigned attorney, the *procurador* Francisco Palacio de Cos submitted to the court a lengthy statement of defense. He noted from the outset that in a case like this, the critical and fundamental point on which the law turned was whether or not Joseph had engaged in coercive violence in order to procure sex with María. When reviewing the facts of the case, Palacio de Cos stated that it was clear that there was no violence on the basis of: 1) the location; 2) the hour; and 3) the “passivity of the

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<sup>75</sup> “porque se atribio a forsar violentamente y sin temor de Dios y de su justicia...esta chica, pequeña de edad, de diez años y seis meses”...“de un brazo la tumbo en el suelo de una barranca, y agarrandola de las trenzas,” telling her “calla, y no grites, por que si grites te he de matar”

<sup>76</sup> “no siendo presumible en una muchacha de poco mas de diez años como le imputa esta declarante”

<sup>77</sup> “pero lo segó la pasión de su apetito”

accomplice [María]" (*la taziturnidad de la cómplice*).

With regards to the location, it was in a ravine that was surrounded by houses, and close to the royal road, which was the primary means of travel through Tasco. Even though Joseph and María were off the road, they were very close to passersby, yet no one claimed to have heard any evidence of screams or crying. María claimed to have accompanied Joseph off the road and into the ravine out of fear for her life, but given the possibility of so many witnesses who would have come to her aid had she screamed, and the fact that Joseph was unarmed at the time, her claims to acquiescence out of fear (which would be considered a form of violence) simply were not credible.

Second, the encounter occurred at midday, when it was still quite light outside. If Joseph had intended to surprise and attack María, why wouldn't he have chosen a later time, when he would have been aided by darkness? Rather, they left the road at that hour because they both wanted privacy.

Finally, María exhibited complete "passivity" (*taziturnidad*), remaining quiet during the encounter, and well after. She only spoke of rape when she was confronted by her mother three or four days after the event, and only because her mother noticed bloodstains on her clothing. Further, the *matronas* inspected María and said that the girl's genitalia had been bruised and irritated, as it would have been for any woman after having intercourse for the first time.<sup>78</sup> Clearly, María's first instinct was to feign innocence and allege violence in order to avoid punishment.

In sum, "her consent, complacency, genuine will [to have intercourse], and benevolence [towards Joseph] resides (*se patentifica*) in that not only did she not tell her mother, but that she took measures to hide it from her, so that she would not suspect her," such as bathing herself in a fountain.<sup>79</sup> The actions María took to hide what happened to her indicates her intentions [her mental attitude towards intercourse] with much greater clarity than any claims to violence.

Palacio de Cos pointed to evidence of the girl's character, and in doing so, commented on the lax moral behavior of her parents and peers. As he said, "We should not encourage [a notion as to her] childishness (*puerilidad*) and immaturity, because *malicia* substitutes for [these characteristics], as is the firm opinion of legal experts. Our present times teach us that experience accelerates [processes of] nature, and further, gives rise to *malicia*, especially among the lower classes (*la gente de inferior Jerarquía*); and it is reasonable and quite natural [to assume] that from the moment they open their eyes to the world, [lower class] people do not see, nor hear, anything other than lies and obscenities, even from their own parents -- dissolution and not demureness being so innate to (them); and as this bad example enters [them] through bodily sensation, it serves to desensitize them to carnal sensuality, and accelerates [processes of] nature."<sup>80</sup>

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<sup>78</sup> "Solo quedo lastimada, como las demas mugeres, quando tienen el primer acto carnal"

<sup>79</sup> "su consentimiento, complacencia, perfecta voluntad, y benevolencia se patentifica en que no solo siglio a su madre el hecho, sino que passo medios para ocultarselo, y que no llegara a sospecharlo"

<sup>80</sup> "No deve obstar su puerilidad, e inmaturidad, pues esta la suple la malisia (como es opinion asentada de los mas bien recibidos doctores). En los tiempos presentes nos enseña la experiencia lo que se adelanta la naturaleza y lo mucho mas, que madruga la malicia, y con especialidad en la gente de inferior Jerarquía; y es la razon, y mui natural, que desde que abren los ojos a el mundo, no ven, ni oien mas, que desonestidades, y obscenidades, aun en sus propios Padres, por lo connatural que son en esta clase de vivientes la disolucion, y ningun recato; y como entra este mal ejemplo por los sentidos corporales, sirbe de insentibo a la sensualidad carnal, y haze adelantar la naturaleza."

The *procurador's* lengthy statement of defense formed a substantial conclusion to the stack of case documents that were returned to Mexico City for review by the *provisor*, Cervantes. Within days, Cervantes offered a written judgment. Noting that the original complaint came on the part of the mother, not on the part of María herself, Cervantes explained that the mother misinterpreted the facts, and charged Joseph unreasonably. The mother made her complaints on the basis of what the girl told her, and in turn, her own presumptions (*aquellas presunciones*), rather than on the basis of witnessing the act itself (*y no el hecho*). The violence the mother suggested simply was not possible, Cervantes wrote. Had this been a violent act, María would not have been able to go on to the store for candles and return all the way home (*no era posible que pudiesse haver ido a la tienda, y volver a su casa como ella declaró*). Furthermore, although the *matronas* testified to signs of injury to María's genitalia, the injuries were typical ones, common to all women whom have intercourse for the first time. As a result of the witness testimony, it was clear that the girl acted on the basis of *malicia*, Cervantes wrote. María's declarations underscore her "accelerated *malicia*, and little innocence," and it helps our review of the case that the mother wanted the pairing between Joseph and María to fail.<sup>81</sup> The evidence, Cervantes concluded, as well as the long imprisonment Joseph had already suffered, was enough to clear Joseph of any presumptions of guilt (*bastante a purgar qualquiera presumpcion*). He should be freed immediately.

At the same time, the *provisor* wrote, because Joseph expressed several times to the court that he would like to marry María, and since the girl was now almost twelve years old, "so that she does not remain a lost girl and prostitute herself to others" (*para que no quede perdida, y se prostituya a otros*), Espino Barros, the *Juez eclesiástico* in Tasco should interview the girl and see if the corrupting quality of *malicia* supercedes the natural limitations of age for marriage (*la malicia suple el defecto de la edad*), such that she and Joseph can marry and resolve the stain of sin.

In response to this request, Espino Barros traveled to María's house to interview her, and asked her directly if she wanted to marry Joseph, but she emphatically refused, insisting that Joseph pay her a dowry as resititution. The judge explained to her that without agreeing to marry Joseph, "she would be lost" to sin, without hope of remedying this damage through marriage.<sup>82</sup> After a long interview, and lacking María's full and knowing agreement to marry Joseph (her *voluntad*), neither the *juez eclesiástico*, nor the officials of the *provisorato* could do anything more, and María, only ten years old at the time of intercourse with Joseph Leiba, and now *corrupta*, was left in the care of her family.

### *María Olaya*

On the afternoon of May 18, 1771, in the mining town of San Luís Potosí, María Ygnacia García appeared in the offices of the lieutenant colonel of the local infantry, Pedro Joseph de Guardiola, to accuse her lover and the father of her child, Joseph Antonio de Texada, a soldier, of incestuous *estupro immaturo* with their ten-year-old

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<sup>81</sup> "Las declaraciones de Luisa dan a conocer bastante su adelantada malisia, poca innocensia que le asisten las reflexas, que quisa faltaran a la madre que la pareo."

<sup>82</sup> "en cuya virtud sino admitia el matrimonio se que daría perdida, y sin esperanza de que se le resolver este daño por otra parte, aun permaneció en la voluntad de no quererse casar."

daughter, María Olaya.<sup>83</sup> Earlier in the day, after having left the house to run errands, María Ygnacia returned home to find María Olaya standing on the patio with a pool of blood collected around her feet. María Ygnacia examined her daughter's genitalia and found that they were also "bathed in blood." She surmised that her daughter had been raped, and when she asked by whom, her daughter replied "mi Tata," indicating her father, Joseph Antonio.

Recording the mother's testimony, the lieutenant colonel called for a notary to come and take a declaration from the girl, in order to "verify if, notwithstanding the girl's young age, [María] gave her consent, [and] if *malicia* had substituted [for the developmental limitations of] her young age."<sup>84</sup> Later, in Guardiola's office, the girl testified that while she performed chores on the patio, her father, Antonio, had called her inside. Once inside, María testified that her father picked her up, carried her into his room, and lay her on the bed. Then, holding her still with one hand on her head and another on her feet, he climbed on top of her. When she began to cry out, he covered her mouth with a pair of gloves, and he raped her.<sup>85</sup> When he finished, Antonio removed his now bloody clothing and washed it in a basin, and told the girl to go and bathe herself. María Olaya testified that she did not immediately report the incident to her mother because her mother had gone for a walk, leaving her alone with her father.

With María Olaya's testimony recorded, Guardiola and his notary traveled to the family home and arrested Antonio. Once the father was in jail, the notary recorded the details from a long and complicated question and answer session between the lieutenant colonel and Antonio, which served as the father's initial declaration. Initially, Antonio denied all charges. "I did not call for María Olaya," the father testified. "I did not call to her, and I did not carry her in my arms."<sup>86</sup> When he was asked directly if he committed *estupro* or "forced" his daughter to have intercourse (*la forzó*), whether he had washed his clothing, or had bathed the girl's body, he replied that "I did not wash the shirt, nor pants, I did not bathe [María] Olaya, I did not take her virginity, nor force her."<sup>87</sup>

In the middle of the declaration, Guardiola called a staff surgeon into the room and asked him to inspect the father's clothing and body for signs of blood. The surgeon indicated that the shirt had been recently washed (*estaba humeda la camisa*), yet there remained clear signs of blood (*se persive claras manchas no pequeñas de sangre*). Confronted with this clear physical evidence, Joseph Antonio revised his account of the events that day, and admitted to sex with his daughter. He initially lied and "breached the *religión del juramento*" out of fear, he declared.<sup>88</sup>

In keeping with the *religión del juramento* of a sexual crimes case, the lieutenant asked his notary to interview the three possible material witnesses in and around the family home that day. The first witness, a neighbor, testified that despite Antonio's claims to the contrary, María Olaya was, in fact, his daughter. The second witness testified that Antonio was inside the house at the time of the alleged incident, and the

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<sup>83</sup> AGN *Criminal*, vol. 548, exp. 1, fjs. 1-41.

<sup>84</sup> "averiguar si no obstante lo tierno de susodicha prestó algun consentimiento, por si hubiera suplido la malicia."

<sup>85</sup> "le dio dos guantes en la boca y le tapo la boca una mano."

<sup>86</sup> "No envió a dicha María Olaya ningun mandado....No la llamo, ni llevo del brazo."

<sup>87</sup> "que no se lavó la camisa, no calzón blanco, que no le echó cubo de agua a Olaya, no la perdió, ni la forzó."

<sup>88</sup> "faltó a la religion del juramento."

witness overheard him call for María three times, asking her to come to him. The witness observed María leaving the patio to go inside, and stated that when she came out she had blood running down her legs and onto the floor (*atendió estaba paradas está, y le chorreaba mucha sangre hasta el suelo*). The third witness confirmed that María Olaya entered the room and stayed with her father until her mother, María Ygnacia, came home and overheard the mother ask her daughter, “where is all this blood coming from” (*de donde te sale tanta sangre*), and later heard the girl answer in response to her mother’s questioning, “I have to say, my Father” (*te ha de decir mi Tata*).

In light of the two initial declarations and witness testimony, Guardiola advanced the case to the *juicio plenario* stage, named a *procurador* to represent Antonio, and ordered the suspect into his courtroom for the purposes of recording his formal confession. The lieutenant colonel took the lead in what became a back-and-forth dialogue between himself and the accused for the purposes of assessing guilt. The lieutenant stated the charges as, “the [forced intercourse] or *estupro* that he committed in the person of María Olaya, and the greater guilt that results from incest.” (*la fuerza o estupro que cometió en la persona de María Olaya, y la mas culpa que resulta de ynsesto*).

Now, with his *curador* present, and asked to respond to Guardiola’s charges, Antonio confessed that he took young María’s virginity, but it was consensual and not forced (*la perdió pero no forzada*). The lieutenant colonel replied, “give a sensible answer....María Olaya being such a young girl,” with the proceedings confirming that she was only nine or ten years old, “she could not have lost her virginity without your having forced her, because if there is no force you need consent and you cannot have [consent] without *malicia*,” something that would be “very irregular” in someone so young. When Guardiola and his notary recorded María’s declaration, the lieutenant colonel examined the girl to see if he could uncover signs of *malicia* and instead found “the candor of pure innocence,” adding that in his view, María would be incapable of soliciting sex due to her youth and immaturity, because “she lacked the willingness according to her nature to ask for or crave [sex].” He asked Antonio, again, how this was possible.<sup>89</sup>

Antonio recalled the events from that day in greater detail, stating that he remembered lying in bed in his room, having just drunk a pitcher (*jarro*) of intoxicating *mezcal*. When María entered the room he asked her to climb on the bed and María complied. He asked her to lift her petticoat (*naguas*) and she again complied. Thus, “he took her virginity with her consent, because if she had not wanted to do [as she did] she would have left.” (*que la perdió con su consentimiento por que si no hubiera querido se hubiera ydo*).

In disbelief, Guardiola asked how Joseph Antonio “dared fail [adhere to] the *religión del juramento*, thereby profaning the respects of God, our father, and of our king,” with his answer. María Olaya climbed up on the bed and even lifted her petticoat

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<sup>89</sup> “diera razon...siendo Maria Olaya muchacha tan tierna, que como consta de las diligencias solo tendra nueve o diez años como pudo haverla perdido sin que la hubiera forzado, por que no aiga fuerza se necesita consentimiento y este no puede haver sin tener malicia, la que, a mas de ser mui irregular en tan tiernos años como consta de estos autos yssó el Sr. Theniente Colonel las posibles diligencias haver si descubria malicia y solo le encontro candor de pura ignocencia, a que se añade lo yncompetente para este acto por sus tan tiernos años que como no madura le falta disposicion a su naturaleza para exigir o apetecer dicho referido acto, el que dispone por razon natural el consentimiento a lo que dijo.”

because she was ordered to do so, the lieutenant colonel intimated, “and she did this without *malicia* by virtue of the same innocence that is known of [her].” Once again, he ordered Antonio to declare, where were the signs of María Olaya’s consent?<sup>90</sup>

Antonio replied that he knew that María consented because once she lifted her petticoat, and after he placed his body on hers, “ready to perform intercourse” (*ya para executar el acto*), María Olaya cried out “people are coming, people are coming, my Nana (María Ygnacia) is coming!” (*¡ai viene gente, ai viene hente, ai viene mi Nana!*) María Olaya then hid under the bed, Antonio stated, and remained silent and motionless until the threat of their discovery had passed. Again, at that point, Antonio declared, “if she did not want [to stay], she would have left” (*sino hubiera querido, se hubiera ydo*). After a moment, Antonio asked young María who was coming. She said no one, and so he again asked her to climb up on the bed and lift her petticoat, which she did. At no time did he make any move to detain her (*no detenerse*).

Reacting to this new explanation, Guardiola declared that Antonio had newly offended God with his false testimony, saying that María was corrupted by *malicia* when her ignorance of sexuality was clear, and that she remained immature, lacked the ability to reason, nor did she have the ability to incite desire in men (*disposiciones para apeteecer varon*). María tried to defend herself with her cries and weak efforts (*con gritos y debiles fuerzas*), which is why you covered her mouth. The circumstances detailed in this criminal *causa* reflect the use of force, which were confirmed by the young and innocent girl, and were also bolstered by the testimony of the witnesses who “confirmed the truth of the girl’s [statement], and the falsity of yours.” All the witnesses testified that you called to her three times, saying “María come here,” and this testimony, combined with the “manifest ignorance of this child, and the evident intent to do wrong (*malicia*)” of Antonio, was visible in the perjury in his initial account, in which he denied all charges, and in the bloodstains on his clothing. All of this, the lieutenant colonel stated, taken together with “the young age of the girl [María Olaya], the possession of her ignorance, her physical incapacity to perform intercourse (*la incapaz de varon*), her declaration, and the evidence on the part of the witnesses mark the truth of Olaya’s [statement], and by consequence the falsity of the declarant [Antonio].”<sup>91</sup>

The subsequent document in Antonio’s criminal *causa* related his *procurador’s* formal defense. This was a lengthy document, spanning some fifteen handwritten pages,

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<sup>90</sup> “mandar que como tiene atrevido de faltar a la religion del juramento en que profana los respectos de Dios nuestro Señor y del Rey” She climbed up on the bed and even lifted her petticoat because you ordered her to do so “y esto hazerlo sin malicia por la misma inocencia que se conose en Olaya.” He ordered again, “en que estuvo el consentimiento de la dicha Olaya?”

<sup>91</sup> “como faltando a la religion del juramento quiere por ocultar su delicto faltar a el respecto a Dios, y nuevamente ofenderle con el falzo testimonio, que le levanta a Maria Olaya con desir que tubo malicia quando esta clara su ignorancia a todos luzes constante estar ymmatura, sin razón, ni disposiciones para apeteecer varon....María trató de defenderse con gritos y con sus debiles fuerzas,” which is why you used a tapaboca. “Las circunstancias de esta causa califican la fuerza y la declaración de la tierna y segun parece ynnocente niña la autorisan, y los testigos confirman la verdad de la niña, y la falsedad del declarante.” All the witnesses testified that three times you called Maria to her “María ven aca,” and this con junto esto con la manifiesta ygnorancia de esta criatura, y la evidente malicia del declarante conste en estos autos por el perjuro, en que negó el todo del echo...por que assi parece que lo permitio la miseracordia de Dios para rendir su tenacidad...de las manchas de sangre....lo qual resulta que los pocos años de la niña la posecion de su ignorancia, lo incapaz de varon, su declaración, y la prueba en parte de los testigos califican la verdad de Olaya y a consecuencia la falcedad del declarante.”

or more than a third of the entire criminal *causa*. The next paragraphs offer a summary of his defense, with attention to the precise concepts he employed, since they, more than from any other cases surveyed for this chapter, shed light on the use of *malicia* as a rhetorical strategy in cases of child rape.

José Ygnacio Vásquez Caro began his defense with a discussion of María's age with regards to the reliability of her testimony, in the hopes of discrediting her as a witness: "Being that María Olaya is a minor, the truth of the testimony vacillates and remains doubtful among minors who have not yet gone through puberty (*menores impúberos*) in criminal trials because they are not yet of age to take full charge of the responsibilities of a truthful *religión del juramento*, and much less when they are accomplices to the crime. The presence of a judge is enough, even, to intimidate them, such that they do not offer the naked truth," the *procurador* wrote.<sup>92</sup> Apart from the general circumstances of María Olaya's age and the setting of a court, the *procurador* intimated that María Olaya's declaration was influenced by her mother, such that her appearance [before the court] was not voluntary but coerced (*coacta*) by her mother who truly put forth the complaint and accusation.<sup>93</sup>

With the credibility of the girl's testimony in doubt on the basis of these circumstances, Vásquez Caro turned to the "main issue of this crime, [which was] to excuse the criminal (Antonio) of the circumstance which constitutes the greatest gravity, about whether there was *rapto*, violence, or force in the perpetration of this crime," or, put simply, "whether or not [María Olaya offered] voluntary consent."<sup>94</sup>

Of course, Vásquez Caro recognized the important barrier of age in matters like consent. If María Olaya is only nine or ten years old, it would be "difficult to establish voluntary consent, or that she does not have *malicia*," he wrote. But, "[w]hen she does not have (*malicia*) on her own, she could acquire it through industry or through the counsel of her mother, whom in these cases can be shrewd [people]." That said, the *procurador* wrote, characteristics like *malicia* are difficult to establish because, "they are intrinsic to the heart, or in the interior of the soul, and as such they are difficult to prove."<sup>95</sup>

In establishing the presence of *malicia* in María Olaya at the time of the alleged attack, it is important to note, the *procurador* wrote, that based on the testimony of the mother, the father, and María Olaya herself, the girl slept right next to her mother's bed,

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<sup>92</sup> Siendo Maria Olaya menor, vacila mucho y queda dudosa la verdad del juramento de los menores impuberos en los juicios criminales por que estos no pueden hacerse perfectamente cargo de los que es la religion del juramento y muchos menos quando ellos son complices en los delitos, pues basta el miedo de la presencia del juez, para intimidarlos y que no digan la verdad desnuda."

<sup>93</sup> "como no consta en al proceso proveido de curador la referida Maria Olaya resulta por insuficiente e imbalida su acusación y mucho mas quando su comparecencia no fue voluntaria sino coacta por la mama Madre que fue quien verdaderamente puso la querella o acusación. "

<sup>94</sup> "Emos llegado a lo mas principal del asunto del delito para escusar a el reo de las circunstancia que consistuye la mayor gravedad, sobre si hubo o no rapto, violencia, o fuerza en la perpetracion de tal delito," or if, as he said, "Si hubo o no voluntario consentimiento."

<sup>95</sup> "Para el consentimiento de dicha muchacha que desde luego...persuadiendose a que por ser muchacha de nueve o diez años como se acierta fuese dificil el voluntario consentimiento o que no tubiese malicia....quando no la tiene por si misma pudo adquirirla por yndustria o consejo de la madre que en estos casos son linceas, y como en asuntos que no se pueden conocer en la casa por ser intrinsecos en el corazon o en lo interior del animo y por eso son dificiles de probanza."

and as a result there were plenty of opportunities for her to learn first hand about adult intercourse. “As [the mother] María Ygnacia declared, they could not turn out the light [in their bedroom],” such that “on some occasions [María Olaya] saw sex acts” between her mother and Joseph Antonio, and “she is of sufficient age for the development of *malicia* and to desire sex,” Vásquez Caro wrote. One cannot deny that she could not ignore what was going on in her parents bed, and as a result, she climbed into bed with her father, “and though ignorant of the pain of the act,” which caused her to cry out, being a young *doncella*, “her actions with her father were voluntary.”<sup>96</sup>

*Procurador* Vásquez Caro argued against Guardiola’s portrayal of María Olaya as an ingénue: “You argue that María Olaya could not have *malicia* because she is of an age that makes her incapable of performing intercourse, and that she lacks the disposition, due to her [innocent] nature, to excite [in others] or [herself] crave intercourse. I, on the other hand, have formed an opinion contrary to yours, and one that is favorable to Joseph Antonio, without having to question María Olaya, and only by virtue of the gathered declarations and arguments. I argue that not only is María Olaya capable of having *malicia*, but that she already has it – at ten years old, she is not only capable, but very capable of desiring the sex act and of stimulating desire in others.”<sup>97</sup>

Vásquez Caro turned to connections between the legal age of consent for marriage and the age of consent for sex as a means of further undermining Guardiola’s attempt to portray María Olaya as a naive child. Referring to the *Siete Partidas* and other documents relating to the age of valid consent for marriage, Vásquez Caro argued that “at age seven [children gain] the use of reason and freedom of thought (*libertad*), and...are capable of having *voluntad*. Once one has both the developmental characteristics of knowledge and free will (*conocimiento y voluntad*), one can suppose that children have the ability to understand matrimony (*tener algunas luzes de lo que es el matrimonio*). Reading through these pieces of doctrina, the question present in this case – whether *malicia suple la edad* – is one that can be asked of children younger than seven years old, and since María is ten-and-a-half years old, she is fully capable of responding to the same question.”<sup>98</sup>

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<sup>96</sup> “como lo declara Maria Ygnacia no puede escondese a la luz de la razon que alguna ocasiones viesse a tener a estos actos carnal, y pues ya tenia edad suficiente para la malicia y apetecer el coito....no puede negarse que no podia ignorar, para lo que subia a la cama, aunque ignorara lo doloroso del acto, como doncella tierna: Luego hubo voluntario.”

<sup>97</sup> Le arguye Ud. Acentado, no poder tener la dicha María Olaya malicia por ser de edad incompetente para el acto y faltar la disposicion a su naturaleza, para excitar o apetecer el acto carnal. Haviendo Vd. Formadose este juicio salva su venia y so dicho respecto yo lo formo mui contrario a favor del reo Joseph Antonio y procurare hacer patente sin preguntarle nada a María Olaya, sino solo arreglandome a lo constante en los autos, no solo es capas de tener malicio sino que defacto la tubo; y asi mismo que en la edad que se acienta tener de dies años, es capaz y mui capaz para apetecer el coito en la edad que tiene, y vamos primero averiguando si es o no capas para dicha apetenencia.

<sup>98</sup> Despues de la larga contenida entre los D.D. sobre la edad que se requiera para contraher esponsales matrimoniales cortó toda la disputa el capitulo Literas de Desponsatune Impuberum en el que se determina la edad de siete años cumplidos, y lo mismo previene la Ley 12, tit. 1, Partida 4 por que a los siete años empieza el uso de la Razon y la Libertad y ya son capaces de tener voluntad, y una vez que ya tiene conocimiento y voluntad, ya se supone sin violencia que han de tener algunas luzes de lo que es el matrimonio pues no puede haver voluntad a la cosa sin su conocimiento, y aun la question acentada, que si la malicia suple la edad son validos los esponsales contrahidos antes de cumplir los siete años: Luego es capas de poder tener malicia una muchacha menor de siete años: Luego María Olaya siendo de diez años es mucho mas capas para tenerla y para tener conocimiento de lo que es la copula para la generación a cuio

It follows, then, *Procurador* Vázquez Caro continued, that although common doctrinal interpretations of age and voluntad, children who have not completed the age of puberty, commonly understood as fourteen for boys and twelve for girls, cannot marry because they “lack generative power” to conceive of a child. However, if *malicia* is present (*malicia suple la edad*), a marriage between children is considered valid, if the children are in the developmental stage of “*próximos a la pubertad*.” This is something that was confirmed by no less an authority than Pope Alexander III (1165-1181). Therefore, before reaching puberty, children can “not only have the appetite for sex, but also the power (*potencia*) for conception (*generación*).”<sup>99</sup>

Citing “the celebrated jurists Giovanni Stefano Menochio (a sixteenth-century Italian Jesuit biblical scholar), Alonso Díaz de Montalvo (a fifteenth-century canon law scholar), and Antonio Gómez (a sixteenth-century Spanish jurist and priest)” Vázquez Caro described a consensus among learned legal scholars that the developmental stage of *próximo a la pubertad* should be understood as ten-and-a-half for boys, and nine and a half for girls, since at this age children “have the capacity to [resist the temptations brought on by] *malicia*,” and therefore constitute criminals. As such, the *procurador* wrote, since María Olaya is ten years old, and is of the developmental stage of *próximo de la pubertad*, she is capable of having perfect (*advertencia y malicia*) for coitus. “[A]nd lets not refer to these ‘tender years’” so that we can avoid discussing *malicia* in children, when a child, like María Olaya, is capable of entering into marriage and even of conceiving children (*generación*), if “*malicia suple la edad*.” “The celebrated jurist Doctor Navarro discussed a girl of nine years old bearing a child, and Pope Gregory I in his *Dialogos* referred to a ten-year-old boy who impregnated his nursemaid, and (sixteenth-century Jesuit scholar and famous casuist) Padre Thomas Sánchez confirmed in his treatise on matrimony that if there was no violence involved, María Olaya is capable of *malicia*, and even more so of desiring intercourse,” Vázquez Caro wrote.<sup>100</sup>

Furthermore, Vázquez Caro continued, in our times, experience has taught us that even at a young age, boys have open eyes for *malicia*, and to desire intercourse, even if they cannot complete the act, and much more so when prodded by immoral examples.

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fín, se dirijera los matrimonios

<sup>99</sup> “...y aunque es verdad que el matrimonio no se puede contraer antes de estar cumplida la edad de la pubertad, que son los catorce años en el varon y los dose en la muger, por que segun la corriente doctrina carecen antes de potencia generativa, pero si la malicia suple la edad, es valido el matrimonio, estanda ya próximos a la pubertad: Assí está determinado y declarado por la Santidad de Alejandro Tercero en el Capitulo Continebatur de Desponsatione Ympuberum: Luego antes de cumplir la pubertad no solo puede haver apetencia para el coito, sino tambien potencia para la generación.”

<sup>100</sup> El Celebre Jurista Menochio...el Abad Panormitano...y Don Antonio Gómez acienten que se deve entender estar ya próximo a la pubertad, el varon que tiene dies años y medio y la muger a los nueve años y medio y quede esta edad ya son capaces de prevenir la malicia de un delicto, y constituirse reos: con que teniendo María Olaya dies años ya está próxima a la pubertad, y es capaz de tener perfecta adbertencia y malicia, para el coito, y ya no les podemos llamar a estos tiernos años para que carezca de malicia, quando ya es capas de contraer esponsales y aun de contraer matrimonio, si la malicia fuese tal, que les supliese la edad, para la generación; y no fuera la primero apta para generar en semejante edad pues el Ynsigne Dr. Navarro...dice que en el reino de Napoles parió una muchacha de dies años de edad y San Gregorio en el Libro 4 de sus diologos, refiere que un muchacho de dies años hiso preñada (pregnant) a su chichigua (nursemaid), con otros varios ejemplares que expresa el Padre Thomas Sanchez en su tratado de Matrimonio de que se infiere sin violencia que teniendo Maria Olaya dies años, ya es capas de dicha malicia, y mucho mas para apetecer el acto carnal.

My investigations revealed that not only in the same room, but in the same bed, or very nearby, slept Antonio and his lover María Ygnacia, and their daughter, María Olaya. With light on in the room (as both mother and daughter testified was the case), it is quite possible that she saw them have intercourse many times, and since celebrated jurists have determined that girls as young as ten years old can desire sex, how can you deny that María Olaya also had this desire, especially with the example of seeing her mother and father have intercourse?<sup>101</sup>

As beautifully expressed by the celebrated eighteenth-century Italian bishop, legal scholar, and author of the *Tratado de teología moral*, Alfonso María de Ligorio, Vásquez Caro argued “it is extremely insolent, the childrens’ game in which they play at marriage, doing the same things that they have seen done, and their parents should not allow it because it incites them, and teaches them to desire what they see and opens their eyes to *malicia*. How then can you negate, in light of such authority, María Olaya’s desire for intercourse when she not only witnessed games among children, but saw the act itself. As a result, there are sufficient grounds to say that María Olaya has the desire, *malicia*, and will for intercourse.”<sup>102</sup> With attention to these facts, and to the fact that Antonio’s judgment (*entendimiento*) was clouded by the pitcher of *mescal* that he confessed to having drunk, which rendered him inebriated at the time of the encounter, and thus incapable of knowing what he was doing, Antonio’s attorney asked that the judge recognize that this crime was borne of moral weakness (*pura fragilidad*) and respond to it with mercy, imposing only the *pena arbitraria*, and not the more serious *pena ordinaria* of death and deprivation of property.<sup>103</sup>

At the conclusion of Vásquez Caro’s extensive defense, Antonio’s case was

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<sup>101</sup> Si María Olaya, estando ya próxima a la pubertad, aunque le false la potencia para el cumplimiento del acto, podra dejar de tener apetencia para el coito, y mas en estos tiempos que la esperiencia está acreditado que aun de menores edades, tienen ya los muchachos abiertos los ojos a la malicia, para apetecer el acto carnal, aunque no puedan completarlo, y mucho mas, quando por algun modo se les incita la apetencia por algun mal ejemplo, Aquí entran ahora las diligencias practicadas a mi pedimento, que presento a V. como referido queda: Por ellas consta que no solo en el mismo quarto, sino en una misma cama, o mui contigua una a otra, dormían el reo Joseph Antonio y su amacia María Ygnacia y su hija de esta María Olaya, y que havia luz en la pieza (lo de oficio se les preguntó a ellas, y no a el reo, ignoro el motivo) y naturalisimamente con la luz y con la immediación havia de verdad acostados en un mismo techo, y quiza muchas vezes los vería tener copula; y si ya como acierta Paulo Zachias de diez años de edad tienen las muchachas natural apetencia para el coito, como podra negarsele esta apetencia a María Olaya, con este mismo incitatibo, de verlo practicar entre el reo y su madre?

<sup>102</sup> Como belissimamente expone el celebre Theojurista Ligorio, es demasidamente insolente el juego de los muchachos que juegan a casamiento, haciendo lo mismo que han visto hacer, y que no deve permitirseles por sus padres, por que se incitan, y enseñan a apetecer las veras y abren los ojos a la malicia, como se podra negar con fundamento bastante, la apetencia de María Olaya a el coito quando no solo veía juegos que lo prenotaran, sino veras que lo calificaran? Luego ay fundamentos bastantes para que la dicha María Olaya tubiese apetencia, malicia, y voluntad para el referido acto.

<sup>103</sup> Y en esta atencion, y que amas de lo referido es mui factible se le obscureciese mas el entendimiento con el jarro de vino mescal que en su confesion expresa haver veido con lo que estaría sin duda ebrio, e yncapas de conocer lo que hacia. Por uno y otro motivo se ha de servir V atenderlo con la commiseracion que demanda este delicto de pura fragilidad y usar del atributo de la miseracordia para imponerle en castigo una pena arbitraria, que no sea de mayor gravedad teniendo para ello presentes los fundamentos expuestos en esta defensa y haviendo por expreso y alegado quanto a favor de dicho reo conduga y protestando quanto protestar deba V. suplico se sirva mandar hacer como pido en justicia, juro en forma, y en lo necesario.”

transferred to the *Real sala del crimen*, which was the entity authorized to impose the most serious penalties, such as the death penalty, which would be used in circumstances like violent *estupro inmaturo*. Joseph Antonio, and his *procurador* received a reply directly from the office of Viceroy Antonio María Bucareli y Ursúa, since the Viceroy acted as president of the royal *audiencia*, which included the *Real sala del crimen*, and occasionally acted as final judge and arbiter in criminal cases, especially when a sentence including capital punishment or labor on a maritime *presidio*. In this case, Antonio was also a soldier in the king's infantry, stationed in Mexico City, which might explain the Viceroy's personal involvement in this case.

Reviewing the assembled criminal *causa* against Antonio, Viceroy Bucareli wrote that in light of the recommendations by the surgeon of evidence of *estupro*, as well as the declarations by María Olaya and by Antonio himself, and in light Antonio's full confession, and owing to the fact that "it does not appear possible to verify what was stated and alleged in [the *procurador's*] response to the charges," the Viceroy ordered "that [Antonio] should be condemned to ten years of service to the king in a maritime *presidio* only for his rations and without pay," with the final destination to be that of the Viceroy's choosing.<sup>104</sup>

Afterward, in a short page, a *fiscal* for the *Real sala del crimen*, who also surveyed the documents from the *causa*, offered this explanation for the sentence:

"The grave crime of *estupro inmaturo*, with the [additional] quality of incest," committed by Joseph Antonio Texada to María Olaya, "is fully justified and sustained. By virtue of the testimony of two eyewitnesses it appeared that [Antonio], who stood alone in the house, called María Olaya inside, and that after a brief period she left bleeding which [the eyewitnesses] saw around her feet; [and] by virtue of the inspection that the surgeon performed on the girl that same day, soon after the crime," this evidence demonstrated that she had been "demonstrably violated," and recently, such that the girl continued bleeding during her inspection, and the suspect's clothing contained bloodstains and was damp from a recent washing."<sup>105</sup>

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<sup>104</sup> En los autos y causa criminal seguida de querrela de Maria Ygnacia Garcia, vezina del Barrio de Tequisquiapa de esta ciudad, viuda que dice de Simon Perez y amasia de Joseph Antonio Texada, soldado de Ynfantria de la Legion de San Carlos de esta jurisdiccion por estupro inmaturo incestuoso e inmaturo, que cometio en la persona de María Olaya hija de la referida, que tambien dice serlo del expresado Joseph Antonio Texada el reconocimiento del cirujano, declaracion de la estrupada, declaracion y confesion del reo, de que aunque resulta ser antenada del estrupante y por consiguiente su afin en primer grado, no la reconoce por hija, ni está de otra manera probada la filiacion, o consanguinidad en primer grado, ni la fuerza que se le atribuye, ni aparecer posibilidad de averiguarse, lo dicho y alegado por el reo en su respuesta al cargo: y lo demas, que son los autos y veen convino:

Fallo: que le debo condenar y condeno en diez años de servicio a S.M. en un Presidio ultramarino a racion y sin sueldo en Plaza de gastador, cuias asignacion reservo al Exmo Sr. Virrey Capitan General, a quien se le de quenta con esta sentencia, por la qual assi lo pronuncio, mando, y firmo con parecer de Assesor."

<sup>105</sup> "El grave delicto de estupro inmaturo, con la qualidad de incesto cometido en María Olaya por Joseph Antonio Texada soldado de ynfanteria de la Legion de San Carlos, está plenamente justificado y constante. Pues por la disposicion de dos testigos de vista aparese que estando solo el reo en la casa llamó para adentro a María Olaya, y que despues de algun rato salio la sussodicha con efucion de sangre, que se le veia por los pies; por el reconosimiento que de ella hizo el sirujano en el mismo día ya poco espacio de cometido el delicto, resultó estar manifestamente violada, y esto tan resiento que aun lo via expelia sangre por la solucion o rotura y por ultimo inspeccionadas a el mismo tiempo las faldas de la camisa del reo por el cirujano y en precencia de el Juez, de varios testigos, y del el que hazia oficio de escrivano se hallaron con varias manchas de sangre que claramente se persevian aun haviendolas labado del reo, de que todavia

Adding to this the declaration from María Olaya, which was in line with the details given by the three witnesses, and due to her young age, there is no basis to presume her testimony regarding what occurred with Antonio to be false or fictitious. In fact much of her testimony supported Joseph Antonio's own claims as to the events that day.<sup>106</sup> Antonio denied everything in his first declaration, the *fiscal* maintained, but in the second he confessed to having violated María's virginity. In the second declaration, Antonio denied forcing her to have intercourse, and denied committing violence of any kind, and claimed that María Olaya gave her consent and *voluntad* to the sinful act of *estupro inmaturo*. These claims are not only contrary to what Antonio also declared regarding María's attempts to defend herself and attempts to cry out, such that Antonio threatened her that if she cried out he would cover her mouth with a gag (*tapaboca*) (and which the girl stated that Antonio did with a pair of gloves so that it stifled her cries (*y que le tapo la boca de modo que ya la ahogaba*), but these claims are "repugnant due to her young age, her innocence, and naivete with which the lieutenant colonel who formed this *causa* testified finding in the girl not the least evidence of *malicia* to commit this type of sexual act."<sup>107</sup> "This is enough [to prove] the atrocity of this most grave crime of *estupro inmaturo*," the *fiscal* wrote, "Thus, the *auditor* (assigned by the *Real sala del crimen* to review the findings of the lieutenant colonel) estimates that the preceding sentence not only corresponds to the crime, but that even in this sentence Antonio is viewed with all kindness."<sup>108</sup>

Here, in the case of young María Olaya, unlike in the previous case involving María Luisa Francisca, the judge, *fiscal*, and Viceroy were unmoved by *procurador* Vásquez Caro's substantial appeal to *sciencia* and *doctrina* regarding the possibilities for *malicia* in María Olaya. Instead, the judge, Guardiola, relied on his own observations in the courtroom of María Olaya's "innocence and candor," which were bolstered by the inconsistencies in Joseph Antonio's testimony. Taken together, these two case studies suggest that the courts would consider the possibilities for valid consent to sex in children, even pre-adolescent children, provided that these claims rested upon firm evidence of accelerated maturity and self-awareness with regards to sex (*malicia*).

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estaban húmedas, según de todo se dio fe."

<sup>106</sup> Agragándose a esto la declaración de la misma María Olaya, que aun que sea la paciente, se debe dar asento a quanto declara, tanto por concordar con lo que desponen los testigos, y con lo que resultó de aquellas inspecciones, y reconocimientos: quanto por que por su tierna edad no hay motivo para presumir supuestas o ficticios todos aquellos passajes y hechos que refiere a tiempo del acto torpe, de que solo pudo quedar instruida por haverlos experimentado, conveniéndose assi a vista de concordar el mismo reo con algunos de ellos.

<sup>107</sup> Este está confeso; pues aunque en su primera declaración lo nego todo, pero en la segunda confesó haver violado, y aunque negó que para ello no la forzó, ni infirió violencia alguna, sino que la misma Maria Olaya assintio de su voluntad a el acto torpe, esto no solo es contrario a lo que el mismo Reo declara de que Maria Olaya intento defenderse y que queriendo gritar la amenasó con que si lo hazia le daria un tapa boca sobre que la sussodicha assienta que de facto le dio dos guantones, y que le tapo la boca de modo que ya la ahogaba: sino que tambien es repugnante atendida su tierna edad, la innocensia, y candides con que el T. C. que formó la causa assienta haverla hallado sin la menor malisia para semejante acto.

<sup>108</sup> "(Y) esto basta para que lo atos de el delicto de el estupro inmaturo de maior gravedad. Por lo que el Auditor estima que la pena impuesta por el Señor Colonel en su presedente centensia no solo es correspondiente sino que aun en ella se vio a el Reo con toda begnignad."

## *Conclusions*

The *sciencia* and *doctrina* of the written Spanish law regarding sexual violence and the case studies detailed here call attention to the critical role of a woman's consent to sex in the prosecution of sexual violence in the colonial Mexican courts. In a decisive fashion, a woman's consent to sex determined how the courts categorized the sexual act, determined the scope of trial procedure, and applied punishment. The variable of consent emerges from law and practices as a hybrid constituted of communicative signs and relevant mental attitudes, and the key feature linking body and will was corrupting *malicia*. Within both forums, substantiating allegations of the deliberate, knowing, self-aware consent to sexual sin of *malicia* required objective evidence of force from trained surgeons and material witnesses, but, more importantly, a judge's reasoned, casuistic evaluation of the victim's character and environment. Linking to the natural stages of intellectual and moral development, law and legal practices defined *malicia* as a product of both nature and environment, and judges determined that children as young as eight years old could be corrupted by it, though marriage could also save them from it.

From a broader perspective, this study also finds answers for the comparative questions posed at the beginning about the joint functioning of colonial Mexico's civil and ecclesiastical courts. Through the use of prescribed due process, the two forums utilized a nearly identical set of procedures in trying cases of sexual violence, a *religión del juramento* that included careful attention to forensic evidence and evaluations of moral character of both victims and assailants, especially through face-to-face *careo*. The two tracks of justice also drew from the same pool of written sources, grounded in Scripture, ancient Roman antecedents, and canon law traditions of moral theology, to promote a shared vision of orthodox sexuality and stable relations within communities. Both forums also sought a similar resolution for sexual violence through compelled marriages, reconciliation of spouses, and exile, though only the civil courts had access to and employed the more onerous labor sentences. In the context of justice for violent sexual sin, this was not the two discrete tracks of justice promoted by late-colonial royal decrees, but a more-or-less unified track that spoke a shared language of legal customs and doctrine.

#### **Chapter Four: Incontinencia and Escándalo: *Partnerships and Collaboration between the archdiocesan Provisorato and the Real sala del crimen, 1770-1800***

As a counterpoint to Chapter Three of this dissertation, which focused on crimes of sexual violence, the present chapter turns to the adjudication of cases of illicit, but consensual sexual relationships by Mexico City's civil and ecclesiastical courts. It offers a comparative study of the adjudication of consensual sexual relationships, primarily adultery, broken marriage promises (*ilícita amistad*), and concubinage, to build on the conclusions of the previous chapters about the jurisdictional and jurisprudential connections between the civil and ecclesiastical courts in and around Mexico City during the late colonial period. To highlight jurisdictional relationships between the two types of courts, it especially centers on the period before and after 1787, the year King Charles III circulated a decree that explicitly limited the authority of ecclesiastical magistrates to punish sexual transgressors. The decree curtailed church magistrates' abilities to apply certain coercive forms of punishment in sexual crimes cases--punishments like fines, exile, jailing, and corporal punishment, which had long been important corrective tools for the church. The Crown's intention was to limit the scope of punishment ecclesiastical judges could apply only to "spiritual exercises" like confession, reclusion, penance, and prayer. For all matters that required punishing the earthly body, the king instructed ecclesiastical judges to forward their cases on to civil magistrates for review and sentencing.

The aim here is to call attention to the interrelationships between the civil and ecclesiastical courts by offering a comparative focus on case records for illicit sexual affairs produced by both types of institutions. This methodology represents something of a departure from much of the previous historiography about illicit but consensual sexual relationships, which have used cases involving adultery, broken marriage promises, and concubinage as a way to engage in discussions about prevailing sexual mores across all classes of colonial society.<sup>1</sup> These studies have primarily used trial records as a means to access the voices of colonial men and women, uncover the details about marital and

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<sup>1</sup> For examples of influential titles in English see Steve J. Stern, *The Secret History of Gender: Women, Men, and Power in Late Colonial Mexico* (University of North Carolina Press, 1997); the rich collection of essays in *Sexuality and Marriage in Colonial Latin America*, Asunción Lavrin, ed. (University of Nebraska Press, 1992); Ann Twinam, *Public Lives, Private Secrets: Gender, Honor, Sexuality, and Illegitimacy in Colonial Spanish America* (Stanford University Press, 1999); Martha Few, *Women Who Live Evil Lives: Gender, Religion, and the Politics of Power in Colonial Guatemala* (Austin: University of Texas Press, 2002); Ramón Gutiérrez, *When Jesus Came, the Corn Mothers Went Away: Marriage, Sexuality, and Power in New Mexico, 1500-1846* (Stanford University Press, 1991). For a selection of titles in Spanish on this topic, see Solange Alberro, "Herejes, brujas, y beatas: mujeres ante el tribunal del Santo Oficio de la Inquisición en la Nueva España," in *Presencia y transparencia: la mujer en la historia de México*, Carmen Ramos Escandón, ed. (Mexico City: El Colegio de México, 1987); Carmen Castañeda, *Violación, estupro, y sexualidad: Nueva Galicia, 1790-1821* (Guadalajara: Editorial Hexágono); Dora Dávila Mendoza, "Vida matrimonial y orden burocrático. Una visión a través de el quaderno de los divorcios, 1754 a 1820, en el arzobispado de la ciudad de México. In *Historia, género y familia en Iberoamérica (siglos XVI a XX)*, Dora Dávila Mendoza, ed. (Caracas: Konrad Adenauer, 2004); Dávila Mendoza, *Hasta que la muerte nos separe: El divorcio eclesiástico en el arzobispado de México, 1702-1800* (Mexico City: El Colegio de México, 2005).

domestic relationships, including their harmonies and discords, and assess the strategies that various stakeholders -- wronged women, jealous husbands, parish priests, local judicial officials -- employed in bringing these cases before the court, or while interacting with the mechanisms of the law. These studies have been fruitful, offering a basis for a deeper understanding of how colonial men and women associated with one another and navigated the broader familial, social, and sexual mores of their communities and larger society. Few studies have explored the relationship between the civil and ecclesiastical courts, the two tracks of justice that regulated illicit sexual behavior, despite the fact that both types of courts regularly heard these types of cases, and the way they tried these crimes could vary significantly in process and outcome.<sup>2</sup>

In addition to muffling jurisdictional connections between church and state, not all studies employing trial records about illicit sex have situated them into an appropriate temporal context. If the church and state formed a partnership in controlling the public and scandalous sins of illicit consensual unions (and many studies rightly presuppose a shared moral theology between church and state in the control of sexual sin), this partnership did not remain unchanged over time. In the late eighteenth century, as part of a broader package of administrative reforms, the Spanish crown issued a series of decrees that expanded the jurisdictional authority of the civil courts in the arena of public and scandalous sins, which included illicit sex, while at the same time sharply curtailing the authority of ecclesiastical magistrates over these same matters. We know that by the 1780s, church and state were no longer co-equal partners in controlling public and scandalous sin, but we have no clear understanding of exactly what these jurisdictional changes meant in terms of actual adjudications.

Drawing from more than one hundred court trials for consensual sexual behavior heard in the major civil and ecclesiastical courts of Mexico City during the late colonial period (1770-1800), this study finds that at the level of the highest courts, prelates, their proxies, and royal administrators sustained a pattern of mostly respectful, mostly conciliatory shared authority and shared resources in their pursuit of convictions for illicit sexual affairs, even as King Charles III formalized alterations to the jurisdictional structure by comprehensive royal decree and tipped the balance, at least in written law, of the partnership between church and state in favor of the civil courts. Closely studied case records produced in the years immediately after 1787 show that the new changes to jurisdictional authority over illicit sexual affairs did not provoke widespread oppositional conflict at the level of the high courts, as one might expect, given patterns of conflict in other areas of the law (especially ecclesiastical immunity and asylum, the subject of the next chapter), and instead regularized interactions between the two tracks of justice according to the new fixed rules (*reglas fixas*). Perhaps the lack of conflict is due to the succession of appointments by the king of carefully selected and mostly regalists bishops who were inclined to accede to royal authority, but this explanation alone is insufficient.

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<sup>2</sup> Jessica Delgado's study of the devotional practices of laywomen in colonial Mexico is one attempt to bridge the divide between the philosophies and practices of the colonial civil and ecclesiastical courts. See, especially, chapter 1 of Jessica Delgado, "Sacred practice, intimate power: Laywomen and the church in colonial Mexico,," Ph.D. dissertation, UC Berkeley, 2009. Other examples of comparative study include F. Giraud, "La reacción social ante la violación: del discurso a la práctica," in *El placer de pecar y el afán de normar*, Seminario de Historia de las Mentalidades, ed. (Mexico City: Joaquín Mortiz/Instituto Nacional de Antropología e Historia, 1988; Pilar Gonzalo Aizpuru, *Familia y orden colonial*, (Mexico City: El Colegio de México, 1998).

The case records detailed in this chapter show that when it was within their power, prelates and their immediate subordinates in the courts employed strategies that excluded civil officials from participation in their sexual crimes cases, and relied on the king's new instructions to do so. These cases do not support a perception of unrestrained regalism at the level of the high courts, but one of considered diplomacy and occasional strategy with regards to due process by prelates and their proxies during a time in which church magistrates found their judicial powers marginalized by the king.

In addition to providing a means for rethinking the relationship of church and state at the highest levels, this chapter also shows ripple effects of the 1787 royal decree into colonial communities. If jurisdictional conflict did not regularly occur among the high court officials who were working to interpret and adhere to the new rules, it did register among the laity whose advocates called upon the king's decree to justify the position that ecclesiastical judges no longer had the authority to preside over their cases, or that the form of punishment an ecclesiastical judge recommended exceeded the scope of his jurisdiction (*competencia*). Ironically, this outcome was the opposite of the king's stated goal in circulating his decree, which was to end disputes over *competencia* and streamline adjudication of public and scandalous sexual sin. Taken together, the two findings offer a coherent vertical picture of the wedge issue of jurisdictional control in and around Mexico City during processes of administrative change.

In keeping with the broader methodology established for this dissertation, the chapter is organized into two sections that balance a study of the law in theory with the functioning of law in practice. The first section analyzes the law regarding consensual sexual relationships to illustrate the legal basis for the partnership between civil and ecclesiastical courts in the late colonial era before moving to a second section that contextualizes a study of the 1787 decree and its implementation through court records for three major courts of late-colonial Mexico City that regularly heard these cases -- the archdiocesan *provisorato eclesiástico*, the civil *Real sala del crimen*, and the General Indian Court (*Juzgado general de Indios*). The first half of this study primarily centers on prescriptive literature like judicial manuals, legal treatises, and church confessionals, to offer a sense of the laws under review by the Spanish crown, while the second half of the study centers primarily on case records and correspondence between officials, to measure the effects of jurisdictional change. As we will see as the chapter unfolds, in addition to the narrow conclusions of this chapter about partnerships and collaboration among the high courts of Mexico City, this study also provides a natural bridge to the final chapter of this dissertation, which focuses on the contentious issue of ecclesiastical immunity and asylum, which stimulated among many of the same central actors as we find in this chapter -- archbishop, viceroy, *oidores*, *fiscales* -- a different and more partisan debate over the limits of church and royal authority.

### ***Part One – Scandalous Incontinencia and Mexico City's Courts to 1787***

In establishing norms for proper sexual behavior, the regulatory institutions of the Spanish crown and its colonial church drew from the mandates of the sixteenth-century Council of Trent, which deemed sinful any form of intercourse outside of marriage and

not aimed at procreation.<sup>3</sup> In prescriptive literature, the Spanish-American church promoted marriage and sex within wedlock, in part, as a reciprocal set of moral obligations.<sup>4</sup> The laity fulfilled their Christian duty to God by having their relationship recognized within the sacrament of marriage, and once married, husbands and wives were expected to honor a moral obligation of fidelity and emotional support to one another that included sexual monogamy.<sup>5</sup> The ideas of mutual responsibility and reciprocity between husbands and wives expressed in theological discourse carried over into the major regulatory institutions of the Spanish state. Notions of marital rights and obligations suffused the bedrock legal sources for colonial criminal law, such as the *Siete Partidas* and the *Recopilación de leyes de los reinos de las Indias*, especially in treatments of lawful paternity, legitimacy of offspring, and inheritance of property, and through royal decree the colonial state promoted sex and matrimony not only as a spiritual but also a civic obligation.<sup>6</sup> Properly expressed through the institution of marriage, and with the goal of procreation in mind, the Tridentine ideal of monogamous sex between married couples promised to help the crown achieve its desired goal of "peace and tranquility," and especially stability -- an orderly expansion of Christianized colonial subjects organized into family units.<sup>7</sup>

Acting in contempt of the sacrament of marriage, then, by committing adultery, living as a concubine or prostitute, or engaging in premarital sex without following

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<sup>3</sup> In her essay "Sexuality in Colonial Mexico," Asunción Lavrin studied colonial church confessionals to interpret the post-Tridentine conception of sexual behavior in Mexico. Lavrin draws from the work of Michel Foucault to discuss the influences across Europe of the restrictive behavior codes of the Tridentine decrees, especially with regards to sexual behavior. Ultimately, she says, according to the teachings of the Spanish colonial church, the orderly relations of sexual activity were "restricted to the safe territory of marriage and legitimized by the need to procreate." Lavrin, "Sexuality in Colonial Mexico," in *Sexuality and Marriage in Colonial Latin America*, Asunción Lavrin, ed., 52. Serge Gruzinski studies sixteenth-century confessionals used to instruct the Nahuas in Tridentine practices with regards to marriage and sexual relations, and finds that "(t)o remedy the "lewdness" of the flesh, the church imposed the sacrament of Christian marriage, which represents a uniform institutional tie, both personal and public....(in which the Nahuas) were all by themselves within the conceptual space of indissoluble monogamy." See "Individualization and Acculturation: Confession among the Nahuas of Colonial Mexico," in *Sexuality and Marriage in Colonial Latin America*, Asunción Lavrin, ed.

<sup>4</sup> The prelates of the Third Mexican Provincial Council in 1585 wrote of concubinage and adultery, "Gravísimo (es el delito) que, estando casados, haciendo injuria al sacramento, y violando la fé que recíprocamente deben guardarse los consortes, están encenegados en tan detestable vicio: por cuyo motivo mandó el Tridentino que se procediese contra ellos." *Concilio III Provincial Mexicano* (Mexico: Eugenio Maillefert y Compañía, 1859), libro quinto, título X, ley I, "Del concubinato y penas de los concubinarios y alcahuetes," 384.

<sup>5</sup> Richard Boyer writes that the Spanish church instructed the laity to observe a "reciprocal," "mutual," "perfect love" that was "rational and just," and finds that in courtroom testimony over spousal abuse, husbands and wives made open references to marital "debts" within a moral economy of rights and obligations of marriage. Boyer, "Women, *La mala vida*, and the politics of marriage," in *Sexuality and Marriage in Colonial Latin America*, Asunción Lavrin, ed., 257. Asunción Lavrin described as a contractual relationship the conjugal debt, or "debito" in the words of the court, that wives and husbands owed one another through marriage, Lavrin, "Sexuality in Colonial Mexico," in *Sexuality and Marriage in Colonial Latin America*, Asunción Lavrin, ed., 64.

<sup>6</sup> Twinam, *Pubic Lives, Private Secrets*, 37.

<sup>7</sup> Boyer refers to this governing philosophy as "Christian patriarchalism." Boyer, "Women, *La mala vida*, and the politics of marriage," in *Sexuality and Marriage in Colonial Latin America*, Asunción Lavrin, ed., 253.

through on a promise to marry, represented not only contempt for God's commands and the sacrament of marriage, it was also a threat to the security of the Spanish state. Thus, the message of the colonial church with regards to marriage, which remained rooted in Tridentine thinking, intertwined with the goals of the state and the responsibility for controlling illicit relationships became a shared one.

Specifically, the civil and ecclesiastical courts were jointly charged with the task of controlling *lujuria* -- the sinful abuse of sensual pleasure -- when it was expressed in forms of *incontinencia*. *Incontinencia*, the preferred general legal term in civil and ecclesiastical prescriptive literature and court records, referred both to the abuse of sexual pleasure and to all forms of consensual illegitimate unions between individuals of both sexes. The sixteenth-century legal scholar Diego Covarrubias distinguished among nine variants of *incontinencia*: adultery; concubinage (*concubinatio* or *amancebamiento*); bigamy and polygamy, which were the heretical forms of adultery that were regulated by the Spanish Inquisition; deflowering a virgin outside of wedlock (*estupro* or *violación* when it involved coercive fraud or violence, typically *ilícita amistad* when it did not); complicity in a spouse's or child's adultery or prostitution (*lenocinio*); elopement (*rapto*); sodomy; pederasty; and bestiality.<sup>8</sup> Consensual forms of *rapto* were explored in the previous chapter and for reasons outlined in the introduction to this dissertation this chapter does not include a close study of the activities of the Inquisition, which had jurisdiction over flagrant marital-sexual heresies like polygamy, sodomy, and bestiality. This chapter focuses on the connection between sin and crime for the three most commonly adjudicated forms of consensual *incontinencia*: adultery, broken marriage promises (*ilícita amistad*), and concubinage.

At root, the seven forms of *incontinencia* were sins of lust, yet, as the eighteenth-century legal commentator Pedro Murillo Velarde suggested, “all crime was sin, but not all sin was crime.”<sup>9</sup> Historian Jorge Traslosheros explains that “scandal” was the key characteristic that transformed a sinful act into a criminal one. The “public and scandalous sins” that occupied magistrates in the colonial courts were sinful acts that, for their visibility and gravity, so shocked and scandalized the community that they necessitated a public response in the courts.

As Traslosheros explains, given their choice, the bishops and archbishops of the colonial Americas would have elected to resolve sinful behavior privately in the context of the *foro interno* of the confessional, which gave priests the opportunity to provide close spiritual guidance, stimulate feelings of contrition, and assign penance privately as a means to help sinners atone for their transgressions and achieve a reconciliation with God. Faced with sinful behavior that evoked public scandal, however, the bishops instructed their lead prosecutors, the *provisores* and *fiscales*, to issue sanctions through the *foro externo* of the ecclesiastical courts that would publicly address the transgression and offer a didactic mode of retributive punishment, one that would simultaneously atone for the sin, heal the rupture within the community the sin created, and encourage future peace and tranquility. Both the *foro interno* of the private confessional and the *foro externo* of the court were oriented towards these practical and transcendent ends.<sup>10</sup>

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<sup>8</sup> Diego de Covarrubias, *Variarum* (Madrid, 1552), Libro I, XXIII, 15

<sup>9</sup> Pedro Murillo Velarde, *Curso de derecho canonico español e americano* (Mexico:,1741), vol. 3, 625.

<sup>10</sup> Jorge E. Traslosheros, *Iglesia, justicia, y sociedad en la Nueva España* (Mexico: Porrúa/Universidad Iberoamericana, 2004), 171.

Scandalous behavior set a negative, sinful example to others and encouraged sin. Like a spark near dry kindling, scandalous *incontinencia* had the potential to ignite dormant or restrained sexual desires in others, even if no scandal was ever intended. As spiritual guides to the community of the faithful, and as instructors in Catholic dogma, priests had a responsibility to publicly address these scandalous sins in an instructive, illustrative manner that would demonstrate to the community the costly outcome for this type of sinful behavior.<sup>11</sup>

The responsibility to control scandal was not limited to ecclesiastical officials. All of the king's representatives were obligated to address the negative effects of public sin. In regular intervals during the seventeenth and eighteenth centuries, Hapsburg and Bourbon kings broadcast their concern about the negative effects of public and scandalous sins through royal decrees instructing "the presidents of the *audiencias*, governors, *corregidores*, and prelates of the churches within the jurisdiction of our government...to take the greatest care in the remedying of damage to the public and attend through all possible means the correction of sin through the administration of justice."<sup>12</sup> The king's legitimacy, in part, depended on his ability to maintain peace and public order and assure the eternal salvation of his subjects. As extensions of royal authority, all colonial officials were directed to respond to instances of public scandal. Thus, in the context of crown policy, scandal was the condition that transformed private sin into a public crime that undermined both church and state.

Before turning to an analysis of court procedure and court cases, the next three short sections explain the *sciencia* and *doctrina* of the written law with regards to adultery, broken marriage promises, and concubinage, and the ways that these three sexual sins generated scandal and thus became crimes subject to prosecution.

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<sup>11</sup> The prelates of the Third Mexican Provincial Council explained to priests that "Grave es el delito de los que viven públicamente amancebados don escándalo del pueblo," and instructed their ecclesiastical judges who encountered scandalous instances of adultery and concubinage to exact "contra ellos las penas establecidas por derecho, agravándolas por razon de lo contumacia, reincidencia, y gravedad de la culpa, y de los reos que la cometan, de suerte que dejen tan abominable vicio, y salgan del riesgo en que se hallan sus almas." For married men and women, or those who did not obey the judge's orders to cease contact with their illicit lovers, "será castigada gravamente á proporcion de su culpa, y echada del pueblo ó diocesis, si le pareciere al obispo, implorando en caso necesario el brazo seglar, como lo dispone el Tridentino." *Concilio III Provincial Mexicano* (Mexico: Eugenio Maillefert y Compañía, 1859), libro quinto, título X, ley I, "Del concubinato y penas de los concubenarios y alcahuetes," 384.

<sup>12</sup> AGN, *Reales Cédulas Duplicadas*, vol 17, exp. 11, fjs 1-2.(1679), entitled "Daños publicos. Encarga que se ponga remedio en los daños publicos, correccion de pecados, justicia, amparar los pobres." In formulaic language, the king wrote, "siendo el medio mas seguro, para que se consigan las felicidades comunes, recurrir a nuestro señor ymplorando su divino auxilio particularmente quando tanto leemos menester como en el tiempo presente, y el camino mas cierto de lograrle es el escusar escandalos y pecados publicos, exercitando la rectitud de la justicia, en la distribucion del premio y el castigo, y cultivando el exercicio de las virtudes, con el establecimiento de las buenas costumbres, detestacion de los vicios, y en mienda de los perjudiciales abusos, que sean yntroducido; he resuelto ordenaros y mandaros (como por la presente os ordeno y mando) quedando os la mano con los presidentes de mis Audiencias, gobernadores, y coregidoresw y prelados de las yglesias metropolitanas cathedrales de la jurisdiccion de vuestro gobierno, pongais sumo cuidado en el remedio de los daños publicos atendiendo por todos medios posibles a la correccion de pecados y a que se administre justicia en los distritos de Vuestro gobierno."

## *Adulterio*

For both the high frequency of cases and potential to engender more widespread harm, adultery was among the most problematic public and scandalous sins. This was not only because adultery represented an obvious transgression of the sacrament of marriage, or because it often led to disruptive sexual rivalry and violence. Adultery also carried with it important economic considerations related to paternity and inheritance, and prompted spouses to engage in civil lawsuits that clogged the court docket.

At its root, adultery signified a clear breach of the promises made between spouses and to God during the sacrament of marriage. Individuals involved in an adulterous affair violated the rights to conjugal fidelity that each person in a marriage vowed to uphold, which obligated a partner not to share his or her body with another. The transgression of God's mandates occurred even if the other spouse consented to the adultery, as consent to adultery would not remove violations of the marriage sacrament. Based on Tridentine recommendations, the Third Mexican Provincial Council in 1585 recommended excommunication for adultery until the offending parties reconciled with God through penitential acts.<sup>13</sup>

Apart from any breach of sacrament and affront to God's commands for conjugal fidelity, adultery disturbed the peace by provoking retributive violence, especially if the offended husband caught his spouse *in flagrante delicto*.<sup>14</sup> Legal compendiums included statutes that explained under what circumstances spouses were protected from prosecution if they killed the offending spouse and his or her lover after catching them in the act.<sup>15</sup> Though this response was justified in law, it was clearly an undesirable outcome and it was common practice for judges to order an adulterous spouse to be held under protective guard, women *en depósito* under the care of a priest, men in jail, to shield them from vengeance by the other spouse's friends or family. Adultery also often formed the basis for civil lawsuits if the offended spouse elected to pursue a separation and sue the adulterous spouse for the reimbursement of a dowry or for the contributions to the cost of a wedding. In many adultery cases, testimony from wives included complaints that the adulterous husband squandered the wife's dowry on gifts for their lovers.<sup>16</sup>

In some ways, the most problematic adulterous relationships were those that resulted in the birth of a child, which raised long-term financial implications for all parties. If an affair produced a child, the offending wife or husband was liable for all costs associated with raising the child through the age of three. If there was any doubt about the paternity of the child, as in the case of multiple lovers, then all parties were

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<sup>13</sup> Joaquín Escriche, *Diccionario razonado de legislación y jurisprudencia* (Madrid, 1874), tomo I, 381, "Adulterio," also *Concilio III Provincial Mexicano* (Mexico: Eugenio Maillefert y Compañía, 1859) [Brian: only short title, not place and publisher after the first citation in a chapter], libro quinto, título X, ley I, "Del concubinato y penas de los concubenarios y alcahuetes," 384

<sup>14</sup> Kevin Terraciano, "Crime and Culture in Colonial Mexico: The Case of the Mixtec Murder Note," *Ethnohistory* 45:5, 1998, 705-748; William B. Taylor, *Drinking, Homicide and Rebellion in Colonial Mexican Villages* (Stanford, CA: Stanford University Press, 1979).

<sup>15</sup> Jerónimo Castillo de Bobadilla, *Política para Corregidores y Señores de vasallos, en tiempo de paz y de guerra* (Madrid, 1595), 78-87.

<sup>16</sup> Such were the claims by Inés Matamoros against her adulterous husband José Sotomayor in 1788, AGN, Criminal, vol 133, exp 1, fs 1-101.

held equally responsible for providing for the child.<sup>17</sup> Children of adulterous affairs also complicated the lines of inheritance. The legitimate children of one or another spouse had the right to petition the court to exclude the child of the adulterous relationship from inheriting property, and the court record includes many property disputes involving children born to parents who were involved in adulterous relationships.<sup>18</sup>

### *Ilícita Amistad*

Cases of broken marriage promises that did not allege violence, typically designated as consensual *ilícita amistad* rather than *estupro* or *violación*, terms that connoted coercion and violence, represented another form of *incontinencia* that was regularly adjudicated by civil and ecclesiastical courts. At its root in Catholic dogma, consensual premarital sexual behavior constituted a sinful abuse of sensual pleasure. Patricia Seed and Ann Twinam have suggested that all classes of colonial society tolerated this form of sin, provided that unmarried men and women obeyed an informally prescribed pattern for acceptable premarital sex.<sup>19</sup> Taken to its end, courtship between colonial men and women generally included a formal promise to marry, which served as a binding contract. Under the pretext of a firm promise to marry, men were allowed to become sexually intimate with their fiancées before the wedding. Later, a man might renege on this promise to marry, perhaps because his promise was offered as a form of seduction, or if he simply experienced a change of heart. However an unfulfilled marriage promise arose, it left the sin of extramarital sex unresolved. If a case came before the civil or ecclesiastical courts, magistrates from both forums pushed unmarried sexual partners to wed, giving them, in essence, an ultimatum that they either elect to wed and resolve the sin by sanctifying their relationship through matrimony, or face criminal consequences such as an extended term of reclusion for women, and some combination of jail time, exile, corporal punishment, and public works labor for men.

Apart from concern for the spiritual wellbeing of the individuals involved in the premarital relationship, a marriage promise broken after sex also carried with it significant potential for social scorn as well as economic loss. In Spanish colonial society, virginity represented a valuable form of social capital that a woman and her family leveraged as part of the rites of courtship. Deflowering that did not result in marriage could have marked social effects for colonial women, depriving them of this important means to establish their social position and secure a dowry.<sup>20</sup> While Ann Twinam has established that elite men and women were especially sensitive to the potential for social stigma associated with the loss of virginity without the accompanying marriage, Richard Boyer and Jessica Delgado have shown that this concern with the social costs of deflowering cut across social and ethnic boundaries, both in terms of fears

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<sup>17</sup> Escriche, *Diccionario razonado*, tomo I, 381, “Adulterio.”

<sup>18</sup> Two detailed examples of this phenomenon can be found in AGN, Criminal, vol. 155, exp. 6, fjs. 67-110, and AGN, Criminal, vol. 266, exp. 20, fjs. 263-284.

<sup>19</sup> Twinam, *Public Lives, Private Secrets*, 38; Patricia Seed, *To Love, Honor, and Obey: Conflicts over Marriage Choice, 1574-1821* (Stanford, CA: Stanford University Press, 1988), 263-65.

<sup>20</sup> These ideas are explored more fully in the previous chapter of this dissertation. See pp. XX-XX. (specific page numbers to be added, once all chapters are collated.)

for economic loss, as well as with concerns for personal and familial honor and status.<sup>21</sup>

Many cases were handled privately, especially among elites, but the civil and ecclesiastical courts also together functioned as a mechanism to restore lost honor, and to address fears of social stigma and economic loss. The court record shows that both elite and non-elite women and their families would admit to the sin of consensual premarital sex and accept the corresponding penance in the hopes that the colonial courts, both civil and ecclesiastical, would make the deflowered women socially and economically whole by enforcing the terms of a marriage contract.<sup>22</sup>

### *Concubinatio*

The last type of *incontinencia* to appear regularly before the civil and ecclesiastical courts were the many gradations of illicit relationships between unmarried and unattached men and women, that is, men and women who had not entered into a promise to marry, nor were they already married to another. Susan Socolow has suggested that outside of two main ethnic groups, white Europeans and Indians living in native communities, most mixed-ethnicity *castas* lived together without becoming married, especially during times of economic insecurity.<sup>23</sup> In the court record, these relationships appeared frequently under the rubric *torpes tratos*, or sinful trades, which connoted an exchange of female chastity and its corresponding social capital for material goods or economic security. General terms like *torpes tratos* could refer to almost any type of relationship, from short-term dalliances, to long-term affairs that involved frequent contact and regular sexual intimacy, to simple platonic friendships that outsiders deemed morally questionable. When colonial courts referred to illicit affairs between unmarried persons as *amancebamiento* and *concubinatio*, these synonymous terms denoted a shared living arrangement, typically between a married man and an unmarried woman, in which the parties were cohabitating and “living as if they were married.”<sup>24</sup> While these relationships were sinful, they did not typically produce the same disruptive social effects of adultery or broken marriage promises, and many relationships endured for years without incident.<sup>25</sup>

### *Patterns of Denunciation for Scandalous Incontinencia*

Cases for all three of these types of consensual *incontinencia* nearly always came to the courts via third parties. In all courts, criminal matters required a formal denunciation by a party independent of the relationship in order to initiate a case. For matters of consensual *incontinencia* in which a family held social and financial stake in the court’s decision, such as with a broken marriage promise, denunciations usually came

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<sup>21</sup> Twinam, *Public Lives, Private Secrets*, 37-39; Delgado, “Sacred practice, intimate power,” Boyer, “Women, *La mala vida*, and the politics of marriage.”

<sup>22</sup> Twinam, *Public Lives, Private Secrets*, 39; Steve Stern, *The Secret History of Gender*, 70-112, Jessica Delgado, “Sin Temor de Dios: Women and Ecclesiastical Justice in Eighteenth Century Toluca,” *Colonial Latin American Review*, vol. 18, no. 1, 116.

<sup>23</sup> Susan Migden Socolow, *The Women of Colonial Latin America* (New York: Cambridge University Press, 2000), 254

<sup>24</sup> Murillo Velarde, *Curso de derecho canónico español e americano*, Vol. 3, 121.

<sup>25</sup> Socolow, *The Women of Colonial Latin America*, 154 ; Twinam, *Public Lives, Private Secrets*, 38-39.

from family members acting on behalf of the men or women involved in the relationship. It was more common in adultery cases for parish priests to act as advisors for aggrieved husbands and wives whose spouses were involved in adulterous affairs and initiate cases by *denuncia*.

Affairs that did not involve adultery or a previous marriage contract typically came to the courts via third parties who lacked direct ties to the individuals involved in the affair. Seldom did the parties involved in these types of relationships spontaneously confess to their behavior. More often, denunciations from community members who expressed shock and dismay at behavior that scandalized the community initiated these cases, signaling that a couple had become especially indiscreet, or that the person providing the denunciation had motivation to bring the relationship before the court. In turn, the court would examine and likely end the relationship in a public fashion "to shame [the parties involved in the affair] and as an example to the community" (*para el escarmiento y de ejemplo de los vecindarios*).<sup>26</sup>

In general, church leaders and royal officials called public attention to scandal by shaking the trees through formal decree. Touring *visitas* of the countryside by a bishop or archbishop included announcements that residents in a town were obligated to visit the bishop or a parish priest and confess all they knew about hidden sins in the community, even if this meant exposing friends and family. In 1718, the archbishop of Mexico, José Pérez de Lanciego Eguiluz prepared for his *visita pastoral* to various communities in the archdiocese by circulating a decree that called upon parishioners to step forward with any knowledge they might have of blasphemers, apostates, *hechizeros*, and witches living among them, as well as anyone "that has been seen accompanying women of whatever status, ethnicity, or condition that are in public sin such as scandalous *amancebamientos*....or married without having received nuptial blessings, or if they are not living a married life, and are separated from their legitimate spouses."<sup>27</sup>

Royal decrees or viceregal *bandos* likewise communicated the shared responsibility of all subjects to help control public and scandalous sins. As one example, between 1759 and 1779, King Charles III circulated three decrees in ten-year intervals, in which he charged "the presidents of the *audiencias*, governors, *corregidores*, and prelates of the churches of the jurisdiction of our government...with the application of punishment for public sin, and especially those that are scandalous," imploring, "the divine help of our Father, to reduce scandals and public sin," and in the "direct administration of justice, punish with severity the manifest public and scandalous sins, having great appreciation for God's commands to rid the [two] Republics [of the colonies, Spanish and Indian] of

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<sup>26</sup> The above quote was common explanatory phrasing by both civil and ecclesiastical judges during sentencing. For detailed examples, refer to sentencing in the case studies below.

<sup>27</sup> AHAM, Episcopal, Edictos, caja 29, exp. 25, 1718, "los an visto acompañar mugeres de qualquier estado o calidad o condicion que ser a esten en pecados publicos como son amancebamientos escandalosos, logros y vicias, si vender de fiado a mal precio que de conttado = si los tablajeros publicos, saludadores, ensalmadores, blasfemos, apostatas de Nuestra Santa Fe Catolica, hechizeros, brujos, supertisioneros, cassado dos vezes, o en grado prohibido de consanguinidad o sin licencia o sin queprecedan las amonestaciones y dispuestas por dicho Santo Concilio de Trento sin que les ayan dispensados = si siendo cassado no han recibido las Bendiciones nupciales o no hacen vida maridables estando separado de sus legitimas mugeres...si alguna o algunas personas han oido o hablado palabras torpes feas y deshonestas en las Yglesias con mugeres, o teniendo tratos descompuestos con ellas..."

those that live in a sinful manner (*relajados*).”<sup>28</sup> Not surprisingly, in light of these types of regular formal pronouncements, allegations of scandalous sin became a chief basis for initiating an investigation and trial.

Sometimes denunciations were expressed in terms of concern for the spiritual well being of others. In 1781, Juan Barriaga appeared before the parish priest of Guadalupe Tepeyac to complain about the "scandalous *incontinencia*," of María Fuentes, the owner of a local inn, and her three daughters. Barriaga alleged that while under the influence of intoxicating *pulque* Fuentes and the three girls solicited sex from male guests at the inn. Barriaga complained of the notorious “*escándalo*” of these three women, whom “being lost [to sin] and every one of them being single and with children...[their] defects have resulted in various scandals...and through their scandalous acts and sinful lifestyle (*mal vivir*)...as much as in words as in actions, live in continuous disorder.”<sup>29</sup>

Other times, concerns for the accused’s spiritual wellbeing and the effects of the corresponding public scandal were only thinly veiled rhetorical devices to bring the court’s attention to other indiscretions. In 1783, a group of Indians from the pueblo of San Pedro Quiechapa arrived as a group to the office of the lieutenant for the *alcalde mayor*, José Altuve, to issue complaints about Ramón Barreyro, the administrator of the customs house (*Ramo de Alcabalas*) for that territory.<sup>30</sup> The Indians reported to Altuve that for several months, Barreyro had been living "with notorious scandal" in an adulterous relationship with Rosa Fernández, a local Indian woman whose husband had been away for months, attending to the family business. During the preceding four months, neighbors had witnessed Barreyro and Fernández retiring for the night behind the same locked bedroom door. Even more troubling, witnesses complained that Barreyro and Fernández locked the woman's young six-year-old daughter in the room with them, "without the least reflection on the bad example that they give her, and can create, of the dishonest and illicit carnal business of the girl's mother with the tax official.”<sup>31</sup> The child, one witness complained, "in whose innocence going forward, the presence of the effects of this illicit friendship, of which there are such scandalous examples, can cause in her conduct and soul, no small ruin.”<sup>32</sup>

Under questioning, Barreyro justified his behavior by saying that the sleeping arrangement was purely a practical decision. Fernández worked as his cook and maidservant and she slept in his room because there was no space anywhere else in the house. There were two beds on either side of his room, and he and Fernández slept separately, he said. The Indians suggested to the lieutenant *alcalde mayor* that the administrator's explanation was only a ruse. Barreyro's kitchen was in a separate building from the main house, and the kitchen building was sufficiently large to accommodate a bed for Fernández and her daughter, if indeed she only cooked and cleaned.

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<sup>28</sup> AGN, *Reales Cédulas Originales*, vol. 106, exp. 44, fj. 1.

<sup>29</sup> AGN, Indiferente Virreinal, caja 2344, exp. 3, fj. 1-13. “sean perdidas y cada uno de ellas se allan solteras i con hijos, cuios defectos an resultado varios escandalos...y por causa de los actos escandalosos i mal vivir...tanto en palabras como en obras, viven en un continuo desorden.”

<sup>30</sup> AGN, Criminal, vol. 378, exp. 4, fjs. 86-97. Unless otherwise noted, the succeeding direct quotes come from this document.

<sup>31</sup> “sin la menor reflexion y para que sin duda presencie el mal exemplo que se le da, y puede creerse, de los deshonestos e ilicitos comercios carnales de su madre con el administrador de alcabalas.”

<sup>32</sup> “cuya inocencia desde luego presencia los efectos de esta ilicita amistad de la que le quedan exemplos tan escandalosos, que pueden causarle en su conducta y alma, no pocas ruinas.”

Furthermore, one townsperson testified, it was “public and notorious” that the woman was “corrupt, scandalous, drunk, and full of these vices ever since her husband left” late last year.<sup>33</sup> The local Indian *gobernador* complained that Barreyro “caused major scandal in the pueblo, with his concubinage and illicit friendship without fear of God.”<sup>34</sup>

These accusations of sexual impropriety became central to the criminal case against Barreyro, but they were folded into wider complaints about the tax official’s fitness as a royal administrator. In addition to his sexual indiscretions, Barreyro also frequently mistreated the Indians in his territory, the complainants said, ordering them to work on his estate without pay, arresting them without cause, blockading the roads to prevent the free flow of goods, all the while living behind a private guard of six men. Barreyro “terrorized these poor local Indians,” they complained, with his “studied violence and force, and mistreatment of the entire village population.”<sup>35</sup> By the end of the case, the sheer volume of witness testimony regarding these secondary concerns overshadowed the initial complaints about Barreyro’s sexual behavior, which had set the case in motion. Ultimately, the combined allegations of sexual impropriety and official misconduct led the *oidores* of the *Real sala del crimen* to judge Barreyro unfit to serve as a royal administrator. Likely to the delight of the townspeople, Barreyro was removed from office, and placed in jail for a term of six months.

Allegations of scandal were sometimes strategically employed by men and women accused of involvement in consensual affairs in their initial statements to investigators. In often competing declarations taken after an outside denunciation set a case in motion, men and women suggested that their sexual partner’s more general behavior raised public scandal as a means to disparage the other and elicit the court’s sympathy. In 1784, the family of seventeen-year-old María Thenorio sent a formal denunciation to the archdiocesan *provisor* Miguel Cervantes, asking the court to resolve a broken marriage promise.<sup>36</sup> Thenorio’s mother alleged that a local man, José López, refused to support her daughter, despite a previous promise to marry, and despite the fact that the two had a child together, a son who was now three years old. The *provisor* asked María about the relationship and she testified that the sexual relations and resulting pregnancy were entirely built upon the presumption that she and López would later marry. Numerous friends and relatives confirmed this arrangement to the *provisor*, noting the frequency of López’s visits, his care for their child, and the number of times the two appeared to stay together in the same house, and even in the same room.

López, for his part, did not deny the relationship, but said that he never promised to marry. The relationship was only a casual one, he said, with a woman who had already given up her virginity, and “when I knew her for the first time carnally, she had already been corrupted and had been a libertine woman as her mother had been all of her life.”<sup>37</sup> It was public and notorious that the scandalous lifestyles of mother and daughter had led

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<sup>33</sup> “corrupta, escandalosa, ebria, y llena de estos vicios, desde la ausencia de su marido.”

<sup>34</sup> “sirviendo del mayor escandalo de Pueblo con su concubinato e licita amistad con el ningun temor de Dios.”

<sup>35</sup> “estos Pobres naturales... arta violencia y fuerza, y mal trato de todo este vecindario.”

<sup>36</sup> AGN, Criminal, vol. 597, exp. 10, fjs. 202-309. Unless otherwise noted, the succeeding direct quotes come from this document.

<sup>37</sup> “Cuando la conosió la primera vez carnalmente, ya estava corrupta, y haver sido una muger livertina como lo a sido toda su vida su madre.”

them to be imprisoned in jail.<sup>38</sup> López invoked “public and notorious” scandal as a strategy to discredit the girl and her mother as connivers, but ultimately, his protestations failed as the *provisor* ordered López to marry María or face excommunication from the church.

In a similar case from 1796, Juana Marina came before an *alguacil mayor* in Mexico City to complain that the philandering of her husband, Manuel Antonio Rosendo, had reached an extreme that necessitated the court's intervention.<sup>39</sup> For the last two years Manuel had lived a *mala vida* abandoning his legitimate wife to engage in a *torpe trato* with a widow from her husband's hometown of Tepeji del Río named María Tomasa, ignoring his responsibility to provide for his family's livelihood and wellbeing. The last straw was when Manuel and his mistress arrived at the family home, drunk, hoping to retrieve a guitar for a nearby party. When Juana, enraged, confronted the concubine, María, Manuel intervened and struck his wife in the head with a rock, causing a life-threatening fracture, according to the surgeon who inspected the wife's injury. It was public and notorious, the wife stated, that her husband "was a vicious man prone to mistreatment, and his concubinage is public and scandalous."<sup>40</sup> Of course, the timing of her denunciation for concubinage, as it took place more than two years after the start of the illicit relationship, suggests that the wife was motivated by more than moral outrage, despite her urgent claims of personal and public scandal.

Sometimes attempts by men and women to employ scandal as a rhetorical strategy in their declarations backfired. In December 1749, María García wrote to the *juez eclesiástico* of Cuernavaca to complain that a local man, Marco de Ábalos, had stolen away her oldest daughter, also named María, and "in his company they began many scandals of *incontinencia*."<sup>41</sup> The mother, María, testified that since her husband died she was left a poor widow and mother, charged with the care of five daughters. Ábalos preyed on her condition, she said, by refusing to offer her daughter his hand in marriage, "as he should," and instead made the mother an offer: if she would not object to young María living with him, he would pay the mother a peso each day for her subsistence. The mother presented in evidence a copy of Ábalos's written offer as part of her petition that the *juez eclesiástico* place her daughter in reclusion, and punish Ábalos.

The subsequent investigation revealed that the situation was more complex than the mother initially allowed. According to Ábalos and a number of acquaintances, he and young María had already been involved in a relationship for more than a year, with, as López' attorney expressed, “the sight, knowledge, and tacit consent of the mother.”<sup>42</sup> Ábalos contended that he provided the girl with food and clothing, and the girl herself admitted that Ábalos became "the owner of my virginity" without any offering any security, like a promise to marry.<sup>43</sup> Ábalos contended that the mother grew upset with

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<sup>38</sup> “es publico y notorio que por sus escandalos y mal vivir han estado en varias carceles madre, y hija.”

<sup>39</sup> AGN, Criminal, vol. 725, exp. 1, fjs. 1-54. Unless otherwise noted, the succeeding direct quotes come from this document.

<sup>40</sup> “Ser un hombre vicioso, de mal entretenido, y su concubinato es publico y escandaloso.”

<sup>41</sup> AGN Indiferente Virreinal, Caja 6144, exp. 12. Unless otherwise noted, the succeeding direct quotes come from this document.

“en su compania se pueden originar muchos escandalos de incontinencia”

<sup>42</sup> “a vista, sciencia, y paciencia de su madre”

<sup>43</sup> “el dueño de mi virginidad....sin el interes de palabra, promeza, ni otra cosa alguna.”

him only when the girl fled her mother's house to live with him, and it was only then, and not before, that she lodged her complaint with the parish priest.

The archdiocesan *provisor* Joseph Primo de Rivera read through Ábalos' letter and the collected witness testimony, and noted that, "I know well the grave guilt perpetrated by the aforementioned criminal, who not only contracted this friendship with young María Antonia, but that according to the letter at the beginning of the case," hoped to establish certain rights over her, as if she were Ábalos' own wife.<sup>44</sup> At the same time, he wrote, "noting the date on the letter, from 1748 to September of this year, at the start of the case, the mother maintained herself in a profound silence consenting to the concubinage, in her own house, as well as Ábalos' house, and is only now moved by her zeal that her daughter does not offend God." Primo de Rivera noted the frequency with which the *curia ecclesiástica* received denunciations like María's mother's, and in these, "the motive is not the correction of their daughters, but some particular interest, or because those that engage in contracts with them do not contribute as much as the mothers want," or because it is more convenient for their daughters to become lovers with another, "or for some type of vengeance, or hurt, that the [male] lovers have raised in them," which appeared to be the case here with Ábalos. Primo de Rivera criticized Ábalos for his role in the affair, but did not order punishment. Instead, he ordered María and Ábalos to cease contact with one another, a demand that Ábalos said he would comply with immediately.<sup>45</sup>

Taken together, these cases illustrate that by the time a case of *incontinencia* came to the attention of the magistrates of the archdiocesan *provisorato* and *Real sala del crimen*, whatever the circumstances, the relationship was framed as a "public and scandalous sin," with the characteristic of public scandal transforming the act from only sinful, to both sinful and criminal. "Public and scandalous sins" necessitated a public response, one that by royal and archdiocesan decree must take place in the *foro externo* of the criminal courts. Scandalous affairs could not be solely addressed discreetly through private channels, as airing out private grievances publicly broadcast a necessary message to those involved in the affair, and others that might be tempted to sin, that those in power would not tolerate this behavior. The case records also suggest that complainants' allegations of public scandal were not always sincere ones -- rhetoric of scandal, since it could prompt a response from the courts, became a popular way for complainants to mask an unrelated personal interest in the case, and for defendants to counter claims of wrongdoing.

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<sup>44</sup> "Bien conoce el Provisor la gravissima culpa perpetrada por dicho Reo, que no solo contrajo la amistad con Doña Maria Antonia, sino que por la carta de foxas primera, quiso con el deshaogo que en ella se advierte hasta fundar derecho en su personal como si fuese su propria muger."

<sup>45</sup> "nota que siendo la fecha de dicha carta del año de 1748 a los once de Septiembre; desde entonces que la recibio la Madre ha manteniendose en un profundo silencio consintiendo el concubinato, ia en su misma casa, ya en la de Dn. Marcos, y aora le mueve el zelo de que su hija no ofenda a Dios. Por lo que se hace verosimil lo que frecuentemente acontese en la maior parte de las denuncias que vienen a esta Curia, y es que el motivo no es la correcion de las hijas, sino algun particular interes, o por que los que tratan con ellas no contribuyen quanto quieren las Madres, o por que les tiene mas conveniencia amistarlas con otros, o por alguna especie de venganza, de injurias, que los amasias les aian irrogado, y que puede discurrirse mui probable lo que para su descargo tiene alegado D. Marcos."

## 1787 – The Royal Decree Regarding Incontinencia

In May 1787, King Charles III received a complaint from the *oidores* of the *Audiencia* of México about the behavior of Archbishop Alonso Núñez de Haro y Peralta regarding the archbishop's judicial decision about two *concubinas*, women who were illegally cohabiting with married men.<sup>46</sup> At the time, the archbishop was also acting as a second interim Viceroy of New Spain, replacing the previous interim Viceroy, Eusebio Sánchez Pareja, who was so named following the sudden death of Viceroy Bernardo de Gálvez. In the context of this dual role, Núñez de Haro had ordered his *provisor*, Miguel Cervantes, to take the two alleged *concubinas* into custody and imprison them in the *cárcel de mugeres* in Mexico City, orders that Cervantes dutifully carried out.

Some days later, a public defender (*procurador de pobres*) assigned to represent the women sent an appeal letter to the *oidores* of the royal *audiencia* in Mexico City, arguing that the archbishop/viceroy Núñez de Haro lacked the authority to make these kinds of determinations in secular affairs. The archbishop was authorized to petition for royal aid to take suspects into custody, the *procurador* argued, but even as acting viceroy he remained a priest by vocation and so did not have the authority to request the imprisonment of suspects directly.

The *audiencia* reviewed the *procurador's* appeal and issued a judgment. The *oidores* agreed that Núñez de Haro had improperly conflated his secular and religious powers, and the women were to be freed from custody and fully absolved of guilt according to the terms of a royal pardon instituted that year. In a letter of response, Núñez de Haro reminded the *fiscal* that the crime of concubinage had long been one of mixed jurisdiction, so he and other ecclesiastical judges had a equal right to initiate and follow through with the cases as did secular judges, which included the right to order imprisonment of suspects. Furthermore, the archbishop stated, because the cases involving the two *concubinas* originated in the ecclesiastical courts, and were heard only in that forum, the royal pardon did not apply.

Ultimately, the women remained imprisoned, as this protracted dispute over jurisdiction could not be resolved at the local level. The *oidores* for the *audiencia* submitted a formal complaint to King Charles III, who in turn sent the matter on to his Royal Council of the Indies in Spain, asking them to make a final determination. The council took the matter under consideration and soon after offered its recommendation, which became the basis for a royal decree issued in August, 1787.

The opening paragraphs of the decree read like a chastisement. The king chided both parties for their inability to resolve their differences. A new general rule at the heart of the 1787 decree, he hoped, would put an end to the frequent "*disturbios*" between "*las dos Potestades*," crown and church, and settle once and for all who had jurisdiction over public and scandalous crimes like concubinage.<sup>47</sup> Ten years earlier, King Charles had resolved a similar jurisdictional *disturbio* in Castile. Now, faced with a similar dilemma, he resolved to extend to his overseas territories the terms of the resolution he had drafted

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<sup>46</sup> AGN, Reales Cédulas Duplicadas, vol. 7, exp. 15, fj. 35. Unless otherwise noted, the succeeding direct quotes come from this document.

<sup>47</sup> "oviando en lo succesivo iguales disturbos entre las dos Potestades."

for peninsular Spain, by referring to the specific terms of the 1777 Castilian decree. The new decree stated:

To eradicate public sins of laypersons, as they arise, (ecclesiastical courts) should exercise all their pastoral zeal by means of their pastors, as much in the penitential *fuero* and with *penas espirituales* [like prayer and communion], as with means like fines, in those cases, and with those formalities, that Law has established; and if these are not enough, they should inform the royal justices, to whom lay the power (*toca*) to punish in the external and criminal *fuero* (with punishments like jailing and corporal punishment), with those temporal punishments put forth by the laws of the kingdom, excusing the abuse of the *párrocos* whom with this motive exact fines, because it is not enough for them to contain and punish such crimes, [since] this power does not correspond to their offices, and if they forget and act as they should not, give notice to my Council of the Indies, so that they can remedy this, and punish the negligent, according to the applicable laws.<sup>48</sup>

Going forward, the king ordered that the terms from Castile would apply to all of his overseas territories. Now, faced with instances of *incontinencia*, his royal agents, and not the ecclesiastical judiciary, should initiate the cases, unless the case could be resolved fully, "according to the law," without assistance of civil judges. If, however, there was any doubt as to the involvement of civil magistrates, the priest or ecclesiastical judge must immediately call upon the assistance of the king's civil judges. Furthermore, in cases of exclusive ecclesiastical jurisdiction, judges should only assign "spiritual punishment" (*penas espirituales*) as corrective measures. This meant that ecclesiastical judges could sentence the criminals to consult with a priest in the confessional, order the convict to attend Mass or to say the rosary on a set schedule, or assign a period of reclusion, thereby addressing the spiritual harm associated with these crimes and encourage reconciliation with God. But, they were to leave punishments like fines, jailing, and corporal punishment, to secular magistrates "who [have the power to punish] in the *fuero externo y criminal*, with the temporal punishments recommended by the laws of the kingdom."<sup>49</sup>

King Charles III issued his decree regarding jurisdiction over *incontinencia* during the brief, three-month period between May and August 1787 when Archbishop Núñez de Haro acted as interim viceroy, awaiting the arrival of his successor, Manuel Antonio Flores. The tone of the decree and its appearance during the archbishop's short tenure as Viceroy suggests that it was intended both as a rebuke and a means to rein in an

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<sup>48</sup> "Que para evitar los pecados publicos de legos, si los hubiere, exercite todo el zelo Pastoral por si, y por medio de los parrocos, tanto en el fuero penitential, como por medio de amonestaciones, y de las penas espirituales, en los casos y con las formalidades amonestaciones, y de las penas que el derecho tiene establecidas; y no bastando estas, se da cuenta a las justicias reales, a quien toca su castigo en el fuero externo y criminal, con las penas temporales prevenidas por las Leyes del Reino, excusandose el abuso de que los parrocos con este motivo exijan multas, assi por que no bastan para contener y castigar semejantes delitos, como por no corresponderles esta facultad; y que si aun hallarse omision en ellas de cuenta al mi Consejo, para que lo remedie, y castigue a los negligentes conforme a las leyes lo disponen."

<sup>49</sup> "á quienes toca su castigo en el fuero externo y criminal, con las penas temporales prevenidas por las Leyes del Reyno."

overzealous archbishop who overstepped his appointed authority. The broader timing of the royal decree in the late 1780s and its regular citation by civil and ecclesiastical judges in *incontinencia* cases after 1787 recommend it as an important signpost for jurisdictional changes in the larger process of Bourbon judicial reform, in much the same way that the Royal Pragmatic on Marriage (1776) studied by Seed and others conferred exceptional powers to the state over formerly church-centered issues like marriage choice.

Viewed in isolation, the decree appears to offer an example in line with broader historiographical discussions of conflicted relations between the late-colonial church and state. However, as the second half of this chapter illustrates, case records that appeared just prior to 1787 are not marked by the frequent *disturbios* suggested by the king, at least within the archbishop's high court and the *Real sala del crimen*. In matters concerning illicit sexual behavior, the relationship between these two offices was mostly collegial in nature and marked by mutual accommodations, even as neither the *oidores* nor the archbishop's representatives were entirely conciliatory in all jurisdictional affairs. After 1787, these same patterns of partnership and collaboration continued, though now influenced by the terms of the new royal decree. Taken together, the decree and the corresponding cases suggest that any *disturbios* related to jurisdiction over public and scandalous sins were exceptional and not the rule, indicating that the decree simply formalized a set of jurisdictional responsibilities and relationships with regards to sexual sin that were more or less already observed by 1787.

### ***Part Two – Patterns of Shared Authority and Mutual Accommodation – The 1787 Incontinencia Decree in Context***

Both aggregate and case study evidence explored in this section suggest patterns of shared responsibility over scandalous *incontinencia* and mutual accommodations between church and civil courts prior to 1787, and evidence suggests that these same relationships continued well after the decree's publication. The aggregate evidence centers on two documents, one each produced by the *Real sala del crimen* archdiocesan *provisorato eclesiástico*, and the first taking the form of a summary report, drafted in 1778-1779 by the *Real sala del crimen*, which details the name, crime, term, and destination for all convicts sentenced by the *Real sala* for terms of unpaid service at Spain's maritime presidios.<sup>50</sup>

In a fourteen-month period, the *Real sala del crimen* sent a total of 179 men to labor on Spain's maritime fortifications in Havana, Puerto Rico, and Veracruz for terms ranging from two to ten years in length. While the summary report refers only to the sentences issued by the *Real sala del crimen*, the *Real sala* was not necessarily the court of first instance for these cases. A range of civil courts initiated the cases that ultimately resulted in the summary list of presidio terms, as it was standard procedure for civil judges to recommend presidio sentences for convicted criminals, and these sentences had to be forwarded on to the viceroy's office for confirmation by his advisory council, the *oidores* of the *Real sala del crimen*, just as the *Real sala* would also confirm capital sentences. As a result, we can infer that these cases were initiated by three types of courts, the *Real sala del crimen* and *Juzgado general de Indios* in Mexico City, and the

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<sup>50</sup> AGN, Indiferente Virreinal, caja 2907, exp. 4, fjs. 1-76, 1778, "Listas de reos sentenciados a los presidios de Puerto Rico, Veracruz, y la Habana por la Real Sala del Crimen."

various municipal tribunals within and outside of the city (*tribunales ordinarios*) that forwarded their sentences for confirmation. These cases would not include any from the tribunal of the *Acordada*, which received royal permission to act free of viceregal oversight.<sup>51</sup>

Before turning to an analysis of this report and its connections to shared authority, breaking down the total number of criminal convicts into useful subcategories contextualizes *incontinencia* among other crimes. Of these 179 convicts condemned to presidio labor, men convicted of sexual crimes comprised nearly forty percent, or 70 of 179. Of these 70 sexual crimes cases, only eleven cases refer to crimes in which the female party encountered coercion or violence, denoted by the terms *estupro* and *violación*. This left 58 cases of consensual “public and scandalous” sins of illicit sexual relations, nearly one-third of all *presidio* sentences. Thirty-one of the 58 cases involved convictions for the general crime of *incontinencia* (as we have seen, a term that the courts used to refer to any abuses of sexual pleasure or illicit relationships that did not involve adultery), 20 were convictions for adultery, three for *ilícita amistad*, and two each for bestiality and sodomy.

This summary report was drafted during a period in which the Spanish crown sought to rapidly build up its maritime fortifications in the Caribbean after a defeat to the British Navy in 1777. In his study of the tribunal of the *Acordada*, Colin MacLachlan notes that the period of 1778-1781 was a boom time for presidio labor, during which the royal *Audiencia* of Mexico, under instructions from the crown, diverted flows of convict labor away from traditional destinations like municipal public works projects and textile mills (*obrajes*), to build up its maritime defenses to protect against a looming British threat. During the 1778-1781 period, the *Acordada*, which dealt with a plague of banditry across the whole of New Spain, alone sentenced 1,026 convicts to presidio labor terms, which represented more than double the *Acordada*'s total issued presidio terms for the preceding twenty year period, 1756-1774.<sup>52</sup> Our sample for the *Real sala del crimen* and its subordinate courts is much smaller than that for the *Acordada*, but it nonetheless offers some insight into the role of the civil courts other than the *Acordada* in controlling cases of illicit sexual relationships, as well as a basis for contextualizing the 1787 royal decree and for understanding a relationship of shared authority and mutual accommodation that is evident at the level of individual cases.

As previously noted, *incontinencia* accounted for nearly a third (58 of 179, 32%) of all crimes for which convicts were sent to maritime labor. Only convicted thieves were sent to labor on presidios in greater frequency according to the report (61 of 179, 34%), and the total number of thieves is misleading, as ten robbery convicts were accomplices in a single case of theft from the home of a wealthy Spanish woman in Mexico City. Men convicted of homicide accounted for 29 of 179 presidio terms (16%), and convictions for prohibited weapons accounted for 25 of 179 (14%). Taken together, these totals suggest that by the early 1780s, consensual forms of *incontinencia*, mostly adultery, were already a significant priority for Spanish civil judges during this period, on par, numerically, with crimes like homicide and robbery. This report suggests already

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<sup>51</sup> Colin MacLachlan, *Criminal Justice in Eighteenth-Century Mexico: A Study of the Tribunal of the Acordada* (Berkeley, CA: University of California Press, 1975), 26-27.

<sup>52</sup> MacLachlan, *Criminal Justice in Eighteenth-Century Mexico*, 79-84.

robust efforts by royal officials to resolve the public and scandalous sin of *incontinencia* by the time the 1787 decree was issued.<sup>53</sup>

The second summary document that completes a general picture of shared authority, and sheds light on the terms of the 1787 decree, is a book compiled by the archdiocesan *provisorato eclesiástico* entitled, *Libro en donde asientan las causas criminales de los años de 1753-1819*.<sup>54</sup> This book referred to criminal *causas*, or full criminal trials that were heard by the *provisorato* during this seventy-year period, which were initiated only after a judge processed an initial denunciation and his agents had collected sufficient witness testimony. Only then would a case go to trial, and become, in the words of the court, a *causa*. There are a relatively small number of criminal *causas* relative to all judicial activity, such as *denuncias* or *procesos* that did not culminate in a full-blown trial. As such, this record is not a reliable indicator for overall activity of the *provisorato* with regards to *incontinencia*, as many factors contributed to an initial case investigation becoming a *causa*. A judge had to find the requisite number of witnesses in order to proceed, which could be difficult with sexual crimes cases, in which most of the activity occurred away from eyewitnesses. Other cases went dormant before reaching the *causa* stage because of the transfer of an official, or the death of one of the parties. The historical archives for the *provisorato eclesiástico* teem with truncated cases that abruptly end without any apparent reason. Variations in total numbers of *causas*, then, might be as much due to changes in recordkeeping, or to a succession of fortuitous events that resulted in a trial, as to any demonstrable indicator. That said, this book offers the basis for outlining some patterns related to the scope of the *provisorato's* activities with regards to *incontinencia*.

The *Libro en donde asientan las causas criminales* shows that until the late 1770s, the overall frequency of *incontinencia causas* remained relatively low, and during the period of 1753-1770, some years offer no record of *causas*. The year 1780 shows the first significant number of criminal *causas* of any kind, and the numbers grow more or less steadily from 1780 through the last year covered by the *Libro*, 1819. At the same

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<sup>53</sup> The number of individuals sent to labor for *incontinencia* and adultery by the *Real sala del crimen* is also a striking total, considering the many alternative ways to resolve *incontinencia* cases. Ordinarily, the courts' stated goal was to reconcile adulterous spouses or to encourage unmarried persons involved in a sexual affair to wed. For a case of *incontinencia* to result in a presidio sentence we can assume that it included some significant mitigating factor, such as either the offended spouse was unwilling to reconcile, or the parties resumed an affair after a prior warning by the courts, such as in our earlier cases. By contrast, by the 1780s in Mexico City's civil courts, homicide cases nearly always resulted in a term of public works or presidio labor.

Another way to consider this document, apart from comparing sheer totals for these crimes, is to compare the types of prison terms that the convicts received. Men convicted of *incontinencia* and sent to labor on a presidio were given terms that ranged from two to ten years. The most common term was two years in duration. Likewise, adultery resulted in terms from two to ten years in duration with the longest term totaling six years. Strikingly, terms for crimes like homicide were of similar duration to those for *incontinencia*. Convicted murderers received terms from between two and ten years, with a mean of six years. This parity of sentences suggests that the *Real sala del crimen* considered the two forms of crime to merit commensurately severe reprisals, and with this data in mind, the document as a whole suggests that the *Real sala del crimen* was both active in *incontinencia* cases and addressed them in a serious manner just before and after the circulation of the king's decree.

<sup>54</sup> AHAM, 105CL, 295 fjs, "*Libro en donde asientan las causas criminales de los años de 1753-1819*."

time, the proportion of *incontinencia* cases to overall cases also rises.<sup>55</sup> In 1784, six of the nine total *causas* were for *incontinencia*. In 1785, *incontinencia causas* totaled five of twelve, in 1786, six of twelve, and in 1787 six of fourteen. This growth in total number of *causas* for *incontinencia* up to 1787 supports a general picture of shared authority with the *Real sala del crimen* over these matters, and is also consistent with a possible line of interpretation with regards to the 1787 decree, that is, increased *incontinencia* activity by the archdiocesan *provisorato* led to an increased number of criminal appeals, which ultimately necessitated a formal decree by the king to eliminate competing actions by the *Real sala del crimen* and the archbishop's *provisorato*.

Complicating this line of interpretation, however, the *Libro* shows that activity in *incontinencia* cases did not disappear, nor really even diminish after 1787. In 1787, there was only one *causa* for *incontinencia* out of the eight total *causas*, but in 1788 that number grew to eight of twenty-four cases, in 1789 to five of fifteen cases, and in 1790 to four of ten. Certainly, the proportion of *incontinencia* activity relative to all judicial activity declined, but the total number of criminal *causas* for *incontinencia* remained more or less unchanged. The years 1794 and 1795 are notable, in that in neither year was there a single *causa* for *incontinencia*, but in 1796, this number exploded, to thirteen *incontinencia causas* of thirty total *causas*. This is not consistent with an image of declining authority of the church in matters of scandalous *incontinencia*.

In fact, the true statistical anomaly appeared between 1797 and 1800, which corresponds with the final four years of Núñez de Haro's tenure as Archbishop. In 1796, thirteen of thirty *causas* were for *incontinencia*, but in 1797, that number dropped to two of seventeen, in 1798 to one of eighteen, in 1799 to one of eight, and in 1800 to just three of twenty-seven. Of even greater significance, of these seven *incontinencia* cases, all but two charged priests with the crime. This is notable in that *incontinencia* cases involving priests were not mixed-*fuero* crimes. Unlike laypersons, priests always had their cases heard before ecclesiastical judges. Subtracting priests from the totals, from 1797-1800 just two of seventy laypeople tried in full by the *provisorato* (3%) were involved in criminal *causas* for *incontinencia*.

Taken together, the above documents help form a more complete general picture of the scope of the activities of the *Real sala del crimen* and *provisorato eclesiástico* during the period the king issued his 1787 decree. The documents suggest that the two tracks of justice already more or less shared responsibility for public and scandalous sexual sin prior to 1787, and after, this activity continued in a relatively undiminished fashion. The enduring presence of both civil and ecclesiastical courts during this period does not suggest the end of an era of exclusive ecclesiastical jurisdiction, followed by its supplanting by civil magistrates.

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<sup>55</sup> Delgado has suggested that such a shift could correspond to the growing concern by the archdiocese with bookkeeping, as the crown began to encroach on the jurisdictional authority of church magistrates. The rise in criminal *causas* might also reflect a shift in priorities that attended the arrival of Mexican Archbishop Núñez de Haro, who succeeded Francisco Antonio de Lorenzana in 1772, and remained archbishop until his death in 1800. Delgado, "Sacred practice, intimate power," 32.

### *Context for the 1787 Decree in Case Records for Scandalous Incontinencia*

This final section moves to a study of *incontinencia* case records produced by all courts prior to and after the 1787 decree in order to evaluate actual court practices. By examining correspondence and court procedures in individual case records it becomes clear that despite the king's reference to frequent "disturbios" in his comprehensive *incontinencia* decree, there was little overt jurisdictional conflict between the audiencia judges and the officials from the archdiocesan *provisorato* before 1787, and after the decree's circulation the courts sustained a pattern of mutual accommodations, acceptance of shared authority, adherence to the new rules, and respect for the joint cause of the spiritual and social welfare of the king's colonial subjects.

In 1785, by the time the archbishop's *provisor*, Miguel Cervantes, initiated a *causa* against José López, the case was the third criminal complaint lodged against López for his relationship with María Thenorio.<sup>56</sup> One year earlier, their relationship, then termed an *ilícita amistad*, came to the attention of the *provisorato*, on the basis of a complaint by Thenorio's mother of López's treatment of her daughter, María. The *provisor* held López in jail briefly and issued a stern verbal warning to cease all contact with the girl, but later that year, neighbors complained to their local *alcalde mayor* that López and María had resumed their relationship. The *alcalde mayor* forwarded the complaint to the *oidores* of the *Real sala del crimen* who imprisoned López again, this time in the royal jail in Mexico City, and ordered him to pay a fine of one hundred pesos, before releasing him from jail and ordering María to live under the close supervision of her parents. Only six months later, *Provisor* Cervantes received word that María and José López had again resumed their relationship. This time, Cervantes petitioned the *Real sala del crimen* for assistance in apprehending López. He asked that the *oidores* assign a constable to keep López under surveillance, and to specifically observe Thenorio's house, where neighbors said she and López had been meeting clandestinely. Through a formal order, the *oidores* José Miers and Eusebio Ventura Beleña dispatched a constable (*alguacil mayor*) on behalf of the *provisor*, and the constable reported arriving at the home at about nine at night, near the time neighbors cited as the preferred time for the couple's frequent meetings. The constable peered through a window, and spied López and Thenorio sitting together on the girl's bed. He entered with two subordinates, and arrested the pair, securing López in the central ecclesiastical jail located in the archdiocesan palace, and placing María *en depósito* with a priest.

The initial stages of this third and final criminal *causa* concerning José López' relationship with María Thenorio offer a particularly compelling example of unproblematic collaboration between the *provisorato* and the *Real sala del crimen* in *incontinencia* cases before 1787. It stands to reason that if the *oidores* of the *Real sala del crimen* were indeed concerned about enforcing expanded jurisdiction over *incontinencia* cases, as they stated in their 1787 complaint, they would not have agreed to assist the *provisor* in this generous, non-partisan manner. The initial case involving José López and María Thenorio originated in the *Real sala*, and this second case was for *reincidencia*, which meant that the couple had resumed its prior criminal activity. In practice, *reincidencia* cases generally met with a more severe sentence than did the initial

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<sup>56</sup> AGN, Criminal, vol. 597, exp. 10, fjs. 202-309. Unless otherwise noted, the succeeding direct quotes come from this document.

case, as generally, judges ordered only moderate sentences in the initial cases and attached a warning that if the convict resumed the same criminal behavior he or she would receive the maximum sentence "according to law." The list of adulterers sent to labor at the maritime presidios discussed earlier, for example, made frequent references to *reincidencia de adulterio* or *reincidencia de ilícita amistad*.

If, at this time, the relationship between the *Real sala del crimen* and the *provisorato* was as fragmented and contentious as the 1787 decree and its supporting documents alleged, then the Thenorio case would have offered an ideal opportunity for the *oidores* of the *Real sala del crimen* to take issue with the *provisor*'s involvement in the case and demand that the matter become the exclusive concern of the *Real sala del crimen*. Instead, the *oidores* dispatched an *alguacil mayor* "without delay," and he was instructed to assist the *provisor* "in whatever way possible," to apprehend López and Thenorio. Even more compelling, these were the same *oidores*, notably José Miers and Eusebio Ventura Beleña, who sent the subsequent 1787 complaint to the king that resulted in his *incontinencia* decree. Later, as López' final 1785 *provisorato causa* progressed, the *audiencia* dispatched its notary to the archdiocesan palace three times to check on the status of the case and share details from their own *causa* begun in 1784.

This 1785 case, which took place only eighteen months before the king issued his decree, and just fourteen months before he received the initial complaints from his administrators, shows straightforward cooperation by the *Real sala del crimen* and the archdiocesan *provisorato*, as church and royal officials untangled the complicated details of their cases. Each court had initiated and completed a criminal *causa* about this one relationship and each court had issued a separate ruling and separate warning to the couple about the ramifications for further contact, all conditions that in other areas of the law provoked factional discord among the judicial houses, and make this seamless expression of institutional cooperation both unexpected and telling.<sup>57</sup>

This lone 1785 case, while illustrative, is not sufficient to explain away the partisan rhetoric of the subsequent 1787 decree as exaggerated, or to dismiss the decree as a non-event in the broader story of jurisdictional change among the criminal courts.

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<sup>57</sup> Other documents suggest a pattern of collaboration and procedural regularity for *incontinencia* cases among the different branches of criminal justice. In 1786, Eusebio Ventura Beleña, acting as *fiscal* for the *Real sala del crimen*, dispatched a notary on the basis of a tip about a suspected illicit relationship (*ilícita amistad*) between Xavier Montes and Isabel Ybarra. The notary arrived late at night to Montes' house in the company of a constable, where the two men found Montes and Ybarra lying in bed with one another, naked. In this case, the *oidores* for the *Real sala* stated that they had sufficient evidence to ensure a guilty verdict. On September 5, their *fiscal* Eusebio Ventura Beleña issued the verdict:

"El testimonio que la Real Sala acompaña a V. E. De la causa seguida contra Nicolas Guzman y Maria Loreto Perez, muger de Jose Ordoñez, instruye el adulterio que aquel comersio con la expresada Maria, y porque se condenó a dos años de reclusion en Santa Maria Magdalena. **Como Nicolas Guzman es soldado del Regimiento de milicias Provinciales de esta corte no ha tomado la Real Sala providencia contra el;** pero no deviendo quedar impune su delicto, se servira V.E. Mandar que trasladandose de la Real carzel en que se halla, al Quartel se pase este expediente a el Señor Coronel; Para que le siga y substancie la causa en toda forma con audiencia del marido de Maria Loreto; y en estado de cuenta; cuia resolucion se comunique a la Real Sala." Sept. 5, 1780 - Mexico City.

Ultimately, the Real Sala deferred on issuing judgment regarding the soldier, even though it was the highest court in the land. The above case is representative of the type of procedural regularity and respect for local *fueros* among the different judicial forums in the period prior to 1787, which stands in contrast to the relationship suggested by the decree itself.

On the contrary, as the final chapter to this dissertation will make clear, *disturbios* during this same period marked the relationship between the *Real sala del crimen* and the archdiocesan *provisorato* over issues of ecclesiastical privilege and claims to asylum in churches by violent criminals. In the asylum cases to come, also primarily from the 1770s-1790s, jurisdictional discord was commonplace among the very same officials we see in the *incontinencia* cases here, the *audiencia fiscal* Eusebio Ventura Beleña, the *provisor* Cervantes, and Archbishop Núñez de Haro. However, in control of scandalous *incontinencia*, this case example and further cases detailed below show a productive working relationship between the two branches of the royal judiciary before and after 1787 that clouds an easy image of generalized opposition between church and state in judicial and jurisdictional affairs.

Several case examples after 1787 show all magistrates making sincere efforts to adhere to the new rules in a non-partisan fashion. The terms of the 1787 decree stated that ecclesiastical magistrates were to limit their punishment to those elements that involved penitence and spiritual exercises. After 1787, there are multiple examples of cases in which the *provisor* and *promotor fiscal*, working with the civil judiciary, made explicit reference to the specific terms of the 1787 decree and obeyed its order to limit the scope of their involvement to prescribing spiritual exercises as punishment for convicts.

On March 7, 1788, just three months after the 1787 decree circulated in the Americas, the parish priest and *juez eclesiástico* for the pueblo of Guazalingo, Josef Argulo y Bustamante, wrote to *Provisor* Cervantes to complain about a problematic case involving the pueblo's Indian *governador*, Juan de Miguel.<sup>58</sup> One year earlier, Argulo requested that the local *alcalde ordinario* imprison Governor Miguel on the basis of complaints from local townspeople about the governor's adulterous affairs with local women, and his "shameful and scandalous" public drunkenness. Originally, the priest had tried to resolve the case and punish Miguel and his accomplices "paternally, so that they would not resume communications," and it was on this same basis that "[he] did not proceed to initiate a *sumaria*," or a criminal investigation that precedes a full-blown *causa*, and instead enlisted the support of his assistant *vicario*, to "take care to correct Juan Miguel," of his sinful behavior.<sup>59</sup> Initially, Miguel was ordered to spend a few days in jail, the priest said, as a corrective, and was given nine punitive lashes (*azotes*) in the public square. Miguel was then freed on bond (*fianza*), and put under the care of two of the principal Indians from his town. But, the judge said, "he hasn't abandoned his drunkenness, [and] he has continued his illicit communication."<sup>60</sup> Furthermore, "he has not complied with the precepts of the church, and with scandal to this community of Christians (*feligresía*) he has abandoned confession, Communion, and hearing Mass."<sup>61</sup> Argulo exhorted the *alcalde ordinario* of Guazalingo to imprison the *governador* for a second time, and three days later, the *alcalde* complied.

Soon after, while Governor Miguel was in prison for the second time, his attorney

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<sup>58</sup> AGN, Criminal, vol. 15, exp. 6, fjs. 67-110. Unless otherwise noted, the succeeding direct quotes come from this document.

<sup>59</sup> "paternalmente, de que no volviese a comunicar"... "no procedí a formar sumaria" ... "tuviese cuidado de corregir a dicho Juan Miguel."

<sup>60</sup> "No ha dejado su embriaguez, ha continuado su ilícita comunicacion"

<sup>61</sup> "no ha cumplido con los preceptos de la yglesia, con escandalo de este filigresia ha dejado de confesar y comulgar, y de oír misa, circunstancias que haber usado la causa que motivo su libertad."

fashioned a formal appeal of the ecclesiastical judge's decision, a *recurso de fuerza* that asked the *oidores* of the *Real sala del crimen* to review his case on the basis of the terms of the 1787 decree, arguing that the decree explicitly stated that an ecclesiastical judge did not have the right to pursue a criminal case against him for adultery. Miguel's attorney sent copies of this appeal to the *juez eclesiástico*, Viceroy Manuel Antonio Flores and the *provisor*. Argulo added his own letter in response, writing that these were mixed *fuero* crimes, since both crimes, adultery and drunkenness, "legitimately pertain to ecclesiastical jurisdiction because in both [matters] reside spiritual concerns."<sup>62</sup> One week later both the *provisor* and the *oidores* of the *audiencia* acknowledged receiving the documents, and the *oidores* forwarded on the documents to the *Juzgado General de Indios*, since Miguel was an Indian.

*Provisor* Cervantes reviewed the *recurso de fuerza*, the supporting documentation, and the case record he received from Argulo and wrote a formal response that he asked his notary to copy and send on to the *Real sala del crimen*, the viceroy, and the local *alcalde ordinario*. Cervantes noted first, that because of the timing, the 1787 decree did not yet apply in this case. The initial case against the *governador* did not begin until late summer 1787, three months before the king sent the 1787 decree, and it was not meant to apply retroactively, "because the *real cédula* mandates only for the future and not for the past."<sup>63</sup> More importantly, the *provisor* noted, the attorney misunderstood the terms of the *real cédula*, and that the priest, and the church, more generally, could continue their involvement in the case, "according to the principle [at work in royal procedural law] that criminal cases should end where they originated."<sup>64</sup> Really, the purpose of the *cédula* was clear, Cervantes maintained, as it was aimed at "the pious purpose that public sins do not go unpunished."<sup>65</sup> With this *recurso de fuerza* the *governador* was merely trying to interfere with the ministerial duties of the priest, and create yet another dilatory appeal, Cervantes wrote, citing that *oidores* Mier and Beleña "lamented [to the king in their initial 1787 letter] the multiplicity of *recursos [de fuerza]* that occupied the state."<sup>66</sup> On the basis of the *provisor's* review of the case, and the Indian governor's clear resumption of illegal behavior, Cervantes wrote that "all of these crimes merit the most severe punishment as an example," and he suggested a program of "healthful spiritual punishment" (*pena espiritual saludable*).<sup>67</sup> The *governador* should "perform a general confession of his sins and take communion within fifteen days, and remain in prison" until he has completed these steps and reported to the parish priest, Argulo.<sup>68</sup> For six months, every Sunday he should say part of the rosary to the Virgin Mary, after the Mass has ended, and every month "he should repeat one time the healthful process of confession and communion."<sup>69</sup>

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<sup>62</sup> "legitimamente pertenecen a la jurisdiccion eclesiastica porque en ambos esta causa espiritual."

<sup>63</sup> "porque la real cedula dispone solo para lo futuro, y no para lo preterito."

<sup>64</sup> "atento lo qual sin ofensa de la Real cedula, se pudiera continuar en el conocimiento de esta causa por el principio sentado de que las causas deber terminarse donde se han inchoando."

<sup>65</sup> "al piadoso fin de que no quedan impunes los pecados publicos"

<sup>66</sup> "lamentandose de la multiplicidad de recursos en que esta ocupado aquel patria."

<sup>67</sup> "todos estos delitos lo hacen digno de el mas severo castigo para su escarmiento"

<sup>68</sup> "haga confesion general de sus pecados y comulgue una vez en el termino de quince days, manteniendose en la prision hasta que la cumpla respecto a la omision que informa el Juez Ecclesiastico"

<sup>69</sup> "en que por espacio de seis meses reze una parte de Rosario a la Santa Virgin todos los domingos en su Parroquia acabada la missa, y cada mes repita una vez la saludable diligencia de confesarse y comulgar"

The *fiscal* for the *Real Hacienda* (treasury), acting as a judge for the *Juzgado general de Indios*, and himself an *oidor* for the royal *audiencia*, reviewed the witness testimony and the corresponding appeal and arguments from the attorney, the parish priest, and the *provisor*. The *fiscal* noted, first, that Miguel was legitimately convicted of both adultery with María Antonia and public drunkenness, and this conduct was public knowledge.<sup>70</sup> Then, the *fiscal* reviewed the actions of the parish priest, Argulo, and agreed with *Provisor* Cervantes that Argulo had correctly followed the terms of the 1787 decree by initiating the case and stopping short of applying a corrective sentence before including the viceroy's office in the matter. Furthermore, the crime “sufficiently merits [Cervantes’ proposed] punishment, as much for [Miguel’s] public shaming (*escarmiento*) as for [the example] for the rest of the Indians”<sup>71</sup> In addition to the spiritual sentence, the *fiscal* recommended a criminal sentence, in which Miguel should be deprived of his position in the community for two years (*está privado de voz en el pueblo*), during which time Miguel should be sent to work on the fortifications in Veracruz. Two days later, the *oidores* for the *Real sala del crimen* ratified the *fiscal*’s recommendation and ordered Miguel to leave with the next boat bound for Veracruz and shortly thereafter a military officer in Veracruz confirmed Miguel's arrival.

Just as in 1785, the above *incontinencia* case suggests continued diplomatic cooperation between the civil and ecclesiastical branches of government, this time in specific reference to the terms of the 1787 decree. The decree was not used as a wedge to leverage the exclusive involvement of either the archdiocesan *provisorato* or the *Real sala del crimen*, as it could have been, but to substantiate claims to due process and clarify the roles of all administrators in the successful reprimand of a wayward *gobernador*.

This same pattern of collaboration among regional officials and judges in Mexico City continued well after 1787. Returning to the earlier cited 1796 *incontinencia* case involving a drunken assault between spouses before a party, after Juana Marina sustained her head injury during the confrontation with her husband, Manuel, and his lover, María, the local *alcalde ordinario* forwarded the case to the *Real sala del crimen* for their review and recommendations. The *oidores* ordered the couple to reunite to resolve the adultery charges, and despite ample evidence of armed assault on the part of Manuel, absolved him of guilt because his wife survived and her injuries had healed. Once reunited with his wife in Mexico City, the *oidores* forbid him to return to his hometown of Tepeji del Río, where his concubine was living.

One month later, the *alcalde ordinario* wrote a letter to the *oidores* of the *Real sala del crimen* to apprise them of Manuel’s behavior. Joaquín Alonso de Alles had successfully reconciled husband and wife, “with the assistance and healthful counseling” (*con la ayuda y consejos saludables*) of the local parish priest, who on orders from archdiocesan *Provisor* Cervantes (presumably because Cervantes was included in the correspondence) offered his assistance to the *alcalde ordinario*. Alonso de Alles also had enforced the exile order for Manuel not to return to Tepejí del Rio, but now wrote that “none of this has been enough [to result in] his correction.”<sup>72</sup> In direct opposition to

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<sup>70</sup> “Acredita forma bastante su concubinato adulterino y incestuoso con María Antonia, y acredita tambien su embriaguez y genio inquieto, y que esta conducta suya era pública en el pueblo”

<sup>71</sup> “merece tanto el debido castigo, así para su escarmiento como para los demás Indios”

<sup>72</sup> “nada de esta a bastado para su enmienda”

combined orders from civil and ecclesiastical magistrates, including *oidor* Miers and *provisor* Cervantes, Manuel had the "audacity to approach the edge of the village in search of his mistress."<sup>73</sup> As a result, Alonso de Alles again arrested Manuel, imprisoned him, placed his mistress *en depósito*. One month later, the *oidores* concluded that for this act of *reincidencia*, Manuel would be sent for a term of four years of labor on the ships of the royal navy at the port of Veracruz.

Nearly ten years after the circulation of the 1787 decree, church and state officials from multiple levels continued an open dialogue and coordinated efforts to control scandalous *incontinencia*. As in the previous example from 1787-1788, this case included *Oidor* Miers and the *Provisor* Cervantes, the same central actors that participated in the initial jurisdictional *disturbio* over instances of concubinage that prompted the 1787 decree. Here, Cervantes ordered his parish priest in Mexico City to assist the *alcalde ordinario* in a successful reunion of husband and wife, and when these efforts failed, *Oidor* Miers, as a representative of the *foro externo* of the courts, resolved the case by imposing a criminal sentence of hard labor. Far from expressing factional defense of *competencia*, this case, as those before it, suggest an amenable partnership between high court officials to fulfill the joint cause of church and king. Furthermore, if any sort of measurable change occurred after 1787, it was for the *provisorato* and its agents to constrain their sentences in *incontinencia* cases only to spiritual exercises, also in line with the king's decree.

In 1796, Marcelina Josefa García came to the local parish priest and accused her husband José Luis Samudio of having sex with the couple's sixteen-year-old daughter.<sup>74</sup> Once in jail, José Luis confessed to the sins of adultery and incest, and in a private meeting Marcelina agreed to forgive her husband and reunite with him. In their review of the case Archbishop Núñez de Haro and his *provisor* Cervantes concurred that the marriage could continue, despite proof of incest, provided that the man fulfilled his assigned penance. As Archbishop Núñez de Haro wrote:

In light of the previous court proceedings (*diligencias*) we approve them and give them as sufficient [to prove the husband's guilt], and in consequence and in attention to the *causas* [to which they pertain], and in use of the faculties which reside in [our offices], we dictate (that): we give the commission and power (*facultad*) necessary to the *cura* of Santa Maria la Redonda of this jurisdiction, so that exhorting José Luis Samudio who is married....to Marcelina Josefa García, a true confession of his sins...[and] absolving him of all and whichever censures (like excommunication) in which he has incurred, [it will thereby] enable his use of [church-sanctioned] matrimony, restoring to him the right and power to ask for and pay his conjugal debt, of which he has deprived [his wife] through incest with María Francisca Correa.

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<sup>73</sup> "osadia de hacercarse a las orillas de dicho pueblo en solicitud de su manceba"

<sup>74</sup> AGN, Criminal, vol. 607, exp. 3, fjs. 14-20. Unless otherwise noted, the succeeding direct quotes come from this document.

At the conclusion of this judgment, Archbishop Núñez de Haro asked that a copy of the case record be passed to the *provisorato* so that the *provisor* could “impose the punishment he sees as fitting.”<sup>75</sup>

*Provisor* Cervantes confirmed the archbishop’s order: “We condemn José Luis Samudio to healthful spiritual punishment, [such] that within twenty days he make a general confession of his sins, and take communion sacramentally, repeat this last order once per month for six months, and every week recite for the appropriate time a part of the sacred rosary on Fridays, kneeling [as he does so].” Cervantes ordered that these orders be passed on to the cura at Santa María la Redonda “so that he could execute what was ordered by his illustrious excellency [the archbishop], and return them to this tribunal when they are completed, and also notify María Francisca Correa (the daughter involved in the incestuous relationship) that she must also confess her sins.”<sup>76</sup>

Because Marcelina and José Luis reunited willingly, and perhaps because this private indiscretion did not generate more widespread public scandal, Núñez de Haro and Cervantes did not include the civil judiciary in this case. The terms of 1787 decree did not mandate the involvement of the civil authorities in every *incontinencia* matter, but only “to eradicate public sins of laypersons, as they arise...in the penitential *fuero* and with *penas espirituales*” like prayer and communion, and only “[when] these are not enough, they should inform the royal justices, to whom lay the power (*toca*) to punish in the external and criminal *fuero*.”<sup>77</sup> In his statement of sentence, Archbishop Núñez de Haro took care to note that the evidence was enough to ensure guilt, and “in consequence, and in attention to the *causas* in which [the evidence] resides, and in use of the [juridical] faculties which reside in us,” thereby justifying his, and Cervantes’s right to impose punishment without involving the civil authorities.<sup>78</sup> In his statement of sentence, Cervantes likewise took care to restrict it to the “healthful spiritual punishment” of José Luis’s confession and fulfillment his conjugal debt to his wife, as the means to, according

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<sup>75</sup> “Vistas las anteriores diligencias las aprobamos y damos por bastantes, y en su consecuencia y en atencion a las causas que de ellas constan, en uso de las facultades que en nos residen, dispensamos digo: Damos la comision y facultad necesaria al cura proprio de santa maria la redonda de esta corte, para que exhortando a Jose Luis Samudio casado in fatie Ecclesiae con Marcelina Josefa Garcia, a una verdadera confesion de sus culpas *intra eam* le absuelva de todas y qualesquiera censuras en que haya incurrido, y le habilite para el uso de su matrimonio restituyendole al derecho de poder pedir y pagar el devito conyugal de que estaba privado por los incestos cometidos con Maria Francisca Correa, su entenada, en cuyo impedimento le dispensamos. Y mandamos que quedando testimonio en nuestra secretaria se pasen esta diligencia al Provisorato de donde dimanar, para que el señor Juez de el, le imponga las penitencias que estime convenientes. Asi lo decreto y firmo su Exa el Arzobispo.”

<sup>76</sup> “Condenamos de pena a Jose Luis Samudio, en la espiritual saludable de que dentro de veinte dias, haga una confesion general de los pecados, y comulgue sacramentalmente, repitiendo esta ultima diligencia una vez en cada un mes por tiempo de seis, y en la que rese cada semana por el propio tiempo una parte del Santissimo rosario los viernes, hincado de rodillas pasandose este expediente al cura de la Parroquia de Santa Maria, para que ponga en ejecucion lo mandado por su Excellencia Yllustrima, y fecho lo debuelva a este tribunal y igualmente notifiqese a Maria Francisca Correa se disponga y haga una confesion general haciendoselo constar a su Parrocho, a quien encargamos zele, se cumpla con lo prevenido. Lo decreto el Sr. Juez Provisor.”

<sup>77</sup> AGN, Real Cedula Duplicada, vol. 7, exp. 15, fj. 35. “Que para evitar los pecados publicos de legos, si los hubiere...en el fuero penitential, (con) las penas espirituales...y no bastando estas, se da cuenta a las justicias reales, a quien toca su castigo en el fuero externo y criminal.”

<sup>78</sup> AGN, Criminal, vol. 607, exp. 3, fjs. 14-20. “en su consecuencia y en atencion a las causas que de ellas constan, en uso de las facultades que en nos residen”

to Núñez de Haro's order, "absolve him of all and whichever censures he has incurred."<sup>79</sup> This careful application of sentence both conformed to the terms of the 1787 decree and allowed the case to remain within the bounds of only the archdiocesan *provisorato*.

A final case study illustrates that problems of *competencia* did ensue as a result of the 1787 decree at levels below those of the high courts, in that after 1787, lesser-ranked civil officials could interject themselves into *incontinencia* cases on the basis of the 1787 decree's call for civil assistance in cases where jurisdiction was in doubt.

In August, 1798, the parish priest of Cuernavaca, Antonio Buenavita, wrote to *Provisor Cervantes* to call attention to a local instance of *incontinencia* and ask for Cervantes' assistance in resolving a dispute with a local civil official.<sup>80</sup> Two months earlier, a young woman, Dominga Salgado, met with the priest to confess to him that she had been involved in adulterous relationship with the *alguacil mayor*, Francisco Ramírez of the neighboring town of Ayacapistla. On the basis of this confession, the priest reported to the *provisor* that he successfully recruited another official from Ayacapistla, the lieutenant of the town's *alcalde mayor*, to take the girl in his custody and place her *en depósito* while the priest worked to reconcile the *alguacil mayor* with his wife. Buenavita had to involve the lieutenant in this matter since since Ramírez, who should have performed this function, was implicated in the affair.

Buenavita asked the lieutenant to isolate Salgado in a protective *depósito* while the priest worked to reconcile Ramírez with his wife. Initially, the lieutenant took Salgado to a house of a trusted official in the neighboring town of Xonacatec. However, the girl asked him if she could go to her brother's house in Cuautla instead, and the lieutenant complied. Inexplicably, two days later, the lieutenant returned and picked up the girl, and brought her back to Ayacapistla to stay with her mother, who lived down the road from the *alguacil mayor* (and was presumably where he and Salgado met). By that time the adulterous relationship had become public knowledge, and soon, "there arose scandals and quarrels" (*se originaron escandalos y riñas*) between Ramírez's wife and Salgado's mother, which ultimately resulted in a physical altercation between the two women.

Reuniting the couple was laborious, the priest complained (*me costó bastante trabajo el unirlos*). Ultimately he was able to convince Salgado to go stay with a sister in Mexico City. At that point, however, the *alcalde mayor* of Cuernavaca, who was a close friend of *Alguacil mayor* Ramírez, interjected himself into the case and ordered the girl released and returned to her own home in Cuernavaca. The *alcalde mayor* acted, the priest said, on the basis that Buenavita did not have a right to resolve this instance of *scandalous incontinencia* according to the terms of the 1787 decree.

Furious about this meddling by the *alcalde mayor*, the priest wrote to the *Provisor Cervantes*, "How irregular are the proceedings of the *alcalde mayor*" of Cuernavaca, such that they "jump out at the eyes" (*salto a los ojos*). "Even if the new royal decree that prohibits...ecclesiastical judges from imposing corporal punishment," Buenavita wrote, "[it] does not end our involvement in *causas* of this kind, nor could it, without first

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<sup>79</sup> Cervantes wrote [make "Cervantes wrote" 10pt], "Condenamos de pena a Jose Luis Samudio, en la espiritual saludable," through which Samudio would, in Núñez de Haro's words, "le absuelva de todas y qualesquiera censuras en que haya incurrido."

<sup>80</sup> AGN, Criminal, vol. 263, exp. 25, fjs. 359-362. Unless otherwise noted, the succeeding direct quotes come from this document.

abolishing canon law and that of the Council of Trent, [which are] sustained and supported by our Catholic kings with their royal protection, and also because it would be...against the power of the diocesan (bishops) to inhibit their knowledge of *causas* appropriate to their jurisdiction.” This power is “derived from the mouth of Jesus Christ,” Buenavita continued, through whose holy words “the power and jurisdiction [of priests] in matters concerning ecclesiastical discipline are undeniable, always aimed, (as they are, towards) the extirpation of vice and reform of customs, [and] directed at [maintaining] the spirit of the flock, [something that only we] command.”<sup>81</sup>

In the last paragraph of this short document, which ends with no further resolution, Buenavita cited the *alcalde mayor*'s friendship with the *alguacil mayor* and his complicity in perpetuating disharmony and scandal in the community as factors that prevented a successful reunion of husband and wife, and called upon “the clear and famed justification of the archbishop” in these matters to resolve this case “with the experience [in law that] it calls for, and with the certain determination called for in public sins.”<sup>82</sup> Though this case, and the only of its kind, ended without resolution, it highlights possible struggles of local officials to successfully adhere the new procedural rules within communities, even as their superiors successfully navigated the terms of the decree with diplomacy and decorum.

### *Conclusions*

Through the documents highlighted above, this study of scandalous *incontinencia* in Mexico City's courts traces a clear web of connections among colonial administrators at all levels, including the king, his Council of the Indies, and his direct representatives in the colonies -- the archbishop and *provisor*, viceroy and *oidores*, and their subordinates in colonial communities. While control of consensual sexual sin formed just one small part of wide-ranging and overlapping responsibilities for these officials, concerns about the potential for *incontinencia* to raise disruptive scandal in colonial communities stimulated the regular circulation of official pronouncements by crown and church regarding normative sexual behavior, as well as regular prosecution of *incontinencia* within the *foro externo* of the courts, and stern sentences of excommunication from the church and multi-year terms of *presidio* labor for criminal convicts. All of this suggests scandalous *incontinencia* was an issue of some urgency, and so gives weight to this chapter's findings with regards to the relationships among officials. *Incontinencia* was not a minor issue, easily disregarded.

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<sup>81</sup> “Quanto sea irregular el proceder tal Alcalde mayor, salto a los ojos: pues si la novisima Real cedula, que llaman de concubinato prohibe a los Jueces ecclesiasticos imponer penas corporales, no les quita el conocimiento en causa de esta naturaleza, ni pudiera sin abolir primero el Derecho canonico y concilio de Trento sostenidos, y amparados por nuestros Reyes catolicos con su Regia proteccion, y tambien porque seria disonante en la materia, y contra la potestad de los señores diocesanos inhivirlos del conocimiento de unas causas propias de su jurisdiccion derivada de la boca de Jesu Christo en aquellas palabras a San Pedro: “pasce over meas” en fuerza de las quales es innegable la potestad, y jurisdiccion en las materias concernientes a la disciplina ecclesiastica, y siempre que se trata de la extirpacion de los vicios y reforma de los costumbres, dirigido todo a la espiritu de las ovejas que les estan en comandadas.”

<sup>82</sup> “Espero que la recta y notoria justificación de VS mirara esta asunto con la madurez que pide, y con su acertada determinación hara que se observen en pecados publicos.”

The temporal boundary for this study, within an era of Bourbon reforms, also provides context for these processes of criminal control. Jurisdictional changes regarding the control of sexual sin were fertile ground for competition and frustrating checks on power, in light of attenuations to the authority of church magistrates, especially after 1750. Such disputes lay at the center of King Charles III's 1787 decree regarding the terms for resolving *incontinencia* cases, yet the case record reveals that within the day-to-day operation of the courts, administrators strived to faithfully execute their offices and adhere to the king's command for a joint effort to control scandalous sin. *Oidores* Miers and Ventura Beleña, Archbishop Núñez de Haro, and his *provisor* Cervantes, in particular, divided the responsibility for providing the shaming *escarmiento y ejemplos al vecindario* required by public scandal between an appropriate *pena espiritual* proposed by priests and a *pena criminal* reserved for civil magistrates. On one hand, this joint diplomacy between crown and church should not be surprising, given Ventura Beleña's renown as a royal administrator and Núñez de Haro's long, twenty-eight-year tenure as archbishop, during which time he collaborated with nine different viceroys. But the findings in this chapter are surprising in light of jurisdictional conflict between these same courts and same officials in other areas of the law. The process of adhering to the new rules after 1787 were not seamless, as Núñez de Haro and his subordinates had to reckon with locally powerful civil magistrates in colonial communities who attempted to undermine their authority by calling upon terms in the 1787 decree. Similarly, and as we will see in the final chapter, Ventura Beleña, though restrained here, employs these same types of strategies to undermine the ability of priests to offer asylum to violent criminals, thus providing a final counterpoint and more complete picture of the jurisdictional issues raised here regarding diplomacy, partnership, and collaboration.

## Chapter Five: *Conflict and Collaboration in Inmunidad Eclesiástico: Asylum and Church Privilege Reforms in Late-Colonial Mexico City to 1787*

“¿Si los palacios de los emperadores y reyes temporales y sus criados gozan por derecho privilegios e inmunidades, con cuánta mas razon corresponde que sean inmunes las iglesias y sus ministros, que están consagrados al eterno Dios vivo y verdadero?” – Decrees of the Third Mexican Provincial Synod, 1585

Building upon earlier conclusions regarding the jurisprudential connections and jurisdictional changes among colonial Mexico’s civil and ecclesiastical courts, this chapter centers on criminal cases tried in Mexico City’s courts involving ecclesiastical immunity privileges and the corresponding protections afforded to criminal suspects who took refuge in Mexican churches, privileges gathered under the terms *asilo local* or *inmunidad eclesiástico*. This study isolates the phenomenon of asylum in churches by criminal refugees against a backdrop of impulses by enlightened Bourbon monarchy to intensify, centralize, and streamline the administration of justice in the Americas during the last decades of colonial rule. These efforts included clusters of measures that gradually eroded the judicial authority of the church in matters of criminal law and its adjudication. Over the course of the eighteenth century, but especially after 1750, royal decrees assigned primary legal authority to secular magistrates over criminal matters that were formerly under the joint purview of church and state, among them the “public and This shift of authority coincided with a series of measures that expanded the tools of criminal surveillance in the Americas through an increased police presence and an expansion of courts and their jurisdictions in an effort to control the behavior of what Spanish officials perceived as a burgeoning population of criminal poor. In this context, the right to take asylum in churches became a regular target for reforming royal officials because it offered inviolable physical protections for suspected criminals, which included delayed sentencing, reduced sentences, and freedoms from prosecution in royal criminal courts.

In three sections, this study balances a treatment of the *sciencia* and *doctrina* of the codified asylum law with a study of asylum practices and disputes over jurisdiction in the late-colonial era, especially within the high courts of the church and state in Mexico City, the archdiocesan *provisorato* and the *Real sala del crimen* of the *Audiencia* of Mexico. First, it surveys the major contours of early Spanish asylum law, which culminated in a series of watershed reforms beginning in the year 1737, going back to immunity law in the Old Testament and the law codes of the Roman Empire as the foundations of medieval-era Spanish asylum law. Taken in concert with the decrees of Roman popes and early-modern provincial synods, these ancient and medieval sources remained the legal basis for asylum litigation into the nineteenth century. Asylum law was highly technical, often contradictory, and in some ways deeply anachronistic, a characteristic that, as this chapter suggests, perpetuated an unusually intricate and rigid doctrinal consensus between the central civil and canon law reference works with regards to the location of immune sites and to the types of criminals eligible for protection. A consensus with regards to due process that necessitated the direct involvement of priests in immunity claims, in particular, which emerged in the thirteenth century and endured into the reform era of the late-eighteenth century, would frustrate attempts by royal

administrators to bring jurisdiction over immunity claims solely under the control of the civil courts.

Next, the chapter then moves to a study of the reform era, centering on the contextualization of a rich and highly detailed report requested by the king's Council of the Indies in 1767, which asked senior legal advisers in the viceroyalties of New Spain and Peru to examine reforms initiated by the Roman pope in 1737 and gauge their suitability for Spain's overseas territories. A close study of this report highlights the specific jurisdictional problems associated with church asylum in the colonies, and shows how and why it was difficult to execute reform there until much later. While American officials were unanimous in their support for new papal decrees that promised to liberalize access to criminals during the course of an asylum case, the Council of the Indies conducted an internal review of the proposed reforms and its legal experts warned that the papal reforms might create complications in the colonies by extending new powers to the church and expanding immunities to a population of minor order clerics, ecclesiastical judges, and their families. As a result of these conclusions, the king and his council rejected major American reform for another twenty years, despite the risks of continued jurisdictional disputes caused by ambiguities in the existing law, and despite favorable conditions for extensive renovation of the asylum privilege. Centered largely on the details of this 1767 report, this section proposes an alternative interpretation of the trajectory of reform to that proposed by much of the existing historiography that has studied American asylum law, which assumes that the colonial era was characterized by a steady and relentless dismantling of ecclesiastical immunities by the Spanish kings and their advisers.<sup>1</sup> This section suggests pragmatism on the part of the crown to endure disputes over asylum claims between church and state, while awaiting even more favorable conditions for comprehensive reform.

Finally, this study concludes with a pair of cases that emerged during a period of restless ambiguity with regards to asylum law in the decade following the publication of the 1767 report, which shows measured diplomacy on the part of the archbishop and his advisers as *oidores* for the *Real sala del Crimen* sought to contravene existing law and invade the fundamental inviolability of the protective space of the church. These cases connect the findings of the first two sections, and build upon the conclusions of the previous chapters regarding the interconnections between Mexico City's high courts. What emerges is a complicated working relationship between the archdiocesan *provisorato* and the *Real Sala del Crimen* in asylum matters. The cases from this period detail how Mexican Archbishop Alonso Núñez de Haro y Peralta and his legal advisers approached direct challenges to the asylum privilege with measured diplomacy. The first case study shows how, in fundamental matters of ecclesiastical privilege like the inviolability of church spaces, Núñez de Haro and his advisers were accommodating, if approached with a spirit of joint purpose and respect for the rights of the church. The final case study, however, highlights the limits to these accommodations, and also the limits to power of the archbishop's office at this moment. When civil officials attempted outright abrogation of the asylum privilege over the extradition of an alleged murderer, the archbishop and his advisers drew from medieval legal precedents in powerful

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<sup>1</sup> As an example of this strand of asylum historiography, see Victor M. Uribe-Uran, "¡Iglesia me Llamo!: Church Asylum in Spain and Colonial Latin America," *Comparative Studies in Society and History*, vol. 49, no. 2 (2007), 446-472.

arguments to justify the continued primacy of the church and canon law in asylum matters. Despite these efforts, and though the written law supported them, the archbishop and his advisers were powerless to protect a refugee from the *Real sala del crimen*'s imposed death sentence. This last case study, in particular, suggests a growing confidence of the king's advocates in the *Real sala del crimen* to intercede in previously inviolable church privileges like immunity and asylum during the late-colonial period.

### ***Part One – The Origins of Immunity Law in Spain and Its Colonies***

European jurists from the twelfth century onward accepted two bases for ecclesiastical asylum law, the Hebrew “cities of refuge” of the Old Testament and the tenets of Roman jurisprudence, especially the comprehensive legal codices of early Christian emperors Theodosius and Justinian, which preserved the customary inviolability of select Roman temples and statuary and extended it to Christian churches.<sup>2</sup> The central concern of both strands of asylum law was to protect potentially innocent criminal suspects from rash, excessive, and especially violent punishment or retribution. Most of this early asylum law centered on three groups: those unfairly encumbered by debt, slaves fleeing mistreatment, and significant for later Spanish law and the trajectory of reform, individuals who killed another accidentally.

Passages from the Old Testament books of Numbers, Deuteronomy, and Joshua dictated God's commands to the Israelites as they ended forty years of wandering in the desert and prepared to enter the Holy Land of Canaan. God ordered the Israelites to create six cities of refuge, three on either side of the Jordan River, where individuals who killed another without forethought or malice could find sanctuary and escape immediate vengeance by the victim's family. Intent, and especially premeditation were defining characteristics of Hebrew asylum law of the Old Testament, shaping the protections afforded to refugees, and modern jurists pointed to key verses from the books of Numbers and Exodus as fundamental proof of God's unequivocal judgment of premeditated murder.<sup>3</sup>

The book of Numbers, Chapter 35 outlined God's instructions to the Israelites regarding criminal refugees, which were delivered in a series of speeches by Moses. As the chapter explained, once local tensions had cooled, the high priest of the refuge city would coordinate an assembly in the victim's village during which the villagers would

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<sup>2</sup> A.X. Pérez y López, *Teatro de la legislación universal de España e Indias* (1791), tomo XIV, 422, “Inmunidad.”

<sup>3</sup> Pérez y López, *Teatro de la legislación universal*, tomo XIV, 422-423, “Inmunidad.” Castillo de Bobadilla echoes the findings of medieval jurists with regards to the origins of Spanish ecclesiastical asylum and explains the early procedures in his *Política para corregidores* (1595): “El origen de la inmunidad de las Iglesias, segun Juan Igneo, y Remigio de Gonni, y otros, es de Derecho Divino...por la ley Mosayca el Altar de Dios (como de lee en Exodo) tenia inmunidad, y el Templo, y el Tabernaculo, para que ninguno fuesse sacado de alli para se castigado; y en los Numeros, mando Dios señalar seis Ciudades para seguro, y refugio de homicidas, y de los fugitivos: y lo mismo se lee en el Libro de los Reyes, y en el de Josue, y en el Deuteronomio; es a saber que de la quarenta y ocho Ciudades con sus Aldéas, que Dios mandó dar a los Levitas, fueron señaladas las tres Ciudades de una parte del Jordan, acia el Oriente, en la tierra de las dos Tribus, y media, que eran Bofor de Gad, y Golan en la Tribu de Manasses; y las otras tres Ciudades fueron Cedés en la Provincia de Galilea del monte Nephtali, y Sichem en el monte de Juda.....a las quales podian acogerse los que huviessen muerto a otros sin culpa suya, y no mereciessen castigo por ello, y havian de estar alli hasta la muerte del Sumo Sacerdote.”

evaluate the circumstances of the killing. If the assembly found that the accused murderer acted without premeditation or intent, that is, if a death was the result of an unforeseen and accidental blow from a hatchet, which was Moses's illustrative example to the Israelites, then the killer could remain protected in refuge city until the death of the city's high priest. If, on the other hand, the assembly determined that the accused "[struck] someone with an iron object," or "has a stone in his hand" or a "wooden object in his hand...that could kill and he hits someone so that he dies," God's criteria for interpreting premeditation, "he is a murderer," and "the murderer shall be put to death."<sup>4</sup> Exodus 12-14 reiterated God's will with regards to protective asylum for criminal refugees: "anyone who strikes a man and kills him shall surely be put to death. However, if he does not do it intentionally, but God lets it happen, he is to flee to a place I will designate. [But] if a man comes presumptuously upon his neighbor, to slay him with guile: thou shalt take him from mine altar, that he may die."<sup>5</sup>

Centuries later, a separate strand of asylum law and practices emerged in Rome in the context of legends from the historical texts of Plutarch, the *Satires* of Juvenal, and the poetic epics of Virgil. Heroic Romulus, one of the two founders of the city of Rome, sought to augment the city's population by designating the hills and forests on Rome's outskirts as sanctuaries where exiles, refugees, runaway slaves, and criminals could find clemency.<sup>6</sup> During the later Roman Republic and Empire, this customary clemency shifted to the temples of the gods, to the statues of the emperors, and by the early centuries of Christianized Rome, to churches.<sup>7</sup> In 391 CE, Emperor Theodosius I offered the first formal regulations for refugees in a Roman church, warning citizens encumbered

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<sup>4</sup> *The Holy Bible: New International Version* (London: Hodder and Staughton, Ltd., 2011), Numbers 35.

<sup>5</sup> *The Holy Bible: New International Version*, Exodus 12-14.

<sup>6</sup> The Spanish kings of the Reconquista utilized a similar principle, establishing *castillos fronterizos* as asylum sites to help repopulate frontier zones and protect them from incursions by the Moors. See, J. Alcántara Sampelayo, *Un castillo fronterizo* (Madrid: Belmez, Revista de Ferias, 1961), 12.

Plutarch, *Lives of the Noble Grecians and Romans*, in John Langhorne and William Langhorne, eds., *Plutarch's Lives, Translated from the Original Greek* (Cincinnati: Applegate, Pounsford and Co., 1874), 439-441, "As soon as the foundation of the city was laid, they opened a place of refuge for fugitives, which they called the Temple of the Asylean God. Here they received all that came, and would neither deliver up the slave to his master, the debtor to his creditor, nor the murderer to the magistrate; declaring that they were directed by the oracle of Apollo to preserve the asylum from all violations. Thus the city was soon peopled, for it is said that the houses at first did not exceed a thousand."

Juvenal, in his 8th *Satire* was critical of inclusive nature of Romulus' asylum, "I would rather that Thersites were your father if only you were like the grandson of Aeacus, and could wield the arms of Vulcan, than that you should have been begotten by Achilles and be like Thersites. Yet, after all, however far you may trace back your name, however long the roll, you derive your race from an ill-famed asylum: the first of your ancestors, whoever he was, was either a shepherd or something that I would rather not name." *Juvenal: The Sixteen Satires*, S.H. Jeyes, trans. (London, 1875).

Virgil, *Aeneid*, Book VIII, John Dryden, trans. (Boston, 1905)

"Of old Carmenta, the prophetic dame,  
Who to her son foretold th' Aenean race,  
Sublime in fame, and Rome's imperial place:  
Then shews the forest, which, in after times,  
Fierce Romulus for perpetrated crimes  
A sacred refuge made; with this, the shrine  
Where Pan below the rock had rites divine."

<sup>7</sup> Kent J. Rigsby, *Asylia: Territorial Inviolability in the Hellenistic World* (Berkeley: University of California Press, 1996), 28-29.

by state tax debts that, "[i]f a debtor to the state takes refuge in a church, he must be dragged from the church building or else the priest must pay his debt. Clergy should not try to protect public debtors from their debts."<sup>8</sup> Later, in 419 CE, Theodosius II expanded these provisions to include protections for suspected murderers and also cemented physical boundaries for ecclesiastical asylum into a "zone of protection" that included the church and its grounds to a distance of fifty paces from the church.<sup>9</sup> In 431, he broadened these early laws regarding locations of immune sites, extending sanctuary not just to the church itself but also to its adjoining porticoes, halls, and houses "so that the criminal will not have to defile the altar by fleeing to it." Criminals had to enter unarmed, for, "if a criminal is not willing to lay down his weapons upon entering the sanctuary, armed men will drag him out." But if they were unarmed, the protection offered by the Roman emperor was absolute: "Anyone who has tried to drag a criminal out of a sanctuary will be condemned to death."<sup>10</sup>

As interpretive anchors for Spanish asylum law, the principles outlined in the Old Testament and imperial Roman decrees entered Spanish jurisprudence in the seventh century in the form of the theocratic *Lex Visigothum*, or Visigothic Code, which gathered together the divine law of the Bible, the nascent canon law of the Catholic Church, and the select decrees of the earlier Roman emperors and Visigothic kings.<sup>11</sup> During the legal revolutions of the twelfth and thirteenth century, the Visigothic Code was revived and directly translated into Castilian by advisers to the Holy Roman Emperor, Frederick III, becoming the *Fuero Juzgo*. The *Fuero Juzgo's* thematic division into separate books that detailed the nature of law and procedure and the regulations of the church also inspired the form and much of the content of the later *Siete Partidas* (1265).<sup>12</sup> How these two

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<sup>8</sup> *Codex Theodosius*, translated by J.H. Bernard (London, 1893), *Mansi* vol. 5. 437-45

<sup>9</sup> *Codex Theodosius*, CT 9.41.5

<sup>10</sup> *Codex Theodosius*, CS 13

<sup>11</sup> There are direct corollaries between the Theodosian and Visigothic Codes. Theodosius II's 431 law concerning the treatment of armed refugees entered the Visigothic Code in two concise lines, Book 9, Title 6, Law 3, "No one shall dare to remove, by force, any person who has sought sanctuary in a church unless said person should attempt to defend himself with arms;" Book 9, Title 6, Law 4, "Where anyone takes refuge at the door of a church, and does not lay down his arms, and is killed, the person who struck him shall be liable to no penalty or reproach therefore." See *The Visigothic Code (Forum Judicum)*, S.P. Scott, translator (Boston: Boston Book Company, 1910), 122.

<sup>12</sup> Historian Jerry Craddock considers the translation of the Visigothic Code into Castilian to be an imperfect one (Jerry R. Craddock, *The Legislative Works of Alfonso X: El Sabio* (Rochester, N.Y.: Boydell & Brewer, 1996), xi), but where there may be debate over exact phrasing, the language and spirit of the laws was nevertheless mostly retained. Though a direct comparison between Scott's English translation of the Visigothic Code and the Castilian *Fuero Juzgo* can be muddy, compare, for example, the laws regarding homicide in S.P. Scott's English translation of the Visigothic Code and the *Fuero Juzgo*, *En Latin y Castellano, Cotejado con los mas antiguos y preciosos codices por la Real Academia española* (Madrid: Ibarra, Impresor de Cámara de S.M., 1815).

*The Visigothic Code*, S.P. Scott, trans. Book 6, Title 5, Law 1, "Whoever kills another ignorantly and unintentionally, if he has cherished no animosity against him, is not guilty of murder according to the Word of God, for it is not just that he should suffer the penalty of homicide who committed the act against his will."

*Fuero Juzgo*, Libro 6, Titulo 5, Ley 1, "Quien mata otro omne sin su grado, nol conociendo, e ninguna malquerencia non avie contra él, non deve prender muerte segunto que dice nuestro sennor; que non es derecho que aquel sea penado por el omicillio, que non lo fizo por su grado."

*The Visigothic Code* S.P. Scott, trans., Book 6, Title 5, Law 2, "If one man should kill another, either standing, coming, or passing by, not being aware of his presence at the time, where no cause of enmity had

medieval Spanish sources treated ecclesiastical asylum in written statutes became critical for the future trajectory of asylum law in Spain and its colonies. By the terms of the 1348 *Ordenamiento de Alcalá* and 1505 *Leyes de Toro*, the *Fuero Juzgo* and *Siete Partidas* gained legal preeminence in Spanish dominions over all other laws, except for local *fueros*, which were mostly silent on the question of asylum. In this way, the firm stamp of divine law and the customary weight of Roman antecedents, which suffused these early authoritative sources, would become interpretive obstacles for future reform of Spanish asylum law.

The Visigothic Code and its later translation, the *Fuero Juzgo*, preserved the judgments regarding premeditation from the Old Testament. Where the cities of refuge were meant to offer protection to individuals who killed without intent, so the Visigothic Code ordered that “[w]hoever kills another ignorantly and unintentionally, if he has cherished no animosity against him, is not guilty of murder according to the Word of God, for it is not just that he should suffer the penalty of homicide who committed the act against his will.”<sup>13</sup> In two subsequent laws regarding the categories of criminals eligible for asylum protections, “enmity” and “accident” were established as the crucial determinants for distinguishing unintentional death from premeditated homicide, and accident became a basis for justifiable claims to asylum: “If one man should kill another, either standing, coming, or passing by, not being aware of his presence at the time, where no cause of enmity had previously existed between them, and he who committed the homicide shall declare that he did it involuntarily, and shall be able to prove this in court, he shall depart in safety,” and, “If anyone, either by accident, or by being pushed in any way, or by rushing headlong upon another, should kill him, he shall not be liable to the penalties of homicide.”<sup>14</sup> For individuals found guilty of homicide, the judgment

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previously existed between them, and he who committed the homicide shall declare that he did it involuntarily, and shall be able to prove this in court, he shall depart in safety.”

*Fuero Juzgo*, Libro 6, Título 5, Ley 2, “Si algun omne mata á otro, no lo viendo, ni lo sabiendo, si ante non avia ninguna enemiztat con él, é no lo mata de su grado, y esto pudiere mostrar antel uez, deve ser quito.

Libro 6, título 5, ley 16 of the *Fuero Juzgo* gives us the Castilian translation of the expansive passage from the Visigothic Code detailing the regulations for “murderers” taking refuge in a church, “Non nos remembramos, que fasta en esaquí pusiesemos penas de muchas maneras daquellos que fazen los omezillios, seguno cuemo el fecho de cada uno merecia. Mas porque aquellos que fazen este pecado, quanto mayor voluntad an de lo fazer, tanto mas fallan razones por que puedan escapar, e fuyen a las eglesias de Dios, que los defendan, y ellos non dubdaron de fazer el pecado contral mandado de Dios, porque tal pecado non deve seer sin pena, ca mata las almas, e faze a los omnes muchas veces fazer peor: por ende fazemos esta ley que vala por siempre, que pues la ley manda que a aquel que faze el omezillio, o el mal fecho de su voluntad, nenguna escusacion, nin nengun poder non vala. Mas si fuyer al altar, el omne quell quiere prender no lo deve ende a tirar sin mandado de los sacerdotes. Mas depues que fuere dicho al sacerdote, e jurar que aquel, que fuyo a la iglesia, es condenado de muerte por el pecado que fizo, el sacerdote tirel del altar, y echelo fuera de la iglesia: y estonze aquel, que andaba en pos él, lo prenda é non le deve dar muerte, pues que lo echaron de la iglesia; mas dévelo meter en poder de los parientes mas propincos del muerto, que fagan dél lo que quisieren, fueras muerte. Y esto establecemos port al que la maldade de los malos sea refrenada, pues que veyen que non pueden escapar, que non sean penados, dexen si al que non de fazer mal con miedo de pena lo que farina muchas vezes por su grado o pudiesen.”

<sup>13</sup> *The Visigothic Code*, S.P. Scott, trans., book 6, title 5, law 1, *Where One Kills Another*.

<sup>14</sup> *The Visigothic Code*, S.P. Scott, trans. book 6, title 5, law 1, *Where One Kills Another*; law 2, *Where One Kills Another without Seeing Him*, “If one man should kill another, either standing, coming, or passing by, not being aware of his presence at the time, where no cause of enmity had previously existed between them, and he who committed the homicide shall declare that he did it involuntarily, and shall be able to

remained as inflexible as it was in God's early warning to Moses: "[e]very man who kills another intentionally, and not by accident, is liable to capital punishment."<sup>15</sup>

Crucially, the Visigothic Code also established clerics as the intermediary between the accused and his pursuers, even in capital cases, stating that "[n]o one shall presume to seize a person who seeks sanctuary in a church, or at its doors; but he may petition a priest or a deacon to restore said person to him; and if a debtor or a criminal takes refuge there, and he should not be liable to the penalty of death, the ecclesiastic in charge of the church may interpose his good offices, and request that said party be pardoned or discharged...[I]n case he should take refuge at the Holy Altar, a pursuer shall not presume to remove him from it without the consent of the priest. The priest having been consulted, however, and oath made that the party sought is a criminal, and liable to be publicly condemned to death; the priest himself shall drive him from the altar, and eject him from the choir; so that he who is pursuing him may arrest him."<sup>16</sup> In this way, consent of a priest to a suspect's extradition became a compulsory step in Spanish procedural law for removing criminals from protective asylum.

Building upon the principles instituted in the *Fuero Juzgo*, the *Siete Partidas* established a broad and clear interpretive logic for asylum law and practice. The reasoning behind asylum privileges and exemptions was simple, the *Siete Partidas* explained. The church was a house of God, and "God's things should have greater honor than those of men."<sup>17</sup> Central among the range of exemptions (*franquezas*) and privileges

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prove this in court, he shall depart in safety;" law 3. *Where One, being Pushed, Kills Another*, "If anyone, either by accident, or by being pushed in any way, or by rushing headlong upon another, should kill him, he shall not be liable to the penalties of homicide. But if one man should push another, and, impelled by that push, the latter should kill a third party, and he who gave the push did so without malice, he shall pay a fine of a pound of gold, because he neglected to avoid the commission of an injury."

<sup>15</sup> *The Visigothic Code*, S.P. Scott, trans., book 6, title 5, law 11, *Where One Man Intentionally Kills Another*.

<sup>16</sup> *The Visigothic Code*, S.P. Scott, trans. book 9, title 3, law 3. *Concerning the Penalty for Removing a Man from a Church by Force*, "Where anyone removes his slave or a debtor from a church, or the altar where he sought sanctuary, without the consent of a priest, or of some other ecclesiastic who has charge of said church, as soon as the fact has been brought to the notice of the judge, if he is a person of high rank, said offender shall be compelled to pay a hundred solidi to the church which sustained the injury. A person of inferior station shall pay thirty solidi, and if he should not have the means to do so, he shall be arrested by the judge, and receive a hundred lashes in public. The master shall then regain possession of his slave, and the debtor shall be surrendered to his creditor;" book 9, title 3, law 4, *A Debtor, or a Criminal, Cannot be Forcibly Removed from a Church, and must Pay such Debts, or Penalties, as are Due*, "No one shall presume to seize a person who seeks sanctuary in a church, or at its doors; but he may petition a priest or a deacon to restore said person to him; and if a debtor or a criminal takes refuge there, and he should not be liable to the penalty of death, the ecclesiastic in charge of the church may interpose his good offices, and request that said party be pardoned or discharged. If a debtor should take refuge in a church, the church shall have no right to protect him but the priest or deacon must surrender him, without delay with the admonition that his creditor shall neither injure nor bind him who claimed the right of asylum; and the creditor must state, in the presence of said priest or deacon, within what time he shall expect the payment of the debt. Because the intervention of the church may be invoked purposes of mercy, is no reason why persons should be deprived of their property. The laws relating to homicides and other malefactors are set forth under their respective titles."

<sup>17</sup> *Las siete partidas del Rey Don Alfonso el Sabio, cotejadas con varios codices antiguos por La Real Academia de La Historia, de orden y a expensas de S.M. en la imprenta Real* (Madrid, 1807), Introduction to *Partida 1*, tit. 11, *De los privilegios et de las franquezas que han las iglesias et sus cimiterios*, "[L]as cosas de Dios hobiesen mayor honra que las de los homes."

(*privilejos*) of the medieval Spanish church was the ability to offer asylum to refugees, something that, the *Partidas* explained, the building and its grounds gained *ipso facto* when it was formally consecrated by a bishop. Through consecration a church space became a “House of Shelter,” which the *Siete Partidas* derived from King David’s Psalm, “That God was a House of Shelter and Repose.”<sup>18</sup> In figurative language of protection and comfort (*amparamiento*, *holguera* or *folgura* in the medieval Spanish), the *Siete Partidas* outlined precise, didactic steps that established a church’s grounds and especially its interior as a protective shelter. A bishop enclosed the relics of saints in the altar as a temporal manifestation of the protective power of Jesus Christ. He inscribed images of a lamb and cross over the entrance to the church to represent protection from the power of God’s avenging angels, symbolizing the mark of lamb’s blood that shielded the Israelites from God’s vengeful plagues in Egypt.<sup>19</sup> These formal acts forged a divine hearth where penitents could come, feel and express their contrition for sin, learn the path to spiritual renewal, and receive God’s mercy.

This shelter was itself to be protected through respectful behavior, the *Siete Partidas* explained. The dead should not be buried within its walls. Men and women should remain at a respectful distance from the altar, unless they were specifically asked to approach. No trade could be carried on in the church or on its grounds, and no one could take up lodgings inside the church, nor house their belongings there. Crucially, secular negotiations, contracts, and especially judicial disputes and sentencing, were prohibited, since, “it would be against reason and a cruel thing to sentence men to death in the place that is established to serve God and for doing pious works.”<sup>20</sup>

This reasoning reflected the spirit of contemporaneous canon law, which likewise restricted secular judicial matters from the space of the church. Pope Lucio III in 1181 declared that “[n]either in churches, nor cemeteries should men resolve blood cases,”<sup>21</sup> and an influential collection of later Papal decrees, which were gathered together under Pope Boniface VIII into a reference work titled the *Sixth Book of the Decretals*, or the *Sexto* (1230), provided further guiding principles: “The priests should execute what is laid out here, and sentences pronounced in churches shall be null, and those that make contracts [in churches] should be punished.”<sup>22</sup> The decrees of Pope Gregory X, taken from the General Council of Lugdonense in 1273 and translated from Latin into Spanish in the seventeenth century, were more explicit: “The entrance to the church should be

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<sup>18</sup>*Las siete partidas del Rey Don Alfonso*, Partida 1, tit. 10, ley 17, *Por qué llaman á la iglesia casa de amparamiento*, “Casa de amparamiento et de folgura llaman á la iglesia, et pore so dixo el rey David en un salmo del Salterio que Dios fuese su amparamiento et casa de su folgura.”

<sup>19</sup> *The Holy Bible: New International Version*, Exodus 12:21-23.

<sup>20</sup>*Las siete partidas del Rey Don Alfonso*, Partida 1, Título 11, Ley 2, “Et por que la iglesia es casa de Dios, segunt dice en la ley ante desta, por ende ha privilejos mas que las otras cosas de los homes, et señaladamente en estas cosas; que non debe ser apremiada de ningunt pecho nin de otro embargo, nin deben en ella nin en sus cementerios iudgar los pleitos seglares et mayormiente los que fuesen de justicia, porque serie contra razon et cruel cosa de judgar los homes á muerte ó á lision en el lugar que es establecido para servir á Dios et para facer obras de piedat.”

<sup>21</sup> Pérez y López, *Teatro de la legislación universal*, tomo XIV, 423, “Inmunidad..” “En las iglesias ni cementarios, no deben controvertirse las causas de sangre.”

<sup>22</sup> Pérez y López, *Teatro de la legislación universal*, tomo XIV, 423, “Inmunidad,” “En las iglesias ni cementarios, no deben controvertirse las causas de sangre;” “Los Ordinarios de los Lugares deben executar lo que aqui se contiene, y las sentencias pronunciadas en las Iglesias son nulas, y los que hicieren los contratos deben ser castigados.”

humble and devout, and one should insist that during prayers, to exclude protests (*clamores*), insurrections (*sediciones*), meetings of laypersons, public conversation among laypersons, vain colloquies (*vanos coloquios*, likely conversations questioning the theology of the Church), negotiations, secular games, and legal matters, especially criminal ones.”<sup>23</sup>

While the Old Testament, the Visigothic Code, and *Fuero Juzgo* established priests as central mediators between refugees and their pursuers, the *Siete Partidas* made this role decisive, formalizing a process for extradition that required a priest’s consent. While criminals could be removed from a church, “for punishment and fine” (*para correccion o pena pecuniaria*) an official could only do so by petitioning a priest for the suspect’s release. His pursuers were required to offer a special oath and guarantee, called a *caución juratoria de no ofender* or sometimes a *fianza de inmunidad*, that they would not kill the refugee (*quitará la vida*), nor cause bodily harm (*ni ofenderá en los miembros*), and until the terms of extradition were resolved and these protections confirmed, the church was to remain the refugee’s shelter. His pursuers could not surround it, nor could they prevent friends and relatives from bringing him food and clothing, and the priests were obligated to sustain the refugee with food and water.<sup>24</sup>

In what would become a critical issue for later disputes, the *Siete Partidas* extended these restrictions for the extradition of all classes of criminals and debtors, except for a handful of limited “exceptional” cases (*casos exceptuados*), which included thieves who preyed upon travelers, robbing and killing them (*ladrones manifestos*); individuals who plundered, burned, or otherwise destroyed fields, vines, and trees (*los que andan de noche*); those who killed or injured another in a church in the hopes of taking refuge there; those who burned, damaged, or otherwise “violated” a church (*la queman o la quebrantan*); murderers (*homicidas*); adulterers; rapists; and individuals owing excessive taxes to the state (described as *traidores manifestos*).<sup>25</sup> If a suspected criminal was not among these exempt classes and was extradited, the official who took charge the suspect was obligated to return him or her to the custody of the church, under penalty of excommunication.<sup>26</sup>

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<sup>23</sup> Pérez y López, *Teatro de la legislación universal*, tomo XIV, 423, “Inmunidad,” 423, “La entrada en las Iglesias debe ser humilde y devota, y debe insistirse en las oraciones excluyendo clamores, sediciones, consejos de muchos seglares y públicas conversaciones de ellos, vanos coloquios, negociaciones, juegos y juicios seculares, especialmente criminales.”

<sup>24</sup> *Las siete partidas del Rey Don Alfonso, Partida 1, tit. 9, ley 1-4*

<sup>25</sup> *Las siete partidas del Rey Don Alfonso, Partida 1, tit. 9, ley 1-4* “[C]a todo home que fuyere a ella por mal que hobiese fecho, ó por debda que debiese, ó por otra cosa qualquier dever se hi amparado)... que non deben amparados en ella, ante los pueden sacar ende sin caloña ninguna, ai como ladrones manifestos que tienen los caminos et las carreras, et matan los homes et los roban: et otrosi los que andan de noche, quemando ó destruyendo en otra manera qualquier las viñas et los árboles, et las mieses et los campos; et los que matan ó fieren en la elesia ó el cimiterio afiuzándose amparar en ella; et los que la queman ó la quebrantan.) (A todos los otros defiende santa elesia que ninguno non les faga mal, segunt que desuso es dicho.)...Segun las leyes antiguas, no gozaban de la inmunidad de la Iglesia los traidores manifestos, homicidas, adúlteros, raptos de virgenes, y los obligados por exacciones de tributos reales a dar cuentas de ellos.”

<sup>26</sup> Juan de Hevia Bolaños offers a cogent description of the seventeenth-century procedures to be followed against a civil official who unjustly extradited a criminal from asylum, which was based on medieval precedents originating with the *Siete Partidas*. See *Curia philippica* (1604), lib. 1, tit. 3, *Parte juicio criminal*, no. 12, “Retraidos”: “Y despues de sacado injustamente, puede compeler a que se restituya, procediendo sobre ello por censuras, y penas, aplicadas para gastos de guerra contra Infieles; como

In the Visigothic Code, removing an individual by force from a church meant bringing dishonor (*deshonra*) upon the church, which brought with it the threat of fine, or public lashing.<sup>27</sup> The *Siete Partidas* similarly invoked a demand for respectful and honorable behavior in a church, saying that those who removed an individual by force "violated" the church (*la quebrantan*), committing a form of sacrilege for not protecting the "honor" (*honra*) of its sacred space, a crime that called for the severe censure of excommunication.<sup>28</sup> Causing bloodshed, injury, or death in the church or cemetery through the forceful removal of refugees, was an especially grave offense that "soiled" the church (*la ensucian*) and required reconciliation with God through a formal reconsecration of the church building and its grounds by a bishop.<sup>29</sup>

Nineteenth-century jurists and compilers of the Spanish legal masterwork, the *Nuevo teatro universal de la legislación de España y Indias* explained that the *Siete Partidas* signified a major turning point in asylum law. The authors of the *Siete Partidas* took a matter that was formerly an extension of a temporal privilege of Roman emperors and declared it divine in origin and inherent to the church, a privilege that flowed naturally from its consecration as a house of God. The *Siete Partidas*, they wrote, so closely aligned itself with contemporaneous canon law on this issue that it overrode local customary *fueros*, curtailed the authority of secular officials in asylum matters, and exempted only a small, select class of criminals from the privilege of asylum.<sup>30</sup>

Over the next two centuries, the structure of the *Siete Partidas*' asylum statutes would frustrate reformers who sought to modernize the law. The *Siete Partidas* remained the fundamental source for Spanish criminal theory, procedure, and precedent, the essential *sciencia* and *doctrina* that justified legal decisions in the courts. Because the *Partidas* were so grounded in the authority of bedrock sources of Spanish jurisprudence – Roman law, the Visigothic Code, the divine law of the Old Testament – and because the

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(alegando mucho) lo resuelven Acevedo, y Castillo, y asi se practica. Y nota, que para excomulgar a uno, declararle, y haverle de declarar por tal, primero se ha de hacer amonestacion, y citacion trina canónica: y despues de excomulgado, primero se ha de hacer otra tal, que se ponga la anathema, y entredicho; y despues depuesto, primero se ha de hacer otra tal, que se ponga cesacion a divinis, porque como cada una de esta penas, sea diversa, y grava, para cada una es menester constar asi de contumacion del Reo, y ser constituido en ella; sino es que por la aceleracion del caso, y justa causa, desde el principio se hizo la amonestacion, y citacion canonica para todas, expresandolas. Nota mas, que no solo se puede proceder sobre la restitution del retraido contra el que la sacó, sino tambien contra el que procede contra el, o le tiene en su carcel, aunque no le haya sacado, pues ampara el despojo hecho por el que le sacó, y no hace la restitution."

<sup>27</sup>*Fuero Juzgo, En Latin y Castellano*, Libro 9, tit 5, ley 3, "Si algun omne saca su siervo, o su debdor de la iglesia, ó del altar por fuerza, que ge lo non dé el sacerdote, ó el que guarda el iglesia, el que lo saca, si es omne de grand guisa, pues que lo sopiere el iuez fagal pechar C. sueldos á la iglesia por la desondra."

<sup>28</sup>*Las siete partidas del Rey Don Alfonso, Partida I, tit. 9, Ley 4, Quáles homes non se pueden amparar en la iglesia*, "A todos los otros defiende santa iglesia que ninguno no les faga mal, segunt que desuso es dicho. Et qualquier que contra esto ficiese farie sacrilegio, et débenlo descomulgar fasta que fata emienda dello, porque non guardó á santa iglesia la honra que debie. Et si forzó home ó otra cosa sacándolo de la iglesia, débelo hi tornar sin daño et sin menoscabo ninguno."

<sup>29</sup>*Las siete partidas del Rey Don Alfonso, Partida I, tit. 10, ley 20, Por qué cosas deben reconciliar la iglesia*, "Reconciliada debe ser la iglesia por dos maldades que facen los homes en ella, que la ensucian: la una quando algun home fiere á otro en ella et cae hi sangre: la otra quando face alguno adulterio ó fornicio con alguna muger yaciendo con ella en la iglesia."

<sup>30</sup>Lorenzo Arrazola, *Enciclopedia española de derecho y administración, ó Nuevo teatro universal de la legislación de España e Indias* (Madrid, Tip. gen. de d. A. Rius y Rossell, 1848-72), Tomo 11, 177.

*Partidas* prioritized a central role for priests in asylum proceedings, the subsequent centuries witnessed a deep inertia with regards to asylum reform in Spain.

### ***Early Modern Reforms of Medieval Asylum Law in Rome and Spain***

With regards to Spanish asylum jurisprudence and practices in the early-modern era, the year 1591 marked a turning point in the development of asylum law. In that year, Pope Gregory XIV's *Cum alias nonnulli* Bull elaborated upon existing medieval asylum law, revising the processes for extradition of refugees and clarifying for all Catholic territories the categories of criminals that were not eligible for the asylum privilege. In the modernizing spirit of the contemporaneous Council of Trent, which met only a few decades earlier, Pope Gregory intended his bull to become the definitive law concerning ecclesiastical asylum in Catholic territories. He meant to quash the many disputes that arose over the wide range of long-held regional customary practices regarding asylum. These included the many pardons that were granted by Pope Gregory's predecessors, which were later recalled as legal precedent and used to justify criminal appeals for immunity. In the colonies, though the Third Mexican Provincial Synod issued decrees related to immunity in 1585, Pope Gregory's *Cum alias* superseded these directives and by law, and within asylum cases of the colonial era, *Cum alias* became the fundamental resource for asylum litigators.<sup>31</sup>

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<sup>31</sup> The Third Mexican Provincial Synod of 1585 drafted elaborate statutes regarding ecclesiastical immunity and asylum, however, they were almost never cited in asylum cases. Pope Gregory XIV's *Cum alias* Bull superseded the authority of the synod's decrees, and was the preferred work to be cited in court cases. The terms of the 1585 synod are included here for reference:

Titulo XIX - De la Inmunidad de las Iglesias y de los Clerigos.

I. Se provee á la inmunidad de las iglesias.

Si los palacios de los emperadores y reyes temporales y sus criados gozan por derecho privilegios e inmunidades, ¿con cuánta mas razon corresponde que sean inmunes las iglesias y sus ministros, que están consagrados al eterno Dios vivo y verdadero? Por tanto, este concilio decreto y manda, que ninguno, de qualquiera calidad que sea, promulgue leyes, haga estatutos contra la libertad eclesiástica, ni cerque, invada ú ocupe las iglesias, ni impida la libre entrada ó salida de ellas; ni extraigan (196) de las iglesias á los que se retraen ó refugian á ellas, y puedan disfrutar de esta inmunidad, sin ponerles prisiones ni guardas en las iglesias ó cementerios, sin hacer violencia á las iglesias, ó rompiendo sus puertas, ó derribando sus paredes, ó subiéndolas á ellas con escalas. Y si contraviniendo á esto personas particulares, incurran ipso facto en la pena de excommunication. Y si fueren comunidades, queden sujetas á entredicho eclesiástico, de cuyas censuras no serán absueltos hasta la plena satisfacción del daño causado á las iglesias: y mientras la iglesia estuviese sitiada estarán suspendidos los oficios divinos. Si el obispo lo tuviere por conveniente, multará en penas pecuniarias para la fábrica de la iglesia á los que violentaren los templos.

II. Qué deben hacer los que se refugian á las iglesias.

A fin de que nadie abuse de la inmunidad eclesiástica para cometer nuevos delitos, manda esté sinodo, que ninguno de los que se han retraido a la iglesia salga de ella para hacer a otro, injuria o agravio, o cometer otros excesos; ni tenga consigo en la iglesia mugeres sospechosos, ni juegue, ni toque a las puertas de la iglesia o cementerio la guitarra ú otros instrumentos de música. Y cuando pasare por la iglesia ó paraje cercano a ella algun ministro de justicia, los refugiados al asilo se escondan de su vista. Y si contravinieren, échaseles de las iglesias, y no sean recibidos en otras, a no ser que de esta expulsion les resulte algun peligro.

III. Haciendo lo contrario de los que se les manda pónganseles prisiones.

Pues en tal caso se les ha de dar otra corrección, echándoles prisiones dentro de las iglesias. Y si violaren este decreto, los sacristanes, o los que cuidan de las iglesias darán parte a los oficiales, para que tomen la providencia oportuna.

In the context of Spanish jurisprudence, long dominated by the legislation of the *Siete Partidas*, *Cum alias* offered two significant developments. First, Pope Gregory XIV refined the procedure for extradition that expanded the protections for refugees and fortified the authority of priests in the extradition process. The pope ordered that under no circumstances, and under penalty of excommunication, could secular officials remove a criminal from asylum without the written permission of a bishop or his direct representative. The only way to secure this permission was through the *caución juratoria* writ that explained a secular official's reasons for requesting extradition and promised that no harm would befall the refugee while in secular care. As the Bull explained, until a civil judge established legal extradition that remitted the suspect to royal control, the refugee remained protected against retribution in the church or in a designated ecclesiastical jail while the bishop or his delegate concluded whether or not the refugee fell among the classes of *exceptuados*, and were thus excluded from asylum privileges.

Second, in a statement that would reinforce existing asylum law for Spain and its overseas territories, Pope Gregory's bull explicitly confirmed in writing nearly the same categories of crimes that had been elaborated in the civil law of the *Siete Partidas*, making the two tracks of law more seamless and harmonious. A sixteenth-century Spanish translation of *Cum alias* from the Latin stated that *ladrones públicos*, thieves who robbed and killed their targets, could not enjoy immune status. Neither could *salteadores del camino*, thieves who preyed upon travelers but did not kill them.<sup>32</sup> Those

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IV. No permanezcan en las iglesias pasados nueve dias.

Mas porque no es justo que, los delincuentes establezcan en la iglesia su propia habitation y domicilio, practicando con flojedad las diligencias para salir con seguridad fuera de asilo, manda este sinodo, que no se les permita estar en la iglesia mas de nueve dias sin licencia especial del obispo. En cuanto a los retraidos por no cumplir el destierro a que salieron condenados, echaseles de las iglesias, a no amenazarles algun grave peligro, u otro riesgo muy notable.

V. Como se ha de proceder cuando el juez seglar prenda a un clérigo.

Para evitar las competencias entra las jurisdicciones sobre castigar los delitos de los clérigos de prima tonsura y menores ordenes, manda el sinodo que los jueces eclesiásticos observen en este punto el decreto del Concilio Tridentino; para cuya ejecucion antes que el oficial o juez eclesiastico conceda a favor de alguno las letras inhibitorias, se informará y examinará, si tiene titulo legitimo, y la indentidad del clérigo con el que se contiene en el título. Esto se entiende cuando el juez seglar no ha puesto en prision á dicho clérigo; pues en el caso contrario, por el peligro que amenaza de la dilacion, se ha de admitir su pedimento, y proveer con arreglo a la disposicion del derecho, para que ante todas cosas se le traslade de la cárcel seglar a la eclesiástica, despues de lo cual se procederá adelante.

VI. No queden impunes los delitos de tales clérigos.

Cuando se dirigieren letras inhibitorias al juez seglar, intímesele con la debida honra, y los jueces eclesiásticos cuiden mucho que no queden sin castigo los delitos de estos clérigos que se le hayan entregado, ni desistan de la prosecucion de la causa hasta la sentencia difinitiva; y en falta de parte contraria, ó no procediendo el juez de oficio, tomará el fiscal la voz en la causa, procurando que siga hasta su conclusion. Y si el delito fuere grave, no den libertad bajo de fianza a los reos, hasta que se termine y sentencie la causa, y sean castigados segun la gravedad de su delito, a fin de que el estado clerical no les sirva de licencia para sus excesos.

<sup>32</sup>*Las siete partidas del Rey Don Alfonso, Partida 1, tit. 11, ley 1*, explains *ladrones públicos* as "Assí como ladrones manifiestos, que tienen los caminos, e las carreras, matan los omes, e los roban." By the 1580s, Gregory XIV differentiated between the *ladrones públicos* and the *salteadores de camino*, or *públicos depredadores* with the former term referring to thieves who killed their targets, in any location, and the latter term(s) referring to those who frequently and violently robbed travelers on public roads, without killing them. For a more complete articulation of the logic behind this distinction see Pedro Murillo Velarde, *Curso de derecho canónico español e indiano* (Mexico, 1741), Vol. 3, 420.

who plundered, burned, or cut down fields, vines, or trees (*tala o saquea los campos*)<sup>33</sup> were also excluded from the protections of the church, as were those deemed heretics or apostates, those who committed treason (*Lesá majestad*) against a prince or king, and assassins who were paid by another to kill or ordered the killing.<sup>34</sup> Critically for the course of future disputes, individuals who committed especially ruthless or cold-blooded acts of homicide, what in Spanish were termed *homicidios alevosos*, also could not enjoy asylum protections.<sup>35</sup>

By the time of the publication of Juan de Hevia Bolaños' influential and widely circulated Spanish legal guide, the *Curia philippica*, in 1604, *Cum alias* (also referred to in texts and case law as the Gregorian Constitution), along with the *Siete Partidas* had become the most cited legal authority in asylum cases arising in Spain and its colonies. Hevia Bolaños explicitly asserted the rights of crown officials in asylum matters but he unequivocally stated that it was necessary to produce the *caución juratoria* writ demanded by the *Siete Partidas* and Pope Gregory's *Cum alias*, which promised the physical protection of the refugee while in the court's care. He also reminded all officials that according to Pope Gregory's directives, ecclesiastical judges and not their royal counterparts should initiate the initial investigation into the viability of an asylum claim, even in especially grave (*gravissimo*) or bloody (*atroz*) cases of *homicidio alevoso* that were notably shocking to the public consciousness (*notorio*).<sup>36</sup> Like Hevia Bolaños, the influential legal scholars of the seventeenth-century, Diego de Covarrubias, Francisco Suárez, and Agostinho Barbosa, reinforced an interpretation of the church as a site of reverence, a shelter for the morally weak, and a place to find spiritual renewal, echoing Pope Gregory XIV's explanations of the purpose of asylum protections in *Cum alias*, and into the early eighteenth century, definitive Spanish royal decrees similarly affirmed the rights of the church and preserved the longstanding protections for the accused.<sup>37</sup> In this way, and though often challenged in the courts, Pope Gregory XIV's *Cum alias* and the *Siete Partidas* remained the definitive law for Spain's political and ecclesiastical jurisdictions into the 1730s.

The year 1735-37 saw the first substantial efforts to clarify the directives of the 1591 *Cum alias nonnulli*. Disputes in the Papal States (those territories under direct Vatican control) over the growing number of suspected murderers in Catholic churches provided the impetus for asylum reform. Pope Gregory XIV's inclusion of the category of ruthless *homicidio alevoso* among the seven types of criminals who were not eligible for asylum proved problematic for Roman judges who had to determine the viability of asylum for refugees on the basis of *alevosía*, or intentional treachery. Legal reference

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<sup>33</sup> *Las siete partidas del Rey Don Alfonso*, Partida 1, tit. 11, ley 4, describes these *devastadores de los campos* as "Otrosí los que andan de noche quemando o destruyendo de otra manera las Miesses, e las Viñas, e los Arboles, e los Campos." Gregory XIV eliminated the term *nocturnos* from his phrasing of the law so that it would apply to more generally.

<sup>34</sup> By the nineteenth century, Spanish jurists would begin to speak of two types of *Lesá Majestad*, *humana* and *divina*. *Lesá Majestad humana* referred to treason against temporal princes and kings, while *Lesá Majestad divina* referred to "treason" against God, specifically heresy, apostasy, blasphemy, sacrilege, sortilege, and simony. See, Joaquín Escriche, *Diccionario razonado de legislación y jurisprudencia* (Madrid, 1874), Tomo III, 877.

<sup>35</sup> The chapter offers a more detailed discussion of the characteristic of *alevosía* on p. 22.

<sup>36</sup> Hevia Bolaños, *Curia philippica*, lib. 1, tit. 3, *Parte juicio criminal*, no. 12, "Retraidos"

<sup>37</sup> Murillo Velarde, *Curso de derecho canónico*, Vol. 3, 173-174.

works explained that *alevosía* depended upon the evaluation of factors such as motive, time of day, location, the type of murder weapon, and especially a surgeon's report on the size and depth of the victim's wounds, reports that were often successfully challenged in the courts given the limitations of early-modern forensic science.<sup>38</sup> To resolve these and related issues, in 1735 Pope Clement XII issued a detailed and wide-ranging bull entitled *In supremo justitatae solio* that would supercede Pope Gregory's *Cum alias nonulli* and would effectively govern asylum practices in the Papal States.

In the bull *In supremo* Clement XII offered revisions to Gregory XIV's asylum statutes that recall the early Hebrew laws regarding the "cities of refuge," which protected persons who killed accidentally or in self-defense from immediate and perhaps unjust retribution. In place of *homicidio alevoso*, with its longstanding interpretive difficulties, Clement XII decreed that solely premeditation, and not the variables associated with *alevosía*, would become the primary characteristic that disqualified a murder suspect from the right to asylum. As Pope Clement XII declared in a 1741 Spanish translation of the Latin original of *In supremo*, going forward, all "criminals suspected of homicide, not being accidental (*casual*) or in self-defense" would be ineligible for asylum.<sup>39</sup> Only deaths resulting from spontaneous accident (*casualidad*) or self-defense (*propria defensa*) were eligible, Clement XII explained, and all other forms of homicide should be considered premeditated.

To explain *casualidad*, Pope Clement XII referred directly to Moses' example to the Israelites, of an axe handle accidentally slipping out of someone's grasp and striking another as an act that lacked premeditation, but added that homicide that was the spontaneous, unthinking result of a quarrel (*riña*) also qualified as *casual*. In his explanation for how judges should interpret self-defense, Clement XII ordered his judges to examine the available evidence, determine which party initiated the violence, and decide if the death in question was an initial act of aggression or a responsive act of self-preservation. If it was the latter, the refugee could justifiably invoke the protections of the Church.<sup>40</sup>

In 1737, two years after Pope Clement XII issued his bull *In Supremo*, his ministers in Rome and officials from the court of Spanish king Philip V formed a coalition and signed a concordat entitled *Alias nos*, that extended the terms of *In supremo* to the Spanish capital of Castile, and by extension, it became the new law for much of peninsular Spain, as Spanish law of the eighteenth century stated that Castilian law should apply to all political jurisdictions unless it directly contravened local *fueros*. In that same year, however, the king's royal Council for the Indies, which was responsible for confirming all new laws for the king's overseas territories, including any new papal decrees, explicitly rejected the use of Pope Clement's *In supremo* in the Americas, despite its more narrow protections of criminal refugees. Subsequently, five times in the succeeding five decades the council revisited the decision to expand enforcement of the *In supremo* to the Americas. Each time the council rejected the Bull, and explicitly retained the antiquated, more loosely constructed, and avowedly problematic terms of Pope Gregory XIV's 1591 *Cum alias nonulli*. The next section of this chapter explores

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<sup>38</sup> Escriche, *Diccionario razonado*, Tomo 1, 440, "Alevosia"

<sup>39</sup> Murillo Velarde, *Curso de derecho canónico*, Vol. III, 174-175, "reos de homicidio, como no sea casual, o para propria defensa."

<sup>40</sup> Murillo Velarde, *Curso de derecho canónico*, Vol. III, 173-176

the details and implications of the last of these five decisions, which occurred in 1767, as a way of highlighting the difficulties for local magistrates of interpreting and applying the competing and contradictory tracks of asylum law that governed Spain and the Americas.

### *Part Two – Spanish Asylum Reform in Late-Colonial Context*

In the second half of the eighteenth century, Mexico City experienced what Silvia Arrom refers to as the city's first "urban crisis," as a confluence of economic, geological, and demographic pressures led to a population surge of migrant peasants into the capital city.<sup>41</sup> A flood of surplus labor and strain on city services ultimately led Spanish administrators to turn to efforts to control what they described as a burgeoning population of criminal poor.<sup>42</sup> In part, these new administrative efforts included strengthening the authority of the central *Real sala del crimen* by adding additional appointees at all levels to process criminal matters.<sup>43</sup> The measures also included the expansion of the jurisdiction and personnel of the *Tribunal de la Acordada* to secure travel routes by persecuting bandits and notorious highwaymen.<sup>44</sup> In 1780, under viceregal decree, Mexico City was divided into eight districts (*cuarteles*), each with its own district court, to streamline the processing of criminal cases. At the same time, then-vice-roy Martín de Mayorga Ferrer dispatched a new class of municipal constables to conduct regular walking rounds of Mexico City's neighborhoods, all in an effort to combat a plague of petty thieves and violent crime.<sup>45</sup>

Amidst these robust efforts to expand surveillance and control crime, when violent criminals took asylum in Mexican churches, royal agents in the capital city found their hands tied by Pope Gregory XIV's 1591 *Cum alias nonnulli*, which, as the previous section explained, gave ecclesiastical judges primary jurisdiction over all classes of criminal refugees, including violent murderers who threatened public safety. In peninsular Spain, judges could extradite criminals by virtue of the reformed and more restrictive laws of Pope Clement XII's 1735 *In supremo*, which narrowed the range of crimes eligible for asylum and specifically targeted violent crime, but American judges could not. The documentary record of royal decrees for the Americas shows that during the period of the greatest reforms to the Spanish-American criminal justice system, 1740-1790, the Bourbon monarchs chose to forego extensive asylum reform in the colonies. Not until 1787, fifty years after first applying the restrictive Clementine legislation on the peninsula, would it take up the matter in a decisive fashion for the overseas territories, and until 1787, the sixteenth-century legislation of Pope Gregory XIV remained a fundamental point of legal authority.

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<sup>41</sup> Silvia Marina Arrom, *Containing the Poor: The Mexico City Poor House, 1774–1871* (Durham: University of North Carolina Press, 2000), 6-7; Michael C. Scardaville, "Justice by Paperwork: A Day in the Life of a Court Scribe in Bourbon Mexico City," *Journal of Social History*, vol. 36, no. 4 (2003), 980-981.

<sup>42</sup> Scardaville, "Justice by Paperwork," 981.

<sup>43</sup> Víctor Gayol, *Laberintos de justicia: Procuradores, escribanos, y oficiales de la Real Audiencia de México* (Mexico: El Colegio de Michoacán, 2007), vol. 1, 122.

<sup>44</sup> Colin M. MacLachlan, *Criminal Justice in Eighteenth Century Mexico: A Study of the Tribunal of the Acordada* (Berkeley: University of California Press, 1974), 8.

<sup>45</sup> Juan Pedro Viqueira Albán, *Propriety and Permissiveness in Bourbon Mexico* (New York: Rowman and Littlefield, 1999), 175.

This section centers on a simple question: Given the chance to enhance royal jurisdiction over violent criminals in the colonies, as offered by the 1737 concordat between King Philip V and Pope Clement XII, why did the crown choose to retain the earlier Gregorian Bull *Cum alias* of 1591, which restricted the power of civil authorities in all asylum matters? The political circumstances could not have been more favorable for a comprehensive renovation of American asylum law. Philip V and future Bourbon heirs to the throne had the support of a succession of mostly regalists appointed as bishop and archbishop in the Americas.<sup>46</sup> In Europe, the king enjoyed growing power over an increasingly conciliatory papacy that publicly expressed concern with ending abuse of the asylum privilege. A sea change in Spanish legal opinion buoyed the king's authority over asylum, as a consensus emerged that described ecclesiastical asylum not as an immutable divine right ordained by God, but as a customary privilege that originated with the benevolence of Christian princes.<sup>47</sup> Despite the modernizing impulse of the Bourbon monarchy with regards to criminal justice, it left intact papal legislation that limited royal jurisdiction over violent criminals, preserved ongoing disputes between civil and ecclesiastical magistrates, and seemed to run counter to the royal mandate for a fair and direct administration of justice (*recta administración de justicia*). All the more surprising was that more robust reform of church privilege came from a succession of Roman popes – Benedict XIII (1724-1730), Clement XII (1730-1740), Benedict XIV (1740-1758) – rather than from the Spanish kings.

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<sup>46</sup> Francisco Sánchez-Blanco, *El absolutismo y las luces en el reinado de Carlos III* (Madrid: Marcial Pons, Ediciones de Historia, S.A., 2002), 16.

<sup>47</sup> Mario Góngora notes “a regalist intellectual shift that occurred in late-seventeenth century Spain, termed “Hispanism.” Broadly based on ideological foundations of the Gallican Church in France, Hispanism provided the theoretical justification for the doctrine of the Divine Right of Kings. Spanish intellectuals and advisors to the king sought to center the authority of the king in spiritual matters as the fundamental and intrinsic “protector” of the church. By this understanding, the king’s authority with regards to the Church was derived from God directly. The power to make decisions with regards to the Church was not based on Papal concession. This shift in thinking, which was an attempt to magnify the king’s power in religious affairs, involved a reevaluation of Biblical and historical sources. Reevaluation of these sources included a reevaluation of the intrinsic immunity of ecclesiastical buildings, as holy and separate from royal power.” See Mario Góngora, “The Enlightenment, Enlightened Despotism and the Ideological Crisis in the Colonies,” in Góngora, *Studies in the Colonial History of Spanish America*, (Cambridge University Press, 1975).

Treatises on asylum from the eighteenth century, including case law studied for this chapter likewise suggest that early-modern legal scholars reappraised the possibilities of asylum law as divine in origin. Eighteenth century Spanish legal scholars, in particular, argued that the legal authority of asylum founded in the Old Testament ended with the New Testament, since the terms of Hebrew law were not specifically renewed there, and argued that according to the Gospels of the New Testament, Jesus ended Hebrew practice when cleansed the temple in Jerusalem, throwing out the money changers, a story that appears in all four Gospels of the New Testament, and most cited from Matthew 21-12-13, “And said unto them, It is written, My house shall be called the house of prayer; but ye have made it a den of thieves.” Commentators in a 1759 printing of Bobadilla’s *Politica para corregidores* discuss this in their notes regarding the origins of ecclesiastical asylum: “no se sigue por lo dicho, que esta inmunidad sea estatuida en la Iglesia por ley Evangelica; porque segun Santo Tomás, Christo, nuestro Señor, no hizo leyes, ni preceptos fuera del Derecho Natural, sino de aquellas cosas que pertenecen a los Sacramentos, y Articulos de la Fe: en lo qual no se cuenta la inmunidad Eclesiastica, y assi no es instituida de Derecho Divino Evangelico. Verdad es, que la Iglesia Universal, justa, y santa, y legitimamente con Sacros Canones, Concilios, y autoridad de Santos Varones, establecio la inmunidad Eclesiastica para utilidad de la Christiana Religion: y assi es de Derecho Humano, y Positivo: en lo qual tambien se resolvió Tiberio Deciano, y otros.”

David Brading has suggested that during the eighteenth century the crown could only turn its attention to matters like amending ecclesiastical privileges after more important administrative issues regarding the church had been mostly resolved, like the secularization of Mendicant doctrines and the expulsion of the Jesuit orders.<sup>48</sup> William Taylor indicates that not all bishops were equally accommodating, and even the most regalist crown appointees were not inclined to favor dramatic change in contentious matters like ecclesiastical privilege.<sup>49</sup> Both types of circumstances could have stalled reform, and there were acknowledged risks that came with interfering wholesale with a fundamental privilege of the church that connected to the immunity of its physical space. For nearly one thousand years, the authority of the church in matters of immunity and asylum were reaffirmed in every important iteration of royal Spanish law, from the seventh-century Visigothic Code to the seventeenth-century *Recopilación de las leyes de los reinos de las Indias*. Simply undoing asylum precedent risked undermining the legal continuity contained in these enduring codes, which was the bedrock for Spanish political legitimacy.<sup>50</sup>

The major interpretive pivot for this section comes from a 1767 request letter that the Royal Council for the Indies sent to American jurists in the overseas territories of Peru and New Spain, asking them to consider the implications and possible benefits of extending to the Americas Pope Clement XII's 1737 *In supremo* Bull, which restricted the right of asylum for criminals who sought refuge in churches, especially for individuals who had committed murder. Typically, the terse, one- to two-sentence decisions from the Council of the Indies mirrored the intention of the council to offer exact, unequivocal direction. The 1767 letter, by contrast, not only contained an extensive evaluation of the asylum issue and its attendant legal and political ramifications by the delegations in the Americas, it offered a similarly comprehensive rationale by the lead legislative counsel for the Council of the Indies. The next section explores this document in detail and explains how, in the context of the trajectory of asylum reform in Rome, Spain, and the Americas, which began with vigor in the 1730s, this correspondence, in concert with other legal and political sources from the period, suggests that the crown's halting, piecemeal reforms to asylum law were a matter of pragmatism and political expediency. Royal legislators were willing to tolerate continued disputes over jurisdiction if it meant that the overall balance of jurisdictional power in a contentious issue like asylum did not tilt any further in the direction of the church. To paraphrase Michael Scardaville, while the Bourbons sought public order in the Americas, they did not seek order at any price.<sup>51</sup>

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<sup>48</sup>See especially chapter nine of David Brading, *The First America: The Spanish Monarchy, Creole Patriots, and the Liberal State, 1492-1897* (New York: Cambridge University Press, 1993), entitled "Erastian Church," 492-514.

<sup>49</sup> William B. Taylor, *Magistrates of the Sacred: Priests and Parishioners in Eighteenth-Century Mexico* (Stanford: Stanford University Press, 1996), 13-20.

<sup>50</sup> Kenneth Pennington, *The Prince and the Law: 1200-1600: Sovereignty and Rights in the Western Legal Tradition* (Berkeley: University of California Press, 1993), 44-45.

<sup>51</sup> Michael C. Scardaville, "(Hapsburg) Law and (Bourbon) Order: State Authority, Popular Unrest, and the Criminal Justice System in Bourbon Mexico City," *The Americas*, vol. 50, no. 4 (1994), 509.

**“No se haga mención de la Bula de Clemente XII”:  
The Council of the Indies and American Asylum Reform, 1767**

The 1767 request for information from the Council of the Indies to the delegations in the Americas originated with a request from the city of Havana for the council to resolve a formal dispute (*competencia*) between a naval officer of the royal fleet stationed at the port of Havana, Commander Manuel de Flores, and the city's *provisor*, Alejandro Piñeda.<sup>52</sup> The two officials were locked in a disagreement over the extradition from asylum of a sailor named Pedro Criado from Havana's cathedral church. In February of that year, while stationed at Havana's marina, Criado killed another sailor from his company, Nicolas Ferrer, and then fled to the city's cathedral church, where he had remained for the past three months while the investigation into his asylum status was ongoing.

Criado's act of violence was only the latest in a series of violent crimes within his ranks, Commander Flores reported. Just months earlier, two different sailors, Joseph Ferrari and Julian Anise, killed a fellow crewman and likewise took refuge in Havana's cathedral church. Flores reminded the *oidores* for the council that they should have received a separate complaint about this earlier case, also unresolved, in which the civil judge had asked the council to apply Clement XII's reforming Bull *In supremo* on the basis of the 1737 concordat between Rome and Spain, both of which gave civil and military judges exclusive jurisdiction over cases of premeditated homicide. Attempts by the military courts to apply *In supremo* led to litigation with the *provisorato* in Havana over the applicable law, and now Commander Flores was turning to the Council of the Indies for their help. In his petition, Flores urged the Council to read and act on the two asylum disputes before them, and authorize the use of Clement XII's *In supremo* bull in the Americas, to help settle this and any future disputes.

Commander Flores' request prompted a timely response from the King's Council of the Indies. Shortly after receiving Flores' letter, the *oidores* for the council drafted a request for information about the viability of Clement XII's *In supremo* bull in the American criminal courts, and sent it on to the delegations of royal administrators in New Spain and Peru, asking for their help. The request prompted a comprehensive forty-page report from the American delegations and from the council's own legal experts. Among the asylum records collected for this chapter, this is the most substantial and detailed of its kind.

The Council's request for information left Madrid on November 1, 1761 and seven months later, on June 22, 1768, the first reply arrived from *fiscal* Manuel Lanz de Casafonda, the spokesperson for the delegation for New Spain. Lanz de Casafonda thanked the council for its request for input, and he reported that his team of scholars had studied all facets of the *In supremo* Bull and compared it with current law and practices in New Spain. He had two key observations about the suitability of *In supremo* for the Americas, which centered on what he identified as ambiguities within the current asylum statutes, and the difficulties of producing sufficient evidence in extradition requests to satisfy the demands of mercurial ecclesiastical judges.

First, Lanz de Casafonda wrote, there was little consistency across the various

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<sup>52</sup> Archivo Histórico Nacional, Madrid, Ramo *Consultas*, Libro 757, “Consultas dadas por el Real Consejo de Indias,” fjs. 334-354. Unless otherwise noted, all subsequent transcriptions come from this document.

asylum bulls issued by the Roman popes of the eighteenth century, not just Clement XII, but also his predecessors, Benedict XIII, Clement XII, Benedict XIV, and this lack of consistency gave rise to conflicts with royal law. Asylum decrees issued by the popes, which were drafted in response to disparate court cases, produced a very long list of possible *exceptuados*, types of criminals that were excluded from asylum. This list vastly exceeded the original seven noted in the *Siete Partidas* and Pope Gregory's 1591 *Cum alias*, the two main sources of asylum law in the Americas, and while *Fiscal* Lanz de Casafonda appreciated that the popes expanded upon the original list of *exceptuados*, thereby limiting asylum for dangerous criminals in canon law practice, he lamented that by contrast, so few *exceptuados* existed in the applicable royal law. Confusion and *competencias* were inevitable among the civil and ecclesiastical magistrates who adjudicated asylum matters as a result of the discrepancies between canon and royal law.

Second, the *fiscal* noted, it was often very difficult to locate conclusive evidence that would exclude someone from asylum, since so many crimes are committed “with caution, secrecy, and cunning” (*con cautela, secreta, astucia*). Lacking direct eyewitness testimony or conclusive material evidence, ecclesiastical judges could easily raise doubts and competing interpretations to successfully preserve a criminal refugee’s right to asylum. These efforts, he wrote, “tie the hands of those who try to punish criminals,” making asylum matters far more difficult to resolve and impeding the *recta administración de justicia*, he complained. Worse, ecclesiastical judges exceeded their rights to criminal cases based on Apostolic decree, and took charge of additional cases, not covered by canon law, thereby impinging upon the rightful jurisdiction of royal magistrates.

*Fiscal* Lanz de Casafonda called upon the Council of the Indies to secure new fixed rules (*reglas fixas*) regarding asylum practices. While *In supremo* represented an improvement over current practice, ideally the council would petition the pope to issue a new bull for all of the Spanish territories, this time including the Americas. The new bull would establish fixed and invariable rules for asylum matters that would preserve “all good harmony and consistency” (*toda buena armonía y correspondencia*) between royal and ecclesiastical tribunals by specifying the crimes for which suspects are denied asylum, enumerating the type of evidence that is needed to secure conviction, and declaring which judge should have exclusive authority over the extradition of criminals who have taken asylum.

At its core, Lanz de Casafonda reminded the council, Apostolic law and secular Royal law aimed at the same end, “to curb the barbarous audacity and sacrilegious impudence of some men who have forgotten their humanity and the eternal punishment that awaits them.”<sup>53</sup> As practiced, these men “plunge into committing such detestable crimes as homicide with the hope of avoiding temporal [punishment] by means of the asylum they take in temples and the studied slowness and protection of the ecclesiastical judges [who] prolong or do not arrive at a decision” concerning the suspect’s immunity claim.<sup>54</sup> This practice is “against the spirit of the Church, [which] as teacher of all

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<sup>53</sup> “de refrenar la bárbara osadía y sacrílega temeridad de algunos hombres que olvidados de la humanidad y del castigo eterno de que les espera.”

<sup>54</sup> “se arrojan a cometer un crimen tan detestable, como el del homicidio con la esperanza de evitar el temporal por medio del Asilo que toman en los templos, y de la estudiada lentitud y protección de los jueces eclesiasticos para que se dilate, o no llegue el caso de decidirse el Artículo de inmunidad.”

goodness and justice, does not want, nor can it want that asylum and the protection of such a merciful and freely given privilege, offered to the *miserables* who take refuge in a church after having committed a minor or unintentional crime, be common to those who commit cruel voluntary homicide, and to other wicked criminals.”<sup>55</sup> A new bull based on the suggestions cited above would effectively end criminal abuses of the asylum privilege, Lanz de Casafonda asserted.

Three weeks later, on March 10 1767, a second report arrived from the Peruvian delegation, penned by its spokesman and *fiscal* Pedro González de Mena. The *fiscal* had a less favorable view of the Clementine Bull than did his colleague from New Spain, and his review and critique of the bull rested on four key points that questioned the primacy of the papacy to determine asylum litigation in Spain, and critiqued the current laws as inapplicable to the exigencies of the Americas.

First, González de Mena noted, despite their support of the church as a site for spiritual renewal, the seventeenth-century legal scholars Diego de Covarrubias and Francisco Suárez regarded ecclesiastical immunity as secular, not divine, in origin and no canonical council, decree, nor law explicitly declared ecclesiastical asylum to be solely a matter of church control. Rather, the purpose of “the blessing of immunity, which temporal princes, by virtue of the respect and veneration owed to the Church, freely concede to those who take refuge there,” is solely, “to escape the severity and rigor of the punishments imposed on crimes of limited seriousness.”<sup>56</sup> Ecclesiastical immunity was purely due to “the pious generosity and benevolence of temporal princes,” and not due to divine command, and so the king should feel confident drafting whatever laws he wished with regards to asylum, provided they corresponded with local customs.<sup>57</sup>

Second, the law in many parts of Spain was already more favorable for secular judges than the existing law for the Indies, and proposed by Clement XII. In territories like Navarra, for example, it was customary for secular judges to take part in any asylum case they wished, according to the provincial rules in Navarra for mixed-*fuero* cases.

American law should be drafted in the same way.

Third, a critical piece missing from the Clementine legislation was a proposal to limit the number and type of immune sites. Immunity should be reserved only for those places “to which is owed particular reverence and special veneration, such as the main building of the church, its chapels in which there are altars and shrines where the holy sacrament is observed and the holy sacrifice of the mass is celebrated.”<sup>58</sup> Even then, immunity should be limited only to “the churches in which the holy sacrament is continuously presented for public veneration..which was the end, object, and general purpose of immunity, by virtue of the respect and reverence owed to the house of God,”

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<sup>55</sup> “contra el espíritu de la Iglesia, que como Maestra de toda bondad y justicia no quiere ni puede querer que el asilo y protección de tan piadosa y liberalmente franqueza a los miserables que se acojen a ella despues de haver cometido un delito leve, o indeliberado, sea común a los crueles homicidas voluntarios, y otros facinerosos delinquentes.”

<sup>56</sup> “el beneficio de la inmunidad, que tan liberalmente concedieron los Principes temporales por el respeto y veneración devida a la Yglesia a los que se refugiaban a ella,” is solely “para huir la severidad y rigor de las penas impuestas a delitos de corta gravedad.”

<sup>57</sup> “la piadosa liberalidad y benevolencia de los Principes temporales.”

<sup>58</sup> “que deva particular reverencia y especial veneración, cómo el cuerpo de la misma yglesia, y las capillas en que haya altares y sagrarios en donde se guarde el santissimo sacramento, y se celebre el santo sacrificio de la missa.”

González de Mena continued, “but wanting to extend it to the sacristies, cemeteries, atriums, porticos, cloisters, gardens, guest quarters, old houses that share a door with the church, and walls outside of the aforementioned churches and convents, and so many sites, places, and profane buildings to which no veneration is owed, with no greater motive than they are simply near the church and are only occasionally used by priests for purposes that are purely temporal and profane,” goes against the origin, basis, and motive for asylum that has impeded princes to concede the immunity privilege to suspected criminals.<sup>59</sup>

Most importantly, “this limitation and marking of fixed locations that have the privilege of immunity,” is more vital for the Americas than for other territories, González de Mena wrote, “because in the rural areas there are many farms and *haciendas* that have chapels and rural oratories, and there are many hermitages, shrines, devotional houses, and farms operated by priests in which criminals can secure refuge, and these same sites give criminals the general opportunity to commit insults, deaths, and other terrible crimes.”<sup>60</sup> Because of the many varied sites for worship in the Americas, all of which had the ability to accept refugees, any revision to current practices had to take these specific colonial conditions into account.

Though their observations of the benefits of the Clementine Bull rested on different specific critiques, there were points of congruence between the positions of the American *fiscales*. To resolve the problems in current practice, both delegates agreed that canon law needed to be amended so that it was in accordance with the mandates of Spanish law and the needs of royal magistrates. Both delegates also agreed that it was time to put an end to the frustrating criminal abuses of asylum privilege and dilatory appeals by ecclesiastical magistrates made possible by archaic laws and conventions. Both also agreed that the best mode for achieving effective asylum reform was to petition the pope to draft a new decree for the Americas, one that could account for the specific colonial conditions outlined above.

Three months later, on June 19, 1768, Julián de Arriaga, head legal adviser and *fiscal* for the Council of the Indies, wrote to the council to advise them of his own findings with regards to the use of *In supremo* in the Americas. His review of the bull assessed the recommendations by the *fiscales* for Peru and New Spain, and offered independent recommendations regarding its utility as an administrative tool for the king and his representatives.

In reviewing *In supremo*, Arriaga explained that while the Bull contained favorable terms, on the whole, if it was put into practice in the Americas, it would likely

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<sup>59</sup> “las Yglesias en que continuamente está expuesto a la veneración pública el santissimo sacramento....que fue el fin, objeto, y causa general de la inmunidad por el respeto y reverencia debida a la casa del Señor, pero querer extenderlo a las sacristías, cementerios, atrios, pórticos, claustros, huertas, hospederías, casas antiguas, que tengan comunicación y puerta al sagrado, y al circuito de tres o quatro pasos, pared afuera de las mismas yglesias y conventos, y a tantos sitios, lugares, y edificios profanos a que no se deve veneración alguna, sin más motivo que sus cercanías al lugar sagrado y el uso remoto de los eclesiásticos para fines puramente temporales y profanos es contra el origen, fundamento, y causa del asylo y fin que movió a los príncipes a conceder y franquear la inmunidad a los reos.”

<sup>60</sup> “[É]sta limitación y señalamiento de lugares fixos que tengan privilegio de inmunidad...por aver en los campos muchas characas y haciendas, que tienen capillas, y oratorios rurales, y haver bastantes hermitas, santuarios, casas de devoción, y granjas de religiosos en donde tienen segura acogida los reos, y que el mismo sitio les da ocasión general hacer insultos, muertes, y otros atroces delitos.”

further restrict royal authority, and hinder the crown's ability to freely and openly administer justice.<sup>61</sup> The first problematic section of the bull, Arriaga noted, was one in which the pope reserved solely for ecclesiastical judges the capacity to extradite a criminal from an immune site and to form the initial *proceso informativo*, the investigation that evaluated the criminal refugee's right to asylum. *In supremo* left the *procesos informativos* in the hands of ecclesiastical judges in all asylum matters, even in clear-cut cases of *exceptuados* like premeditated homicide. This section of the Bull would do nothing to resolve the delays in processing criminal affairs that civil judges already experienced.

Second, and even more problematic, hidden within the new rules regarding *homicidio proditorio* proposed by Pope Clement XII were new rules regarding *clérigos de primera tonsura*, priests who have not yet completed their training and did not yet have an established benefice. According to the terms of *In supremo*, the only way that these minor-order clerics could become subject to secular and not ecclesiastical jurisdiction is if they committed not one but two separate acts of premeditated homicide. Furthermore, the bull further extended the same protections to the family members and servants of officials working within the ecclesiastical courts at all levels (*tribunales eclesiásticos*), thus exempting them from royal justice in cases of homicide. In this way, *In supremo* offered to extend unwanted protections to hundreds of petty church officials.

Third, returning to the issue of primacy of ecclesiastical judges in asylum matters, Arriaga noted that Pope Clement XII originally drafted *In supremo* to meet the needs of the Papal States, where the pope's ministers simultaneously represented both ecclesiastical and civil administrative authority. He noted that the temporal governors of Rome and other cities often performed the commissions of both *fueros* because they lacked prelates in their territories, to the extent that that "they promiscuously use one or the other (set of powers established by *fuero*), being equally interested in sustaining the privileges and benefits" of both offices.<sup>62</sup> In Arriaga's view, *In supremo* thus offered very little for the Americas, since disputes between American officials typically centered on questions of jurisdictional *competencia* between the church and state courts. As far as Arriaga could surmise, Pope Clement XII's insistence on giving ecclesiastical magistrates near exclusive authority over immunity claims would produce "significant procedural obstacles, especially in the remote regions of the Americas, where there is greater need to punish and contain these types of crime, and where there is greater, and not lesser need to authorize and give favor to royal ministers and royal tribunals," than in Rome and peninsular Spain, where *In supremo* effectively governed asylum practice.<sup>63</sup>

Furthermore, Arriaga observed, Pope Clement XII's bull, like other papal bulls,

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<sup>61</sup> "Pero tambien padece la disposicion de esta Bula en diferentes Captiulos bastantes restricciones de la autoridad Real y embarazaria mucho su observancia la libre administraci3n de justicia."

<sup>62</sup> "que promiscuamente usan de una y otra siendo igualmente interesados en sostenes los privilegios y regalias de las dos representaciones."

<sup>63</sup> "Son muchas los reparos, que se ofrecen en esta Bula, y los embarazos, que causaria su observancia, mayormente en aquellas remotas Regiones, donde hay mas necesidades de corregir y contener semejantes excesos, y de autorizar, y favorecer los ministros, y tribunales Reales, y por la dificultad de los recursos al soberano."

was “drafted to restrict royal authority and amplify that of ecclesiastics.” In matters like these, he argued, “one should always read the sacred canons and not the modern writings of the popes, which never approach or measure up to what is desired by secular princes, because at the same time that they approve and consent to something that is prejudicial to ecclesiastical privilege, that same measure will contain something that is an affront to the king.”<sup>64</sup>

Arriaga acknowledged the valid concerns and suggestions of both *fiscales* Lanz de Casafonda and González de Mena, and he agreed that the most certain path would be to ask the pope to draft a new bull that was tailored for the needs of the American territories, but, he warned, the council will never achieve or reach a just and fair decree, “because the resolve of the corte of Rome is always aimed toward maintaining and even amplifying as much as possible the authority of the ecclesiastical *fuero*.” Recent experience in this court, Arriaga warned, demonstrated this point, as did other measures pending in Rome: “Such bulls are never completed to the satisfaction of princes.”<sup>65</sup> He believed the status quo was sufficient, despite its problems, and “one does not have to do more than read [current royal law in the Americas] to understand that it and [*In supremo*] are incompatible,” Arriaga warned. If the Clementine Bull were applied in the Americas, it would “only give new impetus for disputes, difficulties, and competition for authority (*competencias*).”<sup>66</sup>

In response to the recommendations from all three *fiscales* in a document that spanned some sixty handwritten pages, the *oidores* for the Council of the Indies offered a terse single-sentence statement, in which they refused to grant the extension of *In supremo* to the Americas – “no convengo en que se haga mencion de la Bula de Clemente XII” -- and ordered American officials to continue to enforce the current American law – which included Pope Gregory’s 1591 *Cum alias nonulli*, the *Siete Partidas*, and contemporary royal decrees.<sup>67</sup>

Formulating decisions with regards to the application of papal decrees to the colonies was a key point of legislative responsibility and control for the king and his Council of the Indies, and this decision kept in place laws that all parties in this debate agreed contradicted one another, gave rise to frustratingly slow appeals, perpetuated

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<sup>64</sup> “Esta, y las demas Bulas Pontificas siempre han tirado a restringir la autoridad Real y ampliar excesivamente la eclesiastica. En esta materia deberia atenderse a los verdaderos Canones sagrados, y no a las disposiciones modernas de los Papas, las quales nunca conviene que se autorizen por los Principes seculares por que al mismo tiempo se aprueba, y consiente lo perjudicial, que contienen agravio de su Regalia. Las mas de estas Bulas están retenidas y suplicadas en otras cortes.”

<sup>65</sup> “Es cierto, que seria muy acertado, y lo mas seguro pedir al Papa la declaración de muchas dudas, que regularmente ocurren en la práctica conforme lo propone el Fiscal de Nueva España, pero tambien lo es, como lo reconoce el Consejo, que no se lograria la declaracion conveniente, y justa, por el empeño que tiene la corte de Roma, mantener, y aun ampliar siempre que puede la autoridad de su fuero, y de los Ministros Ecclesiasticos. La experiencia me lo ha demostrado en las muchas instancias de nuestra corte, y de otras que hay pendientes en Roma, y no han podido jamas evacuarse a satisfaccion de los Principes.”

<sup>66</sup> “Por este motivo no me detengo en cotejar las clausulas de las dos disposiciones, y manifestar la discrepancia que hay entre ellas, y no alcanzo como el consejo, al mismo tiempo que propone se repita esta cedula, quiere que se remita a la America la Bula, mandando se observe en aquellos Dominios seria dar nuevos motivos de disputa, dificultades, y competencias.”

<sup>67</sup> “Resolucion: Repita el Consejo la cedula, y no convengo en que se haga mencion de la Bula de Clemente XII.”

abuses of the privilege by clever criminals, and provoked jurisdictional *competencias* between church officials and the civil officials charged by the king with controlling violent crime. The final section of this chapter turns to a pair of case studies that highlight the ramifications of the council's decision in Mexico City's courts, highlighting the problems that asylum law posed for civil and ecclesiastical judges during a period, 1767-1787, when the crown allowed ambiguous legislation regarding jurisdiction to govern the courts' practices.

### ***Part Three – Asylum Adjudication Practices and Competencias – Two Case Studies of Ecclesiastical Asylum, 1778***

Among the many day-to-day activities involving the archdiocesan *provisorato*, such as inspecting final wills and testaments, overseeing privately funded chaplaincies and acts of charity (*capellanías y obras pías*), collecting the tithe (*diezmos*), and reviewing marriage requests, asylum cases emerged sporadically, without warning, typically in the form of a dispute over a criminal suspect's claim to asylum. Most of the surviving documentation in Mexican archives appeared in the form of challenges to the asylum privilege and requests for clarification by legal experts, and usually hinged on two issues: allegations by priests or attorneys of wrongful extradition by the police, and allegations by civil magistrates that a refugee was ineligible for immunity because the type of crime he or she committed was among the *exceptuados*, and especially if he or she committed *homicidio alevoso*.<sup>68</sup>

As noted earlier, by the terms of asylum procedure outlined in the *Siete Partidas* and Pope Gregory's 1591 *Cum alias nonnulli*, bishops were to be notified of any asylum matter within their jurisdiction, and tribunals that were directly administered by the bishop, such as the diocesan *provisoratos* in the Spanish-American context, were the courts of first instance for any asylum matter that occurred within the territorial jurisdiction of a diocese. Within New Spain, the *provisorato* for the archdiocese of Mexico was an especially energetic center for asylum adjudication and not just for high levels of criminal activity and mechanisms for surveillance. The archdiocesan *provisorato* was also the court of appeals for asylum disputes that could not be fully resolved by bishops in the other dioceses of New Spain. As a result, the archbishop and his legal emissaries became important mediators in asylum disputes that arose in the dioceses of Puebla, Guadalajara, and even as far away as Guatemala. For cases that originated within the territory of the archdiocese, communication was swift and investigations tended to be complete, since most of the officials involved in asylum matters, the archbishop and his representatives, the *oidores* for the royal *audiencia*, and the viceroy, were in close geographical proximity. The offices of the *Real sala del crimen* lay only a few blocks from the offices of the archbishop and also within walking distance were the two primary asylum sites in Mexico City, the churches of Santa Catarina Martír and San Miguel.

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<sup>68</sup> This section draws from the study of more than one hundred case records involving an immunity claim by a suspected criminal before the archdiocesan *provisorato*. The archival sources for this section are located in the documentary collections (*ramos*) *Criminal*, *Bienes Nacionales*, and *Indiferente General* at the *Archivo general de la Nación* in Mexico City, and the archival collections at the *Archivo histórico del Arzobispado de México*, also located in Mexico City.

Surviving court records demonstrate a predictable, step-by-step procedural pattern for asylum cases by the mid-eighteenth century: Once a suspect committed a crime, fled the scene, and secured refuge in a church, a civil magistrate, usually a municipal judge but sometimes a *fiscal* for the *Real sala del crimen*, initiated a criminal case against the suspect and petitioned the bishop or archbishop for permission to extradite the criminal and transfer him to a secure royal jail, offering a personal guarantee for the suspect's safety via the *caución juratoria* writ. In response, the archbishop delegated an official, usually his *provisor* or *promotor fiscal* to initiate a formal investigation into the viability of the asylum claim, an investigation referred to in the legalese of court cases as a *juicio plenario* or *proceso informativo*.

The asylum *proceso informativo* was a separate investigation from the criminal *proceso*, which ultimately ascertained the refugee's guilt or innocence, but the former was handled much like the latter. The *provisor* ordered his delegates to identify the witnesses present at the moment the refugee committed the crime for which he or she sought asylum and collect their testimony. He then reviewed the witness testimony and allegations by civil and ecclesiastical officials with regards to the asylum claim, and made his decision concerning the legality of the claim. As with other areas of Spanish criminal justice during the colonial period, asylum was not bound to a rule of law. It was casuistic, which meant that while *provisores* and their superiors made general appeals to the *sciencia* and *doctrina* of Spanish law to justify their decisions, these decisions were the product of *arbitrio judicial*, a measured evaluation of the facts of the case, justified in law by appeals to trained reason and the wisdom of experience. The duration of *proceso informativo* processing stimulated the greatest outcry among the royal judiciary, in part because the *proceso informativo* could take as long as a normal trial to complete due to delays in collecting witness testimony and evidence, or if the bishop's legal advisers, who had extensive administrative responsibilities, were sidetracked by other matters.

Asylum cases containing allegations of premeditated murder predominate in the court record, as these cases represented the most direct threats to public order. In 1752, King Ferdinand VI tried to resolve the process of extradition for refugees suspected of premeditated murder, writing that "When [the alleged crime] was notoriously *alevoso*, a judge can pursue the criminal to the church, and extradite him without the agreement or assent of the attending priest, to prevent the suspect's escape" without other procedural formalities, but this decree left in place the legal issue of defining the ambiguous and subjective quality of *alevosía*, such that the extradition was permissible only if *alevosia* was first established in an ecclesiastical court of law. If a suspect was pre-emptively extradited from a church due to fears he might escape, and a *provisor* subsequently decided that the crime was not "notoriously *alevoso*," the secular courts were obligated to return the suspect to the church, under penalty of excommunication.<sup>69</sup>

The case studies that conclude this chapter center on two petitions for extradition heard by the archbishop and his officers, a first case originating with a petition by an *oidor* for the *Real sala del crimen* alleging abuse of the asylum privilege by a group of criminal refugees, and a second case that details a lengthy and complicated legal dispute concerning the right to extradition and trial of a refugee for an alleged act of *homicidio*

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<sup>69</sup> AGN, Reales Cédulas Duplicadas, vol. 7, exp. 15, fj. 35, "Quando fue notoriamente alevoso, puede perseguir al Reo hasta sagrado, y extradele de el sin concurrencia o assenso del eclesiastico, para evitar su fuga mientras se ocurre a implorar su auxilio, que para impartirlo no se requiere otra formalidad."

*alevoso*. Both cases occurred in 1778, ten years after the final decision by the Council of the Indies in 1767 to retain the antiquated, and now ill-defined 1591 *Cum alias* papal Bull as the governing asylum law for the Indies. Taken together, the two cases, which involved the same church officials and center on the same volatile issue of extradition from church asylum, offer a detailed glimpse into the working relationship between the central branches of civil and ecclesiastical authority during a high point of Bourbon judicial reforms.

***April, 1778: A Mass Extradition of Thieves from the Churches of Santa Catarina Mártir and San Miguel in Mexico City***

In April 1778, Balthasar Ladrón de Guevara, the prosecuting attorney (*fiscal*) for the *Real sala del crimen*, wrote to Archbishop Alonso Núñez de Haro to complain about the destructive behavior of a group of criminals who had taken refuge in the churches located in the parishes of Santa Catarina Mártir and San Miguel in the capital city.<sup>70</sup> The criminals had justifiably invoked the privilege of *asilo eclesiástico*, Ladrón de Guevara explained, but rather than using this privilege as a means to safely confess their sins, accept their penance, and reconcile with God, the refugees had instead transformed the church into a literal den of thieves, taking up residence inside the church, living there ignominiously with women of ill-repute (*mujeres sospechosas*), and coming and going without impediment to commit further crimes. When police confronted them, the refugees threw stones and shouted insults, hidden safely behind the high church walls. Ladrón de Guevara warned the archbishop that this group of "lost men" not only undermined public health, peace, and tranquility in the city, they also risked irreparable damage to the surrounding area "such that nothing could be expected but ruin."<sup>71</sup> Ladrón de Guevara requested that all the refugees be removed from the two churches, some thirty-two men in all, and transferred to the royal jail, where they could be closely monitored while awaiting trial.

While this request represented an infringement on the customary inviolability of these two churches, the archbishop was sympathetic and conciliatory. "The request from the fiscal," Núñez de Haro wrote, "is one of the best examples of the love and zeal with which this minister promotes the public tranquility of this Capital, and the welfare and happiness of the vassals of our august and kind Monarch."<sup>72</sup> He agreed with Ladrón de Guevara that the "shamelessness, insolence, and audacity" of the criminal refugees had reached an extreme. The criminals ignored their Christian duty to show respect and veneration to houses of worship, and instead, "used the benevolent sanctuary of the

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<sup>70</sup> AGN, Bienes Nacionales, vol. 638, exp. 69, "Expediente formado sobre pasar los reos de inmunidad de las dos iglesias a la real carcel de corte." Unless otherwise noted, all subsequent transcriptions come from this document.

<sup>71</sup> "Al mismo tiempo que injurian el Sagrado respeto de los Templos, vulneran mortalmente la salud publica, y turban la paz y quietud de la Republica, cuyos precisos bienes será imposible conservar mientras subsista la providencia de los dos unicos Asylos para tal multitud de delinquentes. La situacion de los delinquentes acogidos a los efugios, es tal que nada debe esperarse si no ruinas, y que tal vez llegue el daño a ser irremediable."

<sup>72</sup> "Mui Señor Mio, El pedimento del Sr. Fiscal Dn. Balthasar Ladron de Guevara de 22 de Enero....es uno de los mejores testimonios del amor y zelo con que este Sr. Ministro promueve la tranquilidad publica de esta Capital, y el bien y felicidad de los Vasallos de nuestro augusto amabilissimo Monarca."

church in whatever manner suited them.”<sup>73</sup>

“Such conduct is not strange in these criminals,” the archbishop continued. “For the most part, these are men of the lowest birth, who were raised in pitiful neglect and debauchery, and they have made it a habit and custom of robbing and killing as a means to pursue other vices, which now dominate them, and which they then take with them into asylum. They know the crimes that they have committed are justifiably worthy of all the severity and harshness of the law, which condemns them to the utmost punishment (*último súplico*).” For those attuned to matters of the spirit, this threat of punishment is typically enough, “to restrain them to their duty, for fear of punishment and disgrace,” but for the criminals in question, the protections of asylum “only make them more insolent and immoral.”<sup>74</sup>

“The cases to which the *fiscal* refers are the clearest evidence of this undeniable truth,” Núñez de Haro wrote, as “the robberies that these refugees commit are so frequent, and these, and other excesses to which they have surrendered [their morality]” have so damaged the surrounding community that, “if the many homes in the neighborhood of two parishes are not already uninhabited, then no one wants to occupy them, so that they are not exposed to the insolence and violence of these men.”<sup>75</sup>

Núñez de Haro considered Ladrón de Guevara’s request to extradite the refugees from the church and incarcerate them while they awaited trial and concluded that, “the means that the *fiscal* proposes is the only one to adopt in this matter, to give the public the tranquility and peace of mind that they so demand.”<sup>76</sup>

The above matter provides an example of a type of relationship that often existed between the church and state high courts in asylum matters during this long period of legal ambiguity in the eighteenth century. The *fiscal* Ladrón de Guevara and the archbishop found an equitable resolution within the blurred confines of written asylum law, as Guevara smartly pursued extradition in a respectful and deferential manner, in particular, framing the actions of these refugees in terms articulated by earlier provincial synods with regards to asylum: In the third book of decrees issued by the fourth provincial synod in 1771, the Mexican prelates declared that:

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<sup>73</sup> “La desvergüenza, avilantez y atrevimiento de los Reos efugiados en las dos Yglesias de asilo han llegado al ultimo extremo, y no bastan para contener los en su dever, ni el respeto, y veneracion que se deve a los Lugares que los amparan, ni las muchas frequentes extorciones que se les hacen, y han hecho para que hagan del asilo el uso que conviene.”

<sup>74</sup> “No es estraña en estos Reos semejante conducta. Son por la maior parte, unos Hombres de la mas vaxa extraccion, que criados en un lastimoso avandono, y libertinage han hecho habito, y costumbre de robar, y matar, como medio para fomentar otros vicios de que se hallan dominados, y llevaron consigo a los lugares de Asilo. Saben que sus delitos los han hecho justamente dignos de toda la severidad, y rigor de las Leyes, que los condenan al ultimo suplico, y esta consideracion que en Gentes de otra esfera fuera el motivo mas poderoso, para contenerlos en su dever, por el temor del castigo, y de la afrenta, hace mas atrevidos y libertinos a estos otros.”

<sup>75</sup> “Los caso que en su Pedimento refiere el Sr. Fiscal son la mas clara incontrastable prueba de esta verdad, y todos son ciertos, y estan justificados...los robos que hacen estos Retrahidos son tantos frequentes, y estos, y los demas excesos, a que se entregan han consternado de tal suerte a las Gentes, que no solo se experimentan los lastimosos efectos que informa a V. Excelencia en Sr. Fiscal, si no que estan desiertas, y sin havitantes muchas casas de la inmediacion de ambas Parroquias, sin que haya quien quiera ocuparlas, por no exponerse a la insolencia, y violencia de estos hombres.”

<sup>76</sup> “El medio que propone a V. E. el Sr. Fiscal es el unico que puede adoptarse en este asunto para evitar a tantos delitos, y dar al publico el sosiego, y tranquilidad que tanto clama.”

being unjust, that which was established in honor of the church [should be] converted into irreverence: the council orders that no refugee of a church leave to commit a crime, theft, or bring about other injuries, or bring to the temple women of ill-repute, play games or instruments, or from within the church insult royal ministers, since refugees should hide themselves and distance themselves from [the royal ministers'] presence, and those criminals that contravene what is included above should be cast out from the church [where they take refuge] and will not be received by another church.<sup>77</sup>

By citing instances of asylum abuse within the legal parameters set by the Mexican prelates, Ladrón de Guevara offered to Archbishop Núñez de Haro an easy and justifiable path to mass extradition. This case illustrates that at a time of legal ambiguity, the civil and ecclesiastical officials could reach a diplomatic consensus with regards to asylum law and the treatment of criminals, relying on principles of canon law.

But this diplomatic consensus did not represent the only type of exchange between the *provisorato* and *Real sala del crimen* with regards to asylum in 1778. What follows in the final case study is an elaboration of a particularly long and protracted legal dispute centered on the extradition of a criminal refugee, José Francisco Herrera, who was accused of murderous *homicidio alevoso*. Much of the pertinent testimony and correspondence from this case record is included in the fifteen pages that follow, either in direct translations or in paraphrased form, to illustrate a particularly heated exchange over jurisdiction that arose between the two high courts of Mexico City during this period. Selected for its connections with earlier asylum law and attempts at more modern reforms evaluated in parts one and two of this chapter, this case offers a natural bridge to the larger conclusions of this chapter.

### ***November, 1778: Homicidio Alevoso and the Extradition Case of José Herrera***

On November 5, 1778, José Francisco Herrera was traveling as part of a large mule train carrying paper for the royal tobacco monopoly along the pack roads from Veracruz to Mexico City.<sup>78</sup> With him was a friend and fellow muleteer, Miguel Hernández -- the two men had long been employed together as part of the same mule team. Late that afternoon, as the mule train set up camp under a bridge at the edge of the village of Guadalupe Tepeyac, at the site of the shrine of Our Lady of Guadalupe near Mexico City, Herrera and Hernández began arguing over orders passed down to them by their employer and their angry voices echoed through the passageway. "¡Carajo!," witnesses overheard Herrera insulting his friend Hernández, as he reached into his garments, pulled out a long-bladed knife (*velduque*), and stabbed Hernández in the chest

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<sup>77</sup> "No siendo justo que lo que está establecido en honor de las Yglesias se convierta en su irreverencia; manda este Concilio que ningun refugiado a la Yglesia salga de ella para cometer algun delito, hurtar, ó hacer otra injuria, o lleve al templo mugeres sospechosas, tenga juegos, o toque instrumentos, o insulte desde el sagrado a los Ministros Reales pues deben esconderse, y apartarse de su presencia; y los Reos que contravinieren a lo arriba dicho sean hechados de las Yglesias, y no sean recibidos en otras (2), procurando los Parrocos que esto se haga dando parte al Obispo, o su Provisor, especialmente quando el que se ha de expeler es Reo de pena capital."

<sup>78</sup> AHAM, Episcopal, Provisorato, Causa Criminal, 1778, Caja 117, Exp 1, fs. 1-140, "Autos criminales en contra de Jose Herrera."

while the other man kneeled, inspecting his unloaded cargo.<sup>79</sup>

The location where the mule train had stopped for the night lay along a bustling trade route, and the public stabbing in the afternoon sun created immediate chaos. Herrera's shocked *compañeros* seized him, and as he struggled in their arms, Hernández, the wounded muleteer, took a few staggered steps and fell to the dirt, bleeding profusely from a deep gash near his heart. From the gathering crowd someone cried for a priest to come to hear the fallen man's confession and another called for a civil magistrate to take charge of the scene. Before either could arrive, Hernández died.

In the confusion, Herrera broke free from his captors and fled on foot for the capital city. He entered the church of Santa Catarina Mártir, not far from the city center, and took refuge inside. For a time, Herrera could rest, recover, and explain his circumstances to the available priests, ask for God's forgiveness, and avoid prosecution by royal authorities.

Contemporary judicial manuals offered clear guidance about how to handle Herrera's asylum claim.<sup>80</sup> Though the muleteer committed homicide, until the *provisorato* decided that his crime was egregious *homicidio alevoso*, he had the full weight of ecclesiastical privilege on his side. This meant that under threat of excommunication from the church, crown officials were prohibited from entering the church in pursuit of him. Though they could guard the entrances against escape, they could not block visitors from bringing him food or clothing. They could not lure him out with alcohol, nor could they use fire or smoke to force him out. Instead royal officials would have to wait for the results of the asylum *proceso informativo* and a decision that Herrera's actions fell among the categories of *exceptuados*.<sup>81</sup>

Archbishop Núñez de Haro's legal adviser, the *provisor* Juan Peretón, took the lead in the asylum inquiry and there was much at stake in the initial *proceso informativo*. If Peretón concluded that Herrera acted with *alevosía*, the muleteer would be removed from asylum and turned over to the secular authorities for prosecution. If Herrera was then found guilty, which was almost a certainty by this stage, he faced, at a minimum, a long and potentially lethal term of labor on a maritime presidio and possibly a capital sentence. Civil officials also would confiscate his estate and divide the proceeds between the victim's family and the royal treasury. If, however, Peretón found that the murder was not *homicidio alevoso*, but was in self-defense, or was *casual*, the accidental and spontaneous result of *riña* or drunkenness, the muleteer could initially avoid a prison sentence, remaining in reclusion in the church for a time to perform rehabilitative spiritual exercises under the direction of a priest. At most, he might receive a fine or shorter prison sentence for accidental homicide upon his release from asylum, likely some months later.<sup>82</sup> It was unlikely he would be sent to labor on a presidio and a capital

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<sup>79</sup> According to William Taylor, "carajo" refers to the male genitals. It was considered a particularly gross obscenity, implying that the man so insulted was inferior and cowardly. See Taylor, *Magistrates of the Sacred*, 212-213.

<sup>80</sup> Hevia Bolaños offers a particularly detailed discussion of the many permutations of extradition processing in *Curia philippica*, lib. 1, tit. 3, *Parte juicio criminal*, no. 12, "Retraídos"

<sup>81</sup> Typically this investigation would be carried out by the local *alcalde mayor*. Guadalupe Tepeyac was so close to the capital city that it fell under the administrative jurisdiction of the royal *audiencia*, and so did not have its own *alcalde mayor*.

<sup>82</sup> Though the Third Mexican Provincial Council in 1585 formally set a ceiling for the duration of asylum at nine days (a duration that was preserved in the decrees of the subsequent Fourth Mexican Provincial

sentence was prohibited, as priests could only release Herrera once they received a *caución juratoria* bond from civil magistrates that guaranteed the muleteer's physical safety.

Peretón's investigation rested on the stable support of past precedent. Typically, all parties pointedly, if routinely, acknowledged both the customary authority of the crown in criminal matters, and the church and its grounds as sanctified space. When a crime was found to be among the categories of *exceptuados*, as spelled out in the 1591 *Cum alias nonnulli* Bull, refugees were routinely released to royal control. If, on the other hand, royal agents acted improperly in extraditing a criminal, or if a *fiscal* had doubts about a refugee's right to immunity, he typically returned the case and criminal to the care of church magistrates for their review and decision.

The opening stages of the written case record concerning Herrera's asylum claim detail Peretón's initial *proceso informativo* investigation. Once the *provisor* confirmed that both the lieutenant general of Guadalupe Tepeyac and the *provisor's* delegates had brought the investigation to completion, he reviewed the recorded witness testimony and the procedural steps initiated by the lieutenant, concluding that, "according to the present results from the criminal *sumaria*," the investigation begun at the moment the lieutenant arrived at the site of the crime, "and the declarations of the witnesses, it is clear that the lieutenant has proceeded according to prescribed law as he should." It also appeared that the circumstances of the crime were such that "it should be counted as premeditated homicide," which meant that Herrera could be legitimately released to the royal criminal courts, the *provisor* concluded.

Peretón justified his decision on the basis of written *doctrina*: "Many [legal scholars] have written...that when a death occurs between two colleagues who join together to travel the same road," and while traveling together, one colleague kills the other, if there was not an argument preceding it, nor any particular motive of animosity, "the act of traveling together in this union and in confidence" of this this union, creates circumstances such that, "the victim could not prevent nor return the blow, and that the aggressor delivered the blow assuredly and with *alevosía*."<sup>83</sup> "This seems to be the case (*parece ser*) with what was contained in the *sumaria*," Peretón continued, "José Herrera and Manuel Hernández were colleagues [working] in the capacity of muleteer, and they took the same route, one as a *cargador* (one who loads and unloads cargo), the other as a driver of a muletrain." Criminals who have committed homicide while traveling with others have been excluded from ecclesiastical immunity "almost from the moment that asylum was established," Peretón asserted, as "sacred scripture, canon law, church councils, and above all the Council of Trent, [as well as] later pontifical Bulls were drafted with the principal object of specifying and clarifying those cases in which the church can or cannot protect and defend criminals, and in the most common and most sound understanding of these legal scholars all exclude premeditated homicide from

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Council in 1771), it also decreed that a bishop could extend asylum indefinitely, and in the cases reviewed for this chapter, because of delays in processing the initial *proceso informativo*, the period of asylum for most refugees typically exceeded ninety days, and some remained in protective asylum for years.

<sup>83</sup> "Tales se dicen, como entre otros explica bien el Señor Regente D. Miguel de Cortiada con autoridad de innumerables autores...quando la muerte sucede entre dos compañeros que se unieron para ir un propio camino, y se efectuó en el mismo de homicidio: pues solo el hecho de irlos en esta union y confianza de ella debe ofrecer, no haviendo antes precedido aún ni risa, ni motivo particular de enemistad manifiesta bien el ofendido no pudo precaver ni reparar el golpe, y que el agresor le dio sobre seguro, y con alevocia"

immunity.”<sup>84</sup>

As a result of the clear signs of premeditation evident in the *proceso informativo*, Pereton did not see the need to request a *caución juratoria* oath to guarantee Herrera’s safety, since, “according to this concept, this criminal *causa* resides outside of the rules established by royal decrees, which state that in cases in which great crimes are committed, in which [the characteristics of the crime] raise doubt as to if the criminals are eligible for immunity, they should be turned over to the royal authorities under the protection of a *caución juratoria*, [with a priest] following and determining this point of law.”<sup>85</sup> “Not having this doubt,” the *provisor* concluded, “as it seems there are none (*por que no habiendo esa duda, como parece no la hay*), it follows that [we can] omit the formality of the *caución juratoria*.”

But, Pereton reminded the *oidores* of the *Real sala del crimen*, he reserved the right to revoke the extradition if any later evidence or investigation exonerated Herrera or cast doubt on the nature of his actions:<sup>86</sup> “By virtue of these reflections,” noted above about Herrera’s premeditated actions, “it seems that although the priest at Santa Catarina Martír can therefore assist in the free and easy extradition of Herrera,” with Peretón’s determination with regards to Herrera committing *homicidio alevoso* offering a “substitute” in place of the procedural protections of the *caución juratoria*. “However,” the *provisor* continued, “if the *proceso* or *juicio plenario* stages of the case result in an exception to this decision that favors or raises doubt concerning the immunity of this criminal, the *Real sala* should pass along the corresponding testimony,” which brought the doubts to light, to the *provisorato* so that the *provisor* and his assistants could “determine the point of doubt in agreement with written law,” adding, reassuringly, that “we do not doubt the sincerity, training, and Christian mission of the *Real Sala*.”<sup>87</sup> On the basis of Peretón’s decision regarding extradition, Herrera was removed from on November 13, 1778, eleven days after striking and killing his colleague Hernández and seeking asylum.

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<sup>84</sup> “este parece ser el caso mismo que contiene la sumaria, pues según ella José Herrera y Manuel Hernández eran entreambos compañeros en su oficio de arriero, que trahian una propia ruta, como cargador el uno y el otro aviador de un propio atajo = semejantes reos sabe V.S. que quedaron exceptuados del goze de inmunidad, casi desde el mismo tiempo que se establecieron los asilos. La sagrada escritura, el derecho canónico, los concilios y sobre todos el de Trenta, las posteriores Bulas Pontificas, expedidas con el principal objecto de especificar y aclarar los casos en que la Yglesia puede o no amparar y defender los delinquentes, y por fin el mas común y mas sano sentir de los ynterpretes, todos excluyen de la inmunidad a los homicidios proditores.”

<sup>85</sup> “Según esta conseptua, esta causa está fuera de las reglas establecidas en las posteriores Reales Cedula, en quanto previenen que en los casos de cometerse delitos tan atrozes, que su naturaleza haga dudar si gozarán o no de inmunidad los roes, se entreguen estos baxo caución juratoria a la Jurisdicción Real, siguiendo y determinado el punto la Eclesiastica. Por que no habiendo esa duda, como parece no la hay, se sigue que puede omitirse la formalidad de la caución.”

<sup>86</sup> “Pero como es tambien factible, que aunque ahora aparesca, assi por el Sumario, que es un juicio incompleto, todavia en el plenario , y en el progreso de la causa tenga el reo algunas Justas excepciones que puedan conducir a su defensa y hazer variar el negocio de aspecto, por que a caso de vaire tambien y se minore la gravedad y naturaleza del delito.”

<sup>87</sup> “Por esta reflexión es de parecer que aunque V.S. puede desde luego convenir en la entrega lisa y llana del Reo, sea eso subrogando en lugar de caución, la reserva que de vera nazer, de que si en el proceso y del juicio plenario resultare excepción que pueda favorecer, o hacer dudosa la inmunidad del delincente, se pase el correspondiente testimonio al Tribunal de V.S. para que en el se determine el punto con arreglo a derecho: lo que no deve dudarse de la justificación y cristianidad de la *Real Sala*.”

Two weeks later, a public defender assigned to represent Herrera, *procurador* Mariano Pérez de Tagle, submitted a letter, written on behalf of his client, expressing distress and disagreement with Peretón's decision to extradite the muleteer. First, Pérez de Tagle noted, royal law mandated that a criminal must be extradited with a formal *caución juratoria*, and also with an order that the body of the deceased be exhumed and inspected for signs of *alevosía*, as dictated by royal decrees published in 1750 and reaffirmed in 1764 and 1770. Peretón did not follow the applicable procedural law and instead simply adopted the view put forth by the *Real sala del crimen* that Herrera committed *homicido seguro y alevoso*.

Second, Pérez de Tagle noted, in Herrera's confession to the royal authorities in the royal jail, the muleteer offered evidence that he and Hernández were "intimate friends...as happy and content friends they left for the road, and as happy and content friends they arrived" under the bridge to decamp for the night. No sense of disaffection emerged between the two men "the whole time they traveled together [nor] with the witnesses," Pérez de Tagle noted, even up to the point of the attack, which took everyone by surprise.<sup>88</sup> On the basis of their long friendship and of the few signs of discontent between the two men, Pérez de Tagle maintained, Herrera should be returned to the church, since, "the solid, Christian, and true *doctrina* [governing asylum practice] is based on the general rules that have been followed for all times related to immunity," and that is that save for the small handful of *casos exceptuados*, "criminals should possess asylum privileges regardless of the gravity, enormity, scandal, and harm their crimes might cause to the Republic," and a suspect cannot be excluded from asylum for "similarity between his and other crimes (*paridad*), reasons of character (*identidad*), for reasons of popular opinion, for distaste of certain crimes, for public peace and well being, nor for any other reason, however seemingly urgent and necessary, as was unambiguously written by Pope Gregory XIV in his celebrated Bull *Cum alias* in 1591."<sup>89</sup> "One cannot utilize arbitrary reasoning in immunity cases," Pérez de Tagle reminded the *provisor*, as "it is necessary that all parties follow what canon law has established according to the *doctrina* [of *Cum alias*] just cited," he explained.<sup>90</sup>

Pérez de Tagle noted his appreciation for the *provisor's* well-known training as a judge, but asserted that he could not understand how Peretón resolved all doubts about Herrera's right to asylum through use of the single term, "*parece*," a term that Peretón used to justify his reasoning regarding the facts contained in Herrera's initial *sumaria*. Stating only, "Por que no habiendo esa duda, como parece no la hay," how could the

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<sup>88</sup> "que amigos alegres y contentos vinieron por el camino: que amigos alegres y contentos llegaron a el parage, y que en todo el tiempo que anduvieron juntos ellos, y los testigos no tuvieron entre si la mas leve indisposicion"

<sup>89</sup> "esta solida, Christiana, y verdadera doctrina se funda en la generalidad de la regla canonica que en todos tiempos ha seguido la sagrada congregación de la inmunidad, y es que (salvos los casos exceptuados) deven gozar de ella los delinquentes por graves, enormes, escandalozos, y perjudicales que sean a la Republica sus delitos en tanto grado y con tanta estrechez, que la exceptuacion de los casos no se puede estender de unos a otros por paridad, ni por identidad, ni por mayoria de razón, ni por odio de ciertos delitos, ni por la quietud, bien y paz del público, ni por otras causas aunque sean urgentissimas y necesarias como expresamente lo dice el Papa Gregorio XIV en su celebre bula Cum Alias del 1591. Por lo que la justificación de V.S. en atencion a todo esto se ha de servir de mandar que luego y sin dilación se restituia a mi parte al lugar de que se le extrajo, haciendo para ello a la Real Sala la consulta correspondiente."

<sup>90</sup> "En material de inmunidad no se pueden tomar caminos arbitrarios. Es necesario seguir aquellos que ha establecido el derecho canónico conforme a la doctrina que acabo de citar."

*provisor* “consent, even for a moment, to extraditing Herrera from the church without a *caucion juratoria* and with obvious danger to his life and limb.” The *procurador* disagreed with Peretón’s explanation that the *caución juratoria* did not apply because the facts collected in the initial investigation seemed to prove both Herrera’s guilt and the premeditated nature of the crime, since “neither in *Cum alias*, nor in any royal decree is there a case” in which the *caucion juratoria* request does not apply.<sup>91</sup>

If there is anything notorious about Herrera’s case, it is that he has the legal right to asylum, Pérez de Tagle argued, “since it is notorious that the deceased and Herrera were intimate friends...it is notorious that they never had any arguments in all the time they were friends, and traveled together” as muleteers. “It is notorious that that they left for the road as friends and it is notorious that they arrived as friends,” under the bridge where the incident took place, he maintained. “It is notorious that the act of homicide took place in the moment, and consequently it is notorious that [Herrera] did not have, nor could he have had premeditation, artifice, or calculation,” he continued. “If there is one thing that is clear, it is that you cannot have *alevosía* without premeditation,” Pérez de Tagle concluded, and this was not premeditated homicide but only “simple homicide and without any augmenting quality or circumstance,” and therefore did not fall not among the classes of *exceptuados*.<sup>92</sup>

Now, two weeks after civil authorities removed Herrera from protective asylum with the *provisor*’s consent, Peretón reviewed Pérez de Tagle’s objections, and the investigation materials once again, and agreed that his interpretation of the facts was in error. “The arguments put forth by [Herrera’s attorney] are, in reality, quite weighty,” he began, and noting the witness testimony regarding Herrera’s and Hernández’s long-term friendship, Peretón concluded that “it is very defensible that there was no *alevosia*” in this matter. The testimony supported an interpretation that Hernández’s death occurred as a result of an unplanned disagreement over their master’s orders and “consequently it could be said that the death was committed in the context of a fight (*riña violenta*),” the *provisor* stated.<sup>93</sup> Peretón also noted the circumstances of the killing, in that “if Herrera harbored any bad intentions, he would have killed Hernández on the deserted road, or

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<sup>91</sup> “Yo venero la profunda conocida literatura del Provisor, pero no entiendo como excluyendo la duda el mismo por un *Parece* pudo consentir ni que por un momento se extrajese a mi parte de la Yglesia sin la caucion juratoria y con manifiesto peligro de su vida y de sus miembros. Ni en la Bula ni en las cedulas se halla exceptuado algun caso en que la caución no deva pedirse y darse.”

<sup>92</sup> “Si algo notorio hai es que mi parte goza de la inmunidad: pues es notorio que el difunto y el eran amigos mui intimos, y tanto que aque le cosia los zapatos a este. Es notorio que jamás tuvieron diferencia alguna en todo el tiempo que fueron amigos, y anduvieron juntos. Es notorio que amigos vinieron por el camino y amigos llegaron al parage. Es notorio que el homicidio sucedio en un momento. Y consiguientemente es notorio que no hubo ni pudo haver premeditación, artificio, azechanza, o simulación: y siendo una cosa por si misma clara que no puede haver *alevocia* sin premeditación, se sige el caso no esta como imaginó el Promotor Fiscal fuera de las reglas establecidas en las Posteriores Reales Cedulas, y es notorio que el homicidio fue simple y sin alguna qualidad, y que por eso mismo no es de los exceptuados

<sup>93</sup> “Los fundamentos expendidos por el Reo en su citado escrito de 25 de Junio son en la realidad de mucho peso...El Promotor, que convindando con más escrupulosa reflexión de los testigos, es mui defensible el que no hubo alevosia, pues sobre que no están enteramente acordeis de todo se dexa inferir prudencialmente, que Herrera como cargador, y que venía governando la Requia de su Amo, le mando alguna cosa al difunto, que no hizo, y de hay se trabajaron de palabra, se subsiguise el mecatazo y finalmente la herida; y que por consiguiente pueda decirse que la muerte fue hecha en riña violenta y que todo el suceso fue inopinado sin premeditación ni deliveración.”

even at night, and would not have waiting to perpetrate the crime in town, and near the entrance to the city, exposing himself to the risk of apprehension.”<sup>94</sup> Peretón cited law from the Spanish *Nueva recopilación de Castilla* (1567) which stated that “all men knowingly commit murder (*muerte segura*) except those that did so in a fistfight, in war, or during a quarrel.” On the basis of this law and through the facts of Herrera’s case, Peretón concluded that “here it seems as if the killing was committed in the context of a quarrel and fight, because both consist in arguments, in injuries, in punches, and in wounds,” all of which the witnesses confirmed had occurred during the altercation between the two muleteers.<sup>95</sup>

Peretón called upon the *fiscales* of the *Real sala del crimen*, who had taken charge of Herrera after his extradition, to suspend their criminal trial against him, to return him to the church of Santa Catarina Martír, and if they desired to pursue a criminal trial against him, to submit the *caución juratoria* required by law. Peretón attached his signature to the document, noting the date as July 4, 1779, six months after Herrera was removed from asylum.

Ordinarily this type of request prompted a swift response from the *Real sala del crimen*, given the close proximity of its offices to that of the archbishop. This time, two months passed before the *oidor* for the *Real sala del crimen*, Eusebio Ventura Beleña, acting as prosecuting attorney or *fiscal* in Herrera’s case, acknowledged receipt of Peretón’s request in a terse letter, but offered no further direction. The perfunctory response by the *oidor/fiscal* precipitated another letter drafted in November 1779 by the *provisor*: “Directed to Eusebio Ventura Beleña, on behalf of the archbishop.” Peretón, citing the “well-known integrity and authority” of Ventura Beleña in legal matters, noted his first request sent out in September, which should have served to suspend the criminal trial against Herrera, and restore him to asylum, “as dictated by Apostolic Bull,” until the *fiscal* “delivered the *caución juratoria* ordered in royal decrees.”<sup>96</sup>

Another long delay in correspondence ensued until in January, 1780, six months after Peretón sent his first request for a suspension of Herrera’s criminal case and the muleteer’s return to protective asylum, *oidor/fiscal* Ventura Beleña sent a letter stating simply that in review of the supporting materials from Herrera’s attorney, Pérez de Tagle, and the letters from Peretón, the *Real sala del crimen* had not found a legally justifiable reason for returning Herrera (*no haver llegado el caso de la reserva*), “and in consequence the *Real sala* will proceed in imposing upon the criminal José Herrera the punishment that corresponds to his crime.”<sup>97</sup>

No doubt surprised by this impolitic and perhaps illegal course of action, Peretón,

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<sup>94</sup> “influyendo tambien para ello la reflexa de que si Herrera hubiera tenido antes alguna mala intension, huviera matado a Hernández en lo decierto del camino, y aun de noche, y no huviera esperado a perpetrar el homicidio en un poblado, y junto a una garita exponiendose a el riesgo de que lo aprehendiesen”

<sup>95</sup> “que todo Home que faciere muerte segura salvo aquella que fuere fecha en pelea, en Guerra, o en riña, y aquí parece que la muerte fue hecha en riña y pelea, por que una y otra concisten en voces, en injurias, en golpes, y en heridas.”

<sup>96</sup> “Dirigio a Sr. Do Eusebio Ventura Beleña, de acuerdo de V.A. en cuia vista no duda de su notoria integridad y justificación, que teniendo presente su primer oficio de 8 de con el testimonio del escrito del reo...se sirva e suspender la causa criminal, mandando que restituido previamente el reo al sagrado, como previenen la Bulas Apostolicas, u otorgada la caucion juratoria que previenen las Reales Cédulas.”

<sup>97</sup> “y que en su consecuencia procedera esta Real Sala a imponer a el Reo José Herrera la pena correspondiente a su delito.”

with the support of Archbishop Núñez de Haro, responded immediately, and heatedly: “It is legal dogma that the defenders of royal jurisdiction do not deny that Pope Gregory XIV, repealing all prior concessions and customs, prescribed the norms for proceeding in extraditing criminals who have committed *exceptuados* in his Bull *Cum alias*,” and that the power of decision making in these cases “resides solely in the Bishops and *provisores*.”<sup>98</sup> “In matters of immunity only canon law and Apostolic bulls apply,” and this interpretation was confirmed by royal law, Peretón maintained, quoting a 1720 royal decree which stated, “that the royal *fiscal* or other judge understands that the matter of whether a criminal should not be eligible for ecclesiastical immunity,” and the investigation associated with this determination, “has to proceed through the ecclesiastical courts.”<sup>99</sup> The phrasing regarding purely ecclesiastical jurisdiction over a criminal’s eligibility for asylum was revisited in another royal decree in 1764, Peretón asserted, which stated, “that secular judges can extract criminals from churches without penalty” provided that a competent ecclesiastical judge has reviewed the case, and once “this same judge declares whether the criminal is eligible or not for immunity (the term immunity here expressed with the common turn of phrase “*el sagrado de la Yglesia*”).”<sup>100</sup>

Peretón noted that the *Real sala* did not confer with Herrera or his advocate, nor hear his defenses before issuing judgment in this case, and “one cannot make a judgement only in light of the initial *sumaria* documents,” but only through an audience with the alleged criminal and members of the royal courts. Peretón chided Ventura Beleña for his rush to judgment without hearing Herrera’s defenses: “No, not the laws, nor Apostolic Bulls, nor royal decrees, nor canon law or civil law scholars permit that in material so serious as immunity, as much for reverence for the church as danger and risk for the criminal, in which corresponds no less than his life or the integrity of his body,” can you deprive him of the right to asylum only on the basis of the *sumaria*, and without hearing his statement of defense.<sup>101</sup> Peretón outlined the philosophical bases of royal asylum law, and explained that the purpose of extradition was only “to secure the criminals until an ecclesiastical judge can declare, with knowledge of the case, if a criminal is eligible or not for immunity,” even if a *fiscal* or other judge understands that the criminal act in question is clearly among the categories of *exceptuados* and that the criminal is ineligible for asylum.<sup>102</sup> Until this moment, in this case involving Herrera, and “in more than two hundred and fifty years since the reign of Conquest, there has not

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<sup>98</sup> “Es dogma de derecho que no niegan los defenzores de la Real Jurisdiccion, despues que Gregoriano XIV, derogando todas las concesiones y costumbres anteriores prescribo la norma de proceder a las estracciones de los Reos de Crimenes exceptuados en su Bula Cum lias, que este conocimiento y declaración les toca privativamente a los Obispos y Provisores.”

<sup>99</sup> “En materias de inmunidad solo rigen el Derecho Canónico y las Bulas Apostolicas”

“que el Fiscal u otro juez entienda que el caso que no deve gozar el Reo de la inmunidad de la Yglesia...ha de correr la causa por la Jurisdiccion Eclesiastica.”

<sup>100</sup> “que pueden y deven los Justicias seculares extraher a los Reos del sagrado sin perjuicio con conocimiento de causa por Juez eclesiastico competente....y hasta que por el mismo Eclesiastico se declare si deve o no gozar del sagrado de la Yglesia.”

<sup>101</sup> “No ni los derechos, ni las Bulas Apostolicas, ni las Reales Cedula, ni los Autores Canonistas, ni civilistas, permiten que en una material tan grave cómo lo es la de inmunidad assi por la reverencia devida a las Yglesias, como por el peligro y riesgo del Reo, en que va nada menos que la vida, o la integridad de sus miembros, se le prive de su beneficio por solo una sumaria y sin oyrle sus excepciones y defensas.”

<sup>102</sup> “para asegurarlos hasta que por el eclesiastico se declare con conocimiento de causa, si gozan o no de inmunidad aunque el Fiscal y otro Juez entienda que el caso es expresado y que no la goza.”

been a single example in which the *Real sala* has declared that a criminal has not proven his innocence, and so is ineligible for asylum,” and only on the basis of the initial *sumaria*, has a civil judge, “proceeded to impose upon the criminal the sentence corresponding to the crime.”<sup>103</sup> Worse, Ventura Beleña proposed his sentence despite the direct objections from an ecclesiastical judge asking him to suspend the case while the asylum issue was reviewed, thereby obstructing justice and risking excommunication.

Peretón acknowledged that it was possible that the *fiscal* was following the terms of Pope Clement XII’s *In supremo* Bull instituted in 1737, which might support civil jurisdiction over Herrera’s case but “today you cannot continue” utilizing *In supremo*, “but must throw it out and abolish it entirely, reestablishing the older legal authority of the Gregorian Bull and royal decrees that conform to it, which have been invariably followed in this tribunal.”<sup>104</sup>

Peretón expressed remorse for his procedural errors that led to Herrera’s accidental extradition, but warned that Ventura Beleña was acting “against the tenor and form” of even the newer bulls, which “so narrowly prohibit with censures (like excommunication) reserved to his holiness, and further canonical punishments imposed on violators of ecclesiastical jurisdiction, that secular officials of whatever authority, character, or rank,” try to subvert the authority of the church and impose a sentence, “reserving it exclusively to bishops, and exhorting them...with their priestly perserverance (*con pecho y constancia sacerdotal*), that they resist those that will attempt to block in some way the execution and observance of [Pope Gregory XIV’s] Constitution, recalling the strength and fortitude with which their predecessors have fought for ecclesiastical immunity and liberty, so that with equal energy and conviction they do not allow [these immunities and liberties] to be reduced nor suffer the least hollowing out” by enterprising civil officials.<sup>105</sup> In this spirit and “holding the reins of ecclesiastical jurisdiction in my hands,” I cannot “ignore my responsibility to protect the rights of the church against violators of the rights of the church”...”even at the cost of my life and my blood, given the grave and powerful appeals [and] formidable censures and punishments, [such that they] make me tremble.”<sup>106</sup>

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<sup>103</sup> “No se dará hasta ahora en mas de doscientos sincuenta años que lleba el Reino de conquistado, un solo exemplar de que la Real Sala haia declarado que el Reo no purgado los indicios y por tanto no goza de la inmunidad. Ni menos de que en consecuencia de su declaracion haia procedido a imponer al Reo la pena correspondiente a su delito, despues de requerido por el Eclesiastico, para que suspenda la causa.”

<sup>104</sup> “hoi no se puede continuar sino que debe desterrarse y abolirse enteramente, restablesiendose la Antigua de la Bula Gregoriana y Reales Cedula a ella conformes que invariablemente se ha observado en este tribunal.”

<sup>105</sup> “estrechisimamente prohiven con censuras reservadas a su santidad, y demas penas canonicas, impuestas a los violadores de la Jurisdiccion Eclesiástica que las potestades seculares de qualquiera autoridad, caracter, o dignidad, pretenden hazer semejante declaracion, reservandola privativamente a los Obispos, y a estos los exhorta por las extrañas de Jesu-Christo, que con pecho y constancia sacerdotal, recistan a los que intentaren impedir la execucion y observancia de la constitucion, recordandoles la entereza y fortaleza con que sus predecesores han peleado por la ymunidad y libertad eclesiastica, para que con igual zelo y firmeza no la permiten disminuir ni sufran la menor menos cavo en sus sagrados derechos.”

<sup>106</sup> “No puede el Provisor, que sin merito se halla con las riendas de la Jurisdiccion Eclesiastica en las manos desentenderse de su defensa, aun a costa de su vida y de su sangre, en vista de tan graves y poderosas exhortaciones y de censuras y penas tan formidables, que lo hazen estremeser, contra los violadores de ella.

Three months after sending this powerful statement of defense, Peretón received a reply letter from Ventura Beleña that just as passionately argued for the applicability of Clement XII's 1737 bull *In supremo* in the Americas, and by extension, in this case, despite the earlier referenced decision by the Council of the Indies, blocking the use of *In supremo*. The goal of newer bull, he said, was "the holy end of removing, in matters of immunity, damaging *competencias* that only contribute to obstructing the fair and direct administration of justice, leaving crimes unpunished as an insult to the public cause" of preserving peace and tranquility.<sup>107</sup> Citing a paragraph from *In supremo*, Ventura Beleña reasoned that the bull "called out the pernicious abuses" and "long prison terms that criminals" would endure if ecclesiastical judges were involved in the prosecution of criminal cases in civil courts. "And if this circular and frustrating action can be avoided with good reason," two judges should not simultaneously oversee a single case, "as the *provisor* has tried to do here," Ventura Beleña continued.<sup>108</sup> "The literal and genuine interpretation of the bull is that his holiness wanted to get rid of the delays experienced in a prolonged case of immunity, ordering with clear and explicit voices that a criminal should defend himself before a secular judge," and receive his sentence in secular courts without the involvement of an ecclesiastical judge.<sup>109</sup> "It is not plausible that his holiness, clamoring for a just aim of facilitating the punishment of criminals and the eradication of murderers, would have wanted to leave material" related to doubt in ecclesiastical asylum cases, which the church courts claimed in Herrera's case, the *fiscal* maintained.<sup>110</sup> On the basis of this interpretation of asylum law, and sustaining an interpretation that Herrera's actions constituted *homicidio alevoso* Ventura Beleña denied Peretón's request.

Peretón, now appearing exasperated by Ventura Beleña's delays and rhetoric, offered his own, more detailed interpretation of Herrera's actions, this time relying on Spanish civil law to do so. Citing commentary on the laws concerning premeditated violence in the Spanish *Nueva recopilación de Castilla* (1567), he argued that even in cases where there might have been previous animosity, and where the death wound occurred from behind, which was often interpreted as a sign of premeditation, it could still be said that the killing was still not *homicidio alevoso*. This point, Peretón argued, "not only is laudable in the limited knowledge of the *provisor*," but is evident in the writings "of Saint Augustine, the venerable Bede, Justinian, and other distinguished men," and serves to cast doubt on Herrera's actions, such that questions regarding his actions, and his right to immunity were sufficient to compel the *Real sala* to suspend the criminal case against Herrera, and require them to deliver the protective *caución*

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<sup>107</sup> "el santo fin de remover en puntos de inmunidad, perjudicales competencias que solo contribuirán a estorvar la recta administración de justicia, dejando impunes los delitos en ofensa de la causa pública."

<sup>108</sup> "Lo cierto es que la referida Bula, cantando perniciosos abusos trae oportunamente que en vano sería la prosecución de las causas en los tribunales Reales, la estrecha y larga prisión de los Reos si correspondiese a el Eclesiástico el conocimiento de la causa. Y si todo círculo y acto frustratorio deve evitarse con fundada razón, deve resistirse que dos Jueces conoscan in solidum de la causa de un Reo, que en lo que ha pretendido el Provisor."

<sup>109</sup> "El literal y genuino sentido de la Bula es que su santidad quiso desterrar las demoras experimentadas en el prolongado juicio de ymunidad, ordenado con voces claras y expresas que el Reo se defienda ante el Secular, sin dexar al Eclesiástico conocimiento que el de la sentencia pronunciada por Juez Real."

<sup>110</sup> "No es verosímil que quedando su santidad se explica clamoreando el recto fin de facilitar el castigo de los reos y la extirpación de los homicidios, huviera querido dejando materias para dudas, que pretendia la Jurisdicción Eclesiástica en tan importante asunto se consiviese error en la Bula."

*juratoria* writ and all corresponding testimony related to his criminal case to the *provisorato* so that the *provisor* and his assistants could determine the point of immunity.<sup>111</sup> Peretón called upon the *oidores* of the *Real sala del crimen* to observe the law, submit the *caución juratoria* writ and suspend its case against Herrera. I have “declined to engage in noisy disputes,” Peretón reminded the *fiscal* and acted “in allegiance of peace and good harmony between both jurisdictions, which is so important for the fair and honorable administration of justice and public peace, and best serves both *magestades*, crown and church.” He reminded the *oidores* that they have already violated the principle of ecclesiastical immunity, “even in steps less that are less far along than the current trial,” and that they should thus refrain from imposing a sentence, “while the damage is not yet irreparable.”<sup>112</sup>

Soon after, Ventura Beleña offered an explanation for why Herrera’s crime was premeditated, now ignoring the authority of Apostolic law in the dispute, in that both the *Cum alias* Bull and the later *In supremo* required him to return Herrera to asylum and the case to the *provisorato* while the asylum dispute was ongoing, and await a decision on Herrera’s asylum status from the archbishop and his delegates: “José Francisco Herrera took the life of his colleague, Manuel Hernández, with no other reason than his desire to do so,” Ventura Beleña insisted, “and Hernández’ death did not occur in a spontaneous fight, during war, or through quarrel, and consequently” was *homicidio alevoso* according to the terms of the royal *Nueva recopilación de Castilla*. The *fiscal* noted that none of the witnesses identified a single word of provocation from the victim Hernández towards his attacker, and that Herrera “proceeded to commit premeditated homicide against a man totally unarmed and unable to defend himself.”<sup>113</sup> Furthermore, Ventura Beleña maintained, the witness testimony confirmed that “Herrera had no fear,” of Hernández, and so did not act in self-defense, and “[o]nly his evil character (*malignidad*) drove him to commit murder.”<sup>114</sup>

In taking asylum, Herrera tried solely to “delay his punishment, with notable insult to the cause of public good,” Ventura Beleña continued, “but, it is certain that he committed murder. It is certain that the deceased did not provoke him with words or

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<sup>111</sup> “no solo es laudable en la limitada ciencia del Promotor, sino en los Hombres grandes, de que pudiera traer los exemplars de San Agustín, el Venerable Beda, Justiniano, y otros Varones Insignes) y resolvió que aunque el homicidio o herida se perpetre por detras, una vez que haia precedido enemistad, no hay alevocia...y que vasta para que el homicidio se diga cometido en rixa, el que al tiempo de executar, o antes huviese enemistad declarado y conocida...En atención de todo esto correspondía pedir que V.S. se servira de exhortar en forma y segun estilo a la Real Sala, para que suspendiendo la causa criminal de Herrera, y otorgando previamente la caución juratoria de no offender le pase el testimonio conveniente para la determinación del Punto de inmunidad, mandando que la parte de la Real Jurisdicción ocurra a este tribunal a promoverla.”

<sup>112</sup> “Pero confirmando el Promotor sus decesos, con los que tiene V.S. manifestados a la Real Sala de obra y de palabra, de escusar ruidosas competencias, en obsequio de la paz, y Buena armonia de ambas jurisdicciones, tan importante para la recta administración de justicia, quietud pública, y mayor servicio de ambos magestades...Pues aunque es su obligación de executar, aun en pasos menos adelantados, que en su juicio violan la Ymunidad, se abstendra sin escrupuloso de hazerlo mientras no sea el daño irreparable (cómo lo sería la ejecución de una sentencia) por consultar a la paz y alejar todo peligro de un movimiento popular, que es mui terrible, y sería muy pernicioso. Esperando que S.A. en inteligencia de haverse remitido el expediente a las Reales manos del Soberano, suspenda la causa criminal de Herrera.”

<sup>113</sup> “procedió a una muerte segura contra un hombre totalmente inerme e indefenso o que si alguna tema era la devilissima de una Lia, arma sumamente desporcionada a la del cuchillo con que le quito la vida.”

<sup>114</sup> “nada temió Herrera, y que solo su malignidad le condujo a la muerte segura.”

actions...It is certain that in the place where the disgrace occurred, there were not rocks, wooden stakes, nor hooks,” found objects that might have supported a claim of spontaneous manslaughter with no prior planning. “It is certain that the killer carried the murder weapon with him,” the *fiscal* argued, “and that the witnesses verified everything, namely that Herrera committed *homicidio alevoso* and through this action earned his corresponding punishment.”<sup>115</sup> Turning to the statement of defense from Herrera’s *procurador*, Pérez de Tagle, the *fiscal* contended that the defense statements “were [based on] instructions given to Herrera,” putting words in his mouth, since, “he would not have thought of it, none of it occurred,” and the purpose of the defense was solely “to confuse the proceedings in an interminable manner.”<sup>116</sup> In summation, “this murder was not only purposeful (*segura*) but premeditated, and very thoughtfully executed,” Ventura Beleña argued, and as a result, “the *oidores* of the *Real sala* will know that Herrera cannot ask [me to recommend] any other punishment but that for which the law indicates in such cases, and this is the gallows, to which Herrera will be conducted while bound, in conformity with royal dispensations, and he will have his right hand cut off and placed in the customary manner in the location where the homicide occurred.”<sup>117</sup>

The case record concluded with confirmation of sentence, and a notice from an *alcalde del crimen* that Herrera was hung in a public square in Mexico City on April 13, 1780, eighteen months after the beginning of the case. His right hand was cut off according to Ventura Beleña’s instructions, and placed on a pike at the entrance to Guadalupe Tepeyac, a visible warning message by the *Real sala del crimen* of the punishment that awaited those who commit premeditated murder.

### *Conclusions*

The case of José Francisco Herrera, detailed here in lengthy legal argument between the *provisor* Peretón and royal *fiscal* Ventura Beleña, was the touchstone that prompted the writing of this chapter. Although Herrera's case was not the only time the normally cooperative interaction between the *provisorato* and the *Real Sala del Crimen* fell apart in a protracted asylum dispute, it is the most glaring example of a civil official contravening canon law statutes and colonial customary practice without reprisal. By following the strategy he did, and with the tacit support of the other *oidores* of the *Real*

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<sup>115</sup> “Ni tampoco hallará su justificación otra cosa que subtilezas de entendimiento con que ha pretendido este Reo dilatar su castigo, con notable agravio de la causa pública. Por que lo cierto es que hizo la muerte. Que el occiso no lo provocó con acciones ni palabras. Que éste no puso ni atrichero mal los tercios. Que en el lugar de la desgracia, no hubo piedras, estacas, ni garavatos. Que el matador no ocurrió por arma a los cognillos por que ya la portava consigo...que los testigos estan contexte en todo los substancial, y que es lo que constituie a Herrera de aleve homicidio, y digno por eso del castigo correspondiente.”

<sup>116</sup> “Que la instruccion que dice el Procurador de Herrera haver tomado de esta para defenderlo, no hue instruccion que el tomó, sino instruccion que dio al Reo, de lo que este no pensava, ni pasó, y que toda la idea no fue otra que la de veer como este negocio podia confundirse, de manera que se hiziese interminable.”

<sup>117</sup> Ynfiriendo de todo que este muerte no solo fue segura sino premeditada, y mui pensada...Por todo lo qual ya conocera V.A. no poder pedir el fiscal otra pena este Reo que la que para tales casos señalas las Leyes, esta es de la horca, con la qualidad de que a ella se conduzca arrestrado, en conformidad de las mismas soberanas disposiciones, y que cortandole la mano derecho se coloque esta en la forma acostumbrada, en el parage mismo donde verificó el homicidio.”

*sala del crimen*, Ventura Beleña deliberately upset a carefully negotiated customary balance between crown and church in asylum matters, evident in the first case example, and provoked *competencia* instead of resolving it. In the face of compelling evidence that the ministers of the *Real sala del crimen* had violated Herrera's asylum rights, which in turn contravened broader immunities of the church and disobeyed longstanding procedural law in asylum matters, rather than returning Herrera to the care of the *provisorato*, Ventura Beleña instead pressed forward with an independent and forceful interpretation of Apostolic law that was especially sympathetic to crown interests. His interpretation of the law directly contradicted recent precedents, including directives from the king's Council of the Indies, and dispensed with the advice of widely used civil and ecclesiastical judicial manuals. It represented an especially bold play to subvert the authority of the church in matters the archbishop and his delegates clearly held dear.

Taken together, the above discussions both cast light on the bifurcated relationships between Mexico City's high-courts during the later reform period and illustrate ways that theology undergirded the functioning of Mexico's criminal justice system. Judges mobilized positive, natural, and Scriptural law together in controversial political and theological experiments like the removal of the customary inviolability of Spanish churches. The most powerful representatives of crown and clergy – archbishop, *oidores*, king, Council for the Indies – submitted lengthy, complicated legal arguments detailing the fundamental privileges of the church and the responsibilities of the crown with regards to criminal refugees. Isolated criminal acts by laypersons ballooned into much larger, protracted disputes about the judicial balance between church and state, reflecting the difficulties created by competing bodies of law, and illuminating critical issues at stake: What were the territorial limits to the inviolability of churches? Where did the protective power of the clergy begin and end? What crimes were considered so “vicious,” “exceptional,” and shocking to public consciousness that they trumped the customary immunity of the church and warranted immediate intervention by temporal authorities?

## Conclusion

By emphasizing the jurisdictional and jurisprudential connections between the civil and ecclesiastical high courts of late-colonial Mexico City, as well as a shared tradition of judicial principles, this dissertation raises natural questions about their relationship to the broader processes of Bourbon administrative reform. Scholars such as Patricia Seed and Mark Burkholder have interpreted the Bourbon era as one that saw a steady, inexorable effort of the Spanish state to streamline administration in the Americas, especially after 1750. Part of this effort entailed promoting a single track of justice, which involved restricting the authority of the church over the mixed-*fuero* crimes that ordinarily fell under both jurisdictions, and placing these matters under the primary purview of the civil courts.<sup>1</sup> Nancy Farriss and David Brading suggest a corresponding sea change in governing philosophy that accompanied the transition from Hapsburg to Bourbon rule after 1700. They highlight that the influential seventeenth-century Hapsburg political theorist and royal adviser Juan de Solórzano y Pereira emphasized two parallel tracks of justice in his *Politica indiana*, whereas his eighteenth-century ideological successor, Pedro Rodríguez Campomanes, described the church as simply another administrative arm of the secular state. For both Brading and Farriss, the period after 1750 represented the apogee for this jurisdictional philosophy.<sup>2</sup>

This study's findings are compatible with Brading's and Farriss's general characterizations of the Bourbon reform era, but it also shows that their conclusions require some qualification and refinement with regards to criminal justice in colonial Mexico. By the last decades of the colonial era a complete and unified system of justice was mostly achieved in Mexico City, though not in a form Campomanes and other regalists envisioned. The civil and ecclesiastical high courts of Mexico City realized a comprehensive process of criminal justice through the exercise of partnership and collaboration and by adherence to discrete responsibilities, not through purely secular judicial practices, nor in a binary opposition between church and state. Correspondence between officials of the high courts was generally aimed towards resolving the cases in the longstanding tradition of *arbitrio judicial*, and not towards airing disagreements over jurisdictional *fuero* and *competencias*, the charge often leveled by the crown as justification for reforming decrees. When cases involved joint work by the courts, as with some cases of sexual violence and illicit consensual sex, the two forums often pooled resources, shared information, and respected the boundaries enacted by royal law. The controversial wedge issue of ecclesiastical asylum raised concerns among civil magistrates about justice delayed or denied and sometimes provoked rash exploits by local police but into the last decades of the eighteenth century these were usually isolated instances that an exchange of correspondence by the high courts summarily dismissed. Generally speaking, there is little evidence of arbitrary decision making, factionalism, and abuses of power within the courts.

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<sup>1</sup> Seed, *To Love, Honor, and Obey in Colonial Mexico*, See especially Chapter 10, "Changing Positions of Church and Crown," 159-227; Mark A. Burkholder, *From Impotence to Authority: The Spanish Crown and the American Audiencias, 1687-1808* (University of Missouri Press, 1977), 79-83.

<sup>2</sup> Nancy Farriss, *Crown and Clergy in Colonial Mexico, 1759-1821* (London: University of London Press, 1968), 90-103; David A. Brading, *The First America: The Spanish Monarchy, Creole Patriots, and the Liberal State, 1492-1867* (New York: Cambridge University Press, 1991), 492-514.

The asylum issue eventually provoked a direct confrontation between the highest levels of church and state – by 1787 it involved both pope and king and not just their emissaries overseas due to the far-reaching issues of ecclesiastical privilege that commingled with church asylum law. In all other matters explored by this project, and even during the highest points of the reform period, when the ground shifted through abrupt changes to procedural law and jurisdiction, these alterations did not typically diminish a spirit of cooperation between the civil and church courts. When the law was unclear, high-court judges reconciled conflicting statutes and argued points of evidence to justify their proposed path for resolution of a case. They showed sensitivity for places where the law suggested competing interpretations and might prompt disputes, and both civil and ecclesiastical judges continued to involve one another in their cases, despite many opportunities for stonewalling. Judges for both forums showed close attention to the new directives, restrained from acting when necessary, and enlisted the support of one another through deferential appeals for information, guiding decisions, or manpower. With few exceptions, the major points of rivalry and *competencia* that so concerned the crown occurred mainly with petty magistrates, attorneys, and complainants, not with the high-level magistrates, and many of these grievances were grounded in opportunistic self-interest and not partisan factionalism.

Farriss is right to conclude that “the acceptance of royal control by ecclesiastics depended on who and how control was exercised. The more restrictive the policies and the more removed from royal power the agent was, the more church officials would resist change. They might willingly accept a move toward control by the king, but resist supervision from his subordinates in the Indies.”<sup>3</sup> In the context of “public and scandalous” sexual sin, when the crown shifted primary authority over scandalous *incontinencia* cases to the civil courts, Archbishop Núñez de Haro y Peralta and his subordinates accommodated the new directives, and restricted their involvement only to certain aspects of criminal processing, even as they continued to adjudicate cases. With regards to church immunities, when *oidor* Eusebio Ventura Beleña contravened papal edicts for the asylum privilege in 1780 with an independent and especially regalist interpretation of canon law, he encountered protracted resistance from archdiocesan administrators, but this occurred only after several failed attempts by the *provisor* at collegial diplomacy. But in the context of the high courts, I suggest that we take Farriss’s interpretation one step further. The archbishops and their proxies were willing to accept the king’s interventions and accommodate requests from royal agents acting on his behalf, *provided* that requests to encroach on customary privileges of the church were framed respectfully and grounded in law.

There is also the narrower historiography of criminal law for the late colonial period outlined at the beginning of Chapter One, in which the civil criminal courts were and still often are condemned as a corrupt, arbitrary, abusive instrument of the absolutist Bourbon state, and the ecclesiastical courts regularly suffer (and suffered in colonial documents) criticisms that their officers were more interested in protecting the church *fuero* than in administering justice, flaunted legal conventions (*falta respeto a la religión del juramento*), and used churches and the courts as havens for violent or career

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<sup>3</sup> Farriss, *Crown and Clergy in Colonial Mexico*, 10.

criminals.<sup>4</sup> My research suggests that the criminal justice system in eighteenth-century Mexico City was neither corrupt and arbitrary, nor abusive. Within the range of documents analyzed for this project, records of proceedings within and correspondence among officials in the civil and ecclesiastical courts illustrates sincere efforts by judges and their delegates to faithfully execute their offices in accordance with royal directives for a fair, direct, and “upstanding” or honorable administration of justice (*recta administración de justicia*) that conformed to procedural law (*religión del juramento*). The *arbitrio judicial* reasoning method lay at the heart of judicial practice – a principled search for a “good and equitable” resolution to criminal matters, informed by training, experience, and appeals to relevant authoritative texts.

For the criminal categories covered by this project, and within both types of forums, judges analyzed the circumstances of the crime to protect the social and financial interests of young women targeted by sexual predators and also alleged assailants who were opportunistically charged with sexual violence by self-interested parties. Judges showed mercy to the *miserables* among the king’s subjects who may not have recognized the criminality of their actions for reasons of limited cognitive faculties. Judges fought for the customary and by some accounts divine rights of perpetrators of violent crime to receive protective asylum in Mexico City’s churches, so that they would not hastily or arbitrarily suffer irreparable harm in a heated desire for retribution. Throughout, these decisions were rendered through a careful parsing of positive royal and canon law, the authoritative reasoning traditions of natural law scholars, and Scripture.

For the types of crimes surveyed in this project, and during the late-colonial period, “equitability” in the high courts also came to mean moderation with sentences. Royal directives that punishments include both retributive suffering (*pena de pecho*) and didactic examples for others (*escarmiento y ejemplo para los vecindarios*) were followed, but judges in both forums reframed the terms, moving away from uncompromising capital punishment sentences and liquidation of entire estates, which were used in the recent past and still mandated by royal law, in favor of lighter and arguably more productive and rehabilitative sentences.

Within the archdiocesan *provisorato*, *escarmiento* took the form of public acts of admonishment and contrition, which included visible and utilitarian public works, such as building hospitals and churches; enforcement of exile; and exposure of convicts as sinners before their peers in local congregations during the Mass. These acts provided a necessary doctrinal lesson and were meant to heal the ruptures within communities caused by crime. Through sanctions like “healthful spiritual punishment” (*pena espiritual saludable*), guided by a pastor, which included regular observance of confession, communion, and devotional prayer, *provisores* preferred that convicts experience moral anguish (*confusión*) rather than the purely physical suffering suggested

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<sup>4</sup> This perspective permeates many of the documents reviewed for this study, especially in the last chapter, and was also evident in late-colonial records utilized in Nancy Farriss’ more wide-ranging study of church-state relations in the late-colonial period. Farriss advances the perspective that Bourbon alterations to the jurisdictions of the ecclesiastical courts “were justified, crown officials argued, because of negligence and inefficiency on the part of church superiors. Presented with the evidence of a notable breakdown in ecclesiastical discipline during this period, the government became convinced that the preservation of ecclesiastical immunity was incompatible with the Crown’s responsibility to protect public order and to ensure that equal standards of justice were applied to all royal subjects.” Farriss, *Crown and Clergy in Colonial Mexico*, 11.

by the legal phrase *pena de pecho*. By attending to the moral deficiencies of convicts through reconciliation with God and the Church's teachings, ecclesiastical magistrates reflected the governing philosophies of the regalist archbishops Francisco Antonio de Lorenzana (1768-1771) and Alonso Núñez de Haro y Peralta (1772-1800), who emphasized moderation in punishment through instruments of benevolence and charity, not fear and judgment.<sup>5</sup>

Within the civil setting, moderation in sentencing meant a general move towards corporal punishment and labor service in Spain's maritime presidios, even in cases where royal law demanded a capital sentence. It could be argued that presidio labor was a *de facto* capital sentence due to the length of terms and onerous conditions convicts experienced, but that does not diminish the finding that within hundreds of cases examined for this study of crimes that the law highlighted as especially grievous -- violent assault, premeditated homicide, ravishment of virgins -- and for which royal law ordered a capital sentence, only one resulted in death, and this was for violent murder. Additionally, this lone case fit within a rare exchange of combative correspondence between high court officials, for which the actual details of the crime were secondary to attempts by the *Real sala del crimen* to exercise new powers and judicial authority in matters of church privilege. More substantially, within a centralized royal institution like the mint, that reflected the modernizing spirit of Bourbon reform, and in which administrators had a fresh and firm mandate to render capital sentences for theft, the first superintendent of the mint moderated sentences according to select circumstances like serial theft, evidence of intent, and quantity of confiscated silver, and never utilized the required capital sentence, instead applying corporal punishment, jail, fining, and exile to fulfill the requirements of *pena de pecho* and *escarmiento*.

Taken together, the five chapters in this study suggest we interpret the criminal justice system in late-colonial Mexico with greater attention to the relationships between civil and ecclesiastical justice, and with greater attention to judicial practice and the law and legal principles, together. The civil and ecclesiastical high courts were functional and productive institutions, retained diplomatic collaborative relationships with one another, and case proceedings primarily reflect adherence to due process at all levels. This did not become the sterile and secularized "rule of law" suggested by Bourbon court advisers and modern court practices, and neither did it become corrupt, arbitrary, and abusive. In Mexico City's high courts, justice was more art than application, more reasonably "arbitrary" than erratic or automatic, and in rhetoric and due process all courts acknowledged and incorporated into their rulings the divine authority of Scripture.

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<sup>5</sup> William B. Taylor, *Magistrates of the Sacred: Priest and Parishioners in Eighteenth Century Mexico* (Stanford, CA: Stanford University Press, 1996), 161-162.

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- AHN            Archivo Histórico de la Nación, Madrid: Ramo Consultas
- BHLL          Boalt Hall Law Library, U.C. Berkeley, Robbins Collection
- BN             Biblioteca Nacional, Universidad Autónoma de México
- TBL            The Bancroft Library, U.C. Berkeley, Latinoamericana Collection
- MSCL          Mandeville Special Libraries Collection, U.C. San Diego

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