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'Ghost of the Empire': Church, Law, and the Public Sphere, 1350-1650



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# ‘Ghost of the Empire’: Church, Law, and the Public Sphere, 1350-1650

by

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Committee in Charge:

Professor Daniel Lee, Chair
Professor Kinch Hoekstra
Professor Daniela Cammack

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Abstract

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This dissertation examines how lawyers wrote about the Church as a legal and political actor in their commentaries on the Spanish *Siete Partidas,* the feudal law, canon law, Roman civil law, and city statutes. I show that lawyers strategically rejected the vocabulary of ‘statehood’ and ‘sovereignty’ for the Church, but equally allowed it to claim many of the rights and powers of ‘states’ or ‘sovereigns’. The project argues that the Church occupied a middle political space between temporal and ecclesiastical authorities, in which they could take advantage of their influence and exercise power and jurisdiction without the responsibilities of temporal sovereignty. However, this project also argues that the current frameworks for analyzing this peculiar role of the Church—one that approaches the Church from the standpoint of the State and the secular—is insufficient. While acting, administrating, litigating, and even governing, the Church (and jurists) created models for arguments and institutions which would be adapted, adopted, and implemented by other corporate bodies, including the “Modern State”. It was the Church itself which often developed the bureaucratic machinery which would be adopted and copied by late renaissance and early modern states. There is, in other words, a latent medievalism within Early Modern thought and the development of democracy: ghosts abound. Only by returning to the Church and its legal self-understanding of its actions can we hope to understand both medieval and modern politics.

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**Acknowledgements:**

If you are reading the acknowledgements to this dissertation, you likely know that what follows will be an examination in large part of legal manuscripts—centuries old texts, preserved now in digital archives or rare book collections. These dusty (digital) tomes, printed or handwritten, have been my home these past six years, and will continue to be hereafter.

If you joined me in the archive to open any of these books, you might find various sets of preambulatory remarks by the various authors, editors, and publishers of manuscripts; some even include poems and acrostics, dedicated to the author, the work, and the discipline. In others, you might find long tables of individuals cited within the book, family trees, or trees of teachers with their various generations of students. The bittersweet reality of historical scholarship is that in many cases, the significance behind these names is lost to most of the world.

Every scholar's hope is that they contribute something meaningful to their field, even if only in the footnotes of our colleagues and peers. Whatever my contribution might be, if I should have one at all, is wholly attributable to those who have supported me. Let these brief pages—albeit without poetry or diagrams—preserve my acknowledgements of a fraction of the debts that I owe. To all those who are listed here, and to those that are not, please know that this is a true debt; insofar as all debts are bilateral relationships, these acknowledgements are just as much for my own accountability to be better, love better, and say thank you more frequently than I do.

The Honors College at the University of Houston, and the University of California, Berkeley have been wonderful communities of undergraduates and faculty to learn how to read, write, and engage in scholarly work. I owe my intellectual path to the leadership of Dr. Renu Khator, alongside Dr. Ted Estess and Dr. Bill Monroe of the Honors College at UH. Furthermore, without the language training of Dr. Jonathan Zecher, Dr. Jing Zhang, and Dr. Scott Weiss, I wouldn't have the confidence or skill to do any of the primary source work I do today. Institutionally, I also wouldn't have completed this dissertation without the guidance and support of Erin Blanton, the Department of Political Science, and the research fellowships provided by the Graduate Division.

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I also must acknowledge the debt I owe to my friends and peers. Cory and Jacob, stalwarts and to whose friendship I aspire to be worthy of, thank you. To Caro, thank you for your belief in me. Nathan Pippinger, Rosie Wagner, Jaeyoon Park, Sam Stevens and Brian Judge, your leadership and example set a mark for me to fall short of; Sam, you especially extended a hand when I needed it most and I couldn't have asked for more—thank you. Shterna Friedman, your enthusiasm, curiosity, and brightness continues to inspire me. Samuel and Kristin, you have been model peers and model officemates. The Graduate Division's Summer Dissertation Writing Grant provided not only the chance to finish up this dissertation, but the chance to meet and learn from incredible scholars in other disciplines; it has been an absolute pleasure working alongside Rusana Cieply, Jesus Gutierrez, Michael J. Meyers II, and Joohyun Park—thank you all. Aaron, Anna, Eero, Gio, Alex, and Bob, you are all wonderful humans and scholars, and have contributed meaningfully to this work; I have learned so much from you and look forward to continuing to. Douglas, your friendship came at a deeply important time, and I will always be grateful for it. Special thanks go to Carol and Antonia, whose companionship and warm discussions always made me more excited to go back to work, or not to work at all. Both were immensely valuable, and helped me adopt fresh eyes. And lastly, to Thomas and to Yi-Chen—I didn't deserve your support and your friendship, but you gave it.

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My dogs, Percy and Byron, not only rescued me but taught me love and patience and on multiple occasions improved my work by giving me cause for contemplative walks. On other occasions, they simply deleted the work themselves—no doubt worthy criticism and equally productive. And Chloé—some debts are too great to put into words. Many of the words that follow, in their inspiration, form, or content, owe themselves to you, your encouragement, and your criticism. To my mom, Kimberly, and sisters, Jasmine and Olivia, I love you. And for my dad, Mark: this is for you. I love you.

Joshua

*Figure 1: "The Delivery of the Keys", by Lester Smith at Eastern State Penitentiary. Taken by the author, 2023.*

## Introduction: Ghosts—Myths and Myth-Breaking in the History of Political Thought

Eastern State Penitentiary in Philadelphia is one of America's oldest and most famous carceral institutions. In 1955, the Catholic Chaplain asked an inmate named Lester Smith to paint the chaplain's office with a series of murals depicting famous scenes from biblical and ecclesiastical history. Lester signed each painting as "Paul Martin" in homage to his two favorite saints. After the penitentiary closed in 1970 the Chaplain's office was vulnerable to the elements; the murals fell apart and Lester Smith's work was largely forgotten until Eastern State re-opened as a museum for the history and reform of American incarceration. Even then, official conservation efforts on the murals weren't undertaken until 2014.

The image above is the center of one of those recovered but patchy paintings—the details are largely missing except for the heart of the scene: the hand of Christ, conferring the keys to the hand of Peter. This was the origin of ecclesiastical authority and the creation of the Church: 'You are Peter, and on this rock, I will build my church; I will give to you the keys of the kingdom of heaven, such that whatever you bind on earth will be bound in heaven, and whatever you loose on earth will be loosed in heaven.' Lester Smith was one in a long line of artists, theorists, sovereigns, and popes who were captivated by this moment from Matthew 16. Pietro Perugino's version (c. 1481-1482) is affixed to the wall of the Sistine Chapel in Vatican City, drawing a different kind of a differently reverent tourist.

I was struck by this conservation effort because it captures what I take to be the largest obstacles to understanding the role of the Church in the history of political thought. Too often we focus on a single framework—two keys, two kingdoms, two swords, two *things,* roughly analogous to the familiar problem of the relationship between the Church and the State. This often isn't our fault; an overwhelming amount of writing which comes down to us deals with this problem of spiritual and temporal concerns and the conflicts between ecclesiastical and secular authority. Pope Gelasius's famous letter to Emperor Anastasius (494 C.E) has helped set this structure: 'There are two powers by which this world is chiefly ruled, namely, the sacred authority of priests and the royal power'.[1] This conveniently aligns with a familiar division between the City of God and the City of Man as articulated by St. Augustine.[2] Political history in the West was, perhaps, a series of unsuccessful consummations of this framework, including Charlemagne's efforts to create anew a Holy Roman Empire. In the 14th century, jurists like Bartolus of Sassoferrato and Lucas de Penna invoked seemingly dueling notions of *temporalia* and *spiritualia* (temporal and spiritual things), and Panormitanus even wrote of a 'temporal republic' and a 'spiritual republic'.[3] This is not to mention that the conception of "Church" and "State" are a deeply familiar dichotomy in Anglo-American political, legal, and cultural thought. We have therefore reconstructed much of political theological thought, and medieval political thought, along the lines of this framework; we have treated it as valuable, and placed it center stage in our conceptual histories, and in turn, at the heart of our understanding of the development of the state, of liberalism, and of modernity.

Placing this dual framework and its related assumptions at the center of the image has occluded more than it has revealed about the history of concepts closest to constitutionalism and democracy precisely because of an internal desire of Early Modern and Modern theorists to distance themselves from it. There is more to the mural, if only we can find the right strategies for conservation and reconstruction. It is not sufficient that we try to tell the story differently, but rather that we find a different story to tell. In particular, this story will recover the roles of unlikely individuals, in unlikely moments, from unlikely places, from canon law to American colonial statutes, and from Vatican City to Philadelphia.

This dissertation proposes such an approach to get the Church right—or more accurately, to not get the Church wrong in the same ways as we have in applying austere frameworks and

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[1] Pope Gelasius I to Emperor Anastasius I, "Famuli vestrae pietatis" or, "Duo sunt" (494). Andreas Thiel, ed., *Epistolae Romanorum pontificum genuinae et quae ad eos scriptae sunt: a S. Hilaro usque ad Pelagium II.*, vol. 1 (Braunsberg: E. Peter, 1867), pp. 349-358.

[2] St. Augustine, *City of God.* Michael Edward Moore writes that Augustine's "Two Cities were understood above all as the unearthly, not-yet-realized, spiritual entities whose eschatological consummation lies in the future." Moore, "The Frankish Church and Missionary War in Central Europe", in *Between Sword and Prayer,* pp. 46-87.

[3] The Bartolus and Lucas de Penna dichotomy forms the framework for Chapter 1 below. For Panormitanus' two republics, see Panormitanus [Nicholas Tedeschi] *Consilia,* Vol. I, Cons. 3 and Chapter 5 below.

expectations about ecclesiastical authority. If, instead, we use legal texts and commentaries to examine the mechanics of the Church's rights and privileges we will find a series of familiar controversies in unfamiliar places. Entangled in the debates about why the Church should and should not be able to exercise temporal power abstractly is a body of legal cases and examples that were not only known to theorists of high political theory and theology, but also shaped how the Church was shaping the lives of individuals, the boundaries of the community, the rhythm of political discourse, and the path of constitutionalism. Would we be surprised about the ways in which the Church was handling and shaping the building blocks of Early Modern constitutionalism? Why would we be surprised? How would such a role of the Church change our narratives about, and theories of, contemporary ideas?

The authors confronting the sphere of the Church's authority, power, and jurisdiction were largely not theologians, popes and kings. They were lawyers, struggling to find vocabularies, modes of reasoning, and new conceptual categories to explain the legal capacities of the Church. To do so, they turned to the Roman laws of citizenship, of the treasury, of sacred property, and of punishment. Where the Roman law was too Roman or too 'temporal' they invented parallels: this, then, is how the canonists and civilians alike used the Roman law of treason to create *divine* treason—but with *divine treason* came all of the same rights and trappings of punishing traitors, divine or not. It is striking that most of the jurists involved in this history did not pause to reflect at length at the strange integration of the Church in the public world around them; however, it shouldn't be. Like Josiah Ober once noted about democracy in Ancient Greece, the criticisms stand tall over the historical record because of what once was normal and unquestioned. Some jurists involved in this history did pause; we will find them in the chapters below stressing the chaos being created by blurry lines and mixed legal reasoning. These complaints, made equally by papal sovereigntists and conciliarists, Citramontanes and Ultramontanes, and later, Catholics and Protestants, formed the question which Early Modern theorists of the state attempted to settle: how to redraw the lines around the state to form a clear theory of sovereignty with clear delineations of authority. This inevitably pushed the Church from its historical residence in the public sphere to the side, neither wholly public, nor, obviously, wholly private.

Kenneth Pennington once suggested that we call these jurists "political theorists".[4] For many of the sophisticated thinkers in the pages below, I would agree. At the very least, we cannot deny the presence here of political thought, or at minimum, relics of political thinking reflected in the vocabularies and cases of the medieval jurists. And, as the dissertation will show, we cannot deny the repeated process by which the institutions and tools referenced and developed by jurists were adopted, borrowed, and sometimes banished by the Early Modern state.

## THE ARGUMENT

This dissertation is titled "'Ghost of the Empire': Church, Law, and Public Sphere, 1300-1650". French historian Gabriel le Bras famously wrote that the Church 'remains the truest heir to the empire and the law of Rome'.[5] This was little more than Thomas Hobbes's claim from

[4] Pennington, *The Prince and the Law,* p. 2.

[5] Le Bras, Gabriel. "Le droit romain au service de la domination pontificale." *Revue Historique de Droit Français et Étranger (1922-)*, vol. 26, 1949, pp. 377–98. "L'église romaine demeure la plus véritable héritière de l'empire et du droit de Rome."

*Leviathan* in reverse: that the Church was the "Ghost of the Holy Roman Empire".[6] That the Church was the most important, powerful, and influential medieval institution will be obvious to any reader. The methodological and theoretical difficulty is that there are two persistent myths about the Church that still hold most accounts of medieval thought captive. The first myth is that its power and influence looks as we expect it to—the Church is conceptualized as a monolithic, strictly hierarchical, unified, and absolute authority. From this view, the Church is a state-like entity, and the Pope is a political figure to be analyzed as dueling with kings and states. From this view, bishops, priests, and even individuals themselves derive their meaning and agency only inasmuch as they serve a role in the system and body of the Church. The second myth is that our post-Reformation and post-secularization view of the Church can be theoretically or historically meaningful; studies of the pre-Reformation Church or pre-Reformation politics still attempt to disentangle or identify 'Church' and 'State' or 'secular' and 'religious' concepts and institutions. From this view, 'Church' and 'State' were intertwined, but theoretically (to us) separable.

Focusing on the Church's legal rights and claims allows me to break through both myths. Methodologically, my historical arguments are limited to the vocabulary and argumentation of jurists. Their language is at best an incomplete and imperfect mirror for any real structure and action of the Church, social conditions, or the actual practice of law. However, they do record extensive snapshots of ideas and arguments which we can use to reconstruct change over time, especially because they were fanatical about precise citations. Jurists were furthermore actively transforming medieval Europe, serving as ambassadors and councilors to rulers and cities, teaching in universities, serving as judges, inquisitors, and even colonial administrators. In both theory and practice, jurists exerted influence on the institutions of the Church and the *civitas*. Anywhere that adopted Roman civil and canon legal concepts, terms, and institutions—from Early Modern states and theorists to contemporary law schools in South America and South Africa which still assign Roman Law as a part of standard legal training—bears the imprint of the medieval jurist. To the extent that the law was used at every stratum of medieval society, including countless examples in my own research where named individuals break into *consilia* and court registers, I model my work on contemporary historians whose projects extend histories of subaltern communities and the ideas which shaped their political experiences. The rights and claims I am most interested in are those which are close to the rhythms and institutions which structured the daily life of medieval individuals and often include material expressions—the baptismal font, the ringing of the bells for assembly, and the physical walls of the city.

Because of the ubiquity of law and influence of the jurists, I am not limited to Popes and Kings, or to Rome—through legal commentaries, *consilia* (solicited legal opinions or briefs on real cases), and court registers, I can examine how the universal *and* local church could act locally within the medieval city. By tracing concepts and arguments across hundreds of juridical texts over centuries, I can also reconstruct trends and track change over time, across borders, and even across legal systems. This comparative vantage point on the history of medieval legal thought provides a fresh and interdisciplinary perspective on familiar concepts. By recovering and synthesizing previously unrecognized legal arguments, I show that lawyers strategically rejected the vocabulary of 'statehood' and 'sovereignty' for the Church, but equally allowed it to claim many of the rights and powers of 'states' or 'sovereigns'. I argue that the Church occupied a middle political space between temporal and ecclesiastical authorities, in which they could take advantage of exercising power and jurisdiction without the responsibilities of temporal sovereignty. While

[6] The 'ghost' metaphor is pervasive, but operates differently in Miller, Joshua. "The Ghostly Body Politic: The Federalist Papers and Popular Sovereignty." *Political Theory*, vol. 16, no. 1, 1988, pp. 99–119.

acting, administrating, litigating, and even governing, the Church (and jurists) created models for arguments and institutions which could be adapted, adopted, and implemented by other corporate bodies. I argue that this influence is best understood through the language of the "public sphere" and not the "state", and that the "public sphere" was not something that had to be properly *invented* in the 17th and 18th centuries, as is often claimed, but rather had to be *reclaimed* as an exclusive object of temporal authority. There is, in other words, a latent medievalism within Early Modern thought and the development of democracy: ghosts abound.

I show through a set of linked examples how the Church exercised all kinds of rights and performed all kinds of functions that jurists at the time, and Early Modern jurists, would claim only states could do. They draw the boundaries around civic membership, they perform civil asset forfeiture on Christians and non-Christians, they suspend the communities' legal ability to be a corporate body, they claim the constitutive right of territory, they also are integrated in the physical and metaphysical boundaries of the city itself because of the property status of the walls. These are rights that formerly belonged to the Roman senate, the Roman treasury, Roman provincial governors, and Roman cities.

Modern interpretations of this conceptualized space are clouded by Early Modern theorists who grew frustrated with the lack of clarity. Bodin, for example, recognized that the Church was grabbing some of the 'marks of sovereignty' out of the toolbox of sovereignty, while maintaining the regal authority of temporal rulers; for Bodin, as for Hobbes, this inappropriate blurring of lines was a problem that sovereignty solved. This dissertation shows, in part, that sovereignty did not fix the "problem", but it did pave over the tracks left by centuries of jurists wrestling with it.

Telling this story carries two sets of stakes, one about the development of Early Modern thought, and the other about the political communities and individuals themselves. First, it is easy to take the Reformation(s) and Westphalia along with various other signposts of the death of the Middle Ages as conclusive[7]; there were certainly substantive breaks in theology and politics, but not to the same degree in the law. The law has a long memory; Protestant and Catholic jurists alike wrote their treatises using its ancient vocabularies and metaphors, but also lived in cities which used its institutions, though no doubt bearing the physical scars of wars, massacres, and sectional conflicts.[8] Early Modern theorists like Bodin, Hobbes, and Locke responded to the legacies of medieval thought differently, as did Enlightenment thinkers from Cesare Beccaria to Kant and even John Adams. Medieval law, the thought of the Middle Ages broadly, and the modes of reasoning popular among medieval jurists remained a constraint on later thinkers, even as they tried to develop completely 'secular' theories of politics. My title, and the conceptual framework of the dissertation, deals with these Ghosts—the hauntings of things that are hard to kill, but doubly hard to exorcise.

The second set of stakes is about the political communities themselves. Jurists had robust theories, accounts, and expectations of political life which they communicated in unconventional places, in unconventional ways, and using unconventional methods of reasoning and argumentation. They analyzed civic membership, the origin of obligations, the origin of language, the importance and function of solidarity, and of corporate responsibility, all within the context of a Church which was integrated with public law and the public sphere. When political theory treats

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[7] Contrast for example the approaches of James Tracy and Daniel Philpott. Tracy, James D. *Europe's Reformations, 1450–1650: Doctrine, Politics, and Community*. Rowman & Littlefield Publishers, 2006. Philpott, Daniel. *Revolutions in Sovereignty: How Ideas Shaped Modern International Relations*. Princeton University Press, 2001.

[8] Take the St. Bartholomew's Day Massacre (1572) as one example, within the context of the Wars of the Reformation; daily conflicts might be less bloody, but more pervasive, as in van der Linden, "The Sound of Memory".

the Church as only bringing to the table political theology or, alternatively, a blend of sovereignty and absolutism, it passes over how the Church mediated the relationships of individuals and the transforming worlds around them. My title, and the conceptual framework of the dissertation, deals with the "public sphere" of this medieval legal world[9]; for everything that is surely distinctive and exclusive to Early Modernity about the "public sphere" in Habermas's formulation—the Italian commune did not yet have coffee shops—jurists and members of medieval and renaissance communities did have substantive institutions and frameworks for talking about public life, about dependence and interdependence, about solidarity, accountability, and citizenship. Each of these is only recoverable in the proper context of the role, rights, and space of the Church.

On the whole, the Church fundamentally changed the legal definition and legal structure of the *civitas* to fit onto the landscape of ecclesiastical politics—a landscape which changed hands but not shape after the Reformation. Baldus de Ubaldis, one of the most famous legal minds of the period, wrote that the 'empire and the whole world' depended on the Church (X.2.24.33).[10] Baldus was of course right about his own political moment. By turning to the archives of legal writings and city-statutes we find what Bodin critiqued as an "infinity of minutiae" at the periphery of "sovereignty"—in these "minutiae" we find the raw materials used by the *ecclesia* to define and defend an alternative "public sphere". By recovering and reconstructing this history, we can show how the Church functioned as a negative model that Early Modern and Modern theorists constructed ideas *against,* and a positive model that others (especially political actors themselves) borrowed ideas *from*. That is, the world continues to depend on many of the innovations led by the Church in this period, but often unwittingly so. It is only by recognizing the "Ghosts" of both the Holy Roman Empire and the Catholic Church that we can understand whether and how to reconcile their existence with modern politics.

It would be methodologically and historically disingenuous to set aside the empire entirely. However, rather than offer a 'conclusion' about the empire and the modern state, this conclusion aims at reconsidering what a Church which takes the form as it does in the dissertation means for the theory and historiography of the Early Modern public sphere in the context of rising and thriving empires. Missionaries, churches, and states imported ecclesiastical institutions into colonies and territories both for the global imperial goal of the Great Commission (Matthew 28:19-20) and the social and political order they could provide. The 'empire and the whole world' still depended on the Church, as Baldus had commented on X.2.24.33, but the Church was now splintered, and some of its roles and functions subsumed within and exclusively claimed by the state. As imperial and colonial states faced challenges to occupy, govern, police, and discipline territories on the far periphery of their physical and geographical power, they of course used some of the same strategies that the Church had developed over centuries to do the same. The Church was an ally and an enemy, a model and a source of competition. In reclaiming the contours of and

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[9] Historians, including medievalists, and classicists, are more than comfortable using the term "public sphere" in both a general and Habermasian sense. I will attempt to walk a tightrope between them and suggest that both senses are appropriate—that of a general gesture at a non-private sphere, or that of a specific kind of non-private, non-statal sphere with substantive requirements about how and where citizens engage with each other and with politics. See Novikoff, *The Medieval Culture of Disputation*; Tanner, *Medieval Elite Women and the Exercise of Power*; Melve, *Inventing the Public Sphere*; Kleinschmidt, *Public Sphere, Legitimacy and Security in Medieval and Early Modern European Tradition*.

[10] Baldus at X.2.24.33: "the status of the universal church, upon which the empire and the whole world depend" (Somnia sunt quicquid dicitur contra statum universalis ecclesie, a quo dependet imperium et totus universalis orbis.' [Lyon 1551], fol. 315r. Compare also Knipschildt, "*imperium immediate ab Ecclesia dependet*"—the Empire is directly dependent on the church.

patrol over the "public sphere" from the Church, the state and empire could not strategically or practically extract religion from public life. The same was true of the ideas, vocabularies, and institutions championed by Early Modern theorists.

## GHOST STORIES AND IMPERIAL MACHINES

In Canto X of Dante's *Paradise,* the traveler meets Thomas Aquinas, the great Dominican theologian whose *Summa Theologica* and political writings have left a deep imprint on theology, Aristotelianism, and the history of political thought. Aquinas is a card-carrying member of the "canon" and is often viewed in syllabi and scholarly work as a representative of the peaks of medieval thought. The "Angelic Doctor", though he is in the Fourth Circle of Dante's Paradise, appears almost exclusively in my footnotes below as an intentional counterbalance; Aquinas is a fountain of theological and philosophical thought, but he offers relatively little on the minutiae of civil and canon legal disputes and controversies which embroiled parts of the medieval *civitas.* Instead, my focus drifts to one of the individuals Aquinas introduces to Dante:

> Even as I speak let your eyes follow,
> making their way around the holy wreath.
> That next flame issues from the smile of Gratian,
> who served one and the other court of law
> so well that his work pleases Paradise.[11]

Gratian was a monk and compiler of the first collection of canon law, the *Decretum.* But Aquinas tells us here that Gratian had served both courts (*che l'uno e l'altro foro*)—civil and canon law.

Gratian was a part of a synthetical movement in the 12th and 13th century to collect, analyze, and gloss legal texts; those that followed then collected, analyzed and glossed these glosses. The sedimentary build-up of legal commentaries provides the primary source material for this project and the discipline of medieval legal history. Figures like Gratian and Accursius, Azo and Panormitanus, and Bartolus and Baldus, would exert influence over generations of law students and judges; in Brazil, until the 1916 Civil Code, the *opinio Bartoli* was thought to hold as a legitimate guideline if no positive law could be found on a question.[12] While medieval legal interpretation weighed the opinion of respected jurists highly, it also grew attuned to the predecessor of scholarly consensus and historical method.[13] Both enabled them to push beyond the constraints set by the late medieval and early renaissance jurists as they scrutinized roman legal principles and previous juridical methodologies and modes of reasoning. These would have to be left behind or adapted. The generations of jurists who lived after Dante, from Pierre Rebuffi to Andrea Alciatus, François Hotman, and Jean Bodin, would no doubt fill out the fourth sphere of Dante's Heaven, permitting as it were some light heresy and Protestantism.

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[11] Dante, *Paradise,* Canto X, lines 100-105. Trans. Mandelbaum: "*Quell' altro fiammeggiare esce del riso / di Grazïan, che l'uno e l'altro foro / aiutò sì che piace in paradiso*."

[12] Calasso, F. "Bartolo da Sassoferrato", in *Dizionario Biografico degli Italiani,* Vol. 6, pp. 640-669. Roma.

[13] I am currently making the former argument in a piece titled "Medieval Majoritarianism", in which I show that jurists employed the language of the *maior pars* to reference a consensus on a topic. On the latter argument, see Kelley, Donald R. *Foundations of modern historical scholarship: language, law, and history in the French Renaissance.* Columbia University Press, 1970.

These seemingly immortal jurists were writing about legally immortal objects: the Church, the people, the *civitas*, and the corporation (*universitas*). The ship of Theseus is a well-known philosophical puzzle, but the roman law at Dig. 5.1.76 had a clear solution: "For a legion is held to be the same although many of its members had been killed and others had been put in their place; a people, too, was thought to be the same today as it was a hundred years ago, although no one was alive now from that period. Likewise, if a ship had been repaired so often that no plank remained the same as the old had been, it was nevertheless considered to be the same ship."[14] This would be the site for jurists like Paulus de Castro and Baldus to write that 'the people cannot die'—*populus non moritur.*[15] Hostiensis at X.5.38.14 applied the same logic to the Roman Church, "*quae mori non potest*".[16] A *civitas* and *populus* could be placed in a state of suspension, as in the case of an interdict (Chapter 4); or, they could be temporarily displaced and their privileges lost during a period of military invasion (Chapter 5). But, upon the lifting of the interdict, or the rebuilding of the city-walls, or the restoration of privileges, a *civitas* would appear the same as it had been and always would be. Baldus's famous gloss should be amended: perhaps the *populus* could die, but it could always be resurrected.[17]

In this ideological context, the language of ghosts should now seem entirely appropriate, if not fitting. The first such ghost is the Roman Empire, from whom Gabriel le Bras wrote the Church was a true inheritor. This was partially a historical claim; historians have demonstrated the ways in which the Roman nobility shaped the spread of early Christianity, Bishoprics, and the administrative structure of the Early Church.[18] Though it might be obvious to historians of the period, it is often overlooked in political thought that the conceptual *and* physical material of Church government was a true inheritance (language that, we might notice, implies a death of a kind). Rome's influence in the material and conceptual development of Europe[19] meant that it could persist long enough for Charlemagne and Pope Leo III to draw on it to create a new empire—Holy *and* Roman.[20] This Empire is at the periphery of my project below, but it too would "die". (It is telling, though, as Rosamond McKitterick and David Hulme noted about a decade ago that in Europe, when the European Union needs a historical example of unity, they draw on the "ghost of Charlemagne".)[21]

For Hobbes, Rome's death created a ghost and 'kingdom of fairies' which had contested power in Europe for centuries:

> And if a man consider the originall of this great Ecclesiasticall Dominion, he will easily perceive, that the Papacy, is no other, than the Ghost of the deceased Romane Empire, sitting crowned upon the grave thereof: For so did the Papacy start up on a Sudden out of the Ruines of that Heathen Power. The Language also, which they use, both in the Churches, and in their Publique Acts, being Latine, which is not

[14] Dig. 5.1.76, trans. Watson, with adjustments.
[15] Baldus at Dig. 5.1.76; Paulus at Dig. 5.1.76.
[16] Hostiensis at X.5.38.14: "Romana ecclesia quae mori non potest."
[17] cf. Kantorowicz, *The Kings Two Bodies,* 295-296.
[18] Peter Brown, *Through the Eye of a Needle.*
[19] Here, I'm not claiming it was overpowering or the only influence; in fact, historians and archaeologists regularly show that Rome was *less* influential than we might imagine. But that it bore an influence at all, and in the ways I am suggesting here, is enough to ground this first ghost story.
[20] Or neither, as Voltaire would observe.
[21] McKitterick, *Charlemagne: The Formation of a European Identity* (2008); David Hulme, "Charlemagne's Ghost", *Vision* (Fall 2012).

> commonly used by any Nation now in the world, what is it but the Ghost of the Old Romane Language? ... The Ecclesiastiques are Spirituall men, and Ghostly Fathers. The Fairies are Spirits, and Ghosts. Fairies and Ghosts inhabite Darknesse, Solitudes, and Graves. The Ecclesiastiques walke in Obscurity of Doctrine, in Monasteries, Churches, and Church-yards. The Ecclesiastiques have their Cathedrall Churches; which, in what Towne soever they be erected, by vertue of Holy Water, and certain Charmes called Exorcismes, have the power to make those Townes, Cities, that is to say, Seats of Empire. The Fairies also have their enchanted Castles, and certain Gigantique Ghosts, that domineer over the Regions round about them.[22]

The holy waters, towns, cities, "Seats of Empire", and 'domineering' Ghosts will appear in the chapters below, and in a way broadly consistent with Hobbes's point.

The Papacy—the Roman Church—is the second ghost in this story. The Church was not a direct inheritor of Rome, although the Ripuarian Franks would claim that the *Ecclesia* "lives by the Roman Law".[23] Even as the Roman Law was gathering dust in Cathedral schools, Bishops and priests were working daily to expand their influence along roman roads, to roman cities, using the roman language, but also preaching using a theological language sculpted from Roman legal and administrative terms.[24] In the project below, the Papacy also appears on the periphery, as do the "Ecclesiastical Polities" which look like states to contemporary scholars and Machiavelli alike.[25]

The third ghost was also pointed out by Hobbes—Latin. Recent scholarship has shown widely the depth of influence of Roman Law on the development of European legal systems, and that the language and vocabulary of European politics was shaped by it too.[26] This is the widest reaching of the ghosts because genealogies of concepts in contemporary political theory regularly trace back to or through medieval Europe, and in western political thought, almost always through Latin. The chapters below trace elements of citizenship, credibility and testimony, property and confiscation, legal assembly and majoritarianism, borders and boundaries, and territoriality; each has a rich medieval legal history, from which each chapter excavates bundles of legal questions to examine and reflect on the position of the Church within them. Further, it is a historiographical trope that ideas die or that periods and ages close. If they do, they do so slowly and incompletely; but they, too, can be resurrected, for better or worse.

Lastly, the 'imperial machine'. Lucian of Samosata (c. 125— after 180 C.E.) wrote in his "Apology for the Dependent Scholar" that he was, in his official and public capacity in Egypt, 'playing his part in the mightiest of empires.'[27] This has been alternatively translated as Lucian's being an "active part of the great Imperial machine".[28] The Roman Empire, and especially Roman

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[22] Hobbes, *Leviathan,* Ch. 47.

[23] Celestino Trezzini, *La Legislazione Canonica di Papa S. Gelasio I (491—496)* (Locarno 1911), 6. "la Chiesa vive secondo la legge romana" (61 [58]. 1).

[24] On this last point, this was partially cultural (1st-4th century Roman-Christian life) and partially due to Jerome and Augustine. The Vulgate, and Augustine's scriptural commentaries (in addition to the *City of God,* though it was less immediately influential on late-Antique Europe), were vehicles for a written theology communicated through legal terms.

[25] Machiavelli, *Prince*, Ch. 11.

[26] Bellomo, *The Common Legal Past of Europe;* Pagden, *The Languages of Political Theory in Early Modern Europe*; Horodowich, *Language and Statecraft in Early Modern Venice*.

[27] Lucian, *Apology for the "Salaried Posts in Great Houses",* LCL 430, pp. 206-207: "δημοσίᾳ δὲ τῆς μεγίστης ἀρχῆς κοινωνοῦμεν καὶ τὸ μέρος συνδιαπράττομεν."

[28] Lucian, *Works of Lucian,* Vol. II, trans. Fowler and Fowler, Oxford 1905, p. 32.

provincial administration, was a tremendously complex endeavor, embracing genuinely sophisticated economic, bureaucratic, and colonial strategies. Before the advent of Christianity, Roman religion was a cog in this 'machine'; after the official adoption of Christianity in the early 4th century, the easiest way to assimilate the Christian religion into Imperial administration was to translate the functions of Roman religion over to the Church. That is, the Church not only looked sufficiently like Roman religion, but also looked sufficiently like Roman *public* administration, and sufficiently like the Roman aristocracy broadly.[29] The alternate translation of the "machinery" of empire (even if less textually accurate) invokes a helpful metaphor for imagining this literal *translation* of the empire which preceded the *translatio* which drew the obsession of jurists and medieval theorists, including Marsilius of Padua.[30]

If, as Baldus, Hobbes, and le Bras thought, the Church inherited anything from the Roman Empire and the Holy Roman Empire, and if, as I and others have argued, the Early Modern "State" inherited anything from the Church, then we must come face to face with a Church that was at once a ghost of multiple empires, holding the ghostly forms of multiple legal systems. It was a Church that had erected through its public actions "Seats of Empire" in "Townes" across Europe; towns and cities, whose statutes, universities, roads, and walls would not be equally malleable to grand "Reform". It was a Church that had, perhaps, left an indelible mark on the political, legal, and physical *civitas.*

## 'QUID SIT CIVITAS'—WHAT *IS* A CITY?

To paraphrase Terence (c. 190-159 B.C.E), there are as many answers to this question as there are academic disciplines.[31] The relevant answer for this project comes from a mixture of legal, political, philosophical, and anthropological methods. Historically, certainly, there were particular kinds of communities which more frequently drew the classification of *civitas* in their own times.[32] This varied across Europe and across the periodization which precedes this project.[33]

From Antiquity, we might imagine that the *polis*, *civitas,* or *respublica* was sufficiently political; it was not enough that it was any community enclosed by walls, living in the same place and under the same protection.[34] We also might imagine that it was sufficiently legal and moral and that it was easy to define; Cicero's definition, through Augustine, would become famous:

> *Res publica,* then, is the concern (*res*) of a people (*populi*). A people, further, is not just any gathering of humans that has come together in any way at all; but it is a

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[29] Peter Brown, *Through the Eye of the Needle;* Meeks, *The First Urban Christians: The Social World of the Apostle Paul.*

[30] Marsiglio of Padua, *De translatione Imperii*.

[31] *"Quot homines tot sententiae*" was not only famous in antiquity but referenced often in medieval legal texts to partially explain away conflict between respectable thinkers.

[32] Sébastien Rossignol, *Aux origines de l'identité urbaine en Europe centrale et nordique: traditions culturelles, formes d'habitat et différenciation sociale (viiie–xiie siècles)* (Turnhout: Brepols, 2013).

[33] Joseph Rykwert*, The Idea of a Town: The Anthropology of Urban Form in Rome, Italy, and the Ancient World* (1968); Jean-Charles Picard*, "*Espace urbain et sépultures épiscopales à Auxerre" *Revue d'histoire de l'Église de France* 62.168 (1976), esp p. 220: 'The Roman archetype imposed a mystical geography upon the urban landscape.'; Sabine Panzram, ed. *The Power of Cities: The Iberian Peninsula from Late Antiquity to the Early Modern Period* (Brill 2019).

[34] Aristotle, *Politics,* 1276a 25-28. Jurists did not embrace the same disregard for the signifance of material borders as Aristotle. Guido Papae wrote, 'A city is that which is surrounded by walls, and that which many people call an *urbs*'.

> gathering of a multitude formed into a partnership by a common agreement on law (*iuris consensu*) and a sharing of benefits (*utilitatis communione*).[35]

A 'multitude' of people without justice was little better than a 'gang of thieves' or pirates, Augustine would add.[36] For jurists who were obsessed with providing definitions, exceptions, and clarifications, the question "Quid sit civitas", or "Civitas, quid sit" was haunting; it escaped a firm answer, and in every century of this project we find jurists complaining that no sufficient definition had been offered before.

I am interested in the kinds of considerations that went into the definition of the *civitas* after Augustine and Isidore. For example, the first part of Bartolomeo Cipolla's (1420-1475) summary reads:

> Seventh, I'm looking for what a *civitas* is. See the *Decretum,* Part 1, Distinctio 80, where the author says according to Isidore (Etymology, Ch. XV), that a city is a multitude of people united by the bond of society, called *civitas* from "cives", that is, the inhabitants of the city. It consists of and contains many lives. While an *urbs* might be the fortifications (*moenia*) itself, a *civitas* is not called such from its stones (*saxa*) but from its inhabitants. [See also Bartolus, Jacob de Bellus, Albericus de Rosate, and the canonists at *Liber Sextus* c. si civitas]. And in effect, a *civitas* is surrounded by walls just like an *urbs* is, and so at this law, and above, and below, they can stand for the same thing. Next, I ask whether by the name of a *civitas* something also comes by "territory". But regarding this, I must ask whether a city has ancient walls or new walls, and what is contained within the ancient walls or what is within the new walls. At this point, Bartolus says we should also ask the question of how people can establish *civitates* on their own, or whether they can do so without the authority of a superior. Innocent says that people *can* do it of their own accord without the authority of a superior, at *X*.1.31.03.[37]

Cipolla reflects the standard training and method of a medieval and renaissance jurist; he moves from canon law to Isidore, from Isidore to the civil law, and then oscillates between them to examine walls, territory, and lastly, authority. He continues:

> And there, Innocent himself said that we should not understand [a *civitas*] in relation to whether it has a Bishop, even though in Italy when a place has a Bishop it is a *civitas*; and the gloss at *Dig.* 1.1.5, stresses that this is the law of nations and so [a Bishopric] cannot be necessary to obtain the name [of *civitas*]. Further, the gloss at *Dig.* 3.4.1 asks whether it is necessary for a *civitas* to have a Bishop, and whether a city can exist without a Bishop.[38]

This is a radically different conception of the definition of a *civitas,* even though Cipolla denies it. Medieval jurists cited a tradition going back at least through Odofredus (d. 1265), in which some

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[35] Trans. Asmis, Elizabeth. "The State as Partnership: Cicero's definition of 'Res Publica' in his work 'On the State'." History of Political Thought 25, no. 4 (2004): 569–98, p. 575

[36] Augustine, *City of God,* IV.

[37] Bartolomeo Cipolla, *Titulum de Verborum et Significatione,* [Lyon 1551], Lex. II, ns. 16-17, pp. 80-81.

[38] Bartolomeo Cipolla, *Titulum de Verborum et Significatione,* [Lyon 1551], Lex. II, ns. 17-18, p. 81.

jurists imagined that it was the relationship of a political community to ecclesiastical administration which made it a *civitas.*[39] The only cities which could properly be called *civitates* were those that possessed an episcopal throne; and, a *civitas* could not be a *civitas* if it was somehow outside of episcopal jurisdiction. This was one layer beyond Cicero's *respublica*—a special kind of bond of justice, secured by the proper kind of authority to oversee it. It was no coincidence that Bishoprics or Episcopal Sees were located at politically and militarily strategic locations across Europe as the Church grew in influence in Late Antiquity; these locations were overlaid on the old Imperial map of Rome.

I do not mean to make the obvious point that Europe was, at various points, in various different ways, and to various different extents, becoming Christianized. Rather, I'm observing that the necessary reorganization of Western European legal and political thought to adapt to ecclesiastical administration created a composite: Aristotle and Cicero blended with roman administration, Isidore, the canon law, and the civil law. Nobody presents a clearer view of this composite than Bartolus of Sassoferrato. Bartolus' *Tractatus de Regimine Civitatis* was largely a juridical reworking of concepts from Giles of Rome's and Thomas Aquinas' Aristotelian analyses of political communities. While Bartolus adopted the theoretical claim that different forms of government were appropriate for different sizes of *civitates—maxima, magna,* and *parva*—he broke from Giles of Rome in describing what distinguished these 'extra-large, large, and small' communities from each other. For Bartolus (and the jurists he cited) it was *imperium* and jurisdiction. *Maximae* cities had *imperium* and had other communities subject to them and their courts. *Magnae* cities still had *merum imperium* but did not have other communities subject to them. *Parvae* cities did not have *merum imperium* but did have jurisdiction granted to the 'defenders' of the city for administration of public life. The greatest *civitas,* Bartolus wrote, was often called a *Civitas Metropolitana,* because that city was a unity of citizens, a patriarchal or archiepiscopal seat that had several bishops subordinate to it, having *merum imperium.*[40]

This then is the challenge of the *civitas* and the *ecclesia*—each could be universal or local, but each was intertwined with the other in a series of legal, feudal, and social (largely marital) entanglements. In large episcopal cities, the urban landscape was marked by two palaces: the episcopal palace and the royal palace, often but not always constructed on opposite sides of the city and each close to the walls on their side.[41] How then can we describe the community which surrounds them both, let alone the square at which they meet in the middle, or where they overlap throughout? Why shouldn't it be possible to identify them along familiar poles of 'Church' and 'State', 'temporal' and 'spiritual', 'religious' and 'secular', or along competing visions of sovereignty?

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[39] Compare Jacob Novellus' definition from the mid-sixteenth century: 'observe that cities are called 'cities' (*civitates*) when they have Bishops, according to Odofredus. There, he says that in Christian lands (*terris Christianis*) they are properly called a *civitas* when they have a Bishop. In order to distinguish it from a town (*villa*), a place is called a *civitas* when it is enclosed and surrounded by walls. Among the Gauls, a *civitas* is called a 'villa' according to local usage, according to Jason de Mayno. Municipalities (*municipia*) on the other hand, are called 'large lands' when they have a Bishop, and the term *municeps* relates to the participation in burdens (*munera*)." *De Iure Prothomiseos*, pp. 85-92.

[40] Bartolus, *De Regimine Civitatis.* Cited by Jacob Novellus, *De Iure Prothomiseos,* ns. 119-120 and others.

[41] See Areli Marina, *The Italian Piazza Transformed: Parma in the Communal Age,* Penn State University Press, 2012. And see below, Chapter 5.

## CHURCH AND STATE, CHURCH AND SOVEREIGNTY

The Church and State distinction is an old theoretical and historiographical model and recent generations of historians have implicitly and explicitly moved away from it. From Gelasius I to medieval jurists and theorists of ecclesiastical authority, authors employed vocabularies which seem easily separable into familiar dichotomies. Gelasius wrote that there were "two things" which governed the world, *"auctoritas sacra*" and "*regalis potestas*"—'sacred authority' and 'royal power'. Popes and Kings fought over the authority to appoint Bishops in Christian kingdoms. Two systems of laws governed two systems of courts—canon and civil, or literally ecclesiastical and secular.[42] There were two umbrellas of concerns, *spiritualia* and *temporalia*. There were also Christian Republics and, one would imagine, "Non-Christian" Republics. That these vocabularies and themes existed in medieval thought does not mean that they have been properly interpreted in previous scholarship.[43]

Andrew Willard Jones, in the context of thirteenth-century France, recently wrote that this was not "a world of the secular and the religious vying for position and power, but a world in which the material and the spiritual were totally dependent on each other." He continued:

> I hope to add my voice to the growing chorus of scholars from diverse disciplines who are challenging notions of the "religious" and the "secular" wherever they appear. I contend that the Middle Ages were neither religious nor secular because the religious and the secular were two features of a single construction: the modern, Western social architecture of "Church" and "State, "private" and "public", "individual" and "market" and so on. The societies of the Middle Ages had a different architecture based on different assumptions and different concepts, ultimately on a different vision of the cosmos. [...] Medieval government provides an opportunity for us to see the lines of this architecture.[44]

My argument in this project follows Jones's.[45] In particular, medieval law and legal systems underscore not only the lines of this architecture, but the inadequacy of social scientific and

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[42] See for example Thomas Sanchez, Lib. II, Cap IV, Dub. LV pp. 386-390: 'Indeed, this was most suitable for the Christian republic, not only in spiritual matters, which had already been established by divine law, but also in temporal matters, because the Supreme Pontiff has the authority to enact laws that are conducive to the government and administration of the Church. It is highly beneficial that the ministers of the Church do not involve themselves in secular affairs, as stated in 2 Timothy 2, since they cannot conveniently devote themselves to divine ministry if they can be dragged into court by secular judges or summoned before them. Secondly, even though there is no consensus among scholars as to whether this immunity, both regarding persons and temporal matters, is based on divine law (for many testify that it is of divine law) or on human law, they all agree that it is highly consistent with divine law and derives its origin from it. Also, just as it is consistent with reason for a Prince to exempt nobles from certain taxes as a reward and honor for their nobility, it is likewise in accordance with reason for the Pontiff, by virtue of his dignity and honor as a member of the Church, to exempt clerics from taxes.'

[43] This point is obvious to specialists, especially historians, who are always stressing the entanglement, and often do so carefully. For example, medieval cities often had very intense relationships to patron saints and local cults for those saints, with relics special to the city. The relationship of individuals there to those saints and relics is often termed "civil-religious". Martyr cults spread early in the 5th and 6th century in Gaul. See Bührer-Tierry, "Bishops as City Defenders".

[44] Andrew Willard Jones, *Before Church and State: A Study of Social Order in the Sacramental Kingdom of St. Louis IX* (2017).

[45] See also Robert von Friedeburg, *Lutheran Ecclesiastical Culture, 1550-1675.* Brill 2008, esp. pp. 361-410.

political theoretical models for understanding the history of medieval and Renaissance thought—and even more broadly, the definition and function of the "Church" in European history.

Even as scholars have embraced and confronted the role of the Church and theology in the development of ideas and institutions, they have used a "religion" and "secular" model to rightly observe moments and periods of intellectual exchange. We have long known that sovereignty has theological origins.[46] Lauren Benton has shown the importance of the Church amidst the legal pluralism of colonial societies, just as Martti Koskenniemi has stressed that international law (*ius gentium*) has theological underpinnings.[47] Recently, Eric Nelson has suggested that liberalism itself is comprehensible only within the theological debate between Pelagianism and Anti-Pelagianism—the theology of free will and agency.[48] Political scientists have rightly turned to the Church itself as a potential early model of state formation, with the Church as a "rival for sovereignty".[49] Critical theory and recent scholarship in legal pluralism have further dismantled common narratives about the history of Renaissance and Early Modern political thought, often gesturing at the role of the Church.[50] The Church has also widely been recognized as providing the materials for the birth of public law itself. [51]

The dominant interpretive thread of these literatures is secularization: politics takes ideas and institutions from theology and the Church and strips them of their sacred context even if they cannot completely strip their sacred content.[52] If these genealogies trace back to or through the Catholic Church, then properly understanding the Church as it acted and understood itself will be crucial to the integrity of those genealogies. Furthermore, insofar as Renaissance and Early Modern constitutional thought sprung out of a context in which the Church was a political and moral authority, and to the extent that Enlightenment authors were singularly focused on developing alternative justifications and mechanisms for exercising authority, getting the Church *right* will be essential to the correct understanding not only of the development of Early Modern ideas, but the constraints and possibilities latent within 21st century applications of those ideas. Brian Tierney and Peter Linehan once introduced Walter Ullmann as inheriting an intellectual tradition from F.W. Maitland and John Figgis. Maitland had said that "In the Middle Ages the church was a state," and Figgis had gone further and said, "In the Middle Ages the church was *the* state."[53] Ullmann's intellectual project was, according to Tierney and Linehan, organized around one central idea: "the study of the medieval Church perceived as an organization of government".[54] As an "organization of government", it had a hefty reputation; within liberal thought, from John Adams to John Stuart Mill, the Church was dually a source of barbarism and tyranny as it was also "the authorized champion of intelligence" and "the great improver and civilizer of Europe".[55]

Getting the Church right as an "organization of government" and recovering its legal capacities without relying on a "Church-State" conceptual framework is challenging, but it also

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[46] Schmitt, *Political Theology.*
[47] Benton, *Law and colonial cultures*; Koskenniemi, *The Gentle Civilizer of Nations.*
[48] Nelson, *The Theology of Liberalism*.
[49] Grzymala-Busse, "Beyond war and contracts"; and Grzymala-Busse, *Sacred Foundations.*
[50] Horkheimer, *Critical Theory: Selected Essays*; Brunkhorst, *Critical Theory of Legal Revolutions*; Stanbury and Raguin, *Women's Space: Patronage, Place and Gender in the Medieval Church.*
[51] Loughlin, *Foundations of Public Law.*
[52] See Böckenförde, *State, Society and Liberty,* 26-64; Lubbe, *Säkularisierung.*
[53] Tierney and Linehan, eds. *Authority and Power,* vii.
[54] Tierney and Linehan, eds. *Authority and Power,* vii.
[55] Adams, "Dissertation on the Canon and Feudal Law"; Mill, *Dissertations,* II, 231. Compare also Koskenniemi's argument that the *ius gentium* was the "gentle civilizer of nations".

falls in line with recent scholarship in history which has been widely revising models of understanding medieval thought. Led by scholars like Susan Reynolds, they have also challenged centuries of inherited assumptions about the most apparently hierarchical elements of medieval society—feudalism included—to take a fresh look at how the community was constructed horizontally and not strictly vertically.[56] In the history of jurisprudence, sovereignty, and constitutional thought, scholars have explored how medieval society was a patchwork quilt of political communities and nested jurisdictions. The Church was an active participant in forming, living within, and changing this patchwork quilt. The 'sacred' and the 'profane', the 'temporal' and the 'spiritual', and even the 'religious' and 'secular' were genuine vocabularies and concepts for medieval jurists, though they mean different things than we might expect. The 'secular Church', for example, was the Church as it moved in the *saeculum,* or the world, in human life; the 'religious Church' was the Church as it strived to move outside of the *saeculum,* in monasteries or convents, a life above human life devoted almost exclusively to labor and prayer. The work of jurists to analyze a mixed and blended system was only about dividing the spiritual and temporal worlds above the treetops, in sweeping claims. Underneath this canopy was all of medieval political and legal life, deeply entangled.

Disentangling the political and theoretical imagination of individuals into spiritual and temporal or leaning into historical models of secularization would distort and further confuse this work, but it would also fall into a deeply ironic feature of secularization. Jurists frequently pointed out that the Emperors of Rome were originally consecrated priests and that Roman religion was once fused with the state. It was Christ who had divided the spiritual and temporal powers in the moment of His creation of the Church, such that what belonged to Caesar could be rendered to Caesar, and what belonged to God could be forever rendered to God. This fit a nascent religious community in a small colony well. Christ's division of these powers would become an inconvenience to Constantine, Charlemagne, Frederick II, and Charles V who had outgrown the Early Church and sought their own Christian Empires. The work of Early Modern theorists to develop "secular" government through and because of Enlightenment principles was, in no small respect, an imitation of Christ and the long tradition of jurists and theologians who had been equally frustrated with the blurry boundaries between earthly and heavenly politics. [57]

In the project that follows, I suggest that setting aside these frameworks allows legal and literary texts to reflect more ambiguity and richness. In Shakespeare's *Merchant of Venice,* Portia—disguised as a lawyer—argued that mercy:

> 'Tis mightiest in the mightiest; it becomes
> The throned monarch better than his crown:
> His sceptre shews the force of temporal power,
> The attribute to awe and majesty,
> Wherein doth sit the dread and fear of kings;
> But mercy is above this scepter'd sway,
> It is enthroned in the hearts of kings,
> It is an attribute to God himself;
> And earthly power doth then shew likest God's,
> When mercy seasons justice:

[56] Reynolds, *Kingdoms and Communities*; Reynolds, *Fiefs and Vassals*.
[57] cf. Nelson, *The Theology of Liberalism*.

The argument of this dissertation is that "earthly power *doth* then shew likest God's", not out of necessity, but by a historical and legal process. Likewise, God's power 'doth then shew likest ours'—God's sovereignty, power, government, and the vocabularies used to understand human relationships with the divine were expressed in legal terms and through legal metaphors. When "mercy seasons justice", is does so with a vested bystander: a Church which was the self-proclaimed "*auctrix et cultrix iustitiae*", the 'author and worshiper of justice'.[58]

## POLITICAL LITURGIES: THE PUBLIC SPHERE AND THE CHURCH

The great historian of the *Annales* school Fernand Braudel regularly used the language of "rhythms" to analyze European and Mediterranean life. The "man in his relation to the environment, a history in which all change is slow, a history of constant repetition, ever-recurring cycles"—cycles and repetitions set by the Mediterranean itself, but also the yearly rhythms of harvests, feasts, births, marriages, and deaths.[59] Braudel argued that there were three *durées*—layers or structures of historical time—and that only the third *durée* had been largely analyzed by historians to his date, through political and military histories of great men, great battles, and great empires.[60] Other historians in the *Annales* school, most notably for my work Jacques le Goff, presented new approaches of doing medieval history which recovered, most importantly, new ways to perceive the rhythms which shaped daily life. Marxist historians were broadly sympathetic because the kinds of social and economic histories offered by the *Annales* school were also more materialist. There is a clear overlap, for example, in the "rhythm" focus of E.P. Thompson's "Time, Work-Discipline, and Industrial Capitalism" (1967) and le Goff's classic, *Time, Work, and Culture in the Middle Ages* (1977), which both inform my legal and material approach to bells and time below (Chapter 4).

As a historian of legal ideas, my interest lies in the kinds of rhythms that are intelligible in and through legal texts. Some rhythms might be incidentally captured by legal texts and commentaries, like an archaeological record of social life; for such cases my project reveals, reconstructs, and presents these texts as social and cultural artifacts for other historians and scholars. Other rhythms might be produced and created by legal texts and commentaries because of the social and political role of the legal profession; in such cases, jurists were creating a "form" for conflicts, procedures for resolution, and rules to play by for public and private life.[61]

The metaphor of rhythm invokes a sense of order and disorder but also of harmony and cooperation. In an ecclesiastical context, it would simply be a "liturgy": a *form* of worship, that takes place within the context of a liturgical calendar—including the patterns of births, marriages, deaths, feast days, parades, and various sacraments which formed a part of the "ever-recurring cycle" of medieval life. Politics is no less liturgical, both in a literal sense in which "liturgies" were public offices and duties (Chapter 2), and in the sense in which there is a set of rhythms and practices, important words to recite and ways to recite them, set and governed by law and custom. For the medieval and renaissance individual, then, the liturgy of public life was a composite one—

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[58] It was also confirmed by legal authorities, as in the *Liber Feudorum,* 1.13. See also Pope Innocent VIII, Lib. 5: 'The Roman Church exists as the worshipper and promoter of justice (*cultrix et auctrix iustitiae*), peace, and the preservation of tranquility for all lands (*omium terrarum*), and so much according to the tradition of civil laws.'

[59] Fernand Braudel, *The Mediterranean and the Mediterranean World in the Age of Philip II* (New York 1972), 20.

[60] Peter Burke, *The French Historian Revolution: The Annales School, 1929-2014* (Cambridge 2015).

[61] James A. Brundage, *The Medieval Origins of the Legal Profession: Canonists, Civilians, and Courts* (Chicago 2008).

some forms set by the Church, others set by the local community not inclusive of (but nevertheless influenced by) the Church, and others still not "set" by anybody; these were customary forms evolved from practice.

In analyzing the Church's role in the creation, development, and governance of political liturgies, I use the term "public sphere" in a way that partially invokes the work of Habermas and the scholars who write about the "public sphere" since Habermas. Habermas's conception is a specific argument about historical change and development, with respect to which there *was no* public sphere before he claims it was invented. My aim is to challenge this historical argument, while engaging with the conceptual argument, specifically on the role of the *ecclesia* in "public life". To do so, I present two interpretive alternatives for my argument that allow me to use the term and remain methodologically consistent. First, my argument can be interpreted as a pre-history of the "public sphere" that is compatible with Habermas's 17th and 18th century invention account, albeit with a supplemental emphasis on the Church using new sources. Second, my argument can be interpreted as a constructive criticism of Habermas's "public sphere", in which even the discursive criteria of the "public sphere" might be found in medieval society.

Habermas was a careful thinker about history; where I meet Habermas is the specific notion that the medieval conceptions of public and private are qualitatively different than what emerges in Early Modernity.[62] However, two aspects of Habermas's historical and theoretical arguments can easily be critiqued. First, his history. Habermas makes a number of claims about medieval culture and law which he substantiates on the backs of mid-century German scholarship on feudalism; this scholarship has, in the past few decades, been updated and superseded, including a complete reconsideration of feudalism as a whole.[63] Second, the theory he derives from his history. It is true that anywhere the king can say "I am the state" is a place where the public doesn't exist outside of the King and his immediate court; however, it is also true that this example is from 1655 and Louis XIV never said it. There is a world *before* Louis that is also steeped in apocrypha, but where it is more difficult to substantiate a claim about the absence of a public. For example, Habermas claimed in part that antiquity had no notion of the public sphere as a non-private, non-familial, but also non-statal space—this wouldn't exist until Early Modernity. I do not want to treat Habermas uncharitably here, because in the narrow sense of *his* public sphere he may be correct. But scholars in other disciplines regularly use the term to describe life in antiquity, including Cliff Ando in a recent edited volume on religion in Antiquity.[64] The use of "spheres" as explanatory metaphors pre-dates Habermas, and so not every invocation of a "public sphere" is an invocation of a Habermasian "public sphere". Even so, in Cicero's *De Legibus,* for example, individuals have public religious lives and private religious lives, the one entailed by citizenship, the other entailed by the family. Granted, the model is homology—the sphere of the public and the sphere of the family differ only in size and scope and not in substance. But recent scholarship in classics has also argued that there was something like a private sphere outside of state interference. The objection, then, would be that classicists and historians—and me—in using the term, mean something different than Habermas does.

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[62] Max Weber is here too, though his account is more about entanglement of public and private and then disentanglement, and then the danger of re-entanglement. Religion makes that process harder, if not impossible.

[63] Cf. Otto Brunner and Susan Reynolds.

[64] Symes, Carol. "Out in the open, in Arras: sightlines, soundscapes, and the shaping of a medieval public sphere." *Cities, Texts and Social Networks, 400–1500*. Routledge, 2017. 279-302; Melve, Leidulf. *Inventing the public sphere: the public debate during the Investiture Contest (c. 1030-1122)*. Vol. 154. Brill, 2007; White, James. "Hungering for Maleness: Catherine of Siena and the Medieval Public Sphere." *Religious Studies and Theology* 33.2 (2014): 157-171.

I argue that I can use the term public sphere in a way largely consistent with Habermas, but also invoke something by it that 20th century theorists can recognize in these legal texts as an alternative public sphere. First, my historical argument is broadly compatible with Habermas's argument about capitalism in Italian city-states; Habermas admits that the public sphere starts in those cities, in the context of the 12th century renaissance, and indeed many of the jurists I write about within this project are from those very cities—Venice, Florence, and Perugia, to name a few. The first interpretation of my argument in this project is that the public sphere I invoke and discuss is Habermas's public sphere under construction; what I then show is that the Church was substantially involved in that construction, but that it might not fully take shape until Habermas says it did in the 17th and 18th centuries. My argument is, therefore, a detailed legal pre-history of the public sphere.

The second interpretation of my argument in this project is that my account is a constructive criticism of Habermas, in which I challenge his creation story while embracing his definition of the public sphere. An editorial footnote in Habermas's "The Public Sphere: An Encyclopedia Article" (1964) reads, "the medieval public sphere, if it even deserves this designation, is tied to the personal. The feudal lord and estates create the public sphere by means of their very presence."[65] What if we could show that there was already something substantively impersonal about the medieval public sphere in this period—an impersonality which parallels recent histories of the state and sovereignty?[66] What if we could show that civic-members in the 14th century did have a place they could come to reason together, talk about public life, organize themselves and their collective actions, respond to collective harms, and live within a rhythm of entering and exiting a space where they were alienated from and then restored to their individual identities? And, what if this place was the Church, or an extension of it? I mean this literally in some cases; in early European towns the Church was used for town meetings, markets, fairs, and social meetings (if necessary) before a hall of sufficient size was built elsewhere. This space might very well be different than the 18th century coffee-house, but I want to press on why it must be. In the context of a single *civitas*, it's not clear why the lack of a press should matter—they had town-criers, and important notices were posted on the Church doors, or communicated by word of mouth and confirmed by bells. In the case of an interdict (Chapter 4) where these means of communication and assembly could be suspended by the Church, it is not clear why the framework of a public sphere is far off at all—and indeed, why this situation might not be correctly interpreted as a kind of "deplatforming" from a discursive community that is public but clearly not the state.[67] To the extent that this sphere also involves commerce, the project below reflects commercial influence directly (Chapter 2) or indirectly (Chapter 5)—the same walls that set the boundary of the social and political community also sent a signal to merchants about the freedom of commerce within them.[68]

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[65] Habermas, Sara Lennox, and Frank Lennox,"The Public Sphere: An Encyclopedia Article". *New German Critique,* No. 3 (Autumn, 1974), pp. 49-55, 51, fn. 4.

[66] Skinner, Quentin. "A genealogy of the modern state." *Proceedings of the British Academy*. Vol. 162.

[67] This is an especially convenient historical parallel, given that it aligns with recent scholarship identifying the importance of a "digital public sphere" for theoretical analysis. Cohen, Joshua, et al. "Democracy and the digital public sphere." *Digital technology and democratic theory* (2021): pp. 23-61; Schäfer, Mike S. "Digital public sphere." *The international encyclopedia of political communication* 15 (2015): pp. 1-7

[68] Caspar Klock, *Tractatus Nomico-Politicus de Contributionibus* [Cologne 1740], "De collecta pro refectione operum publicorum imponi solita", Ch. 9, p. 195: 'Merchants, especially, tend to avoid places that are under the protection of a fortress because such places are rarely presumed to exist without tyranny (*tyrannide*).' Klock goes on to write, 'experience testifies that in such castles and fortresses, in our time, there has been brought countless evils. For with

On the whole, my argument is that there is something meaningful and politically constructive in how the space governed by the Church was inhabited and necessarily used by individuals—not Kings, Princes, or Bishops, but ordinary civic-members. Within this space, neither private, nor statal, but something in between, the ideas and institutions in the chapters below order and set the rhythm of the lives of individuals. In a Marxist sense, this might be truly *political*, in which case the Church *is* the state in a sense we need to articulate better—or, it is *social*, in which case it is civil society or the public sphere. The reason that I invoke the specific term "public sphere", then, is because I am hoping to underscore particular forms, paths, and opportunities for communication—this communicative aspect aligns not only with historical scholarship on liturgical practices, but presents new opportunities for scholars of multiple disciplines to examine the medieval church, the medieval city, and the medieval individual.[69]

## METHODOLOGY

The greatest substantive challenge to doing intellectual history in this period is that it is limited in scope; it necessarily treats not only those who can write, but those who can write in acceptable rational styles, forms, and who are almost always engaging in high questions of philosophy and theology. Traditionally, to do the political theory of this period is to study the meaning and implications of the writings of Thomas Aquinas, William of Ockham, William Durand, Al-Farabi, and others. There is an intrinsically desirable structure to this section of the canon—it establishes a convenient continuity between classical and medieval thought, drawing lines between Plato and Aristotle and their medieval readers. The next wave of political and legal theory considered great political and legal actors, including Popes (Innocent III, chief among them) and Kings, as well as significant jurists in this tradition—Bartolus and Bartolus, for instance. However, even a perfectly contextualist historical account can only touch a single author. That is, it leaves out the individual in medieval society; crucially, the ideas, vocabularies, and languages meticulously reconstructed might just as well be foreign and unintelligible to a medieval legal subject. In what follows, I use legal texts in a way inspired by recent developments in history and archival research to pay close attention to the subaltern, to those left out of legal texts, and to individuals. I do this in two respects, but with one crucial limitation. First, the limitation. I cannot get to the 'ground' in what follows—to the individual, to the subject, and especially to subjects who otherwise are absent from the history of political thought of this time. I am constrained by the very legal texts I am looking to extract this information from—legal texts written by literate, educated, and sometimes (but not always) wealthy Europeans. However, I intentionally use two aspects of these texts to counter this influence to get *closer* to the 'ground'. First, I focus on the materiality of legal questions—baptismal fonts and waters, torture, property confiscation, bells, communion, and walls. This allows me to closer approximate a meaning closer to what may have been meaningful in the daily political and social life of individuals. To do so, I also draw on scholarship from other disciplines who are better trained in cultural and social histories,

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them, as if with chains, the freedom of trade is restricted, leading to frequent conflicts and injustices between the soldiers and townspeople. ... The establishment of these fortresses ... is an indication that the Prince lacks sufficient trust in the loyalty of his own people. Once the loyalty of the Prince is suspected, the subjects perceive these signs, and it is inferred that their allegiance has been estranged.'

[69] Again, these are often not new to the discipline of history; Richard Trexler, for example, wrote extensively about the role of religion in "public life" in medieval and renaissance Italy. The question instead is whether, borrowing from his and others extensive historical scholarship, and examining legal texts closely, there is a more specific content to "public life" that might amount to a "public sphere".

anthropology, architecture, and urban studies. Second, I include the particular legal sub-genre of *consilia* in each chapter—the equivalent to *amici* briefs written by medieval jurists about individual cases they have been asked to provide council on, which often record the names of individuals; these were men, women, children, Jews, Muslims, unidentified foreigners, and enslaved persons, all engaged in actual legal controversies, named *by name*. These cannot be representative. But they provide an additional touchstone for the claims I make about medieval legal and political thought, and crucially, medieval political *life*.

The methodology of what follows is not strictly contextualist, not because of a lack of methodological sympathy, but for two other reasons: subject constraints and resource constraints. In what follows, my subject is the structure of legal questions and answers as they develop from the early 14th to the mid-17th century. What were the questions asked by jurists? Did they change? What were the answers? Did *they* change? What meaning can historians and political theorists derive from these two diachronic explanations? To fully account for the contextual constraints of *every* author cited in what follows would require a lifetime of scholarship, even if this would be the most methodologically desirable approach. Instead, I have chosen to substitute privileging single authors by using the writings of *hundreds* of jurists. The quantity of jurists in what follows does not speak to the veracity of any particular claim but it does substantively sketch the structure of the language of legal thought—the structure of questions, of answers, and of the changes in both.

The argument and style of this dissertation reflects my training in political theory, legal history, and history. The framing argument of the project, like this proposal, is that properly understanding the Church in this period requires a slightly different methodology and a different set of tools. But there are three crucial methodological challenges to telling the story differently: the first is the categories of analysis, the second is the problem of hierarchy, and the third is legal pluralism.

Like most paintings of the two keys, the history of political and legal thought has overwhelmingly interpreted the "Church" and "State" along "Church" and "State" lines. The framework sets the categories, sets the vocabulary, and sets our expectations. As outlined above, even if we are cautious, our approach is complicated because jurists operated within a legal architecture which recognized a distinction between *spiritualia* and *temporalia*—spiritual matters and temporal. Within the civil law, they also operated within a classical legal architecture which treated religion as a matter either of public law or of divine law with public significance. The exercise below is still one of translation and one which will not always be able to escape from the categories and expectations of *spiritualia* and *temporalia*.

We also must confront the problem of hierarchy, especially in a version of Europe where the Empire and Pope were influential (though not always to the same degrees). Previous scholars have envisioned a pivot from understanding power from the top-down to understanding power from the bottom-up. Social and cultural historians, by focusing on the local, on marginalized groups, on the subaltern, have reimagined the process for doing and understanding history.[70] In social science, such an approach has taken hold in scholarship rethinking power, politics, and democracy "from below" or from the "bottom-up".[71] Jurists, who themselves were often engaged in the process of social and professional climbing, offer a perspective on the *civitas* and the

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[70] Sahlins, *Boundaries: The Making of France and Spain in the Pyrenees*. Also, the work of Natalie Zemon Davis.

[71] Patberg, *Constituent Power in the European Union;* Colón-Ríos, *Constituent Power and the Law*; Betances and Ibarra, *Popular Sovereignty and Constituent Power in Latin America*; Wenman, *Agonistic Democracy*; Oklopcic, *Beyond the People*; Arvidsson, Brännström, and Minkkinen, *Constituent Power.*

individuals within it from the "middle". Legal writing cannot allow scholars into the minds of individuals, but it can address real cases with named individuals, and the rules which governed the life and rhythm of the town and city. Like the image affixed to this project, the concepts of ecclesiastical authority and sovereignty itself are often disembodied from the medieval subject. They are disconnected from what Braudel once called the "rhythms" of day-to-day life.[72] Carl Schmitt wrote that sovereignty had little use for the jurisprudence of day-to-day questions.[73] This dissertation, however, is a dissertation about day-to-day legal questions; it is a challenge to political theory done and told from the top-down.[74]

If the categories of analysis are in part fragile, and hierarchy is too, then the "problem" of legal pluralism poses the final challenge. Legal scholars and historians of colonialism have invoked this language to discuss the late medieval period, including Mario Ascheri:

> There was no centre of power independent of a centre that was gathering together pre-established traditions and/or creating new laws. The pluralism of powers and cultures during the late medieval period also resulted in a very rich legislative mix. Every power – individual or collective, centralized or decentralized – had its own legislation: from the great kingdoms, to communes both large and small, in remote valleys or in booming cities, the latter by now over-populated and extremely powerful; from the great religious orders and bishoprics and the rich hospital complexes to merchants and craftsmen even in the humblest guilds, and commercial societies and bands of *milites* (political factions, etc.); and even the Studia we have recently considered. [...] [B]oth the rural and urban environments needed a multitude of rules, at the most diverse levels of their corporate lives.[75]

As it stands, there is no adequate organizing principle or even conceptual metaphor which captures the complicated layers, boundaries, and attachments of authority and jurisdiction during this period. As it stands, there is also no scholarly work in political theory which has recovered the Church in these contexts as a player in these jurisdictional games rather than as an attempted ruler of them.[76]

In particular, Lauren Benton has critiqued the standard approach of understanding plural legal regimes as "stacked" or "nested" systems because it often imposes a hierarchy on the system which is organized around sovereignty and the state. It often looks like "early astronomy, with its attempts to plot heliocentric orbits on an imagined geocentric solar system—what is required, ultimately, is a return to faith to account for the inconsistencies."[77] Furthermore, neatly nested systems imply strict boundaries between systems of law, when in reality legal personnel "fail to obey the lines separating one legal system or sphere from another," and "appeal regularly to multiple legal authorities and perceive themselves as members of more than one legal community".[78] Although writing about legal pluralism in early modernity, Philip Stern notes that

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[72] Braudel, *The Mediterranean and the Mediterranean World,* Vol. 1, p. 20.
[73] Schmitt, *Political Theology,* p. 12.
[74] Arban, *Cities in Federal Constitutional Theory*; Stevens and Czaja, *Towns on the Edge in Medieval Europe*; Allen, Christesen and Millett, *How to Do Things with History*; Pegg, *Beatrice's Last Smile*; and Wickham, *The Donkey and the Boat*.
[75] Ascheri, *The Laws of Late Medieval Italy,* p. 135.
[76] As a counterexample from the discipline of history, see Wood, *The Proprietary Church.*
[77] Benton, *Law and Colonial Cultures,* p. 8.
[78] Benton, *Law and Colonial Cultures, p.* 8. Also, Benton and Ross, "Empire and Legal Pluralism".

"'corporate' life has long been at the heart of our understanding of legal pluralism, whether in the sense of religious, ethnic, or commercial "corporate" groups with claims to semi-autonomous laws and legal institutions or formal corporate bodies that served as a "middle level" or "mediating institution" between state and society."[79] Where Cliff Ando has suggested that scholarship on the Roman Empire would be greatly improved by the consideration of contemporary scholarship on legal pluralism,[80] this project stresses throughout the necessity of observing 'mediating institutions' like the Church to better interpret the legal and political culture before modernity.

Manuscript traditions are especially thorny, and the questions of authorship, authenticity, and circulation pose an additional challenge to using legal texts as the base of my arguments. This project is vulnerable to several valid criticisms about how I treat and quote manuscripts and attribute their words to an author; a text might very well have been authored by a different person entirely, or a passage might have been interpolated by an anonymous later hand. It is easy to consult multiple versions of the manuscripts that follow, spanning several centuries; it is an entirely different matter, and one outside of my training, to weigh in on which version of the text is the most accurate. Where possible, I consult the most up-to-date scholarship on authorship; I am confident, for instance, that the words I cite by Bartolus or Baldus or Lucas de Penna are their own, because the past half-century of legal and historical scholarship has settled largely on sound editions and corrected many interpretive challenges already. To them I owe much. However, rather than chase down the earliest handwritten manuscripts in European libraries for each of the legal sources I cite—a preferable solution, but one which is much better left to historians with much more sophisticated methodologies than I possess—I have chosen an alternative approach: volume.[81]

More precisely, because my subject is the shape of legal questions and legal answers, and the reference points and structural expression of those questions and answers remains relatively stable from Accursius to the 18th century, I reference hundreds of jurists across that time period and reconstruct their citations to create a network of jurists writing on the same passages, using the same terminology, citing the same people, but nevertheless "doing" different things. If some of these jurists were answering more contextually specific questions than I give them credit for, my broader argument about the structure of legal argumentation will still hold. Similarly, if a manuscript which I cite turns out to be corrupt, or a forgery, or written by a different person altogether at a different time, my broader argument about the structure of legal argumentation will also still hold; it was one node of an extensive network of legal scholarship. The various manuscripts I consult often have different punctuations or different *siglia* (legal shorthand), but these will not affect my main points.

Lastly, the chapters below will first appear as if they are case-studies of my own selection—what, after all, do baptism, torture, civil asset forfeiture, bells, and walls have to do with one another, let alone political theory and the public sphere? Although the chapters below can function as standalone case-studies, hopefully accessible to scholars for whom the content of that chapter bears relevance for their interests, they were also intertwined in the medieval roman law. That is, these "case-studies" that appear separate to us, appeared to the medieval jurist as being closely related to one another. Accessing *how* this relationship worked requires also understanding the modes of reasoning which allowed jurists to eagerly oscillate between topics and vast swaths of law. For example, Jacobus de Arena wrote:

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[79] Stern, "Bundles of Hyphens", p. 21.
[80] Ando, *Law, Language, and Empire in the Roman Tradition,* pp. 4-6, 22-27 and 137.
[81] cf. Constantine Fasolt, *The Limits of History.*

> An interdict is an action, but if it is necessary in a public or sacred (*sacro*) place, interdicts apply to prevent something from happening in a public place. For example, interdicts can be applied to prevent actions on public roads or to remove something that has already been done. The same applies to religious places such as churches and cemeteries, as well as sacred (*sancto*) places like city walls and gates. However, even though these interdicts pertain to sacred (*sacro*) or religious places, they do not fall under the category of pursuing a thing, as their purpose is to prevent actions from taking place in public (*publico*), sacred (*sacro*), or religious (*religioso*) locations.[82]

In this passage about the civil legal action of an interdict, Jacobus tied together the ecclesiastical interdict (Chapter 4), the status of walls (Chapter 5) with the implied logic of equiparation (Chapter 3) and lastly, illustrated why distinctions between "public", "sacred", and "religious" things and places might be challenging to uphold.

At the juridical level, the rhythm of politics found in legal texts was governed by a different kind of reasoning. 13th and 14th century jurists were quick to embrace a flexible interpretive methodology of law. That they broadly embraced the *de facto* over the *de iure,* or chose to mold the law to fit the world around them has widely been recognized. But the specific mechanics of this method for reasoning have not yet been fully reconstructed. One crucial tool used by these jurists was *equiparation,* a term which defies translation; it sits between equivalency and analogy. Practically, jurists imagined the law as a set of paths or set of actions which could be taken by particular agents; if two agents looked, acted, or were treated as taking the same paths or actions, then a greater legal "equivalency" could be drawn between them. This has previously been discussed in contexts of popular sovereignty, where a *populus* and a Roman legal ward might be imagined to occupy the same kind of status, and therefore be discussed in the same kind of way. I reconstruct part of this logic pertaining to the Church in Chapter 2, but the *effect* of this logic is worth considering closely. Neither the Roman (classical or medieval) law nor the canon laws were effectively siloed; "equiparating" one agent in one context immediately implied a vast array of potential "equiparations" to be drawn in other contexts. The Church (*ecclesia*) would, because of this, be "equiparated" to the Roman senate, the Roman treasury, the Roman emperor, provincial governors, decurions, magistrates, *civitates,* and legally incapable minors—the whole gamut of the Empire.

This logic of legal practice and legal theory was uncomfortable for the historical school of jurists of the 16th century who rejected its ambiguity. However, in what follows, I tentatively embrace the internal flexibility of this legal logic. The logic is inescapably functional. Cino of Pistoia used a physical metaphor to capture the logic—they walk down the same path. They make use of the same resources. When they act, their tools leave the same impression. When you mix a background logic of equiparation with a creativity to make new connections, you find a wild flexibility; this flexibility is often caricaturized without being appreciated. Theological texts will point out that Rahab—the prostitute who helped enable the destruction of Jericho (Chapter 4)—is an allegory, or metaphor, or symbol of, or prefiguration of, any number of things, including the Church and the Kingdom of Heaven. Similarly, William of Durand will observe that the string which pulls the bell of a church may just be the physical rope which tolls the bell, but also anything from the Church to the liberal arts to the Holy Spirit itself. Doing this kind of work requires

[82] Jacobus de Arena, *Super Iure Civili,* [1541], "De Actionibus", n. 2, fol. 300v.

embracing not only the metaphysical commitments of jurists and theologians—embracing a sort of political magical realism, that objects can *do* things, that the invisible can be made visible—but also be willing to 'walk the same path' with Cino.

## PERIODIZATION: THE REFORMATION AS *REFORMATIO*

My methodology for this dissertation requires one final clarification. My periodization is unique for political theory, but in-line with scholarship from the past two decades.[83] I embrace a long view of the Middle Ages.[84] I have drawn the scope of this project to include both Bartolus and Hobbes in part to (arbitrarily) connect the greatest jurist of the Middle Ages with perhaps the greatest political theorist of Early Modernity; however, I have also drawn the scope of this project to show politics taking its breath after the Reformation and discovering "new" problems of civil war, religious sectionalism, and international empire that are, of course, not new at all. If my goal is to offer a different kind of story-telling to tell a different kind of story, it seemed appropriate to embrace a different periodization of the Middle Ages, the Renaissance, and Early Modernity. However, my periodization aligns with recent scholarship embracing continuities between the long Middle Ages and Modernity—part of what Manlio Bellomo famously called "The Common Legal Past of Europe" (*l'Europa del diritto comune*).[85]

The Reformation will occupy a curious position in what follows—out of center, but also deeply medieval and deeply legal.[86] In each chapter, I show surprising continuities through the Reformation that displace assumptions about the necessarily divisive quality of the Reformation. Even Post-Reformation authors rhetorically blurred the lines in ways which stressed surprising continuities.[87] There are crucial contextual considerations here, in particular the resistance to Roman legal ideas in Protestant communities.[88] But the main thrust of the specific arguments I make here point to important continuities.

In part, I hope to suggest ways in which the Reformation, even as transformative as it was, was simply another legal, political, and theological change. The roman and canon laws had vocabularies and procedures to describe these changes and *reformatio* was one of them. Ironically, a *reformatio* was the less extreme version of change—*renovatio* was the more radical version, a figurative re-building *re-novo.* To engage in *reformatio* was to craft the same materials, with patches, to repair and reimagine an existing structure; its coherency and continuity would be assumed with its pre-reformed status. In the light of the chapter-by-chapter legal arguments I make below, which push through the Reformation to stress important continuities in approaches to legal

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[83] Tracy, *European Reformations, 1450-1650.*

[84] le Goff, *The Medieval Imagination,* pp. 19-23.

[85] Bellomo, *The Common Legal Past of Europe.*

[86] This is also in line with 20th century historical scholarship. See Steven E. Ozment, *The Reformation in Medieval Perspective.* Chicago, Quadrangle Books, 1971.

[87] Springborg, "Hobbes on Religion", pp. 366-367: "It was because the Presbyterians and Papists had denied the authority of the prince as God's lieutenant that England had been plunged into civil war, a jostling in the dark. Puritans had denied the principle *cuius regio eius religio* with arguments as vitriolic of the Papists. It was for this reason that Milton had declared with anticlerical fervor that "New Presbyter is but old Priest writ large," and that James I had maintained that "Jesuits are nothing but Puritan-Papists." Hobbes mobilizes his heaviest artillery against the Papists. This is because the authority of the church of Rome represented a direct, and in fact established, threat to the system of authority Hobbes advocated in *Leviathan.* The papacy presented the dual challenge of an international sovereign power and a comprehensive religion legitimized by an entrenched philosophical system."

[88] Gerald Strauss, *Law, Resistance, and the State: The Opposition to Roman Law in Reformation Germany* (Princeton 1986).

thought and legal questions, perhaps then *reformatio* is the appropriate ideological concept for the Reformation—but only if we consider its legal context.

Put differently, the world of theology and politics radically changed when Luther nailed his 95 theses to the door of a church in Wittenburg. But he did so—consciously or not—in line with the legal procedure for publishing a summons or subpoena, in which posting a document to the doors of the city church were sufficient communication and notice for the entire community, including the interested parties. This posting did not change the church doors, or the legal procedure behind them; nor did it immediately change city statutes about citizenship, the city walls, or conceptual traditions about property or coercion. These changes would take time, but they weren't necessary; in many cases, as I show below, the medieval and renaissance tools of managing the relationships of individuals in a community remained much the same. Even ardent Protestant jurists of the late 17th century, just like their Enlightenment political philosopher peers, were 'reforming' and reimagining the world around them through medieval and 'Catholic' materials. It was truly a *reformatio*, not a *renovatio.*

## THE SOURCES: CHALLENGE AND REWARD

The 12th and 13th century witnessed an explosion of legal writing. The Roman civil law, comprised of the Digest, the Code, the Institutes, and the Novels, was rediscovered in the 1080's, spurring a century of legal activity until Accursius (1182-1263) composed his *Great Gloss* of over 100,000 glosses on the Roman Law. Gratian helped collect what would become the first cornerstone of canon law in the 1140's; the feudal law was first compiled in the 1190's out of centuries of treaties and legal documents; and Sicily promulgated its influential *Constitutions of Melfi,* or the *Liber Augustalis*, in 1231. On the peripheries of most medieval legal histories, Spain compiled what would later become the *Siete Partidas* starting in the 1250's, and Iceland began to revise what would later become the *Jónsbók* in the 1260's.

Too often scholars have treated these bodies of law as separable. To be sure, they were separate—they had different causes, different authors, and different contexts. Jurists also readily distinguished between them: Bartolus wrote a small treatise *On the Differences between Canon and Civil Law.* However, jurists cited them interchangeably. Any scholar will attest to the frequency of finding a claim in a legal commentary supported first by a citation to Justinian, then to the canon law, and then perhaps to the feudal law. The challenge, then, is that the citation itself was both *an* argument and the *gesture* at an argument taking place elsewhere. That is, citing the Code, the Feudal Law, and the Spanish Law was *independently* a citation of those legal sources, and the concepts or ideas which stood behind them—perhaps, even, a general legal or theoretical principle which that jurist understood to be inspiring the various positive laws they were citing.

In addition to writing legal commentaries directly on these bodies of law, jurists wrote lectures (*lecturae*) for the Universities which employed them and legal briefs and opinions on concrete cases (*consilia*). Some even wrote extended prose 'treatises' (*tractatus*) on the law and politics, a new genre that would carry into Early Modernity. These texts use the same language (generally), the same contractions and scribal abbreviations, and the same thickets of citations; these all form obstacles for new scholars into the discipline. My access to the genre of legal commentary unlocks tens of thousands of manuscripts, law cases, and compendia of city-statutes to substantially revise the legal history of early modern institutions and accurately describe how the state and prominent theorists inherited, imitated, or rejected legal and theological ideas. Scholars like Bodin and Grotius cited their use of the medieval law in their margins and footnotes;

many others did not, and in their prejudice against the 'schoolmen' and jurists complicated our task further.[89]

Using these materials has a methodological advantage. On the whole, political theory can access ideas from history through single authors—and through the texts from that author, perhaps the author themselves. Because these legal texts hold day-to-day controversies about people and institutions within particular communities, these texts carry the impressions of actual individuals. Indeed, the legal sub-genre of *consilia* was created out of briefs written by jurists giving their opinions on individual cases. As indicated above, reconstructing part of the rhythm of day-to-day legal life, or at least tapping into how jurists viewed these day-to-day controversies, might reflect the deeper theoretical puzzles of political life. In this way, a single *consilium* might just as well answer a canon and civil-law question about the baptism of a single child as it does hint at the new national state of Spain under construction in the early 15th century; one *consilium* might settle a dispute between a monastery and town in Italy at the same time as it marks an important shift in conceptualizing territory and jurisdiction; further, the trial records and testimony of victims of the inquisition carry the impression of the individuals who suffered just as they record conceptions of property confiscation, agency, torture, or religious toleration—all of which have shown to be important moments for political theorists and social scientists alike.[90]

The high barriers of entry to understanding and translating the sources here means that there are few scholarly works currently available that combine a close reading of legal commentaries with accessible style, framing, and story-telling. In each chapter, I hand-select vignettes and illustrations from familiar, or at least unique, moments of political history; I churn the thousands of *consilia* into a handful of specific examples to put names and faces to otherwise challenging legal texts. Lastly, I translate all Latin, Spanish, French and Italian passages, but retain the original text for the non-Latin languages in footnotes; keeping the original Latin would prove to be too unwieldy for the footnotes below but my citations direct to specific folios in readily accessible digital manuscripts.

Jean Bodin, whose writings and theories about sovereignty and the state have undergone a recent surge in scholarly attention, provides a closing example for why projects like this will be necessary for understanding Early Modern politics. In his description of Swiss Democracy, Bodin made the point to note that the Swiss raise their hands to express their voices when they vote, 'in the ancient *chirotonie* of popular republics'.[91] The Athenian assembly (*ekklesia*) utilized voting by hand (*cheirotonia*) for some of its offices; by the time Bodin was writing, 'the stretching forth of hands' had been used by a different *ecclesia* for well over a millennium. The Church used *cheirotonia* not only to elect ecclesiastical officers, but in its rites of healing, in reconciling penitents, in baptism, and in the swearing of oaths. It would also later become crucial to protestant sects like Presbyterians who sought to stress the scriptural basis for their interpretation of ecclesiastical organization.[92]

In some cases, the overlap between classical politics, the medieval church, and early modern political thought will be coincidental, or the Church will be shown to merely help shepherd concepts, vocabularies, and institutions into Early Modernity. In other cases, the Church will be shown to take a much more active role in transforming such concepts, vocabularies, and institutions: this dissertation examines some of those to, at worst, recover previously unrecognized

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[89] Rousseau, *On the Social Contract*.
[90] Hassner, *Anatomy of Torture.*
[91] Bodin, *Six Books,* 2.7: "de l'ancienne chirotonie des Republiques populaires".
[92] Namely Acts 6:5-6 and Acts 8:14-19.

aspects of medieval legal and political thought; at best, it traces a previously lost liturgy of democratic politics.

## OUTLINE

The first chapter begins with birth and rebirth; it recovers for the first time that jurists thought baptism *could* grant citizenship. The blurry lines between 'temporal' and 'spiritual' led jurists to argue that baptism conveyed civic-membership (*civilitas*) as well as other political benefits—a confusion that persisted into colonial Maryland and Virginia. Baptisteries were literal and metaphorical 'fonts' of political membership, doubly confirmed by the acceptance of baptismal books as reliable registries and archives of citizens. From the 14th century to the 19th, baptismal books were also stores of crucial demographic information; however, this feature was secondary to the dominant intuition that baptism itself conveyed natural and political obligations onto an individual in the place of their baptism.

The second chapter serves as a counter-weight to the first chapter, and a demonstration of methodological process. If the thrust of baptism as civic-membership is fundamentally inclusive and equitable—all sexes of all statuses were required to be baptized in the same waters, fresh or stale, and through the same liturgies—civil and canon lawyers were nevertheless working at the boundaries of exclusion in the political and legal community. Specifically, this chapter examines the curious category of "vile" persons. I show that the qualifier "vile" was most frequently employed and subsequently developed within the context of witness testimony. That is, one of the most salient criteria for establishing legal disabilities (e.g., not being permitted to vote, or bear a particular office) was credibility. In turn, a curious criterion for establishing credibility in the context of witness testimony was one's occupation. This chapter shows that as civil and ecclesiastical courts stressed a requirement of credibility, they also loosened the connection between occupation and credibility. That is, by the 16th century, merchants and bankers were no longer "vile", nor by the 17th century were usurers, or even public-latrine workers. As an argument for methodological process, this entire chapter springs from a single passage and a set of three citations in Bartolus' *De Regimine Civitatis*—in which the very kinds of person excluded from voting in a popular government (*regimine ad populum*) were the "*vilissimi*".

Using the Inquisition and John Locke as dual touchstones, the third chapter examines how the Church was "equiparated" with the Roman state and treasury as a public legal actor. The legal methodology of "equiparation" is complicated and has never been reconstructed. It allowed the *ecclesia* to clone the disciplinary logic of treason to invent "divine treason" (heresy), and with it claim the *ius confiscandi* (the right of property confiscation)—one of the most important rights of sovereignty when it was later articulated. I show how the Church jealously defended its possession of the *ius confiscandi*, which in turn required a jealous defense of their status as a "fisc", or as having a "fisc". This triggered paranoia among temporal authorities, ordinary citizens, and much later, Locke in his *Letter Concerning Toleration*.

The fourth chapter continues investigating the Church's use of ecclesiastical censures by examining the interdict, a kind of ecclesiastical discipline which could be applied to whole cities. I identify, for the first time in secondary scholarship, the legal, political, and metaphysical significance of one of the chief consequences of the interdict—the silencing of the bells. Church bells kept time and convened the people licitly in councils or illicitly in rebellion and were a requirement for the formal procedure (*solemnitas*) of convening any assembly. By closing churches to the public and silencing its bells, the Papacy (or Episcopal See) suspended both the

means and the right of assembly in a city. The Church also used the interdict, and the accompanying trade embargoes, as a diplomatic strategy of political, economic, and social isolation.

In the fifth chapter, I turn back to the temporal and spiritual overlap of the *ecclesia* and *civitas* as revealed in theories of public safety and the communal defense. Jurists inherited from classical political thought the tradition that the walls of the city were both political and 'Holy' (*sanctus*), and that "conquest" injured the "gods," because "destruction of the city's walls is likewise the destruction of its temples" (Cicero, *Republic,* III.12). This, however, was less a political theoretical claim than it was a property claim: walls were a special category of property (*res sanctae*) in the Roman law because they were protected by capital punishment. Crucially, only a body with legislative authority of the political community could create and label property as 'sacred'; otherwise, it could only be 'religious' (*res religiosi*). In medieval law, jurists developed legal exceptions which allowed cities (contrary to the law) to repair their walls, with the *ecclesia* once again forming, managing, and defending the existence of the community. The Church (universal and local) played an extensive role in drawing and protecting the physical and metaphysical boundaries of the *civitas.*

In the conclusion, I use the recent findings by intellectual historians about the connection between territory (*territorium*) and the right to induce terror (*ius terrendi*) to show that the role which I have argued in this dissertation about the church creates a conceptual rupture both for historical accounts and contemporary accounts about concepts. Stuart Elden has recently argued that the *ius terrendi*—the right to induce terror within a particular geographical scope—is constitutive of the concept of territory. That is, lesser forms of authority—like a city—are not proper sovereigns and therefore could not possess the "right to induce terror" within a set geographical space. They lacked "territory". This is largely true. However, not only did medieval civil and canon lawyers actively dispute whether the Church as a whole or individual bishops possess the *ius terrendi,* but they also actively invoked the language of fear (*metus*) and terror to describe the kind of coercive tactics available to the Church, its Popes, Archbishops, and Bishops. In the chapters above, we find that censures like confiscation or the interdict contributed to the Church's right to induce terror (*ius terrendi*). In this case, the Church's possession of the *ius terrendi,* as well as a non-technical *functional* ability to induce fear and terror problematizes the strictly legal-theoretical Early Modern and Modern account which bound temporal sovereignty and territory together. This chapter concludes by reconstructing Jacob Pignatelli's (1625-1698) curious concept of 'nested territory'; that is, a territory which is within the territory of another. This model of territoriality closely approximates circumstances of tribal sovereignty; the borders are softer than cases of independent pocketed states, like Vatican City or Lesotho. Pignatelli's deployment of this concept was designed to come to terms with the Church—not the Vatican, but how to make sense of the Church's fragmented but widespread territorial claims and its influence inside and outside of its proper jurisdiction. And, of course, by the point of Pignatelli's writing, the *Ecclesia* was splintered into multiple offshoots, but was nevertheless the same militant, imperial, and colonial ally that it had been for a millennium. If it had been engaged in the construction and governance of the public sphere in Europe up to the seventeenth century, it was now exporting this role to both hemispheres.

## CONCLUSION

Like Lester Smith's mural of the 'Delivery of the Keys', the study of medieval and renaissance political ideas is often marred by accidence and contingency—the chance of what has survived and what has not. Legal texts and commentaries offer a fresh wellspring for political theorists to supplement the handful of canonical texts that have often been used to approximate medieval thought. We find these texts, however, not at the center of the traditional image of medieval legal and political thought. We find it at the margins and indeed, for early legal texts, *in* the margins: we find it in unconventional places, written by unconventionally people. Perhaps, then, the appropriate methodologies and approaches for recovery and conservation are equally unconventional, though methodologically rigorous. Like Eastern State Penitentiary, the history of ideas presents an opportunity for reflection, looking forward, and looking around at what still haunts us.

# 1. *In Nomine Patria:* Baptism and Civic-Membership in Medieval and Early Modern Law

## Introduction

Writing to a late adolescent Charles V (1500-1568), theologian and philosopher Erasmus entreated the Archduke to recall his obligations to his God and his community:

> Do not think, indeed, that the life of a professing Christian is care-free and elegant, unless, of course, you think nothing of the oath which you, along with everyone else, swore at your baptism ... Having sworn the oath of Christ, will you turn aside to the behavior of Julius or Alexander the Great?[93]

Lest he risk being mistaken by the young prince, Erasmus repeated that he ought to obey the laws of Christ, 'to whom you yourself swore allegiance in your baptism'. Erasmus' language of oath-swearing (*iurare*) is curious in two ways. First, he suggests that it is both a personal oath sworn by Charles and an oath which was seemingly shared and sworn by all (*cum omnibus*). Second, he selects the oath sworn at baptism as the most politically salient oath in Charles' life, not the coronation oath which he would one day swear in Bologna on his thirtieth birthday. Indeed, for centuries the coronation oaths of Christian kings had attracted attention and controversy from papal agents and the rulers themselves as decisive and binding political actions—or even actionable political promises, commitments, and allegiances.[94]

Baptismal oaths have attracted no such attention, in part because canon lawyers and theologians did not call the assent to be baptized and the profession of faith an 'oath', properly speaking. Individuals had to express their will to be baptized—verbally if they could speak, non-verbally if they could not—but the validity of the baptismal sacrament and the question of their salvation hung on a series of other minor controversies which filled the pages of medieval canon law: Did the priest or bishop say the right words? Did enough of the body touch the baptismal waters? Were the waters pure enough? Could beer be used in a pinch? Was a baptism performed by a lay-person, heretic, or non-believer valid? Baptism was also seemingly such a canon law matter that even the greatest civil jurists of the period thought it better to leave it to the canonists and keep baptism out of the discussion of civil legal topics.[95]

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[93] D. Erasmus, *The Education of a Christian Prince,* ed. L. Jardine (Cambridge, 1997), pp.17-18.

[94] See R.S. Hoyt, 'The Coronation Oath of 1308', *The English Historical Review,* Vol. 71, No. 280 (Jul., 1956), pp. 353-383 and E.H. Kantorowicz, 'Inalienability: A Note on Canonical Practice and the English Coronation Oath in the Thirteenth Century', *Speculum,* Vol. 29, No. 3 (Jul., 1954), pp. 488-502. More recently, see J. Le Goff, 'A Coronation Program for the Age of Saint Louis: The Ordo of 1250', in *Coronations: Medieval and Early Modern Monarchic Ritual,* ed. J.M. Bak (Los Angeles, 1990) and many of the other contributions therein, and A. Hunt, *The Drama of Coronation: Medieval Ceremony in Early Modern England,* (New York, 2008). And for Charles' own coronation, see K. Eisenbichler, 'Charles V in Bologna: the self-fashioning of a man and a city', *Renaissance Studies,* Vol. 13, No. 4 (December 1999), pp. 430-439.

[95] Bartolus, *Commentaria in Secundam Digesti Novi Partem,* (Venice, 1590), at Digest 50.1, n. 8, fol. 217v: 'Inter quos non est iste quaeritur a spiritualia relinquo Canonistis.' The canon laws of baptism are found in the *Liber Extra,* Book 3, Title 42, [X. 3.42] and briefly in Clement's *Constitutiones,* Book 3, Title 15. Although the law held that water was absolutely necessary for a valid baptismal sacrament (X 3.42.5 and the main gloss there), and therefore solutions with impure additives, distillates, or water-based excretions and secretions invalidated baptism, the weight of necessity (according to some) could water down this strict requirement to permit the use of rose water, salt water, liquids squeezed from flowers and herbs, beer, and even tears, sweat, spit, or urine. See for example Jacob Pignatelli,

Royal baptisms were no doubt important political and symbolic ceremonies and in some cases they either recalled or foreshadowed the political capacities of the ruler.[96] Nevertheless, the 'vows' of baptism have not been commonly understood to be 'oaths' with civil consequence, triggering public and civil obligations for those who have sworn them. Nor has the sacrament of baptism itself been understood as a civil action with legal consequence.

In this chapter I show that the sequestration of baptism as a sacrament best left to canon lawyers was a minority opinion in medieval legal thought. By the sixteenth century, Spanish jurist Franciscus de Amaya claimed that 'nobody can sensibly deny that through baptism one acquires citizenship (*civilitas*); wherever someone is baptized, they are made a citizen (*civis*) of that place'.[97] In fact, jurists by this point were largely in agreement that baptism had a number of civil and legal consequences. Being baptized in a place granted the individual *civilitas* in that place, and with it, the eligibility to be named to offices or serve in public positions of burden, and the ability to be sued or to be tried in courts in that place. More radically, baptism in a place could also transform one's legal place of origin (which was otherwise legally impossible) and even free an individual from the *patria potestas.* This *civilitas*—commonly translated as 'citizenship' in secondary literature, clearly meant something different to the jurists, theologians and cities which accepted baptism as a path to *civilitas,* given that all Christians would have *civilitas* in the place of their baptism but clearly not all of the privileges of formal 'citizenship'; we are left with a concept of civic membership shaping obligations, legal status, and civic identity which challenges common reconstructions of the concept of citizenship in late medieval and renaissance Europe. It is a notion of civic membership that goes beyond citizenship, relying on mutual obligation and oaths. [98]

Section I outlines the general structure of the Roman law of citizenship as it was adopted and its confrontation with Christian ideas in Late Antiquity and especially Medieval Spain. Section II reconstructs the legal history of the controversy about the civil consequences of baptism spurring from two branches of thought—one branch emitting from the Neapolitan jurist Lucas de Penna (1325-1390), and the other from the famous Perugian Bartolus de Sassoferrato (1313-1357). Section III catalogues the legal and civic benefits which accompanied baptism, which included changing nationalities and eligibility for offices. Section IV takes up the question of *civilitas* to examine what kind of membership baptism contracted and which kinds of obligations it incurred—specifically, what kind of commitment the baptismal vow (*voto*) or oath (*iuramentum*) was. The obligations emanating from this commitment ran in two directions: they ran horizontally across and between members and vertically between members and their ecclesiastical or political

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*Consultationum Canonicarum,* Tom. 4 (Venice 1687), Consultatio 212, p. 345 or Gottfried Nikolaus Ittig, *Disputatio Juridica De Mancipiorum Turcicorum* (Lisbon 1689), Cap. II §18, p. 29. On the standard view, see Thomas Aquinas, *Summa Theologiae,* III.66.4. On baptism in canon law generally, see J. Gaudemet, *La doctrine canonique médiévale* (Aldershot, England, 1994); R.H. Helmholz, *The Spirit of Classical Canon Law* (Athens, 1996), pp. 200-228; and R.H. Helmholz, 'Baptism in the Medieval Canon Law', *Rechtsgeschichte-Legal History*, 21 (2013), pp. 118-127.

[96]See for example the baptism of the would-be heir to Napoleon III in 1856. Martin Truesdell observes: 'Research into the earlier baptisms [of Kings] was done by the minister of public instruction and religion and presented to the emperor at a ministerial council meeting'. M.N. Truesdell, *Spectacular Politics: Louis-Napoleon Bonaparte and the Fête Impériale, 1849-1870 (*New York, 1997), p. 205, n. 45, and pp. 63-67.

[97] Francuscus de Amaya, *Opera Iuridica, seu Commentarii in Tres Posteriores Libris Codicis,* (Lyons, 1667), ad C.10.39.7, n. 47, p. 329: 'nemo sanus negabit per Baptismum adquiri etiam civilitatem, cum ubicumque qui baptizatus est, efficitur civis eius loci'.

[98] A point made recently about antiquity by G. Klosko, 'Oaths and Political Obligation in Ancient Greece', *History of Political Thought,* 41(1) (Spring 2020), pp. 1-15.

superiors. Section V returns to the example of Erasmus from above to show the lingering civil power of baptism and the baptismal oath in Early Modernity.

In what follows, I set aside the theological debates about the ceremony and sacrament of baptism. Martin Luther's *Taufbüchlein* (1523), or 'Baptismal Booklet' was largely a translation of medieval rites of baptism into the vernacular German; it maintained the exorcism and allowed the sponsors to answer on behalf of the child. His second revision in 1526 removed some of the symbolic exercises by the priest—spitting on the child's ears or eyes, or the use of salt and oil in the rite—but he effectively limited his reform to linguistic translation. After all, his chief complaint was that the participants in the ceremony did not understand what was being said or being done.[99] Even the debate about infant baptism did not structurally alter the baptismal ceremony in the mind of jurisconsults; Protestant and Catholic lawyers and judges alike still cited Roman and Canon law passages which agreed that baptism contracted *civilitas*. In other words, I set aside here the religiosity of the baptismal sacrament; and, while the baptismal ceremony has long been understood as potentially political, the question of how the *ordo* or the procedure of the sacrament itself was political has yet to be answered.

**Section I: Roman Law of Citizenship and 'Becoming Christian'**

The history of the law of Roman citizenship is one of steady expansion. There were four main ways of acquiring citizenship in classical Roman civil law: birth, manumission, adoption, and 'election' by magistrates. Although the Antonine Constitution (212 C.E.) granted citizenship to almost the entire Roman world, later laws and commentators added royal privilege, residence, and habitation as pathways to citizenship, each with an obvious civic justification.[100] Baptism was neither on the list when the 'Body of Civil Law' was codified under Justinian in the sixth century nor when Accursius assembled his *Great Gloss* in the thirteenth. Christianity of course exerted pressure on ideas of membership and the meaning of citizenship in other ways, both legal and non-legal,[101] and Christian states like the revived 'Christian Empire' under Charlemagne treated baptism as a way to conscript new subjects and bind them to temporal obedience[102]. But even so, Christianity was not yet a formal part of the civil law of citizenship.

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[99] D.G. Lange, 'The Holy and Blessed Sacrament of Baptism, 1519', in T.J. Wengert, ed. *The Annotated Luther, Volume 1: The Roots of Reform,* (Minneapolis, 2015), p. 203.

[100] These paths and their requirements are outlined in two passages in the Digest (50.1) and the Code (10.40). Of these, birth was the most common. On the Roman law of citizenship, see H.F. Jolowicz, *Historical Introduction to the Roman Law,* 3d ed. (Cambridge, 1972), pp. 352-54; C. Ando, *Law, Language, and Empire in the Roman Tradition,* (Philadelphia, 2011), pp. 1-18; and A.N. Sherwin-White, *The Roman Citizenship,* 2nd ed. (Oxford, 1973). On Italian laws of citizenship, see P. Riesenberg, 'Citizenship at law in late medieval Italy', *Viator* 5 (1974), pp. 333-46; J. Kirshner, 'Civitas sibi faciat civem: Bartolus of Sassoferrato's doctrine on the making of a citizen,' *Speculum* 48 (1973), pp. 694-714; D. Quaglioni, 'The legal definition of citizenship in the late Middle Ages', in A. Molho, K. Raaflaub, and J. Emlen, eds., *City States in Classical Antiquity and Medieval Italy* (Stuttgart, 1991), pp. 151-67.

[101] C.L. Nero, ''Christiana Dignitas': New Christian Criteria for Citizenship in Late Roman Empire', *Medieval Encounters,* 7,2 (2001), pp. 146-164.

[102] Charlemagne's revival of baptism as an essential sacrament which needed to be administered the same across his kingdom was steeped in coercion and conquest. His letters in 811 and 812 show that he believed that once somebody was baptized (even under coercion) would then be a peaceful and willing subject. Instead, he was faced with huge populations of conquered, nominally Christian subjects who were still resistant to his authority. With the influence of Alcuin, he pivoted to focus instead on the importance of willing subjects. Still, the Carolingians loom large in the pre-history of baptism for this article, and it is possible more connections ought to be drawn to Charlemagne's intended political project. M. Caffiero, *Forced Baptisms. Histories of Jews, Christians, and Converts in Papal Rome* (Berkeley and Los Angeles, 2012). G.C.J. Byer, *Charlemagne and Baptism: A Study of Responses to the Circular Letter of*

The *Siete Partidas*, originally titled the *Libro de las Leyes,* was a comprehensive code of laws compiled under Alfonso X of Castile (1221-1284) which followed the general model set by Justinian's *Corpus Iuris Civilis.*[103] In addition to the classical Roman Law, the *Siete Partidas* also referred to '*los sabios antiguos que fizieron las leyes*', which included the 13th century Glossators Accursius and Azo, along with Gratian (and his *Decretum*), Pope Gregory IX (and his *Liber Extra*), and the canon law commentator Hostiensis.[104] Its early composition and its combination of civil and canon law concepts and formulas provides us a reference point for how Roman legal ideas had already been adapted after the rediscovery of the *Digest* in the 11th century.

In the fourth part of the code of laws, the jurists identified ten kinds of natural obligations and the origins thereof: one could have natural obligations through birth to their natural lord, vassalage, being raised in a place, military tenure or knighthood, marriage, inheritance, being rescued from captivity or being saved from death or dishonor, from free emancipation (where the emancipator received no reward or compensation for emancipation), residence in a place for ten years, or becoming a Christian (*tornarlo Christiano*).[105] Baptism, as the necessary sacrament for 'becoming a Christian', entered an individual into a system of obligations tied to the place in which they were baptized. Whether these social ties and obligations could be described as '*civilitas*' and these newly obligated persons described as '*cives*' was left for later jurists.

**Section II: Two Branches**

The first jurists to ask whether there was a connection between the Christian sacraments and legal obligations were the early 14th century contemporaries Bartolus of Sassoferrato (1313-1357) and Lucas de Penna (1325-1390). A complex web of citations of glosses, comments, and cases on the question then extended through the 17th century, but all ultimately begin with either or both Bartolus and Lucas. Bartolus and the Bartolists made up one branch of the argument which claimed that baptism had little or nothing to do with civil law; Lucas and many other jurists across Europe made up the second, claiming in fact that not only could baptism grant *civilitas,* but that it also had a range of powerful legal implications.

*The First Strand: Bartolus and the Bartolists*

Bartolus' original argument against the acquisition of 'citizenship' through baptism is simple: although it might seem like the manumission from slavery to sin and the rebirth of baptism parallel legal manumission from slavery and physical birth, the analogy is broken by the disconnect between spiritual matters (*spiritualia*) and temporal matters (*temporalia*). The civil law specified the ways temporal 'citizenship' might be acquired and cities or principalities were free to add their

*811/812* (San Francisco, 1999). Also, O. Phelan, *The Formation of Christian Europe: The Carolingians, Baptism, and the Imperium Christianum,* (New York, 2014).

[103] The earliest surviving manuscripts of the *Siete Partidas* are copies from the 14th century. The jurists who contributed to this code were largely anonymous, and as best as we can tell Alfonso X served as the editor of their collaboration. The *Siete Partidas* provided the code of law which was used well into the 18th century in areas of the world colonized by the Spanish.

[104] Román Riaza Martínez Osorio, 'Last *Partidas* y los *Libri feudorum,*' *Anuario de historia del derecho español* 10 (1933): pp. 5-18; J. F. O'Callaghan, 'Alfonso X and the *Partidas*', in S.P. Scott, R. Burns, *Las Siete Partidas, Volume 1: The Medieval Church: The World of Clerics and Laymen (Partida I).* (Philadelphia, 2012).

[105] *Siete Partidas,* IV.24.2. Translated by S.P. Scott in R.I. Burns, *Las Siete Partidas, Volume 4: Family, Commerce, and the Sea* (Philadelphia, 2001), p. 990.

own, if they had the power.[106] Baptism was not among the 'modes by which *civilitas* is contracted' and was best left to the canon lawyers.[107] However, he was more open to a connection between the spiritual and the temporal in his commentary on the *Code:*

> 'But I ask whether through baptism somebody comes under the jurisdiction of the courts of the city (*sortiatur forum*). It seems that they can, because just as someone comes under the jurisdiction of the courts through manumission [in that place], and is said to be born [there], the same is the case through baptism.'[108]

Even this admission of an equivalency between manumission and baptism stops well short of contracting 'citizenship'. One's baptism in a particular city seems to, in this version of the argument, create a strong enough tie to that city such that the judges of a city—or perhaps even just the ecclesiastical judges of that jurisdiction—have power over them.

The general resistance to the civil effects of baptism was articulated by several notable Bartolists who quoted Bartolus either explicitly or added their own arguments. In a gloss on the Digest passage which introduces manumission (Dig. 1.1.4), Baldus argued that manumission could not affect the natural status of a person, just as baptism did not restore humans to the 'pure' state in which God had created Adam. Instead, manumission and baptism both produced a secondary emancipation (a 'mixed' state) where the consequences of original sin were still binding.[109] Jason de Mayno (1435-1419), one of the last Bartolists, argued that baptism could not change the administration of patrimony and that the role of 'compaternitas' was an ecclesiastical relationship alone which could not spur formal legal obligations.[110]

Guillaume Benoît (1455-1516) gives us the clearest example of a more explicit consideration of the question of civic membership. He adds that all of the spiritual kinships created through the sacraments of baptism and marriage did not change the actual fact that individuals were not related by blood. If they did—that is, if the *compaternitates* created through baptism equated the *paternitates* of the civil law—then sons and daughters could claim succession and inheritance rights from their spiritual godparents just as they could their physical ones.[111] Baptism could not wipe out civil blemishes like *infamia* or debts—that improper mix of spiritual and temporal matters would prove chaotic for civil society.[112] Following this same logic that the

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[106] Kirshner, 'Civitas sibi faciat civem'.
[107] Bartolus at D. 50.1.
[108] Bartolus at C. 10.40.7. I borrow this translation of 'sortiatur forum' from J.P. Canning, *The Political Thought of Baldus de Ubaldis* (Cambridge University Press, 1987), p. 178.
[109] Baldus' interpretation echoes—but differs from—earlier refrains by Jerome ('*Baptisma novum hominem facit'*) and Ivo of Chartres (1040-1115), who argued that baptism was a second creation. God made Adam out of the earth in His image, and thus remakes every Christian out of the water (Ivo, Sermon 1, *Patrologia Latina* 162, col. 506).
[110] Jason de Mayno at Dig. 28.2.29, n. 14-16, *Commentaria in Primam Infortiati Partem* (Venice 1585), fol. 173v.
[111] Guillaume Benoît, *Repetitio in Cap. Raynutius de Testamentis,* (Lyon, 1572), fol. 110v-111r, n. 200-202.
[112] Most jurists agreed that debts or *infamia* were resistant to baptism, as were corporal punishments earned before the baptism. A political or judicial magistrate might, by grace, commute a punishment on account of baptism, but even this grace could not extend to certain severe crimes like treason and counterfeiting money. See for example Francisco Suarez, *Disputationum in Tertiam Partem,* Tom. III (Lyon, 1608), Quaestio 69, pp. 287-295; Jacob Pignatelli, *Consultationum Canonicarum,* (Venice, 1722) Tom. I, Consultatio 92, pp. 92-93; Orazio Carpani, *Commentaria in Quatuor Insigniores Novarum Constitutionum*, (Frankfurt, 1610), § Homicida, n. 814-815, pp. 45-46. Some were more flexible—Thomas Delbene, for example, suggested that because *infamia* is a consequence of crime or sin, if the predicate sin was washed away through baptism, so too might the *infamia*. Delbene, *Tractatus de Iuramento,* (Lyon, 1669), pp. 594-595.

sacrament of baptism can only change sacramental relationships, Benoît concludes, 'Neither is someone, through baptism, made a 'citizen' of the city in which they are baptized, according to Bartolus'.[113]

That, however, is the extent of the negative answers to the question.[114] Indeed, it represents a minority opinion—despite the weight of Bartolus' name and reputation—in the legal sources.[115]

*The Second Strand: Lucas de Penna, Spanish Law, and the Baptism of Jews*

Lucas de Penna took a different approach despite citing and agreeing with many of Bartolus' other claims about citizenship. 'Citizens' can be divided into a number of types. The first relevant 'species' of *cives* is '*originarius'*—native *cives* or 'original' *cives* in the sense that their place of origin (their *origo*) gives their membership its form, meaning, and privileges. Like Bartolus, Lucas then claims that this kind of birthright citizenship is the proper 'original' citizenship, even though individuals who become citizens through other legal mechanisms are often called '*originarius*'. They are, in fact, 'fictive' original citizens insofar as their *origo* is as true and as valid as a citizen who had been physically born in a place and thus obtained that *origo* but is nonetheless not precisely the same. There are three ways by which someone can be made a 'fictive' original citizen: manumission, adoption or arrogation, and election. To this, Lucas adds a fourth: 'namely, regeneration through baptism. For natural birth and spiritual rebirth are equivalent.' Lucas' justification for this equivalency is a passage from the canon law in the *Liber Extra.*[116]

The passage, which is in itself a restatement of John 3:5-7, states 'You must be born again: because unless someone is born from water and the Holy Spirit, they may not enter the kingdom of heaven'.[117] The language in scripture, the writings of the apostolic fathers, and the canon law recognizing baptism as regeneration and rebirth allowed Lucas and others to draw an equivalency between the actions of birth and rebirth which extended beyond metaphysical transformation. Andrea Barbazza (1399-1479), commenting on a different passage in the *Liber Extra,* argued that it is 'not unmerited' to say that somebody becomes a *civis* through baptism because through

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[113] Also compare Hippolytus de Marsiliis, *Tractatus Bannitorum* (Bologna, 1574), In verbo Civitate, n. 119-120, fol. 6. Hippolytus is skeptical that baptism could contract citizenship if the civil law already provided mechanisms for the same on the same grounds that marriage (also a sacrament) would then also contract citizenship. I do not address citizenship or civic-membership by marriage in this article, but it was extensively discussed by jurists.

[114] Plenty of other lawyers—civil and canon—simply did not discuss baptism as it related to civic membership: where we might expect to find precursors to Bartolus and Lucas in Azo (c. 1150-1230), Accursius (c. 1182-1263), Andrea de Barulo (c. 1190-1275), Hostiensis [Henry of Segusio] (c. 1200-1271), Odofredus (d. 1265), Cino da Pistoia (c. 1270-1336), or Albericus de Rosate (c. 1290-1354/60) we don't find it. After Bartolus and Lucas, we also don't find it in the glosses and comments on Digest 50 or Code 10 by Nicolai de Napoli (b. 1315), Joannes de Platea (-1427), Jean Domat (1625-1696), Johann Brunnemanni (1608-1672), or Cyprianus Regnerus ab Oosterga (1614-1687) among others.

[115] Even those who remain neutral, like Marcellus Cala (c. 1580), cite and defend Bartolus' proposed intuition that baptism was analogous to manumission, misleading later less cautious jurists (in this case, Mario Giurba) to assume that he agreed that a person acquired 'origo' through baptism. See Marcellus Cala, *Tractatus de Modo Articulandi,* (Venice, 1597), § 2, Gloss 1, n. 1170, fol. 211r; Mario Giurba, *Decisae Observationes* (Amsterdam, 1652), Observatio 75, pp. 284-288.

[116] Lucas de Penna, *Commentaria in Tres Posteriores Libris Codicis,* (Lyon, 1582), at C.10.39[40].7, pp. 225-226.

[117] X. 3.42.

baptism a human is reborn and if through carnal birth one is made a *cives* then it is the same through the spiritual birth of baptism.[118]

Although the literalism with which Lucas and Andrea draw this comparison might seem strange at first, it is worth noting the longstanding metaphysical commitment within Catholicism to sacraments having physical consequences, including the transubstantiation of the eucharist, the Word becoming Flesh in John 1:1-14, and the existence of miracles. If the bread and wine physically become the body and blood of Christ, then it is not a far stretch for baptism to be a second birth with both metaphysical and temporal effects: salvation *and* civic membership. Lucas' initial step to draw a direct connection between spiritual and temporal matters was the foundation of the arguments which later jurists used to expand on the civic and legal effects of baptism.

Take for example Mariano Soccini (1401-1467), who connected Bartolus' two comments on the *Digest* and the *Code* above to stress that people do contract 'citizenship' and enter into the jurisdiction of the place where they are baptized. Although Bartolus had desired to leave the ecclesiastical aspects of baptism to the Canonists, Soccini quips that he had not yet found an answer in their writings, and so he supplied his own. Because individuals are said to be 'reborn' and 'regenerated' through baptism, they contract '*civilitas*' as if through birth and '*originem*'.[119] Giovanni Battista Costa (c. 1524-1607), citing Soccini, underscored that the legal fiction of civic membership acquired through the rebirth of baptism was the same as civic membership acquired through adoption.[120]

This does not mean that baptism automatically granted all of the privileges of 'original citizenship' when it generated a new *origo* for the individual; jurists were hesitant to admit that 'casual' birth did so either. In order to be eligible to enjoy the privileges of being a *civis originarius,* the individual had to pay their due taxes or submit to public burdens.[121] Baptism could make *cives*, but jurists and cities might still require further civil 'additions' for a *civis* to claim all of the privileges unlocked by their *origo* through baptism.[122]

The 'fictive' path to citizenship was no less 'real', however, than the citizenship which belonged to a *civis originarius*. Antonius Mattheus (1601-1654) argued that what held for 'true original citizens' was also true for those who were 'original citizens by fiction' through baptism.[123] The quality of civic membership generated through baptism (*origo, naturalitatem,* and *domicilium* or *vicinitas*) was "*vera et realis*"—true and real— according to Alfonso de Narbona (1564-1611).[124] The same is echoed by Antonio Fernandez de Otero (b. 1590): of the many ways one can acquire "*vero vicinitas seu domicilium*", birth is the first, but rebirth is the second.[125] Antonio Perez

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[118] Andrea Barbazza, *Commentaria Super Primam, Secundam et Tertiam Partem Decretalium,* Tom. II (Venice, 1508), X.2.19.10, 'Per tuas', fol. 181v, citing both Bartolus passages above.

[119] Mariano Soccini (the Elder), *Tractatus Perutilis et Quottidianissimus de Foro Competenti,* (Milan, 1494), a1v-a2r, at summary 'B'. Not to be confused with his descendent Mariano Soccini (1482-1556), also an accomplished jurist.

[120] Giovanni Battista Costa, *Tractatus de Clausulis Conventionalibus,* Pars Secunda, Clausula 144, p. 246 in Costa, *Tractatuum,* Tom. II (Venice 1671). See also Giovanni Maria Novarrius, *Praxis seu Tractatus Absolutissimus Electionis et Variationis Fori* (Naples 1621), Quaestio 32, n. 8, p. 211.

[121] Paulus de Castro, *Commentaria in Secundam Infortiati Partem,* (Lyon, 1585), at D. 30.86[84].10, n. 3, fol. 37r.

[122] Tomás Carleval, *Disputationum De Iudiciis,* Tom. I, (Venice, 1666), Lib. I, Tit. I, Disp. II, Quaest. II, n. 112-113, p. 28.

[123]Antonius Mattheus, *Tractatus Iudiciarius,* (Rome, 1558), n. 27-28, fol. 18v-20v. Compare Francisco de Caldas Pereira (1543-1597), *Receptarum Sententiarum,* Tom. II, (Frankfurt, 1617), Consilium 47, p. 412.

[124] Alfonso de Narbona, *Commentaria in Tertiam Partem Novae Recopilationis Legum Hispaniae,* Pars II (Toledo, 1624), [at Lex 20, Lib. 4, Tit. 1] Gloss 2, n. 148, p. 413. Narbona explicitly rejects the Bartolist branch of the argument (ibid. n. 150).

[125] Antonio Fernandez de Otero, *Tractatus de Pascuis et Iure Pascendi* (Cologne, 1732), Cap. 4, n. 8-9, p. 8.

(1583-1673/4), following Amaya, argued that baptism leads to (*inducit*) *origo*, in the same way as *nativitas* leads to *origo*, and what results is true *origo*.[126]

The authors in these passages do not treat baptism as a legal proxy for natural birth. That is, the argument is not that a person's baptism in a particular place serves as convincing evidence of their natural birth in that place, and that it is still their natural birth which is generating their obligations and giving an individual their legal identity. The argument instead is that their *rebirth* in a particular place carries its own more powerful legal significance than their birth there (or elsewhere). This was tested frequently: what happens when somebody is baptized in a *civitas* different from that of their natural birth or the natural birth of their parents? They were caught between two potential *civitates* of origin. It was not an inconsequential question—they might be compelled to pay taxes or serve in public positions in one city over another, or they might be ineligible to serve in a position of honor in one city because of their ties to another. Practically then, jurists frequently argued that baptism carried more weight than natural birth for the determination of one's *origo* or *patria*.[127] 'An *infidel* baptized in Naples is called a *Civis Neapolitanus*', wrote Giovanni Maria Novario, and they 'enjoy in the same things as an original *Civis* because they are said to be reborn even with respect to their *patria*'.[128] Rebirth in a place generated the same legal ties and obligations that birth had created, but in a different city; unable to coexist, the ties created through baptism took precedence.

The clearest case study which frequented late medieval and early modern case law was the unbeliever, Jew, or Muslim who was baptized within a political community. According to Pierre Rebuffi (1487-1547), a baptized Jew is not called a foreigner (*externus*) because they have been reborn and have therefore acquired a new *origo*.[129] This unique patriation of a Jewish subject is echoed most frequently in the Spanish Law by Alfonso de Acevedo (1518-1598),[130] Tomás Carleval (1576-1645),[131] and Thomas Sanchez (1550-1610),[132] but also by Italian jurists like Stephanus Gratianus and Mario Giurba (1564-1649).[133] Sanchez in particular applies this to '*infideles*' who are naturalized through the rebirth of baptism.[134]

Marquardi de Susanis (d. 1578), famous for his writings on the inclusion and exclusion of Jews in medieval law and society in *De Iudaeis*[135] also noted that if a Jew or an unbeliever

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[126] Antonio Perez, *Praelectionum in Duodecim Libros Codicis Justitiani,* Tom. II, (Amsterdam, 1661), at C.10.38, n. 4-5, p. 340.

[127] Mario Giurba, *Tribunalium Sicilae Decisae Observationes,* (Amsterdam, 1652), Observatione 75, n. 18, pp. 286-287.

[128] Giovanni Maria Novario, *Commentaria in Singulas Regni Neapolitani Pragmaticas Sanctiones,* (Naples, 1689), De Immunitate Neapolitanorum, Pragm. I, Collectanea II, n. 14, p. 281.

[129] Pierre Rebuffi, *De Pacificis Possessoribus,* n. 267, p. 312 in Rebuffi, *De Tractatus Novem,* (Lyon, 1564). A paleographical note: Rebuffi's argument here is widely cited incorrectly (17 or 216) by his contemporaries and successors because early editions of the text have different numerations of the argument, but not all jurists had a version of the text at hand. They instead had to copy the citations of others, even well after the numeration had been settled for several editions.

[130] Alfonso de Acevedo, *Commentariorum Iuris Civilis in Hispaniae,* Tom. 1, (Salmanca, 1583), Lib. I, Tit. 3, Lex 19, nu. 11, p. 78.

[131] Tomás Carleval, *Disputationum de Iudiciis,* I.I.II.II, n. 111-112, p. 30.

[132] Thomas Sanchez, *Consilia seu Opuscula Moralia* (Parma, 1724), Tom. 1, Lib. 1, Cap. 1, Dubium 9, n. 7, p. 97.

[133] Stephanus Gratianus, *Disceptationum Forensium*, Tom. 1, (Geneva, 1664), Cap. 75, n. 14-16, p. 176; Giurba, *Observationes,* pp. 286-287.

[134] Sanchez, *Consilia,* p. 97.

[135] Indeed, Marquardi de Susanis had a number of restrictions on baptism for Jews and *infideles,* even though that was compatible with Jewish citizenship. J. Kirshner cites Marquardi, alongside Bartolus, as evidence that the jurists were largely in agreement that baptism was not required for individuals to become citizens. Although true, this is a different

(*infidelis*) was baptized in a city, they are made 'citizens of that city' (*cives illius civitatis*), as if they were made 'citizens by reason of origin' (*cives ex causa originis*) [136]. So long as the baptism was authentic and not fraudulent (again a frequent concern), Marquardi saw no reason why a baptized Jew would not be eligible to serve in either ecclesiastical or public offices and positions of dignity; their baptism conferred the same privileges of 'citizenship' as other Christians and they ought not be punished for their past.[137]

Biagio Aldimiri (1630-1713) agreed but went further in claiming that if a child was born to two Jewish parents, and after their birth the mother converted to Christianity, then their child ought to be free and to be baptized. Furthermore, any unbeliever who is baptized outside of their original *civitas*—their proper and natural *origo*—is said to be a *civis* in the place where they are baptized and enjoy the temporal and spiritual privileges of that membership in that place.[138] Part of the logic seems to be supported by the administration of the Church. Joannis Sigismund Zeller (1653-1729) recognized that many objected to Jews being considered to have *origo* in the place of their baptism, even when they were not born there. His response was that no Jew or unbeliever through natural birth could be subjects of the Church; through baptism they enter into the Diocese and Bishopric where they are baptized, just as those who are born in that place to Christian parents (and therefore baptized) are. [139] Their 'mystical' birth weighed more than their natural birth, especially when determining civic membership.

To date, historians have rightly stressed that citizenship was never 'contingent' on baptism; Jews, Muslims, and other non-Christians could become citizens without converting to Christianity.[140] These authors show, however, that Jews, Muslims, and other non-Christians could become '*cives*' *through* converting to Christianity; civic membership was a natural side-effect of the sacrament of their conversion. These authors also highlight the strategic advantages of conversion: because *civilitas* accompanied baptism, baptism granted immediate political and legal equity in the community, to say nothing of the (presumed) reduced liability for persecution.

Jeronimo Gonzalez (d. 1609) observed, while commenting on the *Siete Partidas,* that the canonists had not settled on an answer to whether baptism contracted civic membership and therefore he had to consult the *ius commune*. He found there no statutes to the contrary, and in fact they seemed to reaffirm the legal potency of baptism.[141] And so, quite rightly, Francisco de Amaya (1585-1640) was able to claim that nobody sensibly denies that *civilitas* was acquired through

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question than the one posed in the juristic literature. The controversy was not if a Jew must convert to become a citizen, but rather if a Jew *became* a citizen through baptism. For the purpose of this article I set aside the rest of the important questions about Jews and their relationship to medieval law. Cf. J. Kirshner, 'Pisa's "long-arm" gabella dotis (1420-1525): issues, cases, legal opinions', pp. 223-48, p. 242 in *Europe and Italy. Studies in Honour of Giorgio Chittolini* (Firenze University Press, 2011); A. Toaff, 'Judei cives? Gli ebrei nei catasti di Perugia del Trecento', *Zakhor,* 4 (2000), pp. 11-36; C.H.F. Meyer, 'Nichtchristen in der Geschichte des kanonischen Rechts: Beobachtungen zu Entwicklung und Problemen der Forschung', *Rechtsgeschichte* RG 26 (2018), pp. 139-160; I.M. Resnick, *Marks of Distinctions: Christian Perceptions of Jews in the High Middle Ages,* (CUA Press 2012); V. Colorni, *Legge ebraica e leggi locali: ricerche sull'ambito d'applicazione del diritoo ebraico in italia dall'epoca romana al secolo XIX* (Milan 1945), pp. 86-9.

[136] Marquardi de Susanis, *Tractatus De Iudaeis et Aliis Infidelibus* (Venice 1568), Pars 3, Cap. 3 n. 13, fol. 157r.

[137] Ibid., Pars 3, Cap. 5, n. 7, fol. 164r.

[138] Biagio Aldimari, *Tractatus de Nullitatibus Contractuum,* Tom. 8, (Venice 1710), n. 91, p. 114.

[139] Joannis Sigismundi, *Consilia,* Tom. 1 (Ingolstadt, 1710), Consilium 13, n. 16-17, p. 235.

[140] Kirshner, 'Pisa's long arm', p. 242.

[141] Jeronimo Gonzalez, *Glossema seu Commentatio ad Regulam Octavam Cancellariae* (Rome 1611), at Glossa 9, n. 105-109, pp. 259-260.

baptism.[142] This observation is important—the *ius commune* tradition relied heavily on established customs, court decisions, and recommendations of jurists. Gonzalez thus recognizes not only the formal legal implications of baptism as reflected by many of the jurists above, but also of the dominant underlying intuition of many them and their sources—baptism in a place created ties between an individual and the community there, ties which were expressed using the vocabulary of the roman law, ties that were legal and political, not just spiritual. They were also shared across the many (Christian) political communities and states in Europe.

This historical outline shows how the 'primacy of baptism as the way to citizenship' developed through legal texts and commentaries.[143] All of this confirms through the legal arguments of jurists what Dante had expressed about his own baptism in his *Paradiso*:

> To such a life—so tranquil and so lovely—
> of citizens in true community,
> into so sweet a dwelling place did Mary,
> invoked in pains of birth, deliver me;
> and I, within your ancient Baptistery,
> at once became Christian and Cacciaguida.[144]

The rebirth of baptism creates two *cives*, and it is baptism that gives the child not only a name but a place of familial, historical, and political belonging. And so, Dante later longs to 'return [to Florence] as poet and put on / at my baptismal font, the laurel crown; / for there I first found entry to that faith / which makes souls welcome unto God.'[145]

Insofar as the civic identity of any individual in late medieval and renaissance Europe can be discerned and reconstructed, it must begin with the baptistery which individuals could point to as not only the civic center of the *civitas* but also the location of their civic and theological rebirth. Citizenship in two cities was a classical Christian theological-political claim, both in an abstract sense of the heavenly kingdom and earthly politics and in the particular sense of negotiating between the body of Christ on earth and temporal kingdoms. There is a difference, that is, between Augustine and Gelasius, or between the way theologians write about politics and the way Popes and Christian Kings wrestled over their jurisdiction of souls and subjects. The 'citizenship' detailed above however was legal, enforceable in the courts, and carried different implications than previous theological accounts of earthly and heavenly membership.

Before turning to the theoretical significance of baptism, we should pause on the procedure by which baptisms were recorded, where they were stored, and how they were consulted. At least as early as the 14th century, at the conclusion of the baptismal ceremony, the names of the child,

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[142] Amaya at C.10.39.7, n. 47, p. 329. Compare with Marcantonio Savelli (1624-1695), who claimed that the legal significance of 'birth and baptism' was 'widely proved'; though citing many of the authors included in this article, he combined birth and baptism such that the meaning of his claim is ambiguous: 'Someone born *and* baptized in a certain place is made a true original and natural citizen in that place in which they are born, and are capable of all the privileges, benefits, and duties which other citizens of the same place enjoy.' I include this here because it is notable that the other jurists above are not ambiguous—baptism is not sealing or confirming the rights acquired by birth, although if one's birth and rebirth happen in the same place then it may appear that way. Marcantonio Savelli, *Summa Diversorum Tractatuum,* Tom. 3, (Venice, 1715), § Natus, II, n.1, p. 195.

[143] A. Thompson, *Cities of God: The Religion of the Italian Communes, 1125-1325* (University Park, 2010), pp. 311-12.

[144] Dante, *Paradiso,* Canto XV, lines 130-135, translated by A. Mandelbaum in *The Divine Comedy* (New York, 1995), pp. 451-452.

[145] Dante, *Paradiso,* Canto XXV, lines 8-11.

their parents, and occasionally their god-parents or sponsors were often written down with the date of the baptism in a Baptismal Book (or a more general book for the Parish in which marriages, deaths and burials were also recorded).[146] The local ecclesiastical administrative value of a register of baptisms was twofold: it helped priests and bishops record and track the members of their congregation, and also gave them a piece of evidence to help prevent illegal marriages between blood-relatives.[147] And, for baptism especially, the parallel between the Baptismal Book and the scriptural Book of Life would no doubt have been obvious to parishioners.[148] The oldest surviving registers we possess today come from Givry in France (1303) and Gemona del Friuli (1379) and Siena (1381) in Italy—crucially, pre-reformation registers, kept either voluntarily or loosely mandated by custom.[149]

In the 16th century, immediately following the Reformation, the nascent Church of England, the French monarchy and the Catholic Church all mandated the keeping of registers for baptism and marriage. In 1538, "The Second Royal Injunctions of Henry VIII" written by Thomas Cromwell ordered:

> That you, and every parson, vicar, or curate within this diocese, shall for every church keep one book or register, wherein ye shall write the day and year of every wedding, christening, and burying, made within your parish for your time and so every man succeeding you likewise; and also there insert every person's name that shall be so wedded, christened, or buried; and for the safe keeping of the same book, the parish shall be bound to provide, of their common charges, one sure coffer with two locks and keys whereof the one to remain with you, and the other with the wardens of every such parish wherein the book shall be laid up ; which book ye shall every Sunday take forth, and in the presence of the said wardens, or one of them, write and record in the same all the weddings, christenings, and buryings, made the whole week before; and that done to lay up the book in the said coffer as before; and for every time that the same shall

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[146] B. Laplante, 'From France to the Church: The Generalization of Parish Registers in the Catholic Countries', *Journal of Family History*, Vol. 44(1) (2019) pp. 24-51. The history seems more complicated than this, as early Christians drew up lists of baptism as early as the 4th and 5th century. This practice "disappears" until the time period examined in this chapter, but I suspect that it remained in practice (just in a smaller scope), and that we may have simply lost the material records to time because of the form that the lists took.

[147] In 1406, Henri le Barbu, Bishop of Nantes, issued an edict for his "*civ*[itas] *et dioec*[ese]" stating that in order to prevent illicit marriages between spiritual kin (marriage within the tangled webs of Godparents, sponsors, and compaternity), his diocese must begin to keep a register of births and baptisms with the names of the godparents clearly listed. The text of the ordinance: Le Mee, "La réglementation des registres paroissiaux en France", *Annales de Demographie Historique* (1975), pp. 433-477, 434-435; also, Mols (1956), Vol. I, p. 86.

[148] Of a book: Exodus 31:31-33, Psalm 56:8, 139:16, Daniel 12:1; Of a book of life: Phiippians 4:3; Revelation 3:5, 13:18, 17:8, 20:12-15, 21:27.

[149] As is common in this chapter, the story of the large-scale mandate of baptismal registers may start in Spain with a statute from Cardinal Ximenes [Cisnero], Archbishop of Toledo in 1497. Unlike Henri le Barbu above, the problem faced by Cardinal Ximines was the abuse of the poor record spiritual relationships in order to trigger divorces. 19th century historians claim that Thomas Cromwell witnessed the system of registers while abroad as Vicar-General of Henry VIII and brought the institution to England in the decree below: Waters (1883). On registers generally, see Laplante, 'From France to the Church'; also, R. Mols *Introduction a la démographie historique des villes d'Europe du XIVe au XVIIIe siecle,* Vol. I, (1956) pp. 71-102; R.E.C. Waters, *Parish Registers in England, their history and contents, with suggestions for securing their better custody and preservation* (1883)*;* S. Szreter, 'Registration of Identities in Early Modern English Parishes and Amongst the English Overseas', in K. Breckenridge and S. Szreter (eds.), *Registration and Recognition: Documenting the Person in World History,* (2012).

> be omitted, the party that shall be in the fault thereof shall forfeit to the said church 3$^{s}$-4$^{d}$, to be employed on the reparation of the same church.[150]

The same was the case for King Francis I's "Ordinance of Villers-Cotterets" (1539), which mandated a register for baptisms but for the express purpose of proving an individuals' adulthood.[151] A few years later, at the Council of Trent (1563), the Catholic Church mandated a parish register tracking all spiritual relationships created through marriage or baptism:

> Experience teaches that, by reason of the multitude of prohibitions, marriages are ofttimes unwittingly contracted in prohibited cases, in which marriages either the parties continue to live on, not without great sin, or they are dissolved, not without great scandal. Wherefore, the holy Synod, wishing to provide against this inconvenience, and beginning with the impediment arising from spiritual relationship, ordains that, in accordance with the appointments of the sacred canons, one person only whether male or female, or at most one male and one female, shall receive in baptism the individual baptised; between whom and the baptised, and the father and mother thereof; as also between the person baptising and the baptised, and the father and mother of the baptised; and these only; shall spiritual relationship be contracted. The parish priest, before he proceeds to confer baptism, shall carefully inquire of those whom it may concern, what person or persons they have chosen to receive from the sacred font the individual baptised; and he shall allow him or them only to receive the baptised; shall register their names in the. book, and teach them what relationship they have contracted, that they may not have any excuse on the score of ignorance.[152]

Scholars routinely observe that these mandates were politically strategic for Henry VIII, Francis I, and the Catholic Church.[153] They also suggest that these mandates ushered in a state-led, bureaucratic record-keeping for a new kind of state—that records of baptism and marriage were now civil concerns, or at least were within the jurisdiction of the state insofar as they could be

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[150] 'The Second Royal Injunctions of Henry VIII', Number 12, pp. 39-40 , in W.H. Frere and W.M. Kennedy, *Visitation Articles and Injunctions of the Period of the Reformation,* Vol. II. (1910). Frere and Kennedy note "This injunction was received with much misgiving by the people, especially in Devon and Cornwall. 'Their mustrust is that some charges more than hath been in time past shall grow to them by this occasion of registering of these things" (*State Papers,* I, 612). In December, 1538, Henry wrote blaming the clergy for causing this and other items of the injunctions to be misinterpreted." n.1, p. 540.

[151] P. Delsalle, *Histoires de familles: les registres paroissiaux et d'état civil, du Moyen Âge à nos jours : démographie et généalogie. Besançon*: (Presses universitaires de Franche-Comté 2009). p. 32: art. 51. "Aussi sera faict registre en forme de preuve des baptesmes, qui contiendront le temps de l'heure de la nativite, et par l'extraict dud. registre se pourra prouver le temps de majorité ou minorité et fera plaine foy a ceste fin." (*Aussi sera tenu registre pour preuve des baptêmes, lesquels contiendront le temps et l'heure de la naissance, et dont l'extrait servira à prouver le temps de la majorité ou de la minorité et fera pleine foi à cette fin.*)

[152] Council of Trent, Session 24, Chapter II. pp. 199-200 in J. Waterworth, ed. *The Canons and Decrees of the Sacred and Oecumenical Council of Trent* (London 1848).

[153] H. Jedin, *Le origini dei registri parrocchiali e il Concilio di Trento,* in 'Il Consilio di Trento, Rivista commemorativa del IV cent.' II, (Rome 1943), 323-336.

mandated by the state, collected with the state's support, and used for the state's goals of estimating population or, more menacingly, tracking down heterodoxies.[154]

However, these kinds of conclusions ignore both the pre-reformation history of baptismal registers, and the pre-reformation civil significance of baptism. In addition to the legal and ecclesiastical transformations brought on through baptism, jurists of the 16th and 17th century regularly cite and rehearse the incidental and instrumental value of baptism's making of civic members: one's civic membership and the various components of their legal status can thus be proved through the Baptismal Book. French jurists like Pierre Rebuffi observed that Francis I's 1539 mandate of the baptismal registers was connected to the previous creation of *civitatis originarius* through baptism.[155] Italian jurists followed suit, but presumably with the Council of Trent in mind: Giuseppe Mascardi [Joseph Mascard] held that the *Liber Curati* (a Parochial Register) and its inclusion of names, surnames, parents, and god-parents of the baptized individual could be used to prove one's "*civitatis originis, et civis optime."*[156] It could also be used to prove one's lineage.[157] In a related *Conclusio,* Mascard writes that an individual's age could be proved by reference to a "*Librum Publicum",* with any annotations the officials of that place had also made.[158] The chief of these "public books" which might be used to prove one's age and *origo* was the *Liber Baptismum*. Verallus (died c.1584) came to the same conclusion but cited instead a previous literature of civil and canon law jurists stretching back through Philippi Decius (1454-c.1535) and Aymo Cravetta (1504-1569) to Bartolus, Angelus de Ubaldi, and Paulus de Castro on the kinds of books which could supply evidence for age and status during civil procedures.[159]

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[154] R. Knecht, *Francis I,* (Cambridge 1969) pp. 357-360; R. Knecht, 'Francis I and Absolute Monarchy', *Historical Association,* Issue 72 (1969); Gordon, A. 'The Paper Parish: The parish register and the reformation of parish memory in early modern London.' *Memory Studies*, *11*(1), (2018) pp. 51-68. David Hume counted the lack of centralized record keeping among the 'barbarous' qualities of the medieval "states" of the 12th and 13th centuries, implying that such record keeping was a key marker of statehood. His historical claim is, however, overstated.

[155]Rebuffi, *Tractatus de Regestis, seu Libris Baptismi, Sepulturae, et Aliorum Actuum,* [Amsterdam 1668] p. 388. Article I, Gloss I, n. 15: "*Sexto,* probabitur ex hac professione, quod sit illius civitatis originarius, et civis, et sic ad honores, et privilegia civitatis admitti debebit. [l. 2. C. de his qui veniam aetatis impetr. l. 1. et 2. C. de municip. et origi. lib. 10]. Et sine natus sit in civitate, sine in suburbiis, gaudebit privilegiis civitatis [l. 2. ff. de verb. sign.]. Nam qui in continentibus aedificiis nati sunt. Romae nati esse intelliguntur [l. qui in continentibus. ff. de verbo. sign.]."

[156]Joseph Mascard, *Conclusiones Probationum Omnium,* Vol. 3 [Frankfurt 1588], Fol. 29r, Conclusio 1141, n. 18-21; n. 21: "Amplius, quod quis sit illius civitatis originarius, et civis optime probabit Curati liber, in quo baptizatorum nomina profiteri solet...".

[157] Biagio Aldimari [Blasii Altimari], *Tractatus de Nullitatibus Contractuum*, Vol. 8, p. 105., Rub. II and III, Quaest. I, n. 91:"Civilitas ex baptismatis libro à Parocho detento probatur et eius descendentia." *Tractatus de Nullitatibus Contractuum*, Vol. 8, p. 105.

[158] Mascard, Conclusio 671, n. 1: "Aetas non solum iis modis supra a nobis explicatis probari potest, ied etiam per librum publicum, seu annotationem Officialis alicuius loci; seu castri: ut ita sentiam, movet me...." *Conclusiones Probatiunum Omnium,* Vol. 2 [Frankfurt 1661], pp. 297-298. Relatedly, later biblical commentators read these public books back into scripture: Albert Schultens (1686-1750), commented that Job 19:23—"Oh that my words were now written! Oh that they were printed in a book!"—referred to a public book where all words might be written but also readable by all—Job's book was a *Librum Publicam,* it seems, a *"scribis Civitatem, in earundem tabulariis reponenda."* A. Schultens, *Liber Jobi cum Nova Versione ad Hebraeum fontem et Commentario Perpetuo,* [1757], p. 481.

[159] Paulus Aemilius Verallus, *Decisiones Aurea,* Pars Prima, [Venice 1626], p. 144. Decisio 314, "Aetas probatur per librum baptismi, qui bene conservatur in ecclesia parochiali, argumento eorum, quae dicuntur per omnes [...]."

Italian jurists Vivius (1532-1616)[160], Giovanni Battista Costa (1524-1607) [161], Mario Giurbia[162], and the Sabelli's[163] repeated the same line of argument, as did Flaminio Parisio (1563-1603) and Polidoro Ripa (d. 1613) and Spanish canon lawyers Francisco Peña (c. 1540-1612)[164], Jerónimo de Cevallos (1560-1641)[165], and Nicholao Garcia (d. 1654).[166]

My claim is not that the reason why baptism came to serve this civil role is because of the physical importance of the baptismal book as a centralized record of birth which would have been useful for the "state": my account above is not a backwards prescribing of a functionalist story of the sacrament of baptism. Rather, through the preeminence of the baptismal book as a public book and record of baptism—a record of civic membership because of the previous centuries of legal argumentation—we have material confirmation of baptism's civic function and potential civil significance.

**Section III: Baptism and Citizenship—Horizontal and Vertical Implications**

Having seen baptism's surprising legal significance, we must now look to how the norms and practices of baptism's significance confirmed and challenged the norms and practices of political relationships. The framework for reinterpreting civic membership which I supply here focuses on the ties and obligations which governed the relationships between individuals, their church, and their political community. In particular, I focus on ways in which individuals could exert strategic pressure on their peers or superiors given the obligations and rights acquired through baptism—obligations and rights which are not captured within accounts of '*civilitas*' that interpret citizenship as a function of eligibility for office or to vote.

The civic significance of baptism complicates the model of civic membership as citizenship along both horizontal and vertical dimensions. On the horizontal dimension, by which I mean the ties between and across individuals, civic membership acquired through baptism stresses the dual inclusivity and exclusivity of the political community, and it underscores the contractual—tacit and voluntaristic—quality of civic membership. The sacrament of baptism is inherently exclusive insofar as it can only administered to Christians, but within the sacrament itself it is inherently inclusive insofar as it denies the relevance of distinctions of sex, class, race, nationality or previous religious faith. It also was an oath—an explicitly voluntaristic compact which bound the community and participants in the ceremony together with oaths into membership in a single body. I turn to this horizontal dimension first.

On the vertical dimension—by which I mean ties between individuals and other agents within a hierarchy—the civil significance of baptism first challenges the already blurry distinction between local civic and ecclesiastical life: Bishops are the baptizers of citizens and their political function—along with the political place and space of the Church—mean that the political

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[160]Francisci Vivii, Decis. 489, n. 9, *Decisionum Regni Neapolitani,* Vol. III [Frankfurt 1597], p. 250.

[161] Giovanni Battista Costa, *Consiliorum Sive Responsorum*, Vol. I, [Ticini 1606], 240-241., Consilium 33, n. 4: "ut aperte constat ex fide Baptismalis libri, cui omnino adhibetur fides...."

[162] Mario Giurba, *Tribunalium Siciliae Decisae Observationes* [Amsterdam 1652], pp. 288., Observatio 75, n. 24: "Civilitas vero ex Baprismatis libro à Parocho detento probatur, eiusque Descendentia",

[163] [Guido and] Marci Antonii Sabelli, *Summa Diversorum Tractatuum* [Topic Dictionary of Law]: Vol. I, §. Baptismus III, n. 3-4: [Venice 1715] pp.157-159. Also, Vol. III, §. Natus II, n. 1. [Venice 1715].

[164] Francisci Peña, *Recollectae Decisiones*, Vol. II [Lyon 1650], p. 430., Decisio 1571 [June 18, 1610], n. 3-4.

[165] Hieronymi de Cævallos [Jeronimo de Cevallos], *Tractatus de Cognitione* [Köln 1687], p. 180. Part II, Quaestio IV, n. 81-82:

[166] Nicholas Garcia, *Tractatus de Beneficiis,* Vol. II, [Madrid 1613], Fol. 83v., Chapter 15, n. 33-34.

community itself is intertwined with the community generated and regenerated through the baptismal font. Second, the civic significance of baptism meant that authors could leverage baptism against rulers, good and bad, to reward and punish. I turn to this vertical dimension second.

*Horizontal Ties: Equality, Oaths, and Obligations*

Baptism as a route to civic membership is at the same time exclusive and inclusive; it is one path to civic membership, but civil and canon lawyers from Bartolus onwards agree that it is not necessary for acquiring civic membership and that the other paths to civic membership outlined in civil law are still powerful and viable. However, as we saw above in the example of foreigners, Jews, and unbelievers, baptism might offer a shortcut to civic membership. Baptism removes a Jewish child from the *potestas* of their father and brings them into the *patria* of their rebirth, for example, in a way distinct from other civil law remedies.

And, though the community created through baptism is no doubt exclusive, the universal requirement for baptism for Christians makes that community structurally inclusive: everybody—rich and poor, royal and common, men, women and intersex persons—was baptized not only in the same sacrament but through the same liturgical ceremony and even in the same water. The equality inherent in and necessary to the baptismal sacrament was self-consciously protected by the Church: baptismal fonts were standing water, and thus had to be changed when the water became 'stale'. However, the litany for the blessing of the font when the water was changed and refreshed specified that the water could not be changed for 'somebody of distinction'.[167] Priests could not refresh the font for a King or a member of the elite—just as God was not a 'respecter of persons', neither were the waters of baptism.[168] The equality, sameness, and levelling aspect of the ceremony and metaphysical meaning of baptism is unescapable and necessary for understanding the ties between civic members.

The second element to this horizontal dimension of civic membership is the contractual nature of baptism, which in turn reinforces both individual and group agency. Baptism presupposes agency and volition; canon lawyers and theologians routinely denied that forced baptism was legitimate, even if they could and did routinely happen under coercion.[169] For an adult, verbal confirmation (or if they were mute, some positive sign of confirmation) of all of the baptismal vows was a necessary part of the ceremony. They had to understand the language and the meaning of the commitment they were entering into. The Council of Niceae required catechumens (converts to Christianity) to be sufficiently instructed before baptism and if their life was in grave danger they were to be taught as much as possible before the sacrament was administered. Canon lawyers agreed then that any priests who baptized an adult who did not understand the language of the sacrament could be punished for violation of the central principle of baptism—the freedom of the will.[170] For an infant which did not yet have the 'use of reason' or the faculty of speech, it was still

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[167] J.D.C. Fisher, *Christian Initiation: Baptism in the Medieval West: A Study in the Disintegration of the Primitive Rite of Initiation.* (London and Beccles, 1965), p. 166, Appendix III.

[168] Romans 2:11 in the KJV, translating the vulgate 'Non est enim personarum acceptio apud Deum.' Aquinas pauses on the importance of this concept for equity, as does Thomas Hobbes in *Leviathan.* For its place in scholastic thought, see P. Porro, 'Remarks on the Question of the *Acceptio Personarum* in Scholastic Theology', *Revue des sciences philosophiques et théologiques,* Vol. OME 94, no. 3 (2010), pp. 481-509.

[169] Aquinas, II-II.10, Article 8; Innocent, at X. 3.34.08; Baldus, *Consiliorum,* Vol. 1 (Venice, 1609), Consilium 316, n. 4-5, fol. 93r; and Jacob Pignatelli, *Consultationes Canonicae,* Tom. 5 (Cologny, 1700), Consultatio 13, n. 107, p. 66.

[170] Aquinas, III.68, Article 7.

necessary that the infant *will* their baptism; lawyers thus had to employ a dual conception of guardianship and representation to reinforce both the contractual and soul-saving sacramental process of baptism.

Within the ceremony of infant baptism, the priest asked *the child* of a verbal confirmation of their renunciation of Satan, of his works, of his pomps, of their faith in the Father, the Son, and the Holy Spirit, and crucially of their will to be baptized: in each case, the two (or three or four) appointed godparents of the child, holding the infant by the baptismal font, answered on behalf of the child: '*volo*'— 'I do.' The commitment encapsulated by '*volo*' here is challenging to reconstruct, in part because canon lawyers and theologians were conflicted about the appropriate vocabulary to describe the kind of obligation it generated and the parties who were involved in the promise.

We should first observe that in legal contexts, '*volo*' carried a special significance, precisely because so many legal actions required individual intention. To form trusts, for example, the Roman law required a specific kind of word to prove intention: *peto, rogo, volo, fidei tuae committo.*[171] It could also confirm commitments to contracts and agreements, which was noted by both Bracton and Coke in the context of English law.[172] Independent of its use in baptism, it contained an etymological and contextual legal weight, strongly linked to the act of willing, but a kind of willing which created obligations, legal relationships, and was enforceable by law.

It was more common to talk about the '*volo'* of baptism as a *votum*—a vow, mirroring the '*volo'* of marriage. A vow was a 'simple promise', according to Aquinas, weaker and less binding than an oath. Oaths often sealed simple promises, like when a parent committed their children to future marriages and confirmed that promise with an oath, which in turn was binding on their children and enforceable by law. Aquinas writes:

> The obligation both of vow and of an oath arises from something Divine; but in different ways. For the obligation of a vow arises from the fidelity we owe God, which binds us to fulfill our promises to Him. On the other hand, the obligation of an oath arises from the reverence we owe Him which binds us to make true what we promise in His name.[173]

Within the sacrament of baptism, the individual's promise could plausibly be interpreted as an dual vow and oath, pledged to God, by which they were obliged to keep their commitment to forsake evil and honor their faith in the Holy Trinity.[174] This does, however, show the ease of overlapping the two kinds of commitments.

The external validity and applicability of this oath of baptism was taken up by canon lawyers who argued that there was more to the baptismal 'vow' than a promise to God. Augustinus Triumphus (1243-1328) argued that when an individual 'promises (*promittit*) to live according to the faith and rite of the Christian religion' in baptism they also 'swear an oath to the pope'.[175]

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[171] Institutes 2.23.3.
[172] Henry Bracton, Vol. 2, p. 70; Vol. 2, p. 72; Vol. 3, p. 39; Edward Coke, *The First Part of the Institutes of the Laws of England,* Vol. 2, 301b.
[173] Aquinas, II-II.89, Article 8. For parents and future marriages, see Aquinas at III.47, Article 6, Objection 3.
[174] Francisci Bursati, *Consiliorum*, Liber Quartus (Frankfurt, 1594), Consilium 342, n. 9, fol. 1r: 'At per iuramentum et vota quis Deo obligatur ex dispositione legis divinae...'.
[175] Augustinus Triumphus, *Summa de Potestate Ecclesiastica* (Rome, 1584), Quaestio 22, Art. 4, fol. 133v. From M. Wilks, *The Problem of Sovereignty in the Later Middle Ages: The Papal Monarchy with Augustinus Triumphus and the Publicists* (New York, 1963), p. 161.

This particular extension of the oath of baptism was hotly contested in the Reformation. 'It is absurd and beyond measure unsuitable to swear an oath to anyone in our baptism except Christ', writes one objector to Robert Bellarmine: 'Do you want to add a fourth person to the baptism [in addition to the Trinity]?'.[176] The target of Protestant authors was the implication that the oath of the sacrament of baptism was by extension an oath obliging them to temporal obedience to anybody else, especially the pope.[177] Arguments on both sides were leveraged towards individuals—either they were bound by a series of vows and oaths to obey the Pope or to enter monastic orders, or they had the 'liberty' to refuse such vows and oaths or break them. [178]

Setting aside the rest of the Reformation controversy about oaths, two things are clear. First, it was not unusual to think about the baptismal vow as an oath which could be binding on the individual and could apply to other parties. Second, it was not unusual to leverage the Baptismal vow as a rhetorical device, either towards individuals to remind them or free them of their commitments or towards positions of power to do the same. Luther, like Church authors long before him, wrote that all Christians—the 'Caesar' included—swore the same oath in baptism (*iuravit*) to obey God and not to depart from His doctrines.[179] As I noted above, this equality is reflected (in theory) in the protection of the baptismal waters.[180]

Erasmus' claim is different. His application of the oath of Baptism was directed towards Charles' obligations to God and back towards the community, in no small part because the oath of Charles' baptism was sworn 'by all' (*cum omnibus*)—not that all individuals had sworn the same oath in their own baptisms (which was true), but that at Charles' baptism some kind of oath was sworn in common. This was a creative reinterpretation of the royal baptismal ceremony on the part of Erasmus because the oath was not taken in common. Yet, it seems that Erasmus believed that the obligations generated by the baptismal oath were communal. The legal consequences of baptism as a path to civic membership can help explain how these bonds could formed—and potentially enforced as obligatory commitments—through the liturgy of the sacrament.

Take for example the position of the godparents, who in cases of infant baptism spoke for the child. It was important that godparents were distinct from the child's natural parents because

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[176]'Lancelot Andrews, *Tortura Torti: Sive, Ad Matthaei Torti Librum Responsia,* (London, 1609), p. 202.

[177] Robert Bellarmine, *Apologia,* with *Reponsio ad Librum Inscriptum*, (Rome, 1609), p. 194.

[178] I want to bracket here the rest of the controversy about vows and oaths in Reformation thought. When Luther and other authors argued about the place of vows and oaths in Christian theology, their targets were frequently monastic vows or other particular vows of chastity which promised a particular action in perpetuity. Luther's issue was not with vows as a category, but the 'godless' application and implications of vows in civil society. Even at the strongest point, the argument that vows were not appropriate for Christians can only be taken to mean either that the profession of faith at baptism was not taken as a vow or an oath, or that the circularity of predestination offered an escape: somebody who had professed faith in Christ was not obligated by that single profession and promise to sustain their faith, because if they did not sustain their faith then they had merely shown through their deliberate action that they were not one of the elect. Given that most authors continued to write about the vows and promises of Baptism (and Marriage), the latter interpretation is more likely. See Luther's 1521 text on Monastic Vows in J. Atkinson, ed. *Luther's Works,* Vol. 44: The Christian in Society I (Philadelphia, 1966), pp. 243-400.

[179] This rhetorical move to recognize hierarchy while flattening the scope of the argument to stress sameness was a common strategy used by Augustine, Alcuin, Hildegard of Bingen, Chrstine de Pisan, Erasmus and others, along with Luther here in letter on 20 November 1530 (n. 256) in M. Luther. *Martin Luthers Werke,* Vol. 34 (Weimar, 1908), p. 558: 'et nos in baptismo et Caesar nobiscum una iuravit nos velle obsequium Deo praestare et nullo modo ab eius doctrina recedere.'

[180] This equality is not reflected in the spatial environment of the sacrament. The nobility and wealthy would sit in the front of the church, and so in smaller churches and cathedrals there might not be space for many additional spectators. This was true even in massive cathedrals like the Church of St. John in Ghent for the baptism of Charles V, where the audience was filled with nobility, ambassadors, and various members of state and ecclesiastical administration.

the sacrament created a layer of obligations: the parents had an implicit obligation to raise their child well and in the faith of the Church, but to enforce that obligation the Church enlisted and charged godparents with an explicit fiduciary role in the child's life until they would be confirmed when they were old enough to express their own will using their own reason. In some textual examples of the baptismal liturgy the priest made this obligation explicit:

> Goodfaders and goodmoders and all that be here about, say in the worshyppe of god and our ladye and of the xii apostellys an *Our Father,* and *Hail Mary,* and *I believe in God,* that we may so mynyster thys blessed sacrament... God faders and godmodyrs of thys chylde whe charge you that ye charge the foder and te moder to kepe it from fyre and water and other perels to the age of vii yere...[181]

Other examples of the liturgy of baptism presented these verbal commitments not only as 'charges' placed on the shoulders of the godparents, parents, and the congregation, but as promises and vows. For those directly involved in the sacrament, their obligations could be enforced by canon law with the threat of various ecclesiastical punishments, the largest was of course excommunication—removal from the social and theological body.

We ought not overlook the verbal and tacit participation of the audience. This is further underscored by the liturgical stress on the sacrament as a corporate exercise. The priest leads the congregation in prayer so that "we may so mynyster thys blessed sacrament"; all members of the *corpus mysticum* were welcoming a new member into the Holy Body of Christ. Jacques le Goff writes about the French coronation oath and ceremony that:

> there are those whom one might think should be the most important participants, but whose presence is marginal: the people. Several allusions are made to them in the king's oaths and in certain prayers, but the people's actual presence is only fleeting.[182]

At various points in the prayers and affirmations of the coronation ceremony the people offers their assent (*assensum populi*), they confirm that they wish to be subjects of the Prince (to which they reply, '*Fiat*', or 'Let it be.'), they hear the King's promise 'before God, the clergy, and the people', and they partake in singing the *Kyrie eléison* while the bells ring at the close of the ceremony. Their participation can be taken as merely as a "symbol of the masses", but the fact of the liturgical inclusion of popular participation could be used either as a reference point for Kings to be reminded of that popular participation, or for individuals to experience participation in the coronation of a King. In the latter case, they served as witnesses to an oath they could not formally or legally enforce on their own, but nevertheless was enforceable by God.

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[181] Fisher, *Christian Initiation: Baptism in the Medieval West: A Study in the Disintegration of the Primitive Rite of Initiation.* (SPCK 1965), p. 166, Appendix III.

[182] J. Le Goff, 'A Coronation Program for the Age of Saint Louis: The Ordo of 1250', pp. 46-57, p. 50, in J.M. Bak, *Coronations: Medieval and Early Modern Monarchic Ritual* (Berkeley, 1990). We might compare this to the function of tacit consent in marriage ceremonies, in which the combination of attendance and silence proved consent. Writing about Venice's famous annual re-betrothal to the Adriatic Sea—the Sposalizio del Mare—Giulio Pace argued that the attendance (and silence) of Papal and Royal emissaries proved their active consent to Venice's special relationship of *dominium* and jurisdiction over the Sea. Pace, *De Dominio Maris Hadriatici Disceptatio*, (Lyon, 1619), pp. 25 and 31.

It is easy to see how this kind of ceremony and sacrament would be key to social identity. The late John Bossy writes, "the social effect of baptism in late-medieval Europe was, so far as I can see, to create what an anthropologist has called a 'polyadic horizontal coalition', a kinship-group partly natural and partly artificial."[183] If baptism generated not only artificial bonds between individuals and networks of spiritual sponsors and parents but also artificial bonds through civic membership, we might need to reconsider the implications on the political community.

The necessary voluntarism of the baptismal sacrament and its contraction of civic membership underscore a conception of civic membership which sits uncomfortably between common reconstructions of citizenship in the time period. The 16th century saw revivals in both vertically and horizontally oriented conceptions of citizenship, and baptism's civic role in granting civic membership challenges the way we interpret both.

Bodin's conception of citizenship, for example, was strongly vertical: his conception of citizenship was a common and shared subjection to a sovereign power, and thus it required only consensual submission, not active participation in public life, not rights, not communal bonds or shared laws and customs, and indeed, not even equality.[184] But as a contract, it did require explicit consent. Because of that, Bodin resisted some of the other standards or pathways to citizenship which the Roman law had allowed, including residence and ancestry. Some of Bodin's contemporaries, and indeed many contemporary notions of citizenship used to interpret historical authors, stressed a horizontal conception of citizenship which defined citizenship in terms of equal partnership in a state project, shared backgrounds or customs, shared or exchanged rights, or a necessary equality with other members.[185]

Baptism however was a moment of explicit consent, entering into a contract of mutual obligation with one's peers, one's spiritual kin, and the church leadership. In the case of Charles V below, it may even include a mutual obligation with an entire state. To deny the quality of the consent would be to deny the saving power of the baptismal sacrament. This conception of civic membership thus creates a political community in which most of its members had explicitly consented to membership without a necessary place for sovereignty or submission beyond the submission to spiritual authorities or the submission to be bound by one's oaths, both of which are consistent with a vertical conception of citizenship but without a strong vertical component. Civic membership without sovereignty, but through contract, is thus intensely horizonal and intensely local, contrary to later conceptions of the state which are looking for the *summa potestas* and the *respublica* and not the *civitas.*

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[183] J. Bossy, 'Blood and Baptism: Kinship, Community and Christianity in Western Europe From the Fourteenth to the Seventeenth Centuries', p. 134, in ed. D.Baker, *Sanctity and Secularity: The Church and the World* (1973). The anthropologist referenced is Eric R. Wolf in *Peasants,* (Prentice-Hall, Inc. 1966). Bossy observes that the nuclear family is not as significant in the formation of these kinships as we might expect.

[184] D. Lee, 'Citizenship, Subjection and Roman Law: Jean Bodin on Roman Citizenship and the Theory of Consensual Obligation', pp. 115-119, in C. Ando, ed. *Citizenship and Empire in Europe, 200-1900: The Antonine Constitution After 1800 Years* (Stuttgart, 2016). Bodin criticized Aristotle's conception of citizenship, which required having an active share in public life; such an active conception of citizenship could make little sense of Roman citizenship after the Antonine Constitution, where many—if not most—*cives* would not and could not have such an active share in public life. An Aristotelian view of the Roman world would thus render Roman *cives* foreigners and exiles in their own cities, analytically depriving them of a citizenship which they possessed, and without which it would be difficult to interpret the Roman empire and the various peoples subjected to it. Bodin does acknowledge that the horizontal component is important for the *civitas* but is not necessary for the *respublica.*

[185] D. Lee, 'Citizenship', p. 133: René Choppin, Charles Loyseau, and Jean Bacquet. See also C. Wells, *Law and Citizenship in Early Modern France*, (Baltimore, 1995).

Despite the universality of the sacrament of baptism, it is worth stressing the distinctiveness of its local execution and expression. Baptisteries, especially those within *civitates* or *communes* which had their own particular patron saints and local religious identities, were distinctive architectural constructions.[186] Different political communities and cultures curated different styles of baptisteries, and therefore the *locus* of baptism could therefore be culturally distinct from other communities.[187] If we add to this the historical fact that most people likely lived the duration of their lives in roughly the same place, attending the same Church in whose font they were baptized we likely can't overstate the significance of the baptistery as early as the 4th century as a place where, as Enrico Cattaneo puts it, Catholic 'citizens' could physically point to as the *locus* of their salvation and their promises to the Church,[188] but also to the fount of their civic identity and civic unity. Baptism's relationship with civic membership stresses the potential for a substantive affective dimension of belonging in a political community.[189]

*Vertical: Bishops, Kings and Tyrants*

Because baptism was a legitimate source of civic identity external to typical civic channels, it created an alterative path to legitimation within a political community. On the vertical dimension, baptism's civic function drew the baptizers themselves into the administration of a civil sacrament: the creation of citizens. Baptism's significance and source of legitimacy imbued their office with a political legitimacy which complicates our normal attempts to distinguish between civil and ecclesiastical life. Second, this alternate source of civic membership and legitimacy could also be used to check civil powers; it allowed authors and theorists to leverage the civil importance of baptism against rulers to punish tyrants and to constrain and reinforce the actions of good rulers.

*Bishops*

In the vacuum left by the receding of Roman Imperial administration in the 5th and 6th centuries, Bishops frequently stepped into the role as leaders of urban communities; they competed with other 'notables' for outright power but even where they were not the rulers of city and civic communities they continued to possess power through their status and influence as religious leaders.[190] The concretization of a system of collecting of tithes at the same time began a massive transfer of wealth from the hands of political communities and individuals to the coffers of the Church, and thus Bishops had economic power, too.[191] Furthermore, in the Post-Imperial period of late-Antiquity, Bishops used the network of *civitates* which had previously served as the administrative structure of the Roman Empire in order to communicate with other bishops and

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[186] Golinelli, 'Il Comune italiano e il clto del santo cittadino.' pp. 573-593, in J. Petersohn, ed. *Politik und Heiligenverehrung im Hochmittelalter* (Thorbecke, 1994); also S. Patzold, and C. van Rhijn, *Men in the Middle. Local Priests in Early Medieval Europe,* (Berlin, 2016).

[187] E. Cattaneo, 'Il battistero in Italia dopo il Mille' *Miscellanea Gilles Gerard Meersseman,* Vol. 1, (Padua, 1970), pp. 171-195; E. Cattaneo, 'La *Basilica baptisterii* segno di unita ecclesiale e civile', pp. 9-32 in *Atti del convegno di Parma* (1976).

[188] Cattaneo, 'La *Basilica baptisterii*', pp. 9-10.

[189] Hints of this can be found in L. Martines, *Lawyers and Statecraft in Renaissance Florence,* (Princeton, 1968), p. 286; G. Brucker, *Florentine Politics and Society, 1343-1378,* (Princeton, 1962), p. 310; and N.P.J. Gordon, 'Plotting Conflict in Florence, 1300', *Renaissance Studies* 24.5 (2010), pp. 621-37, p. 626.

[190] D. Fernandez, *Aristocrats and Statehood in Western Iberia, 300-600 C.E.,* (Philadelphia, 2017), p. 123; 126-127.

[191] P. Brown *Through the Eye of a Needle: Wealth, the Fall of Rome, and the Making of Christianity in the West, 350-550 AD*. (Princeton, 2012).

secular rulers, and they used this political network to form compacts between communities, raise funds for public projects, or raise petitions of mistreatment.[192] Any civic function then of Bishops when we turn to the 14th century onwards relies on a rather long established history of administrative powers and strategies.

The civil significance of baptism, however, added a different dimension to the civic role of Bishops: if civic membership is acquired through baptism, then Bishops and Priests play an instrumental role in creating citizens. Bartolus had famously claimed that *civitas sibi faciat civem*—cities make their own citizens—as part of a larger justification of the heterogeneity of city-statutes across Italy which had different requirements and thresholds for citizenship.[193] Even within a juridical system where legislators were the authors of citizenship statutes, Bishops in this context were the executors. The power of Bishops extends beyond their religious influence, their social status supported by their station, wealth, or education, or their family ties through their physical and metaphysical role in the creation of citizens; the baptistery was the location of the first civil act of every *civis,* and the Bishop was the key administrator of that action.[194] Scholars of the Church and the Italian Communes stress that this function of Bishops adds to their role as the 'unifier' or even 'baptizer' of the *civitas* or *commune.*[195]

*Tyrants and the Privilege of Private Baptism*

For prominent and powerful individuals, baptism was also an opportunity for public scrutiny and was a mechanism for punishing and constraining a tyrant. Private baptisms—baptisms in the personally owned chapel or home of a usually wealthy individual—were prohibited by a canon law from the Council of Vienne (1311-12) with two exceptions: emergencies or if the child was the son of a ruler.[196] This canon was included in Clement's *Constitutiones* and was repeated at other councils and synods.[197]

Early commentaries took the canon as an opportunity to distinguish between a *princeps* and a *tyrannus.* Johannes Andraea (1270-1348) and Niccolo Tedeschi (1386-1445) offered a blended account of tyranny, drawing on biblical examples, Aristotle, and medieval (Gregorian) distinctions between a prince and a tyrant, but with the purpose of interrogating the rights and privileges of a tyrant. In short, regardless of the historical or theoretical account of tyranny, ruling by right (*ius*) *came* with rights. By pursuing their own good rather than the common good—the formulation of Aristotle and Bartolus—or by ruling *non iure,* tyrants lost the right to the name of *princeps,* and with it, the rights and privileges which accompanied 'right rule'.[198] One of these

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[192] D. Fernandez, *Aristocrats and Statehood*, pp. 138 and 160-195.
[193] J. Kirshner, 'Civitas sibi faciat civem', pp. 694-713.
[194] E. Cattaneo, 'La Basilica Baptisterii', p. 29.
[195] P. Golinelli, 'Il Comune italiano e il culto del santo cittadino', pp. 573-593, p. 580 in J. Petersohn, ed. *Politik und Heiligenverehrung in Hochmittelalter* (Sigmaringen, 1994); P. Golinelli, 'Antichi e nuovi culti cittadini al sorgere dei communi nel nord-Italia', *Hagiographica,* Vol. 1 (1994), pp. 159-180, p. 165.
[196] Clement, *Constitutiones* 3.15.1.
[197] K. Taglia, 'Delivering a Christian Identity: Midwives in Northern French Synodal Legislation, c. 1200-1500', pp. 77-90, p. 82 in P. Biller and J. Ziekler, ed. *Religion and Medicine in the Middle Ages,* (Suffolk, 2001). An 1874 edition of the *Kirchliches Verordnungs-Blatt für die Sedauer Diöcese,* (Nr. 1401, IV), p. 38 observes that this canon law was still enforced at the time.
[198] Tedeschi stressed the power of naming—that tyrants were not deserving (*non merentur*) the name of *princeps*. Johannes Andrea (1270–1348), at Clem. 3.15; Niccolo Tedeschi, *Commentaria ad Quartum et Quintum Decretalium,* (Turin, 1577), at 3.15, fol. 30v, n. 9. Bartolus' *Tractatus de Tyranno* is key to most late-medieval and early modern accounts of tyranny, and it is cited here by Tedeschi.

privileges was the right of private baptism, which Andrea and Tedeschi both denied to the tyrant. Any priest who administered a private baptism against canon law, wrote Biagio Aldimari, would be suspended from their office for six months.[199]

At the very least, the canon law privilege of private baptism was a legal recourse which canon lawyers and ecclesiastical officers could revoke or refuse to provide in order to punish a tyrant, and in the Italian context specifically, to deny the privileges to the many tyrants whom had overrun the various *civitates* and *communes.* This denial of privilege carries one additional layer of significance: denying the tyrant the right to baptize their child in their personal home or chapel denied them the opportunity to legitimately bring their child into civic membership in privacy. The Church could not deny the sacrament of baptism—especially of a child—universally, even of a tyrant. They would recognize the baptism as legitimate, but they would hold the tyrant responsible for a clear violation of canon law. Canon lawyers could, however, force tyrants into the public and prevent tyrants from legitimizing civic members on their own terms, in their own household, without the legal participation of bishops, the baptizers of citizens. And, with the civil and religious significance of the ceremony of baptism, the location of the baptism of a ruler's child would not go unnoticed; any denial of the privilege of private baptism would have been public signal and potentially even a public shaming of a ruler's *perversum dominium.* This check on the power of a ruler can only be understood as a result of the civic centrality of the sacrament of baptism. The political role of the bishop and archbishop here serves as a counterbalance to other political actors and could be employed to undermine or legitimate the power of that ruler, especially if they were a tyrant.

**Section V: Erasmus and Charles V—A 'Christian Prince'**

As a privilege granted to rulers by the Church, the 'right' of private baptism could be rescinded; we can also imagine that the privilege could be readily granted to rulers as a reward for their virtue, or rather that the bishop's and archbishop's leaving of a preexisting privilege in place offered a tacit positive reinforcement of a ruler's behavior. Beyond the privilege of private baptism, or the tacit privilege of public baptism and active support and participation of the Church and its administrators, the importance of the baptismal ceremony and civil significance of the obligations created through the sacrament could be used to attempt to constrain even a Christian Prince.

Erasmus' imploration to recall his oath which he 'along with everyone else' swore at his baptism was no doubt part of Erasmus' goal to remind Charles V that he was a *Christianus civis* first and a *Christianus princeps* second; the equality of the sacraments which see neither rich nor poor nor royal nor common is a convenient place to ground an Emperor among equals. But Erasmus' stress that Charles' oath was both personal and communal deserves closer contextual examination.

Charles V had been baptized two weeks after his birth in a calculated political and religious ceremony. The ceremony was described in great detail by Jean Molinet (1435-1507)[200] and Diego Ramirez de Villaescusa de Haro (1459-1537)[201], and Prudencio de Sandoval (1553-1620)[202]: there

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[199] Aldimari, *Tractatus de Nullitatibus Contractum,* Vol. 8, Quaest. I, n. 106, p. 113.

[200] Jean Molinet, *Chroniques de Jean Molinet,* Tom. 5, (Paris, 1828), Chap. 305, 'La nativité et baptesme de monseigneur le duc Charles, premier fils de monseigneur l'archiduc et de madame Jehanne d'Espaigne', pp. 122-129.

[201] Villaescusa was the Bishop of Astorga (transitioning to the Bishop of Malaga) at the time and he appears to have written from Ghent about the ceremony. His account is published in *La Reina Doña Juana la Loca: Estudio Historico por Antonio Rodriguez Villa* (Madrid, 1892), pp. 51-53.

[202] Prudencio de Sandoval, *Historia de la vida y hechos del Emperador Carlos V,* Part 1, (Barcelona, 1625), pp. 3-6.

was a kilometer long wooden bridge which would lead the evening procession over the streets from the Palace to the Church of St. John with enough space on the sides for the citizenry to stand, a boat alongside the pathway in the river filled with musicians, triumphal arches over the constructed walkway with motifs from Roman history, the Bible, and the insignia of all of the territories within the jurisdiction of the future Emperor, and perhaps most powerfully of all thousands of torches, candles, and lights which illuminated the procession from start to finish—'Never had Ghent seen such a sumptuous display of light for any prince born in or entering the city.'[203] They even offered a detailed order of the procession, first entrant into the church to the last.

When it came to the baptism itself, however, all three chronicles are understated: Villaescusa's account was the lengthiest, and between observations of how Charles was handed up stages towards the baptismal font and a bizarre coin-tossing ceremony by the crowd, he interpolated simply that Charles was 'baptized by the said Bishop of Tornay, according to the order of the Holy Church and was called Charles.'[204] Both Molinet and Sandoval did the same, with Sandoval saying only that on the seventh of March, "*se hizo el bautismo"*—he was baptized.[205]

These chronicles are devoted entirely to the grandness and highly intentional political and religious symbolism grafted into every step of the ceremony[206]; but nowhere do they mention the oaths of baptism which through the 'order of the Holy Church' must have taken place. They do however give essential context for the parties to the oath, and crucially, who Charles V was swearing an oath to, through his godparents: several hundred civic officials of Ghent, 70 'gentlemen' or courtiers of the Archduke's household, the president and members of the council of Flanders, 17 chaplains, Heralds and Kings of Arms (with a troupe of trumpeters), Charles' four godparents, the Knights of the Order of the Golden Fleece, and with what room was left in the church, regular individuals. This curated selection of participants included nobles from surrounding territories (confirmed externally by the insignia on the triumphal arches lining the processional pathway), officials from several branches of government and administration, clergy, and the military.

In this context, Erasmus' reinterpretation of Charles V's baptism has two important implications which reinforce my argument above. The first is that Erasmus takes Charles V as having personally sworn the baptismal oaths and being personally bound by the baptismal oath which was verbally expressed by his four godparents—Margaret of York, Margaret of Austria, the Prince of Chimay, and the Seigneur de Berghes. The second is that Erasmus took these oaths to be communal and reciprocal; the oaths sworn by Charles were sworn at the same time by all in attendance, and all were bound by them. Charles' first political, legal and theological act was the taking of an oath which bound him to many of the leading officers and families of the state in addition to leading officials in the Church; given that some commoners were also in attendance at

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[203] Molinet, trans. R.Strøm-Olsen, 'Dynastic Ritual and Politics in Early Modern Burgundy: The Baptism of Charles V', *Past & Present,* No. 175 (May, 2002), pp. 34-64, p. 51.

[204]Villaescusa, *La Reina Doña Juana la Loca,* p. 53: 'donde fue bautizado por el dicho obispo de Tornay, segund la orden de la santa Iglesia e llamado Charles'.

[205] Molinet, *Chroniques,* p. 125: 'Monseigneur Pierre, éveque de Tournay et abbé de Saint-Amand, baptisa l'enfant, qui fut nommé Charles.' Sandoval, *Historia,* p. 5: 'Tardaron treze dias en hazer esta obra; y puesta en perfecion, a siete de Março se hizo el bautismo.'

[206] Strøm-Olsen has argued that this ceremony was one of ritual innovation, creating a 'new political space' for the celebration of a male heir in the Empire. My emphasis on the theoretical implications of baptism and inclusion of Erasmus are compatible with, but go beyond, his account of the significance of the ceremony. Strøm-Olsen, 'Dynastic Ritual and Politics', p. 35.

the back of the cathedral and were immediately outside lining the processional pathway all the way back to the palace, Erasmus may indeed be suggesting that it bound Charles to the people, too.

**Section VI: Conclusion**

In 746, Boniface (c. 675-754) complained directly to Pope Zacharias about a potential heresy taking place in Salzburg: a rural priest from Ireland named Vergilius (700-784), speaking in poor Latin, was baptizing people in the name of the *patria* or 'fatherland' instead of in the name of the *patris.* As the principal and most necessary of the seven sacraments, Christian authors realized it was crucial to have a precise formula with which all Christians would be baptized (by priests, or in emergencies, by lay persons). The formula, drawn from Matthew 28:19, had remained consistent for centuries: "I baptize you in the name of the Father (*patris*), and of the Son, and of the Holy Spirit".[207] Departure from the formula—and worse, baptizing individuals in the name of something so secular as the *patria*—risked jeopardizing the souls of those being baptized and engaging in heresy. Pope Zacharias understood Vergilius' error not as heresy but as a harmless slip of the tongue: he reassured Boniface that any Christians baptized by Vergilius in the name of the *patria* would be understood to have been baptized in the name of the *patris,* and their baptisms therefore were a legitimate administration of the sacrament.[208] Boniface's paranoia underscores the importance of baptism, but it also locates baptism strictly as an ecclesiastical concern in the 8th century. It belongs to the realm of spiritual concerns (*spiritualia*) rather than temporal or earthly concerns (*temporalia*).

I showed above that Lucas de Penna's linkage of *temporalia* and *spiritualia* allowed later jurists to depart from the formal Roman civil legal model of citizenship. Baptism could grant and transform legal and civic status, and indeed, generate and regenerate civic identity in one's *origo* or *patria.* An adult born to Jewish parents in Moorish Spain, if baptized in Dante's (and Machiavelli's) font at San Giovanni in Florence would have an entirely new *patria* as if —and as good as that—acquired by natural birth. By the 16th century, baptism had a foot squarely in both *temporalia and spiritualia,* granting not only civic membership but also serving as a powerful indicator of civic identity in a way which was more legible and concrete than its alternatives. This history of baptism's civic and legal roles shows some need to reconsider our conception of the horizontal and vertical bonds of medieval and renaissance political communities, including the mechanisms for enforcing the mutual obligations of rulers, and the need to more precisely account for the ways that individuals could be members of the body politic—could be *cives* and have *civilitas*—and yet not be eligible for office or bear any of the other signifiers and rights of formal 'citizenship'.

It is also glaring that the Reformation does not present a significant rupture in the above history or in the civil effects of baptism. Many of the jurists above either bridge over the Reformation or are writing after it; excepting the more radical movements around the sacrament of baptism, the lasting impression of the rite is continuity rather than disruption. Luther's revised—

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[207] Matthew 28:19: "Therefore go and make disciples of all nations, baptizing them in the name of the Father and of the Son and of the Holy Spirit.". The *Didache,* written in the first century, records this trinitarian formula as the "form" of baptism along with the need for running water, but it is not the only possible formula for baptism: early Christians also seem to have baptized individuals only in Jesus' name, as is recorded in the Book of Acts (2:38, 10:48, 19:5) and as evidenced by the sustained concern of Catholic authors that other non-trinitarian formulas were being used.

[208] *MGH, Epistolae Selectae,* 1, 80, pp. 178-179. Translation in M. L. W. Laistner, *Thought and Letters in Western Europe*, (New York, 1931) pp. 184–5. See also Philipp Jaffe, *Bibliotheca Rerum Germanicarum,* Vol. III, 191.

or not-so-revised—theory of baptism was clearly theologically motivated; what I have shown in this chapter, however, was that the civil significance of baptism necessitates that the sacrament continued to have political importance across Europe and after the Reformation, whether it was engaging with its political significance or not. Importantly, despite the many other changes to religious sacraments and even the general practice and approach to the baptismal sacrament, none of the changes seem to effect the legal and civic implications of baptism in a particular place.[209] And, particular places continued to place weight on baptism as a record of membership in a community long into modernity. Where state registers of births and citizens were underdeveloped, it was customary to accept record of one's baptism as proof of birth in a place even under the Austro-Hungarian Empire (1867-1918). Even in Italy today in some cities, citizenship by the *ius sanguinis*—citizenship by blood or ancestry—can be proven with a birth certificate *or* a baptismal certificate issued by their parish and authenticated by the Church.[210]

[209] This is in many ways a surprising implication and deserves further attention in scholarship about the reformation and post-reformation politics and theology. See generally, H.O. Old, *The Shaping of the Reformed Baptismal Rite in the Sixteenth Century,* (Grand Rapids, 1992).

[210] Empoly, Villorba, Luzzara and Arosio are four examples.

"Who are they that make you ashamed? The fullers or the cobblers or the builders or the smiths or the farmers or the merchants, or the traffickers in the market-place who think of nothing but buying cheap and selling dear? For these are the people who make up the Assembly (*ekklesia)*. ... amateurs (*idiotas*)!

Socrates to Charmides, in Xenophon's *Memorabilia* 3.7.6.

## 2. Butchers, Bakers, and Makers: Ignobility and Witness Testimony in Medieval Law

### Introduction:

The 13th century witnessed the growth of *pittura infamante*—pictures of infamy, or defamatory paintings. While most examples have been destroyed or lost, city statutes in Vercelli (1242)[211] and Bologna (1243 and 1248)[212] record their early development. The most famous example of the genre is likely Botticelli's depiction of the Pazzi conspirators hanging by their necks on the exterior wall of the Palazzo Vecchio; the fresco stayed until it was destroyed at the request of Pope Sixtus at the Medici expulsion in 1494.[213] These genres depicted criminals at the moment of public punishment, torture or death; they were surrounded by base animals like pigs or donkeys (often females), or prostitutes, witches, or the demonically possessed; and, their insignia—their rings, seals, or coat of arms—were almost always being pressed into the excrement of either the animals or persons around them. Each motif stressed a different angle to the same action: the destruction and ruin of noble status, noble privilege, and reputation or *fama*.[214]

[211] Gherardo Ortalli has shown that writing infamy predated drawing it; the 1242 Vercelli statutes show that this early case was a list of names written on white-washed walls with descriptions of the crime. Images were added later. G. Ortalli, *La Pittura Infamante: Secoli XIII-XVI.* Ortalli and Giuliano Milani are the two pioneering scholars of pictures of infamy: see G. Milani, 'Prima del Buongoverno: Motivi politici e ideologia popolare nelle pitturre del Broletto di Brescia', *Studi Medievali* Ser. 3, 49 (2008), pp.19-86; G. Milani, 'Pittura infamante e damnatio memoriae: Note su Brescia e Mantova' in I.L. Sanfilippo and A. Rigon, *Condannare all'oblio: Pratiche della damnatio memoriae nel Medioevo* (Rome 2010), pp. 179-196; and the thesis, M. Ferrari, *La propaganda per immagini nei cicli pittorici dei palazzi comunali lombardi (1200-1337). Temi, funzioni, committenze* (Pisa 2011), esp. pp. 94-128.

[212] The 1248 Bologna statute reads in part: "We decree that the elders would do best to keep the painting that was once made in the Palace of Bologna city-commune about the occurrence of Roffeno, and not to destroy them." G. Milani, 'The Ban and the Bag', p. 122; Statuto generale delle Società delle Arti e delle Armi (1248), in: Statuti delle Società del Popolo di Bolognia, 2 vol. Ed. Augusto Gaudenzi, Rome 1896, Vol. 2., pp. 522-523. In C. Behrmann, *Images of Shame: Infamy, Defamation and the Ethics of Oeconomia,* (De Gruyter: Boston 1016),

[213] While most public examples of *pittura infamante* like Botticelli's Pazzi fresco were destroyed, we do seem to have sketches by famous artists modeled after them, and so we have a good idea of what the figures looked like. For example, Filippino Lippi (1457-1504) sketched a figure around 1480, likely modeled after Botticelli; separately, Leonardo da Vinci (1452-1519) also drew a sketch in 1479 of the hung Pazzi conspirator Bernardo Bandini dei Baroncelli. Behrmann, 'Images of Shame', p. 44.

[214] G. Ortalli, 'Colpire la fama e garantire il credito tra legge e propaganda: Il ricorso alle immagini', in P. Prodi, ed. *La fiducia secondo i linguaggi del potere* (Bologba 2007), pp. 325-357; S.Y. Edgerton Jr, *Pictures and Punishment: Art and criminal prosecution during the florentine renaissance* (Ithica 1985).

*Figure 2: 1559/1560: Four counts from Stolberg and their shame. Description below.*[215]

[215] *Copyrighted image.* The nobles (counts) pictured had borrowed money from a widow. After the widow died, Joachim von der Schulenberg inherited the bond and tried to collect on the loan and the interest owed. The nobles refused and Joachim took them to court (June 28, 1559). Schulenberg commissioned and published this piece with a detailed letter describing their crimes. In the upper panel one of the noblemen is riding a mare backwards while a crow flies in his face; he holds up the animal's tail while both he and another man press their seal stamps into the mare's urine. A third noble underneath is pressing his signet ring into the mare's excrement, and the fourth noble on the left is pressing his seal into excrement he holds in his hand. The lower panel shows a sow eating feces while the nobles once again dirty their seals and signet rings. Watercolor pen drawings. Color plate n. 166, with description on pp. 310-311, in M. Lentz, *Konflikt, Ehre, Ordnung: Untersuchungen zu den Schmähbriefen und Schandbildern des späten Mittelalters und der frühen Neuzeit (ca. 1350-1600*).

These images were also a signal of a radical shift in carceral, punitive, and procedural principles. It had been a long-standing principle of Roman and medieval law that legal subjects ought to be treated differently according to their status, condition, or office: Medieval legal commentaries from Azo, Bartolus, and Baldus onwards stressed that personal or corporal punishments ought to be harsher for "*viles, quam nobiles*"[216], and even their respective testimony was considered to be *prima facie* less trust worthy—*viles personae* could be tortured to verify that they were telling the truth, but other persons of higher status could not.[217] This was, of course, tied to the reputation or credibility of the criminal or witness. The promise offered by the *pittura infamante* was in spirit egalitarian: even those with a high reputation, who previously enjoyed some protection from the law according to their status and condition, could be tortured, punished harshly, and be reduced to pressing their once-noble seals into excrement. It was, therefore, a step towards juridical procedures which did not act "with respect of persons"—something which early modern theorists like Thomas Hobbes and Jean Bodin would make central to their accounts of equity, equality, and the definition of a popular government.[218]

But implied within the *pittura infamante,* and indeed in the background of judicial questions about the torture and punishment of *nobiles* was the place of 'vile persons' (*viles personae*). Who were they? What was the content of their "vile"-ness? Baseness served as a distinctive justification for marginalization and exclusion because of its ambiguity and function. There was no explicit definition of "baseness" and it would demand continued clarification in the indexes, margins, and footnotes of manuscripts well into early modernity.[219] Scholars also recognize that where it was used it was ill-defined but they do not attempt to define it.[220] Yet it is also distinctive because it was so readily employed in this period against Christian members of the same political community. Other kinds of exclusion—and even parallel conceptions of baseness—were being employed against heretics, non-Christians, and foreigners, but the lines drawn by "baseness" were in varying degrees used to define the relationship between the "low" or the "base" and the body politic even where they were already a part of a significant shared community—the *corpus Christi*. "Baseness" is an easy justification for exclusion, insofar as it already has an internal logic for exclusion: who would readily agree that the "base", "abject", or "worst" ought to be treated in the same way as the "good", the "normal", or the "virtuous"? Employing the language of "baseness" often implies a different set of rules better fit for "those" cases and persons, unless

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[216] Accursius at Dig. 2.9.5; Baldus at C.9.14, n. 3; Corneo, at fol. 474; *Edictus Rothari* 48, ed. Bluhme, MGH LL 4, 21: *The Lombard laws.* Translated with an introduction by Katherine Fischer Drew, Philadelphia 1973, 61. In Siems, "Observations Concering the Wergild System", p. 42, in *Wergild, Compensation and Penance: The Monetary Logic of Early Medieval Conflict Resolution;* Roffredus Beneventano (1170-1243), a student of the famous Azo, makes the distinction because of corporal punishment: Septima, Fol. 45r. See also Paulus de Castro, *Prima Super Codice,* [1535], Fol 4., n. 5. And, *Solemnis Atque Tractatus Libellorum* (1502)

[217] See the comments on Novel 9 below, throughout.

[218] Bodin, *Six Books,* 2.7. Hobbes defines distributive justice and equity as *non acceptio personarum* in *Leviathan.*

[219]"Vilissimi qui dicantur" Johann Melonius, *Thesaurus Iuris Feudalis, Civilis et Criminalis, Novus* [Nuremberg 1665], Tit. 19.1, p. 228; Lord John Maclaurin, *Arguments and Decisions in Remarkable Cases* [Edinburgh 1774], no. 92, November 1731, King against Christie, pp. 625-633 (A gardener, James Christie, kills Alexander Campbell, a soldier, for sleeping with his wife; Christie is acquitted in part because the roman law had permitted such an action against a "vilis persona": "the meaning of the law extended not only to persons of bad fame, but to all persons of low degree". p. 631.

[220] J. Rollo-Koster, *The People of Curial Avignon: A Critical Edition of the* Liber Divisionis *and the* Matriculae *of Notre Dame la Majour* (Edwin Mellen Press 2009), p. 22.

the category is explicitly rejected or wholly embraced.[221] Who precisely was being excluded when the language of 'baseness' was employed and what were the working justifications? And what was the context of their exclusion?

In this chapter, I argue that the medieval and renaissance legal conception of baseness (a) can be traced to the rules and laws of testimony and (b) was rooted in the reputability and credibility assigned to different kinds of labor or occupation. The category of 'base' persons and 'base' occupations was contentious and controversial but it was also dynamic. It was tied to a composite concept of value—a mixture of credibility and trustworthiness, which itself was tied to wealth and status. Occupation was thus behind these concepts: laborers with tedious and low paying jobs or traders looking to make quick profits were already of a lower status (because the nobility would not or could not do them without risk to their reputation), but they were, by virtue of their occupation and their wealth, less trustworthy (in the context of court) and their word was "worth" less in the law of testimony. Their lack of credibility, which was in fact closer to social and economic credit, meant that some security had to be offered to ensure they were in fact telling the truth. This security was taken out in torture and physical punishment.

To this end, this chapter has one historical and one conceptual argument. The overarching historical argument is that the roman law of testimony was the source of reflection about *viles personae.* But, it underwent a series of changes which radically altered who could and could not give testimony—and who could and could not be tortured. Civil and canon lawyers agreed that witnesses needed to have good *fama*—but *fama* could be lost or forfeited through *infamia,* which could happen either by law or by fact. *Infamia* by fact operated frequently as a prejudice against certain occupations, especially those tied to profit-seeking or money-making. Commentaries on the law of testimony linked together the reputation of a witness and their occupation or art. Jurists used the laws of testimony and witnesses to distinguish between witnesses of reputable occupations and witnesses of disreputable ones. The disreputable workers were written off as 'vile' persons and could not give testimony (or could only give testimony if they have been tortured), which in turn could be used to justify other civil disabilities. By the 17th century, many of the "vile" occupations which had previously prohibited individuals from giving testimony, or which required them to be tortured in order for them to give testimony, had been either written off as not-"vile" or in fact serving the public utility and therefore praise-worthy. Even merchants, tradesmen, bankers, and usurers had been redeemed from their legal "baseness". In this historical argument, I isolate for the first time in secondary scholarship which occupations, conditions, and actions counted as 'base', 'sordid', or 'vile' in late medieval and renaissance legal texts and trace the legal argumentation back to the source to show how these categories developed. I also then trace the category forward, following the jurists who began to obsessively wonder whether commerce was a noble or an ignoble art and whether nobles could lose their nobility by engaging in trade. This historical process was also intensely local, driven and shaped by city and regional customs and norms, which was recognized as it happened by 13th and 14th century jurists.

The conceptual argument is that within these historical changes there are two features of the medieval legal conception of "baseness" which challenges our understanding of late medieval, renaissance, and early modern political theory. First, jurists were torn between competing schemes of nobility and "baseness", one of which was a feudal and aristocratic binary conception where the "low" or the "base" functioned as synonyms simply for "non-noble". All of society could be divided into two groups, noble and ignoble. The other was more complex, which recognized space

[221] This is, I argue, was the operating definition of popular government either criticized or accepted by (a) classical conceptions of democracy and (b) early modern theorists of sovereignty and government.

between the "nobles" and the "base"—a middle category neither noble or ignoble, but which could have access to some of the privileges of "nobility" or some of the prejudices of "ignobility". Within each schema, the lines between categories were fluid. But the binary system itself was rigid; it became difficult to adequately account for the grey areas and boundary cases which were factually in-between.[222] Second, because the origins of the justification for the exclusion of "base" occupations was the roman law of public *munera* and the "infamy" which accompanied other occupations, medieval jurists never rid their arguments of the question of the public utility and necessity of labor. They avoid it for a time, but they ultimately confront the fact that if there was a place in Plato or Aristotle's *polis* for "base" occupations, they cannot be "base" enough to warrant serious disdain or exclusion. The "baseness" of the occupations of the *demos* thus actively lurks behind both critics and defenders of popular government. A popular government, Bodin would write, much like Xenophon did in the epigraph above, was one where the assembly was made up of butchers, bakers, bankers, and crucially, "amateurs".[223]

This chapter will proceed in the order of the strings pulled and will follow what unravels. First, I outline the roman, civil, and canon law positions on the rules for witness testimony, which turn on the question of reputation and credibility. Second, I take up *fama* and *infamia* among the medieval jurists to show that the kind of disreputability which was most wide ranging and most ambiguous was *infamia* by fact, which itself was connected to occupation. Third, I show how jurists used the *infamia* by fact of particular occupations at first to justify but then protect the *viles* from (unecessary) torture, while at the same time eroding the protections and immunities guaranteed to *nobiles.* Fourth, I argue that it is in the debate about the privileges of the *nobiles* that we find these historical shifts occurring and then confirmed: where commerce and other "base" occupations once destroyed *fama* and with it *nobilitas* and its privileges, by early modernity those occupations were no longer stained with disrepute—the privileges, however, were more widespread. I conclude with two thoughts about the implications of these arguments for historians of political thought.

A final note: Importantly, *viles personae* are not the poor. Repeatedly, civil and canon lawyers like Baldus de Ubaldis (1327-1400)[224], Angelus de Ubaldis (1328-1400)[225], Alexander de Imola (1424-1477)[226], Giovanni Bertachini (1448-1497)[227], Pietro de Monte (1499-1572)[228] and others stress that we shouldn't call the *pauperes* "vile"; they can be, certainly, but 'baseness' requires more than just poverty.[229] Many examples in the canon and civil law which prescribe a disability to the *personae pauperes et viles* are actually stressing some difference in content rather than simply synonymy: poor people might be of low condition, but the low condition was still a

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[222] One example of this is the roman legal concept of liberty and its clash with the feudal villein. Where the Digest (and Henry Bracton, drawing on Azo) had held that persons were either free or unfree (a perfect binary), the villein was both free and unfree—neither and both.

[223] Bodin, *Six Books,* 2.7.

[224] Baldus at C.5.5.7pr, 'humilem', cited by many later jurists.

[225] Angelus at C.5.27.1.

[226] Alexander de Tartagnis (de Imola), *Consiliorum seu Responsorum,* Vol. 6, [Venice 1590], Cons. 209, n. 6, fol. 133r.

[227] Bertachini, *Repertorium Iuris Utrosque,* at the word 'Viles' and below.

[228] Pietro de Monte, *Repertorium,* at the words 'Viles' and 'Vilitas': Baldus "dicit quod paupertas non facit personam vilem dummodo habeat bonos mores". He also points to the notes at C.28.21.

[229] We have some examples in non-legal primary sources where "vile" persons are mentioned alongside the poor, which underscore that that they are distinct, albeit related, concepts. Oberto Cancelliere records the September 1164 assassination of the Genoan consul Marchese della Volta, "*a quibusdam vilissimis personis et pauperibus."* MGH, Vol. 18, Oberti Annales. A. 1164-1173, p. 61

separate status that the poor were not automatically subsumed into. That the *vilissimi* are not the poorest casts doubt on most of the economic (and potentially class) interpretations of *viles personae.* They also were not, it seems, the same as the *personae miserabiles* who likewise dominated the canonistic literature of charity and poverty, like widows and orphans.[230]

**Section I: "Vile" Persons, "Vile" Arts, and Credibility**

The civil and canon laws of testimony were the site of the most extensive comments on *viles personae.*[231] Jurists widely agreed that witnesses needed to be credible; uncredible witnesses, they argued, should not be witnesses at all. When jurists employed the language of "base" persons, it was most often to stress why "vile" persons lacked the credibility, or the right kind or amount of credibility, to give witness testimony. This can be traced back to the Roman civil law and Justinian's *Novellae,* as well as the Digest. [232] Justinian's Novel 90, "On Witnesses" (*De testibus*), begins:

> We then decree that [...] witnesses must be of good repute (*bonae opinionis*). They must either be above any kind of imputation to the contrary, thanks to the unquestionable level of their rank, their position in imperial service, their wealth or their occupation (*artis laudabilis*) [...] No menial, low or totally insignificant types are to come forward to give evidence unless they are such as could be easily proved [...]. Should they, as well as being unknown and completely obscure, be evidently aiming in any way to falsify the true facts in their statements, they can actually be subject to torture.

Those who practice *artifices ignobiles* or the *vilissimos* or the "obscure" cannot be witnesses; any witnesses who are 'obscure' or 'unknown' can be tortured if they seem to deviate from their

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[230] Mäkinen, Robinson, Slotte, and Haare, eds. *Rights at the Margins: Historical, Legal and Philosophical Perspectives* (Brill—Leiden, 2020), esp. Robinson, "Poverty and Need in the 14th Century: Johannes Andreae, Bartolus of Saxoferrato, and Baldus de Ubaldis", pp. 31-62.

[231] Jurists relied on three branches of the roman law to draw the boundaries around and between the *nobiles* and *viles*: rules of public office or public burdens, laws of adultery, and the law of testimony. Because of the spatial and topical limitations of this chapter, I set aside the other two branches and the historical details of the connection between the three, which I address in forthcoming material. The law of testimony was the overwhelming main source of juristic writing on *viles personae.* See here the text of the other two laws for reference:

> C.12.1.6: "Persons of the lowest grade of merchants or minters or low officials or persons engaged in the base service of station master or men of the lowest dregs of officialdom, or who live on various disgraceful gains, shall not attempt to enjoy and position of rank [entering imperial service]."[231]
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> Dig. 48.5.25: "A husband is permitted to kill a man whom he catches in adultery with his wife in his own house [...] if the [paramour] is a pimp or if he was previously an actor or performed on the stage as a dancer or singer or if he has been condemned in criminal proceedings and is not yet restored to his former status, or if he is a freedman [...] or if he is a slave.

[232] Dig. 22.5.3 approaches this, but in slightly different language: "The reliability of witnesses must be carefully assessed. One must first inquire into their status. Are they decurions or plebians? Do they lead an honest and blameless life, or has there been some mark of disgrace? Are they well off or needy, so that they may readily act for gain?" trans. Watson.

testimony.[233] The eligibility and ineligibility to give testimony was a crucial legal question, and the logic and vocabulary in Novel 90 left ample room for controversy and movement, as I will show below. But in general, the early Glossators and Post-Glossators were in complete agreement: the *condition* of witnesses was all-important and needed to be investigated and proved by a court. Before witnesses could be admitted, judges needed to investigate whether they were 'vile or noble' a 'friend or enemy'. [234] Serious witnesses (*testes graves*) had more credibility than other kinds of persons, wrote Odofredus, Bertachini, Giovanni Paolo Balzarano, Giovanni Maria Monticelli and others. [235] Anything which struck against somebody's reputation or *fama* might be sufficient to bar them entirely from being a witness, or at least devalue their testimony.

In some parts of Europe this devaluation led to a crude reputational mathematics. In the *Liber Augustalis,* 'base' persons—those in positions of service, serfs (*adscriptii*), villeins, or other 'vile ranks'—were prohibited from dueling or engaging in trial by combat. They were also broadly prohibited from accusing and serving as witnesses against persons of noble ranks (counts, barons, or knights) unless the right ratio of persons to status had been met: "the number of witnesses on behalf of these persons should be larger: *i.e.,* two counts, four barons, eight knights, and thus, as a result, sixteen townsmen should elicit trust and should induce full proof against a count, who has been charged in a criminal case." Two barons, four knights, or eight townsmen were thus sufficient proof against a baron and so on down the orders.[236] This seems to have been unique to the Constitutions of Melfi (1231) and it would reappear in later commentaries of the feudal law like that of François Hotman.[237]

Canon law also provided ample opportunity for jurists to further define and debate the content of the category of *viles personae*, especially the entirety of the canon law chapter 'On Witnesses and Attestations' (*Liber Extra,* 2.20). Most of the marginal glosses and fragmentary comments from canon lawyers were concerned with the quality of witnesses required for their testimony to be heard in a matter concerning a member of the clergy. Where a cleric had been accused of crimes by credible witnesses (*testibus fide dignis*), they could not be cleared by witnesses who were "*viles*" or criminals. Witnesses, as a rule drawn from Roman law (and intuition), needed to be of good reputation and opinion. [238] Likewise, accusations and cases brought against a cleric could not be grounded in the testimony of 'infamous and notable witnesses', none

[233] Translated by Blume. See also O.F. Robinson, *Penal Practice and Penal Policy in Ancient Rome,* (Routledge 2007), pp. 170-175.
[234] Bartolus, Quaestio 14, fol. 92.
[235] Odofredus, fol. 213v-214v. He repeats much the same argument in the related passage in Code 4.20; Giovanni Bertachini, *Repertorium,* at 'Testes'; Johannes Paulo Balzarano, *Commentaria ad Constitutiones Utriusque Siciliae,* [Naples 1620], fol. 142 and also, fol. 176-177; Giovanni Maria Monticelli (b. 1584). The general principal was that a *testis vilis* cannot be admitted, but the thrust of many of the exceptions is that they could—and often must—be admitted as witnesses by necessity. Even further, drawing on Bartolus and Paris de Puteo, Monticelli stuck to three requirements for torture of a *testis vilis.* Giovanni Maria Monticelli, *Aureum Repertorium de Testibus in Materiis Civilibus et Criminalibus Titulorum* [Venice]. See also Baldus, at 2.20.47.
[236] Book II, Tit. 32. J.M. Powell, *The Liber Augustalis: or Constitutions of Melfi Promulgated by the Emperor Frederick II for the Kingdom of Sicily in 1231* (Syracuse University Press 1971), pp. 90-91.
[237] François Hotman, *De Feudis Commentatio Tripartita*, [Colon 1574], pp. 603-604.
[238] X. 2.9.12, p. 698 ad 'Quoquomodo'.

of whom counted as the kind of serious and reliable witness required to make a claim against an agent of the Church. [239] Indeed, in general, canon law proceedings rejected "*viles testes*".[240]

There were a handful of special cases and exceptions deserving notice. First, "vile persons" could be admitted as witnesses against clerics *only if* the accused cleric had previously been accused of being 'of bad reputation and opinion'.[241] Second, the rationale for "vile" witnesses being excluded was in part that witnesses do not always have complete memories, and that the truth even in the best cases is often obscured—how much more doubt would be cast on the process if the witness was "vile"? [242] Third, they sought to extend the moral claim of Matthew 7:1-3—without irony—to the procedure of accusations: Jesus had said "Judge not, that you be not judged", and followed by discouraging those with logs in their eyes from picking out the specks in others. The canonists, however, used this passage to stress that all accusers must thus have "*bona fama*", and must not be suspect by any of the other laws which bring doubt and suspicion on one's character; it was the logs in the eyes of criminals and *viles personae* which prevented them from accusing others.[243] Finally, the canon law did provide exceptions for exceptional crimes like simony, heresy, or treason. In these cases, the testimony of *viles personae,* or alternatively, accusations levied by *viles personae*, could be heard by a judge and accepted as valid, but only if the accuser was tortured first. The whole procedure played out in a gloss at X.5.01.10, in which a layperson "John" was accusing a priest of simony. As a lay-person, John was already prejudiced in most cases from making accusations against clergy. Because simony was an exceptional crime, it seemed like John's accusation was valid. But, John was also *infamatus,* and he had not been tortured. Thus, John could not rightly accuse the priest of simony, and he was subject to ecclesiastical censure for his infamy and his accusation. [244]

Overall then, *viles personae* were those persons who lacked the reputation and credibility to be believed. What caused an individual to lose or to lack *fama*?

## Section II: *Fama* and *Infamia*—Civic Death, Civic Leprosy

*Fama* and *infamia* are crucial roman legal and political concepts, and they were the conceptual lynchpin between rules about witnesses and other legal examples of baseness.[245] In

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[239] X. 2.20.7, p. 705, ad 'Ex parte'.

[240] X. 2.20.54, p. 756, ad b, 'Emendarus'. See also 5.01.19, p. 1588, ad h 'Ad denunciandum': "tantum honestae personae admittuntur"; and 5.07.12, p. 1679, ad h, 'Quod quisque tenetur': "dummodo persona sit honesta et bonae famae quia viles personae non admittuntur ad denuntiationem."

[241] X. 2.20.10, p. 709, at b, 'Illorum'; X. 2.20.14, p. 711, at c, 'Suam'.

[242] X. 2.20.40, p. 714, at a, 'Unicum'.

[243] X. 5.01.01, p. 1573, at a, 'Legitimus. An addition to the gloss notes that there are many other persons who cannot bring accusations: women, orphans, those who have been carried away, accused of a crime, suspected of a crime, corrupt by trade (*quaestu corruptus*), fortune tellers, the infamous, slaves, the poor, the soldier, a ruler, a freedman, kin against kin, enemies, and a Cleric against the Church.

[244] X. 5.01.10, p. 1577, ad l, 'Laicus'. See also X. 5.03.32, p. 1631, at k, 'Adminicula'.

[245] A.H. Greenidge, *Infamia: Its Place in Roman Public and Private Law* (London 1894); M. Kaser, "*Infamia* und *ignominia* in den römischen Rechtsquellen." ZRG 73 (1956), pp. 220-78. S. Bond, "Altering Infamy: Status, Violence, and Civic Exclusion in Late Antiquity", *Classical Antiquity,* Vol. 33, Issue 1 (2014), pp. 1-30. Also, C. Edwards, "Unspeakable Professions" in M.B. Skinner and J.P. Hallett, eds. *Roman Sexualities* (Princeton 1997); P. Garnsey, *Social Status and Legal Privilege in the Roman Empire* (Oxford 1970); Peters, 'Wounded Names'; Migliorino, *Fama e Infamia,* pp. 13-14; F. J. Rodimer, *The Canonical Effects of Infamy of Fact: A Historical Synopsis and Commentary* (Catholic University of America Press, 1954); Tatarczuk, *Infamy of Law;* J.A. Bowman 'Infamy and Proof in Medieval Spain' in Fenster and Smail, eds. *Fama: The Politics of Talk and Reputation in Medieval Europe* (Cornell University Press 2003), pp. 75-94. I don't treat the third kind of *infamia* here—*infamia* by canon law. But see J.M. Livingtson,

classical Rome, every citizen had an *existimatio*— "reputation" or "status". The Digest defines *existimatio* as "a position of unimpaired *dignitas*".[246] *Infamia* was the legal loss or denigration of *existimatio*; it was a civil disability, stripping the "infamous" of their legal privileges, protections, offices, dignities, and rights.[247] There were two kinds of *infamia: infamia* of law and *infamia* of fact. The former was a consequence of a court case—a specific crime and specific judgement. The latter was not established by a judicial verdict but instead was manifest by particular actions. In either case, *infamia* was called 'civil death' (*morte civili*)[248] and scholars have recognized the kinship of *infamiae* and slaves (*servi*)[249]. It was also not dissimilar to excommunication—or at least, it was similar enough that it was noted frequently in medieval civil and canon law that *infamia* and *excommunicatio* were equivalents.[250] What matters for the current argument is the latter kind of *infamia* and that "immediate *infamia* was attached, *ipso iure,* to certain unseemly trades. This professional *infamia* applied to prostitutes, musicians, theatrical workers, gladiators, and funeral workers."[251] The line between the two kinds of *infamia* could be blurry: a pimp or madam might be convicted as a pimp or madam (and therefore are *infamis* by law) or they might by their livelihood and without the formal reprimand of a court be *infamis* by fact.

Although *infamia* was not necessarily the same concept in the 13th century,[252] we do find in the *Siete Partidas* the same two kinds of *infamia:*

> Reputation is the good condition of a man who lives justly and according to the law and good customs, and who has no defect or blemish in his character. Defamation means an accusation made against the reputation of a man, which is called, in Latin, *infamia*. There are two kinds of defamation, one which arises solely from an act which is performed, and the other derived from the law which declares persons to be infamous on account of the acts which they commit.[253]

The *infamia* by law included some professions: madams or pimps, 'buffoons' (*juglares*), 'mimics' (*remedadores*), and "merry-andrews who wander around publicly among the people, and sing or

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*Infamia in the Decretists from Rufinus to Johannes Teutonicus* (University of Wisconsin-Madison 1962); F. Migliorino, *Fama e infamia. Problemi della societa medievale nel pensiero giuridico nei secoli XII e XIII,* (Catania 1985); G. May, "Die Infamie im Decretum Gratiani", *Archiv für katholisches Kirchenrecht,* 129 (1960); Landau, "Die Entstehung des kanonischen Infamiebegriffs von Gratian bis zur Glossa ordinaria" *Forschungen zur Kirchlichen Rechts-Geschichte und zum Kirchenrecht* 5, Böhlau-Verlag, Köln-Graz (1966), VIII.

[246] Dig. 50.13.5.1. Other locations important for *infamia* include: Dig. 3.2; Dig. 47.12; C.2.11(12); C.10.59(57).

[247] In the Roman Republic, the censors were tasked with keeping the senatorial register; *infamia* took its first forms as the censor's marks against names on the register or the omission of certain names altogether. Greenidge, 'Infamia', p. 79.

[248]Paulus de Castro, *Consiliorum sive Responsorum,* Vol. I [Venice 1571], Consilium 435, fol. 226r. See also C.P. Sherman, *Roman Law in the Modern World* (1917).

[249] J. Glancy, *Slavery in Early Christianity* (Oxford 2002), pp.25-30; Edwards, 'Unspeakable Professions', esp. p. 76.

[250] Baldus, §. 'Notatur etiam' [Vol. 1, Fol. 176].

[251] Bond, 'Altering Infamy', p. 6. Also, "The declaration of someone as *infamis* and the citation in court that a man's profession made him either a *persona turpis* or otherwise disgraced were key considerations in judicial decisions", Bond 7; Garnsey, Social Status and Legal Privilege in the Roman Empire (Oxford 1970), p. 231.

[252] Bond, 'Altering Infamy', p. 27.

[253] *Sieta Partidas,* 7.6.1: "Famas es el buen estado del ome que biue derechamente, e segund ley, e buenas costumbres, non aviendo en si manzilla, nimmala estança. E disfamamiento tanto quiere dezir, como profaçamiento que es secho contra la fama del ome, que dizen en latin Infamia. E son dos maneras de enfamamiento. La una es, que nasce del secho tan solamente. E la otra, que nasce de ley, que los da por enfamados por los sechos que fazen." *La Quinta Partida* [Lyon 1550].

make jests for a reward", those who fight wild beasts for money, or those who fight for money at all: those who "risk their bodies for money in this way, may well be disposed to commit some other wickedness for a pecuniary consideration", and so are "infamous". So too are knights who "rent the property of others as a merchant (*merchante*)", usurers, "and all persons who violate agreements and contracts which they have sworn to keep".[254]

When Lucas de Penna took up the topic of dignities elsewhere, he wrote that "infamous" persons could be distinguished either by crime or baseness of life—*infamia* of law and *infamia* of fact—which in either case segregated them from the 'community of honorable people'.[255] This "baseness of life" could come with the *infamia* of fact from an occupation, and as Odofredus (d. 1265) had argued, traders, shopkeepers, abject officials, pasture-keepers, and other "vile" persons could be excluded from dignities and offices.[256] 'Base' (*turpis*) occupations, Lucas wrote, could trigger infamy by fact and the civil disabilities which accompanied it. It also seems that Spanish jurists, even into the 17th century, were most likely to continue stressing the *infamia* of a "base" person and a "base" life and its legal and ecclesiastical consequences; it was even placed on stage in Juan de la Cueva's *Comedia del Infamador* (1581).[257]

*Infamia*—specifically, *infamia facti*—is the lynchpin of the medieval legal conception of baseness and its consequences. *Infamia* strips an individual of their ability to bear honorable public burdens, to serve in dignities and high offices, to testify in court, and even their immunity from torture. For the nobility, to become "infamous*"* is to become *touchable* by the law and the public. Furthermore, *infamia* follows the "infamous" everywhere, 'like a leper with leprosy' as Bartolus wrote.[258] This was a common refrain.[259]

*Fama* was a qualification. It was also a privilege which unlocked protections that some possessed and others lacked; as such, it was also something which could be lost. The procedure of legal *infamia* stressed that the line between *fama* and *infamia* was permeable. Jurists were clear that the social stakes were higher for the nobility, and the kinds of actions which could jeopardize *fama,* status, or *nobilitas* thus came under intense scrutiny. This was especially the case with the live question of whether engaging in a particular kind of trade or labor was sufficient to cause the loss of *fama* and trigger the loss of the legal protections that the cloak of reputation could offer. Nevertheless, credibility—or value of testimony—hinged on many factors, and the most relevant factor was often the "*art"* they were engaged in.

## Section III: *Infamia Facti*, Testimony and Torture—A Gap Between Law and Custom

Novel 90 had an additional qualification about witness testimony which caused controversy for medieval jurists. "Vile" and infamous persons might be generally prejudiced from being witnesses, but if their testimony was to be admitted at all, they ought to be tortured first. This standard Roman legal approach was held by Azo and Odofredus (d. 1265), the latter of whom

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[254] *Sieta Partidas,* 7.6.4.
[255] Lucas at 12.1.2, fol. 65, also there at n. 13.
[256] Odofredus at C.12.1.6.
[257] Alfonso de Azevedo, *Commentariorum Iuris Civilis in Hispaniae Regias Constitutiones,* Vol. 5, [Antwerp 1618] Lib. 8, Tit. 3, l. 3 and 4, n.32-53, pp. 65-67; Antonio de Sousa, *Aphorismi Inquisitorum in Quatuor Libros* [1630], Lib. II, Cap. 24, n. 18-22, fol. 185r; Antonio Perez, *Praelectiones in Duodecim Libros Codicis,* Pars Altera, [Antwerp 1720] Cod. 10, Tit. 57, 'De Infamibus', pp. 376-377.
[258] Bartolus, at Dig. 3.1.9, *Commentaria In Primam Digesti Veteris Partem* [Turin 1577] fol. 99v; Bertachini, *Repertorium,* Tertia Pars, fol. 24r, n. 30.
[259] François Marc, *Decisiones Aureae*, q. 730, nu. 3: "Infamia infamen sequitur sicut laepra laeprosum."

argued that for witnesses who lacked 'good opinion' or 'good reputation', torture was necessary to validate their account. Because "artificers" or practitioners of "*viles artes*" were ignoble and "*viles*" and lacked the *fama* required for witnesses by reason of *infamia facti*, laborers like cobblers, sub-collectors or swindlers, or other tradesmen must be tortured before their testimony could be admitted. [260] Bartolus largely agreed with Odofredus on this count, and his commentary on Novel 90 was famous and widely cited, as was his lengthy treatise *On Testimony.* These passages contain his most extended discussion of *viles personae* and the *vilissimi.*[261]

For Azo, Odofredus, and Bartolus—and the rest of the jurists who relied on the maxim they helped construct[262]—torture cut in two significant theoretical ways. First, a person could only be tortured if they were "base". Neither nobles nor ordinary citizens could be tortured. Second, the justification for their torture was that they did not have enough of—or the right kind of—credibility because of their status or condition. Their maintenance of their testimony through torture proved the truth of their claim, which could otherwise be proven through reputation.

There was some disagreement around the edges. Paulus de Castro stressed that there were strict requirements for a judge to examine the "vile" witness before they could be tortured.[263] Bartolus and later jurists allowed "vile*"* witnesses to be admitted without torture if both parties in a suit agreed.[264] In either case—tortured or not—they were still "*humiles*", 'abject', or "*viles personae*", and their testimony ought to hold less weight than others.[265] Yet, in the opposite direction, the question of whether or not somebody could be tortured turned on whether they were "*vilis*" or "*ignotis*"; otherwise, torture was an injury to the individual wrongly harmed.[266]

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[260] Odofredus at Novel 90; Bartolus at § Sancimus, n.2-8, fol. 38v; Bartolus at § Si vero ignoti, n. 9; Bartolus at the rubric of Novel 90; Azo at Novel 90, § Si vero ignoti, fol. 228r. Bartolus thought that *infamia facti* repelled the infamous person from dignities and from freely giving testimony in most cases. They could be a witness in a grievance involving the brother, but ought to be tortured before giving testimony in other cases (*cum tormentis debet admitti*). This followed Azo's argument closely, though Azo stressed *bone opinionis*. Cf. Azo, fol. 167 and the rubric there. For a later example, see Giovanni Campeggi (1448-1511), *De Testibus*, Vol. 4, Fol. 97, Reg. 121, Col. 2.

[261] Bartolus' comment here was abridged, summarized, and quoted so consistently that eventually jurists stopped citing it as an originally Bartolan comment at all. For a critical edition, see S. Lepsius, *Des Richter und die Zeugen: Eine Untersuchung anhand des Tractatus testimoniorum des Bartolus von Sassoferrato* (Frankfurt am Main: Vittorio Klostermann 2003).

[262] Johannes Emericus a Rosbach [Johann Emerich von Rosbach] (1541-1605) fol. 436, n. 20. Tit. 3, Cap 3. (Frankfurt 1658), *Practica Criminalis seu Processus Judiciarus*; Hieronymus de Monte, *Quaestionum Varias Concernentium Materias Valde Singulares,* Liber nunc primim aeditus (Venice 1574), Quaestio 31. n. 10, p. 130 with the labeled title "Testibus vilibus vel infamibus non creditur nisi cum tormentis"; Marco Antonio Natta (d.1568), *Consiliorum seu Responsorum, Vol. 4* (Frankfurt 1588), Cons. 665. nu. 10. fol. 44; Lancelotti Galliae, *Consiliorum sive Responsorum* (Venice 1598), Consilium 75, n. 32-34, fol. 198.

[263] Paulus also notes that like a murderer is prevented from testifying even against another murderer, somebody who is *infamous* should be repelled too in both civil and canon law, unless they have completed repentance (*peractam penitentiam*). In the civil law, Paulus quotes Baldus: *Baldus dicit posse idem dici de iure civili quasi testis criminosus sit vilis et abiecta persona.* Paulus de Castro, on Novel 90, si dicatur, n. 3. And also Paulo on Novel. 90, quoniam, [1535] fol. 188.

[264] Azo had denied this ability of a judge.

[265] Bartolus at Novel 90, 'Testium', Fol. 38v. Elsewhere at Code 4.20, fol. 213, n.2. See also Barthelemy de Chasseneuz (1480-1541) fol. 146v, [Venice 1581]. Consilio 58, n. 30.

[266] Andrea Barbazza [1410-1480], *De testibus ad c. testimonium de testibus,* Vol. 4, Fol. 136, p. 2, nu. 18. Nellus de Sancto Geminiano (d. 1430), in his treatise *De Testibus* argued further that torture was appropriate for criminal cases but not civil cases; and in civil cases, persons who were not *vilis conditionis* could not be tortured. Even then, torture required a set of specific conditions, one of them being that the testimony of the witness was changing. Nellus de Sancto Geminiano, *De Testibus:* n. 114.

This strain of argument was persistent because authors continued to recognize the dominant categories of personal status and conditions. Theoretically and practically, Pier Corneo (1423-1493) argued, a 'vile and abject person' is treated differently than a 'serious person of good condition, good life, and good *fama*.' The latter kind of person, which includes people in dignities, knights, dukes, captains, soldiers, and nobles, would have to be proven an 'unserious person, of *vile* life, whose reputation could be held against them' for them to be tortured or punished harshly. Even if a 'serious' person was punished, they ought not be strung up (*suspendi*) or be subjected to other 'vile' punishments.[267] Giulio Pace (1550-1635) argued that equity of punishment would threaten the entire system of the consideration of personal status and condition: so long as distinctions between persons existed, it seemed unsettling for those distinctions to not also be reflected in the laws of punishment.[268] Otherwise, it is 'absurd' for a more honorable person to be punished heavier than *homines viles,* because then their honor would actually be an 'injury' to them. There is even a 'geometry' to righteous punishment: when the person of higher station is punished the same as a person of lower station, they have farther to fall and therefore suffer a more grievous punishment. Equality, in this account, led to inequity.[269]

Despite this established and persistent tradition, we also find jurists recognizing that changes were occurring. In a set of additions to Guillaume Durand's (1230-1296) *Speculum Iuris,* Andrea claims that legal prejudices against 'vile arts' had been set aside through general custom since at least the late 12th century: 'today, witnesses are not repelled according to vile, obscure, or ignoble artifices, unless they are *servi* or mercenaries'.[270] The waning of these legal prejudices seems to have leaked into the norms of torture. Franciscus Casonus (d. 1564), in his *Tractatus de Tormentis*, observed that the only conditions under which somebody could be tortured were if they started to waver in their testimony or were shown to be lying. These applied equally whether the subject was noble or not. The 'whole of Italy' no longer observed the custom which had previously given decurions, soldiers, doctors, and nobles immunity from torture. Furthermore, *viles personae* were listed alongside minors, pregnant women, new mothers, the sick or weak, pubescents, and the elderly as kinds of persons who ought not be tortured. The conceptual and linguistic shift around *nobilitas* and *viles personae* happened in two directions at what seems like the same time: though there were many 'base' persons and occupations, the jurists switched their focus from the quality of their occupation to the condition of their testimony. This shift was a strike against the privileges and immunities of the *nobiles,* but also offered general protection for the *viles.*[271]

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[267] Pier Filippo Corneo, *Consiliorum,* Vol. I [Lyon 1544], Consilium 217. fol. 165r. Also Corneo at C.2.15. Also fol. 67. Also, again in the *Communium Opinionum Syntagma,* Vol. II, Tit. 28, ns. 14, 16, 17. In the same volume, fol. 437r. And fol. 545, n.121-124.

[268] Giulio Pace, *De Contractibus et Rebus Creditis* (*Ad Librum quartum Codicis)* (1603), at C.4.21, n. 37, p. 436.

[269] Pace at C.4.21, n. 37: 'It would be absurd if more honorable men were subjected to more severe punishments than low individuals, for their honor would therefore harm them. However, a punishment would be geometrically more severe if it were arithmetically equal, that is, if the same punishment of either bodily harm or infamy were inflicted. For just as the fall is more severe for the one who falls from a higher place than for the one who falls from a lower place, even though both fall to the same location, so then is the punishment more severe for those who are in a higher position than for those who are in a lower position, even if the punishment is the same.'

[270] Guillaume [William] Durand, *Speculum Iuris* [Basil 1574], Book 1, Partic. 4, 'De teste', fol. 283-341. The relevant addition is at "Artifex": 'Pyleus says that today this has been abolished by general custom, whereby witnesses are not rejected today because of any lowliness, obscurity, or ignobility, unless they are slaves or hired by the party presenting them."

[271] Francisci Casoni, *Tractatus [...] de Indiciis et Tormentis* (Venice, 1557), 'Tracatus de Tormentis', Ch. 10: 'Quae personae torqueri possint, et quae non', esp. ns. 13-17, fol. 78v. Also, Odofredus in *Tractatus de Quaestio.*

Trust or credibility had never been a binary concept—even the jurists who thought that *viles personae* ought to be prohibited from proving testimony thought that it was on account of their having a smaller portion of the truth to offer than a "serious" or noble witness. But this spectrum of credibility allowed authors to sketch out a hierarchy of credibility. Much later, Prospero Farinacci (1554-1618) worked from top to bottom, from the most credible witnesses to the least. Those who live by their own labor (*de proprio labore*) or craftsmanship (*artificio*) are not generally said to be 'poor' (*pauperes*) and are not necessarily untrustworthy witnesses. Other occupations can sap at one's reputation or credibility: farmers, craftsmen, or other laborers or hired-workers who live in the fields and 'by their sweat' cannot be witnesses of 'whole' or 'complete' trust (*integrae fidei*). Other individuals are considered 'vile' because of the "*vilitas"* of their craft itself, like gamblers, actors, jesters or comedians (i.e., *infamia facti*, properly speaking). Others still are considered "vile" not because of their crafts but because of their 'abject' and dishonorable life on account of a crime they have committed, or because they are infamous by law or fact, or are 'the most vile people' (*homines vilissimi*) like pimps, prostitutes, or those 'convicted of public offence' (*de publico delicto damnati*). At the bottom are those who are called *viles* not because of the 'baseness of their life' (*non ex vilitate vitae*), their art, infamy, or crime, but because their status has been diminished by the civil law and law of nations—such persons are *servi.*

It was left to the civil laws in each place, and then the judge, to determine whether or not somebody's "art" was 'mechanical and vile', but there was no longer a general principle separating the nobles from the rest—nobles from *ignobles*. There were of course still *nobiles,* but the non-nobles were not necessarily *ignobiles*. That is, non-*nobiles* were a stratified group of persons which could be sorted on account of their trustworthiness. Farinacci offered a threefold summary for other jurists and judges: *viles personae* of the first degree (*villanis*) and others born from low or common stock (*ex humili et plebeio genere natis*) are unanimously agreed to have little credibility as witnesses and are often barred; *viles personae* of lesser degrees, like ignoble, base, and obscure workers might be barred by reason of their 'baseness', but not their craft. All other kinds of *viles personae* are generally admissible.[272] Again, however, these depended on the civil law of each *civitas* and he points to many councils and *curia* in Europe which held seats for craftsmen like carpenters.[273]

The texts and arguments above show that the law of witnesses and testimony was the central place for the implementation and development of the language of baseness in medieval law. It also shows two crucial conceptual shifts. The first is that there is a loosening of the consideration of personal status and condition, especially with regards to testimony: the category of who *might* be excluded from being a witness expands, but jurists are less likely to argue that they *should* be excluded. As early as the 14th century, jurists like Joannes Andrea could stress that the local customs and laws about testimony in some parts of Italy were leaning away from the original interpretations of Azo and Accursius, overriding some of the most important of the privileges and immunities of *nobiles.* The second is that the distinctions between reputability and

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[272] Prospero Farinacci, *Tractatus de Testibus,* Lib. II, Tit. VI, Quaest. 57, Amplia X, n.59: "Igitur in hac quaestione accipiendo viles personas..."

[273] Prospero Farinacci (1554-1618), *Tractatus de Testibus* (Lyon, 1606), De Oppos. Contr. personas Test. Titul. 6, Quaest. 57, Amplia X: Fol. 97; ns. 51-70; Also see *A Dissertation on the Statutes of the Cities of Italy: and a Translation of the Pleading of Prospero Farinacio in Defence of Beatrice Cenci and her Relatives*, trans. with notes by George Bowyer. In *De Testibus,* also see numbers 34, 48-49; Pace at C.4.21, n. 27, pp. 464-465. Also, Baldus at C.9.9.4pr, 'Gracchus': "Quia erat vilis persona: et quae sit vilis persona, relinquitur arbitrio iudicis, secundum Cyno, unde facit ad statutum istius civitatis, dicens."; and Cornelius Benincasius, *De Privileg. Paupertat.,* Sexta Quaestio, fol. 737, n. 20-22.

work were expanding and hardening: feudal manual laborers, like villeins, were subsumed into the lowest class of *servi*, while other 'arts' and 'crafts' were being renegotiated as more or less honorable. With the exception then of the *villani,* there were 'arts', 'crafts', or 'trades' which might or might not—depending on location and the will of the judge—impinge on one's ability to testify or be punished harshly. These shifts converge at a single point: what about the nobles who engage in *viles artes,* or even just commercial trades? Do they lose their *nobilitas,* and with it their advantage in offering testimony, protections from torture, and their privilege for more lenient punishment?

**Section IV: Nobility, Commerce, and the Decay of *Infamia Facti***

Once occupation and labor had been partially disentangled from baseness, and baseness detached from a complete legal prejudice against testimony, the final conceptual shift was to finish the disentanglement: that is, it was not enough that certain occupations were not by nature *ignoble*, and that some led to more or less trustworthiness—what was left was to say that most occupations had nothing to do with baseness at all, and in fact many were highly useful, and therefore implicitly valuable. As valuable kinds of labor, they bore no prejudice towards the credibility of the laborer. We can see this most clearly in the juridical treatment of *nobilitas.*

There are two identifiable steps to this process that we find in juridical texts. The first is a complex differentiation of commercial activity and the second is the consideration of public utility or public necessity. For the first, jurists began by taking advantage of a classical roman distinction between business done by one's own hands and business done through a representative. There was a kind of social paradox in Rome where having money was noble but *making* money was dirty, especially making money through trade; we thus find aristocrats managing trade corporations through their slaves in order to keep money-making at a distance from their status and reputation.[274] The medieval law similarly stressed that nobles would not lose their nobility if they simply supervised trade and the business operations were run through somebody else.[275] Another differentiation was the protection of *personal* trade; wholesale traders, retail traders, and resellers might be damned, but we ought not disparage somebody who is simply selling their *own* grain, wine or oil. A noble could keep their nobility if their 'business' was selling their own products and they would not even properly be called *negotiatores*.[276] Then, in the same process as these previous two steps, jurists could blow open the whole of the category of 'business' to differentiate between *true* businessmen and others; instead of the simple distinction from Cicero of wholesale and retail trade, jurists interrogated the definitions of buying and selling, of the scope of the marketplace, of what counted as a 'product', and what counted as 'trade'. Doing so allowed them to excuse many trades and professions that once would have been grouped in with commercial professions and place the burden of the reputation of commerce on others. Alternatively, replacing the monolithic conception of trade which was stained with the canon law accusations of 'sin' and 'projection from

[274] For example, Plutarch in *Cato the Elder* writes that "He used to loan money also in the most disreputable of all ways, namely on ships." See also E.W. Haley, *Baetica Felix: People and Prosperity in Southern Spain from Caesar to Septimius Severus.* (University of Texas Press 2003).

[275] Alciatus, Lucas de Penna, Aymone Cravetta and others.

[276]Giovanni Antonio de Nigris (1502-1570): Ioannis Antonii de Nigris de civitate Campaniae, *Commentarii in Capitula Regni Neapolitani* [Venice 1594]: Fol. 170, n. 88. Also see De Arbitrio Concesso Officialibus, Chap. 223, n. 5, n. 26. In his oft-cited Consililum 163, Aimone Cravetta (1504-1569) recognized that nobles could not exercise arts 'commonly reputed as *vile* and ignoble', including running a tavern (a kind of *negotiatione*), but that 'negociatio non dicitur, quando quis vendit granum, vinum, aut oleum suum.'. Cravetta, *Consilia*, Consilium 163, fol. 491.

the city of God' with a stratified one allowed them to distinguish meaningfully between the good and honorable kinds of trade and the dishonorable and sinful kinds of trade. Some of the most sinful—like usury—ought not count as trade at all.

The second step was already latent in the roman approach to sordid liturgies and public services. At C.12.1.6, one of the other common sources for 'vile' persons, the Roman law read:

> Persons of the lowest grade of merchants (*negotiatoribus*), or minters (*monetariis*), or low officials (*abiectisque officiis*), or persons engaged in the base service of station master (*stationarii*) or men of the lowest dregs of officialdom, or who live on various disgraceful gains, shall not attempt to enjoy and position of rank [entering imperial service].[277]

The occupations in the law itself are discussed with a particular language of baseness: *abiectus, turpis,* and the ordinary gloss adds *vilis.* Sarah Bond has recently grouped many of these occupations in her analysis of the disreputability of 'taboo' professions in this law and others. The language of 'taboo' is especially fitting for some of the more "unclean" (*spurcus*) occupations, like workers in funeral trades.[278] In itself, the law here seems simple enough: it wanted to preserve dignities and ranks by limiting access.

When Accursius (1182-1263) compiled the main gloss, he connected C.12.1.6 to a series of others, which would in turn shape how all later jurists read and interpreted the exclusion of merchants, minters, and other people in base services.[279] Traders (*negotiatores*) or shopkeepers (*cuidam ergasterio praesunt*) were prevented from holding a position in imperial service[280], and the secondary gloss clarifies that merchants or traders cannot be appointed to those positions *not* because they lack nobility (*non nobilitates defectu*) but because they are 'like *viles*'. Bankers, money-changers, and minters, because of their "*vili officio*", could not aspire to higher offices.[281] Accursius then fleshed out what some of the other occupations might be. Millers or bakers might be included by the words "low officials", and in the corresponding laws and glosses at C.11.16, these *pistorii* were those who made bread for the palace and as such were excepted from additional burdens.[282] The same exemption was borne by those who supplied pigs for the public, and wine for the public, or even sell any of these for the growth of the public *fisc.*[283] "Station masters" kept the gates and roads at the edges of a *castrum,* and they could be excluded because they keep station over "vile products" like oil, salt, or onions.[284] Accursius thought the rest of the law could include "anything"—for example, forest stewards (*saltuarii*) and those that keep pigs or pastures.[285] The jurists that followed more or less repackaged Accursius' helpful notes, like Andrea de Barulo

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[277] C.12.1.6, translated Blume.
[278] S. Bond, *Trade and Taboo: Disreputable Professions in the Roman Mediterranean* (University of Michigan Press 2016). Bond highlights, among other things, the sensorial variable of Roman conceptions of 'taboo' professions.
[279] C.12.34.1, 11.8, 11.16, 12.57, and 11.61.
[280] Accursius' gloss at 12.34.1 says that keepers of shops keep "stations", are *quasi negotiationi*— 'quasi-businessmen.'
[281] Accursius connects the inclusion of minters here to C.11.8.2.
[282] Accursius at C.12.1.6, and at 11.16 in the main gloss.
[283] The following title, C.11.17, deals with the *suarii,* and technically the *sellers of wine,* although they are not mentioned by name in the actual set of laws.
[284] Accursius at C.12.1.6. At C.12.57, the ordinary gloss identifies *stationarii* as those who stay at the borders, who are called "limenarchae" and "irenarchiae". Also Dig. 48.3. It is striking that these 'rulers of the borders' were 'base'.
[285] Accursius at C.12.1.6.

(1190-1275)[286], Nicolai de Napoli (b. 1315)[287], Lucas de Penna (1325-1390)[288], and Giovanni Bertachini (1448-1497)[289]. This includes Bartolus, who argued that the "Negociantes artes vilissimas" or the "vilissimas artes" include those who look after pigs (*custodium porcorum*) and those who sell oil and salt (*qui vendunt oleum et sal*).[290]

However, the exclusion here is a very specific kind of exclusion: it prohibits particular groups of people from participating in civic administration. Some of these administrative functions came with social prestige; however, many did not and many others were widely seen as immense burdens. These "sordid" *munera,* often called sordid liturgies, were effectively compulsory public services—either providing or paying for the labor to look after roads, buildings, baths, sewers, and the like. [291] Similar exclusions, like C.11.17.1, recognize that "Since public swine dealers (*porcinarii*) of the eternal city devote their earnest efforts to the interests of the Roman people, they shall be always free from sordid liturgies."[292] Some of these occupations are not exempt because they are base; they are exempt because they are busy. *Porcinarii,* like butchers, wine-distributors, bakers, weavers and so on were also hereditary labor associations (*corporati*). Many of these associations already had the burden of feeding and clothing the Roman state and people; their "earnest efforts" in that burden exempt them from *additional* burdens of public *munera,* an exemption which some jurists called a "privilege".[293] Joannes de Platea's comment on these topics draws out the logic of public utility at play: it is in the state's interest (*reipublicae interest*) that these kinds of workers are both working and teaching their craft to future generations of workers (*docentes artes necessarias reipublice*) rather than undertaking formal public burdens (*publicis muneribus*).[294]

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[286] Andrea de Barulo at C.12.1.6.

[287] Napoli at C.12.1.6.

[288] Lucas de Penna at C.12.1.6 underscores the dirty quality to these rules, taking his cue from the law's "*fex*"—dregs, scum, and in the plural, 'excrement'.

[289] Bertachini. *Repertorium,* Tertia Pars, at 'Negotiationem', p. 567, with citations of Panormitanus, Cravetta, and Aemilius Maria Manolessus.

[290] Bartolus ad C.12.1.6, 'Ne Quis': "Negociantes artes vilissimas ad dignitatem non aspirant, et aspirantes repelluntur ab ea, hoc dicit. ... Et nota appellari vilissimas artes illorum, qui stant custodium porcorum, et illorum, qui vendunt oleum et sal, ut dicit glossa."

[291] Sirks, B. 1989 "Munera Publica and Exemptions (vacatio, excusatio, and immunitas)," in Studies in Roman Law and Legal History in honour of R. d'Abadal I de Vinyals, eds. J. Sobreques and M. Pelaez, 79-111. Barcelona. ;Tran, N. 2006. *Les membres des associations romaines: le rang social des collegiati en Italie et en Gaules sous le haut-empire*. Rome. ; Tran, N. 2011. "Les gens de métier romains: savoirs professionnels et supériorités plébéiennes," in *Les savoirs professionnels des gens de métier. Études sur le monde du travail dans les sociétés urbaines de l'empire romain,* eds. N. Monteix and N. Tran, 119-133. Naples. ; Tran, N. 2013. *Dominus tabernae: le statut de travail des artisans et des commerçants de l'Occident romain*. Rome.; Tran, N. 2016. "*Ars* and *Doctrina*: the Socioeconomic Identity of Roman Skilled Workers," in *Work, Labour, and Professions in the Roman World*, eds. K. Verboven and C. Laes, 246-261. Leiden.; Treggiari, S. 1980. "Urban labour in Rome: *mercennarii* and *tabernarii*," in *Non-slave Labour in Graeco-Roman Antiquity*, ed. P. Garnsey, 48-64. Cambridge.; Lis C. and H. Soly. 2012. *Worthy Efforts: attitudes to work and workers in pre-industrial Europe*. Boston.; Lis. C and H. Soly. 2016. Work, Labour, and Professions in the Roman World. Leiden, The Netherlands: Brill.

[292] The *porcinarii,* also called *suarii*, may also have been responsible for butchering pigs and cattle. Sirks, *Food for Rome: The Legal Structure of the Transportation and Processing of Supplies for the Imperial Distributions in Rome and Constantinople,* p. 350; pp. 382-384.

[293] Andrea de Barulo, fol. 144, ad v. sordidorum.

[294] Platea at C.10.66.1. Compare Bartolus, at C.10.66: "Artifices hic expresse habent immunitatem a personalibus muneribus tam discipuli quam magistri, hoc dicit." The law applied to both teachers and students of the listed arts—it would make little sense to exempt the 'master' of a craft from a liturgy but take time from the student's apprenticeship or education by forcing the burden on them. Platea agreed.

This same principle is found again in the medieval discussions of executioners; if there wasn't a public executioner, jurists ultimately decided that the judge could compel a private person to perform the execution. The caveat was that this person should already be 'vile', like a butcher who was already experienced in cutting flesh, or jail-keepers on a public salary.[295] The justification for compulsion was, Bartolus argued, 'public utility'.[296] Jurists began to point out once again that many of the "base" and "sordid" occupations of a political community are necessary—not just the bakers, butchers, and weavers but the latrine-keepers, sewage-workers, notaries and secretaries too. The necessity, combined with the burden of the task, ought to distinguish them from genuine baseness. And if their position was politically appointed for the sake of public utility (*publicam respicit utilitatem*) like a scribe, secretary, or actuary, their occupation might be moved from the class of *viles et mechanici* into the *nobiles*.[297] Commerce, too, eminently useful and necessary, would have to be reconsidered—after all, the theological interests of the church for universal Christianity *and* abstinence from trade demanded it, unless they intended to have a universal community without commerce at all. And so we find Mattheo d'Afflito (1447-1523) arguing that merchants are 'certainly not nobles' because all *artifices* are ignoble, unless, that is, they are engaging in commerce out of necessity or in a place which could not sustain itself without commerce.[298]

Joannes de Platea observes that the starting point of *nobilitas* was parallel to the law of testimony: nobility was tied to *fama,* and particularly one's *fama* within one's *civitas*.[299] *Infamia* either by law or by fact could make somebody ineligible to serve in an office (which had dignity annexed to it): 'the gates of dignities are not open to the infamous.' Participants in 'vile arts' had these gates slammed shut, including bakers, sellers of salt, oil, and fruit, foresters, bath attendants, cloth-workers, and other 'exercisers of *vile* services', along with 'craftsmen and traders and other *vile* persons'.[300] This seemed potentially unfair to Platea—they were not being repelled from dignities by any identifiable law, and so perhaps they ought not be. He squared the controversy by arguing that while they were not technically "infamous" by law, their business was still '*vile* and *humiles*'; they ought not be legally punished for their trades, but the cheapness of their trade meant that they had a presumption of "infamy" and poverty against them. Accordingly, less credit (*fides*) was to be extended to them in testimony or in offices. [301] This presumption is not against their natural character. The argument here is that offices and positions of dignity are costly and time intensive—the wealthy can bear that cost, but a poorer tradesman cannot; so, there ought to be

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[295] Lucas de Penna, Fol. 443v.

[296] Bartolus was more hesitant but concludes that a person can be compelled 'according to public utility (*publicam utilitam*), when they are a *vilis* person'. And even though the definition here of a *vilis persona* is that they lack *dignitas,* Bartolus hopes that no judge assigns this 'vile' and 'horrendous' job to somebody of good condition and reputation (*bonae conditionis est et famae*) even if they lack *dignitas*: the indignity of the job ran deep, for who would allow their daughter to marry somebody who had been compelled to do such an 'ignominious' task? Bartolus at Dig. 13.7, § 'Titius':

[297] This example is from a case on which Menochius offered advice. The occupation in question was the notary, and the conflict of the case was whether "*notaria*" was a vile and mechanical art, and therefore if they could be excluded from the *collegium* in the city of Genoa. Menochius, Cons. 552, Fol. 82v-83v.

[298] Matthaeus de Afflictis, *In Tres Libros Feudorum* (Lyon 1560), 'Quis dicatur Dux, Comes vel Marchio', Rubrica 36, fol. 140v n. 16.

[299] Joannes de Platea, *Super Codicis Libris Tres* (Lyon, 1550), at C.12.1, fols. 159r-164v, ns. 9-10.

[300] Platea at C.12.1.6, fols. 161r-162v.

[301] Platea at C.12.1.6, n. 1: 'But because such lowly individuals engage in such activities due to poverty, there is a presumption against them, and less trust is placed in them than the wealthy.'

some suspicion about how they could afford it. Jurists defended the concern of the lengths that an individual might go to in an office if they were incapable of bearing the costs.[302]

Once jurists recognized that *nobilitas* according to the civil law was created—that it was an artificial grant of status made by someone with the power to grant it, by which someone is shown to be more respectable or honorable than others (the *plebeii*)—it was a short step to recognize that it could be easily lost or forfeited.[303] In particular, the civil, canon, and feudal law generally agreed that civil nobility could be lost through the exercise of 'vile' and 'mechanical' arts and offices. [304] But this loss was not a natural legal fact; it, too, was a civil legal consequence, or was tied to custom. Platea situated his argument about nobility within the 'customs of Italy', where nobles could descend to poverty and to *viles artes,* and thus became *ignobiles*.[305] This contingency meant that the content of nobility or whether an office (*officium*) is 'vile or honorable' (*vile vel honorabile*) also depends on the custom of a particular region.[306] Who has the authority to confer dignities—princes or emperors, barons, counts, or even the people—is similarly regionally specific to who has the 'power from law or custom' (*potestatem ex lege vel consuetudine*).[307] This also applied to the definition of "vile"—Andrea Alciatus noted that 'today' the arts which are called *"vilis vel nobilis"* are judged according to the 'common consideration of the city' (*communem reputationem civitatis*),[308] or "*ex communi hominum usu*" as Menochius wrote.[309]

There was a subtle presumption against the power of money. Those who were willing to do outrageous things for money like the fighters of wild beasts in the *Siete Partidas*, are considered as "infamous" by fact because there is no telling what else they might do for money; Platea opts for the example of someone who is paid to climb dangerously high trees to collect fruits. They are "*quasi infamis*" because the danger they risk to their body suggests a service to money which is in

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[302] Platea at C.12.1.6, n. 1: 'Indeed, the wealthy should be chosen for honors and positions of dignity, as there is no suspicion of base gain against them and they are capable of bestowing due honor on their position.'

[303] Platea, C.12.1.6, n. 5.

[304] Baldus at C.4.63.3, *Super Codice,* [Venice 1586], fol. 132v. See also Panormitanus at Decratals 3.4.3, *Commentaria in Tertium Decretalium Librum,* Tom. 6 [Venice 1588] c. 'Quia nonnulli modum': n. 6, fol. 29r; Raynerius, *Tractatu de Nobilitate,* q. 4; Socinus and Socinus, *Secunda Pars Consiliorum Maria et Bartho. de Socinus* [1545], Consilium 246, fol. 93v, n.3: "Et sic probatio non videtur sufficiens quod sit de domo quia illi que provenerunt ad paupertatem et viles artes exercent non reputantur nobiles sed ignobiles."; Franciscus Curtius (Senior), *Consilia* [Venice 1580], Consilium 18, n.2, Fol. 22v: "Quia illi, qui pervenerunt ad paupertatem, et viles artes exercent, non reputantur nobiles sed ignobiles."; Felinus Sandeus, *Commentariorum ... ad Quinque Libros Decretalium,,* Pars Secunda, [Venice 1601], Decret. Lib II. Tit. 20, Ch. 22, n. 5, fol. 125r: "Et adde, quod nullus potest dici nobilis, qui facit artes mechanicas."; Matthaeus de Afflictis, *In Tres Libros Feudorum* [Lyon 1560], 'Quis dicatur Dux, Comes vel Marchio', Rubrica 36, fol. 140v, n. 15: "Sed quid de nobili ex nativitate, qui propter paupertatem facit viles artes, an remaneat porro nobilis: dicit Bartolus [in C.12.1], quod non reputatur nobilis. Sed ego pro hoc allego textus ... Qui autem dicantur exercere viles artes, vide in [C.12.1.6]; Andrea Tiraquelli, *De Nobilitate,* Ch. 20, n. 1, p. 151: "Nobilitatem etiam perdit, qui vilibus et mechanicis artibus, et officiis".

[305] Platea, C.12.1.1, n. 1. and n. 7. Platea cites Aristotle's *Politics,* Book V, too.

[306] Platea, C.12.1.1, n. 7: 'Et sic ex consuetudine regionis attenditur nobilitas et ignobilitas' and therefore 'Sic et officium reputatur vile vel honorabile secundum consuetudinem regionis'.

[307] Platea, C.12.1.1, n. 8, fol. 160v.

[308] Alciatus, Praesumptio 48: Fol. 130.

[309] Menochius, Consilium 225, n. 31, fol. 95v. The rest of this extensive consilium answers the question of whether a widow named Catherine could inherit from her husband despite her 'vile, abject and deplorable' condition, or of the legitimate (or potentially illegitimate?) sons should inherit instead. In his dictionary at 'Nobilitas', Sabelli summarizes nobility like Platea did, dividing it into theological, natural, mixed, and political or civil. Fol. 205.

tension with the proposed public service of offering testimony or serving in a dignity or office.[310] Even if somebody was *nobilis* by some other means, engaging in money-making, dangerous occupations, or more broadly, taking pay for labor they did not *need* to do, posed a threat to their *fama* and their ability to hold office while the stain of *infamia facti* lingered. Commerce was a practical, political, and theological threat to *nobilitas:* Gratian's *Decretum* had had famously claimed that 'a trading man can rarely, or never, please God. And so no Christian ought to be a merchant; and, if they will be one, they ought to be projected from the Church of God.' [311] Or as the canonist Roland of Cremona (1219-1259) claimed, 'nobody can be a merchant without sin.' In their discussion of 'vile' and 'base' persons and trades, the jurists largely seemed to agree: many of the examples of occupations attain their baseness from their engagement with money (*pecunia*), wealth (*divitia*), or business (*negotiatio*). Alciatus even claimed that any merchant or craftsman with so much as a storehouse was not noble but often *viles* according to the *ius commune.*[312]

Guy de la Pape (1402-1487) exemplified the argument which had stretched back at least to Bartolus: nobles, if they wanted to keep their nobility and the privileges that came with it, were prohibited from engaging in trade.[313] Exercising such "*negotiationes, et mercantias"*, which are not appropriate for nobility triggers the loss of nobility.[314] This was the custom in Delphi and several "*status huius patriae*" (states of France). Annotations on this passage by Etienne Ranchini (c. 1500-1582) held that nobles were prohibited from exercising trades, lest they lose their nobility in the process; Ranchini and Pape agreed that this loss of status was temporary, remaining in effect only as long as the noble continued to trade.[315] In a note on the same passage, a jurist named Matthaeus stressed that the "vile" stain of commerce was permanent under Charles IX, until explicitly removed by a royal authority. Fallen nobles who had made the mistake of exercising 'vile and plebeian businesses and arts' needed to be restored by the King.[316] Another jurist claimed that families of recently deceased traders were desperate to petition for civil forgiveness for their sins against *nobilitas,* and that these petitions were "quotidian". [317]

As in the case of the *viles personae* above, the *infamia facti* of particular occupations began to decay. Even Platea ultimately argued that climbers-of-high-trees are not *infamis,* on the grounds that it is in the public interest that the fruit be collected; nothing could be illicit which was in the public interest. We might *trust* them less because of their occupation—their testimony is not inadmissible, just less trustworthy—unless they're testifying against somebody else of their same

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[310] Perhaps this is a form of the presumption against non-agricultural manual-labor found in classical and medieval texts. We also find Bartolus commenting on the example (and two others) in Dig. 3.1. § Removet, n. 6-7.

[311] Gratian, Distinctione 88, Ch. 11 'Eijciens': Eijciens Dominus vendentes, et ementes de templo, significavit, quia homo mercator vix, aut numquam potest Deo placere. Et ideo nullus Christianus debet esse mercator; aut si voluerit esse proijciatur de ecclesia Dei." The scriptural and ecclesiastical animosity towards trade can be traced through the Gospel of Luke (6:34), the Councils of Nicea (775), Lyons (1274) and Vienna (1310) and is backed by the authority of Jerome, Augustine, Cassiodorus, John Chrysostom, and Aquinas, among others. Generally, see O. Langholm, *Economics in the Medieval Schools: Wealth, Exchange, Value, Money and Usury according to the Paris Theological Tradition, 1200-1350* (Leiden: Brill, 1992); Holman, *Wealth and Poverty in Early Church and Society*; Isenmann, in, *Understanding the Sources of Early Modern and Modern Commercial Law*

[312] Andrea Alciatus, *De Praesumpt*., Praesumptio 48. n.6.

[313] Guy de la Pape [Guidonis Papae], Quaestio 196: 'De mercatura Nobilibus prohibita', p. 212, n.1: Also, *Decisiones Grationopol.* Quaestio 391, 'An Nobilitas per mercaturam amittatur', pp. 363-364.

[314] Guy de la Pape, Quaestio 196, n. 1.

[315] Baronis, annotation at Quaestio 196, p. 212.

[316] Mattaeus, note at Quaestio 196, p. 212.

[317] Baronis, annotation at Quaestio 196, pp. 212-213.

condition, in which case it seems that their testimony is fully admissible.[318] Platea's argument stops with those who climb trees for money and does not extend to merchants. Platea leaves us with a less rigid conception of nobility than previous jurists and he observes in real time that the internal and inherent *qualitas* of nobility is beginning to take over the common discourse of *dignitas* and *nobilitas*. Still, *nobilitas* cannot come from wealth and it was connected directly to temporal power and action. As such, it could be lost either through the loss of *"bona fame"* or the *infamia facti* of practicing 'vile arts' (*viles artes*). Some of the occupations, however—including some of the ones which exchange certain kinds of labor or performance for money directly—which would have before been classed as *infamis facti*, are not if they are necessary for the state.

Part of this was a return to a proper understanding of how public offices are regulated. French jurist Pierre Rebuffi (1487-1557) argued that the exclusion from office was a penalty which was applied through the law, not through the social and cultural bias which fortified *infamia.* Simply selling cheap goods (*vilis mercimonii*) did not provide sufficient grounds for such a penalty, and so even less warranted was the exclusion of merchants and other useful (*utensilia*) trades. [319] Tradesmen were not *infamis facti,* and could not by fact of their trade alone be stripped of particular privileges and grouped among the *viles artes* or *vilissimi.*

We can see shifts in the legal treatment of the originally 'vile' business as early as Lucas de Penna (1325-1390), who recognized that some areas of Italy like Naples were embracing some *negotiationes* and giving them easier access to nobility (*libentius de nobilitate contendunt*). Lucas also began the process of a larger return to classical texts for sourcing ideas about work. He resuscitated Cicero's distinction from *De Officiis* between *magna et copiosa* trade and *tenuis* or *sordida* trade, which read:

> Trade, if it is on a small scale, is to be considered vulgar; but if wholesale and on a large scale, importing large quantities from all parts of the world and distributing to many without misrepresentation, it is not to be greatly disparaged. Nay, it even seems to deserve the highest respect, if those who are engaged in it, satiated, or rather, I should say, satisfied with the fortunes they have made, make their way from the port to a country estate, as they have often made it from the sea into port.[320]

Bartolomeo Cipolla (1420-1475) also underscored the legal innovation of the commercial cities like Venice through the matter-of-fact observation that those who perform the functions of the republic, as a senatorial rank (*ex ordine sunt senatorio*), are called nobles even as they exercise commercial arts; therefore, there must be some crease wherein commerce has shed its ignobility. Otherwise, the Venetian nobility would be a walking and ruling contradiction. One of the distinctions through which commerce had been redeemed was Cicero's definition above, which was cited widely.[321] André Tiraqueau (1488-1558) devoted a chapter in his *De Nobilitate* to the social and legal threat of commerce. He recognized there had been a shift: some arts, crafts, or trades were no longer disapproved but they were still not honorable, and so still not appropriate for nobles. And yet, the reconsideration of commerce as no longer a 'sordid' art had distinguished

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[318] Platea, C.12.1.6, ns. 1-2 on 'ascendentes arbores periculosas"—"Minus tamen fidei eis adhibetur, ex quo tali periculo se exponunt propter lucrum, nisi inter alios eiusdem conditionis homines testificentur."
[319] Pierre Rebuffi, *Lectura super tribus ultimis libris Codicis,* (Turin 1591), at C.12.1.6, ns. 3-4 fol. 159v.
[320] Cicero, *De Officiis,* 1.52. See Lucas de Penna, C.12.57.11, 'Si cohortalis', fol. 973: Lucas was also predated by Albericus de Rosate (1290-1360) at C.5.5.7, 'humilem'.
[321] Johann Marquart, *Tractatus Politico-Juridicus de Iure Mercatorum et Commerciorum* [1662], p. 86. n. 70-73.

a rising group of workers who were neither nobles nor *viles* persons. This was, for Tiraqueau, a return of a kind to Aristotle, where merchants were counted among the commoners (but not the slaves) and not the nobility. It also was a return to Plato, insofar as we find more authors and jurists like Tiraqueau recall that there was a place for commerce and craftsmen in the 'healthy' city of sows in Book II of the *Republic* (370b-372e).[322]

Andrea Alciatus (1492-1550) exemplifies the progression of the argument. For Alciatus, '*vile* trades' still existed, but the meaning of "trade" needed further explanation. He begins by defining a trader (*mercator*) as a person engaged in the exercise of business (*exercitium ... negotiatio*). This turns out to be a vigorous definition. Those who sell cloth fall short of the requirement of "exercising" business, property lenders and sellers lack the "wares" required by the definition, and even those who sell wheat, wine, and oil from their own land aren't engaged in trade, properly speaking, because the quantity was too small. By definition, those who take material and transform them to sell them were also exempt, like craftsmen of all kinds, shoe-makers, weavers, cobblers, laundry-workers, gold-gilders, furriers, and dyers. Only wholesale traders, who transport products across seas and long distances, are rightly called traders. And, Alciatus argues, these wholesale merchants were providing the same essential function for the Italian cities as they had for the *populi Romani:* they stocked communities with the goods and wealth necessary for survival, and thus cannot be counted among the "vile" arts or trades. [323]

In the 16th century, Benvenuto Stracca (1509-1578), called by some the father of commercial law, claimed that a general custom had been introduced: witnesses couldn't be repelled according to *ignobility,* their craft or trade, or their utility.[324] A trader could be called "noble" with respect to their reputation and a 'person of good faith' (*persona fide digna*) with respect to their testimony.[325] The question most frequently addressed in texts was whether a particular merchant was a trustworthy person, or whether a noble who engaged in commerce did so without fraud; they were not presumed to be ignoble by the fact of their trade.[326] Their profession, by the civil law*,* as Kaspar Ziegler (1621-1690) later claimed, was not unlawful, just less honest.[327] After all, as Tiraquelli had observed, the vices of commerce weren't vices of the *art* of commerce—crime, trickery, fraud, perjury, counterfeiting, those vices which had damned trade and commerce to dishonor, were "*vitia, non artis, sed hominum*".[328]

We even find movement where it might be least expected: moneylending and usury. Alciatus had argued that usurers lacked merchandise and so were not "traders" properly speaking, even if they were otherwise morally problematic. Claudius Salmasius (1588-1653) agreed with Aristotle that lending was dishonest, but recognized that even dishonest trades are useful and 'almost necessary'. In fact, what distinguished usury from the other dishonest arts without which human society could not exist? Profit, and the hope for profit, was not only necessary for the city

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[322] He began by writing that most people believed that merchants were extremely base (*sordissimum*), especially the merchants of base things or those who do their base trade through base methods—those who lie, perjure, and steal. The laws widely agreed that nobles by birth could not engage in commerce, and merchants could not be appointed to positions of nobility. All nobles who nevertheless choose to engage in commerce should lose their privileges—or at least, cease to enjoy their privileges—either until they stopped or were restored by a civil authority. Ch. 33, n. 2-4.

[323] Alciatus, *De Verborum Significatione,* Tom. II, l. 207, l. 'mercis appellatione':

[324] The argument is nearly the same as Prospero Farinacci's at the close of the section above. Benvenuto Straccha, *De Mercatura Decisiones et Tractatus Varii* [Lyon 1632], Decisio 58, n. 11, pp.157-158 See also the *Oxford International Encyclopedia of Legal History.*

[325] Hippoyltus Marsilii, *Tractatus Bannitorum* [Bologna 1574], fol. 52.

[326] Simon Pauli, *Dispositio in Partes Orationis Rhetoricae* [Magdeburg 1582], fol. 618-621.

[327] Caspare Zieglero [Kaspar Ziegler], *De Iure Commerciorum:* n. 5 [p.5].

[328] Tiraquelli, *De Nobilitate,* Ch. 31, n. 19, p. 360.

to function in an abstract sense. The "smell" of money was uniquely capable of over-powering the foul-smelling dirty jobs which cities could not function without. Salmasius mused that despite the reputation of money-lending, most would prefer it to the dirty work of butchering, shoe-making, or tanning. But Salmasius also observed that the prejudice against profit and commerce was inconsistent with reality; if trading to make a profit was "base", then all arts and trades were "base", and all commercial trades were but grades of usury. Instead, it was more consistent to reconsider the older distinctions about the nobility and ignobility of labor, and that even usury could be redeemed. [329]

By the 17th century, the long transformation was almost complete. Dutch jurist Ulrik Huber (1636-1694) observed that in his age, both the people and the state had taken note of the importance of commerce in a republic, and as such were viewing it with honor. 'These days', commerce no longer spoiled nobility, reducing otherwise good people to a 'low and abject' social and civil status. Instead, aristocratic and popular governments in Venice, Genoa, the Dutch Republic, Florence, and England had embraced it as being central to their power. This was not a universal shift, Huber claimed—the dignity of merchants in free republics was greater than in other kinds of regimes. Huber's reading of history was convenient for the Dutch republic, which had established a colonial empire rooted in large scale commerce, and that this was consistent with—and indeed a product of—the structure of popular government. The assembly not only needed to be open to merchants, tradesmen, and craftsmen because of a commitment to accessibility for public offices and dignities, but because the wealth those citizens brought into the city made it more wealthy and more powerful.[330]

**Section VI: Conclusion—Credibility, Politics, and the People**

Early modern historians had a suggestion for the proximate cause of the grand shift in the nobility or ignobility of commerce. German author Baron von Lowhen, in his *Analysis of Nobility in its Origins* (English ed. 1754), writes:

> Since the discovery of the new world, commerce has acquired a splendor and importance of which before it was not susceptible, and riches being naturally productive of aspiring desires, merchants who had sense enough to limit their pursuit of gain, figured at court and laid out part of their gains for a title; and from such golden roots are sprung many branches of the several degrees of nobility, the highest, the princely not excepted. This was, indeed, something of a breach of the old statutes concerning nobility, which exclude merchants, but the same trade is carried on to this day, and why not? If suitable intellects and morals be not wanting, who can better support nobility than merchants of over-grown fortunes. The ancient laws of honour in Germany were very rigid on this point, *nobiles se negociationi et mercaturae immiscentes perdunt nobilitatem* ['nobles who involve themselves in trade and commerce lose their nobility'].[331]

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[329] Claudius Salmasius (1588-1653): pp. 522-551, esp. p. 527, 530, 534-535. Salmasius has a helpful restatement of many of the distinctions between base workers, from actors to tanners to money-lenders. See especially the passage that begins 'Quid hodie infamius carnifice?'.

[330] Ulrik Huber, *De Jure Civitatis* [1708], Lib. II, Sect. II, Cap. IV, 'De Nobilitate', n. 69, but see generally ns. 67-69 and 71; also 2.2.4, n. 73 and 2.2.5, n. 19.

[331] Baron von Lowhen, *The Analysis of Nobility in its Origins* [London 1754], pp. 62-63

While the exact historical claim here is beyond the scope of the argument of this chapter, it is nevertheless clear that a radical "breach" in the content of nobility had occurred well before the end of the 15th century. Trading and commerce, which had once been grouped with the other *viles artes* which had the power *by fact* to strip the nobility of their rights, privileges, and immunities, was under reconsideration by necessity in order for the commercial republics like Venice to exist with an internally consistent system of values. The law of testimony was the site, if not a reflection of the source, of this development.

To cross from legal history into political theory, the cornerstone of democratic theory (and indeed the history of democratic theory) is that one's occupation or wealth should not bar them from serving in an office. This spurned one of the most common criticisms of democracy—that those who made up the *demos* or the *ekklesia* are 'idiots', amateurs, untrained in politics, cobblers and shopkeepers. Jean Bodin, in analyzing the different kinds of democracies in Switzerland, noted that the most popular regimes (the cantons of Uri, Schwits, Undervald, Zug, Glaris, and Apensel), that offices are given to "verie Sadlers, and such other mechanicall men"; other cantons like the Bernoies, and Zurich, "compose their Senat of divers handy craftsmen", but supplement that by reserving chief magistracies for noble families.[332]

For social scientists and political theorists, including Jürgen Habermas, there has been a temptation to lean into class analysis and feudal regimes to organize medieval social and political relationships. This can often be useful, but it risks presenting a shallower version of these relationships. In this case, class and labor do underwrite the credibility of medieval individuals, but it is this credibility which inflects their political and juridical status. Specifically, the concept at the heart of what makes an individual 'base' is whether their word can be trusted; any argument about private or public communication, let alone social trust, social bonds, or social networks that does not confront how individuals place value in the words of their peers will be missing a crucial part of the story. And, if this credibility is further intertwined with both the limits of corporal autonomy and political representation, medieval and Early Modern histories of political thought will have to excavate these overlooked variables to recover the development of institutions of communication, trust, and even representation.

Let us return briefly to Bartolus for a closing example. In his *De Regimine Civitatis,* Bartolus defines a popular regime:

> And so we call that government a government for the people (*regimen ad populum*), or a government of the multitude (*regimen multitudinis)*, as was said. This government is so called, however, since the jurisdiction is with the people or multitude: not because the whole multitude joined together should govern, but that a government entrusted to certain individuals for a time [...]. But what I say, 'by a multitude', I mean with the most worthless people excepted (*dico per multitudinem intelligo exceptis vilissimis)*, as in C. 12.1.6. Likewise, some magnates can be excluded from that government: those who are powerful that they would oppress others, as in Dig. 1.18.6.2.[333]

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[332] Bodin, 2.7.

[333] Translation from J. Robinson. Critical text, D. Quaglioni, *Politica e Diritto nel Trecento Italiano: Il "De Tyranno" di Bartolo da Sassoferrato con l'edizione critica dei trattati "De Guelphis et Gebellinis," "De Regimine Civitatis" e "De Tyranno," Il Pensiero Politico* (Florence: Leo S. Olschki Editore, 1983).

Here, the *multitudo* is either the active governing agent or the body from which representatives are selected; the whole of the people of the state is the larger group. The *vilissimi* are included in one, but excluded from the other. The modern historical contemporary accounts have either chosen not to explain who these 'most vile' persons were, or assumed a class analysis. Filippo Serafini (1831-1897) claimed that Bartolus, 'like many other medieval political figures and jurists, does not have a *giusto concetto* of equality of law in the state; even *il regime democratico* becomes *un regime privilegiatio,* corresponding to the spirit of the Middle Ages.'[334] However, Serafini does not, like many interpreters who followed, give content to the *vilissimi*—he simply translates it to "il basso popolo", as Federigo Sclopis did when he argued Bartolus was 'excluding the lowest of the people' (*excusa l'infima plebe*).[335] The same is true for C.N.S. Woolf who, in the first extended analysis of Bartolus' political thought in English a century ago, rightly points out that "Bartolus takes every precaution in restraining his Democracy", but lets the Latin speak for itself as to what or whom Bartolus is "restraining his Democracy from".[336] Diego Quaglioni also leaves the Latin untranslated.[337] Hagen Keller equates the *vilissimi* with the *Unterschichten,* linking Bartolus to oligarchic quality of the Italian commune, where the 'better people' ruling meant the exclusion of the lower class.[338] Ulrich Meier writes that the *vilissimi* were 'probably the lower middle class' or lower bourgeoise (*unterbürgerliche Schichten*).[339] James Blythe offered the clearest, and strongest contextual interpretation of the *vilissimi,* tying them to the lower guilds.[340]

All of these accounts overlooked Bartolus' own gloss on the cited passages, in which he defines the *vilissimi* by example: they included pig-keepers, oil-sellers, and salt-sellers. I have suggested here an alternative explanation for the *vilissimi* grounded in Bartolus's citations of sordid liturgies and the law of testimony. In drawing on the law of liturgies, the *vilissimi* were likely essential workers, and to burden them with potential public service would detract from their

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[334] Filippo Serafini, Vol. 22, p. 431-432.

[335] J. Rollo-Koster, 'The People of Curial Avignon', p. 22.

[336] Woolf, *Bartolus of Sassoferrato: His Position in the History of Medieval Political Thought* (1913), p. 117. The Carlyle brothers do discuss Bartolus' *De Regimine Civitatis* in vol. VI, p. 76-80, and cite the passage on p. 78, but that pass over the point.

[337] "Rappresentativita del governo, rotazione delle cariche, esclusione dall'esercizio della giurisdizione dei *vilissimi* e dei *magnates*," p. 223 in D. Quaglioni, "'Regimen ad populum' e 'regimen regis' in Egidio Romano e Bartolo da Sassoferrato", *Bullettino dell'Istituto storico italiano per il Medio Evo* (BISIME), 87 (1978), pp. 201-28. Also, "...rispetto delle norme "quas cives instituerunt", rappresentativita, elletivita e rotazione delle magistrature, esclusione da queste di "vilissimi" e "magnates", sono le fondamentali caratteristiche del "regimen ad populum". p. 148 in D. Quaglioni, "L'officiale in Bartolo', in *L'educazione giuridica* (Perugia 1981), Vol. 4, pp. 143-187. *L'educazione giuridica* was published in six volumes: Perugia 1975-1981 [volumes 1-4]; Napoli 1988-1994 [volumes 5-6].

[338] "Bezeichnenderweise fällt es den italienischen theoretikern des 14. Jahrhunderts schwer, in bezug auf die Kommune die Oligarchie von der Politie oder Demokratie schlüssig abzugrenzen. Für Bartolus von Sassoferrato ist klar, dass auch in der Politie, die er für Städte von der Grösse Perugias für die beste Regierungsform hält, die Ämter und Vergütungen *secundum gradus debitos* vergeben werden müssen, wenn die Volksherrschaft ein gutes Regiment sein soll [...]. Auf dem Hintergrund der zeitgenössischen Praxis und der rechtlichen Regelungen kann dies nur heissen, dass die höhoren Ämter den besseren Leuten vorbehalten sind. Dass die Unterschichten, die *vilissimi,* nicht am Stadtregiment partizipieren, ist für Bartolus ohnehin selbstverständlich." "Kommune" *"Kommune": Städtische Selbstregierung und mittelalterliche "Volksherrschaft" im Spiegel italienischer Wahlverfahren des 12.-14. Jahrhunderts*, in G. Althoff, ed. *Person und Gemeinschaft im Mittelalter* (Sigmaringen 1988).

[339] H. Meier, *Mensch und Bürger: Die Stadt im Denken Spatmittelalterlicher Theologen, Philosophen und Juristen* (De Gruyter 1994). When used in this kind of context, *unterbürgerliche* or *Unterschichten* is a structural, but ultimately not descriptive, term which indicates a lack of real property, education, or poilitical and legal privileges, but also seems to be more appropriate for early industrialization. W. Kaschuba, *Lebenswelt und Kultur der Unter-Bürgerlichen Schichten im 19 und 20 Jahrhundert* (München 1990), p. 60.

[340] Blythe, *Ideal Government and the Mixed Constitution, 1250-1375*, p. 179.

trades and the public good. The pig-keepers, oil-sellers, and salt-sellers of Bartolus' day were stepping into the same 'privileged', imperially protected, and state-sponsored position as their 4th century predecessors. However, taking a cue from the laws and customs of exclusion in the law of testimony, while their occupations were publicly honorable, their labor and wage made them juridically 'unbelievable'. Both were valid grounds to exclude them from offices.

The medieval jurists who debated about the rules of witness testimony were not democratic theorists, nor did they (in large part) have any specific political commitments to forms of government. But, they were engaged in either actively reforming the categories of "baseness" and "nobility" or passively reflecting changes already happening in language, culture, and local law across Europe and in the *ius commune.* In doing so, their writings present two challenges for historians of political thought of for interpreters of early modern political theory. First, the descriptive definition of a popular "estate" (as interpreted by Bodin) of whether the assembly or offices of government was open to cobblers, shoemakers, and traders without limitation is an effective and substantive one. This was not an innate, automatic feature of popular government, because *civitates* had to reform the laws of nobility and witness testimony to repeal formal prejudices against the merchants, bankers, and tradesman who were legally and culturally "infamous" before. Second, this process—taking place in or reflected in the laws of testimony—point to the central "juristic obstacle" to the democratic state: the consideration of status and occupation, or the "respect of persons". Put crudely, the assembly and offices of the state had to be open to "vile" persons just like noble ones; alternatively, noble persons could not possess special immunities from torture. There was no altruistic concern to protect the weak and powerless in this process: the emphasis instead was that the wealthy and nobility needed to be torturable too.

Torture, public punishments, and public executions were obviously not simply academic legal questions; they would take center stage—literally, on public platforms—during Europe's many Inquisitions. During the Inquisition, the credibility of witnesses, the weight of social status, and the torture-ability of subjects, poor and wealthy, Christian or unbeliever, were questions of public and, as the next chapter shows, fiscal policy.[341]

[341] Ron Hassner has recently used the Spanish Inquisition to suggest that torture continues to be a question of public policy. See Hassner, *The Anatomy of Torture.*

"Treasurers and record keepers ... resemble the shape of the stomach and intestines: these, if they accumulate with great avidity and tenaciously preserve their accumulation, engender innumerable and incurable diseases so that their infection threatens to ruin the whole body."

John of Salisbury, *Politicratus,* 5.2

"If Treasure be the sinewes of a commonweale, as the auntient Orator said, it is verie necessary to have the true knowledge thereof, first to see by what honest meanes to gather money together; secondly, to imploy it to the profit and honour of the commonweale..."

Bodin, *Six Books,* 6.2, trans. Knolles.

“I wanted to see the church adorned with every sort of good thing. But they say Aristotle distinguished three sorts of good: goods of fortune, goods of the body, and goods of the mind. I didn’t want to change his order, so I began with goods of fortune, and I might have worked up to goods of the mind if untimely death hadn’t called me away.”

Pope Julius II to Saint Peter in Erasmus’ *Julius Exclusus*

## 3. Sinews of the State: The Church and Fiscal Rights (*de iure Fiscus*)

From November of 1459 to October of 1460, in the city of Arras in northern France, the first large-scale witch-hunt in Europe was launched against subjects accused of "vauderie". Suspects had allegedly attended secret evening assemblies in which men and women mocked the Christian sacraments, pledged their souls to Satan, engaged in sexual acts with one another and with demons, crafted poisons and potions, and exposed their anuses to the sky[342]; outside of their midnight congregations they were suspected of committing arson, stealing the bread of the Eucharist and feeding It to toads, and slaughtering infants before baptism (or also cannibalizing them).[343] The investigations, arrests, and trials came in waves, and, not incidentally, climbed the social strata. The first to be accused were vagabonds and a prostitute, but as the trials progressed, prisons filled with furriers, cooks, aldermen, merchants, financiers, and even a chamberlain of the Duke of Burgundy. In total, twenty-nine people were convicted; twelve were burned at the stakes in the town square. Those who weren't killed were imprisoned, but all the convicted had their property confiscated—especially the wealthy, who, along with most of the public, began to suspect that the whole ordeal was a pretext to seize property for ecclesiastical judges and church officials.[344]

The appeals began immediately, rising first to the court of the Duke of Burgundy, Philippe le Bon, and finally to Charles VIII's *parlement* in Paris. Witnesses were summoned and some

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[342] Jacques du Clerq, *Mémoires de Jacques du Clercq sur le règne de Philippe le Bon, duc de Bourgogne,* 2nd ed., vol. 3, ed. Frédéric de Reiffenberg (Brussels: Lacrosse, 1836), Book 4, Chapter 4, pp. 20-21. They were further accused of teleporting to and from the meetings and consuming demonically manifested food and drink.

[343] These accusations were not unique to Arras; instead, they reflect a series of old but resurgent stereotypes and superstitions about anti-Christian behavior. These accusations and the fascinating logic behind them, the procedure for interrogating suspected witches, and the appropriate sentences are recorded in a recently translated English edition, *The Arras Witch Trials: Johannes Tinctos's* Invectives contre la secte de vauderie *and the* Recollectio casus, status et condicionis Valdensium ydolatrarum *by the Anonymous of Arras* (1460), ed. and trans. Andrew Colin Gow, Robert B. Desjardins, and François v. Pageau. See also Matthew Champion, “Symbolic Conflict and Ritual Agency at the *Vauderie d’Arras*”, *Cultural History,* April 2014, Vol. 3, No. 1: pp. 1-26.

[344] Franck Mercier observes that the trials brought a ‘chill’ about the city; important citizens began to leave and trade slowed down as citizens were less convinced about the security of contracts and safety of debtors. Mercier, *La vauderie d’Arras: Une chasse aux sorcières à l’automne du Moyen Âge.* Rennes: Presses universitaires de Rennes (2006).

convicts were released from prison in 1461. But, the *parlement* did not issue a judgment on the case until May 20, 1491—over thirty years after the first arrests and public executions. The *parlement* ruled that there had been excessive abuses of judicial procedure, of gathering and verifying witness testimony, and of the norms and rules of torture. Whether these abuses originated by conspiracy or bureaucratic incompetence—or both—as the pamphlets distributed in Arras had insinuated, the court did not say. But they did annul the entirety of the original judicial and inquisitorial proceedings, restoring most of the victims (alive and dead) to their original status, demanding the return of their confiscated properties with interest, and even extensive reparations to be paid by the heirs of the guilty (and those who had *done* the illegal confiscation). They ordered all of the documents of the original trials to be burned and destroyed and they set aside some of the reparation funds to build a fifteen-foot-high stone cross bearing the words of the judgment of the *parlement* of Paris which would be erected in Arras to serve as a public reminder of the restored status of the formerly accused. It also must have served as evidence of the authority and power of the high court to set right what lower courts had bungled.[345]

The *Vauderie d'Arras* is a famous case for historians of inquisition, heresy, and witch trials first because of its staggeringly unique set of circumstances, including how it ultimately was resolved, and second because it took place in a sophisticated urban environment in which there were countless writers, chroniclers, and jurists whose accounts of the trials and of the contexts survive.[346] For my purposes, however, what is most striking is the frequent concern expressed by victims, their lawyers, public pamphlets, and the ultimate judgment issued by the *parlement* about the injustice of the confiscation of property. It was in fact a turning point in the trials—in public opinion, in the appeals, and in the behind-the-scenes political machination which allowed the case to rise to Paris, in part because the city of Arras had a right against confiscation in their charter, and in part because the wealthy felt especially targeted by the local inquisition. One lawyer on appeal argued that the whole ordeal—from the fantastical stories about witchcraft to simpler heterodox beliefs—was 'designed to get money'.[347]

Recent scholarship has revised the degree to which confiscation played a steering role in the inquisitorial process and the degree of corruption involved in confiscation.[348] For centuries, scholars sympathetic to the victims of inquisitions across Europe[349], took the public and bourgeoise paranoia about property confiscation seriously and painted the process as being an important

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[345] Paul Fredericq, *Corpus Documentorum Inquisitionis Haereticae Pravitatis Neerlandicae,* Vol. I, *Tot aan de Herinrichting der Inquisitie Onder Keizer Karel V* (1025-1520) (Gent 1889), n. 300; p. 341.

[346] There were other, earlier witch-trials of course. See Richard Kieckhefer, European Witch Trials: Their Foundations in Popular and Learned Culture, 1300–1500 (London: Routledge, 2011), 106–47 (esp. 124–33).

[347] Jean de Popaincourt, "Et apperera par lesdits procès que tout a esté fait pour avoir de l'argent". Mercier, 332.

[348] Kamen, *The Spanish Inquisition: A Historical Revision,* as one example of one inquisition. Recent scholarship has also revised the long history of the inquisition, recognizing its many different forms and features as it disappeared and reappeared across Europe. The number of victims has been revised down, but greater precision has been lent to categorizing and understanding the kinds of punishment and the kinds of accusations.

[349] There were many inquisitions. The ones treated in this chapter largely take place before the Roman Inquisition (the one which would target philosophers and scientists like Galileo), and before the work of inquisitions was physically, legally, and bureaucratically centralized near the Vatican in an official Holy Office (which remains today, under a different name, but which still oversees ecclesiastical discipline). The question of whether the Church possessed a *fiscus* or the right of confiscation developed behind an in parallel with inquisitions; what makes the examples I highlight striking is the *response* of other actors—of the Duke Phillip le Bon and of Parliament. Their claim, implicit and explicit, was that Arras was a mistaken and rogue local procedure, and that a national secular authority could provide order where it was lacking. In the bigger picture, the response of the Catholic Church to bring the inquisitorial process in-house was the same kind of recognition, as was the Spanish Inquisition's secular and theological mixed status insofar as the inquisitorial officers were appointed by the King.

revenue stream for local churches, cities, and the Catholic Church as a whole.[350] This has never been unfounded—Pope Sixtus wrote in a Papal Bull that the Spanish Inquisition "has for some time been moved not by zeal for the faith and the salvation of souls but by lust for wealth (*lucri cupiditate)*"[351]—but it has been exaggerated. After all, many accused heretics were poor, propertyless, or otherwise towards the bottom of the late medieval social life, and they were explicitly incentivized during inquisition investigations to turn in their more noble and more wealthy fellow citizens. The scholarly focus on confiscation is a reflection of first-hand accounts of citizens. In one scene, in Bologna in May of 1299, two men named Bompietro and Giuliano, and the exhumed body of a woman named Rosaflore were burnt at the stake with resistance and hesitancy from the public. Despite the disquietude at sentencing and the execution it was four days *after* the executions when the resistance escalated, triggered by a notary for the Inquisition reading the sentences aloud, in which it was announced that Bompietro's property would be confiscated from his estate (and his heirs). One wealthy spectator who had served in public office in Bologna, named Paolo Trintinelli, denounced the inquisitors: "the thing that had been done to Bompietro and Guiliano was an evil deed and that the inquisitor could have anything he wanted written, so that he himself would not give one bean for those writings."[352] The timing of Trintinelli's objection is telling: the execution was no doubt a great injustice but it was the announcement of the confiscation which set Trintinelli off.

Heresy triggered two chief penalties: capital punishment for the unapologetic, and confiscation. The difference between the two is that, for moral and theological reasons, it was unseemly for the Church to engage in (or be seen to engage in) capital punishment. When it came time for execution the Church would hand over the prisoner to the secular arm for them to do the dirty work. Confiscation, on the other hand, was not beneath them, although the norms and rules of confiscation were hotly contested between secular and ecclesiastical authorities, as I will show below. Nevertheless, the Church's role in confiscation attracted suspicion, if not outright rancor from first-hand witnesses, attitudes largely inherited by scholars who study them.[353] Readers of the Arras trial accounts above—like the audience—find it difficult to ignore the fact that

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[350] Henry Lea was the first to highlight the financial machinations of inquisitions, writing in one place that confiscation "supplied the fuel which kept up the fires of zeal" (Vol. I, p. 529). Henry C. Lea, "Confiscation for Heresy in the Middle Ages", *The English Historical Review,* April 1887, Vol. 2, No. 6, pp. 235-259; Edward L. Praxmarer, "Confiscation of Property as a Penalty for Heresy in Southern France, 1056-1328" (1957); Arthur S. Tuberville, *Mediaeval Heresy and the Inquisition* (London 1921), pp. 211-216; Donald Prudlo, ed. *A Companion to Heresy Inquisitions* (2019) p. 254; Irene Bueno, *Defining Heresy: Inquisition, Theology, and Papal Policy in the Time of Jacques Fournier* (2015) pp. 53, 86-87, 136, 282-289; Andrew Willard Jones, *Before Church and State: A Study of Social Order in the Sacramental Kingdom of St. Louis IX* (2017); Damian J. Smith, *Crusade, Heresy, and the Inquisition in the Lands of the Crown of Aragon (c. 1167-1276),* (2010), p. 205; Rachael Mary Hardstaff, "Heresy and Aristocracy in Thirteenth-Century Languedoc", (2019) (Doctoral Thesis).

[351] Pope Sixtus, April 18, 1492, 'Ad Perpetuam Rei Memoriam'. Lea's translation: "[I]n Aragon, Valencia, Mallorca and Catalonia the Inquisition has for some time been moved not by zeal for the faith and the salvation of souls, but by lust for wealth, and that many true and faithful Christians, on the testimony of enemies, rivals, slaves and other lower and even less proper persons, have without any legitimate proof been thrust into secular prisons, tortured and condemned as relapsed heretics, deprived of their goods and property and handed over to the secular arm to be executed, to the peril of souls, setting a pernicious example, and causing disgust to many."

[352] Carol Lansing, *Power and Purity: Cathar Heresy in Medieval Italy* (1998), p. 156; see also Lansing, "Popular Belief and Heresy" in *A Companion to the Medieval World* (2012), p. 283.

[353] Bueno, *Defining Heresy: Inquisition, Theology, and Papal Policy in the Time of Jacques Fournier,* p. 282: "The management of possessions confiscated from heretics and their descendants created, for example, the opportunity for enrichment that conferred upon the inquisitor an economic role of great importance. The inevitable degeneration of the office ensued, culminating in cases of extortion, falsification, and undue hoarding of assets."

inquisitorial judges and agents of the state and church would have reaped over 10,000 "pounds" alone from the house of Beaufort would their conviction have been upheld.[354]

What has been overlooked entirely in the secondary literature is that the right of confiscation claimed by the Church was a civil law right of sovereigns (or a *regalian* right). In fact, even some canon lawyers—let alone civil lawyers—denied the Church had any right of confiscation at all and that only the temporal state possessed and could execute the *ius confiscandi.* The Church confidently claimed a connection between treason and heresy as divine treason (*lesae maiestatis*), and thus claimed parallel powers to respond appropriately to so grave a crime. But, this can be traced to a strategic decretal by Pope Innocent III in 1199, codified in the *Liber Extra.*[355] The Church's need or desire to patrol its faith was (a) not a necessary project, and (b) does not and did not have necessary legal or political consequences. How did the Church come to acquire such a generally accepted jurisdiction over the property of lay-persons (in ecclesiastical crimes)? How did the Church transform this jurisdiction into a claimed *right* of confiscation that belonged to emperors, kings, or princes? How did this right—though contested—take shape and take hold in late medieval, renaissance, and early modern law? More crucially, how was it appropriate at all to talk about the Church as having both the power to confiscate property and a "treasury" to put the profits?

This last question highlights an important assumption that scholars and political theorists make in thinking about the medieval Church, especially as a legal actor. As I hope to show by the end of this chapter by treading briefly into early modern English protestant thought, the Church's success in claiming the right of confiscation and fiscal rights more broadly may deceptively imply that such a status and collection of rights was always there; but there was a historical process to its development, a period of contestation, and this process of development has important implications for how theorists think both about the development of the state and of property rights. As I suggest below, the Church's latent claim to jurisdiction over all personal property of Christians and the right to seize any and all of it upon suspicion of a crime was a lingering anxiety for early modern authors of religious toleration; as Marxist theorists or simply astute readers of Locke might note, it was a concern about property—not just conscience—which motivated theories of toleration. The memory, sometimes exaggerated but no less deeply felt, of the history of confiscation and medieval inquisition was a lingering confirmation of the danger of unmoderated religious authority within the state.

This chapter proceeds as an unfolding. It is first necessary to start at the methodological and historiographical beginning and provide an account of how the *ecclesia* was "equiparated" to the *respublica* and the *fiscus* in medieval law. However, despite the frequency and clarity of this equiparation, secondary scholarship from Ernst Kantorowicz onward has taken the equiparation of the *ecclesia, respublica,* and *fiscus* to a minor as the ending point of analysis, not—as it turns out—a source of further confusion and innovation for medieval jurists. The equiparation of *ecclesia* to other public law actors opened a door through which lawyers could push the rights of the *ecclesia* far beyond restitution. Equiparation wasn't *causing* this push, but it enabled it. It is through this open door, and through the Church's practical exercise of public facing authority and power that the Church and medieval jurists claimed the right of confiscation on its behalf. In the second section, I show that it was the classical roman legal ideas about public religion which linked the

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[354] Gordon Andreas Singer, "La Vauderie d'Arras, 1459-1491: An Episode of Witchcraft in Later Medieval France" (Dissertation: University of Maryland, History, 1974) contains a detailed account of Beaufort's estimated income and assets, as well as the relative degrees of punishments on other suspects.

[355] Pope Innocent III's decretal *Vergentis in Senium* (1199), later X.5.7.10.

privileges of the *fiscus* and the *ecclesia,* which in turn allowed medieval jurists to ascribe to the *ecclesia* the same kinds of rights as the *fiscus* possessed precisely because the *ecclesia* was the same kind of legal entity (and thus the deeper significance of their 'equiparation'). In the third section, I outline the complexities and controversies about how the *ecclesia* exercised fiscal rights, and whether (or which part) of the church was said *to be* or *to have* a *fiscus.* Only then can we return to the example of confiscation above—how the *ius confiscandi* was claimed and defended by the *ecclesia*. In the fifth and final section, I take a step back to consider the place which the *ecclesia* holds in economic and criminal jurisdiction in legal thought.

The precise example of the economic and criminal jurisdiction of the Church presents a challenge for political scientists seeking to understand models of state formation and development. It is a fact that the Church was a sophisticated political, economic, social, and religious organization, operating across borders and oceans—it was both colonial and imperial, too. The fiscal strategies and capacities of late medieval and renaissance communities has drawn much scholarly attention, including the development of public property[356], mechanisms for taxation[357], charity[358], public debts[359], but the Church and its activities also generated revenue for the state, either in the levying of financial penalties for ecclesiastical crimes or, as I will show in a later chapter, in providing their own funds for public construction and civic defense.[360] But the Church, as an administrator of tithes, extensive holder of land and other properties[361], and function as a bank (local, regional, and international) can only be understood by reconstructing the precise legal origin of its fiscal claims. [362] This is especially true because neither the rights, institutions, or logic behind the rights or institutions of the Church fundamentally changed after the Reformation—the Church simply found competitors for their claims. More broadly, my argument here takes place within a much longer historical story about the relationship between wealth and the Church

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[356] Guillaume Leyte, *Domaine et domanialité publique dans la France médiévale: XIIe-XVe siècles* (1996).

[357] Massimo Vallerani, "'Ursus in hoc disco te coget solvere fisco': Evasione fiscale, giustizia e cittadinanza a Bologna fra Due e Trecento" (2014), pp. 39-50 in *Poder, Fisco y Sociedad en las Épocas Medieval y Moderna: A Propósito de la Obra del Profesor Miguel Ángel Ladero Quesada, ed. Ángel Galán Sánchez and José Manuel Nieto Soria.*

[358] Gemma Colesanti and Salvatore Marino, "L'economia dell'assistenza a Napoli nel tardo Medioevo", in Marina Gazzini e Antonio Olivieri, eds. *L'ospedale, il denaro e altre ricchezze. Scritture e pratiche economiche dell'assistenza in Italia nel tardo medioevo* (2016).

[359] Especially on usury; see for example Armstrong, "Usury, Conscience and Public Debt: Angelo Corbinelli's Testament of 1419" pp. 173-240 in *A Renaissance of Conflicts: Visions and Revisions of Law and Society in Italy and Spain,* ed. Marino and Kuehn (2014).

[360] The next chapter considers the interdict and the power of the Church to suspend the political, social, and religious community of entire cities. The chapter following that considers the walls of the *civitas* and their mixed status—both sacred and temporal—and the narrow question of whether the Church can be taxed to help fix the walls of the city.

[361] Arnold Pöschl, "Kirchengutsveräusserungen und das kirchliche Veräusserungsvebot im früheren Mittelalter," *AKKR,* cv (1925), 3.96, 349-448. For an earlier period of history, also Elisabeth Magnou-Nortier, *Aux origines de la fiscalité modern: le système fiscal et sa gestion dans la royaume des Francs à l'épreuve des sources (Ve-XIe siècles*) (Geneve: 2012).

[362] Ekelund, Robert B., Robert F. Hébert, and Robert D. Tollison. "An Economic Model of the Medieval Church: Usury as a Form of Rent Seeking." *Journal of Law, Economics, & Organization* 5, no. 2 (1989): 307–31; Nelson, Benjamin N. 1947. "The Usurer and the Merchant Prince: Italian Businessmen and the Ecclesiastical Law of Restitution, 1100-1550," 7 Journal of Economic History, supplement 104. Especially French thought: De Roover (1962), "La doctrine scolastique en matière de monopole", in *Studi in onore di Amintore Fanfani* (Milan); De Roover. (1971), *La pensée économoque des scolastiques: doctrines et méthodes* (Paris); Goglin (1976), *Les misèrables de l'Occident médiéval* (Paris); Ibanes (1967), *La doctrine de l'église et les réalités économiques au XIIIème siècle* (Paris); Le Goff, *Your Money or Your Life: Economy and Religion in the Middle Ages;*

conceptually[363] and also in practice,[364] with the Carolingian empire and the following century as a crucial pivot point.[365] Because this is a massive subject, what I'm ultimately taking on is the very narrow question of how and whether the *ecclesia* can be said to have a treasury, and the kinds of rights and powers which correspond to that. In passing, this argument cannot help but underscore the tangible benefits accrued by communities and actors through participating in the system of property confiscation—cities, for example, could tap into imperial privileges by aiding in Inquisition and confiscation, and claim a right to a cut of the proceeds. Whether their participation was strategic self-interest or whether the Church was purchasing their executorial function is a question of interpretation.

In what follows, I also want to be cautious not to let assumptions about the internal hierarchical consistency of the Church slip in the back-door. Scholarship has shown frequently that the "Church" in its broadest terms was first a "pious ecclesiological abstraction"[366]—it was one body, governed by one person, and all "churches" within the "Church" were branches subordinate to and within the jurisdiction and control of the Head; however, the fact of this corporate theory of organization does not necessitate that Bishops always act in line with that structural hierarchy (or fail to exercise their own view of their jurisdiction)[367] let alone the smallest churches at the edge of the "Church's" spatial reach. Late antique synods like the Synod of Frankfurt (794) recognized that free persons could build a church on their own land, and even sell them.[368] There are multiple "Churches" here, with meaningful distinctions between them. What I will ultimately show in this chapter is that there is a centrifugal movement—once the *Roman Church* has a claim to publicness and a *fiscus*, other church entities (Bishops and local *ecclesiae*) have a ground to claim publicness and 'fiscs' of their own.

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[363] Wilks, "Thesaurus Ecclesiae (Presidential Address)". For a recent approach from sociology, see Guillaume Erner, "Christian Economic Morality: The Medieval Turning Point".

[364] P. Brown, *Through the Eye of a Needle: Wealth, the Fall of Rome, and the Making of Christianity in the West, 350-550 A.D.* (Princeton: 2013); S. Wood, *The Proprietary Church in the Medieval West* (Oxford University Press: 2006). On the material side of property accumulation: I.N. Wood, 'Entrusting Western Europe to the Church, 400–750', Transactions of the Royal Historical Society (2013); Valentina Toneatto, *Les Banquiers du Seigneur. Évêques et moines face à la richesse (IVe-début du IXe siècle*) (2012); F. Mazel, *L'Évêque et le territoire: l'invention médiévale de l'espace* (Paris, 2016).

[365] Mayke de Jong, "The State of the Church: *Ecclesia* and Early Medieval State Formation" in *Der Frühmittelalterliche Staat: Europäische Perspectiven* (2009); also de Jong 'The Two Republics: *Ecclesia* and the Public Domain in the Carolingian World" in *Italy and Early Medieval Europe: Essays Presented to Chris Wickham,* ed. R. Balzaretti, J. Barrow, and P. Skinner; Patzold and van Rhijn, "The Carolingian Local Ecclesia as a Temple Society" (2021).

[366] David Addison, "Property and 'publicness': bishops and lay-founded churches in post-Roman Hispania", *Early Medieval Europe* (2020), 28(2) 175-196, p. 178.

[367] Rowan Dorin, "Bishop as Lawmaker in Late Medieval Europe", *Past and Present,* Vol. 253, Issue 1, (November 2021), pp. 45-82.

[368] Capitulare Franconofurtense, ed. A. Boretius, MGH Capit. 1 (Hanover, 1883), no. 28, ch. 54, p. 78: 'De ecclesiis quae ab ingenuis hominibus construuntur: licet eas tradere, vendere, tantummodo ut ecclesia non destruatur, sed serviuntur cotidie honores.*'* Also, Hincmar of Reims*, Collectio de ecclesiis et capellis, ed. M. Stratmann, MGH Fontes 14 (Hanover, 1990):* laypersons could hold *dominium* over churches. Patzold, "The Carolingian Local Ecclesia" (2021), p. 540. See also the Council of Agde (506) reiterating that clerics "hold" the property of the Church, but are penalized for using it improperly, using it personally, or attempting to sell or alienate it. Interestingly, the *regula* there states that if a cleric sells or gives away the property of the Church (including the land or the Church itself), they must make the Church whole again from their own means.

The picture of the "Church" in this chapter is a Church between private and public life, with its relationship to the state open to interpretation.[369] It is not the church as a state,[370] but as something curiously in between, almost coterminal with "society"[371], necessary for its existence, thought to be necessary for moral life, but in constant quiet (and sometimes not quiet) conflict with political life over the way it patrolled and policed orthodoxy. It was in the Church's ability to 'act civilly' which created conflict, but also provided the site for a reconsideration of rights of criminal jurisdiction and public finance.[372]

Specialists of medieval political thought, political theology, or medieval historians will be well familiar with Kantorowicz's account of the *fiscus* and the property of the king and kingdom in *The King's Two Bodies.* The relevant section treats the context of Bracton's theory of kingship. In one footnote, he writes:

> The distinction between *fiscus, patrimonium,* and *res privatae* of the emperor was lacking clarity even in ancient times ... and the Civilians did not always realize that the terms were used with a different meaning at different times ... I refrain from pushing this complicated problem, especially since in Bracton feudal concepts interfere everywhere with the terminology of the Civilians.[373]

My account here, I think, is consistent with Kantorowicz's, but that there may be very few occasions on which potential tensions would arise, given the differences in both source material and contexts. The essential overlap in Kantorowicz's account and mine is that his point is that "fiscal" things were the property of the realm—they could not be alienated, and they "touched all"—and they affected everybody and were quasi-sacred things. With that, we can turn to the classic 'equiparation' of the *ecclesia, respublica,* and *fiscus.*

**Section I: 'Walking along the same path': Church, State, and Fisc**

What is a *fiscus?* Albericus de Rosate's (1290-1360) *Dictionary of Civil and Canon Law,* a common starting point and touchstone for controversy among later jurists, defines the "Fisc" in two ways. Albericus writes that the 'Fisc is a sack, or a place, in which public taxes are stored.' Updated slightly for his time, he offers an alternative: 'Or according to others, the *fiscus* is a chamber or a purse belonging to the King'. [374] Accursius' gloss at C.10.1, "*De Iure Fisci*" (On the Rights of the Fisc) had clarified that the *fiscus* was an Imperial chamber which could receive assets, money, or other various interests of the state. According to Accursius, it was explicitly not the

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[369] David Addison, "Property and 'publicness': bishops and lay-founded churches in post-Roman Hispania", *Early Medieval Europe,* Vol. 28, Issue 2 (2020), pp. 175-196.

[370] Either abstractly or literally—universally or locally. Figgis, *Political Thought from Gerson to Grotius*; Thomas Noble, *The Republic of St. Peter: The Birth of the Papal State, 680-825.*

[371] Importantly, my reading is not the same as the recently applied anthropological model of the "temple society" to western Europe. See Wood, *The Christian Economy of the Early Medieval West*; Wood, "Creating a 'temple society' in the early medieval west', *Early Medieval Europe,* Vol. 29, Issue 4, pp. 462-486.

[372] Innocent at *Extra* 5.39.27, n. 3: "(Suae) nota quod licet agere de crimine sacrilegii civiliter, sicut de aliis criminibus ad suum interesse. Item licet augeatur iniuria propter sacrilegium, non tamen introducitur actio iniuriarum, nec ex legibus, nec ex canonibus, qui induxerunt accusationem de crimine sacrilegii, imo omnes canones et leges, quae loquuntur de sacrilegiis, semper poenas corporales vel spirituales infligunt, vel pecuniarias, et illa fisco applicantur."

[373] Kantorowicz, *The Kings Two Bodies,* pp. 164-192. This passage is at pp. 170-171, fn. 246.

[374] Albericus de Rosate, Dictionary at 'Fiscus': "Fiscus est saccus vel locus in quo publica vectigalia reponuntur."

"patrimony" of the Emperor.[375] The chief controversy for jurists—denied here very early by Accursius and others—was distinguishing between the property of the *state,* which the King or Emperor might manage and use but which was not his own private property, and the property of the person of the King. As scholars have frequently noted in the history of the development of the idea of the *fiscus* and the state, the step to depersonalize (or reinforce the impersonal nature of) the treasury was key to what we often call medieval constitutionalism.[376] Gaines Post noted in particular the publicity of the treasury, taxation, and the sovereign rights of the Emperor or *Rex*; Accursius "clearly makes the *fiscus* public" and "it succeeded to the old public treasury (*res Romana*) and thus belongs to public law."[377]

Lest things be easy, however, Albericus follows these definitions up with a host of additions and qualifications. If the *fiscus* was a treasury, or at least a place to store funds, then it seemed that as a matter of fact cities or republics both possessed what looked like treasuries. Lucas de Penna would later agree, writing that the *respublica* was a 'body of a corporation, and the *fiscus* and *aerarium* (which are the same) are a part of the *respublica,* just like I have my own 'treasury' in the form of a little purse where I keep my money, which is a part of my whole patrimony.'[378] Albericus also suggested that the church must be considered as well because they seemed to have a *fiscus*, and because the management and administration of the empire required the participation of the Church and Christians, even if "fiscus" was not the proper term to use.[379]

Lucas' analogy and Albericus' consideration of the Church stress that the *fiscus* was already departing quickly from its original imperial context to include kings, principalities, churches, and by weak resemblance, individuals. As I will show in Section III, the question of whether non-"sovereign" or non-"state" actors could rightfully call their "sack or place in which [funds] are stored" a *fiscus* and utilize the rights of the *fiscus* was hotly contested. The conceptual struggle, as Vassalli once noted, was that the function of a *fiscus* was absolutely necessary, and opened up every corporate entity and even private persons to recognize the function of their own "treasuries" of varying sizes and scopes, running from kings to cities, churches, colleges, and citizens, all of whom saw in the *fiscus* a mirror for their own *arca* or *saccheto* [*saccellum*].[380] It

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[375] Accursius at C.10.1: "Fiscus est ipsa Imperialis, vel Imperii camera, in qua receptatur quidquid ad commodum pecuniarium, vel Regni pertinet." And further, "Fiscus dicitur ipsa Imperialis, vel Imperii camera, non dico patrimonii Imperatoris.". See Vassalli, p. 73. The first definition was repeated word for word in Matthias Stephani's (1576-1646) *Tractatus de Iurisdictione,* Lib. II, Part I, Cap. VII, Memb. I, p. 253.

[376] The distinction of significance for Kantorowicz and others is the distinction between the private property of the ruler and the public property of the state. Affirmed in a statute belonging to Lothair III (1125), confiscated goods of bandits or robbers, or property purchased with state assets, belonged to the "potius regiminis subiacere ditioni, quam regis proprietati". See also Vassalli: "Certamente tuttavia in questa separazione dell'impero dalla persona dell'imperatore, in connessione coll'obiettiva sussistenza autonoma della potestà dell'impero, il passaggio al concetto di un'astratta personalità dello Stato à avviato." [§19]. And, Duff, *Personality in Roman Private Law,* for the *populus* and *fiscus* distinction.

[377] Gaines Post, "The Theory of Public Law and the State", p. 49-50.

[378] Lucas de Penna at C.12.49.4: 'Since the state is a certain body of the community (*corpus universitatis*), the *fisc* or *aerarium* (which are the same) is a part of the state itself, just as my personal *fisc* that is, the bag in which my money is stored, is a part of my whole estate (*patrimonii*).

[379] Albericus de Rosate, *Dictionary,* at 'Fiscus': "Quod tamen verum non puto de proprio significato vocabuli..."

[380] Vassalli, *Concetto e natura del fisco,* p. 75: "Il fiscus è dunque con la respublica in tanto e solo in tanto equivalente, in quanto la parte possa stare pel tutto. In conseguenza avrebbe non solo ogni re, ma anche ogni città un fiscus; e cosi la chiesa; ogni collegium approbatum, poichè ha un'arca communis, avrebbe un fiscus; anche ogni privato ha la sua arca, e perfino il più povero il suo saccheto [saccellum]."

was not an easy reflection to shake, despite some early attempts to settle the question by Lucas de Penna.[381]

Analogizing was both the source and the process of the difficulty of defining the *fiscus.* One of the most common medieval legal methodological concepts is that of 'equiparation' (*aequiperare*). When two or more things are equiparated they are understood to be of the same kind of thing. As jurists reflected on the methodology of law, they came to subdivide equiparation to more precisely discuss the definitions of concepts or things which were equiparated but had different degrees of sameness. The Perugian jurist Filippo Massini (1559-1618) outlined one possible subdivision: 'equiparation' could be particular, universal, or identical.[382] Two or more things could be said to be particularly equivalent if there were enough internal similarities between them such that we can use the reasons and arguments from one and apply it to another (e.g., contracts and voluntary pacts). Two or more things could be said to be universally equivalent (or '*by mode of rule*') if they are similar in all ways and they have been explicitly equiparated by legislators (e.g., gifts made in contemplation of death and legacies).[383] Third, Massini says that identical equiparation (*idemtifica*) does not simply establish sameness between two 'species' of things, but merges the 'species' together to create a unified category.[384]

It was left to the jurist to be precise about the kind of equiparation they intended to draw between concepts. Some were less cautious than others. Massini, for example, launched into the proper subdivision of equiparation because he saw his peers and predecessors as imprudently equiparating 'the powers of our time' to the 'ancient praetors'; after all, the Roman magistrates who had the power to help and correct the civil law for the public benefit (*utilitatem publicam*) were from a different time and context than the magistrates of Massini's 'time' which presided over states like Milan or Cremona, over provinces, or the governors over Umbria and Piceno.[385] Massini's conclusion was that there were many similarities in their powers—they could be particularly equiparated, without explicitly equating them in law, and without abolishing the differences between their 'species'. But this equiparation was nevertheless an argument; it needed to be defended from objections and limited in scope.

The many 'equiparations' of the church, state, and the "fisc" resist a tidy organization, and we are not helped in many respects by the jurists who were drawing them. Summaries, Indexes, *Reportoria,* and glosses are filled with different combinations of claims of equivalency between the church, the treasury, the city, the state, and a minor (or pupil): the '*fiscus* and *ecclesia*', '*ecclesia,* a minor, and the *fiscus*', '*ecclesia,* a minor, and the *civitas*', *'ecclesia* and *civitas*', '*ecclesia* and the *respublica*'—all are "equiparated". Scholars who note this equiparation stress

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[381]Lucas below, but at C.12.49.14: 'Does any city or church, not to mention free kings, have a *fuisc,* that is the right or privilege of the *fisc?* To this, I would say briefly, no.'

[382] Filippo Massini, *Commentaria in Secundam Codicis Partem et Tractatus Bonorum Possessionum* [Pavia 1601], At Rubric 'C. Qui Admitti', ns. 395-399.

[383] Justinian, Institutes 2.7.1: "These gifts in contemplation of death now stand on exactly the same footing as legacies; for as in some respects they were more like ordinary gifts, in others more like legacies, the jurists doubted under which of these two classes they should be placed, some being for gift, others for legacy: and consequently we have enacted by constitution that in nearly every respect they shall be treated like legacies, and shall be governed by the rules laid down respecting them in our constitution." Trans. Moyle. Emphasis added.

[384] Institutes, 2.20.2: "And formerly they were of four kinds, namely, legacy by vindication, by condemnation, by permission, and by preception [...]. Solemn forms of words of this sort, however, have been altogether abolished by imperial constitutions; and we, desiring to give greater effect to the wishes of deceased persons, and to interpret their expressions with reference rather to those wishes than to their strict literal meaning, have issued a constitution, composed after great reflection, enacting that in future there shall be but one kind of legacy..." Emphasis added.

[385] Massini, *Commentaria,* n. 399, p. 53.

the protection granted by the civil law against prescription or in favor of restitution. The Church and the *fiscus,* Ernst Kantorowicz writes, "equaled also a minor and a madman because all of them were under age."[386] As potential actors, what these all have in common (in this narrow context) is that they are legally incapacitated, but for their own benefit.[387]

The main privilege at stake was a set of extraordinary remedies available for an unjust or unequitable loss—*restitutiones in integrum.* Dig. 4.1 introduces this remedy:

> For under this head, the praetor helps men on many occasions who have made a mistake or been cheated, whether they have incurred loss through duress or cunning or their youth or absence or through change of status or justifiable mistake.[388]

In principal, these remedies existed because the Romans recognized that contracts and agreements could proceed according to the letter of the law and yet produce an inequitable situation. If a soldier or agent of the state had to leave the city and travel on official business for an extended period of time they might suffer losses or damages from a third-party's prescription (*praescriptio*) or possession (*usucapio*), which in the latter case could be accomplished in as little as one or two years. By the letter of the laws of prescription and usucaption the action might very well seem valid. But given that the circumstances were out of the control of the individual who had suffered damages, this extraordinary remedy gave the Praetor the power to annul or undo what had actually happened and restore the property of the soldier or agent of the state to the position it was before the loss was suffered.[389]

The principle was the same for the other cases—petitions for restitution on the grounds of fraud, duress, change of status, or justifiable mistake. The *restitutio in integrum propter aetatem* was a slightly broader remedy:

> Particularly important too is the rule that a minor (i.e. one under twenty-five years of age) may get in integrum restitutio if his inexperience has led him to enter into a transaction which turns out to be disadvantageous, even though he cannot show that the other party actually took advantage of his youth.[390]

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[386] Kantorowicz, *Kings Two Bodies,* 183, n. 285. See also Gierke, III. 483; Baldus, C.10.1.3, n.3; Baldus, C.4.5.1, n. 6.

[387] [Under Construction:] Otto von Gierke supplied the most extensive list of examples in his III.483. I have here compiled his citations and gone beyond them extensively. I believe this to be the most extensive—although certainly not exhaustive—collection of citations of equiparation passages in the secondary literature. Much could be learned upon a closer examination and comparison of the context of these sources. The *fiscus* and *ecclesia* are equiparated in: Baldus at C.10.1.3, n. 3; Petro Dominico Magdaleno Capiferreo, *Tractatus* [Venice 1586], fol. 141; Dominicus Tuschi, 1621, vol. III, Conclusio 395, p. 557; Tuschi, Conclusio 396; Giovanni Francesco de Ponte, n. 17-18, p. 185; Bartolus at C.2.37.1; Panormitanus at X.3.17.03; Andrea Barbazio at X. 3.17.03; Vicentius de Franchi, *Decisiones Sacre Regii Consilii Neapolitani,* Decis. 248. The *ecclesia* and *civitas* are equiparated in: C.1.2.23; Bartolus at C.1.2.23; Alexander in *Consilium* 60; Jacob Pignatelli at 9.86; The *ecclesia* and *respublica* are equiparated in: Petrus Philippus Corneo in *Consilium* 45; Johannes Baptista Asinius, *Practicae seu Processuss Iudiciarii ad Statutum*, Pars Prima [Frankfurt 1589], fol. 51-52; Philippi Decii*, Commentarii in Digestum Vetus et Codicem Commentarii* [Venice 1609]; The *fiscus* and *civitas* are equiparated in: Albericus Rosate at Dig. 49.14.1, n. 2; The *ecclesia* and a minor are equiparated in: (Aymone Publitium Pedemontanum) Commentarii in Consuetudines Aruerniae [Paris 1548], Tit. 13, Art. 3, Nu. 5, Fol. 66.

[388] Digest 4.1, trans. Watson; also, Franciscus Lucani*, Tractatus de Privilegio Fisci*, § 1, n. 139, fol. 9v.

[389] See C.2.50; Berger, *Encyclopedic Dictionary of Roman Law*, p. 682.

[390] Jolowicz, *Historical Introduction to the Study of Roman Law*, p. 229; see also p. 99; p. 407.

The passages in legal commentaries which equiparate the Church, the *fiscus*, and the city or republic to a minor are often claiming that these kinds of corporate legal entities enjoy the privileges of a minor with respect to restitution. If a private person or entity tries to acquire the property of a Church or the *fiscus* through prescription, they might successfully occupy the property for the period of time ascribed in the law, but the Church or *fiscus* has a legally set window of time within which they can challenge and void the prescription by reason of their privilege of restitution. It is also worth noting that many of the actors who were *doing* the prescribing and usucaption were also 'minors'—other churches, cities, *castra* and *villae.* Many of the cases which spurred commentaries on the *ecclesia* and the *restitutio in integrum,* for example, were about *ecclesia*-on-*ecclesia* property disputes.[391] The equiparation of corporate associations to minors in corporation theory has been widely noted and much discussed under the umbrella of what Ullmann labelled the "minority thesis". [392] As Canning observed, however, the equiparation of the *civitas* and a minor was limited and did not apply in many other cases and contexts.[393] And yet, there was more to the equiparation than the privilege of restitution.

The *fiscus* and the church were frequently equiparated in the civil and canon law and in most cases the comparison was obvious and unproblematic. Along with the republic and the *populus,* the *fiscus* and the church were likewise immortals without heirs. [394] As Cino da Pistoia so nicely said, the "Church and the *fiscus* walk along the same path" (*Praeterea ecclesia et fiscus pariter ambulant*).[395] This illustrative language is imprecise. One equiparation—or rather, one conceptualization of a shared path between two legal actors—opened the door for other comparisons drawn from the original similarity. Even if all later equivalencies are rooted in one original equiparation, any close examination of primary sources reveals that the *other* equivalencies are equally relevant and consequential. In other words, there is more to the equiparation of the church, *fiscus,* and the *civitas* than the privileges of restitution. And, there are many primary sources—Marcantonio Genua quipped in one *Quaestio* that the connection between the *ecclesia* and the *fiscus* was 'a most frequent argument (*frequentissimo argumento*) taking up a thousand passages'.[396]

Take for example the jurist Johannes Crusius on what happens if the goods of a monastery are abandoned or become destitute: 'the said goods are yielded to the Fisc*,* if by the Fisc it is understood to be that of a particular Church itself, which is said to have a *fiscus* ... For the *Ecclesia*

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[391] Baldus at C.4.5.1, n. 6.

[392] Walter Ullmann, *"*Juristic Obstacles to the Emergence of the Concept of the State in the Middle Ages"uytvh nb, *Annali di Storia del Diritto – Rassegna Internazionale, XII – XIII* (1968– 9): 43– 64.; Canning, *The Political Thought of Baldus de Ubaldis,* esp. pp. 193-197. Lee, *Popular Sovereignty in Early Modern Constitutional Thought,* Ch. 4; Lee, *Right of Sovereignty,* p. 36.

[393] Canning, *The Political Thought of Baldus,* p. 194, n. 34. "The jurists did, however, admit that the similarity between the republic and a minor was not close in every respect." Bartolus at C.11.30.3; Bartolus at Dig. 3.4.1, n. 2. Accursius at C.11.30.3 'proconsul'; Jacobus de Arena at D.40.3.3; Lucas de Penna at C.11.30.1; Innocent IV at X.1.41.1, n. 1.

[394] Franciscus Lucani, *Tractatus de Privilegio Fisci*, Section 1, n. 56: 'The *fisc* or *respublica* does not have an heir, because it cannot die.'

[395] Cino, at C.8.54.34, § Item. This seems to have been an attractive phrase. Bartolus borrows it at C.11.62(61).4, n. 1, referencing the passage at C.1.2.23 which I discuss below: "*ecclesia et fiscus paribus passibus ambulent*". Jason de Mayno used it to explain the equiparation between the *fiscus* and a woman, who also 'walk along the same path' (*pari ambulant passum*). They share similar protections and privileges, but Jason also notes that in cases of conflicting testaments (one benefiting the *fiscus* and one benefitting the woman) the judge ought to side with the woman against the *fisc*. Jason de Mayno, *De Actionibus,* §Fuerat, n. 70-71.

[396] Marcantonio Genua, Quaestio 251: 'Therefore, we must not deviate from the commonly held opinion, glosses, and the most frequent argument used in the countless places regarding the treasury to the church (*de fisco ad ecclesiam*).

is compared to the *fiscus* with respect to its privileges (*in Privilegiis*).'[397] When Crusius claims that the Church is compared to the *fiscus,* he cites two Roman Law passages—one about restitution (C. 2.21) and one about the relationship between the *ecclesia* and public law (C. 1.2.23). The first part of Crusius' claim is a different kind of claim than the equiparation passages above. After all, "Are the *ecclesia* and the *fiscus* the same kind of thing" is a different question then the oft-asked "Does the *ecclesia* have a *fiscus*?" In this case, Crusius believes that in some sense the Church is both compared to a *fiscus* in that it enjoys the same privileges as a treasury and is said to have its own *fiscus.*

The issue of restitution and the origin of the definition of public law converged for the famous jurist Jacques de Révigny, who argued that "other cities than Rome have their own public Law, are public themselves, and can seek restitution—and likewise the Church, for divine and public law walk together ('*nam ius divinum et publicum ambulant pari passu*')."[398] Before turning to C.1.2.23 and the origin of the equiparation of the *ecclesia* and the *respublica,* we should conclude with one additional observation about the process of equiparation. The example of restitution above concerns the Church's ability to exercise rights which look like the rights of the state, the treasury, or minors. For other legal questions like prescription, however, medieval jurists—Innocent III, Baldus, Mattheus de Afflictis, and Marinus de Caramanico—drew the arrow in the other direction. Baldus writes that "the same prerogative against prescription, which the Roman Church enjoys, is enjoyed by the Empire" or that "the Roman Empire enjoys the same prerogative as the Church", or that the prescription of 100 years "shows that the empire is treated as on a level with the Church."[399] The nature of walked paths and walking partners is that the consequences of the comparison run in both directions.

**Section II: The Privileges of Public Law**

Before we can analyze the privileges which the *ecclesia* was said to enjoy it is worth pausing to consider the place of the *ecclesia* in Roman law. Recall first that 150 years before the codification of roman law under Emperor Justinian (ruled from 527-565), Theodosius had issued the Edict of Thessalonica (380 C.E.), making Christianity the official religion of the Roman Empire. Though the Council of Nicaea had briefly settled some of the questions about "orthodox" Christianity[400], the significance of the legal acceptance of Christianity was not so much in the settling of questions about Christianity itself, but in (a) nominally replacing Roman religion officially with Christianity in all of its state functions and (b) drawing initial lines around the consequences for those who would not publicly recognize the validity of Christianity.[401] We ought

[397] Joanne Crusio, *Commenta Hayana aulae Ecclesiasticae et Horti Crusiani ad oppugnatae Legitimae Potestatis, Voluntatis et Invasi* .fol. 625, §II, n. 9 Quaest. Princ. 4, Cap. 1. 5. 1.
[398] Gaines Post, "Two Notes on Nationalism in the Middle Ages", p. 313. Revigny, Code [fol. 219v.] See also Kantorowicz, p. 177.
[399] Kantorowicz, p. 181, n. 280: Baldus at C.7.39.3, n. 17-18 and C.7.30.2, n. 2.
[400] No such thing would exist for at least a millennium (if at all) and it would quickly fall apart in the Reformation.
[401] I say "publicly recognize" because we are mistaken if we think that the adoption of Christianity as the public religion of the Empire was analogous to the enforcement of orthodoxy in the Middle Ages. In fact, historians have shown that very little was required for Roman subjects to abide by the laws about Christianity, and indeed, little had been required of Christians earlier in the Empire in order to stay in line with the requirements of public religion in the 2nd and 3rd century.

not understate the peculiar publicness of Roman religion, and of Roman Christianity, especially in the Roman Law.[402]

As I began to show above, the public law status of the Church was often referenced as part of an explanation for why the Church possessed access to the rights of the state or a minor; the method for this explanation was equiparation. Jason de Mayno gives us one example of how this operated in practice. Jason writes that the gloss and canon law had notably equiparated the *minor* and the *ecclesia*. Many jurists—Joannes Faber, Angelus of Aretinus, Bartolus, and Baldus—supported such an equiparation, but in a network of other equiparations too. The *minor* and the *ecclesia* were similar in their legal protections against the actions of their guardians; for the same reason the *minor* was thought to be treated the same as the *respublica* and the *fiscus*. From these two sets of equiparations, it seemed fair to jurists to extrapolate that the *ecclesia* and the *respublica* shared at least the legal privileges of minors making contracts. But Jason makes two observations which do not share this narrow contextual interpretation. The first occurs at the beginning of the argument: 'The gloss expressly says that the *ecclesia* is a public place (*loco publici*).' The second occurs at the end: 'To this should also be added the text at C.1.2.[23] where the *ecclesia* and the *respublica* are equiparated, and the truth of this will be clearer for those who examine what is said below about the *fiscus*.'[403] This kind of logic, the passage, its context, and its implications, must be examined in full to understand the significance of the equiparation.

One famous passage of Justinian's *Code* (C.1.2.23), which would later be referenced frequently by medieval jurists by its opening words "*Ut inter divinum"* begins:

> In order that a proper difference may exist between divine and public and private rights, we ordain that if any one leaves an inheritance or legacy or trust or gift, or sells anything, to holy churches, or to venerable hospitals, poor houses, monasteries, nunneries, orphanages, founding-inns, old men's homes or cities, there shall be a very long time for the recovery of the property left, given or sold, not to be confined to the customary prescriptive period.[404]

The law here pairs together "divine and public", and states explicitly that the motivating principle is that there ought to be a difference between how public "rights" and private "rights" are administered. The Church stands on equal footing with other public-serving institutions. Gifts and testaments to public-serving institutions ought to be treated differently than gifts to private persons, and specifically, they ought to be freed from traditional restrictions about private gifts. These restrictions are the same as I covered above in Section I—they could not be taken advantage of through contracts, but they also were protected against prescription. That is, if a private person were granted or sold a tract of land, but somebody else happened to occupy and use that land for an extended period of time, they might lose their rights to that land despite the original contract by the "prescription" of the occupant. For regular individuals, the period of time required to gain or

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[402] For the background ideas and vocabularies which influenced early written Christian thought, I like M. Thorsteinsson Runar, *Roman Christianity and Roman Stoicism: A Comparative Study of Ancient Morality* (2010).

[403] Jason de Mayno, §Ex maleficiis, n. 32-36, esp. n. 32.

[404] Latin: "Ut inter divinum publicumque ius et privata commoda competens discretio sit, sancimus, si quis aliquam reliquerit hereditatem vel legatum vel fideicommissum vel donationis titulo aliquid dederit vel vendiderit sive sacrosanctis ecclesiis sive venerabilibus xenonibus vel ptochiis vel monasteriis masculorum vel virginum vel orphanotrophiis vel brephotrophiis vel gerontocomiis nec non iuri civitatum, relictorum vel donatorum vel venditorum eis sit longaeva exactio nulla temporis solita praescriptione coartanda." (This law was modified by Novel 9 and Novel 131, c. 6.).

lose property by prescription was relatively short—sometimes two, five, or ten years. For the *ecclesia* or the *respublica,* the period of time required for "prescription" was extended to 100 years—the legal equivalent of an infinite period of time too long to ever practically take effect.[405] It was this context that would lead Baldus to note as above and elsewhere that the Church was "equal to the Empire" (*ecclesia est par imperio*).[406]

When the equiparation of *ecclesia* with other institutions is combined with the context of public law in C.1.2.23, the Church comes to take on an especially public, state-like legal role with legal capacities. Panormitanus writes:

> Note from the first part of this gloss that the Church does not only use the right of a minor, but that it can sometimes use the right of the republic, and thus the privileges granted to the Republic seem also to be granted to the Church. [...] This proceeds because the public law (*ius publicum*) consists in sacred rites and clerics (*sacris et sacerdotibus*). [...] Secondly, note that the Church can use the right of the Empire (*iure Imperii*) and thus the privileges attributed to the Empire ought to extend to the Church, a fact which is well known because the Church has *imperium* in spiritual matters, which are more worthy than temporal matters. Therefore these privileges ought by the superiority of reason be extended to the Church, for the Church is above all [has pre-eminence] (*nam ecclesia habet principatum*).[407]

17th century jurist Jacob Pignatelli (1625-1698) carries this forward: 'In particular, the *Civitas* and the *Ecclesia* are equiparated and enjoy the same privilege, namely, by the reason of public law, and by this method (of reasoning) not only by public law but also divine law.'[408] Once again, it was the method of equiparation as a process of reasoning which allowed these deductions. We can compare Pignatelli's reading of legal history to Gaines Post's reading of Ulpain's original law and medieval legal thought:

> "Public law," said Ulpian, "pertains to the *status rei Romanae,* private law to the utility of individuals"; and the public law deals with religion, priests, and magistrates. ... By 1228 they were saying that the public law exists to preserve the *status* of the *Respublica* lest it perish. ... And what is public pertains secondarily to the utility of private individuals. For the common utility, priests forgive men their sins and save souls; and magistrates interpret the laws, render justice, and maintain law and order, for otherwise laws would be useless. They and their office are therefore subjects of public law. The *fiscus,* too, is public, for it is the treasury of

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[405] Jason de Mayno wrote an influential commentary on this law, in which he suggests that the 100 year period is set because it was the longest period of time a human could live. The rest of Jason's commentary is worthy of a closer look, especially numbers 2, 15, 16, 20, 21, 31, 32, and in the next law, 7, 14, 33, 43, and 44. See also Matthaeus de Mathesilianis (1398-1412), *Tractatus Extensionis ex Utroque Iure Elucubratus.*

[406] Baldus at C. Const., 'De novo Codice componendo, fol. IV: "Et istam partem teneo et confirmo, quia posito quod donatio non tenuisset ecclesia tamen praescripisset non obstante, quia subditus non prescribit ut ibi, sed ecclesia est par imperio."

[407] Panormitanus, *Commentaria Secundae Partis in Primum Decretalium Librum,* Tom. 2 (Venice 1591), X.1.41.03, n. 10-12, fol. 165v:

[408] Pignatelli, 9.86: "Praesertim quod Civitas et Ecclesia aequiparantur parique gaudent privilegio illa scilicet ratione publici iuris ista ratione non modo iuris publici sed etiam divini. Uti vero damnum inferentes tenentur quoque insolidum in defectum aliorum."

> the Empire, not the patrimony of the emperor; and criminal jurisdiction and the fines imposed by the courts and the confiscations made by the *fiscus* are treated by the public law because they are for the common welfare.[409]

Commenting on the passages of the Code regarding the Fisc (C.10.1), Joannes de Platea could thus write that crimes and offenses against the Church could be adjudicated according to public law, not private law, because C.1.2.23 had confirmed that the *ecclesia* occupied a privileged space in public life.[410] The same was true with the *fiscus* which enjoyed by the same set of laws the same privileged space in public law.[411] Some of these privileges attached to the treasury itself—the ways it could act in relation to private parties or the state. Other privileges were contagious and transferred to the public officials who oversaw the *fiscus* as well as many other public-facing offices. Franciscus Lucani (d. circa 1484), in his tract *De Privilegio Fisci,* outlined the privileges of these kinds of offices which included immunities from some public burdens.[412]

Put differently, it is the publicness of the church which makes it so natural for jurists to connect it to the *fiscus*. Balbus writes in his *Tractatus de Praescriptionis*, that the '*Ecclesia* enjoys the privileges of the *fiscus*' because the 'goods of the *Ecclesia* are called public'. Indeed, 'the *Ecclesia* is called a republic, and that the *Ecclesia* and the *Respublica* proceed on equal footing, as is often proved.' Many agree, he concludes, that 'so many of the goods of the Church are said to belong to the republic, and that the favor which is owed to the republic is even more so owed to the Church.'[413]

As it turns out, then, the equiparation of *ecclesia, respublica,* and *fiscus* was a convenient legal pathway to confirm the standard line of argument held by Popes and most ecclesiastical writers from Gelasius onward: that ecclesiastical power was more weighty or more important than temporal power, but they were of the same species of thing.[414] Couched in legal vocabularies, which as Panormitanus had argued meant that the *ecclesia* possessed an *imperium* not only analogous to but more important than the temporal *imperium*[415]*,* the Church's "publicity" had one further consequence, noticed and capitalized on by Pope Innocent III.

In 1199, Pope Innocent III sent a letter to the city of Viterbo expressing an explicit concern of the harm caused by heretics and heresy in papal territories. It is a passionate letter, which begins with Innocent's concern that the 'corruption of the age' was spreading unchecked through the 'vineyard' and 'flock' of Christ—the overseers of the estate, and 'watchdogs' of the flock, had failed to bark at the dangers creeping in. To correct these failings, Innocent wrote that heretics ought to be sought out, tried, deposed from office, and anathemized. Their allies—those who protected them, housed them, tolerated them, or permitted their beliefs to be taught—were guilty as well, by virtue of their tacit consent expressed by their silence.

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[409] Post, *Studies in Medieval Legal Thought: Public Law and the State, 1100-1322,* p. 316.
[410] Joannes de Platea at C.10.1, n. 14.
[411] Joannes de Platea at C.10.1, n. 14, continued.
[412] Franciscus Lucani, *De Privilegiis Fisci,* n. 140-141, fol. 9r. He includes the Prince's doctor, the Prince's cook, and the Prince's notary.
[413] Johannes Franciscus Balbus, *Tractatus Praescriptionum* (1565) pp. 344-345, n. 3. Balbus cites here Panormitanus (X.01.20, n. 12), Gratian (C.23, q.4, c. 3 'quod ergo voluit'), the Code (1.2.23) and Felinus Sandeus (1.03.28).
[414] Pope Gelasius I to Emperor Anastasius (494): "There are two powers, august Emperor, by which this world is chiefly ruled, namely, the sacred authority of the priests and the royal power. Of these that of the priests is the more weighty, since they have to render an account for even the kings of men in the divine judgment."
[415] Panormitanus, *Commentaria Secundae Partis in Primum Decretalium Librum,* Tom. 2 (Venice 1591), X.1.41.03, n. 10-12, fol. 165v.

> In the lands subject to our temporal jurisdiction we order the property of heretics to be confiscated; in other lands we command this to be done by the temporal princes and powers, who, if they show themselves negligent therein, shall be compelled to it by ecclesiastical censures. Nor shall the property of heretics who withdraw from heresy revert to them, unless some one pleases to take pity on them. For as, according to the legal sanctions, in addition to capital punishment, the property of those guilty of *maiestas* is confiscated, and life simply is allowed to their children through mercy alone, so much the more should those who wander from the faith and offend the Son of God be cut off from Christ and be despoiled of their temporal goods, since it is a far greater crime to assail spiritual than temporal majesty.[416]

In lands subject to the Pope's temporal jurisdiction, their goods ought to be confiscated (*publicari)* by the Church. In lands *not* within the Pope's temporal jurisdiction, Innocent wrote that the confiscation ought to be done by secular powers and princes but that the Church could still compel and order them to execute such a confiscation and censure them if they were negligent. The grounding logic for this penalty was that confiscation and seizure of movable and immovable property was part of the punishment for treason—and this confiscation even included nullifying inheritances and thus depriving the sons of traitors of their property too. If this was the penalty for treason, "How much more appropriate", Innocent rhetorically reflects, "is it for those who have gone astray in the faith and offended God, the Son of God Jesus Christ," to be "stripped of their temporal goods."[417] Rebelling against the eternal *maiestas* was weightier or heavier (*gravius*) than temporal *maiestas.* This letter was placed in the *Liber Extra* by Raymond de Pennafort in 1234 (X 5.7.10) thus giving it a "permanent position in ecclesiastical law".[418]

Innocent's linking of treason to heresy (or more simply, temporal *lesae maestatis* and divine *lesae maestatis*) has been noted by scholars.[419] What I have suggested above, however, is that it is more than an analogy; it takes advantage of a particular kind of legal equivalency. That is, Innocent III's invention of ecclesiastical treason is not an *imitation* of civil law treason and its punishments but is rather a claim that heresy is a *public crime* against the *ecclesia,* which is not only an entity with a "weightier" *potestas* and *imperium* in an abstract sense, but that it is also an entity which belongs in the public law in the legal sense. Thomas Delbene, who features prominently in the next section, quotes an extensive history of legal thought which confirmed that the crime of *Laese Maiestatis humanae* was dwarfed by the ecclesiastical equivalent and carried

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[416] Translated by Henry C. Lea "Confiscation for Heresy in the Middle Ages", pp. 235-259 in *The English Historical Review,* Vol. II (1887). p. 236.

[417] Innocent: "Quanto magis, qui aberrantes in fide Deum Dei filium Iesum Christum offendunt, a capite nostro, quod est Christus, ecclesiastica debent districtione precidi, et bonis temporalibus spoliari, cum longe sit gravius eternam quam temporalem ledere maiestatem?"

[418] Pennington, "'Pro Peccatis Patrum Puniri': A Moral and Legal Problem of the Inquisition", *Church History,* Vol. 47, No. 2 (June 1978), pp. 137-154, p. 138.

[419] Ullmann, "The Significance of Innocent III's Decretal Vergentis,"; Henri Maisonneuve, *Études sur les origines de l'inquisition,* 2nd ed. (Paris, 1960), pp. 156-157; 281-284; 339-357. O. Hageneder, "Studien zur Dekretale 'Vergentis' (X V.7.10). Ein Beitrag zur Häretikergesetzgebung Innocenz III." *Zeitschrift der Savigny-Stirftung für Rechtsgeschichte,* Kan. Abt. 49 (1963), pp. 138-173). Capitani, 'Legislazione antiereticale'; Kolmer, 'Christus als beleidigte Majestät'; Walther, 'Innocenz III. und die Bekämpfung'; Meschini, 'Validità, novità e carattere della decretale Vergentis'; Chifoleau, 'Note sur la bulle Vergentis'.; Also, Pennington 1978.

the same punishments of execution and confiscation.[420] Prospero Farinaccii defends the harshness and severity of punishment for heresy because the punishment fit the public nature of the crime and the *weightier* significance to divine treason over secular treason.[421] Any application of the logic of treason to the Church presupposes that the Church is the kind of entity against which it is possible to commit treason—this itself is its own argument and depends largely on a claim about the status of the corporate body in the law. Once its status is secured in the law as the type of body (or type of ruler) that is possible to properly 'betray', then jurists can move to ask whether betrayal or rebellion against subordinate authorities is considered a betrayal of either the head or the whole—a pattern which plays out in the feudal and civil law, but then in mirrored fashion in the canon law.[422]

In later legal texts, the threads of equiparation, and the public law origin of the *ecclesia* were woven together with heresy and "divine treason" in a way entirely consistent with Innocent III's imagination of ecclesiastical authority. Taking a step back, then, we can draw a direct line from Justinian's *Code* to 16th and 17th century legal treatises on treason and heresy.[423] "Where previous statutes had granted privileges to religion as a public good or public service (or necessary feature of public life", the Code stated, "the Roman Law now exclusively limits those privileges to the Catholic faith. All other religions (heretics) are not only depraved of those specific privileges, but are also subject to additional burdens."[424] This extended to confiscations: "all places, buildings, private structures, private houses" and so on held by heretics "are to be claimed for the Catholic Church".[425] The logic was that heresy was a public crime, "because wrongs committed against 'divine religion brings detriment to all'.[426] Their property could be confiscated, although not necessarily to the state—it might instead pass down to the legal inheritor of those goods, but the heretic could not receive gifts or inheritances themselves, or enter into contracts, and their last will was void. The public crime of heresy, like the public crime of treason, extended beyond death.[427]

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[420] Delbene, *De Officio Inquisitionis Circa Haeresim,* Pars I, Dubitatio 106, 'De poenis haereticorum temporalibus', p. 279.
[421] Farinacii, Quaestio 185, n. 24.
[422] On treason generally, see also Nicholas Boherii, *Tractatus de Seditiosis,* in which Nicholas distinguishes the kinds of associations which treason can properly be done. The only two observations to make in his discussion is that there was some disagreement about whether treason could only be committed against kings, or if opposing the king's subordinates, cities, villages, and allies also counted, or if treason could be committed against independent cities even if they were smaller. As before, if the city had *regalia* and jurisdiction by its own superiority over itself, then treason seemed to fit. He says at one place that many jurists had argued that *laese maiestatis* was only appropriate against the *regem, qui supremus est in dominus in regno.*[422] He continues that the gloss had argued differently, because treason could also be committed for conspiring against the prince or his allies, or against the *rempublicam Romanorum.* There, he says, *crimen laesae maiestatis et crimen patriae oppugnatae* were considered different species; the crime in the latter case was *sedition*, not treason or *perduellionis.* n. 9.
[423] Phrasing: The line goes in both directions. Conceptually, the thread moves forward from equiparation to confiscation. Historically, the thread was drawn backwards. Delbene, and several of the other jurists cited in this chapter, were writing explicitly on the inquisitorial rights and powers of the Church. Their project was to justify, ground, and at times limit the rights of the Church. They did so by tracing the history of ecclesiastical authority, which always intersected with Innocent III and his original view of the punishment of heretics. They rarely discussed equiparation; they always cited (or cited somebody who was citing) C.1.2.23.
[424] C.1.5.
[425] C.1.5.3.
[426] C.1.5.4.
[427] C.1.5.4.

Divine treason was a special kind of sedition which possessed the power to divide any ecclesiastical and political community and jeopardize public safety by weakening the moral and theological bonds which tied the community together. Divine treason was also open rebellion against any of God's allies, including His appointed head of the Church, the Pope. Nicholas Boherii, in his *Tractatus de Seditiosis,* argued that as a consequences of the greater *maiestas* of the Pope, any rebellion against those with delegated authority or jurisdiction from the pope would also be considered treasonous—this could extend to Bishops, Cardinals, clerks, or even the family members of the Popes or Cardinals.[428] Any rebellion against lesser magistrates of the Church was equally an assault against the *maiestas* of the Pope and equally worthy of prosecution for treason.[429] Boherii was aided by ecclesiastical history, in which Pope Julius II had been involved in a treason trial against Bentivolis of Bologna.[430] This was, we might recall, the same Pope Julius II as would feature strongly in Machiavelli's *Prince* and who was lampooned in Erasmus' dialogue *Julius Exclusus*. [431] This portrayal of Julius II provides us a chance to see the striking difference between the scope of claims possible in Innocent III's writings (c. 1198-1216) on ecclesiastical financial rights and Erasmus' view of Julius II's claims in 1514.

*Julius Exclusus and the "New" Financial Church*

The opening exchange of *Julius Exclusus* has Julius shocked that the gates of heaven are locked and his key will not work. His guide replies that he has brought the wrong key: the "secret money-chest" opens by the key of power but the gates of heaven open by the key of wisdom. The silver "key of power", Saint Peter would argue a few lines later, was "very different" from those given to him by Jesus. Peter was also not impressed by Julius' bejeweled clothes, purchased with funds from the "secret money-chest" that his key could actually open: "In all this stuff—the key, crown, the cloak—I recognize marks of that rascally cheat and imposter who shared a name with me but not a faith."[432] Julius' troops were "highly practiced thieves". His self-proclaimed wit was proved by his ability "to coin money from the bare promise of ecclesiastical offices", and sell indulgences, a scheme so complex that his own bankers could not understand them: "I never let up on accumulating money, understanding as I did that without it nothing is managed properly, whether sacred or profane."

The promise of power and riches, Julius argued to Peter, were all that could attract individuals to ecclesiastical office: in the first century and early history of the church, "the reward of bishops was nothing but hard work, sleepless nights, constant study, and very often death: now, it's a kingdom, with the privileges of a tyrant. And who, if he has a chance of a kingdom, won't grab at it?" Julius then describes how and why he took over Bologna:

> out of the immense sums that [the ruler] collected from the citizens, only a few paltry thousands ever reached my treasury. ... And so, with the French doing the

[428] Boherii, *Tractatus de Seditiosis,* n. 7: Quod etiam habeat locum contra insultantes vel delinquentes adversus episcopos cardinales et clericos vel religiosos familiares Papae et Cardinalium.
[429] This particular point about treason was contested by jurists, with some arguing that *only* 'sovereigns' could have treason committed against them. Other kinds of rebellion against non-sovereign officials was still a crime, but a lesser form of rebellion (i.e., not properly *lesae maiestatis*, but sedition, or the offender was a *perduellio*).
[430] Boherii, *Tractatus de Seditiosis*, n. 17.
[431] Desiderius Erasmus, "Julius Exclusus" in *The Praise of Folly and Other Writings,* trans. Robert M. Adams (New York and London: Norton Critical Edition: 1989), pp. 142-73.
[432] Erasmus, *Julius Exclusus.* Trans. Adams.

> work ... I drove out the Bentivogli and put bishops and cardinals in charge of the town, so that all the money there, down to the last penny, came into the hands of the church of Rome. Besides, in the old days, all the titles and dignities of imperial rule seemed to belong to him. Now you see everywhere statutes of me; my titles are inscribed everywhere, my trophies are admired; nothing to be seen but stone and bronze images of Julius."[433]

Later in the dialogue, Julius was proud of the vast changes which the Church of Rome had undergone: "That hungry, impoverished church of yours is now adorned with a thousand impressive ornaments," the "real ornaments" were not faith or contempt of wealth but "regal palaces, spirited horses, and fine mules, crowds of servants, well-trained troops, assiduous retainers"—"high-class whores and oily pimps", his companion interjected—and "plenty of gold, purple, and so much money in taxes that there's not a king in the world who wouldn't appear base and poor if his wealth and state were compared with those of the Roman pontiff." Julius concludes to Peter:

> Evidently you are dreaming on about the old church in which you, with a couple of hungry bishops, acted out the role of a meager pope afflicted with poverty, labor, danger, and a thousand other troubles. The new age has changed all that for the better. Nowadays the high pontiff of Rome is another creature altogether; you were a pope in name only. What if you could now see all the holy churches decorated with the wealth of kingdoms, the thousands of priests everywhere, many of them with splendid incomes, all the bishops equal in wealth and military power to so many kings, all the splendid episcopal palaces?[434]

Erasmus' parody shows, among many things, a sharp critique on two dominant customs and claims of the Church at Rome. First was a direct critique placed in the mouth of Saint Peter about the Church having possessions at all—how could Peter, "who left all my possessions behind to follow, unclad, a barefoot Christ" be said to have a patrimony? But Julius replied that "various cities are the property of the Roman church," and indeed they were a part of the "special possessions" of previous Popes. What good was piety, Julius continued, when they were losing out on "thousands and thousands of ducats, enough to furnish out a legion of soldiers." Julius was of course mistaken on the relationship between the Church and wealth altogether. Peter tells him that he must not "suppose Christ himself is some common commodity"—those who "accumulate money, displays of wealth, possessions of every sort," are "utterly alien to Christ."[435]

Second, Erasmus' stress on the particular abuses of Julius II (and previous popes who had similarly taken advantage of the Church's financial powers) suggests that while the Church as a whole had taken a far step from Christ's endowment of the keys to Peter, Julius' particular crimes were about the abuse of their new powers. Julius' chief moral problem was a completely twisted set of priorities: "What's left of me that's good at all if you take away my money, strip me of my

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[433] Erasmus, *Julius Exclusus.* Trans. Adams.
[434] Erasmus, *Julius Exclusus.* Trans. Adams.
[435] Erasmus, *Julius Exclusus.* Trans. Adams. One of Julius' most comedic lines of the dialogue is a quip about Aristotle: "I wanted to see the church adorned with every sort of good thing. But they say Aristotle distinguished three sorts of good: goods of fortune, goods of the body, and goods of the mind. I didn't want to change his order, so I began with goods of fortune, and I might have worked up to gods of the mind if untimely death hadn't called me away."

power, deprive me of my usury, forbid my pleasures, and even destroy my life?" There is, implicitly, a mild acceptance of the Church's financial abilities and powers, if not *de iure* at least recognizing the *de facto* developments of the previous centuries. When Saint Peter confirms to Julius that he would still be barred from heaven, Peter gives him a word of practical advice: "You have here a gang of muscle-men; you have a pile of money; you're a good builder. Go make yourself a new private paradise; but make it good and strong to keep the demons of hell from dragging you out of it." Perhaps Peter was, out of abundant compassion, giving Julius a sliver of false hope about his future. But it seems telling that, excluded from heaven, Peter has left Julius to a space between heaven and hell, a world of his own—a parodied paradise—supported by his wealth. The dialogue passes over in tacit recognition the structure and status of the "new" church; it could possess wealth and was wealthy; it could tax and collect taxes, order and execute confiscation, purchase and sell churches, land, and whole cities and states. But most of all, it unquestioningly possessed a treasury or a *fiscus.* What was left was to remind ecclesiastical persons that they were servants of God, not oligarchs and warlords.

In this section, I have shown that the "path" that allowed the Church to claim that it could punish heretic just as the state could punish traitors was created by the specific legal logic of equiparation; the equiparation of the *ecclesia* and *respublica* and the passages at the beginning of the *Code* reserved a privileged status for the *ecclesia* in public law, with a host of privileges and rights. Innocent III's strategic linkage depended on the one hand on a shared intuition that the Church did exercise an *imperium* and *potestas* analogous to that exercised by temporal states, but on the other hand on the legal context that the *ecclesia* was the right kind of legal entity which could bear those rights and privileges. Medieval lawyers made sense of the problem by showing that the *ecclesia* was the right kind of entity to bear those rights, and grounded their arguments in the equiparation between *ecclesia, civitas, fiscus,* and *respublica,* as well as the implications of "*Ut inter divinum*".

This is a more consequential connection than it may seem at first, because one of the generally accepted principles (at least in the early development of medieval law) was that only 'sovereign' states possessed the *regalia* and other rights and privileges ascribed to the Emperor in classical Roman law. Treason could be committed against the Emperor, but not a minor magistrate in a city on the fringes of the empire. The Emperor and the Empire had a *fiscus*—lesser communities like villages and cities who were dependent on the Empire did not. If the *ecclesia* was the right kind of entity which could have treason committed against it, then it was implied that they also possessed the other rights and privileges (and institutions) appropriate for that kind of legal entity. This played out specifically in arguments about the treasury. Innocent III had demanded confiscation as just punishment for divine treason—but if the *ecclesia* did not have a treasury, what sense could be made of the punishment? And, if the *ius confiscandi* was a right possessed only by 'sovereigns', how could the *ecclesia* be said to be able to confiscate property at all? Let us turn now to the relationship of the *ecclesia* to its other equiparated legal entity: the *fiscus.*

**Section III: Facts vs. Fictions—Having and Enjoying the Privilege of the Fisc**

Pope Julius II was on the extreme end of the Church's relationship to property and confiscation and he certainly attracted critiques from his contemporaries and near contemporaries for it. On the other end, very few objected to the Church's ability to collect the property of their clergy if sufficient cause arose. The jurist Oldradus (d. 1335) was asked to provide an opinion on

a case in which there was such an objection. In it, he actually argued that condemned goods ought not be applied to the Bishop even if the sentence was issued by ecclesiastical courts. Instead, they ought to be applied to the temporal lord. The details of the case were as follows:

> A certain clergyman holding emphyteuticary goods [a long-term lease of land] was condemned by a certain temporal lord who had jurisdiction in the place where those immovable goods were situated; he was condemned by his bishop as punishment for the crime he had committed [heresy], and the goods were taken from him. And it was declared that [the goods] were to be applied to the bishop. The temporal lord says that the immovable goods which were held by [the cleric] ought to be applied to him rather than to the bishop; it is asked therefore, what does the law say?[436]

The law said that distinctions must be drawn between the condition of the person, the kinds of goods confiscated (immovable or movable) and the severity of the crime. If the property were movable and owned outright by the cleric, then they could be confiscated and given to the Bishop. However, because the piece of property at stake was immovable, and was in fact a lease from the temporal lord himself, Oldradus remained committed to a strong view of the property right of the lord. No matter the crime, Oldradus argued, the lease of the land ought to return to the owner and could not be *transferred* to the bishop simply because the accused was a cleric. In other words, it was also improper for the Church to simply assume the lease without the consent of the temporal lord who retained total jurisdiction over the land. It was up to them if they wished to re-lease the property to the Church.

As Oldradus drifts from the facts of the case, he is lead to comment that confiscation itself is either extraordinary or ordinary. [437] When it is an extraordinary punishment, it is not permitted generally by law, but instead is a consequence of a particular judgment issued by a judge with the jurisdiction to do so. Alternatively ordinary confiscation is permitted by law or custom[438], and can be ordered by any judge with *merum imperium* by 'reason of territory', because confiscation can only be done by reason of jurisdiction and jurisdiction adheres to territory. [439] If a Bishop or Church did not have territory then they did not have the jurisdiction to order confiscation.[440] Even in the case of movable property, confiscation ought to be performed by a secular judge with jurisdiction and not the Church or the Bishop themselves. And, even when confiscation *did* occur, it ought not go into the hands of the Bishop personally. Instead, it ought to go to the Church as a whole—much like in the case where a soldier commits a crime and his goods go either to his heirs or the legion as a whole.[441]

Oldradus' *consilium* reflects a careful balancing act between a set of key related concepts: jurisdiction and territory, the scope of criminal and penal jurisdiction, feudal rights and landed property, the limits of Episcopal property, and even a 'separation of powers' between temporal and ecclesiastical judges and courts. It also sets as a baseline the standard and reasonable account of how and when the Church can initiate the process of confiscation. It is an extremely limited account of episcopal rights, but it recognizes something like a *fiscus* at the level of the Bishop's

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[436]Oldradus, *Consilia* (1585), Cons. 17.
[437] Oldradus, *Consilia* (1585), Cons. 17, n. 10.
[438] Oldradus, *Consilia* (1585), Cons. 17, n. 7.
[439] Oldradus, *Consilia* (1585), Cons. 17, n. 10.
[440] Oldradus, *Consilia* (1585), Cons. 17, n. 10. But see Chapter 6—they often did have territory and this kind of jurisdiction.
[441] Oldradus, *Consilia* (1585), Cons. 17, n. 10.

office—if the goods were not owned or possessed by the Bishop but instead by the Episcopal Church, then there must be some corresponding Episcopal purse to keep them in. But did the *ecclesia* have a *fiscus?* Or even more strangely, *was* the *ecclesia* a *fiscus?* In either case, did they possess some fiscal rights (*iura fiscali*)?

The equivalencies I described in Section I worked in medieval law as fictions; like the legal personality of the corporation, these legal fictions allowed the law and the state to make sense of organizations and actions where they otherwise would not be able to. But the 'fictional' aspect of the actors led to some awkward interpretations. Faced with interpretative stress, jurists could either take a narrow interpretative approach or a flexible one; either the fictions were narrowly construed and narrowly interpreted, or they could be stretched and extended. The extent to which the *ecclesia, civitas,* and *fiscus* had access to the same legal remedies (and therefore were 'equivalent') was one such awkward interpretive question, leading to many awkward—but viable—interpretive solutions.

*Fisc, Empire, and Cities*

The "proper" interpretation of the *fiscus* and what kinds of entities can possess it (or be called a *fiscus*) can be traced back largely to Baldus. Earlier jurists— Placentius, Azo, Accursius, and Odofredus—had adopted a straightforward entry-point to the definition of the "Fisc". Accursius writes, 'The *fiscus* itself is called 'imperial' or the 'chamber of the empire' (*imperii camera*); I do not call it the *patrimony* of the Emperor.'[442] Given that the *fiscus* was defined within the context of imperial authority and Rome, most early jurists reminded their readers that it was exclusively a feature of imperial authority. Odofredus (d. 1265) writes that where the *fiscus* is said to be compared to the *respublica,* it is only properly referring to the Roman state—other cities are called 'republics' improperly, and thus can not be said to possess a *fiscus* either.[443] Many interpretive challenges sprung from this simple beginning. Kantorowicz spotlights the many debates about the relationship between the *fiscus* and princely or royal authority (*regalia*):

> The lawyers proceeded quickly to a more impersonal and public exposition of fiscal property. They tried to find out what the fisc really was, and to whom it belonged. Was it identical with the respublica? Or was the respublica only the usufructuary of the fisc, as Placentinus maintained, or the owner of the fisc, with full dominium over it, as Azo believed? Moreover, what was the relation between the Prince and the fisc? Had, by the lex regia, the fisc been conferred upon the Prince together with the imperium? And if that were so, would the fisc then be the property of the Prince or was he merely the administrator and vicar of the fisc, assuming the privileges which derived from it, but responsible for its undiminished preservation for the benefit of his successors? And how did the fisc compare with the other appurtenances which the Prince was entitled to alienate, of which he could freely dispose, and which actually were subject to the prescriptive effects of time? Finally, if one assumed that the fisc was neither identical with the respublica nor with the Prince, was it perhaps a fictitious person per se, a "person" having its own patrimony, having experience, its own council, and "all the rights in its breast"—

[442] Accursius at rubric of C.10.1. "Fiscus dicitur ipsa imperialis vel imperii camera, non dico patrimonii imperatoris." See also Post 1964, *Studies in Medieval Legal Thought,* p. 317.
[443] Odofredus, *Super Tribus Libris Codicis* [Lyon 1550] at C.10.9.1, n. 6, fol. 22v.

> that is, did the fisc have an independent existence all by itself as a body corporate?"[444]

The early stone to fall was the exclusivity of the *fiscus* to Rome—only the city of Rome was understood to have a "fisc", went one common rejoinder.[445] Either through translation, equiparation, or the *lex regia* jurists would extend the title and privileges of the *fiscus* to the states around them. For Bartolus, the extension of the "fisc" to cities was simple: a *populus liber* was itself a *fiscus,* much like the Roman state was, and so any *civitas* which did not recognize a superior was of the same kind of *respublica* as Rome, and thus *was* and *had* a "fisc".[446]

Bartolus continues elsewhere: 'In cities which recognize a superior *de iure* or *de facto,* like the cities of Tuscany, the city itself is the fisc. For it is called a free people as mentioned in [D.49.15.24] ... But in those cities which do not recognize anyone as lord, statements concerning the fisc are understood to apply to their commune.'[447] For Baldus, it was important to contextualize the standard exclusivity of the *fiscus* to Rome to recognize that although the gloss explicitly said the *camera Imperii* and not the *camera populi,* the *fiscus* would always "secondarily" belong to the *populi Romani,* because 'the Prince represents the people, and that the people's *imperium* persists even after the death of the Prince'.[448] Baldus addressed the fiscal properties of cities elsewhere, but agreed largely with Bartolus: cities 'fill their territory the place of the emperor'[449], and only have their own "fisc", unless through non-recognition and their own 'statutes and customs' they have a more general kind of *fiscus.* [450] Other jurists were hesitant to embrace such an extension of the *fiscus* to smaller political communities, but in at least the case of Albericus de Rosate, the concern was not about cities exercising the rights and privileges of the *fiscus* as a feature of their legitimate sovereignty, but instead cities and kingdoms usurping the role of the *fiscus* in inheriting or receiving assets left without heirs or abandoned.[451] This was a common point of tension between cities and kingdoms.[452]

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[444] Kantorowicz, p. 179.

[445] Bertachini, *Repertorium* at 'Fiscus': "Fiscus est solius urbis Romae, non aliarum civitatum". See also Francisco Mantica, *Vaticanae Lucubrationes et Ambiguis Conventionibus,* Lib. 11, Tit. 18, n. 17.

[446] Bartolus, Dig. 49.14.2, n.2. Elsewhere, Bartolus parsed words about the "sameness" of the *fisc* and the empire, in which he divides 'republics' into four kinds—the empire, the romans, a city, and a municipality—and with respect to which only the first two could claim sameness. This complicates somewhat his gloss on the Digest. Bartolus at Rubric of C.10.1, ns. 1-11, but especially n. 2-5, 7, 9-10.

[447] Bartolus at D.5.3.30.7, n. 2. See Canning, *The Political Thought of Baldus,* p. 120.

[448] Baldus, Rubric at C.10.1, ns. 11-18. fol. 238v-239r. See also Canning, *The Political Thought of Baldus,* p. 89 *et passim.*

[449] Baldus at X.1.2.13, n. 3; Canning, *The Political Thought of Baldus,* p. 116.

[450] Baldus at the Rubric at D.1.8.

[451] Albericus Rosate, *Commentarii in Secundam Partem Digesti Novi* (Venice 1585), Rubric at Dig. 49.14, n. 1-2, fol. 216r. French jurist Jean Pyrrhus d'Angleberme (1470-1521) subtly critiqued Albericus: 'Hence, the ancients said it was proper to collect the public money which our Albericus, most learned in his time, did not ignore when he argued that a *fisc* is used improperly when applied to the Church (*ecclesia*) or a city (*civitas*) or any other place other than the prince's treasury.

[452] Kantorowicz, p. 175, n. 259: "On the basis of C.10.10.1, the author discusses the right of the fisc to intestate inheritance and rejects claims on the part of cities or other local corporations (see, on the altercations between fisc and cities, Woolf 1913, p. 120ff, and on the *successio ab intestato* on the part of corporations, Gierke III, 291, n. 139; a legacy snatched by a city must be revoked by the Prince: "Et quasi bona patrimonialia Christi et fisci comparantur. Ut administratores rerum Christi pauperum cibos ad libitum non disponant ..., sic bona fisci in protectionem et conservationem reipublicae servanda sunt." Philip of Leyden, 1, n. 15, p. 14, quotes the relevant passage from the *Decretum.* For the very common legal concept according to which the poor are the owners of Church property, see Gierke, III, 293, n. 143."

Jason de Mayno's commentary on the subject takes place in the middle of a gloss on *De Actionibus,* where concerns himself with the definition of a *respublica.* Within the Roman law, the default assumption was that any passage or law which mentioned a *respublica* must be taken to refer to Rome—the laws were of course roman civil laws and so to what other *respublica* would they be referring to? There is, however, a different background assumption working here beyond just the context of the laws. The argument goes that Rome was the only proper city—something about it was distinctive. And so, even after the Roman empire collapsed in part and the Roman law lay dormant for centuries, when it came time for jurists to resuscitate and apply the law within their new political contexts, the presumption in favor of the special publicity of Rome still needed to be interrogated and reconsidered. Some argued that Rome still had a special claim to the name of *respublica* that other cities were only imitating or pretending after. Many famous jurists, like Baldus and Bartolus, had strongly implied that only the *civitas Romana* has a fisc, and that *municipia* certainly do not. Rome also bore other privileges and immunities which were peculiar to it that other *civitates* could not claim. [453] Elsewhere, Jason wrote that the *fiscus* had the privileges of 'tacit hypothec' (*tacite hypothice*), which cities did not, unless local city statutes had been created saying otherwise. No city but Rome, he writes, have that privilege and have that particular fiscal right. However, Jason still confronts at the end of this comment that Baldus and others had admitted that the Church had one exception according to the code, and therefore there were cases in which even the 'episcopal chamber has [the rights of] tacit hypothecs' (*camera episcopalis habeat tacitam hypothecam*).[454]

Others were simply upset about the usurpation itself. Martin Laudensis writes that cities do not by right have *ius fiscaliae* (fiscal rights) and therefore cannot accept 'condemned goods' (*bona damnatorum*), despite the fact that most cities "today" who do not recognize superiors (in error) by the same error 'pretend themselves to have *iura fiscalia*'.[455] Fiscal rights were part and parcel to *regalia*—the rights of rulers—and as debates and lines were drawn about "proper" or legitimate rulers, so followed the package of fiscal rights.[456] We therefore find cases across juristic literature, for nearly every one of the self-proclaimed and sometimes recognized independent cities and kingdoms of the time. The question might run in either direction—"Is such and such a city a *princeps?*" or "Does such and such a city possess a particular fiscal right?"—but they inevitably collided.

*The Church and the 'Fiscus'*

If fiscal rights are an aspect of sovereignty—to take a shortcut followed by Canning and others—then it is clear why the Church occupies a strange place in the question. The Pope was a temporal sovereign within the papal states and was sovereign over the Universal Church; in both contexts, canon lawyers especially agreed that it made sense for them to bear a *fiscus* as a feature of their sovereignty. But mirroring the opinion of civil lawyers about a *princeps,* they quickly claimed that this treasury did not belong to the person of the Pope, but rather to the Church itself.[457] Furthermore, the Church possessed property, and though hotly contested by Catholic sects like the

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[453] Jason de Mayno, *De Actionibus,* § Rursus, n. 36-47.
[454] Jason de Mayno, *De Actionibus,* § Fuerat, n. 70-71.
[455] Martin Laudensis, *De Fisco*, fol. 3. q. 64.
[456] Martin Laudensis, *De Fisco*, fol. 5, q. 232.
[457] Wahl, "Immortality and Inalienability: Baldus de Ubaldis", *Mediaeval Studies,* pp. 308-328.

Franciscans during the 12th-13th centuries[458], there was an ancient relationship between the Church and the *fisc* in metaphorical and literal terms. As the head of the Church, all of the possessions of the body of Christ, from "souls" to actual property, formed the treasury of the Church, over which Christ was the executor.

Augustine wrote in a commentary on Psalms 147[146], '*Si non habet rem suam publicam, Christus non habet fiscum suum*"—what Kantorowicz translates as "Unless Christ has his state he lacks his fisc."[459] His reading of this sentence is:

> In this case, the political notions of *res publica* and *fiscus* were used in a figurative and spiritualized sense: the community of mutual love and charity depended upon the spiritual treasure, and the one who practiced charity and gave alms thereby contributed to the "fisc" of Christ without needing to fear the temporal "fiscal dragon," that is, the "exactor of the fisc" of the empire. This passage, too, was received by the lawyers; Lucas de Penna, for example, quoted it in full when discussing ecclesiastical property.[460]

However, the "figurative and spiritualized" reading of Augustine here does not quite hold up to the context of his narration on the Psalm itself. Augustine was entreating his readers to not be "barren": Christ would return expecting his followers to have invested themselves in the souls of others, increasing the body of Christ like the servants of the parable in Luke.[461] Unlike that parable, Augustine demands that Christians not wait for Christ to return to "exact" payment. That is, there are positive demands of Christianity which others (Christian and otherwise) might demand of the individual Christian, but their calling was not to wait until asked and then provide their generosity.

Augustine writes instead, "be then your own exactors"—wait not for the "compulsion" of others. In the example of charity, "let alms sweat in thy hand, till thou findest a righteous man to whom to give it. One there is who seeketh thee, another thou oughtest to seek." But Augustine understood the psychological ties between the individual and their property—generosity, even if internally desired, would not come easy unless they intentionally "set aside from your substance, each what pleaseth him according to the needs of his family, as a sort of debt to be paid to the treasury." That is, each Christian should take from their property and income a portion of proceeds

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[458] Pope John XXII quoted the Augustine passage in this paragraph in his debate with the Franciscans—Christ had a *fisc,* so why shouldn't the Church?

[459] Augustine, *Enarrationes in Psalmos,* CXLVI, 17, PL, XXXVII, col. 1911. Wilks, "Thesaurus Ecclesiae", p. 36: "Nor can there be any doubt that Augustine had used the notion of a thesaurus Ecclesiae on many occasions." Wilks continues: "Augustine's two purses, ecclesiastical and public, dividing the world between them, were now gradually replaced during the twelfth and thirteenth centuries with the view that the whole world was the thesaurus Ecclesiae, whilst the spiritual treasury came to be seen as the other treasury, the treasury of sacramental grace. It was this latter version, not the Augustinian one, which was to be adopted by Wyclif—and was suitably changed to suit his own purposes by replacing the pope with the king as the chief treasurer. We should perhaps classify it as a third version of the treasury of Christ theory. But without the intermediate stage of the papal theory Wyclif s version would not have been possible. There was a vital step in between. He was at best only the stepson of Augustine." p. 45.

[460] Kantorowicz, p. 176. Augustine writes: "Ne putetis quia aliquis draco est fiscus, quia cum timore auditur exactor fisci; fiscus saccus est publicus. Ipsum habebat Dominus hic in terra, quando loculos habebat; et ipso loculi Judae erant commissi (John 12:6)." Lucas de Penna's reference is at C.10.1, n. 6-8, p. 4-5 in [Lyon 1582] edition.

[461] Luke 19:11-27. The parable tells of a noble man who was leaving his estate for a time on business. Before he leaves, he gathers his ten servants together and gives them each a gold coin, commanding them to 'do business' (*negotiamini*) while he was gone. The first servant makes 10 coins, the second makes 5; both are rewarded. But the servant who kept his coin in a napkin (not doing any business) was scolded for failing to do even the minimum of depositing it in a bank where it could have earned interest.

earmarked for charity, as the equivalent of a debt to the earthly *fisc,* which was not *theirs* anyways, since it was *owed* to the treasury. Only then will the Christian find it easier to be appropriately generous and charitable. It is at this point that Augustine begins his famous passage on the definition of the fisc:

> If Christ have not a state of His own, neither hath He a treasury. For know ye what 'fiscus' means? 'Fiscus' is a bag... Think not that *fiscus* is a kind of dragon, because men are alarmed when they hear of the collector of the *fiscus:* the *fiscus* is the public purse. The Lord had one here on earth when He had the bag: and the bag was entrusted to Judas. The Lord endured Judas, who was both a traitor and a thief, in him shewing to all the world His longsuffering; yet they who contributed, contributed to the Lord's treasury.[462]

Thus,

> Cut off then and prune off some fixed sum either from thy yearly profits or thy daily gains, else thou seemest as it were to give of thy capital, and thy hand must needs hesitate, when thou puttest it forth to that which thou hast not vowed. Cut off some part of thy income; a tenth if thou choosest, though that is but little. ... He whose righteousness thou oughtest to exceed [The Pharisees], giveth a tenth: thou givest not even a thousandth. How wilt thou surpass him whom thou matchest not? Who covereth the heaven with clouds, Who prepareth rain for the earth; Who maketh the grass to grow upon the mountains, and herb for the service of men.

This proverb is often paired together with another—*Hoc tollit fiscus, quod non accipit Christus*, or "What is not received by the *Christus,* is exacted by the *fiscus.*" How to balance these two proverbs—one projecting a cooperative relationship between *Christus* and *fiscus*, and one projecting an adversarial relationship—has attracted a great deal of scholarship.[463] The two are paired together because Gratian, borrowing from a different Pseudo-Augustine sermon, paired them together. [464] Despite their apparent tension they are indeed compatible and consistent with Augustine's political thought and theology. Taking the legal and economic language of Augustine seriously, we can understand the "debt" owed to the *fisc* of Christ as supreme, and as encompassing as much of one's property as one can tolerate. What remains, then, is put to the temporal *civitas*,

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[462] Augustine, *Enarratio in Psalmos,* cxlvi*,* 17, PL 37, col. 1911: Nunquam hoc facietis nisi aliquid de rebus vestris sepositum habueritis quod cuique placet pro necessitate rei familiaris suae tamquam debitum quasi fisco reddendum. Si non habet rempublicam suam Christus non habet fiscum suum. Fiscus enim scitis quid sit? Fiscus saccus est unde et fiscellae et fiscinae dicuntur. Nec putetis quia aliquis draco est fiscus quia cum timore auditur exactor fisci. Fiscus saccus est publicus. Ipsum habebat Dominus hic in terra quando loculos habebat. Et ipsi loculi Iudae erant commissi.

[463] Kantorowicz, "Mysteries of State: An Absolutist Concept and its Late Mediaeval Origin", *The Harvard Theological Review,* Vol. 48, No. 1 (Jan. 1955), pp. 65-91; "Ueber die Rechtsparömie: 'Quod non capit Christus rapit fiscus' pp. 236-329 in *Archiv für katholisches Kirchenrecht mit besonderer Rücksicht auf das Vaticanische Concil* (Mainz 1874). Historically, see Luther, *Army Sermon Against the Turk* (1529); Roger Maynwaring (1590-1653), *Religion and Alegiance;* Charles Leslie, *An Essay Concerning the Divine Right of Tithes* (1700), p. 171.

[464] Gratian's *Dectretum,* c. 8. XVI. q. 7, loosely repeated by Albericus Rosate above in *Dictionarium.* Kantorowicz: "With these words Gratian concluded a brief discussion about tithes due God and Caesar, borrowing the whole passage from a Pseudo-Augustinian sermon in which the unknown preacher argued that taxes rendered to the fisc became the more burdensome the less tithes were rendered to God, p. 175, Pseudo-Augustine, *Seromnes supposititii,* LXXXVI, 3, PL, XXXIX, 1912. See also de Roover, p. 77.

either for subsistence or for pleasure. If, like Augustine, we were committed to the superiority of the eternal *civitas,* we could rightly then reduce the commitment of property either to the eternal or the temporal *fisc:* what is not committed to the eternal *fisc* (*quod non accipit Christus*) is committed to the temporal *fisc* (*hoc tollit fiscus*). Both debts must be paid, leaving no room, properly speaking, for genuine private ownership of property.[465] This is not a picture of the world as it is, or as it can realistically be, but instead how the Christian ought to conceptualize themselves as relating to the world.

With the executor of the *fisc* being temporarily departed from the earth, Christ's "patrimony" would have to be managed by somebody else—logically, bishops would argue, those to whom Christ had entrusted his "keys".[466] It is in this delegated official capacity that the Church and later the Pope would claim to possess a *fisc.* Or, as Flemish civilian Philip of Leyden put it, "One compares the patrimonial possessions of Christ and the Fisc". [467] As a practical matter, the Church possessed wealth and property, and individual churches were also conceptualized *as* property. The late antique Merovingian king Chiplerich I (539-584) claimed—with I think a vastly understated strategic dimension—that his *fiscus* was poor, as its wealth had been transferred (*translatae*) to the Church.[468] Susan Wood has recently published a massive account of the growth of the proprietary Church in the West.[469] The Church collected tithes and alms—the debts Augustine argued were owed to Christ above—and oversaw the property of clerics and Churches across Western Christendom. The consensus of lawyers was that the Fisc belonged to the 'empire', but that the 'most holy fisc' implied that the only empire which carried real significance was the Church.[470]

The growing wealth of the Church might explain why, sometime between the time of the Glossators and the time of the Post-Glossators, it became necessary for jurists to address the elephant in the room: could the *ecclesia* be understood to exercise the same kind of fiscal rights as secular states, given the kinds of actions they were engaged in were similar enough? The question is absent in Accursius but present in Lucas de Penna and the Ubaldi brothers.

Lucas writes that there had been slippage in the vocabulary applied to actors and their wallets. As I discussed above, the exclusivity of the *fiscus* to Rome had waned, leading some to think that 'not only free kings but even *civitates* if they are free, or even those who are subjected to others can have their own *fisc*.'[471] Churches—and here Lucas means churches down to the most

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[465] This is a necessary consequence of Augustine's legal vocabulary. Whether he intended this as an account of how the Christian ought to view the world, or as how the world ought to be, is an open question.

[466] Compare of course Julian's lone key at the gates of Heaven, above.

[467] Philippus de Leyden, *De cura rei publicae et sorte principantis,* I., n. 9. "Bona patrimonialia Christi et fisci comparantur." Quoted and translated by Kantorowicz, p. 175.

[468] Chilperic: "Ecce pauper est fiscus noster, ecce divitae nostrae ad ecclesias sunt translatae". This quotation comes to us from Gregory of Tours, *Historia Francorum,* Book VI, 46, and is tongue-in-cheek. The full quotation has Chilperic say that there is "no king but the bishops; my office has perished and passed over to the bishops of the cities." Gregory's Chilperic is discussed by Gierke, Kantorowicz, Vassalli and others.

[469] S. Wood, *The Proprietary Church.*

[470] Kanorowicz, 787. This also aligned with the application of economic language to social relationships and Christianity. See also Guillaume Erner, *La morale économique chrétienne: le tournant médiéval,* pp. 513-522, esp: "Cette représentation liait de manière étroite l'argent et le bien commun, le lien social et la conservation des richesses. Voilà pourquoi le riche en général, mais aussi l'usurier pouvaient être considérés comme des menaces pour la communauté et le lien social. Le lien social, idée chrétienne, naît d'ailleurs à cette époque."

[471] Lucas de Penna, *Commentaria in Tres Posteriores Libris Codicis* [Lyon 1582], C.12.49.4. n. 1-2, esp: 'And from these it seems that not only free kings, but also cities, if they are free or even if they are subject to others, can have their own *fisc.'* p. 935-936.

local levels—had often exercised authority over the goods of clergy if they died or committed an ecclesiastical crime. Corporations, too, exercised authority over some of the goods of their members. If the conception of "fiscal" authority was simply the management of property, then every king, church, corporation, city, and even every individual would have a *fisc.* Even the *pauper* would have a tiny *sacellum.* The salient differences would be matters of degree, not of kind.[472] Lucas thought this would be an untenable and absurd understanding of the *fisc,* departing wholly from its attachment to sovereignty and its public dimension. As in most cases, however, a jurist having to clarify a refutation to an argument is suggestive of competing interpretations—even if they were just misunderstandings or rumors—and is suggestive of cracks forming at the edges of legal theory.

These cracks are more apparent in Baldus' commentary on a *Novel* of Justinian concerning the confiscation or condemnation of goods by judges. Baldus addresses the arguments of some judges that Bishops of a city can condemn a persons property and apply the goods to their chamber (*camera*)*,* thus depriving heirs of their inheritance in the same stroke as taking the role of the *fisc* in their city. Baldus' resistance is telling. His objection, and reasoning for why this kind of action is inappropriate, is that the goods ought to be applied to the *camera* in Rome—not their own in their own city—because otherwise they would seem to be partial in their adjudication of the case (*quia videntur esse iudices in sua causa contra rubrum et nigrum*). Baldus also seems to be secondarily concerned about the effects and implications of Bishops or the Church hunting for pecuniary punishments (*studeant extorsionibus*), and in turn depriving heirs of their rightful inheritances.[473] Angelus de Ubaldi expands on the same point, also recognizing the potential injustice done to wives who might be deprived of their dowries.[474] He argues that in most cases, judges ought to order goods distributed to the appropriate heirs according to civil law. Where there are no such inheritors, or where there are goods leftover, goods might then be claimed and assigned to the *fisc,* but never to the 'chamber' (*camera*) of the judge.[475] Confiscation and 'application' were privileges of the *fiscus,* and as neither *civitates* nor Bishops had "fiscs", the execution of confiscation or application of goods was always an error, he continued, and defenses of that practice were born from 'unsound intellect" (*absonus intellectus*). It didn't matter, Angelus argued next, that Bishops practiced confiscation and application anyways—by law and right, they are unable to, unless in the case of necessity; in that case, then, the money or the goods must be put to 'pious uses', which was actually a precise term akin to a trust managed only for charitable purposes.[476] But as a general rule, Bishops and churches could not apply property or financial penalties to their own chambers as a function of punishment or legal procedure.

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[472]Lucas de Penna, *Commentaria in Tres Posteriores Libris Codicis* [Lyon 1582], C.12.49.4. n. 2, pp. 935-936.

[473] Baldus, *Commentary on the Code,* [Venice 1577] at Nov. 134.4/13, after C.9.49.10, 'Bona damnatorum', n. 1., fol. 235r: Especially: 'And the second reason is that Bishops do not engage in extortions, because punishments for wrongdoings cannot be applied to themselves [the Bishops].

[474]Angelus de Ubaldi, coll. 9, 'Ut nulli iudicum', fol. 52r-53v, 'ut autem': fol. 52r-53v, *Commentaria in IX Authenticis Collationes* (Turin 1580). Treason was the largest exception to the rules and procedures of inheritance. A judge could order confiscation of property *including* dowries and prejudicing inheritances as a post-mortem punishment for the traitor. The living successors might appeal that they were ignorant of the treason taking place, and the judge could by their own will determine whether to release some of the property back to them. Angelus touches on treason in this same passage, at n. 3.

[475] Angelus de Ubaldi, *Commentaria in IX Authenticis Collationes* (Turin 1580), fol. 52r-53v.

[476] Angelus de Ubaldi, *Commentaria in IX Authenticis Collationes* (Turin 1580), n.2, fol. 52r-53v: 'It is established that only the *fisc* has the privilege of having goods applied to it, not the city, or anybody else. If we were to say otherwise, it would follow that a judge would judge in his own case, which is absurd. ... However, Bishops may act

More frequently, jurists stressed that the church lacked some of the particular rights of the fisc. Alexander Tartagnis [Imolensis] (1424-1477), like others, rejects the privilege of *tacit hypotheca,* while recognizing that the *ecclesia* was still properly equiparated with the *civitas* and the *fisc* and still possessed privileges according to the rights of cities—they just lacked this one.[477] These pieces are put together by the 16th century canon lawyer and Cardinal, Francesco Mantica (1534-1614).[478] Mantica maintained that the name of the *fisc* and the fiscal rights and privileges with it still only properly applied to the Roman *respublica;* even cities who possessed delegated *merum imperium* could not possess 'fiscal rights' because fiscal rights were a part of the bundle of *regalian* rights. *Regalia*, of course, attach only to princes. Only when the princes or kings have conceded the privilege to "inferior" princes, like Barons, could the Barons exercise those rights—but again, only by privilege. When those rights are conceded formally, they are just as good as they would be if the prince was exercising them. But in a *civitas* which is subject to another jurisdiction, there can be no such bundle of fiscal rights or claim to a "fisc" unless that had been confirmed explicitly by the superior. Many, however, argued that different things held *de facto*—more on that in a moment. Before he concludes on the question, even Cardinal Mantica has to address the lingering intuitiveness of the church: 'Moreover it might be possible that the name of a *fisc* could be extended to the church because it is a spiritual treasury (*fiscus est spiritualis*).' But, he writes, 'the *ecclesia* does not *proprie* have a *fiscus*'. The only context in which the church exercised anything close to proper fiscal rights or privileges is in the context of tithes—either in local churches or the Papal Camera.[479] Canon lawyers like Hostiensis[480], Panormitanus[481], and Joannes Andreae[482] were able to talk about the extensive rights possessed by the Papal Treasury without invoking the conception of the Roman legal *fiscus* and its rights and privileges. This was, on balance, the baseline argument that neither churches nor Bishops, nor Archbishops possessed a *fiscus,* running from Accursius to Early Modernity.[483]

*The Ecclesia and the Fisc—Having and Being*:

The difference between being and having a *fiscus* is a meaningful distinction, both for the jurists considered here and for how secondary scholars have treated the topic in the past century. Scholars have rightly stressed the importance of the theory of *being* a "fisc" as a part of corporation theory, linked closely to the development of the idea of the state. *Having* a "fisc"*,* however, is a more straight-forward administrative feature of governance attached to the administration of funds—what makes them properly *fiscal* is that both the administration and the funds are to some degree "public". That it is administrative, however, is not proof that it is inherently less theoretical

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contrary to this in practice, but they cannot do so legally (*de iure*) unless there is a case of necessity, and in fact they must allocate all punishments to pious uses.'

[477] Alexander de Imola, *Consilia,* Lib. VI*,* Cons. 104, n.3, fol. 56v-r. [Frankfurt 1610].

[478] Cardinal Francisco Mantica, *Vaticanae Lucubrationes et Ambiguis Conventionibus,* Lib. 11, Tit. 18, 'De tacita fisci hypotheca', ns. 17-27.

[479] Cardinal Francisco Mantica, *Vaticanae Lucubrationes et Ambiguis Conventionibus,* Lib. 11, Tit. 18, 'De tacita fisci hypotheca', ns. 17-27.

[480] For context, Hostiensis writes at X.3.30.1 that 'The tenth part of all lawfully acquired movable goods is given to God by divine constitution as a *debita*.

[481] On tithes, and some of the intricacies of tithing property or purchasing immovable properties from the Church, see for example p. 143r-144v, [Venice 1591]; Panormitanus 3.08.05.

[482]Joannes Andrea, at X.3.30.1 [Venice 1489], fol. 94v.

[483] Giovanni Francisco de Ponte, *Tractatus de Potestate Proregis,* Tit. I, § IIII, ns. 61-69, p. 22-23: *'*Bishops and Archbishops don't properly have a *fisc'.* (*Fiscum proprie non habent Episcopi, Archiepiscopi*).

than the grand significance of the impersonal *fiscus* and *respublica* taking shape behind and above the heads of medieval rulers. Being a *fiscus* was crucial; so too was being able to claim that one *possessed* one. In both cases, the "Church" and indeed "churches" had a case to make on both fronts.

From the cracks in the interpretations in the previous subsection, and the underlying intuitive fiscal properties of the Church's activity in late medieval and renaissance political and economic life, came a reconsideration of the question of whether the Church was, or possessed, a *fiscus.* After recounting most of the arguments above, Marcantonio Genua (1491-1563) wrote that 'the facts are to the contrary.'[484] The extensive but scattered arguments affirming the fiscal rights of the *ecclesia* are difficult to parse for two reasons. First, jurists argued—sometimes both, or sometimes either—that the *ecclesia* "was" a *fiscus* or that it "had" a *fiscus.* The claims are importantly different but are compatible. To say that the *ecclesia* "was" a *fiscus* was to stress the corporate equiparation of the *ecclesia* to the *respublica* or the *civitas.* It was eternal, impersonal, and outside of the private patrimony of whoever was the head of the association. Arguments about "being" a *fiscus* often stressed the privileges or protections of the *ecclesia,* such as against prescription. To say that the *ecclesia* "has" a *fiscus* was to stress the administrative and legal *rights* of the *ecclesia,* and in particular, to stress that it possessed the same kinds of specific legal rights as the *respublica* or *Princeps*. Proponents who vindicated and defended the rights of the *ecclesia* were not always precise in their language of *who* or *what* possessed the *fiscus.*

*The Roman Church and the Pockets of Christ*

The easiest argument to make for jurists, and one even the strong-line authors above had to recognize, was that the Roman Church was or possessed a *fisc,* if not by some technical legal argument, by fact. What I show in this chapter, however, is that this admission is a technically complicated juggling act—admission that the *ecclesia* was or possessed in some part a *fiscus* opened the door to a host of claims about their rights or privileges but also about their status in relation to superiors (temporal and ecclesiastical). At the very least, as a matter of both reality and of the logic of the corporate status of the Church, the *ecclesia* as a whole was understood to include the property of the individual churches. Baldus writes in the *Margarita* that all of the churches of the world are within the 'wings' of the Roman Church, and so all of the individual possessions of the individual churches are possessed by the 'mother' Church.[485]

The juggling was impressive—Joannis Bertachini de Firmo, though quite committed to the superiority and *imperium* of the empire, writes that any community which recognizes a superior 'does not have a *fisc,* except the *ecclesiam Romanam,* whose *fiscus* is even greater and to whom such goods [clerical] ought to be applied.' [486] Baldus also recognizes the superiority of the

[484] Quaestio 250. Marcantinio Genuensis Bishop of Isernia, Quaestio 250, asks 'Whether the fisc of the *Ecclesia* is rightly a *fisc* and whether it enjoys the privilege of *tacit hypothecae* as well as other privileges of the *fisc*?

[485] Baldus, *Margarita,* [1491] unfoliated. One passage begins "Et sic ecclesia tribus modis dicitur..."

[486] Bertachini, *De Gabellis, Tributis et Vectigalibus,* fol. 53v, n. 16: 'This is not the case in the cities of the March that recognize a higher authority, as they do not have a *fisc,* except for the Roman Church, which is the *fisc* and the superior to which such goods must be applied.' Bertachini then, in the next paragraph, repeats the familiar argument: 'A city that does not recognize a higher authority has its own treasury.' But once again, 'in fact, we see that after the peace of Constance, from which the cities of Italy received pure and mixed imperial power, they usurped, in fact, the right to impose taxes.'

ecclesiastical *fiscus.*[487] This was a simple extension of the superiority of the papacy which authors almost had to affirm as a matter of both faith and legal principle.[488] Modern scholars on Baldus have tried to downplay these commitments found extensively throughout his commentaries and glosses. The claim that the "fisc" of the church is greater than that of the Emperor's is a more specific claim than papal superiority and also has more to do with 'this world'—a 'world' in which most jurists agreed that the Emperor was greater.[489] The Papal Camera was also a strong contender for the title of a *fiscus,* given its annual revenues and institutional economic role in Europe.[490] Cardinal Francisco Mantica, in a passage which ultimately defends the exclusivity of the fisc to the Empire, recognizes that the Camera in certain matters 'takes the place of a fisc' (*obtineat locum fisci*), especially in the exaction of papal tithes.[491]

Joannes de Platea argued in the rubric of C.10.1 that Bishops do not have a *fiscus,* because the *camerae episcopi* does not have the privilege of *tacitae hypothecae.* The universal church, however, has a *fiscus.* And furthermore, it does seem like an individual church has its own *fiscus* which is called a *thesaurus,* to which the goods and property of offending prelates could be applied. The pockets of the church descended directly from the pockets of Christ.[492] Joannes pays particular attention to the act of translation.[493] Joannes' conception of the Church's fiscal status is a balancing act between two sets of facts and ideas. On the one hand, the *universal* Church had long been exercising the authority which Christ had delegated directly to Peter. Their authority was total, certainly, but the sacralized conception of authority gave the Church an advantage in defending their particular privileges or powers—those too must have been delegated by Christ, otherwise they would not be exercising them. As a *universal* church, the *ecclesia* thus had the metaphorical "fisc" as a treasury of souls and wisdom as referenced by other medieval authors, but also a physical *fiscus* through which they administered the temporal tasks of defending the *ecclesia*'s power and (at least nominally or ideally) spreading Christianity to the world. If this *ecclesia* had territory and jurisdiction, and along with that, a *fiscus* according to its territoriality and 'sovereignty', this would be a secondary *fisc* by nature of its origin, but in practice, a mere

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[487] Bertachini, *Repertorium,* at 'Fiscus': "Fiscus eccleisae Romanae est maior Imperatore". Also, Baldus at 6.42.14pr, n. 28 [Venice 1577], fol. 148v. See also the related claims that the "populus maior Imperatore" found extensively in Baldus and others. And, Robert Bellarmini, "Epistolae ad Joannem Barclaium", col. 1007-1008, in *Novemdecim Varii Argumenti Opuscula* [Coloniae Agrippinae 1617]; For the same sentiment, often paired with papal supremacy, see also Joannis Barclaii "Scriptores nationis Italicae pro temporali potestate Pontificis", Num. 20, p. 862 in *Tractatuum de iurisidictione imperiali seu regia,* Tom. III. [Frankfurt, 1613]; Orazio Marte, *Tractatus de iurisdictione inter iudicem ecclesiasticum et laicum exercenda,* Pars Tertia, Cap. 1, n. 16, p. 296 in [Genua 1620]; Joannes Aloysii Riccii, *Praxis Aurea Quotidianarum Rerum Ecclesiastici Forum,* Tom. II [Venice, 1646], Resoutio 231 n. 16, p. 163; Joannis Antonii [Gianantonio] de Sancto Georgio, *Commentaria in usus feudorum* [Frankfurt, 1598], Praeludia n. 9, p. 23; Bartholemy de Chasseneuz [Cassanaei], *Catalogus Gloriae Mundi* [Venice 1569], Quarta Pars, fol. 89r at 'Septima'.

[488] Dante Fedele, *The Medieval Foundations of International Law: Baldus de Ubaldis (1327-1400),* pp. 72-74; Canning, *The Political Thought of Baldus,* p. 44.

[489] See for example Baldus at D.1.14.3.

[490] William E. Lunt, *Papal Revenues in the Middle Ages,* Vols. 1-2 (Columbia University Press: 1934), esp. Vol. 1, pp. 57-135.

[491] Cardinal Francisco Mantica, *Vaticanae Lucubrationes et Ambiguis Conventionibus,* Lib. 11, Tit. 18, 'De tacita fisci hypotheca', ns. 17-27.

[492] Joannes de Platea, Rubric at C.10.1.

[493] Joannes de Platea, Rubric at C.10.1, ns. 4-8; 13. This is essentially a recounting of Baldus and Bartolus' comments. For example, n. 7 states, 'Before the transfer of imperial power, the *fisc* and the Roman Republic were the same, but not after the transfer... And that is why today the emperor says 'my *fisc*' ... And the gloss states that the *fisc* is the Prince himself, and that the *fisc* and the *respublica* of another city are different.

confirmation of the *fisc* it previously possessed.[494] This secondary 'public' might be coterminal with the temporal state, or might exist as a bubble within it, causing potential conflict with respect to the "territoriality" of the *ecclesia.*[495] It also created an awkward space which might be said to be apart from the *civitas* itself despite being within it. This might be confirmed by city statutes, excluding the church or priests from counting as a part of the city, or priests when the "citizenry" are spoken about.[496]

On the other hand, *churches* were engaged in civil law and feudal structures, and individual bishops bought and sold property, leased church lands, entered into contracts with cities and private persons. Their ability to manage their fiscal accounts had to match up with some kind of treasury. The compromise Joannes reaches is to deny them a *fiscus* but grant them a *thesaurus.*[497]

Let's parse this difference quickly and see why it matters. The Church had long exercised some control over the property of its clerics, even if simply in late-Antique capitularies which provided guidelines for how they ought to use and manage their property.[498] Others forbade clerics from possessing personal property at all.[499] Others still, more frequently, reminded clerics and the laity that the property of the church was in no way the property of ecclesiastical officials.[500] In their relationship to clerical property, the *ecclesia* took on the role of the *fiscus,* and indeed, its claims could supersede those of the temporal *fiscus* under the right circumstances. Take for example a cleric who dies without heirs. Normally, their property would 'succeed' to the *fiscus.* Baldus, Angelus, and Bertachini however note that 'The *ecclesia* is to be preferred to the *fiscus* in the succession of the property of clergy.'[501] This also applied in cases where a cleric had committed an ecclesiastical crime which carried the punishment of confiscation or loss of property.[502] And,

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[494] Some scholars like Lunt observe that the Papal treasury is unified. That is, the papal treasury itself does not distinguish between the different 'layers' of its revenues, and naturally does not take into account the metaphysical value of the souls of its treasury. In practice, there are line-items for different revenue streams. But, the line between its *territorial* papal accounts and its other papal accounts could be blurry. The implication is this: despite the fact that the papacy has an indisputable *fiscus* within its territories as the *fiscus* as a proper *respublica,* this *fiscus* might overlap entirely on the books with its *contested fiscus* with respect to its treasury which *all* Christians and Christian states pay into. This is a different degree of *fiscus.* (The historical question is whether this is really reflected in the books.)

[495] The final chapter of this dissertation will turn to the distinction between the *terras Ecclesia* and the *territory* of the Ecclesia. We frequently find reminders from civil lawyers that the Church "nunquam habuit, nec hodie habet (tanquam Ecclesia) territorium, id est, ius terrendi". Johannes Limnaei, *Notitiae Regni Franciae,* Lib. III, Cap. IV, p. 65. Johannes' needs to repeat this strong claim because there was a lingering 'rumor' (perhaps just in the *pro et contra* style of the jurists) that the *Ecclesia* did. Furthermore, Jacob Pignatelli discusses the nested territoriality of the *Ecclesia* and ecclesiastical jurisdiction extensively.

[496] The analogy Petrus draws is worth closer attention. When, for example, people talk about the 'citizenry' (*civium*) of a place, they mean to talk about the *civitas.* But whether this includes the church and its officials seems to be up to city statutes. Petrus de Ubaldis, *Tractatus Super Canonica Episcopi,* Fol. 240, n. 40.

[497] But notice the imprecision across centuries (obviously) which might cause confusion. Wilks, p. 36: "Nor can there be any doubt that Augustine had used the notion of a thesaurus Ecclesiae on many occasions."

[498] Cited above, in the *Capitulare Franconofurtense,* Hincmar's *Collectio de ecclesiis et capellis,* and the example of the prohibition of the Council of Agde (506).

[499] Theological doubts about Church property stretch back to the ascetics in Early Christianity. In administrative statutes from the 6th century onwards, clerical possession of property seemed to be constantly under regulation and suspicion. In the 14th century, the 1339 Girona synod prohibited clerics from purchasing property *for their wives* within the parish to discourage the public display of clergy starting and keeping families. See Michelle Armstrong-Partida, *Defiant Priests: Domestic Unions, Violence, and Clerical Masculinity in Fourteenth-Century Catalunya* (2017).

[500] Council of Agde (506) and many others.

[501] Bertachini, *Repertorium,* at 'Ecclesia'.

[502] Gloss at X.3.08.05, 'Praeter eius': "Item argumentum est hic quod bona clerici damnati devoluenda sunt in fiscum ecclesia."

canon lawyers like Antonio de Butrio—either cautiously or without much note—used the language of the *fiscus* to describe this relationship to clerical property.[503]

These cases of succession were common and many serve as clear examples of conflict between temporal and ecclesiastical authorities on many fronts. First, they help draw the boundaries of judicial authority in a spatial or geographical dimension and a hierarchical one—who and where is the final destination of property of this kind; how far does their reach extend? Does their function as final destination imply a permissive licensing of all other property, regardless of whether that has any grounding at all in law? The *ecclesia*'s privilege over the property of their clerics was more than just a simple feature of their organizational structure. It was, by necessity, a privilege which carved out a secondary public space, within which they were the *fiscus.* An example might help illustrate this point.

One case recorded in the *Rota Romanae* regarded an individual who died without an heir. His property was seized by the secular ruler (*principis secularis*) as a matter of intestate succession; the Fisc steps in and 'succeeds' where no others can (*fiscum debere succedere deficientibus caeteris*). The ecclesiastical *curia* contested this claim, arguing that the deceased had been a cleric, and that their property ought to be applied to the Church and the *curia* because it was clerical property. The case turned on whether the individual could be proven to have been a cleric. If he was, then the *curia*'s claim was valid because the *ecclesia* has a *fiscus*. The rest of the brief case attempted to tease out the burden of proof required to show that he was or was not a cleric.[504]

In his practical compendium of criminal law and procedure, Diaz asked whether ecclesiastical judges could, as an imitation of civil laws (*imitando leges civiles*), punish a cleric in the same way and with the same consequences as temporal judges could punish a lay-person. In other words, could the ecclesiastical court apply the punishment of confiscation on clergy? The answer was that they clearly could. [505] But even the clergy distinction sidesteps the most interesting case of all: what about the lay person? Other canon lawyers extended this power to apply to lay persons who violated canon law as well.[506] The punishment may have been an "imitation" of civil law disciplinary powers, but in order to make sense of confiscation as a whole the *ecclesia* needed its own imitation of the temporal *fiscus* as the practical place to put the proceeds, and as the theoretical origin of the *right* of confiscation too.

Guglielmo Redoano's argument on this is worth examining closely.[507] The bishop is said to have a *fiscus* because of their powers within the Church and the property of clerics. Redoano also says that this is a general custom (*de consuetudine generali*) that the Bishop has a *fiscus,* or that their Church does. But where Redoano goes next is even more important. He works backwards from this general custom to radically expand the appropriate vocabulary to discuss the role and position of the Bishop. The Bishop, he says, has *merum* and *mixtum imperium,* because the general conclusion of jurists had been that those who have *merum* and *mixtum imperium* have a "fisc". From this *imperium* of the Bishop, come the rest of the fiscal powers and privileges which the Bishop also possesses, from the right of confiscation or emoluments or *commodo.*

In one particular *Quaestio,* Marcantonio Genua writes that 'whether the Church enjoyed all the privileges of the temporal *fisc'* was a 'notable and very useful question,' especially given

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[503] Antonius de Butrio, *Super Tertio Libro Decretalium* [1503] at X.3.08.05: fol. 57v-58v.
[504] *Rota Romanae Decisiones,* [Lyon 1567], Decisio VII, Fol. 442.
[505] Joannis Bernardi Diaz de Luco, *Practica Criminalis Canonica,* Ch. 124, 'Bonorum Publicatione Puniri', fol. 112v-113v.
[506] Antonius at X.3.08.05.
[507] Gulielmo Redoano, *Tractatus de Spolii Ecclesiasticis,* Quaestio 17, 'De Privilegiis Camerae Apostolicae Circa Spolia', n. 73, fol. 264; Quaestio 251, fol. 296:

the extent to which they were equiparated in famous legal passages from the Code (like C.1.2.23 above). One interpretative approach was that they were equalized (*exaequatus*) only in the explicit sense presented in the law—this was the approach taken by Vasquez, Curtius, and Marcus Antonius Peregrinus. The other interpretative approach was to recognize that the 'sameness of reason' allowed more flexibility for equating the Church and the "fisc", in particular where the question was to the finances of the Church, so long as the law did not prohibit it explicitly elsewhere. In Quaestio 250, Marcantonio Genua writes that the *Ecclesia*—more specifically, the *Camera Episcopalis*—rightly has a *fiscus.* In his *Practicabilia Ecclesiastica* he draws the connection explicitly: if the Church has a *fiscus,* then it must enjoy all of the privileges of the temporal "fisc" to that end.[508]

This might be the limit to the relationship between the *fiscus* and the *ecclesia,* but continued commentaries about the actors *within* the *ecclesia* suggest that there remained confusion about who and what possessed the *fisc* and therefore *fiscal* rights. For example, Franciscus de Ponte, in his *Tractatus de Potestate Proregis Collateralis Consilii* writes that 'all kings have a *fisc*', and so too does any actor which has the status or title of a *rex* or *princeps*; but Bishops and Archbishops cannot 'properly have a fisc' (*proprie fiscum non habere*) because they are subject to the Pope and recognize him as a superior. Yet, he records a host of arguments to the contrary—that indeed Archbishops and Bishops themselves can also be said to possess a *fisc* and the fiscal rights attached to it.[509]

*Territoriality: The Provinces of the Church*

Only when we have understood the logic behind and consequences of "equiparation" can we be sensitive to how striking the implicit claims are in passages of medieval legal commentaries when jurists step from considering the *civitas* in one sentence to the *ecclesia* in the next, even if the author explicitly resists the implication. In his treatise *De Praescriptionibus,* Balbus writes that the city which does not recognize a superior by law or by fact is said to have a fisc, for the city itself *is* a *fisc* (*nam ipsamet civitas est fiscus*). From this, he writes, it is inferred that in all the provinces of the church (*provinciis ecclesiae omnia*), any passages referring to the "*fisc*" are understood to be referring to the *ecclesia*. After concluding this stage of his argument, Balbus defers through citation on the question of whether the *ecclesia* or bishops can be said to have a *fisc*—those he cited said no, but it is clear why it was an intuitive follow-up question.[510] We find this exception about the *terris ecclesiae* throughout legal commentaries: when, within the context of the *terris ecclesiae,* somebody said the word *fisc,* they must mean the *fisc* of the *ecclesia Romana*.[511] It is also clear then that equiparation was stoking a much larger crisis of legal and political ideas: the church's lands (*terrae*) were sometimes exclusive territorial lands, as in the case of the papal states, but the *terris ecclesiae* was also widely used to refer to land under 'Christian' control. Despite Balbus' suggestion, the word "fisc" spoken in one place might justifiably refer to two places—a territorial temporal authority, inheriting its *fisc* from the Roman *respublica,* and a

[508] Marcantonio Genua, *Practicabilia Ecclesiastica* [Rome 1620]: "Si igitur ecclesia habet fiscum, ergo eius fiscus habet omnia privilegia fisci secularis per approbationem dictarum legum."
[509] Franciscus de Ponte, *Tractatus de Potestate Proregis Collateralis Consilii,* Tit. I, § IIII, ns. 61-69, p. 22-23.
[510] Joannes Francisci Balbus, *De Praescriptionibus,* Pars II, Quint. Prin., ns. 4-5, [Speyer 1610] p. 448:
[511] Bertachini, *Repertorium*, at 'Fiscus': "Fiscus dicitur ipsum commune non recognoscens superiorem, sed in terris ecclesiae dicitur ecclesia Romana."

quasi-territorial ecclesiastical authority, inheriting its *fisc* through equiparation from the same Roman *respublica.*

Where does all of this maneuvering leave us? Who or what has, or is, a *fisc*? The Roman Church is called a *fisc*.[512] The *ecclesia* (universal) has a *fisc*.[513] The prelates of the *ecclesia* have a fisc.[514] And, next, it will be seen that in certain contexts and cases, Bishops and the Episcopal See possess a *fisc* as well.

*Specific Powers or Privileges of the Ecclesiastical Fisc(s)*

Sebastiano Guazzini (fl. 1612) writes that bishops 'today' by custom have the *ius confiscandi.* He continues that 'today', Bishops have by custom the *iura fisci* and the *ius confiscandi* to confiscate goods to themselves (*sibi*) or to their *Camerae,* as all of the canonists had agreed. Any pecuniary penalties could be applied either to themselves or to their *camera.* And further, this was especially true for the goods of delinquent clergy.[515] The Cardinal Tuschi, perhaps unsurprisingly, also thought that the 'Roman Church is called a *fisc*" with respect to its privileges, but that the 'Bishop has a *fisc* and confiscation' (*Episcopus habet fiscum et confiscationem*).[516]

One of the most influential jurists on the subject was Joannes Bernardo Diaz, seen above, and we should notice that his comments are in a collection on practical criminal questions of canon law. He writes that Bishops ought to condemn penalties on criminals to the *camera Romanae*, and not to themselves, even if the custom sometimes concluded that they could (citing Anania). Angelus had argued that the Bishop does not have a *fisc,* and therefore that it seemed that they could not issue a monetary penalty against a cleric unless they applied the penalty elsewhere. And so neither the text of the canon law, the glosses, nor the doctors said that the Bishops had a "fisc".[517] Felinus Sandeus, also widely cited, concluded that the Bishop is not said to properly have a *fiscus.* They could not confiscate property to their own *camera,* and did not have the privileges with respect to contracts that the *fiscus* did. Baldus had said that the Bishop could issue monetary penalties, but that the proceeds had to be applied to the *fiscus* of the Catholic Church and not to their own camera. The reason was that they would then be violating one of the oldest principles in Roman law—that none can be the judge in their own case. Angelus had also said that the Bishop should not keep any of the penalties, but instead imburse them (unless there was an emergency) to the poor. That is, unless the bishop *also* had temporal dominium (*dominium temporale ut latius per eum*).[518]

Sandeus, arguing *pro et contra,* also noted that many had concluded differently, saying that it is well said that any member of the laity can by the *ius confiscandi* have their goods confiscated by the clergy and taken to the *camera* of the Bishop. This is how Imolensis thought about it, whenever the civil law extended to punish and apply to clergy. In the glosses on passages like

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[512] Petrus de Ubaldis, *Tractatus Super Canonica Episcopi,* Fol. 240, n. 39-40.

[513] *Rota Romanae Decisiones,* [Lyon 1567], Decisio VII, Fol. 527, n. 2.: "Ecclesia habet fiscum". And, Guglielmo Redoano, *Tractatus de bonis per personas Ecclesiasticas intuitu Ecclesiae acquisitis post mortem Relictis vulgo Spolia nuncupatis*, Quaestio 17, n. 73, in *Tractatus Illustrium,* Tom. 14, 'De Censuris Ecclesiasticis' [Venice 1584], fol. 213-269; Petri Pauli Parisii, *Repetitio de Praescriptionibus*, fol. 285-286.

[514] Bertachini, *Reportorium,* at 'Ecclesia'. Also, Cardinal Tuschi, Quaest. 112.

[515] Sebastiani Guazzini, *Tractatus de Confiscatione Bonorum* [Lyon 1676], p. 19, ns. 1-13.

[516] Tuschi, Conclus. 396.

[517] Joanne Bernardo Diaz, *Practica Criminalis Canonica,* fol. 117v. Also, Ch. 145, n.2, where Diaz gives a full narrative of the changes that have taken place to the standard legal thought on the *fiscus.*

[518] Sandeus at X.1.31.13, n. 11.

these, some people thought that the *fisc* was meant to be the *fisc* of the Pope. Others, like Buttrigarius, thought that the *fisc* was meant to be the *fisc* of the Bishop. Sandeus concludes that it seemed more likely that Bishops possessed a *fiscus,* which had all the rights of a *fiscus,* especially considering the mechanics of episcopal administration as frequently settled by the *Rotae Romanae.* There, multiple decisions had firmly concluded that the Bishop's *fiscus* could succeed to the goods of clergy if intestate, and that they properly were applied to the *curiam ecclesiasticam* and not to the *fiscis principis.* This was the sense in which earlier authors like Albericus de Rosate had defined the word *fisc* in their dictionaries, even if Albericus himself thought that this was not the proper signification of the word. Sandeus concluded, tracing with the words of Franciscus Pavi, an auditor of the Rota Romanae, who said that "*de iure hodie de consuetudine generali episcopis habet fiscum*"—'by right today and by general custom, the Bishop has a *fiscus'*.[519]

Marco Antonius Peregrinus (again, widely cited)[520] writes that it's not a question whether the bishop has the *iura fisci* and *ius confiscandi sibi* or their *camera.*[521] Jurists had concluded that the Bishop condemning pecuniary penalties ought to apply them to the *camera* of the Roman Church and not to their own *camera,* because they could then be the judge in their own case if it was otherwise. Goods contracted with the Bishop himself were not *tacite Hypothice*—they were not real security kept by the debtor under a hypothecary agreement—because the law said that these conditions were null.[522] There are only two solutions which make sense: either the bishop has the 'right of temporal *dominium*' united with their spiritual authority and can apply penalties to their own treasury, or they don't, in which case they might be able to 'infiscate' (*infiscare*) but not 'confiscate' the property—they were obligated to immediately transfer or sell them, and apply the proceeds to pious uses.[523] There, the canonists also say that Bishops who do not have territory cannot confiscate immovable goods, because confiscation only exists through the possession of the "*ius terrendi, merum imperium, et iurisdictionem*". Heresy is the most notable exception to this general rule.[524]

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[519]Sandeus at X.1.31.13, n. 11; Joannes Franciscus Pavinus, *Rotae.* Also, Prospero Fagnani, *Commentaria in Quintum Librum Decretalium,* [Coloniae Aggrippinae 1704], 'De Poenis', Caput II, n. 8, p. 282.

[520] In addition to jurists, Kanrotowicz, 170, fn. 246. Peregrinus, *De iure fisci,* Lib. 1, n. 8: "Fisci autem res sunt, quae in Principatus sunt patrimonio ... quorum administratio, quasi stipendia laboris, in usum et usufructum Principi concessa est, pro tuitione imperii et populorum bono regimine."

[521] Marco Antonius Peregrinus, *De Iuribus et Privilegiis Fisci,* Lib. 1*,* n. 104-105.

[522] This is the minor argument again. D.20.2.3.1—pupils cannot mortgage property, no matter how free they might be in their peculium.

[523] These had all sorts of restrictions and requirements. Bartholomaei Bertazolli Ferrariensis, *Tractatus Clausularum Instrumentalium* [Frankfurt 1599], Clausula II, Glossa II, p. 102. Here is the broad summary. The goods of clergy pertain to the *fiscus* of the church, but nobody really understands this to be exclusively the *fiscus* of the Roman Church. The opinion of the canonists is that it is about the *fisc* of the college of Bishops, and so Bishops by law ordinarily have "fiscs" and the *iura fiscalia.* Furthermore, some Bishops are magistrates (*maioribus magistratibus*) and have *merum et mixtum imperium,* such that they preside over their *civitas* and diocese. The bishop is even compared to a guardian (*praesidi*). With this jurisdiction, they have the power to induce pecuniary penalties and apply them to their *camera,* even if they are bound to convert those penalties to 'pious uses'. Other canon lawyers assumed the *iura fiscalia* of the Bishop, and asked about the details of the procedure for a Bishop to "infiscate" the goods of a delinquent cleric. Marco Antonius Peregrinus, *De Iuribus et Privilegiis Fisci,* Lib. 1*,* n. 104-105: 'But on the contrary, a ruling was made in favor of the bishop. There, it is stated that the possessions of a condemned cleric belong to the *fisc* of the Church, and although some understand it to refer to the *fisc* of the Roman Church, and the opinin of the canons is that the Bishop, as the one collecting for the *fisc,* has the ordinary right to the *fisc* as well as fiscal rights (*iura fiscalia*); also, Franciscus Lucanus, *Tractatus de Fiscus.*

[524]Marco Antonius Peregrinus, *De Iuribus et Privilegiis Fisci,* Lib. 1*,* n. 104-105: "Ubi inquit quod Episcopus non habens territorium non potest confiscare bona immobilia." What is interesting here is that it is unclear when and where Bishops would have *territorium*; they often have or hold feudal land grants, or manage large dioceses. But ordinarily

Peregrinus clarified that jurists ought to focus on the kinds of *fisc,* not the kinds of actors holding the *fiscs:*

> And I ask how many kinds of *fisc* there are. Baldus responded that there are two kinds—general and particular. Of the general kind there are the *fisc* of the Pope and of the Emperor, and you ought to prove this because the Pope is in every way the proxy of Christ, and through him the Church is ruled, and everywhere has the *fisc,* because the Church is everywhere. In the same way the Emperor has the *general* kind of *fisc*, because he has the charge to lay the foundation for fiscal rights everywhere and everyplace. Rightly, then, [some people *do* have the particular kind of *fisc*]: Kings, Princes, Republics, and Free Cities'.[525]

Even these pronouncements are general and ambiguous, and unless there was a particular case pertaining to a particular privilege of the *fisc,* it was sufficient to not in passing that the church did or did not enjoy the privileges of the *fisc* while pivoting to a different point entirely. This was often the case—the Church's possession of a *fisc* was merely an argumentative step towards stressing or striking down its temporal and ecclesiastical rights and privileges.

It took the patience and expertise of a jurist like Nicolaus Everardus (1462-1532) to parse particular privileges and determine the extent to which the equiparation held in practice.[526] For Everardus, the method of argumentation (*arguendi modus*) which moved from the *fiscus* to the *ecclesia* or to a 'pious cause' was both 'frequent and very useful', because the many privileges of the *fisc* had been 'subtlety and astutely counted' by jurists.[527] Unless the law said otherwise, the comparison between the *ecclesia* and the *fiscus* could be drawn '*ad infinita*'. There were six 'sweet and singular (*pulchra et singularia*) privileges of the *fiscus*', all highly technical: (1) The fisc must be paid by a debtor's estate even if it consumes an inheritance, (2) defendants can be required to provide the fisc with a list of assets, (3) a fisc can legally mix aged goods together with newer ones (like corn) in times of crisis in order to serve the public better and cause less damage, (4) securities granted by the Prince do not extend to the property of the fisc unless expressly permitted by law, (5) the fisc can compel the appearance of plaintiffs in a temporal court, and (6) the fisc benefits from a lower threshold of consent with respect to the release of securities.[528]

From these, Everardus writes that we can 'deduce the utility from arguing from the *fiscus* to the *ecclesia* or pious cause', and that doing so results in a number of practical applications for use in daily proceedings (*quotidiana exempla*). In accordance with the privilege of the fisc to enjoy a presumption in its favor with respect to wills and testaments (1), the *ecclesia* enjoyed the same presumption. If there were two wills and it was unclear which was completed first and last

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these are not "territory". Within the Papal States, the Roman Church has a "territory", but this is not the context Peregrinus seems to have in mind. Peregrinus continues: "Quia confiscatio sit per habentem ius terrendi merum imperium et iurisdictionem. Fallit secundum eos in crimine haeresis."

[525] Also note this sense of both territoriality and breaking through territoriality. The church is everywhere.

[526] Nicolaus Everardus, *Centum modi argumentandi topicorum* [1545], 'Locus a Fisco ad Ecclesiam vel Piam Causam', Arg. 26, pp. 201-207. See also Everardus, *Loci Argumentorum Legales* [Lyon 1568].

[527] Everardus here has in mind Baldus at C.4.39.1; Saliceto at C.7.73.7. "Et iste arguendi modus a fisco ad ecclesiam vel piam causam est frequens et valde utilis, quia multi sunt privilegia fisci enumerata subtiliter et magistraliter..."

[528] On (3), Giovanni Francesco de Ponte writes that 'A *civitas* like a *fisc* can in times of scarcity, to cause less damage, mix up old and corrupted corn with new corn and distribute it amongst citizens and subordinates in a way consistent with the law'. Giovanni Francesco de Ponte, *Tractatus De Potestate Proregis Collateralis Consilii et Regni Regimine,* [Naples 1611], Fol. 48-49.

because they were made on the same day, they had to be merged or averaged together in accordance with the civil law. But if one of the wills stated a gift to the church or to a pious cause, that will was taken to have precedence. In accordance with the privilege of the fisc to request lists of assets from individuals (2), the *ecclesia* in relation to a 'pious cause' can oblige the same list from a trustee. The *ecclesia* could compel the appearance of plaintiffs before a judge (5) and enjoyed the same lower threshold for consenting to a release of security or debt (6). They also, Everardus observes in passing, like the *fiscus,* could conduct business on holidays where all other business was prohibited. Everardus concludes by reminding his reader that the equiparation doesn't always produce consequences beneficial to the *ecclesia*: the *fisc,* and thus the *ecclesia,* had to play by the rules of the *ius commune* if they bound it, unless there had been a *ius speciale* carving out exceptions for the *fiscus* or *ecclesia.*[529]

The *ecclesia* therefore possessed not only the name of *fiscus* by the 15th century, but could on those grounds possess as many of the fiscal rights as they desired to claim possession to. The chief of these, I will show next, is the *ius confiscandi*, not only one of the most frequently claimed *fiscal* rights of the Church, but one of the most long-lasting medieval *institutions* enabling inquisitions, funding colonial projects, and motivating early modern political theorists of religious toleration who argued not only for the liberty of conscience but the liberty of property rights free from potential confiscation for the exercise of their right of conscience.

**Section IV: The *ius confiscandi*—a case study**

The *ius confiscandi* is the formal right to confiscate property. As an action, it was called the *publicatio bonorum*, effectively the 'making public' of goods. Property that was confiscated or made public was done so either as a punishment for crimes against the state or for the sake of public utility. The *ius confiscandi* was thus intertwined with exercising effective criminal jurisdiction and pitted the state against absolute rights to private property; that is, where the state possesses a dormant right to confiscate property as potential punishment, the right to private property of individuals is neither absolute, nor secure, and is dependent on the judgment about and exercise of the *ius confiscandi.* It should then be no surprise that when jurists wrote about the potential sovereignty of political actors, they often paused to explicitly comment on whether that actor possessed or did not possess the *ius confiscandi*, and how it acquired it.

When Peter Paul of Paris wrote about the Duke of Milan, whose power was equivalent to the Emperor within his kingdom, Peter adds, 'specifically, that he has the *ius confiscandi*'.[530] Legal commentaries on communities, often cities, which did not 'recognize a superior' and their rights to confiscate property were extensive.[531] In the case of Milan, even those who had resisted

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[529] Nicolaus Everardus, *Centum modi argumentandi topicorum* [1545], 'Locus a Fisco ad Ecclesiam vel Piam Causam', Arg. 26, p. 207: 'You should know that this is not always a good consequence. The law speaks in terms of the *fisc,* and so it does not apply to private matters. On the contrary, the opposite effect is valid. Just as it is in the *fisc,* so it will apply to private matters, unless there is a specific cause or reason in the *fisc,* or unless it is specifically determined otherwise in the laws regarding the *fisc.* The *fisc* operates under common law (*iure communi*) unless there is evidence of a special law (*iure speciali*).

[530] Petri Paul Parisii (Frankfurt 1590), *Consilia,* Vol. I, Cons. 1. The Duke of Milan's authority within and against the Empire was a frequent subject for jurists. See Baldus' many *consilia.* On Gian Galeazzo Visconti and the origin of Milan's feudal and civil authority, see: D.M. Bueno de Mesquita, *Gian Galeazzo Visconti, Duke of Milan (1351-1402)* (Cambridge: 1941); F. Cognasso, 'Il ducato visconteo da Gian Galeazzo a Filippo Maria', in *Il ducato visconteo e la repubblica ambrosiana (1392-1450)* (Milan: 1955), pp. 296-304.

[531] See for example, Baldus at C.6.24; C. 6.35.4; C.7.30.2; C.10.1; C.49.3; C.6.62.1; Bartolus at C.10.1.

application of 'fiscal' language to non-imperial authorities recognized that the Duke was '*rex siciliae in regno suo',* and that their 'rule' came with the presence of a *fiscus,* and with the *fiscus,* the *ius confiscandi* and the 'faculty of *infiscandi bona*'. [532] The underlying argument, as I have shown above, is that they were the right kind of entity which could be called a *fiscus* or possess a *fiscus,* and thus can exercise the rights of a *fiscus.* If, as I also showed, the *ecclesia*—in all its senses—was one of these entities, then it might be the case that the *ecclesia* also possessed the *ius confiscandi.*

What is striking about the *ius confiscandi* is that despite the insistence of jurists that the *ius confiscandi* is wholly reliant on supreme authority and that it was a right attached the possession of a *fiscus,* the Church's exercise of the *ius confiscandi* has rarely been challenged or squared with the Church's possession—or lack thereof—of a *fiscus,* or indeed of the kind of 'sovereignty' necessary to possess one. It is one thing for the Church to *receive* the proceeds from financial penalties or fines. It was in fact a longstanding feature of European legal thought that such fines ought to be split between the temporal lord and the episcopal treasury in the jurisdiction where the fine was levied. [533] This would be compatible with an *ecclesia* which lacked a *fiscus* and had to rely on the secular authorities whose civil authority and treasury were accompanied with the actual political and legal tool of confiscation. But the argument made on behalf of the Church, and accepted by some civil lawyers, was that they *themselves* possessed the right to levy the penalties on their own. This was a different kind of claim altogether.

In historical accounts of the Inquisition, this right is largely taken for granted as being a radical theoretical shift. Scholars note that it was a mixed—secular and ecclesiastical—right to punish heretics, and that though it originated as a punishment wielded by temporal rulers in their role as protectors of the faith, the Church quickly stepped in and asked for a cut of the proceeds. King Roger II of Sicily seems to be the first to have applied confiscation as a routine punishment for heretics in his territory.[534] The Council of Tours in 1163 demanded that secular princes imprison heretics and confiscate their properties.[535] In a decretal of 1184, Pope Lucius III argued

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[532] Petri Paul Parisii (Frankfurt 1590), *Consilia,* Vol. I, Cons. 1, ns. 25-26. Peter cites a number of interesting sources: Paul de Castro, Cons. 225; Angelus, Cons. 193, 'in casu accusationis'; Alexander, Cons. 2, 'cum aliis adductis'; Socinus, Cons. 3, Col. 6 'postremo' and Cons. 66, Col. 6, nu. 26; Francuscus de Cursius, Cons. 48, Col. 10, Cons. 49, Char. 9, Col. 2, Ver. 9 'ostenditur' and Cons. 65. As before, I will set aside the rest of the question of whether cities or free peoples can confiscate goods. As a right bundled together with other *regalian* rights, the only question was whether a community was properly a 'rex'. If they were a *rex,* they must have a *fisc,* and all the rights which attached to their status, including the *ius confiscandi.* Any controversy in these cases was instead directed at history: did they indeed 'not recognize a superior', or were they actually just 'pretending to be in liberty'? Further, the more interesting question is whether other kinds of *non*-superior actors possessed the *ius confiscandi*. Bartolus at C.10.10, n. 7: 'I ask whether a city can confiscate property for crimes? It is stated that not by the same reasoning, and I think differently in cities that today do not recognize a higher authority either by law or in fact, and thus the people are free (*liber*). The same city itself is the *fisc,* and can therefore seize abandoned property and also property from a crime like the *fisc.* The same applies if the city had a privilege granted explicitly or if all *regalia* were simply granted, as in feudal cases.' See also Alexander, 'Utrum civitates habeant ius confiscandi'. Also, recall Bertachini, *Repertorium*, at 'Fiscus': "Fiscus dicitur cuiuslibet civitatis non recognoscentis superiorem".

[533] See Kantorowicz, pp. 174-175, citing [Edward and Guthrum, Prol., cc.2 and 12; VIII Aethelred, cc.2, 15, 36, 38; I Canute, cc.2 and 4; ed. Felix Liebermann, *Die Gesetze der Angelsachsen* (Halle, 1903), I, 128f, 134f, 263, 265, 267, 280f.] [Examine].

[534] Donald Matthew, *The Normal Kingdom of Sicily* (Cambridge University Press: 1992), pp. 186-187; Edmund Curtis, *Roger of Sicily and the Normans in Lower Italy, 1016-1154* (New York and London: 1912), p. 355 *et passim.*

[535] Robert Somerville, *Pope Alexander III and the Council of Tours (1163)*: *A Study of Ecclesiastical Politics and Institutions in the Twelfth Century* (1977), especially 54-55: "The synod also condemned 'all heretics,' and assorted thieves and pirates including those selling military supplies to the Saracens, 'on the model of the decrees against such

that the Church ought to receive the benefit of confiscation.[536] Innocent III of course famously demanded confiscation in papal and temporal territories.[537] The punishment of confiscation was not surprising to contemporaries of these developments—as the famous historian of the Inquisition Henry Charles Lea wrote, it was "an ordinary resource of medieval law", practiced in England under King Alfred, France, and in Germany under the feudal law, for crimes of treason, false-witness, homicide, and rape.[538] The crucial theoretical rupture is that the *ius confiscandi* was a right of sovereigns; either the Church was a sovereign too, or its usurpation of a particular right of sovereignty was so effective that its authority to exercise it was largely unquestioned.

Claude Tholosan, a judge in Briançon, and author of *Ut Magorum et Maleficiorum Errores* (On the Errors of Magicians and Witches), [539] highlighted that both the civil and canon law seemed to treat heretics and the 'magicians' or 'enchanters' of roman law as traitors:

> It would seem that the action taken against these persons is that of *lesae maiestatis,* because they have expressly plotted and machinated against the supreme majesty (magestatem) in such cases just as if they were to have machinated against the temporal prince.[540]

Tholosan continues, however, by noting that:

> the punishment of confiscation of property is reserved exclusively for the temporal prince who does not recognize a superior, because this 'right' (*propriete*) is attached to the *fiscus,* and it is up to him to deal with the crime of *lesae maietsatis;* it concerns him directly, as the immediate vicar of God, and that whatever he does, he does as God, not as man.[541]

Confiscation was a right of sovereigns, and Tholosan doubted whether princes were in the habit of granting special concessions to subordinates to try cases of treason or order the confiscation of property.[542] A note in the margins, citing the *Code* and Joannes Andrea's comments on the *Novels*

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action from the Lateran council.' Their goods should be confiscated; they should endure servitude; and secular princes who have been informed by the Church but who have not bothered to move against them (*iurisdictionem temporalem in eos non curaverunt exercere*), should be censured..."

[536] Pope Lucius III, '*Ad abolendam',* November 4, 1184. Incorporated in the Fourth Lateran Council (1215) by Pope Innocent III.

[537] Pope Innocent III's decretal *Vergentis in Senium* (1199)*,* later X.5.7.10.

[538] Lea, *A History of the Inquisition in the Middle Ages,* Vol. 1, pp. 501-502.

[539] Martine Ostorero, Agostino Paravicini Bagliani, Kathrin Utz Tremp, eds. *L'Imaginaire du Sabbat: Edition Critique des Textes le Plus Anciens (1430c. – 1440c.)* (Lausanne: Université de Lausanne,1999). Tholosan, IV.31, 'L'Exercise de la Justice du Prince', pp. 362-416.

[540] Tholosan, IV.31, p. 408: "Videretur eciam dicendum quod contra tales esset procedendum tamquam contra reos lese magestatis, quia tales moliti sunt et machinati expresse contra suppremam magestatem in casibus in quibus tale eciam crimen comictitur si machinetur contra terrenum principem." Tholosan gestures at C.9.18.7 where torture is permitted for 'magicians' and other 'enemies of human kind' regardless of their status or nobility, which otherwise would exempt them from torture.

[541] Tholosan, IV.31, p. 408: "... et solo suppremo principi terreno non recognoscenti superiorem conmpetetur vindicta et vendicacio bonorum quia talis proprietas habet fiscum et ei de crimine lese magestatis pertinet cognoscere, quia ipsum immediate concernit, quia est vicarius Dei immediatus, et quod facit, ut Deus facit, non ut homo."

[542] Ibid. Franck Mercier observes the importance of confiscation in the minds of the witnesses to the Arras trials. On his reading of Tholosan and confiscation, see especially Ch. 7 in *La Vauderie d'Arras: Un chasse aux sorcières à l'Automne du Moyen Âge,* pp. 139-162, esp. pp. 160-162. Mercier cites F. Autrand, "Le Concept de souveraineté dans

and the *Liber Extra,* however, notes a practical 'split' (*sisione*) of the Empire and its rights, which either allow cities or princes that do not recognize a superior to wield the rights of the Emperor by prescription, or ecclesiastical statutes which divvy the goods of heretics into three parts—for the Church, the inquisitors, and the temporal officials. From this, it seems clear that the *regalia* are sometimes exercised or executed by others.[543]

Yet, the judgment in the Arras trials issued on July 7, 1460 explicitly identified the confiscation of goods for crimes in order to continue to fund the Church's project of policing orthodoxy:

> All of your property, of each of you, is to be confiscated, in abhorrence of such a crime; immovable property is [to be applied to] the *fiscus,* and movable property rightly applied for the purpose of offsetting the cost of the process and burden of the Holy Inquisition.[544]

Confiscation was applied, with regularity, from the 12th century onwards, but the justification offered in the Arras judgment and other Inquisition trials that the confiscation was connected to *funding* the Inquisition was a later addition.[545] The transformation of the *ius confiscandi* and those who would seek to wield it begin with medieval legal theories about heresy.

*Heresy*

I have already discussed the connection between heresy and treason—divine treason and temporal treason—in the Church's claim to temporal authority and jurisdiction. The legal and practical mechanics of heresy and confiscation need closer explanation.

First, why was confiscation linked so heavily to heresy? In part, confiscation was the fitting punishment for heresy because it was also the punishment for treason. As treason against Divine majesty, the goods were steered towards the ecclesiastical treasury rather than the temporal treasury. Canonists argued strongly that the crime of heresy was a purely ecclesiastical crime, and so even with respect to confiscation the canon law rules and procedures ought to be applied over

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la construction de l'État en France, XIIIe-XVe siècles", S. Bernstein, P. Milza, *Axes et méthodes de l'histoire politique en France*, (Paris 1998), pp. 149-162.

[543] Tholosan, IV.31, p. 410, '*En marge du f. 79v*': 'Ut suppremus superiorem non recognoscens dici debeant fiscus et vicarius Dei, adduntur ista: Sisione imperii causante ... et ibi notatur per Johannem Andreee in *Novella* quia possunt intelligi de principibus et civitatibus non recognoscentibus superiorem, qui sibi regalia prescripserunt; patet quia certe sunt constituciones ecclesiastice extravagantes per quas bona hereticorum in tres dividuntur partes: una applicatur Ecclesie romane, alia inquisitoribus, alia officiariis temporalibus pro expensis et laboribus exequcioni, per que patet regalia non semper dominis utilibus applicari, sed interdum directis dominis, et quibus principalius pertinet vindicata delictorum per quam bona delinquencium confiscuntur..."

[544] Returning to the Arras example and the July 7, 1460 judgment: "Omnia bona vestra et cuiuslibet vestrum in detestationem tantorum criminum confiscata pronunciantes, et ea quoad immobilia fisco, mobila vero pro sumptibus procesuum et onere Sancte Inquisitionis supportandis nobis applicantes."

[545] It may have begun as a response to growing costs of the inquisition, coupled with ambiguous and thorough inquisitors who recorded to the penny their expenses. We find one example in the character of Bernard Gui, who was made famous by Umberto Eco's *The Name of the Rose.* Gui records the expenses of burning four people in 1323 at Carcassone, from the wood, vine-branches, straw, stakes, and ropes, to the salary of the executioner. In total, the proceeding cost 8 livres, 14 sols, and 7 deniers. For Gui's theory and methodology of prosecuting heretics, see Gui, *Practica officii inquisitionis heretice pravitatis.* For the Carcassone affair, see *Comptes royaux* (1314-1328), ed. François Maillard (Paris, 1953), Vol. I. I owe this particular example to Murphy, *God's Jury.*

civil ones, given that both the laity and clergy are subject to the jurisdiction of the Church.[546] Thomas Delbene offered a defense of the appropriateness of the confiscation for heretics, beyond the connection to the civil law treatment of treason cases. First, Delbene argues that confiscation was the optimal punishment for heretics because 'humans fear most of all the loss of their own property *(bonis*)'. Second, he writes that heretics were active enemies of the Church; by depriving them of their temporal goods 'they are made weaker in their war and assault on the Church'.[547] Delbene does not take note, as some modern social scientists have, that many of the victims of the Inquisition and of confiscation were of the lowest classes of late medieval and renaissance society and were therefore already manifestly weak in their assault on the Church. But other canonists would likely note a corollary to Delbene's argument—that even poor heretics pose an active threat to the Church as like a disease or poison. Confiscation, alongside excommunication or temporal punishment, was aimed at isolating and starving heresies of their resources. Delbene finishes where the practice of confiscation has its origin—the crime of treason.

Albericus de Rosate (1290-1360), in a comment on the *Digest* treating the rights of the Roman Imperial Treasury (Dig. 49.14), argued that in line with civil law arguments about treason and canon law arguments about heresy, any heretic or traitor loses their rights to property from the moment that their crime begins (*ex tempore quod incidit in haeresim*); 'From the day that the heretic falls into heresy, it seems that their administration [of property] is forbidden (*interdicta*) and consequently their faculty and disposition of property (*facultas et dispositio dominii*) are taken away from them.'[548] Thomas Delbene likewise claimed that the goods of a heretic could be confiscated from the day that they fell into the heresy.[549] Delbene cited, among other things, a Papal Bull from Pope Martin V "Inter cunctas", which itself was a series of questions for those who followed the opinions of John Wycliffe and Jan Hus.[550] He notes that the principle and logic were identical as temporal treason.[551]

Inquisitorial documents record a slightly different account of the origin of confiscation for the crime of heresy. In one statute, those who are caught with prohibited heretical books or otherwise support heresy incur excommunication and confiscation (*eorum bona confiscantur*). If they are a 'base person' (*si viles sint personae*) they can be punished with physical beatings. But, if they are honorable (*honestiores*), they can be fined according to the discretion of the Inquisitors (*pro Inquisitorum arbitrio*).[552] Status protected an individual from physical punishment but opened

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[546] Delbene, Dubitatio 106, n. 7: 'Furthermore, in the execution of such punishment (namely the confiscation of the goods of heretics), attention should be given to the laws, not civil laws, but ecclesiastical laws, because the crime of heresy is purely an ecclesiastical crime. However, since the crime is ecclesiastical, both laypersons and clerics are subject to the laws and jurisdiction of the Church.'

[547]And third, because it fits the crime: confiscation was applied for 'human' treason, and so it should be applied in cases of 'divine' treason. Delbene, Dubitatio 106, n. 8.

[548] Albericus de Rosate at D. 49.14.43.

[549] Delbene, Dubitatio 106, n. 1: "bona haeretici sunt ipso iure confiscata a die quo quis incidit in haeresim."

[550] Pope Martin V, '*Inter Cunctas',* February 22, 1418.

[551] Delbene, Dubitatio 106, n. 1.

[552] Phillip Limborch, *Historia Inquisitionis, Cui subiungitur Liber Sententiarum Inquisitionis Tholosanae* (Amsterdam 1692) Fol. 218-219, Ch. 14, 'Regarding those who read and retain prohibited books: Those who bring into the land of the faithful those books of heretics that are prohibited due to heresy or false and suspicious doctrine become supporters of heretics and incur excommunication, and there goods are confiscated. If they are of lowly status, they are subjected to physical punishment, while if they are of higher standing, they are punished with exile according to the discretion of the Inquisitors. However, the punishments do not stop there; they escalate to greater cruelty as the tyranny grows (*gradum parat tyrannis*). If a strong presumption of heresy arises due to the reading, retention, defense, or printing of heretical books, with additional circumstances, torture may then be employed to ascertain the truth.'

them up to financial penalties and provided a net benefit to inquisitors and the Church in a way that torture could not. There was no profit in torturing a 'base person' back into submission to the Church; but there could be profit in identifying heretics who were *honestiores*.

There are three practical elements to the theory and execution of confiscation that canonists, civilians, popes and temporal lords needed to iron out: Who collects? How is it split? What happens if the property falls into the hands of others?

All authorities were bound to police their jurisdictions for heretics. The famous Papal Bull 'In Coena Domini' bound together pirates and heretics as public enemies. In one *quaestio,* Prospero Farinacci argues that associations and communities, including churches, are obligated to 'punish' and 'clean' the community of heretics, partially in accordance with 'Coena'. If they fail to do so, they not only break their oaths and obligations as authorities, but can also lose their ecclesiastical dignities, related powers, and can be suspected of heresy. [553] The specific task of confiscation fell to the temporal authorities. Thomas Delbene specified, however, that the punishment of confiscation in the context of heresy was a consequence of an ecclesiastical proceeding; princes and temporal lords, he writes, cannot exercise the *ius confiscandi* against the will of the Church. From the perspective of the Church, they were the hands to collect the property on behalf of the Church, and little more. After the development of inquisitorial offices, civil lawyers (and occasional canonists) argued that any right or power of confiscation in the context of the inquisitorial process must be delegated from the Church and was not inherent in the offices and charges of the inquisitors themselves; inquisitors could pronounce a sentence, but they still needed executors (often temporal authorities) to execute the sentence. Even when Popes gave extraordinary latitude to inquisitors by delegating the power and jurisdiction of sentencing excommunications or interdicts on those who were uncooperative, inquisitors had no direct claim to the action of confiscation or to its proceeds.[554] Records of oaths administered to jailors also imply that the Church had to remind all of the participants in jailing suspects or heretics that they must resist the temptation of taking anything from those in their charge, even if it seems to be a gift, or even if the prisoner has died. Their property—any and all of it—had to be reported to the Inquisition for proper confiscation to proceed.[555] With this shared responsibility for ordering and executing confiscation, it was a natural progression for Church to lay down rules and audits for ensuring that the secular arm properly and honestly performed their part of the administration of justice.

The papal bull 'Ad extirpanda' assigned the classic three-part division of the goods of heretics—one part for the city where they lived, one part to the office of the Inquisition, and a third part for the Diocese.[556] As Orazio Carpani woud note, this division doesn't necessitate that each of these actors possesses a treasury, or that the Bishop has the *ius confiscandi*, even if to others it

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[553] Prospero Farinacii, *De Haeresi,* Quaestio 182, §2, ns. 15-29.

[554] Peter Clarke writes that "Nicholas IV [1227-1292] often granted more freedom to inquisitors, allowing them to deploy excommunication and interdict against those obstructing their work regardless of papal immunities", but even so inquisitors had no direct claim to the action of confiscation or to the proceeds. Clarke, *The Interdict in the Thirteenth Century,* p. 90. On interdict and ecclesiastical censures in the role of policing and governing the *civitas* see the next chapter.

[555] Oath Administered to Jailor of Inquisition, *Archies de l'Inquisition de Carcassonne,* Doat, XXXII, fol. 125. in Lea, Vol. 1, p. 530. The relevant text of the oath with respect to property reads: quod de caetero non teneat scriptorem aliquem in muro nec equos, nec ab aliquo immuratorum mutuum recipiant nec donum aliquod. Item nec pecuniam illorum qui in muro decedunt, retineant, nec aliquid aliud, sed statim inquisitoribus denuncient et reportent."

[556] Delbene, Dubitatio 106, n. 3.

would seem to be implied.[557] But who was to judge whether this split was being honored? The response of Church authors suggested that this was a live issue. Boniface VII's decree had specified that the execution of the confiscation ought not to be done by a prince or temporal lord *before* the local bishop or ecclesiastical official (with the power to do so) has issued a sentence on the crime.[558] The practical consideration here is obvious—church officials wanted to stop temporal lords and actors from "jumping the gun" before the official sentence had been issued. A charitable reading would be to impute a sense of due process on the proceedings—it would be unjust for rulers to seize property that was not legally seize-able. A more realistic reading would be to recognize that the church had a vested interest in being a part of the seizing process. Without their oversight, what was to stop temporal authorities from cooking the books? Further, temporal officials could not demand that the Inquisitors give account for the goods confiscated—only the Camera could do that and oblige them to *rationem reddere.*[559] Lastly, churches were immune from confiscation even if clergy were the subjects of inquisition.[560]

A royal letter from 1304 suggests that either clarification or incentivization was necessary to ensure that the property did not stagnate and that the proceeds passed into the hands of the proper recipients in accordance with canon law. In particular, immovable property was confiscated by the royal authority; they had one year to sell or alienate the property, otherwise it would transfer to the Bishop of the territory in the second year for the Bishop to sell. Interestingly, if the Bishop failed to sell or alienate the property in the second year, it would pass to the next successor, and so on down the line.[561]

Inquisitors had a target on their backs as the sentencers of confiscation. They could be accused of targeting individuals on account of their property, of seizing their property too

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[557] Orazio Carpani writes that bishops don't have a *fiscus* or territory, or the *ius confiscandi,* even if the *ecclesia* in general has a fisc. Carpani writes that the tripartite division of proceeds from confiscation are to be divided between the *fisc* of the Duke, the Bishop, and the Inquisitors. However, Carpani takes a minority position on clerical property—temporal goods from clerics by ecclesiastical judges ought to be applied to the *fiscus* of the temporal lord, not the *ecclesia.* This was the general custom in France. Carpani, *Commentarii in Quatuor Insigniores Novarum Constitutionum,* 'Tit. De Iure et Privilegio Fisci', n. 32-33. [June 30, 1559]

[558] Delbene, Dubitatio 106, n. 4: "Et postea Bonicacius VIII decrevit bona haereticorum non solum esse confiscanda (quemadmodum decreverant praedecesores) sed etiam esse ipso iure confiscata. Ibi: 'Confiscationis tamen executionem non debere a Principibus et aliis Dominis temporalibus fieri antequam per Episcopum loci vel aliam personam Ecclesiasticam quae si per hoc habeat potestatem sententia super eodem crimine fuerit promulgata."

[559]Delbene, Dubitatio 106, n. 5.

[560]Delbene, Dubitatio 106, n. 6.

[561] [January 23, 1304]: " In hunc modum est sciendum quod immobilia que nobis et successoribus nostris advenient de heresibus et faidamentis hcreticorum debemus nos et successores nostri et tenemur vendere vel alienare infra annum, talibus personis que facient episcopo et ecclesie Albiensi et successoribus suis servicium et alia que tenebantur facere eis veteres possessores pro rebus iisdem; si vero nos vel successores nostri non vendiderimus vel alienaverimus infra annum immobilia huiusmodi, episcopus Albiensis vel successores sui in secundo anno et in tertio accipiet auctoritate propria ilia immobilia. et possidebit et faciet fructus suos, et si nos vel successoxes nostri infra tertium annum non vendiderimus vel alienaverimus predicta ut dictum est, episcopus Albiensis et successores sui ex tunc habeant et retineant auctoritate propria possessionem et proprietatem omnium predictorum pleno jure." We find the same sentiment again in a decree from Phillip: An order had been made "quod nos medietatem bonorum immobilium ipsorum condemnatorum ad manum nostram devenientium tenemur extra manum nostram ponere infra annum, et si infra primum et secundum annum dicta bona non fuerint vendita, idem episcopus in tertio anno dictorum bonorum fructus facit suos, et si bona huiusmodi condemnatorum in tertio anno vendita non fuerint in quarto anno tam in possessione quam in proprietate dictus epsiscopus bonorum ipsorum efficitur dominus in solidum, et habet idem episcopus electionem dicta bona retinendi pro pretio pro quo alii venderentur." Lea, *A History of the Inquisition in the Middle Ages,* Vol. I, Appendix XVIII: "Royal Letters Concerning the Confiscations at Albi" (Doat, XXXIV, fol. 131), pp. 581-582.

ambitiously or against standard procedure, or for skimming proceeds off the top to enrich themselves. These accusations often appeared together. One of the most famous examples of inquisitorial harassment was of Meco del Sacco of Ascoli in the 14th century.[562] Meco was a suspected heretic who was investigated by inquisitors multiple times over the course of his life. After an initial conviction, Meco reconciled with the Church and withdrew to the countryside to build a sanctuary and hospital while promising not to write. As his community grew, Inquisitors turned their eyes on him again and convicted him a second time. Meco appealed to the Pope and his sentence was revoked by Pope Benedict XII. This did not stop Inquisitors from trying him a third time, which Meco again appealed to the Pope, though he would die before Pope Clement VI could ensure his absolution was enforced. As Janine Larmon Peterson notes, "the local Augustinian convent took Meco's side" against the Franciscans, who "in fact had confiscated his property a bit too precipitately while he was away contesting his second condemnation. Meco's supporters were vindicated in 1347, when the very same inquisitor who had sentenced Meco for the final time, Pietro da Penna San Giovanni, was himself condemned for using his office to extort money from the populace."[563]

Finally, what happens if the property of a heretic—movable or immovable—has escaped confiscation for one reason or another? Can that property be prescribed? Prospero Farinacii discusses this question in great detail, concluding ultimately that the Church bore the greater privilege against prescription than the secular authority. Farinacii returns to the original nature of the equiparation of Church and *fiscus* to underscore the unique privilege of the *ecclesia* against prescription. Further, the requirements of the acts of prescription might be different—for prescribing the property of heretics against the secular power, it was not necessary to show that one's use of the property was in good faith. If one was attempting to prescribe property against the ecclesiastical *fiscus,* however, good faith was a necessary component of much higher standards.[564]

*Temporal Usurpations*

As in the case of *imperium* or rights pertaining to kings and sovereigns (*regalia*), a jurist's commitment to whether or not a community could exercise the *ius confiscandi* turned on whether they could acquire and bear *regalia*. Where a strong argument could be made about the temporal independence or rightful authority of the community, it was then assumed that the bundle of rights they could exercise as 'rulers' included the *ius confiscandi*. In one *consilium,* Laurentius Calcaneus (d. 1478) gives the example of the Dule of Milan.[565] In the following *consilium,* Laurentius reminds the reader that it does not matter that the Duke of Milan doesn't possess the *ius confiscandi* exclusively by his own right by virtue of his submission to and recognition of the Emperor as the source of his authority. The Duke was, of course, the *vicar* of the Emperor within his territory

[562] Antonio de Santis, *Meco del Sacco: inquisizione e processi per erasia (Ascoli-Avignone 1320-1346),* (Ascoli Piceno: 1982).
[563] Peterson, "Holy Heretics in Later Medieval Italy", *Past & Present,* No. 204 (August 2009), pp. 10-11. Other examples run in the opposite direction—that politics were more to blame for accusations of fraud or financial malpractice than the evidence for crimes itself.
[564] Prospero Farinacci, *De Haeresi,* Quaest. 190, §9, n. 130.
[565] Laurentius Calcaneus, *Consilia* [1521], Cons. 65, n. 1-3, fol. 123r. Calcaneus' *consilium* is interesting in part because, citing Bartolus, he claims that no 'vicar' of the Emperor can be called a tyrant because they have 'administration of the republic by right'.

*because* of his recognition of the Emperor's authority, and nevertheless possessed the *ius confiscandi.*[566]

At least one jurist was not neutral on the changing customs of the times. In a passage addressing the length of valid prescription against the empire or the Catholic Church, Angelus de Ubaldis doubled down on the supremacy of those two associations. They enjoyed the same privilege *against* prescription, on the grounds that the privilege is reserved 'as a sign of preeminence and superiority' (*praeminentiae et superioritatis*). All this meant was that even the extended window of legal infinity (100 years—longer than the length of a human life, and longer than memory) was not enough to prescribe something against the Church or the Empire. But Angelus does not finish his reflection there. He continues, noting that some jurists had begun to make similar distinctions about the things of a *civitas*—distinctions about the property, the fiscal matters, and even perhaps the public-ness of the *civitas*. But it was 'dangerous' (*periculosum*) to make that argument, Angelus says, because according to Cino the *ius reipublicae* was not valid in any *civitas* other than Rome. However, some cities had thus unfortunately usurped both that legal equiparation and the privileges of the fisc, again according to Cino, because cities do not—and here he means *should not*—possess the *ius confiscandi* unless they have *regalia.*[567]

Jurists were in a difficult conceptual and definitional position. On the one hand, it seemed worthwhile to distinguish the powers and institutions of the Emperor from other powers and institutions which—although perhaps modeled after those institutions, sharing the same operating definitions and principles, and borrowing the same vocabulary—were being used by 'lower' kinds of authorities. Along this line, jurists like Johann Schneidewein (1519-1568) argued that the Emperor alone properly has a *fisc*; other kinds of communities like lords over land, cities, municipalities, and colleges were understood to have a purse (*bursa)* or a coffer (*arca)*. As non-Imperial entities, they did not properly possess a *fiscus* or have the *ius confiscandi* or any of the other privileges of the fisc—that is, unless they actually were an Imperial-like entity (a lord, free-city, free people, who did not recognize a superior, and therefore were *'Rex in regno suo*'. That kings or *principes* possessed the *ius confiscandi* was beyond debate,[568] and so the legal argumentation turned on the status of claimant.[569]

Johann Schneidewein, like the generations of jurists before him, were faced with the mini-Empires and mini-Emperors across Europe; some had won concession from a superior for the privileges they exercised, others had prescribed it. [570] This prescription was confirmed by many jurists, including Baldus.[571] The perfect example was the legal status and rights of Saxon cities. Johann, following the standard argument, recognizes that cities and lords (*dominis*) could prescribe fiscal rights (*Iura Fiscalia praescripserunt*), and thus 'by custom and prescription have the *ius confiscandi*, and indeed the *Regalia*' have also been prescribed. He continues, 'Today, therefore,

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[566] Laurentius Calcaneus, *Consilia* [1521], Consilium 66, fol. 124r-126r. The most interesting part of the *consilium* reads: 'And the right of confiscation (*ius confiscandi*) for offenses is one of those measures to intimidate those who plot against the prince and seek to overthrow the state and disturb the peace. Therefore, if it is possible to punish such individuals, it is also permissable to confiscate their property. Hence, with one grant, that which follows from it is also granted. This is why a delegate has the power to excommunicate anyone, as long as it is within their jurisdiction, even if they proceed somewhat unjustly.'

[567] Angelus de Ubaldis, at C.7.30.1, n. 2-3.

[568] Vincentio de Franchis, *Corpus Decisionum Sacri Regii Consilii Neapolitani* [Coloniae Agrippinae 1599], Cap. 2, n. 5: "Reges habent ius confiscandi."

[569] Nicholas Boherii aligns with earlier jurists who had argued that cities and kingdoms do not have the *ius fisci* unless they also had *merum et mixtum imperium et regalia.* Boherii, *Tractatus de Seditiosis*, starting at fol. 94 and later n. 8.

[570] Johann Schneidewein, *Commentariorum,* Pars Prima, [Argentorati 1571], Fol. 308, n.8.

[571] Baldus at C.4.39.1; Bertachini, *Reportorium,* at 'Civitas'.

by use and custom, those Saxon cities which have *merum et mixtum Imperium* or superior jurisdiction are understood to have the *ius confiscandi*.'[572] German jurist Matthias Coler (1530-1587) used the same example, with more pejorative language. The Roman civil law prohibition of cities claiming the property of the dead, instead of directing that property to the Imperial *fiscus* was wholly ignored 'in Saxon law'; there, cities 'having *merum et mixtum imperium* usurp by custom the *ius confiscandi*.'[573]

In his Rubric of C. 10.1, Joannes de Platea focused on whether the lords of communities, cities and municipalities had by law a *fiscus* and with it the *ius confiscandi.* [574] Like others, he also agreed that cities in Lombardy had *merum* and *mixtum imperium* and *regalia* which had been conceded to them from the Emperor. Cities other than Rome, and specifically cities that do not have *imperium,* do not have a fisc, but they can have a *bursam communem.* And yet he recognizes (with disdain) that *merum* and *mixtum imperium* along with the *ius confiscandi* had been usurped through custom by other cities.[575] Once again, however, the usurpation of the *ius confiscandi* was a part of the broader usurpation (*usurpatum*) of *regalia* or *imperium.*[576]

Where the feudal law had a greater hold and the delineations of superiors and dependents were clearer, the lines of confiscation were drawn more precisely. Jeronimo Olives writes that the *ius confiscandi* belongs only to the supreme prince and the lord King, or others who don't recognize a superior in the use of their *feudo*; nobody has a *fiscus,* then, except the *dominus Rex et princeps supremus.* Any sentence of confiscation of goods from feudal dependents might be executed by the Barons, but the goods were applied to the *fiscus* (and therefore to the Crown).[577] Here, the Church possessed no special privileges, even if the offending vassal was a cleric. Recall the *consilium* of Oldradus above, where he quite sensibly sided with the strength of the feudal lord's right of land ownership. [578]

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[572] Johann Schneidewein, *Commentariorum,* Pars Prima, [Argentorati 1571], Fol. 308, n.8: 'The same applies to cities and lords who have prescribed Fiscal Rights, and thus they have the right of confiscation through custom and prescription, for it is also said that regal rights can be prescribed. ... Therefore, today, by Saxon custom and usage, it is understood that those who have pure and mixed power (*merum et mixtum imperium*), or superior jurisdiction (*superiorem Iurisdictionem*), are considered to have the right of confiscation.

[573] Matthias Coler, *Decisiones Germaniae* [Leipsig], Decisio LXXII, 'De bonis vacantibus et iure confiscandi', pp. 244-246: 'Because cities, having *mixtum et merum imperium,* by custom, exercise the right of confiscation, it follows that the property of a deceased person without an heir, or perhaps because they have brought death upon themselves out of a guilty conscience, belongs to the *fisc* of the prince.

[574] Joannes de Platea, Rubric at C.10.1: 'Fifth, I ask whether lords today and communities of cities and municipalities have the *fisc* and the right of confiscation by law for the reasons which confiscation is lawful'. Joannes continues, 'However, this does not apply to the cities of Lombardy, to which the Emperor granted pure and mixed imperial power and regalia ... Among these regalia are included the right of confiscation and the seizure of goods.'

[575] Joannes de Platea, Rubric at C.10.1.

[576] Alphonso Moditio, *Dubitationes et Resolutiones* [Turin 1610], 'Dubitationes in § Plebiscitum', and especially Dubitatio 46, n.9-10: 'Cities do not have the *ius confiscandi* unless they have regalia; Italian cities do not have a *fiscus* or the *iura fiscalia* unless by privilege of custom or prescription.' ; See also Jacob Cohellio, *Commentaria De Bono Regimine Rerum ad Universitates in Bullam X Clementis Papae VIII* [Rome 1656], § 1, Glossa 2, Cap. 7- §1 Glossa 5. I discuss Cohellio in the introduction to this dissertation and in the chapter on walls.

[577] Jeronimo [Hieronymi] Olives, *Commentaria* [Madrid 1567], Cap. 6: 'If the perpetrator (*homicida*) himself cannot be held accountable, all his goods shall be confiscated and applied to the court (*curiae*). Does that mean that according to this chapter, that barons have the power of confiscation and can impose the penalty of confiscation? The response is no. The right of confiscation is the right of the supreme ruler, namely the king or another who does not recognize a higher authority in the feudal domain. ... And whether judges today can confiscate, even though they are in a supreme position, is touched on by Andreas de Isernia.'

[578] Oldradus, Cons. 17. Fol. 8v-10r. Compare to Francisco Albitio, *De Inconstantia in Iure Admittenda* [Amsterdam 1683], Cap. 22, n. 94, p. 144.

*A Tool of Public and Private Discipline:*

Heresy and treason may have been the theoretical origin of the penalty of confiscation, but as early as 1422 we find an expansion of crimes which might induce confiscation. One constitution from Milan began by detailing a host of crimes which deserved the death penalty: treason, counterfeiting currency, poisoning, homicide, assassination, rape of virgins, rape of 'honest and decent-living woman', robbery, arson, and counterfeiting official seals or insignia.[579] The second set of crimes deserved the penalty of confiscation:

> Likewise, false statements about the instruments and writings of the Prince, hostile invasion *more in Dominium nostrum,* and in public highways or roads, and even offences committed which according to the *ius commune*, *ius municipali,* or out of the present *constitutiones,* are imposed with the penalty of the confiscation of goods. Any goods and *iura* of all of those criminals once located are to be made public, incorporated, and confiscated by the *Fisc.* These goods are understood to be apprehended from the day that the crime was committed, even if, through ignorance or negligence or the impossibility of Officials, they were not at they time rightfully and actually apprehended. The law does recognize [the right of succession to heirs], except in the case of the crime of treason, as provided in the *ius commune.*[580]

Angelus de Aretina (or Angelus Gambellionibus), in his *Tractatus de Maleficiis*, observes that judges can confiscate and publish goods in some cases which the laws provide, like when someone is accused of incest, or when somebody is deported. Even when the law doesn't necessarily supply confiscation as a penalty, the judge did have *arbitrio et officio* in the case of extraordinary crimes or even in ordinary crimes by accident (*per accidens*). In these cases the judges did need to be established from the will and power of the prince in order for their sentences to have validity. The publication of goods is a consequence of *merum imperium,* and so any judge who possessed through delegation *merum imperium* could 'make goods public' (*facere publicationem bonorum*). The claim here is that the exercise of the punishment of confiscation is ultimately delegated from the Papal or Imperial *camera,* and as such, the goods cannot be applied to the local cities. They lack *regalia,* and as such the right and the place to confiscate goods. [581]

Albericus de Rosate recognizes the limitations on cities in his day (*hodie*).[582] It was a relevant question for communities which were fairly active in patrolling their membership—what happens when somebody, on account of some crime or accusation, is expelled from the city? What happens to their property? What happens to the debts they owe? What happens to the debt which is owed to them? If truly guilty, their debtors were freed from their obligations—unless, that is, the city decided to step in and "succeed" as the creditor, as in a statute from Bologna. Here was the conceptual controversy. Albericus treats the complications caused by the existence of creditors and debtors when magistrates exercise the penalty of confiscation of publication within the example of Bologna. The relevant history is one of faction—seventeenth century historian Pierre

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[579] See also Francisci Lucani, *De Privilegio Fisci*, Section 4, 'De crimine laesae maiestatis' 11v-12r, ns. 1-15, including "raping virgins and confusing commerce'. Lucani has an interesting account of tyranny in the city's re-founding, and the damnation of memory.

[580] I found this text in Orazio Carpani's *Commentaria ... de Iure et Privilegio Fisci* [Frankfurt, 1610], Rubric on p. 102.

[581] Angelus de Aretina [Angelus Gambellionibus], *Tractatus de Maleficiis* [Colonia Agrippinae 1599], p. 573-591.

[582] Albericus de Rosate, *Commentariorum de Statutis,* in *Tractatus Illustrium,* Vol. II, fol. 14, Quaest. 86, n. 8-12.

d'Avity briefly records the city being torn apart between two families, the Lambertates and the Garmeneens, who 'had reduced Bologna to a bad state' (*reduisirent Bologne en mauvais estat*).[583] Bologna drove out the Lambertates, with between 12,000 and 15,000 people, and confiscated their property.[584] But what of their many creditors and debtors? It was a two-part question. First, had the parties been justly expelled? If not, then any punishment was unjust, including the absolution or transfer of debts. But if they had been justly expelled, then what happened to their debts and the debts owed to them? Then, Albericus argues, we might argue that debtors were 'liberated by law'. Alternatively, others argue that because their property was "made public" by statute or custom, the debtors were liberated because the commune of Bologna 'inherited' the debtors from the family at their expulsion.[585] Albericus does say that most jurists disagreed with this argument, because cities do not have the *ius confiscandi* without the authority of the prince. Others disagreed about the point of liberation—rather than the debts being absolved, if what was held by the factious families truly became public or general, then the community retained the right to call the payment due.[586]

The tension within the jurists' approach to criminal thought is shown by Christoph Wintzler. On the one hand, 'grave offences' ought to result in the confiscation of property (*bona confiscantur*). On the other hand, those entities most in charge of the criminal law were not thought 'properly' to have the '*ius confiscandi bona propter delicta'*.[587] And yet, the practical execution of justice in European (especially Italian) cities created further challenges for jurists to reconcile with the law.

*Corporate Charters and Liberties*

The final wrench thrown into the late-medieval and renaissance system of civil and canon justice is the temporal and ecclesiastical immunities granted to communities, often in the form of charters or treaties. These immunities could, for example, exempt the community from their obligation to supply a specific kind of tax or fee to the temporal state or the Church. As I will discuss in the next chapter, they could also (in theory) prohibit the Pope from placing the community under an interdict.[588] And finally, cities and kingdoms could secure charters which exempted them (again in theory) from confiscation. Charters were not absolute—they could be revoked by force and conquest or by right, as in the case of ingratitude.[589] Where cities had formal charters guaranteeing protection from confiscation, especially in Spain, but also in Arras (the site of the witch-trials serving as the thematic example for this chapter), confiscation by the Church or the Kingdom could be a double injustice; it might violate their charter on one count, and violate justice or fairness on another.

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[583] Pierre d'Avity, *Nouveau Theatre du Monde,* (Paris 1661), pp. 382-383.
[584]François Schottus, *Histoire d'Italie* (Paris 1628), 374; Giuliano Milani, *L'esclusione dal comune: conflitti e bandi politici a Bologna e in altre città italiane tra XII e XIV saecolo* (Istituto Storico Italiano per il Medio Evo: 2003); and, throughout *A Companion to Medieval and Renaissance Bologna,* ed. Sarah R. Blanshei (2018).
[585] Albericus de Rosate, *Tractatus de Statuum,* Fol. 14, q. 86, n. 10.
[586] Albericus de Rosate, *Tractatus de Statuum,* Fol. 14, q. 86, ns. 11-12.
[587] Christoph Wintzler, *Observationes de Collectis seu Contrabutione Imperii* [Frankfurt 1612] Consilium V, Fol. 401.
[588] See for example Pope Boniface VIII and the Duke of Burgundy in 1298. Clarke, p. 62: "Boniface VIII forbade the imposition of interdicts on lands of Duke Robert of Burgundy for the crimes of his bailiffs or officials unless the duke or his deputy refused full justice for these crimes when warned or requested."
[589] Franciscus Lucani writes that the prince can revoke their exemptions by reason of ingratitude, tracing back to Baldus at C.6.7.2. Lucani, *Tractatus de Privilegio Fisci,* §1, n. 126, fol. 9v.

Henry Charles Lea writes: "In Arras a charter of 1335, confirmed by Charles V in 1369, protected the burghers from confiscation when condemned for crime by any competent tribunal".[590] All confiscation was a violation of the charter of Arras, whether by the Bishop or by the King. Town or city magistrates often pointed to their charter as a source of their rights and privileges, and appealed to the Pope on behalf of the heirs to the estates which were being seized, both by the Bishop and by the King. Lea observes however that the politics of these cases were fluid. While, in 1430, Philippe le Bon decided not to confiscate the properties of the accused, he nevertheless reserved the rights of the kingdom and the bishopric to seize the property in 1460, once again against the alleged chartered rights of the city. Charters and specific ecclesiastical immunities are not my focus in this project—though ecclesiastical immunities will figure broadly in Chapter 5. However, their history coincides with the tradition of 'privileges', specific laws granted by authorities across Europe; it should be clear that these dense networks of revocable or irrevocable rights and liberties created a political and legal problem that only a *princeps* 'above' the laws might be able to solve. They form much of the fabric that would eagerly be knit together into a unified system by Early Modern jurists.

*The* ius confiscandi *and the Church*

It is now possible to return to the *ecclesia* and its right to confiscate property. In the most limited interpretation of the *ius confiscandi,* the *ecclesia* possessed the right or power of confiscation but could not exercise it. They were dependent on the temporal power to exercise the confiscation and split the proceeds according to canon law. Their authority was limited, in part, because they did not properly have a *fiscus,* or have the same kind of *fiscus* and therefore the same fiscal rights of states.

In the most expansive interpretation, the *ecclesia* did possess a *fiscus,* and with it, the *ius confiscandi.* They could confiscate the property of laity or clergy, and the proceeds could be applied not only to the office of the Inquisition (or directly to the 'field-work' of the Inquisitors), but also to the *fiscus* of the Diocese or the Pope. Indeed, sub-Papal authorities (Archbishops and Bishops) could claim the financial ability and jurisdiction to take a cut of the confiscated goods themselves, primarily due to the territoriality of jurisdiction. That is, all of the Roman or canonical legal procedures from confiscation stressed the relevance of territory: if a heretic fled the jurisdiction of the judge who sentenced them to confiscation to another jurisdiction or state, the confiscated properly nevertheless ought to be applied to where the order originated from, not where the confiscation took place.[591] On the same grounds, a Bishop could claim that it was more

[590] Lea, *A History of the Inquisition,* Vol. 1, p. 522. Lea cites Duverger, *La Vauderie daus les États de Philippe le Bon,* Arras, 1885, p. 60.

[591] This too, was up for debate, but in a way that still stressed the relevance of territory. An older thread of legal argumentation had held that a judge's sentence could not be binding outside of their jurisdiction. Citing Albericus de Rosate, Fransiscus Lucani asked whether an order for confiscation could thus be valid of the goods were outside of the territory or within a different 'district'. As with most legal questions, the law by which a statute or sentence was issued was determinative in its scope and application. If the judge made the goods public by municipal law (particular to their own territory or jurisdiction), then it could not be binding in another municipality, in a different territory and jurisdiction. If, however, the confiscation or publication was issued according to the *ius commune,* then the effect of the sentence was binding outside of their territory and jurisdiction. Those goods ought to be confiscated and incorporated into the *fisc* in the territory where the goods are located—not of the original judge. Franciscus Lucani, *Tractatus de Privilegio Fisci,* §3, n. 4.

appropriate for the confiscated property (and the proceeds thereof) to remain in the local jurisdiction and economy of the Bishop.

As a matter of fact, it was the Church's use and perceived abuse of the *ius confiscandi* which drew contemporary criticism from chroniclers. Geronimo Zurita recorded public riots in Castile after the Edict of the Faith, proclaiming that the confiscation of the property of converted Jews (conversos), which included 'many gentlemen and leading citizens (*muchos caballeros y gente principal)*' was itself in violation of the corporate charters and liberties (*contra las libertades del reino*) which should have protected the cities within the kingdom from the Church's right of confiscation. Monter William writes "Specifically, they objected to the Inquisition's confiscation of property of convicted heretics and the secrecy of prosecution witnesses, 'which were two very new things, never practiced, and very prejudicial to the kingdom.'"[592]

In the response to the Arras judgments, the criticism was the same. The criticism of—and new arguments about—confiscation continued through the French Wars of Religion (1562-1598).[593] And, in Locke's *Letter Concerning Toleration,* we find the same concern for the Church's exercise of their right of confiscation:

> Do those who beat and torture people on the pretext of religion, and rob them of their property and put them to death, do all this in a spirit of friendship and goodwill? [...] For [they claim] their only motive in seizing people's goods, mutilating their bodies, ruining their health in filthy prisons, and taking their lives, is charity and zeal for their souls, in order to ensure their faith and salvation..."[594]

Such authorities—civil and ecclesiastical—had long practiced seizures of the "civil goods" of individuals.[595] When Locke targets the purpose of "religious association", he stresses that the "whole of the church's teaching" is directed to the "public worship of God and the attainment of eternal life":

> There is and can be no concern in this association with the possession of civil or earthly goods. No force is to be used here for any reason. All force belongs to the civil ruler; and the possession and use of external goods are subject to his power.[596]

As Locke continued his articulation of the limits of ecclesiastical authority, he stresses that even if the Church is permitted the authority to excommunicate its members (in a way perfectly compatible with the principle of toleration), they

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[592] Zurita, *Los Cinco Libros Postreros de la Segunda Parte de los Aneles de la Corona de Aragon* (Aragon 1579), Libro XX, (Año 1485), fol. 341r. "Comenzáronse de alterar y alborotar los que eran nuevamente convertidos del linaje de judíos, y sin ellos muchos caballeros y gente principal, publicando que aquel modo de proceder era contra las libertades del reino; porque por este delito se les confiscaban los bienes y no se les daban los nombres de los testigos que deponían contra los reos, que eran dos cosas muy nuevas y nunca usadas y muy perjudiciales al reino." From E. William Monter, *Frontiers of Heresy: The Spanish Inquisition from the Basque Lands to Sicily,* (2003), pp. 10-11

[593] Kathleen A. Parrow, "Neither Treason nor Heresy: Use of Defense Arguments to Avoid Forfeiture during the French Wars of Religion", *The Sixteenth Century Journal,* (Winter 1991), Vol. 22, No. 4, pp. 705-716.

[594] Locke, *Locke on Toleration,* ed. Richard Vernon, Cambridge Texts in the History of Philosophy (Cambridge: 2010), p. 4.

[595] Locke, *Locke on Toleration,* p. 7: "By 'civil goods' I mean life, liberty, physical integrity, and freedom from pain, as well as external possessions, such as land, money, the necessities of everyday life, and so on."

[596] Locke, *Locke on Toleration,* p. 11.

> must be careful not to embellish the decree of excommunication with verbal abuse or physical violence that would in any way harm the person or property of the ejected member. [...] Excommunication does not, and cannot, deprive the excommunicated person of any of the civil goods that he previously possessed; they belong to his civil status and are subject to the ruler's protection.[597]

Locke writes again: "no private person has the right to attack or diminish another person's civil goods in any way because he professes a religion or ritual differing from his own."[598] Every time Locke writes about the relationship between a religious association and the property of its members and former members, he stresses that the religious association has no rights to the civil goods of private citizens:

> Neither persons, then, nor churches, nor even commonwealths can have any right to attack each other's civil goods and steal each other's worldly assets on the pretext of religion. I beg anyone who thinks otherwise to reflect what unlimited opportunities for conflicts and wars they are giving mankind, what an invitation to plunder and kill and nourish grievances for ever. It is impossible to build and maintain peace and security, let alone friendship, among men where there is a prevailing belief that dominion is founded in grace and that religion should be spread by force of arms.[599]

This division between ecclesiastical authority and private property extends even to 'Americans' who retain their 'pagan' rites of religion:

> No one, and I mean no one, should be deprived of his worldly goods on account of religion, including Americans who have been subjected to a Christian prince; they should not be stripped of their lives or property because they do not accept the Christian religion. If they believe they please God and attain salvation by their ancestral rites, they should be left to God and themselves. I will retrace the story from the beginning. A small, weak band of Christians, totally destitute, arrive at a territory inhabited by pagans; as foreigners they approach the indigenous people for material assistance, as one human being to another, which is normal. They are given the necessities of life; they are allowed places to settle, the two groups become one people. The Christian religion puts down roots and expands, but is not yet the stronger party. Peace, friendship, and good faith are still maintained, and equal rights are preserved. In the course of time their ruler converts to the Christian

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[597] Locke, *Locke on Toleration,* pp. 12-13.
[598] Locke, *Locke on Toleration,* pp. 12-13.
[599] Locke, *Locke on Toleration,* p. 15. The Latin of the *Epistola de Tolerantia* [Gouda 1685] is interesting here, where Locke concludes by ripping the curtain away to show the 'propagation' of the Gospel as endorsed by Protestants and Catholics as being something 'waged' instead by arms (*armis propagandam*): "Nullae igitur sive personae, sive ecclesiae, sive demum respublicae, ius aliquod habere possunt bona civilia invicem invadendi seque mutuo rebus mundanis spoliandi, sub praetextu religionis. Qui aliter sentiunt, velim secum reputent, quam infinitam praebent humano generi litium et bellorum materiem: quantum ad rapinas et caedes et aeterna odia incitamentum. Nec uspiam securitas aut pax, nedum amicitia inter homines stabiliri aut subsistere potest, si ea obtineat opinio, Dominium scilicet fundari in Gratia: et religionem vi et armis propagandam." pp. 29-30.

> side, and the Christians become the stronger party. It is only then that it becomes a duty to trample upon agreements and violate rights to get rid of idolatry. From then on, innocent pagans, scrupulous observers of justice in that they have not offended against good morals and the civil law, are to be stripped of their lives, property, and ancestral lands, if they will not abandon their ancient worship and transfer their allegiance to new and foreign rites. At last it becomes quite evident what zeal for the church means, at least when it is combined with the passion to dominate, and it is clearly revealed how easily religion and the salvation of souls serve as a cover for robbery and lust for power.[600]

Locke's criticism of the "robbery" and "lust for power" of religious associations is a transparent criticism of the Catholic Church, and a faint echo of Erasmus. Locke's observation was not at all unique, and indeed, it is important that it is not. Rather than serving as evidence of the Catholic Church's standing doctrine in the late 17th century, Locke's argument in the *Letter Concerning Toleration* is a comprehensive criticism of the practice of confiscation and the exercise of fiscal rights over property and other "civil goods" which the Church had developed over centuries. Locke's critique is also not particularly "Protestant" or uniquely post-Reformation: his reading of "robbery" and "lust for power" pairs nicely with the jurist of the Arras appeals trial who thought "*Et apperera par lesdits procès que tout a esté fait pour avoir de l'argent*"—the whole ordeal was done for money. [601]

If a faint line can be drawn between the Arras witch-trials and Locke, one further faint line can be drawn through to Locke's contemporary Thomas Barlow (c. 1607-1691). Barlow was a Bishop of the Church of Lincoln and a staunch anti-Catholic.[602] In his *Discourse Concerning the Laws, Ecclesiastical and Civil Made Against Hereticks* (1723)—published anonymously and initially attributed to Daniel Whitby (1638-1726)—he claims that there is key difference in the implications of Protestant and Catholic theologies and philosophies of toleration. If Barlow were to disagree with a Catholic about transubstantiation, he writes that he would try to persuade the Catholic that the bread was made by human hands and was not the real Body of Christ, lest he "worship what he eats". If the Catholic did not see the error in his ways, even if Barlow thought he was an Idolater, Barlow would leave him be and pray for him. The Catholic, on the other hand:

> will by force make me believe the same, or profess such Belief whether I will or not, or upon my not being able to believe, or willing to dissemble, will call me Heretick, and set his Church upon me, to pursue me to the last extremities, of suffering in my Liberty and Goods, and Life itself; Surely I must look about me,

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[600] Locke, *Locke on Toleration,* p. 27. On Locke's view of what amounts to the canon and Roman law theory of the public-criminal nature of heresy, see p. 34: "Therefore these worldly goods cannot be taken away from one party and given to another at the whim of the ruler, nor can private possession of them be transferred from one citizen to another, even by law, for a reason that has nothing to do with his fellow citizens, namely, his religion. For, whether it be true or false, a person's religion does not damage the worldly interests of other citizens, and only worldly interests are subject to the commonwealth."

[601] Jean de Popaincourt, "Et apperera par lesdits procès que tout a esté fait pour avoir de l'argent". Mercier, p. 332.

[602] On anti-Catholicism and the history of religious toleration, see Michael D. Breidenbach, *Our Dear-Bought Liberty: Catholics and Religious Toleration in Early America* (Harvard 2021).

> and consult my own Preservation, and call in the Protection of Government and Laws in my behalf.[603]

Barlow saw no future in which "peace" was possible living under Catholic authorities, but not because the Catholic Church might apply spiritual or social punishments on him.[604]

> [B]ut when the Sentence, pretended to be Spiritual, must and will have the outward effects of Confiscation, Imprisonment, Tortures and Death; it is then that the cruel Consequences beget a Terrour and Abhorrence of that Communion, wherein I must not only bear the load of Damnation, as far as in their power to cast it on me; but I must first suffer Ruin and Destruction in this World [...][605]

As in the case of Locke, the audience in Spain at the announcement of the Edict of the Faith, and the audience and jurists of the Arras appeals, Barlow highlights confiscation—and torture and death—as one of the "destructive" practices of the Church against believers and heretics. As Barlow developed his argument, he did address excommunication and physical punishment. But he also addressed in full the history of confiscation:

> They must lose all their Goods. For (1.) whosoever apprehends them (which all have Liberty to do) hath free leave to take from them all their Goods, and full right to enjoy them ... And this Punishment, saith Innocent the Third, 'we command to be executed on them by the Princes and Secular Powers, who shall by Ecclesiastical Censures be compelled thereunto.' Moreover, after the Sentence is pronounced against them, 'Their Goods, if they have any still remaining shall all be confiscated, and never shall return to them. ... 'The very House in which the Heretick is found must be destroyed and never built again, and the ground must be confiscated, and so must all the other Houses contiguous to it, if they belong to the same Person, (unless it appear to the Inquisitors that the Lords of them were wholly inculpable) and all the Goods of them must be sold, or become his that takes them.'[606]

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[603] Barlow, *Discourse Concerning the Laws, Ecclesiastical and Civil Made Against Hereticks by Popes, Emperors and Kings,* p. vi. See also J.A.I. Champion, "'An Historical Narration Concerning Heresis': Thomas Hobbes, Thomas Barlow, and the Restoration debate over 'heresy'" in David Loewenstein and John Marshall, eds. *Heresy, Literature, and Politics in Early Modern English Culture* (2010).

[604] Barlow writes that it was "such a religion, in the Reign whereof I can not live in Peace and Safety." If spiritual punishments were all Barlow had to worry about from Catholic authorities, then he could "sit down and enjoy my own Conscience". p. xiii: In British law, [13. Eliz. cap. 11] "for self defence and preservation of the Government in Church and State", the justification for acting against the Catholics was their likelihood to "raise and stir Sedition and Rebellion within this Realm—to the Disturbance of the most happy Peace thereof." This "peace" included a concern for property. Barlow continues that assemblies were dangerous. "Under pretence of tender Consciences, do at their Meetings contrive Insurrections, as late Experience hath shewed. And so in the next Penal Act for restraining Nonconformists from inhabiting in Corporations; it was because the Teachers had taken upon them to preach in unlawful Assemblies, Conventicles or Meetings, thereby taking an opportunity to distil the poisonous Principles of Schism and Rebellion into the hearts of his Majesty's Subjects, to the great danger of the Church and Kingdom."

[605] Barlow, *Discourse,* p. vii.

[606] The excised citations are *Const.* Innocentii IV. *cap. 2.* [...] Const. Fred. 2. Concil. Bitterense, Can. 3. p. 678. Statuta Raimundi, Com. Tolos. p. 449, 450. Concil. Arelat. A.D. 1234, Can. 5. p. 2341. [...] Innocent 4, cap. 26, Clem. 4. Const. 13. Leg. 25, 26. Concil. Tolos. Can. 6. Concil. Bitterr. Can. 35. p. 694. Concil. Albien. Can. 6. 723. Stat. Raimundi Comit. Tolos. Concil. provinc. Narbon. Can. 35. p. 694.

Barlow's most important observation is the parenthetical at his introduction of confiscation. When the Church pronounces a sentence of confiscation on a subject, he suggests that "all have Liberty" to execute the sentence of confiscation on heretics and their allies. This is not an accurate portrayal of the canon (or civil) law procedure of confiscation, but it is strongly aligned with Locke's interpretation of the individual "Executive Power of the Law of Nature."[607] This principle, of course, held that the disorder and disadvantage of the State of Nature was the widespread practice of partial judgment in enforcing the Law of Nature by all individuals *in* the State of Nature. It also echoes, through the citation of Innocent III, the papal bulls like 'Ad extirpanda' (Innocent IV) and 'In Coena domini' (Urban V) which identified the 'enemies of mankind', against whom extraordinary punishments were permissible. Barlow in his dispute with his Catholic friend, Innocent's pirates, and Locke's subject of the state of nature all occupied the same plane: a vulnerable subject on whom some punishment could be extracted by anybody and everybody.

While Barlow's interpolation does not suggest anything about the practice of confiscation, either historically or in Catholic states of his own time, it does suggest the power of the lingering mythology of the Church of the late medieval and renaissance world—the Church of the Inquisition(s). But even as a fractured Church, and even historically exaggerated, the reputation of the Church and the echo of its right of confiscation was used as a negative image against which principles of toleration and property rights could be articulated.

**Section V: Conclusion—Economic and Criminal Jurisdiction Reconsidered**

Helmholz once wondered why the Church seemed to hesitate to push the boundaries of the equiparation which was so commonplace in medieval legal thought:

> It might have seemed tempting, at least as a matter of policy, for churchmen to claim all the privileges of the Roman fisc, against which prescriptive claims did not normally run. As Maitland once said, the medieval church was a state, and claims to sovereignty were routinely made on the church's behalf. Why not claim this normal attribute of sovereignty? This would have protected the rights of the church against all contrary claims.[608]

This chapter suggests that the Church (in practice) and jurists (in legal argumentation and theory) could toe the line of the question of ecclesiastical sovereignty. The *ius confiscandi* was a fruit of sovereignty, but it was not on the grounds of sovereignty that jurists argued that the *ecclesia* or Bishops possessed it. Indeed, they embraced on the one hand that the *ius confiscandi* was a chief part of the regalian rights and that the *ecclesia* did not properly possess *regalia,* but on the other hand recognized that the *ecclesia* possessed that same right. One might rightly observe, especially in this period, that sovereignty and authority are not air-tight; there will be pockets where they might operate differently or become contested. While those sovereign *de iure* (or in the conventional late medieval and renaissance legal sense) might out of ignorance, tolerance, or

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[607] Locke, *Second Treatise*, Chapter II, § 13: "To this strange Doctrine, viz. That in the State of Nature, every one has the Executive Power of the Law of Nature, I doubt not but it will be objected; That it is unreasonable for Men to be Judges in their own Cases, that selflove will make Men partial to themselves and their Friends. And on the other side, that Ill Nature, Passion and Revenge will carry them too far in punishing others. And hence nothing but Confusion and Disorder will follow, and that therefore God hath certainly appointed Government to restrain the partiality and violence of Men."

[608] Helmholz, *Spirit of Classical Canon Law,* p. 184.

apathy allow some of the peripheral *regalia* to be prescribed or used out of turn, especially on the periphery of their rule, the *ius confiscandi* was not a peripheral right. It was crucial for the exercise of criminal jurisdiction, and yet, the Church was able to claim it as their own, without claiming the full bundle of sovereign rights within the territory of a kingdom. The *ius confiscandi,* and indeed the fiscal rights of the Church, might spring out of one of the gaps created in the operating practice of a porous sovereignty.

This chapter may also suggest a different answer—that the Church did not press because it was not in its interest to do so. That is, canon lawyers *did* occasionally claim that the Church possessed the *ius confiscandi* by virtue of also possessing all of the rights of sovereignty. But doing so would make the *ecclesia* equal to any other kingdom or state. We might think that such a claim would be a step *down* from the ambitious intentions of forward-thinking Popes, Bishops, or Inquisitors. It might have been a more impressive feat to toe the line between "sovereignty" and exercising *regalia* without "sovereignty". Put differently, if the *ecclesia* could claim to exercise the *ius confiscandi* within the territories of other kingdoms—France, in the case of this chapter—it could claim to exercise one of the chief rights of sovereignty within another sovereign kingdom; it was a claim, in fact, about supremacy.

The Arras trials are striking because of the recorded response of the audience and crowd in the initial stages of the trials and sentencing. I have already noted that the lawyer for the defendants claimed a financial motivation on the appeal of the convictions to Paris.[609] But after the initial sentencing, we also have the extended poem of a contemporary satirist commenting on the whole affair. In several places in Arras, people circulated and threw the poem at public gatherings and perhaps at minor proceedings relating to the trials. On the back was scribbled a warning that the poem not fall into the hands of a "monstre". The opening stanza (of nine) reads:

> Les traitors remplis de grande envie,
> De convoitise et de venin couvers,
> Ont fait regner ne scay quelle vauldrie
> Pour cuider prendre à tort et à travers
> Les biens d'aulcuns notables et expers,
> Avec leurs corps, leurs femmes et chevance,
> Et meetre à mort des gens d'etat divers.
> Ah, noble Arras, tu as bien eu l'advance.[610]

It was not the heretics who were the "traitors", contrary to the canon and civil law equivalency which had settled as common opinion of the jurists—it was the lustful and envious officials who set out to steal 'the property of notable and upright citizens / their bodies, their wives, and their horses'. The Parliament of France seemed to agree, finding in part that the original trials were excessive, abusive, and false from the start.[611] All of those convicted were restored to their original

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[609] Jean de Popaincourt, "Et apperera par lesdits procès que tout a esté fait pour avoir de l'argent". Mercier, 332:

[610] Part of a much longer poem, cited in Fredericq, 1889: *Memoires de Jacques du Clercq,* deel III, pp. 81-84; also cited by Duclerc, liv. iv. c. 16. I am neither a translator of French, nor of poetry, but a clumsy translation would be: 'The traitors, filled with great envy / Driven by greed, covered in venom, / Have made reign some unknowable villainy, / Seeking to wrongfully seize and take, / The goods of the notable and the experienced, / Along with their bodies, wives and wealth / And put to death people of diverse status. / Oh, noble Arras, you have indeed had the advantage.

[611] Parliament itself was the subject of another poem, which reads in part: J'ai veu grant vauderie En Arras pulluler, / Gens plein de rêverie / Par jugement brusler. / Trente ans puis ceste affaire Parlement décréta, / Qu'à tort sans raison

honor, reputation, and status (*honore, fama et statu*). They ordered the responsible parties (including the Duke of Burgundy) to pay roughly 6500 Parisian livres as reparations, and also prohibited the Bishop of Arras, inquisitors, and other judges from applying various methods of torture in future cases and trials.[612] And finally, they took a portion of the reparations to build a stone monument to record the injustice which had occurred.

While this chapter is not about property rights, it is notable that the private rights to property were not—at least until Locke or later—even close to absolute.[613] Even where jurists wished to tie property to natural law or the *dominium* granted to humans by God at the beginning of human history, or where they designed to restrain the rights of an emperor over private property, or even where jurists strenuously argued that two people could not own (completely) the same object, there were still a number of exceptions: "the prince could expropriate property if he had cause, was pressed by necessity, or could rest his action on the public good".[614] This chapter investigates a different actor entirely—how and to what extent could the Church expropriate property? Did its temporal and ecclesiastical authority over members of the Church extend to their personal property, within the 'cause' of enforcing orthodoxy? How did this power develop?

The answer is that this power conceptually and methodologically originates in the equiparation of the *ecclesia* to other public legal actors. This equiparation was most frequently used to justify the Church's privileges of restitution and against prescription, but through the function of public religion (in C.1.2.23), the equivalency of the *imperium* and *potestas* of the *ecclesia* to the *respublica,* and the equivalency between divine and temporal treason, the equiparation of *ecclesia, respublica, civitas,* and *fiscus* both grounded and necessitated that the Church's possession of a treasury. With the possession of a treasury came all of the rights of a treasury, including some technical privileges and rights, but also the *ius confiscandi.*

What I have suggested in the final section is that the right of confiscation and the fiscal rights of the Church over the property of its members (and ex-members) stuck in the mind of post-Reformation political theorists and writers on religious toleration as evidence of the Church's overreach. The ecclesiastical jurisdiction of the Church included, as a matter of fact and legal right, the sovereign right over property and the *public* criminal jurisdiction over *public* crimes of religion. Note here that Hobbes took a surprisingly similar line, though from the opposite direction: "Heresie is nothing else, but a private opinion, obstinately maintained, contrary to the opinion which the Publique person (that is to say, the Representant of the Commonwealth) hath

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faire / A mort on les traicta. See *Chronique métrique de Chastellain et de Molinet,*111; G. Chastellain and J. Molinet, *Recollection des merveilles advenues en nostre temps*, Bruxelles, 1836, p. 111, vv. 921-928.

[612] Parliament's claim here to have the capacity to judge and reprimand the practices explicitly or tacitly consented to by Bishops should not go unnoticed. The torture strategies forbidden included anything of particularly 'hellish' quality (*de gehenne*), such as the iron bonnet, burning the soles of feet, forcing suspects to drink oil and vinegar, and beating the stomachs of suspects. It was Parliament's restriction of torture which attracted the attention of some early scholars, such as W.H. Davenport Adams, *Dwellers on the Threshold, or Magic and Magicians,* Vol. I, pp. 135-136.

[613] I have also bracketed the thorny question of the rightfulness of property. Underneath the claims about property, confiscation, and the treasury of the church above is the question of whether the Church ought to have goods and possessions at all. This applies both to individuals (i.e., should members of the clergy have homes? Clothes? Other movable or immovable property?) and the Church. See for example Bertachini, in his *Reportorium: "*Ecclesia debet habere bona." Also, Wilks' observation: "In 1080 Gregory VII declared that the Roman church was the source of the 'terra imperia, regna, principatus, ducatus, marchias, comitatus et omnium hominum possessiones', Reg. vii. 14a (ed. Caspar: Berlin, 1955), p. 487. That this should be distinguished from the terra ecclesiae is suggested SCH 7 (1971), p. 85."

[614] Pennington, *Prince and the Law*, p. 24. [cf. Odofredus, 1.22(25).6, Cortese, *La norma I*, 131-134; Nicolini Priprieta 100, n. 2.; Glossa ordinaria to C.23, q.8 d.p.c.22 v. emeret.].

commanded to bee taught."[615] Heresy might not be the same kind of public crime as imagined by Catholics, but it had developed legally as an imitation of secular approaches to treason. Here, Hobbes drew them back together again. Heresy might well be internally treasonous, especially if "obstinate" individuals continued to disobey the sovereign.

Furthermore, the Church's exercise of properly "fiscal" rights and its financial role in late medieval and renaissance Europe situates it in a unique place in the organology of the pre-Modern bodies politic; it had its own institutions which 'resemble[d] the shape of the stomach and intestines',[616] and actively collected what Bodin called the "sinewes of a commonweale."[617] But were the financial organs their own or shared by the other bodies politic? If deeply entangled for centuries, how could Early Modern theorists disentangle them?

Jean Bodin begins the sixth book of his *Republic* with a discussion of the necessity of the office of Censors and the function of censuring for the maintenance of a commonwealth. These Censors had no jurisdiction or power and had no direct power of punishment—their office was to name and shame, and the Roman law supplied the ramifications for the *infamis* or *ignobilis*. Bodin traces briefly the historical development of the function of censuring from Constantine to Charlemagne and the Medieval Catholic Church. It was the Church which inherited this function of censuring rulers and subjects. Confiscation was one of the rights employed by the Church in ecclesiastical censures, alongside interdicts and excommunication—and they used it, Bodin writes, to "excommunicate Corporations, Colleges, Universities, Emperours, Kings, and Kingdomes, without distinction of age, sexe, innocents, or mad men, although since (but too late) they have somewhat corrected this abuse."[618] Bodin observes that only recently had the Council of Orleans (1510) had seemed to "divide the temporall censure ... from the ecclesiastical censure" by "taking away suspension, interdiction, and excommunication"—in so doing, "the ecclesiasticall censure is of no force." Bodin also suggests that the function which the Roman censors had served in the Republic was necessary: "yet it were better to allow both to the Bishops and Antients, than to take all from them, and thereby to deprive the commonweale of that which is most necessarie". It is to the ecclesiastical censure—specifically the interdict—and its theory, function, and entangled legacy in Early Modernity that I turn to next.

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[615] Hobbes, *Leviathan,* Ch. 42.

[616] John of Salisbury, *Politicratus,* 5.2: "Treasurers and record keepers ... resemble the shape of the stomach and intestines: these, if they accumulate with great avidity and tenaciously preserve their accumulation, engender innumerable and incurable diseases so that their infection threatens to ruin the whole body."

[617] Bodin, *Six Books,* 6.2, trans. Knolles.

[618] Bodin, *Six Books,* 6.1, trans. Knolles.

"...the voice of the turtle-dove, Mother Church, is not heard in our land. ... the Lord of Hosts stopped the mouths of those celebrating him, and abandoned us in derision and hissing, so that people and priest lack rites and masses."

Matthew of Rievaulx (c. 1109-1167)[619]

"In such a condition there is ... no account of time, no arts, no letters, no society."

Hobbes, *Leviathan,* Ch. 13.

### 4. Bells, the Interdict, and Collective Punishment: Suspending the Bodies Politic

Girolamo Savonarola (1452-1498), the Dominican Friar, cult-hero of Florence, and target of Machiavelli, was hung and his body burned on the morning of May 23, 1498. He had been excommunicated the year before by Pope Alexander VI in a decree which also commanded that Florence cooperate with his arrest and prosecution: "If you refuse obedience to these commands, then, that the dignity and authority of the Holy See may be maintained, we shall be forced to have recourse to an interdict upon your city, and to other measures still more effective."[620] The interdict was a tool of collective ecclesiastical discipline; rather than excommunicate the entire city—a practice criticized by Augustine and outlawed by Pope Innocent IV, although occasionally still done—the Pope could place the city under an interdict. It was a step short of excommunication that still prohibited the administering of the sacraments, celebrating of the offices, and closed the church to the laity. Masses were to be said by the clergy in private, behind closed doors, and in hushed whispers so that none could hear—and that was if the Pope permitted them to do so at all. The Church-bells, which would have regularly rung to call citizens to prayer, tell time, celebrate festivals, and begin the Mass were ordered to be completely silenced. The interdict derived from a class of Roman law injunctions ("any kind of prohibition, ban, or exclusion decreed by the competent magisterial or imperial authority")[621], and *interdiction* would have a legal afterlife as a ruling of incompetence in early modern European law.[622]

The interdict was "a vital tool of interventionism" and a "political weapon".[623] Like excommunication it can be understood as a kind of political sanction[624] often paired with other international diplomatic sanctions like trade embargos.[625] It was "a familiar diplomatic weapon in the armaments of the Church".[626] This 'weapon' was wielded as and perceived as such: King John in England "treated the interdict as tantamount to a declaration of war, and war between pope and king continued for five years until an armistice was made".[627] William Stubbs (1825-1901),

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[619] "Et hec primordialis causa et certa apostasia quod vox turturis, idest matris ecclesie, non est audita in terra nostra. Ex hinc maxime conclusit dominus sabaoth ora canentium se, et dereliquit nos in derisum et in sibilum, ut sit populus et sacerdos sine sacris et sacrificiis." A. Wilmart, "Les mélanges de Mathieu, préchantre de Rievaulx", *Revue Bénédictine,* 52 (1940), pp. 15-84, p. 83; Peter D. Clarke, *The Interdict in the Thirteenth Century: A Question of Collective Guilt* (Oxford: 2007), p. 134.
[620] Pasquale Villari, *The History of Girolamo Savonarola and of His Times,* p. 246, Book IV.
[621] Berger, *Encyclopedic Dictionary of Roman Law,* 507.
[622] From this latter context Honoré de Balzac—trained in the law but eminently bored by it—would construct the plot for his novella *L'Interdiction* (1836).
[623] Clarke, *The Interdict in the Thirteenth Century,* p. 2.
[624] R.H. Helmholz, "Excommunication as a Legal Sanction: The Attitudes of the Medieval Canonists", *ZRGKA* 68 (1982).
[625] Clarke, *The Interdict in the Thirteenth Century,* pp. 183, 185-187, and 262.
[626] Christopher R. Cheney, *Pope Innocent III and England* (Anton Hiersemann Stuttgart, 1976), p. 303.
[627] Cheney, *Innocent III and England,* p. 304.

famous constitutional historian of England, once called it "that most fearful and suicidal weapon of the medieval Church".[628] That it was "fearful" will be made clear below. But Stubbs' reason for calling it "suicidal" was that the interdict occasionally, if not often, did more harm to the Church than good; ecclesiastical authorities worried that it ripped at the fabric of human and divine community and facilitated the spread of heresies. Yet, the interdict (not to mention its threat) was frequently employed by the Church on large and small communities from Rome (1155) to Norway (1198) to England (1208) and multiple times to the often-insolent Florence and Venice (1376; 1478 and 1481; 1503; 1606).[629] The interdict was also notably used in 1955 against St. Cecilia's Chapel in New Orleans when white parishioners, in retaliation against integration, barred a black priest named Rev. Gerald Lewis from entering to say the Mass. Like the medieval interdict, it could only be lifted by the Archbishop who levied it and only once proper reconciliation had been made.[630] Unlike the medieval interdicts discussed in this chapter, it was against a single chapel and although it was an inconvenience and embarrassment for the parish, it was no longer a fracturing of social and political life.[631]

On Palm Sunday, six weeks before his execution, Savonarola's enemies stormed the church of San Marco and set it on fire. Savonarola's allies climbed the bell-tower and rang the bell—named "Piagnona"—in alarm and in hopes of summoning armed citizens to come to their defense.[632] In June, the Signoria initiated a trial against the bell, which they called the *arma suae seditionis*: the weapon of the friars' sedition.[633] As such, the Signoria removed the bell from the campanile of San Marco, and had it drug through the streets of Florence, whipped, tortured, taken outside of the walls of the city, and imprisoned at the Franciscan convent of San Salvatore al Monte where it would remain for fifty years.[634] Much has been made of this strange scene. Only recently have some scholars moved beyond its "symbolism"[635] to recognize that the claims made by the

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[628] William Stubbs, *The Historical Collections of Walter of Coventry,* Vol. II (London 1873), p. lv.

[629] Also France (1199), Dax (1242), Scotland (1317), and against Lewis of Bavaria (1324) and Elizabeth I (1570).

[630] The Vatican praised Archbishop Rumme's use of the interdict. Clement Meyer, a white pastor, captured the same anxiety as priests and Bishops in the 13th and 14th century: they were "facing the very serious danger of losing the privilege of receiving the sacraments, of Christian burial and other privileges of the Church. We are in danger of excommunication." The interdict was only lifted in 1958 when Catholic families signed a letter of repentance, although R. Bentley Anderson writes that "it appears they had been given quiet assurances by members of the Society of the Divine Word that no black priests would be sent to celebrate Mass in their community. See R. Bentley Anders, *Black, White, and Catholic: New Orleans Interracialism, 1947-1956* (Vanderbilt University Press, 2005), pp. 145-148.

[631] If Archbishop Rumme could have cut the power, disconnected the phone lines of the community, or suspended postal delivery in the town, then he would have more closely approximated the power of his medieval predecessors.

[632] It must also be noticed that Savonarola's followers were called the *piagnoni*. Simone Filipepi, *Conaca,* in *Scelta di prediche e scritti di fra' Girolamo Savonarola, con nuovi documenti intorno alla sua vita,* eds. Pasquale Villari and Ernesto Casanova, pp. 453-518 (Florence, 1989).

[633] Zolli and Brown, "Bell on Trial: The Struggle for Sound after Savonarola", *Renaissance Quarterly* 72 (1019), 54-96, esp. 56-57; Alessandro Gherardi, *Nuovi documenti e studi intorno a Girolamo Savonarola,* (Florence: 1887), pp. 321-322; Pasquale Villari, *La storia di Girolamo Savonarola e de' suoi tempi,* Vols. I and II, (Florence: 1887-1888), but esp. vol. 2, p. 181; ccxx-cclxxxvi.

[634] This was not a spur of the moment popular reaction, but the literal order of the judicial sentence: "gather any other prominent members of the order so that, with whips and instruments of torture and a cart, they conduct the said bell to the said church of the said brothers." June 29, 1498 decree, in Villari, 2:291-292; translated in Zolli and Brown, "Bell on Trial," p. 90. Lorenzo Polizzotto, *The Elect Nation: The Savonarolan Movement in Florence 1494–1545* (Oxford: Clarendon Press, 1994), p. 232.

[635] Lorenzo Polizzotto, *The Elect Nation*, p. 170: "These proceedings, needless to say, were symbolic. How better to demonstrate to the Florentines that Savonarola's influence had come to an end than by silencing and degrading the voice which had called his supporters to worship and, when the convent was under siege on the night of 8 April last, to arms."

Signoria personified the bell as a legally capable actor and that the political and social consequence of the "sound of silence" would have been impossible to ignore.[636] Bells could be baptized, tortured, imprisoned and killed[637]; they could ring licitly or illicitly, to warn of invasion or for celebration, to convene civil or canon law councils and chapters, to assemble the people, signal uprisings, and mark the time. Only with this context can we appropriately measure the loudness of the silence which the interdict mandated.

The interdict presents a challenge to political theorists because it was an ecclesiastical censure with clear public and political ramifications; through the interdict, the Church claimed and exercised authority over cities across Europe, silencing their church-bells and the various functions the bells provided, suspending the right and capacity for citizens to assemble and make law. The Church was not the civil ruler of any of the *civitates* it placed under an interdict and yet they possessed the power to disrupt the civil rhythms and capacities of territories and their Christian and non-Christian residents alike; they were not exercising "civil sovereignty", but nor was the interdict an obvious extension of "ecclesiastical sovereignty". This chapter has a historical argument and a theoretical argument, and bells play a central role in both.

The historical argument is straightforward; jurists maintained that bells played multiple functions in legal and political life and also maintained that the bells must be silent during the interdict. Section I shows that bells were more than a material fact of medieval life, and both canon and civil lawyers stressed that they served dozens of legal, political, religious, and metaphysical functions. Bells were both ecclesiastical and public and so their political functions must be interpreted within their ecclesiastical legal context, not extracted from them. When a political community or its leaders committed a crime against the Church, canon lawyers hesitated to apply and then outlawed its supreme disciplinary tool: excommunication. Cities and corporate bodies could not be excommunicated (starting with Pope Innocent IV). However, Section II shows that their hesitancy was not about assigning collective responsibility and punishing corporate bodies—the roman civil law provided plenty of material to support such actions. The interdict was a perfect alternative: it fulfilled the canon and civil legal purpose of recognizing collective agency and disciplining corporate bodies without the damnation of the souls of the young, old, and future individuals within it. Following Section II, Section III shows the interdict in its proper context of civil law theories of collective action and responsibility while outlining its main effects, one of which was the silencing of the bells. The first part of Section IV attempts to interpret these effects using the arguments and reflections of canon and civil lawyers. In this, my historical claim is about the debates and arguments between jurists about the interdict and its consequences: it is not

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[636] Zolli and Brown, "Bell on Trial". See also Niall Atkinson's work on "soundscapes" and "sonic communities": Atkinson, "The Republic of Sound: Listening to Florence at the Threshold of the Renaissance." *I Tatti Studies in the Italian Renaissance* 16.1 (2013), 57-84; *The Noisy Renaissance: Sound, Architecture, and Florentine Urban Life.* (Penn State University Press, 2016).

[637] The baptism of bells is the most surprising of these. It was an old practice, outlawed by Charlemagne in 789, but continued into at least the 10th century (Pope John XIV baptized a bell in 968) despite canon lawyers arguing that inanimate objects could not be baptized. Angelo Rocca (Bishop of Tagasti), *De Campanis Commentarius* [Rome 1612], pp. 44-47. On the personality of inanimate objects, consider Carolly Erickson: "Medieval perception was characterized by an all-inclusive awareness of simultaneous realities. The bounds of reality were bent to embrace—and often to localize—the unseen, and determining all perception was a mutually held world view which found in religious truths the ultimate logic of existence. This perception ... was encouraged by Neoplatanist ideas of the power and number of noncorporeal beings, the presence of life in inanimate creation ... Medieval people lived in a perpetual climate in which noncorporeal beings were a familiar and to some extent a manageable force...". *The Medieval Vision: Essays in History and Perception* (Oxford University Press, New York 1976), p. 27. See also Genesis 28, and Jacob's anointing of a stone.

about the practice or efficacy of the interdict, although I show in Section V that even its lack of efficacy underscores my historical and theoretical argument. In other words, my historical argument is not about whether the bells did or did not ring during an interdict—rather, it is about why jurists, Popes and Kings thought the question of whether they could was so important.

The theoretical argument is less straightforward. If the historical argument holds and I am mostly correct about how jurists contemporary to the interdict thought about its implications, then the interdict and what it implies about the Church's claims to authority become more challenging subjects for political theorists and social scientists. The interdict causes standard models and vocabularies of the spiritual and temporal spheres, the "Church" and "State", to break down. As a sanction designed to bring about obedience, reconciliation, and acceptance of responsibility for wrongs committed against the order of justice, the claims about the power of the Church in its levying of the interdict suggest that its authority was over individuals and the community as a whole—non-Christians included. The degree of goods and services prohibited by the sanction required a power not only over life and death of the subject, but also a power which erased the essential functions of the political and social community. It also implied jurisdiction over the concepts of public justice and of public rights. But the Church's claim over the *civitas* was not sovereignty or even public authority of the same kind or quality as that of the temporal ruler, requiring us to reconsider the theoretical interpretation of the space being contested through the interdict in pre-Enlightenment political life.

I make the theoretical argument in the latter half of Section IV. Drawing on the jurists' own arguments about the effects of the interdict, death, and time, I suggest that a more historically accurate and contextually defensible conception of the Church's claims to authority invokes something like a public sphere. This kind of conception would not have been accessible to the jurists, but my re-interpretation of their arguments and vocabulary produces a model of understanding the relationships between the individual, the Church, and temporal politics which I think is both historically sensitive and, on balance, more intelligible to the subjects of my study than current alternatives. When the Church issued an interdict, they took disciplinary action against a territory outside of their *own* territory and individuals outside of their spiritual jurisdiction. Some of these effects may have been minor inconveniences to non-Christians, but others suspended public-facing benefits and services which were more severe. The Church's material, legal, and political integration into the 'public' grounds their disciplinary jurisdiction and the power to issue this injunction. But, insofar as the Church claimed to make up part of and police this 'public' or 'public sphere', the interdict was a partial *evacuation* of responsibility and administration. In Section V, I show that the strategies of resisting the interdict confirm what historians have long known: the interdict was often counter-productive. Also, however, interdicted communities developed alternatives to the services provided by the Church and took on new roles in the administration of the 'public' or 'public sphere'.[638] The methodological difference of this section

[638] I have no intention of picking fights with theorists of the "public sphere" as most frequently written about in political theory and I have no intention of applying any of the content of the language or theory of the public sphere from contemporary theorists back to my historical period. The language of "spheres" obviously predates Habermas (e.g., Tocqueville), and so I should have some flexibility to use this language to illustrate what I take to be the conceptual model of political life in medieval law and politics. The most I will say on the "public sphere" in the 20th and 21st century sense is this: it might be the case, if my view about the Church and its claims is correct, that the "public sphere" was not something that had to be *invented* in the 17th century and beyond, but rather *reclaimed* as an exclusive object of temporal authority. Jürgen Habermas, *The Structural Transformation of the Public Sphere*; Peter Lake and Steven Pincus, eds. *The Politics of the Public Sphere in Early Modern England;* Jeffrey Sawyer, *Printed Poison: Pamphlet Propaganda, Faction Politics, and the Public Sphere in Early Seventeenth-Century France* (1990).

is a question of re-interpretation versus interpretation; some of the explanations offered at the end of this chapter would have been accessible to the jurists I write about, but some would not have been. I defend these "re-interpretations" as more plausible, if not also accurate, translations of medieval and renaissance political concepts.

Before beginning, I want to address two final questions: Aren't some bells just bells? And, why hasn't this account been told before? The two are related. Many bells are just bells and as such have attracted archaeologists, experts in material culture, religious historians, and in the late 19th and early 20th century, many historians of technology and engineering. Many of these scholars, however, were not regularly reading civil, canon, and feudal law. Even as 'just' bells, they remain sources of cultural and political conflict; recently, the US District Court for the District of Arizona ruled that Phoenix's noise ordinances could not apply to churches because their right to sound church-bells fell within the scope of first amendment privileges.[639] On the other hand, scholars on church discipline often opt to write about excommunication instead of the interdict, and scholars on the interdict have other objectives than to write about bells and other sensitivities which have fairly led them not to inquire into the legal and theoretical significance of the bells' silence.

Scholarship on the interdict has a long history, beginning with a 16th century jurist and scholar Pierre Pithou's (1539-1596) *De l'origine et du progrès des interdits ecclésiastiques*. It entered into a brief resurgence in the works of German canonist Franz Kober's *Das Interdikt* (1869), American scholar Arthur Howland's dissertation on the interdict (1899) and Stanford lecturer Edward Krehbiel's *The Interdict: Its History and Operation* (1909).[640] Specific interdicts—England and Florence in particular—drew the attention of specialists like Christopher R. Cheney and Richard Trexler[641], but the interdict as an ecclesiastical legal tool dropped into footnotes and passing examples, or as a point on which to view the writings of individual authors[642]; it is not that the interdict ceased to be important and widely noted, but rather that it was assumed that all had been said either about the interdict or that its much more interesting sibling, excommunication, deserved the attention. Peter Clarke's recent monograph on the interdict was the first close study of the interdict in nearly a century and it is indispensable for its account of the moral question of collective guilt and the early development of the interdict; my work here draws extensively on Clarke's history of the interdict, but my sources are later (14th-16th century) and

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639 *Saint Mark Roman Catholic Parish v. City of Phoenix*; Brett J. Haroldson, *Saved by the Bells: A Look at Campanological Rights of U.S. Churches,* Rutgers Journal of Law & Religion, Vol. 17, (2015).

640 Franz Kober, a series of three articles published in two volumes. *Das Interdikt* (1869), *Archiv für Katholishces Kirchenrecht,* vol. 21. pp. 3-45. and pp. 291-341 *Archiv für Katholisches Kirchenrecht,* Vol. 22 (Mainz 1869), pp. 3-53; Arthur Howland, "The Origin of the Local Interdict" (1899) and his thesis "The Interdict, its Rise and Development to the Pontificate of Alexander III.".

641 Christopher R. Cheney, *Pope Innocent III and England* (Stuttgart 1976); Richard Trexler, *The Spiritual Power: Republican Florence Under Interdict (*Leiden 1974). The Venetian Interdict has gained ground in recent years, thanks to some notable figures who engaged with it, including Paolo Sarpi and Robert Bellarmine. On the latter, see Stefania Tutino, "The Controversy over the *Interdetto* and the Attacks against Bellarmine's Theory", Ch. 3 in *Empire of Souls: Robert Bellarmine and the Christian Commonwealth* (2010). Also, Thomas F. Mayer, *The Roman Inquisition on the Stage of Italy, c. 1590-1640* (University of Pennsylvania Press, 2014), esp. pp. 64-114.

642 Thomas Woelki, "L'interdetto ecclesiastico nella dottrina di Francesco Zabarella", pp. 89-106 in Chiara Maria Valsecchi and Francesco Piovan, eds. *Diritto, Chiesa e Cultura nell'Opera di Francesco Zabarella, 1360-1417;* Harald Maihold, *Strafe für fremde Schuld? Die Systematisierung des Strafbegriffs in der spanischen Spätscholastik und Naturrechtslehre,* (Köln-Weimar-Wien 2005), pp. 116-119; Lotte Kéry, *Gottesfurcht und irdische Strafe. Der Beitrag des mittelalterlichen Kirchenrechts zur Entstehung des öffentlichen Strafrechts* (Köln-Weimar-Wien 2006), pp. 171-174; on territoriality and the interdict, see Giovanni Chiodi, "Tra la civitas e il comitatus. I suburbi nei giuristi medievali" in Maria Vittoria Antico, ed. *Dal suburbium al faubourg. Evoluzione di una realtà urbana* (Milan 2000), pp. 225-320.

include the civil law. This literature can be split up into two camps: it either treats the interdict as a kind of self-regulation of the Church (and thus the subject of the interdict is the body of believers, the 'in-group' of the Church), or it treats the interdict as a site for conflict between the Papacy and temporal authorities. Both camps observe the many specific sanctions of the interdict within a *civitas,* but largely insofar as it disrupted the lives of Christians. Political theorists and political scientists have yet to consider the operation and scope of the interdict and how to square it with standard interpretations of ecclesiastical power, authority, and the state.

Consider lastly that bells, trumpets, town-criers, drums and other noise-making tools and officers have long been part of political and social life, even if their quotidian qualities serve as theoretical camouflage. Martial wrote of the bells of the bath ringing, Plutarch and Strabo of the bells of the Athenian fish-mixed of the priests of Syrian Gods, and Suetonius of Emperor Augustus' placement of bells by the doorway of the Temple of Jupiter.[643] In *The Fury's,* Aeschylus's Athena announced, "Herald, summon the people to their places, raise the Tyrrhenian war trumpet, fill its bronze with mortal breath, sound the piercing cry to call the people" to a murder trial at the Areopagus.[644] They announced the presence of fire, emergency, or foreign attack, and their utility doubled in folklore: in 610, the church bells of St. Stephens scared off the entire army of King Clotaire II of the Franks, and under the reign of Alfred the Great (848-899) the "Bosham Bell" split the ship of Viking raiders trying to escape.[645] They were metaphysical entities with names; their chords corresponded to particular prayers, homilies, and signals, some of which could fight off demons and evil spirits.[646] These same bells warned bystanders against touching the condemned during public executions, or celebrated of feasts, festivals, and royal occasions, ringing at coronations and funerals, though they could be muted with leather clappers for solemnity.[647] They were also hunks of heavy, valuable metal and as such were spoils of war. [648] All of these uses were mixed by canon and civil lawyers, blurring their lines between where their ecclesiastical functions end and their other, "public" or otherwise, uses begin.

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[643] Martial, *The Epigrams of Martial,* Book XIV, Epigram 163, titled 'Tintinabulum', Loeb, Vol. II, pp. 496-497.; Plutarch, *Quaestiones Convivales* 4.4.2; Strabo, *Geography,* 14.2.21.

[644] Aeschylus, *Oresteia: The Fury's,* lines 566-569, translated by Peter Meineck. cf. the war-trumpet employed for a drinking game in Aristophanes' *Acharnians,* lines 1000-1005.

[645] Coleman, *Bells,* p. 36; Mark Antony Lower, *Compendious History of Sussex* (1870), p. 67.

[646] Marcus Antonius Genuensis, *Tractatus de Ecclesia,* Quaest. 248, n. 6, fol. 219; S. de Blaauw, 'Campanae supra Urbem: Sull'uso delle campane nella Roma medievale', Rivista di Storia della Chiesa in Italia, 47 (1993). J. Gardner, '"For whom the bell tolls": A Franciscan Bell-founder, Franciscan Bells and a Franciscan Patron in Late Thirteenth-Century Rome', in A. C. Quintavalle (ed.), Medioevo: I Committenti. Atti del XIII Convegno intemazionale di studi, Parma 21-26 settembre 2010 (Milan, 2011), pp. 460-68, at p. 460.

[647] Byzantine Chronicler Joannes Zonaras (c. 1070-c.1140) attests to a different practice of hanging bells around the necks of the condemned. Travel writer Henry Swinburne (1743-1803) mused that "This superstition may be the real origin of the custom in England of parish bells ringing while a malefactor is on his way to the gallows; though it is generally supposed to be meant as a signal to all hearers, admonishing them to pray for the passing soul." *Travels in the Two Sicilies,* Vol. I [London 1790], p. 154. One remarkable text which records the 'memory' of a bell at Rome chronicles its most ancient memory of ringing peace between Pope Gregory IX and the Senate in 1135, elections in 1283, rebellion in 1327, town council decisions in 1360, festivals in 1410, peace treaties in 1438, executions in 1453, assassination in 1471, military victory in 1482, celebrating the death of Mehmed II in 1481, and of course the daily divine offices. Francesco Cancellieri, *Le due nuove campane* [Rome 1806], Ch. 3, p. 40.

[648] Alibhai, "The Reverberations of Santiago's Bells in Reconquest Spain", *La corónica,* Vol. 36, Num. 2, pp. 145-164; Lintz, Delery, and Leonetti, eds. *La Maroc médiéval: Un empire de l'Afrique à l'Espagne.* Paris, 2014, pp. 462-463.

**Section I: "Notice of all Publick Actions": Bells and the Law**

Guido Pancirolli (1523-1599), an Italian historian and antiquarian, devoted a chapter to bells in his *History of Many Memorable Things Lost*:

> They are of very great Use, in regard they give us at a Distance the Hour of the Day or Night, when we cannot see the Sun. They call us to Prayers, and alarm us to assist at a Conflagration. They assemble the Magistracy, when there is a Summons to Arms. They call Scholars to their Books, and the Judges to the Bench. In a Word, they are Signals that give Notice of all Publick Actions, so that we should be very much incommoded, and at a Loss without them.[649]

Pancirolli's summary is useful but incomplete; though it stresses the "Publick" uses of bells, it undersells the "Loss" that might take place were they to be silenced (Section IV below). This section argues and shows through the medieval civil and canon law that bells were explicitly public objects and exclusively within the jurisdiction of the Church. No bell could be hung or rung in public without the permission of the Church, and generally, in any building that was not a Church. Improper use of the bell could be punished by civil and canon law authorities. Second, bells were a material indication for the solution to a theoretical puzzle for civil and canon lawyers: how do individuals meet, come to agreements, and make decisions? That councils or collectivities were artificial persons with a single will is widely known; but, in the 'mysticism' of these bodies, the bells play a central role for jurists to explain the possibility and procedure for reaching quorum, intention, deliberation, and agreement. Collective action required a formal procedure of assembly—*solennitas*—and bells were the first requirement.

As such, bells (and trumpets and heralds) were crucial legal tools to convene councils, chapters, and popular assemblies. Where no bell was rung, the actions of the assembly might be nullified; where the bell was rung improperly or out of order (rebellion or sedition), the status of the assembly was ambiguous—its actions could be nullified because the assembly was improperly convened, or they could be validated because the assembly was properly but *illicitly* convened. Finally, bells were a crucial tool in the exercise of criminal jurisdiction in civil law: bells distinguished between night and day and crimes committed after the evening bell carried greater punishments. More importantly, the ringing of bells escalated punishments for illicit assemblies and gatherings, as in cases of rebellion and sedition. While historians widely note the use of bells as a practical part of rebellion, the legal and theoretical context of this section will show that bells were more than a convenient noise-making device for organization; in fact, they signaled that the corporate body had assembled, with the capacity to make decisions and that their assembly was deliberate and intentional—done outside of the public and legal order in a challenge to authority.

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[649] Pancirolli, *The History of Many Memorable Things Lost, which Were in Use Among the Ancients* [London 1715], pp. 326-330. Pancirolli's *Rerum Memorabilium* was a comparative history and politics of knowledge and tools, fully translated into English in 1715. On Pancirolli, see Vera Keller's work, "Accounting for Invention: Guido Pancirolli's Lost and Found Things and the Development of *Desiderata*", *Journal of the History of Ideas,* 73(2), pp. 223-245; and V. Keller, *Knowledge and the Public Interest, 1575-1725,* (Cambridge, CUP, 2015).

*Bells: Public and Ecclesiastical*

Two facts about bells confuse the modern reader: they are fundamentally public and fundamentally ecclesiastical. These are not only compatible but are so intwined that they are difficult to separate—and it may indeed be a mistake to try. Bells were 'public' by legal definition as a contrast to their potential 'private' usage in the homes or private chapels of (wealthy) individuals. Bells were ecclesiastical by legal definition because they existed primarily to call individuals *publicly* for divine worship. To hang and ring a bell *for that purpose* in the private home was thus a violation of its publicity and sanctity. These distinctions begin in the canon law but transfer to civil law explanations of the uses of bells by citation. The starting point is a peculiar canon law (X.5.12.23), in which a priest named John had accidentally caused the death of a child when, as he was ringing the church bell, the bell fell from its headstock and down to the floor below. The immediate question was a criminal one with a clear answer: no guilt should be assigned to the priest, because as the marginal gloss summarized it, 'no one is liable for an unforeseeable accident'.[650] A theoretical question lingered: what was the priest engaged in while he was ringing the bell? With the 'sounding of the bells' he was 'giving the sign to convene the people of faith for divine services' (*ut signo dato conveniret populus fidelium ad divina*). Other accounts of this action use the word "congregate" (*congregandum populum*).[651] Jurists placed bells squarely within the Church's jurisdiction because they convened and congregated the '*populus fidelium*' to worship. This limited where they could be hung. In another canon law, X.5.33.10, Pope Celestine III (r. 1191-1198) rejected that Templars, Hospitallers, and other religious associations could build their own prayer houses with bells and 'ring them publicly'. Celestine argued that the Church must use every means to stop them, so that they did not continue to 'endanger the justice of others.'[652] The marginal gloss added that the right (*ius*) to hang and ring bells publicly belonged exclusively to the Church—organizations who ignored this committed a 'public crime' and were subject to the 'coercion' of the Bishop.[653]

Taken together, this gave jurists the confirmation of the proper purpose and context for the use of bells. Famous canon lawyers Hostiensis (1200-1271), Albericus de Rosate (c. 1290-1354), Panormitanus (1386-1445) and Joannes de Anania (d. 1457), cited widely for their commentaries on these passages into the 17th century, stuck to the arguments and vocabulary provided by the canon law.[654] Joannes de Anania clarified that bells were fundamentally public and belonged in

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[650] Gloss at X.5.12.23, [UCLA] col. 1715: "Nota quod de casu fortuito nullus tenetur cum praevideri non possit." Whether or not bells were regularly falling from rafters and killing ordinary persons, this example became a model for accidental manslaughter—if bell-boughs break while ringing, the bell-ringer escapes legal responsibility so long as they cry out to alert those who might be below. Mariano Socino, *Super c. ad audientiam de homicidio,* Fol. 164v in *Electissime* [1508].

[651] Joannes de Anania, at X.5.12.23, fol. 1332. We should not understate the significance of either the language of assembly (*convenire; congregare*) nor the Christian usage of *populus* to self-describe the congregation. It was not a Ciceronian conception—it had been inflected through Augustine, insofar as Augustine was available, and again through Caesarius, Isidore, several Popes, and the resurgence of schooling in the 9th century. By this time, it was vernacular, but also formal (unlike *plebs*). Nevertheless, it still carried some of the classical sense of the term: *populi* were not accidental or unintentional; they must convene, with a purpose, and with a decision-making apparatus. Cicero, *De Re Publica,* I.41.

[652] X.5.33.10, [UCLA] col. 1809: "*iustitiam non impediant aliorum*".

[653] X.5.33.10, [UCLA] col. 1809 at 'Potius per te'.

[654] Hostiensis, *Commentaria in Primum Decretalium Librum* [Venice 1581], at X.1.06.30, 'In causis', ns. 10-11, fol. 57r; X. 1.06.35, 'Coram', n. 4, fol. 62r; Albericus de Rosate, *Dictionarum* [Venice 1581], 'Campanarum', also cites the civil Roman law, Dig. 4.2.9.1, discussed below.

churches. Churches could have as many bells as they wished, but private homes and chapels could have none at all. In such cases, Joannes argued that the reason for the bell did not exist: in private, there was no public to constitute and in chapels serving families or fraternities there was no *populus* to convene.[655] There were exceptions, but even these confirmed that the Church possessed the right to grant privileges and exceptions to allow bells to be hung and rung in places like monasteries, though they were permitted only one.[656] Later jurists Francois Marc (d.c. 1525), Estaban Daoiz (d. 1619), and Agostinho Barbosa (1589-1649) summarized these rules as having two prongs: 'To have a bell publicly, and to ring it, is not possible in a private prayer house, even through religious exemption or privilege'; 'To have a bell publicly in a place and to ring it publicly is the sign of a public and sacred place'.[657] At least at the beginning of this historical period, bells were by legal definition public and sacred and required the sanction of ecclesiastical authority to ring.[658]

Because of this, the canon law formed the location for the legal analysis of bells and their significance. X.1.27.01 offered a catalogue of the 'representations' or 'significations' of bells, and Joannes Andreae's summary was the most influential, copied by jurists like Panormitanus and Antonius de Butrio almost word for word:

> The gloss here shows that this chapter proves that the bell is a sign (*signum*) of gathering the chapter, and following that shows that it is a sign for going to war. This chapter proves that it is a sign for the passing of the hours; Hostiensis says that it is sometimes a sign for thanksgiving, as when the Christians win a glorious victory. The same can be said of the laudable custom by which the bell is said for the salutation of the Virgin Mary [the *Ave Maria*]. Sometimes it is a sign of an election taking place, sometimes a sign that someone has lost their life (as at Padua), sometimes for an excommunication, sometimes for the joy and honor of a certain person in a parade, sometimes for the extinguishing of a fire, sometimes for going to bed, sometimes for convening the people's court (*ad parlementum populi convocandi*), and sometimes for honoring the Body of Christ.[659]

The line between 'sign for' and 'does' is blurry; when the bells ring to chase evil spirits away the bells "do", but when the bell rings to "signal" the convening of a chapter, it might either "mark"

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[655] Joannes de Anania at X.5.12.23, fol. 133r: "in illis cessat ratio quare pulsantur".

[656] Albericus de Rosate, *Dictionarum* [Venice 1581], 'Campanarum' at vers. 'Ubi conceditur'.

[657] Francois Marc, *Decisiones Aureae in Sacro Delphinatus, Vol. I-II* [Venice 1561], Quaestio 1110, fol. 365r; Stephano Daoyz, *Juris Pontificii Summa, Seu Index Copiosus Continens Conclusiones, ac Summam omnium materiarum* [Milan 1745], p. 66-67; and Augustini Barbosa, *Collectanea Doctorum,* Tom. III [Lyon 1669], at X.5.33.10, pp. 224-5.

[658] These rules were fluid, especially since bells were valuable tools and signs of influence. Oldradus offered a different account. Oldradus, de Ponte, *Consilia,* [Venice 1570], Cons. 228, fol. 104r-105r. Nicolaus Rodriguez Fermosino (1605-1669) notes that some 'brothers' were permitted only to have a single bell to announce the hours but concludes that 'general custom had derogated from this constitution'. Nicolai Rodriguez Fermosini, Tractatus II, Tomus II, De Officiis Et Sacris Ecclesiae, ad titulum XV libri I decretalium, De Sacra Unctione (Lyon 1662), De Officio Custodus, Quaest 1, pp. 545-551; Albericus, *Dictionarum,* at 'Campana'.

[659] Andrea, X. 1.27.01, n. 13, fol. 196v [Venice 1612]; Antonius de Butrio, X.1.27.01, n. 10, fol. 20v *Commentaria Super Prima Primi Decretalium,* Tom. I [Venice 1578]; Bishop Lelio Zanchi (1520-1594), *Tractatus de Privilegiis Ecclesiae,* [1585] Priv. 40, ns. 8-12, p. 76-77; Roberto Maranta, *Tractatus docti et insignes de ordine iudiciorum* [Coloniae Agrippinae 1578], Pars. VI, p. 320, ns. 111-114.

that it has occurred or "do" some of the assembling itself.[660] Bells announce things but they also *do* things; they might have a kind of illocutionary force. This passage was crucial, because when lawyers were faced with the interdict's general prohibition on ringing bells, they used these 'significations' to interpret the effect of the sanction.[661] Again, bells were 'sacred' and ecclesiastical just as they were public. Insofar as they were both, jurists recognized the potential confusion of who ought to pay for them. Some thought that the church bells provided such 'utility and advantage' (*utilitatem et commodum*) that all residents within the parish could be taxed to provide for them.[662] To the rest of their 'utility and advantage' we turn next.

*Deliberation, Intention, and 'Maior'-itarianism: Bells and Collective Bodies*

In this subsection, I will show that bells were necessary components for convening assemblies; their role has escaped notice by scholars because of an understandable impulse to use legal and political thought on corporate personhood to make claims about representation, the *maior pars,* making law, or corporate responsibility.[663] In fact, the ringing of the bell to convene the assembly—and more broadly the formal procedure (*solennitas*) required for assembling any collective body—has important implications for these topics. Where no bells (or equivalent auditory signal) are rung, the assembly cannot convene, and it cannot make valid law; where the bell has been rung out of order or illicitly the assembly cannot licitly convene. Civil and canon lawyers applied this to both the general category of assembly and reaching agreements in multitudes as well as civil and canon law corporations or chapters. I will later (Section IV) use this to show that the interdict suspends both the means of assembly (the bell) and the right to make law itself. Bells were a necessary but not sufficient variable of assembly in most cases; however, as in cases where throngs of individuals were congregated in a public space, the ringing of a bell (accidental or intentional) transformed individuals into a 'mob', or people into *a* 'people'.

First, roman law and the medieval jurists required an auditory signal for convening collective bodies, either the original law-making body of the community, civil law corporations or associations, or canon law synods, chapters, and councils. The puzzle for jurists was a central one to the history of political thought: how do collectivities form and make decisions? Though the answer in juridical thought is always by the will of the *maior pars,* this question can be asked more precisely: How do large numbers of persons assemble and create 'majorities' out of discordant groups at all? Jurists had answers to both. The *Digest'*s history of the senate reads in part that "it grew hard for the *plebs* to assemble, and to be sure much harder for the entire citizenry to assemble, being now such a vast crowd of men" and so the senate was given "trusteeship of the commonwealth." [664] Accursius' analysis of this subject begins elsewhere in the *Digest* with a reflection on corporate responsibility but begins here theoretically with the 'difficulty' of the

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[660] See also Sagismondo Scaccia (1564-1634) *Tractatus de Iudiciis Causarum Civilium, Criminalium, et Haereticalium,* Liber Primus, [Venice 1648], Cap. 36, ns. 1-2. Fol. 77.

[661] See also Prospero Farinacii at X.1.27.1, *Commentaria in V Libros Decretales,* Tom. I [Köln 1676], pp. 384-385, and also p. 29 and 226; Jean Etienne Duranti [Durantius] *De Ritibus Ecclesiae Catholicae, Libri Tres* [Rome 1591] pp. 71-72, Book I, Chapter 22: "De Turri Sacra et Campanis Seu Tintinabulis".

[662] Marcus Antonius Genuensis, Bishop of Isernia, *Tractatus de Ecclesia* [1620], Quaest. 248, n. 6, fol. 219r.

[663] Corporate personhood received great attention from continental scholars in the late 19th and early 20th century. Gierke, *De Genossenschaftsheorie;* Dernburg, *Pandekten*; Mestre, *Les Personnes Morales*. In America, these were incorporated into legal and academic thought by F.W. Maitland and Roscoe Pound, both of whom also drew on the work of New Zealand's Sir John William Salmond.

[664] Dig. 1.2.9.

assembly of the people. Close attention to his and later jurists' comments reveal that jurists were actively attempting to square a classically inherited commitment to natural sociability with the legal and political reality of what seemed like natural disagreeability. Dig. 4.3.15.1 held that the subjects of a municipality could not be collectively held responsible for fraud, with the justification: "what fraudulent or malicious act can they [as a body] do (*facere*)"? The implied impossibility of collective action seems to have unsettled Accursius, because he quickly qualified the original words of the law:

> By 'can they do' (*facere possunt*) it is as if to say that nothing is easy for them to do, because it is not easy for them to agree (*consentire*); but they still might do something with difficulty, as when the bell is rung because it seems that all have then done what the council has done, or its majority.[665]

What began as a legal question with theoretical underpinnings turned practical with different theoretical underpinnings. Some editions of this gloss replace *consentire* with *sentire,* with the differing emphasis placed on the capacity for making judgments, having opinions, or meeting as opposed to the mutual project of *consentire.* Accursius' pivot is telling, because he takes the thrust of the original law to be that collectivities of citizens cannot *easily* take action as a whole—especially, one would imagine, the "fraudulent or malicious acts" of the *Digest*'s original reference. The *Digest*'s skepticism of collective action was overcome, in Accursius' view, by the 'difficulty' of the artificial organizing power of the bell and the procedure of making a council.[666]

Accursius cited a different legal passage which gives further texture to his sense of the 'ease' or 'difficulty' of collective action. D. 4.8.17.6-7 and 4.8.18 read:

> If an arbitration has been referred to two persons, ought the praetor to compel them to make an award because, considering how prone by nature men are to disagree (*propter naturalem hominum ad dissentiendum facilitatem*), the matter is never likely to come to an end? For where an arbitration is referred to an unequal number of persons, the reference is valid not because all will easily agree but because, although they disagree, a majority is found whose opinion will stand (*et si dissentiat invenitur pars maior, cuius arbitrio stabitur*). But it is common for an arbitration to also be referred to two persons and the praetor ought to compel the *arbitri,* if they do not agree, to select a particular third person whose authority may be obeyed. [7] ... if an arbitration is referred to three persons, it is certainly sufficient that two agree, provided the third had also been present. However, if he was absent, although two agree, the decision is not valid, because the arbitration was referred to several persons and, if present, he could have brought them over to his opinion. [4.8.18]

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[665] Accursius at Dig. 4.3.15.1: "Quasi dicat nihil facile, quia nec consentire facile possunt. ... Sed tamen possunt cum difficultate, ut campana pulsata, quia videbuntur omnes facere quod consilium facit, vel maior pars ... et metum inferunt. An alternate edition has a few choice substitutions: "Quasi dicat nil facile, quia nec et sentire facile possunt ... sed tamen possunt cum difficultate ut campana pulsata quia videbuntur omnes facere quod consilium facit, vel maior pars."

[666] On corporate guilt in medieval civil and canon law, see D. Quaglioni, "'*Universi consentire non possunt.'* La punibilità dei corpi nella dottrina del diritto comune"; A.M.P Nicolo, "La persona giuridica in diritto canonico. Tra valorizzazione e relativizzazione"; M.F. Fontanella, "Corruzione e superamento del principio *societas delinquere non potest* nel quadro internazionale"; L. Peppe, "'*Societas delinquere non potest.'* Un altro brocardo se ne va."; P.M. Vecchi, "La persone giuridiche: un sguardo al diritto attuale"; and Sampson, *The Historical Analysis of Grotius' Analysis of Delict.*

> Just as where three judges have been appointed, the judgment of two have agreed, in the absence of the third, is not valid because the majority opinion is valid only where it is apparent that all have pronounced judgment.[667]

Accursius' analysis on this passage was influential and taken up by Odofredus[668]: a *universitas* or any group of people cannot easily come to agreements, but it can be said that the whole *universitas* agrees if the bell rings. Whatever natural sociability humans may have, conflicts are difficult to settle. This passage claimed that humans are *disagreeable* by nature even when they are social. The only solution is a third-party arbitrator, which also makes the minimum number of persons for any mediated agreement three, the same minimum for any corporate body. What makes this passage particularly fascinating is the justification for the mandate of any judges appointed to hear the agreement: even where *most* of the judges to whom the case had been referred are present, "the majority opinion is valid only where it is apparent that *all* have pronounced judgment." The justification is not procedural, as we might have expected, but was a hypothetical claim about the potential of deliberation: the missing parties "could have brought them over to [their] opinion" were they present.[669]

Nevertheless, the original thrust of the roman law was that agreement (*consentire*) was 'difficult' and needed either judges or rules. From Accursius to Odofredus to Estabon Daioz (d. 1619), one of these rules was the ringing of the bell. Daioz writes, 'citizens cannot come to agreements (*consentire*) easily, but with difficulty they are able to ring the bell, by which they seem to make a council. This council acts either by the majority (*maior pars*) or because they instill awe (*metum inferunt*).[670] From Accursius to the early 17th century, then, jurists read the formal procedure of forming assemblies as a touchstone for coming to agreements. Though technically originating in the laws of arbitration and court procedure, this procedure was also at the heart of the legal origin of the community itself and popular sovereignty—Dig. 1.1.9, 'Omnes

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[667] Dig. 4.8.17.6-7 and 4.8.18, trans. Watson, with adjustments.

[668] Odofredus, *Commentaria super Digesto Veteri* [1504] at Dig. 1.2.2.9.

[669] These passages were quoted in political arguments in early modernity. In his handwritten notes on Book VIII of the *Laws of Ecclesiastical Polity,* Robert Hooker writes: Entities do not wish to be disposed badly, the multitude commanding is bad ... Therefore the most prudent jurists have taught it necessary for the public good that the state be guided by one man [Dig. 1.2.2.11], and assuredly unless each society be ruled in this order, every dispute and disagreement would be endless because of the native facility of men for disagreement. *The Folger Library Edition of The Works of Richard Hooker,* Vol. 3, *Of the Laws of Ecclesiastical Polity, Books VI, VII, and VIII,* ed. P.G. Stanwood (1981). This passage comes from 'Hooker's Autograph Notes from Trinity College, Dublin, MS 364, ff. 69-84', p. 493. Hooker is offering a normative reading on Dig. 1.2.2.11, which reads: "...It has come about that affairs of state have had to be entrusted to one man (for the senate had been unable latterly to govern all the provinces honestly). An emperor, therefore, having been appointed, to him was given the right that what he had decided be deemed law." Trans. Watson. It was also used, with similar roman legal passages, to underscore human life before civil remedies. Franz Stypmann (1612-1650), author of a treatise on the sea that was published alongside the works of John Selden, Giulio Pace, and Grotius, writes: 'Even in a communion it is easy to excite discord, owing to the natural facility of men to disagree, it very easily happens that they resort to private quarrels and private arms supported by equal rights.' It was even strung together with the concept of original sin to suggest that this divisiveness was a corruption and not the natural state of humankind. *Tractatu De Jure Maritimo,* Libri I, Cap, V, n. 16-17, p. 216 in Cocceji, ed. *Grotius Illustratus seu Commentarii ad Hugonis Grotii,* Tom. IV [Wratislaviae 1752]; Joannes Oldendorp, *Variarum Lectionum Libri ad Iuris Civilis Interpretationem,* [Coloniae Agrippinae 1575], 'Iuris Naturalis, Gentium, et Civilis', Tit. II.

[670] Estabon Daioz, following Accursius' argument to the letter, used a different Digest passage to illustrate the work that rules could do to cover the gap left by the impossibility of unanimous consent. Dig. 41.2.1.22 reads: "Citizens of a municipality can possess nothing of themselves because the consent of all is not possible. Hence, they do not possess the marketplace, public buildings, and the like, but they use them in common."

Populi'—and from there the procedure for all collective bodies from the *populus* to the council.[671] The formal procedure for properly convening these assemblies was called *solennitas*. Assemblies had to be convened properly, or 'with *solennitas*': information about them had to be published, they must be started by some auditory signal, and the must take place in the right kind of place. If the standards of *solennitas* were not met, a judge might rule that the assembly had not been licitly convened and its actions were not binding.[672]

*Solennitas* would be required for ecclesiastical and secular assemblies.[673] C.10.32.2 had spoken of calling together decurions "in the usual manner" (*solemniter convocatis*), providing plenty of ambiguity for medieval jurists to craft into a list of requirements. These requirements followed roughly the same rules for summoning witnesses: they could be made by heralds or town-criers, and Baldus, like Bartolus, wrote that they could be summoned 'by bell, as when the bell sounds to the *parlamentum populi*'.[674] When these audible signals sounded in public places in the city, it was understood to have had the effect of informing the whole city and thus was binding on all. Church doors were also a sufficiently public place to post a paper notice.[675] All other means of convening the assembly were not valid.[676] Hostiensis, Joannes Andreae, Bertachini, Francisci de Pavinis, Joannes de Anania, and Estaban Daioz all stressed that the bell was likewise a *signum* of the chapter congregating and by the same logic and same civil law passages, a requirement for making statutes, casting votes for an election, engaging in 'reformation', or indeed holding the Papal conclave. [677]

*Solennitas* often took shape as a set of positive requirements for assembly making. Angelus de Ubaldi writes that all assemblies must be 'solemnly' convened', through the sound of a trumpet (*tubae*) or bell (*campanae*) or a herald (*praeconis*), and that this council must always be called in a public place (*in loco publico*). [678] This had a practical dimension: ringing a bell summoned those from a distance who would otherwise be absent (according to Baldus)[679], but they also have a natural effect of assembly. Albericus writes that 'whenever you blow trumpets, a whole crowd will gather around you'.[680] Though criers and trumpets were valid tools for convening assemblies, jurists were agreed that bells were able to 'bring people more fully to the notice of what it signifies than the voice of a herald', not to mention with less effort.[681] The auditory signal was especially important because jurists thought that leaving people out of the assembly could cause harm to both those excluded and the assembly itself. He used the same justification seen above: if those who

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[671] Albericus, *Dicionarum* [Venice 1581], gloss at Dig. 50.17.160.1.
[672] *Solennitas* is also written as *solemnitas.* I use the former throughout this chapter. Cravetta, Consilium 88 and 134.
[673] Additiones to Bartolus at C.10.31[32.2], [Basil 1588].
[674] Baldus at C.10.32.2. And Bartolus at C.10.31[32].2, n. 4, fol. 16r-16v.
[675] Recall that the beginning of the Reformation is often pegged to Luther's circulation of his 95 Theses by first sending them to the Archbishop of Mainz in October 1517, but also soon thereafter by posting them on the doors of churches; this was a standard procedure for canon and civil legal 'citation' or 'summoning'.
[676] Cravetta, Consi. 134, nu. 5, p. 387: Other than the bell and trumpet, "alias gesta non valent". See also Cons. 88.
[677] X.1.27.0; Joannes Francisci de Pavinis, *De officio et potestate capituli sede vacante,* Praeludium V, n. 21, fol 411 in *Tractatus Illustrum,* Vol. 13, Part II [Venice 1584], pp. 408r-432v; Joannes de Anania at X.5.12.23, fol. 133r; Bertachini, *Repertorium Iuris Utriusque,* Prima Pars [Venice 1590], fol. 232v-233r, at 'Campana'; Roberto Maranta (1476-1530) *Tractatus docti et insignes de ordine iudiciorum* [Coloniae Agrippinae 1578] Pars. VI, n. 111-114, p. 320; Baldus, *Commentarius in Sextum Codicis Librum* [Venice 1586], fol. 118r.
[678] Angelus at C.10.32.2, n. 5.
[678] Bartolus at C.10.32.2, fol. 16r-16v.
[679] Baldus, *Commentaria in Decretales* [Venice 1571] at X.1.06.31, fol. 117v.
[680]Albericus, *Dictionarum,* [Venice 1581], 'Campana'.
[681] Bonifacius de Vitallinis, *Lectura Super Constitutionibus Clementis* [1522], fol. 230. ns. 12-15.

should have been called were not, then those who were absent 'might have drawn others to their opinion'.[682] Angelus continues: 'You should say that they must all come together (*convenire*) in one and the same way, such that one of them cannot commit the authority of another.'[683] The harm implied by absence and failed procedure was that one person might have their authority (*auctoritas*) committed by another person.

The positive requirements of *solennitas* imply ramifications if those standards are not met. Angelus asks, 'What if the *consilium* appears not to have been convened?'[684] Bertachinus supplies one answer: 'We are to understand, however, that the actions of the council of the people are not valid unless the council is convened in public and in the usual place by the sound of a trumpet or a bell at the command of Power (*de mandato Potestatis*)'.[685] Giulio Ferretti (1480-1547), invoking another commonplace phrase in medieval legal thought, confirmed that any council which 'represented the whole people' (*consilium totum populum repraesentaret*) exercised authority of the same kind and degree as that of their superiors, but only if it had been legitimately convened at the sound of a trumpet or bell.[686] If not, their authority and perhaps their representation of the "*totum populum*" was cast in doubt. Jurists like Jason de Mayno employed these arguments in practice. When the city of Crescenti was embroiled in a case about the validity of payments for pastoral and water rights, Jason's legal opinion hinged on the valid assembly of the town's counselors and the ringing of the bells which caused the council to represent the whole people.[687] Some jurists did not agree with the centrality of bells (or trumpets or criers) for *solennitas,* but as Cravetta wrote in one *consilium,* 'although others might seem to speak to the contrary, it is better to stand by the witnesses who affirm this about the sounding of the bells than others who would deny it, even if they numbered a thousand.'[688]

The concept of the *maior pars* took precedent within the theory of decision-making of the assembly but the theory and procedure of assembly-making preceded any voting action. They were of course closely related, but the bell or equivalent auditory signal preceded and was necessary for the construction of the *maior pars.* Take Baldus' oft-cited series of comments on corporate action at Dig. 3.4, especially Dig. 3.4.3. Baldus argued that corporate bodies can only generate a willed action when the *maior pars* of the congregated corporate body had willed it, and when this congregation had at minimum 'two-thirds of all those having a voice'.[689] Here, Baldus means two-thirds of those eligible by local or corporate statute to vote. What began as a clarification on the

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[682] Baldus disagreed on the point of quorum in a difficult passage at C.10.32[32].45, 'Nominationem', fol. 18v [Venice 1590]. Who counted as somebody who was "expected" to be at the council? Was there a minimum threshold that had to be met? Angelus suggests that it would only be right to expect those who are "in the city" (*in civitate*), but it would also seem wrong to "expect" the sick or those who suffer from other impediments which would prevent them from going.

[683] Angelus at C.10.32.2.

[684] Angelus at C.10.32.2, ns. 3-8.

[685] Bertachini, *Tractatus de Gabella,* Fol. 53v. This was, in fact, littered throughout the roman law and the commentaries of it. Bertachini for example cites: C.10.32.2; D.1.1.8; Dig. 3.4.3; C. 10.32.45; Dig. 50.1.19; Dig. 50.9.2, Dig. 49.14 'aliud, § refertur'; C.10.34; See also Aretinus, at Dig. 30.1.32.2; Felinus in X.1.03.07, at 'actus' and Felinus in X.1.02.06; and Bartolus at Dig. 50.1.19 generally.

[686] Giulio Ferretti [Julius Ferrettus Ravennatis], *De Gabellis, Publicanis, Muneribus, et Oneribus*, 415. On this phrase, see also Paulus de Castro at Dig. 2.14, 'Imperator Antonius'. fol. 72v in [1547] edition, and Ullman, "De Bartolli Sententia".

[687] Jason de Mayno, *Consilia,* Lib. III, Cons. 71, fol. 76v.

[688] They did not number a thousand. Cravetta, *Consilia,* Cons. 134, nu. 5, p. 387.

[689] Baldus at Dig. 3.4.3, 'Nulli', [Venice 1616], fols. 204v-205r; Bartolus at Dig. 3.4.4, ns. 7-8, [Venice 1596], fol. 112r.

*maior pars* turned into a summary of the 'requirements' for congregation, which were binding on assemblies 'unless war or another impediment prevented' them.[690] Peter de Ancharanus summarizes it nicely: assemblies make valid decisions 'when people are called publicly by a trumpet or a bell or by voice, although not all come, all seem to do what those who did come do, provided that two-thirds attend, and the *maior pars* of those two-thirds reach an agreement.'[691]

Baldus' lengthy reflection on procedure has a final distinction worth considering closely—some decisions of the corporate body required perfect attendance, in contrast to most where two-thirds 'sufficed'. Most actions of the *universitas* fell under the latter category, but some decisions, either by nature of their specific content, or by city-statute, or by the statutes of the *universitas* itself, required "*omnes*" be 'present' for the decision. [692] Paulus de Castro wrote that though these cases were fewer, there were contexts in which the 'present' could not speak for the 'absent'.[693] Where "*omnes*" were required, the *universitas* had to 'summon the absent', or in other words, delay the meeting, send notices to all eligible attendees, post notices on the Church door, and utilize heralds to announce the meeting in advance. Bells and trumpets could not meet this requirement because they had an auditory limitation: they could not reach those who could have been present but were out of earshot. On passages like these, we encounter jurists concerned about the harm caused to the absent and to the whole body on account of absent members. Alexander Tartagni (1424-1477) writes, 'You should interpret this to mean that the *maior pars* of those present will suffice unless those who are present wish to make a decision to the prejudice of those who are absent; in those cases, then, the presence of all who are absent and their consent (*consensu*s) is required'.[694]

The capacity of assemblies without quorum or the *minor pars* to act within an assembly varied according to jurists, but if their actions were to have any validity at all, the ringing of bells was required.[695] Ancharanus wondered whether assemblies might still be valid if quorum is not met—if 'two-thirds are often called but never come', and some action must be taken.[696] Quoting Joannes Andreae, Ancharanus writes that where the *maior pars* does not want to convene (*non vult convenire*), the *minor pars* may take action by the 'lapse' of the right of the *maior pars*. In cases where a superior has called a *universitas* directly, he argued that the *minor pars* could take valid action, even if it numbered 30 out of 100—that is, less than the 'majority of two-thirds' (33% + 1) required for valid action otherwise.[697] For all the procedural thorns and legal arithmetic of

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[690] I'm bracketing an incredible amount of procedural material here, one section of which treats meetings called by superiors with the authority to call meetings almost instantly; these had much fewer requirements, and bells, criers, or letter might not be required in such cases because the burden to maximize attendance was loosened.

[691] Peter de Ancharanus at X.1.02.01, ns. 113-115, *Commentaria in quinque Decretalium libros* [Bologna 1581], pp. 22-23. Umberto Locati (1503-1587) writes that a *maior pars* of two-thirds led to the action of a 'single voice'. Umberto Locati, *Opus quod iudiciale inquisitorum* [Rome 1570], p. 393.

[692]Baldus at Dig. 3.4.3, fol. 205v, beginning 'Quid si casualiter'. See also *additio* at 'illud'.

[693] Otherwise, ringing the bell was a sufficient 'summoning' action. Paulus de Castro at Dig. 3.3.1, n. 24; at Dig. 3.4.3-5, n. 8, fol. 104v.

[694] Alexander de Tartagnis, *additio* at Bartolus' C.10.32.45. Compare Angelus' *additio* at Bartolus' C.10.32.45. This was a complicated procedural and theoretical point. See Peter Paul of Paris, *Consilia,* Vol. III [1590]*,* Cons. 90, n. 21.

[695] Barthlolomaeus Cepolla (1420-1475), *Cautelae iuris,* 2q; Felinus at X.1.02.06; Barb[azza?] at X.1.29.06; and implied in some of the additions to Bartolus' comment on D.1.1.9.

[696]Ancharanus meant this more technically than Giovanni Cagnazzo (-1521), an inquisitor in Bologna, who suggests that where a two-thirds requirement was not set by statutes or demanded by the kind of business, ringing a bell throughout a place was sufficient to call those who wished to be present and business could be undertaken. Giovanni Cagnazzo [Joannes Tabiensi] (-1521), *Summae Tabienae,* Pars Prima, [Venice 1569] p. 518.

[697] Peter de Ancharanus at X.1.02.01, n. 115.

decision-making discussed here and omitted, what remains crucial is that the auditory signal was a prerequisite for any collectivity to make any decision by any formula.

Lastly, it should be clear that the requirements for a corporate body to take valid and binding action are also the requirements for it to be held responsible for their actions. These passages thus prevail in literature on corporate responsibility and delict, though, taking our cue from the jurists themselves, we need to provide a supplementary emphasis on procedure.[698] The intuition is this: corporate bodies can only be held responsible *as* corporate bodies (and not as the individual members themselves) if they had been properly convened and collective action was legally possible.[699] Action precedes responsibility, but assembly precedes action. Modern historians recognize as much: Giorgio Giorgi notes that as a function of the juridical personality of the corporation, it was responsible for any illicit act committed with the deliberate will of all or most of its citizens, summoned at the sound of a bell or trumpet.[700] Jurists like Odofredus, Paulus de Castro, Antonius de Butrio agreed—a bell, pipe, horn or audible signal implied a deliberate assembly had convened.[701] Deliberation and intention were crucial for criminal punishment, and proving the deliberation and intention of a large number of people was difficult—this much was the concern of Dig. 4.3.15.1 above, because it was unclear if large groups of people can do (*facere*) anything at all, let alone commit a crime. Nevertheless, the auditory signals which allowed groups to act 'difficultly' allowed them to act criminally: the forethought and intention required to convene a meeting and the difficulty of accessing and ringing the required bell or sounding the trumpets served as proof, in the same stroke, of the forethought and intention to will the crime that the multitude—or now, with the bells having rung, the single corporate body—has committed. Indeed, we can only speak of the corporate body acting if its *maior pars* had come to a declaration of the will, and the *maior pars* could only exist where it had been properly summoned. Jurists could therefore ask a factual question in the prosecution of questions about crime and, as I will show below, rebellion: did the bells ring?[702]

Again, these checklists and arguments appear in real court cases. Pier Filippo Corneo (1423-1493) puts these pieces together in a *consilium* which argued that it was possible for a community or *universitas* to be held responsible as a collective body for a collective crime.[703] It is a lengthy *consilium,* but it deals with a council and people who had been accused of marching with arms from the palace to the house of a nobleman and trespassing on his land. Corneo's decision had two prongs. First, because a council represents the whole community, and actions undertaken

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[698] Oldradus, *Consilia et Quaestiones,* Cons. 315 [Venice 1503], fol. 121. Also, Lucas de Penna at C.12.60.3, all, but especially n. 10; and C.12.35.18pr, all, but n. 9 onward. Ullmann, "The Delictal Responsibility of Medieval Corporations" 64 L.Q. Rev. 77 (1948); Arturo Barcia Lopez, *Las personas juridicas y su responsabilidad civil por actos ilicitos,* Segunda Edicion (Buenos Aires, 1922), esp. p. 242-259.

[699] Bartolus, at Dig. 4.3.15pr-1.

[700] Giorgio Giorgi, *La Dottrina delle Persone Giuridiche o Corpi Morali,* Vol. IV, Trattato II, Libro I, pp. 64-65: "Ma checchè sia di ció, assai importanti sono le obbligazioni al risacrimento de danni che leggi e statuti ponevano a carico delle Comunità presupponendone la personalità giuridica. La Comunità era responsabile del fetto illecito, commesso con la deliberata voluntà di tutta o di massima parte della cittadinanza, convocata a suono di campana o di tromba."

[701] Odofredus at D.3.4.7pr, 'sicut municipum'; Paulus de Castro at 3.4.7: [fol. 105r-v]; Antonius de Butrio at X.1.06.30, n. 2, *Commentarii Super Prima Primi Decretalium,* Tom. I [Venice 1578], p. 126.

[702] Compare Bartolus at Dig. 48.19.16pr, n. 9 for an indication of the fluidity of corporate responsibility in this period: 'I say further that if they raise a flag and ring the bells, that in doing so it is not said to be the criminal action of the whole *universitas* if deliberation has not preceded this action. In such a case, those who ring the flag and ring the bells are rather said to be instigators of individuals and are understood to be 'doing' the action more than the *universitas*'.

[703] Pier Filippo Corneo, *Consiliorum,* Vol. IV, Cons. 224, Fol. 164v-166v; Polyrodus Ripa, *Tractatus de Nocturno Tempore,* Cap. 62, n. 19.

by the council are thus carried out by the entire corporate body. If the council engaged in a criminal act so too did the *universitas.* This argument was rooted in representation. Second, Corneo argues that this specific crime seemed to have been done by the whole people as individuals, and as a principle, what the *maior pars* of the people have done, the whole people have done. This argument was rooted in the fiction of consensus and the definition of assembly. The latter was more interesting for Corneo and is more interesting for us. He attempts to show that the witnesses in the case agreed that most of the council-members were present at and outside of the palace, that the bells had rung, that many people assembled and took up arms, and that they proceeded to march, shouting *"arme arme, carne carne"*— 'arms, arms, flesh, flesh'.

Corneo argues that the facts of the case make it clear that the people assembled at the palace legitimately—that is, each of the requirements of formal procedure had been met, from the ringing of bells, to the quorum of two-thirds, and even to the deliberation and intention of their act (proved by their chants for 'arms'). The bells played a special role because they indicated that the people were assembling in the style and name of the *universitas.* Corneo maintained that the fulfilment of *solennitas*—quorum, the apparent agreement of the *maior pars,* and clear deliberation and intention—implicated the collectivity. Corneo writes that 'three things are required for a *universitas* to commit a crime and thus be punished for the crime it has committed. First, that the bell or trumpet has rung such that the whole *universitas* has gathered; second, that there is a shared understanding (*communicatum consilium*) between all members of the *universitas;* and third that all are assembled in the usual way and in the usual place.' The key to Corneo's opinion is that the

> people is a kind of imaginary body which is not seen, nor can it easily be distinguished from the things that are seen—for example, that the whole or the almost whole people has taken action. For in large *universitates,* individual persons commonly don't have distinct knowledge of everyone who is a member of the *universitas* and the number of them who are present who are in the people. And the tumultuous multitude might be seen, but in the same way it is not easy to show how many of them there are and how many of the bunch are the actual tumultuous ones, and if there's no information about any of this it cannot be established that the whole people or almost-whole people took action.[704]

That is, no witness, no matter how credible, can give any concrete testimony of who and how many people are present in any given collective action. The bell, and the *populus*' response to the bell, offered Corneo the evidence to see the imaginary body—the ears aided the eyes.

In this light, it is worth pausing to note that bells played a role in the effect, experience, and consequence of communal decision-making from Accursius' writings onwards. A council, assembly, set of judges, or other collective body could only take valid action if its *maior pars* had come to or voted on a decision. There existed no 'minority'; there was just a single willed decision made by a single body assembled as a whole, by the bell, and whose decision could also be marked by the bell. The auditory signal which convened them might be thought to be a single voice (perhaps *clamor* or *vox*) of the assembled corporate body, louder than any individual's voice and indeed of many voices, but also artificial, and perhaps with an air of impartiality, or at least, the air of the single truth of the outcome. Bells signaled that a deliberate constitutive act had occurred, and its ringing manufactured a single artificial voice to take the place of the discordant voices of the people in the assembled body acting 'difficultly'.

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[704] Pier Filippo Corneo, *Consiliorum,* Vol. IV, Cons. 224, fol. 164v-166v, n. 13.

As David van der Linden noted, bells "had a centripetal function, drawing together distinct confessional communities", and he quotes a priest from Bourdeaux named Gilbert Grimaud to illustrate the creation of an "acoustic community" at the ringing of a bell, because ''il semble que Dieu anime le son de ce metail pour penetrer les coeurs'"—'it seems that God animates the sound of this metal to penetrate hearts.'[705] What I have suggested here is that the legal analysis and function of bells recorded by medieval jurists shows that it was not simply "confessional communities" finding themselves created by the God's 'animation' of the bells. The *populus* at the origin of the political community, civil and canon law chapters, bodies at elections, town meetings small and large, and even the temporary communities formed by alarm bells and cries for help were all assembled by, and with the strict requirement of, an auditory signal like the bell. All of corporation theory, from Accursius' famous definition ('A corporation is nothing other than the men who are there') to Baldus' extensive writings, relies on the formal legal procedure for congregation.[706] Political theorists can only (rightly) emphasize the development of theories of representation, collective action, and popular sovereignty in corporation theory once they pause to observe that all legal discussion of the *universitas* is preceded both textually and theoretically by *solennitas*.[707] Our accounts of the corporate body can be richer for it—Baldus wrote that corporations were an 'image perceived more by the intellect than by the senses'[708], but the auditory signals of assembly give us one small window into hearing the unseen. Many of these passages on assemblies and chapters point back—through direct quotation, citation, or later jurists in *additiones* or marginal citations—to the fact that the ringing of the bells which summon or convene the assembly is just one of the many '*repraesentationes'* of the bell or trumpet.[709] To these we turn next.

*Bells and the Criminal Law: Earshot, Nighttime, and Rebellion*

This subsection covers a lot of ground, but it is notable that this ground is all within the criminal law, contrary to the previous subsection. We can group the legal significance of bells here into three categories. First, bells crystalized the importance of earshot. Drawing on criminal law about the duty of bystanders to help those in need, jurists conceptualized bells as extending the reach of public 'shouts', 'cries', or 'decrees'. Second, jurists and cities defined day and night itself by the ringing of the evening bell, and crimes committed after the final bell carried an escalated punishment for such an extraordinary crime. Third, jurists used bells to distinguish *accidental* disorderly public assemblies and *intentional* disorderly but *ordered* public rebellion, sedition, and protest. The ringing of bells was a crucial sign that people had convened against a rightful authority and as such could be held responsible for their actions.

First, earshot. The roman law at C.6.35.12 applied a formalized principle of the duty of bystanders when it mandated that slaves come to the aid of their master if he was attacked "under the same roof". The original passage clarified that such slaves "who can hear the cry for help" are bound by virtue of their relationship to their master to "run to prevent treachery".[710] The controversy for medieval commentators was not about the relationship of servants to masters but

[705] van der Linden, "Sound of Memory", p. 16, ns. 41-42. They "also worked as centrifugal powers, extending their sound across parishes and entire cities to ward off danger, evil spirits, and heresy."
[706] Accursius, gloss at D.3.4.7; Canning, *Baldus,* p. 186; Baldus at Dig. 3.4.7.1, fol. 206v.
[707] Baldus at Dig. 3.4.7.1, fol. 206v, with his *additio* at Dig. 3.4.7pr as his classical statement of the *universitas.*
[708] Baldus at X.1.31.3: "Est igitur collegium imago quedam, que magis intellectu quam sensu percipitur."
[709] Baldus at C.7.5.1; Cravetta, *Consilia,* Cons. 134, n. 5; Jason de Mayno, *Consilia,* Vol. III*,* Cons. 71.
[710] C.6.35.12pr-1.

about the nature of being within earshot of the "cry for help". To explain the obligations triggered by proximity, jurists turned to the curfew bell of the medieval city.[711] On this passage, Bartolus wrote that the principle of 'vicinity' which underwrote the duty of a servant to aid their master was the same as duties triggered by bells with the only difference being one of scope. Whether or not one had heard cries for help, alarm, or assembly often mattered for theorists, and bells vastly extended the reach of those sounding them and the number of potential duty-bearers who heard them.

Second, night. Criminal statutes often doubled punishments for crimes committed after nightfall.[712] But what was night? Bartolus, Baldus, Jacob Buttrigarius, and Alexander of Imola all wrote that night-time itself was defined civilly—and proved and testified to—by the ringing of the bells which closed the day.[713] Acts committed after the evening bell were committed at night, and thus subject to escalated punishments. City statutes, even at Rome, suggested that those were arrested after dark, and who pretended they were ignorant of the sound of the bells, should be beaten 'for a quarter of an hour'—a deliciously ironic punishment.[714] As late as the 17th century, Carlo Petra (1629-1702) maintained that the bell tower of San Lorenzo Maggiore in Naples announced the beginning of night for the community, after which time bearing arms in public was prohibited and subject to heightened punishment.[715] Jurists were not blind to the darkness of night—Jacob Buttrigarius argued that those who were out of earshot of the evening bell could still be held responsible for acts committed when it was clear that it was 'natural' night[716]—but it was important that communities controlled the time and the restrictions around the night, using church-bells and later their own municipal bells to do so.[717]

The final criminal legal dimension of bells was sedition. Two very short roman laws published in 384 and 466 (C.9.30.1-2) prohibit the excitement of mobs and the disturbance of public peace:

> [1] If anyone, contrary to the plainest command, puts himself at the head of a mob (*plebem*) and to the prejudice of public tranquility (*publicam disciplinam*) attempts, perchance, to defend it, will incur the gravest punishment. [2] In no places or cities shall any (public) demand be made by tumultuous clamors; nor shall insolent

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[711] Baldus, *Commentaria in I et II Infortiati Partem* [Venice 1615] at Dig. 29.4.12.1, § Hoc autem, fol. 122r.

[712] Alexander de Imola, *Consiliorum,* Lib. III [Venice 1590], Cons. 75, fol. 67r-68v; and at Dig. 28.2.25.1.

[713] Baldus [Venice 1571] at X.1.29.43, ns. 17-18, fol. 184r. On night, see also Baldus at Dig. 28.2.23pr and the *additio* there. Fol. 62. [Venice 1599], in Venice 1599: At 'fictio'. And Baldus at X.2.09.02, n. 4, fol. 171r. Baldus in additio at 3.1.1.pr, 'Hunc titulum', fol. 170r. See also Angelus, Cons. 193. Bartolus at C.6.35.12, n. 4-5.

[714] *Le due Nuove Campane di Campidoglio* [Rome 1806], p. 43, ns. 4-6. See also Sible De Blaauw, "Campanae supra urbem: Sull'uso delle campane nella Roma medievale," Rivista di storia della chiesa in Italia 47, no. 2 (1993): 367–414.

[715] Carolo Petra, *Commentaria in Universos Ritus,* Tom. I [Naples 1721], Ritus 12.

[716] Dusk was a 'false night'—the hours between 'civil' night and 'natural' night, where it still might be light out and therefore not absolutely and positively night, then the suspect could only be charged with a simple offense.

[717] Buttrigarius at C. 6.35.12; Baldus at C.6.35.12pr, n. 1. Church feasts and holidays caused some confusion because the bells were ritually silenced, but there jurists clarified that they must consider the 'hour at which it was customary' to have rung the bells. Bartholomaeus Cepolla (1420-1475) wrote in one *consilium* that city statutes used these prohibitions to prohibit individuals from sneaking goods out of a city at night, or sneaking around the city without a light, perhaps to prevent illicit machinations. But, these were all civil statutes—Cepolla noted elsewhere that they had to be on the books in order for individuals to be punished for violating them. Baldus at 3.2.11.1, § 'Etsi talis', [Venice 1576], fol. 176r. Bartholomaei Caepollae, *Consiliorum sive Responsorum*, Lib. III [Frankfurt 1599], Consilium 36, n. 42, n. 151. Or they regulated who could enter the palace, *Tractatus de Servit. Rust. Praed.,* Cap. 9, n. 14. On statutes, see *Commentaria in tit. ff. De aedilitio edicto* [Lyon 1550], fol. 65v-68v.

> speeches be made solely for the purpose of insulting someone. Persons who make such speeches and raise up a tumult may know that their demands will bear no fruit, and they will be subjected to the penalties which the ancient laws provided for the authors of seditions and tumults (*seditionum et tumultus*).[718]

These laws did not spark great controversy or debate among the medieval legal commentators. Baldus offered only a clarification: 'Provoking tumult and clamor among the people must be punished with the penalty of sedition, and even that which is done in response to the clamor of the people is not received with the effect of law'.[719] This law was, however, cited extensively in comments on other passages of Roman law which treated when and how to know if a "mob" had actually formed and a "tumult" or "clamor" actually raised. Bells played a central role in the definition of these kinds of actions. They could be *good* clamor or *bad* clamor. Bells were regularly used to raise the alarm of an invasion or the sign of the beginning of a war, and so as in the case of Savonarola's allies above, the bells were a call to arms.[720]

However, as in Savonarola's case, a call to arms which lacks the permission and authority of the community is also a call to rebellion; bells were particularly useful in extending the 'earshot' of such a call. Bells can certainly *amplify* collective action— Caspar Klock (1583-1653) wrote that 'the pulses and unusual movements of the bells do not uncommonly turn the spark of popular anger into a most voracious *incendium,* or stoking the flame of rebellion from under the ashes.'[721] What I want to suggest is that what makes the ringing of bells so seditious in the context of rebellion was the very same legal and metaphysical power which they had to assemble a council. We have much evidence of bells as a *part* of seditious or rebellious actions, which I will discuss briefly. But evidence of bells as a sign or part of sedition is not the same as them being *constitutive* of sedition. For the textual evidence to support my reading of bells and sedition we would need to find explicit connection between bells and the intention, constitution, and ultimate responsibility of the assembled 'mob'. From Bartolus onwards, there is.

Nicolas Boerii (1469-1539) writes in a treatise on sedition that a 'purposeful deceit and machinated conspiracy' is evidenced by those who 'congregate the people through the ringing of bells and raising of flags'.[722] It mattered that the inappropriate use of the tools to convene assembly undercut the legitimacy of the assembly and made it something short than a *universitas* in most cases. It was instead a 'convocation', of all of the citizens (*omnes cives*), being 'incited' by the tools of congregation. Their collective action was necessarily seditious.[723] But their illicit assembly

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[718] C.9.30.1-2, trans. Blume.

[719] Baldus at C.9.30.2, [Venice 1577], fol. 229v.

[720] And as in the case of fearful southern Italians: "All'armi, all'armi / la campana sona / il turchi son calati alla marina / chi n'ha le scarpe rutte, si ile sola / nun ha paura di pigliar spine" ("To arms, to arms / the bell is ringing / the Turks have landed / he who has broken shoes, fix them / don't be worried about getting splinters"): "These are the words of an old Calabrese folk song that tell the story of one of the most primitive and aggressive emotions of mankind: fear. In fact it was an ancestral fear, an all-encompassing fear that made up the daily life of the people of the coastal region of the south of Italy, who were continually attacked by pirates." Frencesco Serpico, "The Threat from the Sea: The Kingdom of Naples between piracy, warfare, and statehood in a *tractatus* by Giovan Francesco de Ponte" / *La minaccia dal mare. Il regno di napoli tra pirateria, guerra e costruzione dello 'spazio' statale in un tractatus di giovan francesco de ponte.* Italian Review of Legal History, 6 (2020), n. 3, pp. 47-74.

[721] Caspar Klock, *Tractatus Nomico-Politicus* [Köln 1740], Cap. 9, n. 94, p. 200.

[722] Nicholas Boerii [Nicolas de Bohier], *De Seditiosis,* n. 34.

[723] Nicholas Boerii [Nicolas de Bohier], *De Seditiosis,* n. 8-9. Boerii and other jurists made exceptions for legal actions which don't require deliberation for fault to be assigned: homicide, continued crimes like rebellion, war, tolerance of

was still a sufficient convocation to be held responsible for their sedition. Boerii writes in the same treatise that the 'intention' of a *universitas* can be sufficiently declared by deeds and not only words, as when in the community of Agenius assembled together at the ringing of the church bells to rise up in rebellion.[724] Odradus stresses that such an assembly has the quality not only of intention, but 'unity of the act and unity in consent' (*unitas actum unitas consentientium*).[725] Deliberation is also strongly implied by the ringing of the bells; when Mattheo d'Afflictus offered his opinion on a case of a *universitas* rising up against the Antonius de Regina, Baron of Marchia, he wrote that the 'disturbance and molestation' took place after 'the deliberation of the said *universitas,* congregated unanimously in the usual manner and ringing of the bells'.[726] The annotation to the decision, written by a later jurist summarized that for the *universitas* to have committed and be punished for a crime, they must have done so in common, with deliberation, and with the ringing of a bell.[727]

If this is correct, then bells were an efficient cause of rebellion and sedition, not just a tool. Indeed, early modern authors commonly reflected on the practice of 'Turks' who removed bells from their conquered populations to reduce '*populorum rebelliones*'.[728] Renatus de Lusinga writes that they forced peoples to abandon 'the use of bells, with which they were summoned to carry out an organized rebellion'.[729] Richard Simon (1638-1712), a French Catholic scholar and 'orientalist' argued that this 'a political or economic policy, because the sound of bells can serve as a signal for the execution of revolts'.[730] Johann Moritz Triller (1662-1701) argued that the metropolis of Persia lacked the 'indulgence' of bells for the sake of stability, and further suggested that the practice of the 'Turks' was analogous to occupying powers which prevented the restoration or reconstruction of city-walls.[731] Hermann Kirchner (1562-1620) wrote that the removal of bells from the 'whole Eastern empire' because of their use in 'exciting sedition' was a 'mark of their tyranny'.[732] This was a formal military and occupational strategy: scholars note that when Constantinople fell in May 1452, Mehmed allowed Christians continue to meet and celebrate the sacraments, but forbade the use of bells or *semantra* (wooden noise-making instruments).[733]

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unjust oppression, or importantly, if the *civitas* and its *totus populis* tacitly consented to the action by letting it take place.

[724] Nicholas Boerii [Nicolas de Bohier], *De Seditiosis,* n. 10.

[725] Oldradus, *Consilia,* [Pavia 1503] Cons. 315, 'De his que fiunt a maiori parta' (on Dig. 3.4).

[726] Mattheo d'Afflictus, *Decisiones Sacri Consilii Neapolitana* [Lyon 1552] p. 729-730, Decis. 376.

[727] Caesar Ursillus *annotatio* to Mattheo d'Afflictus, Decisio 376, *Decisionum Sacri Regii Neapolitani Consilii, Centuriae Quatuor* [Frankfurt 1600], pp. 567-568.

[728] Renatus de Lusinga, *De Incremento et Occasu Imperiorum Latinorum,* [Noribergae 1603], Lib. 2, Cap. 2.; See also Caspar Klock, *Tractatus Nomico-Politicus* [Köln 1740], Cap. 9, n. 95, p. 200.

[729] Renatus de Lusinga, *De Incremento et Occasu Imperiorum Latinorum,* Lib. 2, Cap. 3, pp. 191-195, 5.

[730] Richard Simon's *Des remarques sur la Theologie des Chrétiens du Levant, et sur celle des Mahometans,* in Jerome Dandini, *Voyage du Mont Liban* (Paris 1685) Remarques sur le Chapitre VII: (pp. 209-210): L'auteur de cette Relation est peu exact dans ce qu'il rapporte des Turcs. Premierement il n'y a gueres d'apparence, qu'ils ayent pris toutes les cloches du levant pour faire de l'artillerie: car le metal dont elles sont compsées n'est gueres propre pour faire du canon. S'ils en ont donc privé les Chretiens de leur obeissance, c'est plutost un effet de leur politique, que de leur oeconomie, parce que le son des cloches peut servir de signal pour l'execution des revoltes, et pour donner l'alarme par tout en peu de temps. See also William Jones, John Reeves and Thomas Blakemore*, Clavis Campanologia or A Key to the Art of Ringing* (London 1788), 397.

[731] Johann Moritz Triller, *Tractatus Historico-Iuridico-Politicus de Actionibus per Indirectum Expenientibus* [Lipsiae 1702]. Cap. III, 'Usum Materiae in Cavendo delineat', pp. 712-713.

[732] Hermanni Kirchneri, *Respublica ad Disputationis Aciem Methodice Revocata* [Marburg 1634], pp. 206-207.

[733] "Mehmed made sure that Christian soundscapes could not be heard in the public sphere of his soon-to-be capital, and so the use of both bells and *semantra* was forbidden." See also Alex Rodriguez Suarez, "The fate of bells under

After the Reformation, the rebelliousness of bells was deeply felt by both Protestants and Catholics; religious rebellions in Bourdeaux and Paris led to the confiscation of bells, and the former case was mentioned by Bodin alongside the example of the 'Turks'.[734] David van der Linden suggests that "Catholics associated the ringing of Protestant bells first and foremost with rebellion. Grimaud for example argued that if the Protestants had not destroyed all Catholic bells during the wars of religion, it was only to repurpose them and 'instigate murder and sedition'."[735] Some of this was no doubt organizational convenience, as when François de Bosquet forbade Protestants in Montpellier from ringing their own bells, out of fear that they could 'have a signal to gather together under the pretext of public prayers, and then become masters of the city, as they had done before' (*davoir un signal maintenant pour sasembler en eux de besoing soubz pretexte des prieres publicques et se rendre maistres de la ville, comme ilz avoient fait autre fois*).[736] van der Linden continues, "after La Rochelle surrendered to Louis XIII in 1628, the king ordered that the town hall bell be melted down, because it had served the Protestant consuls to convoke meetings where they had voted to rebel against their lawful sovereign."[737] It is possible to read examples like this only with an eye to the use of bells as signals. Samuel Cohn records many examples of popular movements in the 15th and 16th centuries which used bells, and the 1512 popular revolt in Pieve di Cento is an illustrative one: the *populo* "held a general consultation (*Conseglio generala*), rang their church bells, congregated in their major church, and 'in one voice' chanted 'Chiesa, Chiesa'. They then presented the keys of their town to the papacy and sent the Ferrarese castellan back to Ferrara."[738]

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Ottoman rule: Between destruction and negotiation", in Angeliki Lymberopoulou, ed. *Cross-Cultural Interaction Between Byzantium and the West, 1204-1669: Whose Mediterranean Is It Anyway?* (Routledge 2018). Pertusi, A., 1976, La caduta di Costantinopoli. L'eco nel mondo, vol. 2: Gli echi in occidente e in oriente (Milan: Mondadori) 90-91; Philippides, M., (ed. and trans.), 2007, Mehmed II the Conqueror and the Fall of the Franco-Byzantine Levant to the Ottoman Turks: Some Western Views and Testimonies (Tempe: Arizona Center for Medieval and Renaissance Studies", pp. 126-7. Whether it was a coincidence that the Church and her canon lawyers seemed to relax the restrictions on bell-ringing under ecclesiastical censure at the same time as Islamic communities at her borders developed a wide-spread reputation for the same will have to be held for a different scholar or a different time. Recent scholarship has begun to examine the clash between Catholic communities and their bells and their many contexts, Protestant and Islamic. Alibhai, A.A.H., 2008, 'The Reverberations of Santiago's Bells in Reconquest Spain', La corónica 36.2, 145–64. Arnold, J.H., and Goodson, C., 2012, 'Resounding Community: The History and Meaning of Medieval Church Bells', Viator 43.1, 99–130; Kreiser, K., 2012, 'Les tours d'horloge ottomanes: inventaire préliminaire et remarques générales', in F. Georgeon and F. Hitzel, (eds), Les Ottomans et le temps (Leiden and Boston: Brill), 61–74; Škegro, A., 2015, 'Catholic Church Bells from Ottoman Clock Towers in the Bosnian Eyalet', Vjesnik za arheologiju i historiju dalmatinsku 108, 295–313.

[734] Bodin, 4.7, fol. 487. See also Paulo Mezger, *Orationum Salisburgensium,* Pars Tertia [Augustae Vindelicorum 1700], fol. 85. On 'whether in general bells are useful for the republic', see also Jacob Friedrich Ludovic, Johann Michael Eschenwecker, *Dissertatio iuridica De eo quod iustum est circa campanas vom Recht der Glocken* (1739), quoting Speidelius, to say that 'Histories reveal what happened to the Sicilians at Vestpers, what happened to the Parisians in the morning, and these reasons perhaps influenced the emperor of the Turks...'. Fol. 41.

[735] van der Linden, p. 17: 55 Grimaud, part III, p. 178.

[736] van der Linden, 17, n. 53, citing: Bibliothèque nationale de France*,* MS Français 15833, [François de Bosquet] Memoire de la demande de ceux de la R.P.R. de Montpellier pour avoir des cloches, 11 December 1643, fols 241r–242v.

[737] van der Linden, p. 17, n. 56, citing: Declaration du Roy, sur la reduction de la ville de La Rochelle en son obeissance, contenant l'ordre et police que Sa Maiesté veut y estre establie (Le Mans: Veuve F. Ollivier, 1628), p. 10.

[738] Cohn, *Popular Protest,* p. 192; see also the grain riots in 1476 at Modena, the revolts against the Medici in November of 1494, the conspiracy in Cremona in March 1501, the Bolognese in May 1511, tax revolts in April of 1526, and woman-led rebellions in Pisa in 1505 and Ravi in March 1553. Samuel Cohn, *Popular Protest and Ideals of Democracy in Late Renaissance Italy,* (2021); p. 26, but also 43-44; 60; 86-88; 101-102; 151; 160; 168; 174; 184; and 192.

In the Bologna rebellion of May 1511, the people "rang their church bells" and "'all' shouted 'liberty'".[739] With the necessary context of medieval legal theories of collective assembly and action, I argue that the bells are not simply auditory tools to mark a rebellion or protest taking place. The bells in fact *convene* the people such that their shouts of liberty carry the authority of a council, even if their assembly was illicit and disorderly—their corporate action had weight because they rung their bells and triggered corporate responsibility for their actions, which in turn triggered the potential for corporate punishment. The bells were not just a *feature* of popular action and they did not simply practically enable it; they legally created it. They transformed the hundreds of individuals into a unified, collective, and ultimately criminally responsible rebellion. It is the bells which are signaling the power and authority of 'all' to do anything, including 'shout liberty'. Cohn, like other historians, notes the use of bells in passing as a descriptive feature of popular movements, not as possibly constitutive legal parts of the movements.[740]

*Conclusion*

In this section, I have highlighted that the canon and civil law treated bells originally as public and ecclesiastical objects. Furthermore, they were crucial to the theoretical development of ideas about deliberation and agreement, criminal punishment, and even rebellion and sedition. What is crucial is that the rules about bells were constructed using both canon and civil law in surprising ways—they were entrenched as public objects by the canon law, as legally constitutive for councils in the civil law, chapters and groups in the canon law, and deliberation and assemblies in both. In summary, bells carried ecclesiastical qualities both because of their use in canon law procedures of convening chapters, ringing ceremonies, celebrating offices, etc. but also because they were under the jurisdiction of the bishop. To date, the Church of England still has a canon which states: "No bell in any church or chapel shall be rung contrary to the direction of the minister."[741] In a retelling of the ecclesiastical history of bells, Johannes Laue (1683-1721) argued that the trumpets of the Ancient Israelites—which sowed the seeds for the future use and 'vindication' of bells—had been handed over to the priests to keep and use and were thus considered among other 'sacred things', notably alongside other tools which 'tend to preserve good order' (*ad bonum ordinem conservandum*). While they still maintained a sacred and ecclesiastical quality into early modernity, Johannes also argues that 'a great part of their use is for Politics'.[742] Indeed, wherever there are bells, they can be used politically.

**Section II: Corporate Punishment—From Excommunication to Interdict**

In Section I, I showed in part that jurists had resources to assign corporate or collective responsibility as well as corporate or collective punishment. In the canon law, and with respect to excommunication, this was much more difficult. St. Augustine had counselled against the

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[739] Cohn, *Popular Protest,* p. 184.

[740] Cohn does however offer an essential redescription of renaissance Italian rebellion: "In summary, the character of leadership of popular insurgency had not shifted from what it had been in the late Middle Ages. For both periods, the sources fail to support conclusions drawn for early modern France and that have been generalized for 'pre-modern' Europe. Despite peasants, the popolo, and citizens assembling with flags of foreign city-states and monarchs and chanting for their city-states' enemies to intervene, overwhelmingly their leaders came from the populace, ringing church bells, calling their members to arm, and organizing shop closures, assemblies, and processions." p. 160.

[741] *Canons of the Church of England,* F8.2. See also Canning 1987, p. 192.

[742] Johannes Laue, *Quaestionem an Turrium et Campanarum Usus in Republica Christiana* [Leipsig 1704], §6-12.

collective spiritual punishment of a household for the sins of the father[743]; anathemizing the innocent children and wives of the heretic ran counter to Christ's new covenant and instead echoed God's earlier tendency towards collective physical punishment at Sodom and Gomorrah or indeed the world during Noah's flood.[744] Augustine's opinion was incorporated into canon law, but it was not until 1246 that Pope Innocent IV outlawed the use of excommunication for collective groups; this was a relatively early milestone in the development of medieval legal thought, and so most jurists agreed that it was 'not possible to excommunicate a chapter or *universitas,*' including a city (*civitas*), town (*villa*), or people (*gens*).[745] If a Pope or Bishop wished to censure an entire city or collectivity, it would need a different tool—the interdict. In this section, I argue that the scholarship on collective excommunication often distracts from the criminal legal context which provides its logic for collective agency. Scholars have rightly noted that excommunication is an awkward and inappropriate punishment for a thing that does not have a soul; furthermore, corporations also contained guiltless individuals, including infants and future members who had not yet been born. But jurists took no serious issue with the concept of collective ecclesiastical punishment itself; the innocent could be included if they simply pivoted to the interdict. The interdict came with its own moral quandaries, but focusing on the collateral damage of innocent souls distracts from the political practice of collective ecclesiastical punishment which ultimately accepted it. In fact, corporate excommunication (and other corporate censures) was explicitly a right of the Pope; the cannon law simply outlawed its practice.

Excommunication was the most severe ecclesiastical censure, and it cut the excommunicated individual off from the body of the Church in its ecclesiastical and social functions. There were different weights of excommunication—major and minor—and each diluted stage of excommunication lessened the distance placed between the minor excommunicate and the body of the Church and the Body of Christ. Where the wholly excommunicated person was strictly anathemized, meaning that other Christians even of their own family could not speak, eat, or do business with them, a minorly excommunicated person might be permitted to live out of sync with religious life, not partaking in the sacraments, but able to press their ear up to the Church door and listen to worship and divine services. In any case, only Christians could be excommunicated, for specific crimes, and through a specific process.[746] Excommunication was a legal model of punishment, entirely consistent with the roman legal context it originated in[747], and reflected once

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[743] Augustine, Letter 1. In *The Fathers of the Church,* Vol. 81, Letters 1-29, Trans. Robert B. Eno. Pennington, "Pro peccatis patrum puniri"; Clarke, "Punishment of the Guiltless"; Clarke, *The Interdict in the Thirteenth Century,* pp. 14-28.

[744] In the first two cases, the Old Testament God was persuaded by Lot to look for innocents in the cities before destroying them. In the latter case of the Flood, God had predetermined that there were none. Therefore, at least insofar as Old Testament theology was concerned, these examples were certainly of collective punishment, but with no risk or moral concern of the punishment of innocent lives.

[745] C.24 q.3 c.1; VI 5.11.5*;* Smith, on the Law of Associations: "'The Pope does not declare the punishment of corporations to be impossible, nor does he forbid all kinds of punishment. What he does say is that universitates are no longer to be excommunicated ... not because they are legal fictions, but because such a sentence would involve the innocent along with the guilty." Generally, see Eschmann, "Studies on the Notion of Society in St. Thomas Aquinas, I: St. Thomas and the Decretal of Innocent IV *Romana Ecclesia: Ceterum*," *Medieval Studis,* 8 (1946), pp. 1-42; Piergiovanni, *La Punibilità degli innocenti nel diritto canonico dell'età classica* (Milan 1971-1974). Estaban Daioz, "Capitulum vel universitas non potest excommunicari".

[746] See for example Otero, *de Pascuis*, Cap. 39, ns. 132-136.

[747] Edward Krehbiel noted that "despite the decline of all Roman institutions in the fourth century of the Christian era, the first case of general excommunication on record does no violence to Roman legal principles"—a village was punished because one of its residents had kidnapped a young girl from a neighboring village, and the whole community was punished "not for his fault, but for a lesser fault of their own in permitting the captor to keep his prize in the

over in the fact that the word for those who ignored the effects of an excommunication were *contumaces*—the same word used for those who ignored judicial sentences or magistrates.

There are two dominant arguments against excommunicating an entire city (or other collective body): that it is inappropriate on account that the corporate body does not have a soul and that it is ethically dubious because it subjects 'innocent' people to damnation. The modern interpretation stressing the first seems to have started with Duff: "In any case, only baptised persons could be excommunicated; therefore, since no corporation has ever been baptised, *excommunicatio universitatis* could only mean *excommunicatio singulorum."*[748] Joseph Canning picked this line of argument up with the support of Baldus: "Similarly Baldus holds that a city-community, lacking a soul, cannot be excommunicated—only its rulers can be. Again, this shows no more than that he denies that the community possesses a soul in a theological sense: it would be in his mind that only a baptised human being could be excommunicated. No corporation had, of course, ever been baptised."[749] The second justification against corporate excommunication is the dominant one stressed by historians of excommunication. Both were common justifications used by Popes, canon lawyers and civil lawyers, and so are undoubtedly worth rehearsing.

However, stressing the unethical quality of the punishment, or the lack of the soul of a corporation, often shrouds corporate excommunication in a cloak of impossibility; it disguises that it was indisputably within the power and right of the Pope to excommunicate entire cities and that they frequently had the desire to do so. At the Synod of Melfi (1113) the council excommunicated the whole city of Benevento; Innocent III excommunicated the totality of rebellious citizens of Narni in 1214; and Innocent IV excommunicated the city of Orvieto, though he would retract this order and publish his ruling outlawing the practice entirely.[750] Even if jurists had qualms about collateral damage for excommunicating the *singular* corporate body, they expressed no such objections when Popes individually excommunicated all of the individuals of the body; in fact, drawing on the roman civil law, so long as one person was left standing, the 'whole right of the *universitas* remained with the one not excommunicated'.[751] Elisabeth Vodola astutely observes that the ecclesiastical interdict "paradoxically" denied much of the same privileges as excommunication did, and indeed "continued to jeopardize innocent souls by depriving them of the grace imparted through the Eucharist and of the benefits and other forms of worship and suffrage."[752] But, it only strikes us as a "paradox" if we place disproportionate emphasis on the punishment of innocent citizens and assume that because the Church hesitated to issue collective excommunication that they would hesitate to issue collective censures like the interdict, which was vastly disruptive but did not immediately jeopardize salvation.

Furthermore, stressing the guilt of the innocent sidesteps the legal context of collective guilt, capacity for collective action, and origin of collective punishment which hang in the background of collective ecclesiastical punishments and censures. Where the corporate body has taken action and is responsible for its actions there are no 'innocent' or 'guiltless' individuals, only those who have actively or tacitly consented to them. Civil and canon lawyers used the logic and vocabulary of collective responsibility to justify the ecclesiastical punishment of entire corporate

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village." Edward Krehbiel, *The Interdict – Its History and its Operation* (American Historical Association, 1909), 5-6.

[748] Duff, *Personality in Roman Private Law*, pp. 223-224.

[749] Canning, *Baldus*, pp. 192-193.

[750] Vehse, "Benevent", 115. Partner, *The Lands of St. Peter* (1972), 138-154.

[751] Paulus de Castro at Dig. 3.4.7, § 'in decurioribus', ns. 2-3, *Commentaria in Primam Digesti Veteris Partem* [Lyon 1585], fol. 105v. This principle derived from testaments which bequeathed herds or flocks of animals: Dig. 30.1.22.

[752] Vodola, *Excommunication in the Middle Ages,* p. 59.

bodies even where they thought the punishment should not be excommunication.[753] Unsurprisingly, these discussions hinged on *solennitas.* Baldus writes that the *universitas* cannot automatically be accused of a crime committed by its members, even if it is committed by the entirety of its members. The exception was if the action was committed *deliberately*—that is, when a meeting had been assembled by the sound of a trumpet or a bell.[754] Elsewhere, this was phrased as hinging on the *maior pars*—Paulus de Castro writes that where the *maior pars* of the *universitas* had committed a crime, the whole corporate body might be held responsible for that crime.[755] This does not mean that jurists were anxious to assume collective responsibility—Bartolus wrote that it was a 'very delicate question'.[756] Bolognese inquisitor Giovanni Cagnazzo (d. 1521) extended this to the *civitas.* It seemed clear, from Papal decretals, canon law, and civil law that it was possible for a *civitas* to be guilty of sufficient enough a crime that a Bishop could subject it to an interdict. From Bartolus onward, jurists had agreed that a *universitas* could be punished so long as the act was committed deliberately and had followed the formal procedural requirements of meeting (such as the ringing of bells). If however all of the people of the city (*omnes homines civitatis*) committed a crime together without convening an assembly, then the crime could be understood to have been committed by the singular members of the *universitas* and not the *universitas* itself.[757] Representation and the construction of the collective body through formal assembly was a requirement for the kind of guilt necessary for ecclesiastical punishment, but largely because of civil law procedural rules about assembly.[758] One surprising feature of collective responsibility warrants attention: when jurists argued that a multitude could commit a crime (*omnes* or not) and could be punished for that crime, jurists argued that their *individual* punishment ought to be made *lighter* by virtue of its collective origin. Indeed, some jurists suggested that *individual* punishment was less appropriate than simply punishing the leaders or officials of the multitude, or perhaps the most famous, wealthy, and noble of them.

With this in mind, the entrenchment of jurists against collective excommunication was not a stance against collective punishment. It was instead a stance against the inappropriateness of the specific censure of excommunication against the collective body as a single entity. Popes were still free to excommunicate every individual within the collective body—an act which ought to trigger the same moral and ethical concern raised above by scholars and jurists about the punishment of the innocent, but it does not.[759] Jurists in fact embrace the possibility of the excommunication of all of the members of a *universitas* or city, or its ruling parts. It rarely mattered that the corporate body lacked a soul, because everyone within it who did have a soul could be excommunicated instead. Take Antonio Fernandez de Otero (1585-1645), for example, writing long after the question of corporate excommunication was thought to have been settled. After rehearsing the classic definition of the "*corpus mysticum*" of the corporate body and stressing that

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[753] Victor Martínez Patón, "Análisis histórico de la responsabilidad penal corporativa", Doctoral Thesis at the Universidad Autónoma de Madrid and Université Paris Ouest Nanterre la Défense Madrid-París (2016); Bartolus, at Dig. 48.19.16, § Nunnunquam, [Venice 1590] fol. 188r.

[754] Baldus, *Practica Baldi,* [1528] 'De Procuratoribus', fol. 18, with marginal note by Antonius de Cremonte.

[755] Paulus de Castro at Dig. 3.4.7, § 'in decurioribus', ns. 2-3, *Commentaria in Primam Digesti Veteris Partem* [Lyon 1585], fol. 105v.

[756] Bartolus at Dig. 48.19.9.4, 'Nonnumquam', n. 1: "Ista quaestio est multum subtilis iudicio meo".

[757] Joannes Tabiensi, *Summae Tabienae,* Pars Prima [Venice 1572], 'Excommunicatio V', n. 3, p. 640.

[758] See Elisabeth Schneider, "*Naturae rationalis individua substantia:* Eine theologische oder juristische Definition der Person?", pp. 245-270, esp. 263 in Böhm, Jürgasch, and Kirchner, *Boethius as a Paradigm of Late Ancient Thought.*

[759] Alexander de Imola at Dig. 30.1.22pr, fol. 21.

it was a "*persona ficta et repraesentata*", Otero continues, citing several other jurists stretching back to Bartolus, that 'the whole body can be condemned and punished for the actions and offenses of particular individuals.'[760]

This detour to collective excommunication was necessary because it had been ruled out of the Church's toolbox of ecclesiastical punishments and censures; excommunication was only useful against individuals. Jurists still widely employed the logic of assessing collective responsibility and guilt, just not to justify collective excommunication. Instead, Popes and jurists pivoted to the interdict, which *could* be levied against entire communities. They had other advantages: unlike excommunication, they were inherently territorial, and provided jurists with a more useful tool to exert ecclesiastical authority and control over a geographical space. The interdict, looking very much like a 'minor' excommunication, was used to discipline the *universitas* or *civitas* for its own sins or the sins of its leaders and justified with the canon and civil law theories of representation, deliberation, and tacit consent.

**Section III: The Interdict and its Consequences**

The difference between excommunication and interdict is precisely what makes the interdict interesting. Excommunication and 'suspensions' (another kind of ecclesiastical censure) were useful against individuals, but not a corporation (*universitas*), college (*collegium*), or city (*civitas*).[761] This 'general' capacity of the interdict meant that it could be wielded against a collective body where there lived by fact a subset of non-Christians who might be affected by the consequences of the interdict. It was a 'different way' of discipline which sidestepped the limitations of criminal and canon legal punishments.[762] It was not technically a "punishment"; it was a censure, or disciplinary action, applied for a 'medicinal' purpose of bringing about reconciliation. Still, 'the multitude of the people and princes ought not be easily subjected to ecclesiastical censure', and so it was serious. [763] The interdict is a challenging subject of study in part because it was historically opaque; Krehbiel writes that there was no consistent use of the word even by papal officials as late as 1585.[764] When Krehbiel and others express frustration about the precision of the content and vocabulary of the interdict, they nearly always refer to Papal registers or ecclesiastical records.[765] Much greater precision can be found in the writings of civil and canon lawyers, but it must be some indication of the sustained confusion (or importance) about the interdict that dozens of treatises[766] were written about it, cited extensively, and republished in

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[760] Antonius Fernandez de Otero, *Tractatus de Pascuis et Iure Pascendi* [Lyon 1700], Cap. 20, ns. 6-7, p. 86.
[761] St. Antonius, Archbishop of Florence, *Tractatus Perutilis de Interdicto,* n. 5, fol. 338v.
[762] Lucas de Penna at C.12.35.18pr, n. 9, [Lyon 1583] fol. 312r.
[763] Bonifacius de Vitallinis [Antalmi], *Lectura Super Constitutionibus Clementis* [1522], at Clement 5.10.2, fol. 68.
[764] Krehbiel "The earliest cases cited as interdicts are called excommunications in the sources; and not, indeed, until the adoption of the word in a technical sense by the papal chancellery under Alexander II is there any regular and consistent use of the word even by officials. ...other writers of the same period fail to distinguish it from a ban and excommunication."
[765] Peter Clarke's work has shown the interdict to be a cohesive and intentional tool. Clarke (2022), "Excommunication and interdict", In, Wei, John and Winroth, Anders (eds.) *The Cambridge History of Medieval Canon Law.* Cambridge, GB. Cambridge University Press. Clarke (2021), "The interdict in past and current historiography: Perspectives and preoccupations" In, Jaser, Christian, Woelki, Thomas, Daniels, Tobias and Baumgart, Winifried (eds.) *Das Interdikt in der europäischen Vormoderne.* (Zeitschrift fur Historische Forschung, Beihefte, 57) Berlin. Duncker-Humblot, pp. 27-54.
[766] Johannes Andreae (1270-1348) wrote the most influential legal tract on the interdict, followed by Joannes de Lignano's (1325-1383) two treatises on ecclesiastical censures and the interdict, and treatises by Joannes Calderinus

the *Tractatus Universi Iuris,* where they received a second life of influence. In addition to tracts, we can also use the extensive commentaries directly on the canon law to reconstruct the consequences and implications of the interdict in the minds of jurists.[767] Lastly, we have early modern reflections on the interdict as a historical and legal subject, from Pierre Pithou's (1539-1596) *De l'origine et du progres des Interdicts ecclesiastiques* to continued discussion in the 17th and even 18th centuries; its lingering presence in the memories of early modern jurists heightens the curiosity of the sanction, especially when aligned with its relative ineffectiveness.[768] My aim here is not to comprehensively catalogue the effects of the interdict; my aim instead is to highlight the effects most frequently flagged by jurists and highlight those potentially interesting for other political theorists. Chief among these, as I have stated before, is the silencing of the bells.

Bishops, Archbishops, or Popes could issue interdicts for many reasons. Heresy was the most extreme case, but there the Church was more likely to reach for the tools of Inquisition and ultimately excommunication and/or execution. They could issue interdicts for non-payment of tithes or rents or general disobedience.[769] The Church also frequently issued interdicts against cities or nations because of the sins and disobedience of their rulers—interdicts could "not only punish a people's failure to resist its ruler's sin but also to coerce it into" resistance against them.[770] Temporal rulers might disrupt the Church's claims in appointing ecclesiastical officials, cause injury to church officials or church property, fail to protect church officials or church property from injury by others, or fail to provide the Church with soldiers.[771] Or, rulers might find themselves and their territory interdicted because they engaged in a dubious marriage or extramarital relationship.[772] When the Church had cause for an interdict—and the canon law was clear that they must have a specific cause—they were bound to provide the justification for the interdict in writing and circulate the sentence in writing to the public and to the place that would be subject to it.[773] The Church had a choice between several kinds of interdict—they could issue it against whole nations or cities (general interdicts), against persons (special interdicts), or against persons but which followed the individual no matter where they traveled (ambulatory interdicts).[774] My focus here is the general interdict.

The interdict had countless effects, and treatises on the interdict catalogued them by the hundreds. The interdict was consistently defined as 'an ecclesiastical censure, as a penalty for disobedience or offense, which especially forbade the people from partaking in the sacraments.'[775]

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(-1365), Nicolaus de Plove (-1440), and Saint Antoninus, Archbishop of Florence (1389-1459). Minor tracts were also written by Berengarus Fredolii (d. 1323), Bonincontro de Boattieri (the eldest son of Johannes Andreae, d. 1350), Johannes Auditor, and Thomas Hospital.

[767] Within the canon law itself, most of the consequences of the interdict are recorded throughout X.5.38—'On the Sentence of Excommunication—, especially X.5.39.11, X.5.39.53, and then X.1.04.05.

[768] Estaban de Ávila, *Tractatus De Censuris Ecclesiasticis,* Pars V, Disp. I-V; Pietro Catalano, *Universi Iuris Theologico-Moralis Corpus Integrum,* Tom. II; Francisco Suarez, *De Censuris in Communi,* Disp. 34, Sect. 3, n. 7; George Sayer, *Casuum Conscientiae sive Theologiae Moralis,* Lib. 5, Cap 5, n. 4; Martin Bonacinae, *Tractatus de Censuris Aliisque Poenis Ecclesiasticis,* Disp. V; Aegidius de Coninch [Giles de Coninck], *De Sacramentis ac Censuris,* Disp. XVII, 'De Interdicto et Cessatione a Divinis'; Fernando de Castropalao, *Operis Moralis,* Pars Sexta, 'De Censuris', Disp. V, 'De Censura Interdicti'.

[769] Bonacinus, Disp. 5, Punct. 8.

[770] Clarke, p. 45.

[771] Bonacinus, Disp. 5, Punct. 8, n. 2. These are largely the crimes of England in 1208 and 1257.

[772] As in the interdict on France in 1199.

[773] Clarke, pp. 103-126. Clarke gives a thorough list of causes for the interdict on pp. 112-114.

[774] Joannes Calderinus, *Tractatus,* n. 10; Nicholai Plovii, *Tractatus,* n. 2, fol. 333r.

[775] See for example, Joannes Andreae, *Tractatus,* n. 1.

According to medieval jurists, it derived its name because it was thought to be a 'statement for an *interum*'—that is, it lasted only so long as the judge who issued it willed it to last.[776] Only once the interdict had been "relaxed"—the official term for removing the sanction—could life return to normal, but only once particular reconciliatory actions had also been fulfilled. After all, the explicit purpose of the interdict was to bring about reconciliation, either between guilty rulers and the Pope or guilty people and the Pope. Violating the interdict and rejecting its effects was called an "irregularity", a delightfully understated name for what is otherwise a serious penalty; open resistance to the interdict could trigger excommunication for the individual and further collective punishment.[777]

In *tempore interdicti,* the community cannot 'celebrate the divine'; this was a catch-all for almost all of the sacraments and services provided by the clergy. Citizens could not hear Mass, partake in the Eucharist, go to confession, or receive penance for sins. If they died, their bodies could not be buried in the cemetery attached to the Church. So long as the clergy themselves were not subject to the interdict, they could hold Mass and divine offices for themselves—but it had to be 'behind closed doors, in a whisper (*submissa voce*), without ringing the bells, and excluding the interdicted'.[778] The consecrated host (the blessed bread and wine, transubstantiated into the Body and Blood of Christ) could not be visible to anybody but the clergy, even as they transported it to administer last rites. Because the interdict was supposed to threaten only the order of public life and not the salvation of souls, the clergy were permitted to baptize infants and offer last rites to the dying.[779] Marriages were permitted but they could not be blessed and administered by a priest.[780] Clergy were permitted to preach the gospel—but only the gospel—outside of the church.[781] The interdict also disrupted the operation of universities and 'exercising the acts of study'.[782] These effects applied to churches; church officials, either out of piety or inconvenience or both, often complained about them. Some even claimed that they possessed ecclesiastical liberties and privileges which could release them from some of these effects—they might for example, by claiming age-old custom, claim that even if the community was under an interdict, they could still 'ring the bells, and celebrate the divine offices with a loud voice'. The Papacy had to put its foot down, lest the censure lose all its force: 'Therefore, having learned of such a custom, which would sever the nerves of ecclesiastical discipline itself we have decided, with the consent of our brethren, to completely annul it, since it was not a custom, but was rather considered a corrupt concession.'[783]

The pressing needs of the faithful—or the damage done to the rhythm of communal life—carved out exceptions as early as the mid 14th century. If baptism was permitted, so too must all of

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[776] Andreae, n. 5.
[777] X.1.04.05.
[778] Andreae, n. 36; X.1.04.05. The clergy were not included in the *civitas* or *populus* by default.
[779] Nicholai Plovii, *Tractatus de Ecclesiastico Interdicto,* n. 22.
[780] Hostiensis at X.4.1.11.
[781] Clarke, p. 143.
[782] Joannis de Lignano, *Tractatus de Ecclesiastico Interdicto,* n. 2, fol. 335v. This is a more complicated issue than it seems. Any reference to the interdict and university life would have referred in some capacity to the interdict in England at the end of the 12th and beginning of the 13th century where a number of university students and faculty were executed in connection to the social disturbance surrounding the murder of the Archbishop Thomas Becket. For the connection to classical educational practices, see Jakob Middendorp, *De celebrioribus Academiis,* Book I, Ch. 12, p. 68-69, where Jakob mentions that students are still summoned to study by a "*signo vel campana*", much in the tradition of the "*veteribus philosophis*" where bells (*tintinabula*) were always in used to summon students to lectures, according to Juvenal.
[783] X.1.04.05: "...disrumperetur nervus ecclesiasticae disciplinae..."

the services which were necessary for it, such as blessing the baptismal font and consecrating the oil—no bells could be rung, however, and it might not even be permitted to take place in the church. The local church in an interdicted place still needed funds and so it was permitted to open its doors on rare occasions to accept tithes and money. Elsewhere, it became widely thought that a small procession could be held to present the Body of Christ to the sick, including a quiet ringing of the bells and the lighting of lamps.[784] St. Antonius, Archbishop of Florence, argued that by the same logic, the Eucharist could not be denied to pregnant women, or those heading out to sea or to war; the security of their salvation in face of their present danger outweighed the consequences of the interdict.[785] By the late 15th and early 16th century, these exceptions—championed by Savonarola—included a more extreme view on the publicity of the Body of Christ (transported with the regular procession of candles and bells).[786] Finally, the laity could ring their *own* bells for the hours (but not the canon hours), and for the Hail Mary.

The silencing of the bells was one of the most significant consequences of the interdict because they were used to signal or trigger most of the divine offices which the Church was prohibiting—Mass, the Eucharist, burials, and convening ecclesiastical chapters. 'All doctors' recognized the prohibition, according to Antonio Quintanadueñas (1599-1651) and that was no exaggeration.[787] The ruling was ubiquitous, from 13th century canon law to early modern legal and theological commentaries, notably well through the Reformation; where we find interdicts, we find the silence of the bells—and sometimes strangely wherever we find bells (e.g., in histories of technology) we often find the interdict.[788] This punishment was extremely practical but also theoretically rich for contemporaries to the interdict. Take for instance William Durand (1230-1296), whose comprehensive Biblical knowledge gave other jurists every resource to layer their legal analysis with biblical references (e.g, the 72 golden bells sewn onto the high-priest's robes in Exodus 28:33-34) and metaphor (e.g., the 'wood on which the bell hangs signifies the wood on

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[784] Calderinus, *Tractatus de Interdicto Ecclesiastico,* Part II, n. 3. fol. 331r; St. Antonius, Archbishop of Florence, *Tractatus Perutilis de Interdicto,* n.17, fol 340r.

[785] St. Antonius, Archbishop of Florence, *Tractatus Perutilis de Interdicto,* n. 18, fol. 340r.

[786] Savonarola, *Confessionale pro istructione confessorum,* Fol. 81v.

[787]Antonio Quintanadueñas (1599-1651), *Singularia Theologiae Moralis ad Septem Ecclesiae Sacramenta* [Venice 1648; 'Ad sacrosanctum, poenitentiae sacramentum appendix', Dubium XVI, p. 285.

[788] Panormitanus at X.1.06.30, 'In causis'; Bertachini, *Repertorium,* Prima Pars [Venice 1590] Repertorium Iuris Utriusque, fol. 232v-233r, at 'Campana', and at 'Interdictum ecclesiasticum', v. 29.; Peter de Ancharanus, *Interdict,* n. 5; Dominicus de Sancto Geminiano (1375-1424) *Lectura Super Sexto Libro Decretalium Liber Sextus,* 5.11 begins fol. 276r-295v*,* 5.11.24 goes from 294v-295r.; Filippo Franchi (1401-1471) *Commentaria In Sextum Decretalium Volumen* [Venice 1579] VI.5.11.24, §. Adiicimus, n. 4, fol. 263r; Franciscus de Zabarellis, *Super Clementinis,* at 5.10.2. [1497]; Stephanus Costa, nu. 12; Joannis de Lapide (1425-1496), *Tractatus de Administratione Sacramenti Eucharistae et de celebratione Missae ex Canonibus et probatis authoribus* [1558] Fol. 126r; Angelo Rocca [Angelus Roccha] Bishop (1545-1620), *Opera Omnia,* Tom. 1: [Rome 1719] *De Campanis Commentarius ad Sanctam Ecclesiam Catholicam* pp. 151-196*;* Martinus Bonacina (1585-1631), *Opera Omnia,* [Lyon 1705], Disput. V, Punct. IV, p. 447; Peter de Ancharana, at Clement, 5.10.2, ns. 3-5; Augostinho Barbosa, X.5.11.24, 'Alma mater', ns. 11-14; Diego Covarruvias a Leyva, *Relectio Cap. Quamvis Pactum* [Lyon 1558], Pars 2, § 4, n. 5, p. 309; Gregory Sayer (1560-1602), *De Censuris Ecclesiasticis* Lib. V, Cap. IX, pp. 425-428. [Venice 1614]; See generally, "De Interdicto, Cessatione a Divinis, Depositione et Degradatione", Book 4, Ch. 7; Book 5, CH. 9; Book 5, Ch. 14, nu. 33; and Book 5, Ch. 19, nu. 16; Bartolomeo Ugolini (1540-1610), *Ad Clementem VIII, 'De Censuris Ecclesiasticis'* Including *Tractatus de Interdicto* [Bologna 1594], pp. 665-741; Into early modernity: Luiz Nogueira, *Quaestione singulares Experimentales et Practicae de Sacramentis* [Venice 1702], Quaest. XIV; Miguel Antonio Frances de Urritigoyti (-1670), *De Ecclesiis Cathedralibus Tractatus,* Cap. 24; Jacob Friedrich Ludovici (1671-1723) *Dissertatio Iuridica circa campanas, vom Recht der Glocken* (1739) § 32.

the holy Cross'). [789] Again, the rhythm of the legal analysis itself often stresses the severity of the silence of the bells. William Durand devotes a paragraph to the power of the bells to keep storms and danger at bay, causing 'demons' to flee at the 'trumpets of the eternal king' in order to stress the silence of the bells during Passover, and then during an interdict. The interdict, he writes, caused by the 'offense of subjects', prevents the whole community from speaking. Durand partially quotes Ezekiel 3:26: "I will make the tongue stick to the roof of your mouth [so that you will be silent and unable to rebuke them] for they are a rebellious people (*domus*)." The bells were similarly an 'organ' of the Church body, similarly 'stuck' under an interdict.[790]

Three final points can be made on this specific prohibition. First, the sentence of the interdict overrode any local customs which seemed to allow the ringing of bells and opening of the church doors during the general interdict.[791] Custom—especially old and practiced local custom—was a constant threat to the homogenous application of law by temporal and ecclesiastical authorities, but the interdict was an explicit exception. Second, jurists like Agostinho Barbosa recognized that the punishment 'excluded the *populus* and the laity' from divine services.[792] The target for the interdict is often taken to be Christians, but it's clear that because the interdict was laid against the *civitas* and a specific geographical place, the *populus* was affected too. We might view this as a hypothetical punishment—any non-Christians would be prevented from enjoying divine services if they sought them out. But it also seems clear that the interdict imposed a significant disruption on the life of the *civitas* such that its effects were not just hypothetical for the whole community. Finally, there was a significant resistance to and change about the rules of the silence of the bells. In particular, Joannes Andreae recognized the possibility for the laity to ring *their own* bells, if they possessed them, for specific functions, even during an interdict.[793] The applicability of this permission would have scaled proportionally to the growth in production and adoption of non-Church bells.[794] As I show in Section V, though this might seem at first to undermine my argument, I think this resistance heightens the theoretical significance of what I take to be happening during the interdict.

**Section IV: Silencing the Bells—Interpretation and Reinterpretation**

In Section I above, I outlined the various social, political, but most importantly legal functions of bells, quoting along the way Guido Pancirolli (1523-1599) who nicely summarized their role in politics and society—"In a Word, they are Signals that give Notice of all Publick Actions, so that we should be very much incommoded, and at a Loss without them."[795] Taken together with Sections II and III then, it is clear that if an ecclesiastical censure were to silence the

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[789] Durand, *Prochiron vulgo rationale divinorum officiorum,* Book 1, Chapter 4, 'De Campanis': fols. 12v-13v [Lyon 1551], esp. n. 8. My favorite of these metaphors, and coincidentally the one most frequently cited by later jurists, was the rope of the bell, which symbolized everything from life itself to the intertwining force of history, allegory, and morality, to the up-and-down process of dialectic.

[790] Durand, *Rationale Divinorum Officiorum*, Lib. VI, Cap. 72, n. 15.

[791] Joannes Andreae, *Tractatus,* ns. 113-120.

[792] Barbosa, *Votorum Decisiorum et Consultivorum Canonicorum,* Tom. II [Lyon 1664] Lib. III, Vot. 102, p. 179-189; Nicolai Rodriguez Fermosini, *De Officiis et Sacris Ecclesiae,* Tract. II, 'De Sacra Unctione' [Lyon 1662], De Officio Custodus (X.1.27.01), Quaest. 1, pp. 545-551.

[793] Andreae, *Tractatus,* n. 114 and n. 115.

[794] Gregory Sayer (1560-1602), an English Catholic stressed this permission greatly, but his writings caused significant controversy, because it seemed to undermine the intended effect of the interdict. Sayer, *De Censuribus,* Lib. 5, C. 9, n. 3.

[795] Guido Pancirolli [Pancirollus], *The History of Many memorable Things lost,* p. 326-330.

bells of a city, that not only would there be no legal or licit means of providing 'Signals that give Notice of all Publick Actions'—and thereby either prohibiting or inconveniencing them—but that the cities and people within them would be, at the very least, 'very much incommoded'. This section will demonstrate that it was crucial for canon and civil lawyers that all bells (and later, just church-bells) be silenced under an interdict precisely because of the weight of the inconvenience. My argument is about the legality and illegality of the sounding of the bells, not about the actual sounding of them. There must have been many exceptions or accidents where the church bells rung during an interdict which did not rise to the Papal curia because the necessity or accidental quality of the case was uncontroversial. (Papal courts however record many cases of clearly intentional violations, so it was a contentious subject). My argument is the bells exist and ring by permission—once revoked, any ringing is an aberration, *even if warranted.* Practically, this may have meant as little as a double-take—the individual who knows that the bells are ringing out of order has to judge their new meaning in its new disorderly context. Any ring, in the moment it is rung, takes place against the context of the mandate of the interdict, without the active permission of the Church; every ring is presumably illicit.[796]

This section offers five interpretations and three re-interpretations for how this shapes our conception of authority in this time period and this context. I call the first set 'interpretations' because my analysis handles explicit writings of jurists and interpretive claims that would have been accessible to them. I call the second set 're-interpretations' because I will be offering explanations out of the reach of jurists, theorists, and theologians themselves, but which I nonetheless think are *more* accurate readings of the Church, its claims to authority, and its claims to be able to construct and intervene in public and political life. The five interpretations deal with law-making, war, the private body of Christ, territory, and reconciliation. The three re-interpretations deal with the concept of the public, the disruption of time, and the suspended life and death of the *civitas* for the purpose of understanding more wholistically the Church's claim of authority in imposing the interdict. I close with a final reflection on the latent significance of the *Ave Maria* bell which was often permitted to ring even during an interdict: it was a daily promise of the possibility of peace, and escape from a timeless, isolated, and unharmonious world.

*The Interdict: Interpretations*

First, law-making. The faculty and process of making law stretches back in the roman law to Dig. 1.1.9 (and the many glosses and legal commentaries on it): "All peoples who are governed under laws and customs observe in part their own special law and in part a law common to all men." Here, medieval jurists reflected on what distinguished laws from statutes, who could make law (Emperors, princes, senates, cities, or peoples), and how to best begin to interpret laws and statutes. From the 14th to the 16th centuries jurists used this foundation to ground the capacity, right, and procedure for making and writing down law in cities: Sebastiano Napodano (1298-1362) writes that Naples' collection of written customs were properly law, written down after a 'bell,

[796] Bells could still be rung in cases of emergency—invasion, fire, or to warn of an incoming storm. We might imagine however that these emergency bells would carry a special tenor of panic against the context of the interdict; it was already illicit to ring the bell, so any rupture onto the soundscape would be startling, if not also louder against a backdrop of eerie silence.

trumpet, or other customary signal' had convened a congregation of at least two-thirds of the people, of which a *maior pars* had come to agreement.[797]

My argument about law-making runs in two directions. One runs from the bells to the practice of making law—if bells are a necessary part of *solennitas* and therefore in the convening of assemblies where law is made, then their silence necessarily prevents assemblies from forming and making law.[798] Keep in mind further that earlier in this historical period (the late 13th to the mid 14th century), it was still customary in smaller towns and cities to hold public business within the church itself—including markets and trials, but also town councils and meetings.[799] The implication of the bells on assembly-making and legislating might work in this direction—prohibition by effect. The other runs from the status of interdict and the crimes which caused it. Can an interdicted community make valid law? The answer is no. Take Bartolus' comments on Dig. 1.1.9, where he argues in passing that the excommunicated and interdicted cannot make law (*facere statuta*). Bartolus cites the canon law but likens the excommunicated and interdicted with those who have been banished by the Prince or have otherwise lost their right to participate in law-making bodies.[800] In either direction the consequence is the same: the interdicted *civitas* and *all* of its citizens lose their right and ability to make law.

Second: war. Church bells were often called 'trumpets of the militant Church' because they scared off demons.[801] Medieval theologians meant this literally (or metaphysically) and the war-powers of the bells were formalized in the twelfth-century operating handbook of liturgical

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[797] Soon after Frederic II promulgated the Constitutions of Melfi (1231)—what Ernst Kantorowicz once called 'the birth certificate of the modern administrative state'—jurists began to analyze the statutes and write commentaries. One of these jurists, Sebastiano Napodano (1298-1362), became famous for his commentary, and was asked to write the *proemium* for the written customs of Naples; this would be reprinted (and glossed and commented on itself) in every printed edition of the *Consuetudines Neapolitanae* until the 18th century: "I say that written custom is a municipal law commonly and legitimately constituted in writing by the people or the *maior pars* of those present. ... Its written quality is proved by the fact that it is law, and it immediately follows that it is 'commonly' approved because all of the people (*omnes de populo*) ought to be called, but two-thirds of it must be present. Within these two-thirds, the *maior pars* must come to an agreement (*consentire*). In this, the *maior pars* ought to be greater (*maiores*) in their nobility, dignity, antiquity, and [act] with the knowledge of the common folk (*scientia cum plebibus*). And women and minors under the age of 25 are not considered among the wiser (*prudientores*), and as such do not enjoy full suffrage in the republic. And a bell, trumpet, or other customary signal must convene them in the usual place." The glosses on this passage cite many of the roman and canon law passages discussed above, and several, from 16th century Neapolitan jurists, offer resources for readers wondering about the essential role of bells. *Consuetudines Neapolitanae* [Naples 1567], 'Proemium', n. 12-13, p. 6. See also Isidore of Seville's definition of *lex:* 'Law is an ordinance of the people, by which the elders have enacted something together with the *plebs'* (*Lex est constitutio populi, qua maiores natu simul cum plebibus aliquid sanxerunt*). Book 5, Ch. 10. Trans. Gallagher. Aquinas adopted this definition at ST.I-II, Q90, A.3, Obj. 2

[798] This may seem a counterintuitive logic for modern readers, but it aligns with how medieval jurists processed cause and effect. Take for example the interdict and baptism. The interdict explicitly permitted baptism, but explicitly forbade divine services, an umbrella which included a number of the ceremonies which consecrated the oil, cup, and waters of baptism. Rather than let baptisms take place with unblessed and unconsecrated instruments, canon law and the canonists permitted the necessary services for the administration of the necessary sacraments. Francois Marc, *Decisiones Aureae in Sacro Delphinatus, Vol. I-II* [Venice 1561], Quaestio 844, p. 379. Consider also that Bishops commonly "blessed the hot water and the hot iron for civil courts", also prohibited by the interdict; Thompson, *Cities of God,* 46.

[799] Council of Ravenna (1311); Thompson, *Cities of God.*

[800] Bartolus at Dig. 1.1.9, n. 13. "Quaero, nunquid excommunicati et interdicti possint facere statuta? Et dico, quod non."

[801] Nicolai Rodriguez Fermosini, Tractatus II, Tomus II, De Officiis Et Sacris Ecclesiae, ad titulum XV libri I decretalium, De Sacra Unctione (Lyon 1662) De Officio Custodus, Quaest 1, pp. 545-551; Joannis Stephani Durantius, *De Ritibus Ecclesiasticis,* Lib. 1, Ch. 22, n. 4, p. 139 [Lyon 1606].

services, the *Ordines Romani.*[802] Starting with William Durand, canonists and jurists illustrated the power of bells through political analogy: demons feared the 'trumpets' of the church on the offensive 'just as the tyrant, hearing in his own land the trumpets of a powerful king is struck with fear'.[803] The Church also kept its bells like a 'watchman' keeps his trumpet, 'keeping watch through the night against the machinations of the Devil'.[804] Consider also the military strategies of occupation discussed briefly above: Jacob Ludovici wrote that most cities had a special bell to signal the closing of the city gates for the evening; when such cities were occupied by 'hostile forces', the enemy garrisons often forbade the ringing of such a bell. Perhaps this was a purely strategic policy, but the bell's silence may have been a real reminder that the gates of the city were open, that the *civitas* had no power to close its gates and protect itself, and that their vulnerability was at the will of the occupying army.[805] In this context, the implication of the silence of the bells is obvious: the community *around* the church, not just the church itself, was in much the same position as the occupied *civitas*. The interdicted city had no recourse to the bells which metaphorically sound the alarm for the approaching spiritual enemy or which metaphysically have the power to drive them off; demons and tyrants had no 'trumpets' to fear.

Third, the treatment of the Eucharistic host is one of the strongest indicators of the intended isolation of the interdict and where we find some of the strongest examples of resistance. As discussed above, the consecration of the host (if permitted) had to take place behind the closed doors of the outer and inner church, performed in whispers, and out of sight of any windows. By closing the church and forbidding the administration of the Eucharist, the interdict achieved one level of distancing the 'body' of believers from the Body of Christ. However, the terms of the interdict also legally prohibited clergy from letting anybody lay eyes on the host, through windows or when clergy were transporting it to the dying. Clergy who were careless about this rule might cultivate the impression among the community or higher-ranking officials that the interdict was not being enforced—"it provoked scandal in 1297 when consuls of interdicted Béziers had the host taken from its clergy to their town hall".[806] Displaying it, even accidentally, made the host *public* in a way which violated the intended purpose of the interdict—making the body of Christ *private* such that no individual could even catch so much as an accidental glimpse of that which aided their salvation. In extreme cases, the Eucharist was removed from the *civitas* completely—an absolute evacuation of the Body of Christ, a total alienation and deprivation of the 'holy' from the city.[807]

Fourth, territory. Krehbiel writes that "the interdict was always territorial; that is, it affects all persons within specific boundaries, not because they are persons—for this would be general excommunication—but because they are within stated limits".[808] Unlike excommunication, the interdict could be applied to an entire *civitas*, which required jurists to define the *civitas* alongside

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[802] Gardner, "The Cardinals Music: Musical Interests at the Papal Curia", 120. Citing M. Andrieu, Le Pontifical Romain au Moyen-Age (Studi e Testi, 86, 87, 88, 99; Vatican City, 1938–51); i: Pontificale romanum saeculi XII, Ordo ad signum aecclesiae benedicendum, pp. 293–5. 'ad effugandos daemones et Dei filii congregandos, procellas et tonitrua vel grandines abieciandas'.

[803] Durand, *Rationale Divinorum Officiorum*, Lib. VI, Cap. 72, n. 14. Marcus Antonius Genuensis, *Tractatus de Ecclesia,* Quaest. 248, n. 6, fol. 219.

[804] See also Honorius Augustodunensis (1080-1140), *Gemma animae.* Andrew Kirkman, *The Cultural Life of the Early Polyphonic Mass: Medieval Context to Modern Revival* (2010).

[805] *Dissertatio Iuridica De eo, quod iustum est circa campanas, vom Recht der Glocken* (1739) §39: Halygraphia p. 2. p. 376, and p. 443.

[806] Clarke, p. 190.

[807] Clarke, p. 190.

[808] Krehbiel, p. 8.

other territorial entities and explain how ecclesiastical judgments extended across them.[809] They followed an already moving trajectory which tracked the *civitas* as it extended beyond its walls and into the surrounding villages and countryside.[810] It was important that the interdict applied to an expansive definition of a *civitas* (or alternatively to all of the territory of a ruler[811]) because jurists wanted to limit the ability for a citizen of an interdicted *civitas* to simply ride out to a neighboring village for Mass; they also then limited how far individuals could travel to escape its territorial effects.[812] The grand exception to this territorial view of jurisdictions and punishment was the monastery: regardless of whether they were within the 'suburbs' of a *civitas*, convents and monasteries were not considered 'contiguous' to the city or territory. They existed outside of territory—perhaps 'cloistered' from it—and as such posed an obstacle to the growing conception of territoriality in medieval Europe.[813] This often created conflict in attempting to enforce the interdict. Citizens regularly attempted to take refuge from the interdict on the lands of monasteries and convents, especially to bury their dead in the consecrated graveyards there.

Finally, reconciliation and rebuilding. The 'relaxation' of an interdict was celebrated with great joy in first-hand accounts, in part because it marked reconciliation with the Body of the Church (and God). But it was a reconciliation in more ways than one. Because the community had been tarnished or sullied by the crimes which led to the interdict and the interdict itself, the community needed to participate in ritualistic reconciliation in which the buildings and community were cleansed and reconsecrated; the church itself was reconsecrated in a ceremony paralleling baptism.[814] These ceremonies were borrowed from ritualistic responses to homicide and bloodshed in the church, cleaning the literal and metaphorical bloodstains from the ground. More still had to be done. Recall that bodies could not be buried in church cemeteries during the interdict. As such, they were often carried off and buried alongside the roads entering town. For families wishing to reconcile the now isolated bodies of their family in the church cemetery, they now had to exhume and rebury those bodies with the proper celebration. Each of these rituals stressed that death of many kinds had taken place—something like murder, something like the death of life without baptism, and literal unconsecrated death. Each needed to be properly confronted for reconciliation to take place.

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[809] Calderinus, *Tractatus,* ns. 24-27, fol. 326v-r; Boniface VIII, 'Si Civitas' (1298); VI.5.11.17.
[810] Nicholai Plovii, *Tractatus,* n. 5; St. Antonius, Archbishop of Florence, *Tractatus,* n. 20-25.
[811] Calderinus, *Tractatus,* n. 29; Nicholai Plovii, *Tractatus,* n. 25; St. Antonius, Archbishop of Florence, *Tractatus Perutilis de Interdicto,* n. 14, fol. 349v.
[812] Calderinus, *Tractatus,* n. 40-41; St. Antonius, Archbishop of Florence, *Tractatus,* n. 14.
[813] One final observation on territory and the interdict: the interdict and its threat was based in fear (*terror*). Pierre Pithou wrote that the interdict 'led to the terror of the excommunicated'. (Pithou, *De Interdicts Eccl.,* 18-19.) Canonists agreed that the church could induce temporal punishments for severe crimes or for striking fear, and Francisco Suarez wrote that ecclesiastical censures were sometimes designed for the 'terror of the living', as 'fitting punishment' and 'for the common good'. But jurists also agreed that the 'power of inducing terror' was a right of the magistrate, and often, exclusive to civil powers. Indeed, the word territory itself is said to derive from the space within which one has the right to induce subjects to terror. I will be examining both the *territorium* and the *ius terrendi* of the Church in the next chapter, but it is worth flagging here in the context of the interdict in part because of the territoriality of the interdict and also in part because of the existence of the ambulatory interdict—that is, an interdict which would apply to an individual no matter where they traveled in the world. See Damasus, 'Brocarda', 'propter terrorem'. Clarke, 18; Suarez, *De Censuris in Communi, Communicatione, Suspensione, et Interdicto,* Tom. 5, [Moguntiae 1617], Disputatio V, Sectio I, 95, but throughout; see also Bartholomaeus Ugolini, *Tractatus de Censuris Ecclesiasticis,* 245.; Ferdinandi Arias de Mesa, *Variarum Resolutionum,* Libri Tres, [Naples 1643], p. 519. Elden, *Birth of Territory*.
[814] Clarke, p. 246; In Gratian's *Decretum,* D.68 c.3 and De con. D.1 c. 19.

*The Interdict: Re-Interpretations*

As a 'medicinal' censure designed to force rulers and communities to reconcile with the Church the interdict was designed to be disruptive to the lives of Christians. If the interdict were exclusively an in-group disciplinary procedure, the effects and implications highlighted above would still be significant for historians, political scientists, and political theorists, not least because as strategies they could still be imitated by other actors. They notably were, as within the English state and the Anglican Church, or more broadly as the late renaissance and early modern state learned from the Church's strategies for policing heresy and managing the Inquisition. This view would also be consistent with recent trends in the social sciences (which are realizations of early 20th century scholarship in medieval political thought) that recognize the Catholic Church before the Reformation as a state or state-like entity. These accounts largely assume a centralization of authority and policymaking in the Pope with a constituency of Christians. Excommunication fits with this view as a crucial tool for punishment and regulation, even if it could only be used against individuals.

However, this approach struggles to make sense of the interdict, which could be used as a collective censure; and, in placing a *civitas* and its territory under sanction, it clearly would have included non-Christians (Jews, Muslims, and perhaps those ambivalent to religion overall).[815] This subset of residents and citizens were not subject to the spiritual jurisdiction of the church and could not be excommunicated. They also would not have been affected by the denial of Mass, the Eucharist, or penance. Jews also seem to have been permitted to gather in synagogues even if a city was under an interdict. Yet, several of the sanctions of the interdict *must* have disrupted their political and public lives because other terms of the interdict were not strictly ecclesiastical. Recall that an interdicted people, council, or *civitas* cannot make law, according to Bartolus, even if non-Christians (if permitted) served on the council. Furthermore, they also would have been deprived of the various benefits provided by the church-bells and the use of the church itself as a public meeting space or marketplace.

That the Church can remove the right of law-making and otherwise disrupt and reorder the lives of entire communities within a territory, some individuals of which were explicitly outside of the ecclesiastical jurisdiction of the Church and explicitly within the political or temporal jurisdiction of a civil ruler genuinely challenges our understanding of the reach of the Church in the medieval *civitas.* It seems inappropriate to apply the language of the state because we are faced with the claims of the actual state—England or Florence, for example. It also seems inappropriate because the Church refused to use the legal language of sovereignty as well as the formal legal language attached to the core rights of sovereignty in these endeavors. As I showed in the previous chapter, however, the Church still attempted to claim the right to exercise some of the rights of sovereignty without taking on the rest of the package—this was perhaps strategic, as 'statehood' itself was still wildly unstable.

The trouble then is what to make of a non-state which has jurisdiction over a territory which is not *their* territory, citizens who are not *their* citizens, and can indeed suspend the means and the

[815]While we cannot know with any certainty how many non-Christians lived in any of the interdicted cities, we have countless *consilia* and records in the Papal *curia* dealing with legal controversies about Jews, Muslims, and heretics (including agnostics or heterodox persons), and we also have countless cases of expulsion in Spain (1492) numbering tens of thousands of Jews and Florence (1470s and 1490s) in the thousands. No matter how small, numerically or proportionally, we must not think that their participation in their communities was negligible. P.J.P. Goldberg writes, "The medievalist must ... regard all population 'statistics' with suspicion."Goldberg, *Medieval England: A Social History 1250-1550* (London 2004), p. 71.

rights of political assembly.[816] I argue that it makes more sense to approach the medieval Church as building, setting the rules for, managing and policing a sphere which is partially territorial, political, and of course ecclesiastical. In each of these senses it is public, articulated in contrast to private alternatives inside the individual, the home, or behind the closed doors of the church. This sphere itself is cohesive, but it overlaps in unsettling ways with states, territories, and other jurisdictions (which can often leave the impression that it is fragmented and scattered). The interdict can be reinterpreted as a disruption of this public sphere, if not a suspension of it. The church-bells ordered public life; the church-doors were public message boards for notices and subpoenas; their halls housed councils and meetings. Their ceremonies created citizens, provided for public health in the orderly burial of the dead, provided order for the exercise of criminal jurisdiction, and managed reconciliation between citizens. By suspending all of these functions through the interdict the Church was claiming an extreme degree of authority and control over public life, if not also political life—and, through the suspension of the right to make law, authority and control over political agency.

*Tolling Time*

Time, which Aristotle (and then Aquinas) called "the number of motion" had multiple senses in the Middle Ages. Jacques le Goff famously catalogued the conflict between times—labor time, merchant's time, and Church time—in the Middle Ages, to which E.P. Thompson later added the time of industrial capitalism.[817] Our concern with the interdict is two ways of measuring natural time—the passing motion of the day. One divides the day into a series of hours; the other into a series of hours with canon law significance (also called "hours"). The two were merged in the Middle Ages, and the church bells tolled both (often at the same time, with the same strokes). Church bells were rung to mark the canon law "hours" of the night and day: Matins (before dawn; 3-5 am), Lauds (dawn; 5 am), Prime (6am), Terce (9am), Sextus (noon), Nones (3pm); Vespers (6pm), and Compline (end of day; 7pm), and depending on custom, a Midnight Office might be observed as well as Vigil (2am).[818] These bells were unquestionably silenced by the interdict and jurists repeatedly note that the church bells could not be used to sound them, and that clergy cannot participate, cause, or even permit bells be rung to mark these hours. They could not even ring a hand bell outside of the Church*;* this would violate the interdict. By the letter of the law, the interdict banned the ringing of all bells, including that of the hours. The church withdrew all participation—if not all permission—of the telling of time.

This strong view seemed to have met with great resistance, as canonists in the 14th century record the nearly constant question of whether the laity might ring their own bells, without the help

[816] Modern supranational corporations and social media companies are a strikingly close analogue, especially the practice of "deplatforming". For example, were Twitter to suspend the accounts of an entire city (or perhaps political party) in response to a violation of company policy, which in turn hindered their ability or capacity to continue to organize, we might find ourselves roughly on the same plane as the medieval interdict.

[817] Aristotle, Physics, 219b1-2. Jacques le Goff, *Time, Work, and Culture in the Middle Ages* (1977); E.P. Thompson, "Time, Work-Discipline, and Industrial Capitalism" *Past & Present,* No. 38 (Dec., 1967), pp. 56-97. Chloé Stowell is also making a remarkable set of arguments on clocks in Early Modern political thought and democratic theory in her forthcoming work.

[818] Fixing prayer to times of the day was a Jewish (and Old Testament) tradition (see Psalm 119:164). Drawing on this passage, early Christian authors (Origen, Hippolytus) encouraged Christians to keep the same schedule of prayer. This included potentially rising at midnight after one's "first sleep" to pray, before returning for one's "second sleep". The keeping of hours was also observed by Pliny the Younger in *Letters,* Letter 97 to Emperor Trajan.

of the clergy 'for the telling of time' (*pro horis notificandis*).[819] Joannes Andreae and Nicolai Plovii carved out a similar exception.[820] One set of Metropolitan church councils from the 14th century (April 1374) tracked these grounds, recognizing again that the laity could ring their own bells, and later jurists would largely agree.[821] I do not know what the laity's 'own' bells would have looked or sounded like in the 14th century, unless these texts refer already to the expansion of municipal bell towers found in the wealthier Italian commercial cities.

How, then, did the interdict disrupt the telling of time, and the perception of the passing of time? Only two points can be made on this. The first is that the legal capacity to mark any time at all passed from the Church to the laity, or more broadly, from the Church to the community (laity or not). The interdict was not designed to be punitive, and so we ought not expect the harshness of a complete suspension of time; but it is worth noting that permitting the hours to be rung by non-clergy certainly undermined the disruptive effect of inhibiting the Church's management of keeping time. However, the second point is that the canon law hours which provided the structure for daily life in the medieval *civitas* did not simply tell the time we are accustomed to. That is, the 5am bell rings to say that it is both "5am" and "the Church's 5am"; the latter, the canon law hour of Lauds, was accompanied with a specific hymn and prayer, determined by a complex calendar. To detach the Church hour from the natural hour was to strip the "hour" as a unit of its sacred qualities and consequences. Time might pass and continue to be marked but it was no longer consecrated and holy; for the community under an interdict, the passing of time was now in their own hands and not in the hands of God's appointed stewards. Time passed, sure, but it was now vulnerable and outside of God's protection; it was no longer 'holy' (*sanctus*).[822] But in line with the first point, this transfer may have been a loss for the Church, too—the transition from private prayers at the hours to public prayers at the hours took place in the 4th century, and the interdict curiously silences the Church's public prayers. It cleaves the Church's public hours from the community's public hours.

*Death*

The interdict would have necessarily emphasized the life-giving power of the Church and the anxiety of being alienated from it. Furthermore, though the dying could receive last rites, they would do so with the knowledge that their bodies would have to be buried unceremoniously in unconsecrated ground, "'like dogs' in ditches and highways without priests or prayers".[823] William Durand highlighted that the Church celebrated darkness and silence as a part of its Easter traditions—just as the world entered an eclipse while the 'sun of justice' hung on the cross, so too were the bells silent during the three days remembering the Crucifixion. Durand also writes that

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[819] Calderinus, *Tractatus de Interdicto Ecclesiastico,* n. 95.
[820] Andreae, n. 114-115, fol. 346r; Plovii, n. 12 and n. 21.
[821] Astesanus of Asti (d. c. 1330), a Franciscan lawyer and theologian, records a question and answer: 'Can the clergy in any way ring the bells, have the bells rung, or permit the bells to be rung for the dead or for the hours?' 'Not at all, but if the laity do thus they are not bound [by the same rules] unless they consent to them'. *Summa Astensis,* Tom. II, [Rome 1730], p. 488. Also: *Concilium Provinciale Sextum*, April 1374, ab Archiepiscopo Hugone Guidardio, Cap. 32, p. 237; Joannes Tabiensi [Giovanni Cagnazzo?], *Summae Tabienae,* Pars II [Venice 1572], p. 161; Silvestro Mazzolini , *Summae Sylvestrinae,* Pars Secunda, [Venice 1601], fol. 42r. See also *Summae Sylvestrinae Quae Summa Summarum Merito*, Pars Secunda [Lyon 1594], pp. 47--. Martini Bonacinae, *Opera Omnia,* [Lyon 1705], Disputatio V, Punctum IV, pp. 446-448.
[822] For the protective "sanction" of the *sanctus,* see the next chapter.
[823] Clarke, p. 162. Roger of Wendover, *Flores,* ii.46.

the early morning bells which break the night exclaim, 'Arise you who sleep, and rise from the dead'. Under an interdict, these bells were also silenced. There would be no auditory chime to call the community to awake and 'rise from the dead'; at Durand's other suggestion, it would have been like a perpetual eclipse, neither night nor day.[824] This is underscored by the criminal legal use of bells to define nighttime itself. Lastly, it would not have gone unnoticed that the 'real' night would have been quieter without the church bells. Whether the night would have seemed to pass faster or slower without the night bells might be an impossible question to answer; however, we might remember (against the backdrop of readings of 'sleeping' in political thought) that many individuals slept *twice* on a given evening—the first sleep (*primo sonno, premier sommeil,* or *primo somno*) carried the individual until the middle of the night when they would wake up for prayer, or to continue chores. The second sleep would then carry them to morning and bells would have aided both cycles of this 'biphasic' sleep.[825] Though the interdict could not be likened to a social death, it might be adequately likened to a social dying—a 'medicinal' torniquet applied on a part of the body which might, over time, cause the limb to die. At the very least, however, the theological and ritualistic emphasis on life and death within Catholicism would have stressed multiple layers to the temporal and eternal life and death of the interdicted community. It was a suspension of the community, in time and space, awaiting reconciliation to breath anew.[826]

*The Hail Mary—A Final Reinterpretation*

In his *Tractatus de Interdicto Ecclesiastico,* Joannis Calderinus paused to consider a custom which was often practiced in Italian cities:

> I have often been asked (*consultus*) whether in the time of an Interdict, the bells may be rung for the saying of *Ave Maria,* as is done by such a laudable custom in the evenings in some places.... You should say that they should; the salutation of the Virgin is not an 'office' of any particular order, but in fact it is recognized that this practice was principally introduced for the laity. The rules for the interdict above do not apply to this case.[827]

What saved the *Ave Maria* from the reach of the interdict, according to Calderinus and later jurists, was that it was a popular movement to maintain some regularity through the chaos of the interdict.

If my interpretations and reinterpretations are roughly an accurate picture of the implications of the authority of the Church through the use of the interdict, consider the overall effect of the permission of the prayer of *Ave Maria.* The Church had made public life chaotic and disorderly, removing the structure of religious services and the structure of time and rhythm the

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[824] William Durand, *Rationale Divinorum Officiorum* [Lyon 1559], Lib. VI, Cap. 72, n. 3-10.

[825] See A. Roger Ekirch, *La Grande Transformation du Sommeil: Comment la Révolutin Industrielle a Bouleversé Nos Nuits* (Éditions Amsterdam: Paris, 2021); Ekirch, *At Day's Close: Night in Times Past* (Norton, 2005). The implied reference above is to Richard Tuck, *The Sleeping Sovereign: The Invention of Modern Democracy.*

[826] I owe my sensitivity to death's place in the interdict to Carol Ze-Noah's recent and forthcoming work on Marcus Garvey. Metaphorical, allegorical, and legal-analogical death abounds in medieval, Renaissance, and Early Modern political thought, and its connections to 19th century thought are always worthy of conversation and further study; I have Carol to thank for both.

[827]Calderinus, *Tractatus,* fol. 330v. Calderinus was quoted a century later by Nicholas de Plowe [Plovii]. On this, see Rev. Herbert Thurston, "Our Popular Devotions V—The Angelus: Compline or Curfew Bell—Which?", pp. 61-73, in *The Month: A Catholic Magazine,* Vol. XCIX, January-June 1902, p. 67.

church-bells otherwise provided—secular substitutions could be made, but with a loss of sacred meaning. All assemblies were implicitly illicit, the community could not make law, and every individual's harmony with the 'Mother Church' and every other individual was disrupted. It was not unlike a Catholic-Hobbesian state of nature, although perhaps with an Aristotelian inflection: life outside of the orderly, peaceful, regulated *polis* the Church provided was bestial. To push the Hobbesian parallel once more—and hopefully not wear out its welcome—it is not difficult to reimagine the Catholic subject in their artificial state of nature, faced equally with their death, spiritual and social, not reaching for the laws of nature, those 'articles of peace', but a petition to Mary in the 'prayer of peace':

| | |
|---|---|
| Holy Mary, Mother of God, | Sancta Maria, Mater Dei, |
| Pray for us sinners, | Ora pro nobis peccatoribus, |
| Pray, pray for us; | Ora, ora pro nobis; |
| Pray for us sinners, | Ora, ora pro nobis peccatoribus, |
| Now, and at the hour of our death, | Nunc et in hora mortis, |
| The hour of our death. | In hora mortis nostrae. |
| The hour, the hour of our death, | In hora, hora mortis nostrae, |
| The hour of our death. | In hora mortis nostrae. |
| Hail Mary! | Ave Maria. |

**Section V: Resisting the Interdict—A Practical Objection**

In this section, I want to briefly address the obvious objection: wasn't this kind of ecclesiastical censure easy to resist, especially on the periphery of Papal power and control? Given that we have many records of resistance and disobedience, wouldn't this have undercut the intended and real effects of the censure, and the implications I drew from it above? The answer is that resistance was easy, even if sometimes costly, but that this resistance strengthens my theoretical argument above; the various strategies of resistance often attempt to reintroduce the order and rhythm of public life which the interdict was attempting to suspend, but as an alternative to the Church. Historical evidence suggests that the interdict was not only ineffective at times, but also counterproductive, actively harming the interests of the Church. This underscores my theoretical argument above because of the *way* that it harmed the interest of the Church: by evacuating the *civitas* they let others step in and fulfil essential services. By packing away their public behind the closed doors of the Cathedral, they left the public *extra Ecclesiam* to others. Let's examine a few of these instances and mechanisms of resistance by the clergy, temporal authorities, and communities themselves.

The Church itself records resistance to the interdict in the canon law. X.1.04.05 records the case of an interdict against Le Mans (1200-1205) and the obstinate officials at the Church of St. Peter de Curia who had not ceased celebrating divine services, 'ringing their bells', and thus acting as a part of the Body of Christ out-of-alignment with the head (*membrum suo capiti non cohaerens*). [828] The clergy claimed a right or privilege by custom which exempted them from the general interdict, which the Pope outright rejected on appeal. We know that the clergy often claimed local customs, statutes, and claimed privileges to ignore the interdict because jurists regularly restated, clarified, and wrote opinions that the general interdict almost always superseded these claims of custom. [829]

[828] X.1.04.05.
[829] Joannes Andrea, *Tractatus de Interdictis,* n. 68, citing X.1.04.05.

We also know that temporal authorities resisted the execution of the interdict, again from canon law and canon law commentaries. The Council of Vienne in 1311 (codified as Clement 5.10.2) records that:

> Grave complaint has been made to us by prelates that certain nobles and temporal lords, when their territory has been laid under ecclesiastical interdict, have publicly and solemnly celebrated masses and other divine offices, not only in the chapels of their own houses, but also in collegiate churches and other churches in prominent places. They invite—and what is worse, sometimes compel—people to celebrate the divine offices. Not content even with these excesses, they have the people summoned, *even those under interdict,* by the ringing of bells and by the public crier, to hear Mass.[830]

Any person who encouraged, facilitated, or ordered the violation of interdicts would be 'automatically' (*ipso facto*) excommunicated in line with X.5.39.53. The glosses and comments on passages like these highlight that those seemingly most likely to resist the interdict were rulers and nobles.[831] Peter de Ancharanus (1333-1416) called the transgression of these temporal lords a 'double-aberration', because they rang the bells *in an interdicted place* and *for an interdicted people*.[832] Historians also record that they used force or the threat of force to coerce clergy to celebrate the offices. [833] Bishops, clerics, and other ecclesiastical persons who were tasked with carrying out the sanction of the interdict had targets on their back, not unlike diplomats fearing potential retaliation in a state where respect for diplomatic privileges are wavering. Indeed, like diplomats, bishops and clerics possessed immunity which in theory should have stopped temporal authorities from acting against them. This did not stop clergy from being assaulted, having their property confiscated, or being chased out of the city.[834]

Whole communities also resisted the interdict, in a process which Peter Clarke analogized to strike-busting; the Church's clergy provided communities with essential goods and services, which they withdrew during an interdict. In extreme cases, the terms of the interdict required the clergy to leave the *civitas* entirely or the clergy feared for their own safety and so fled. Pope Innocent III's interdict of Narni in 1208 instructs clergy to leave the city for "nearby places".[835] This would have left the city with no one to administer baptisms or the last rites. In 1282, Pope Martin IV's interdict of Perugia instructed most of the clergy to leave, but to retain a skeleton crew to administer infant baptisms and penance for the dying.[836] Where there weren't clergy—or enough clergy—to work, some towns hired priests and clergy from other towns to reside and work for as long as the interdict lasted, paid for by the community treasury. Clarke records the example of San Gimignano's interdict of 1290, in which the city hired "'blackleg' labour" in the form of two priests named Bonsignori and Jacobus, as well as multiple payments for bell-ringers to ring the time and the hours.[837] This was

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[830] Clement 5.10.2 [Vienna Decree 2.36].
[831] Clement, 5.10.2, Main Gloss [UCLA] Col. 309
[832] Peter de Ancharanus, Clem. 5.10.2: "duplicem excessum ... in loco interdicto et populum interdictum"
[833] Clarke, p. 188: Clerics of Santo II of Portugal feeling coerced to offer the sacraments and celebrate offices.
[834] England and Portugal, most notably.
[835] Clarke, p. 189.
[836] Clarke, p. 189. Clarke notes that the commune of San Gimignano, having only a skeleton crew on hand which refused to "perform ministrations", "consequently resorted to hiring priests elsewhere for this purpose." Clarke cites Reg. Martin IV, no. 280. Cf. ibid. no. 281 (Spoleto).
[837] Clarke, pp. 204-211.

explicitly against the canon law and upset the Pope greatly, but there was little that could be done beyond extending the interdict and reprimanding the community. Communities were stubborn and industrious—it was only a matter of time before the laity or non-Christians found alternatives for the rhythm and structure of life while the Church was withdrawn and silent.

Such flouting of ecclesiastical authority has three dimensions. First, the temporal authorities must have rightly perceived the interdict and its consequences as an obstacle to their salvation. A regular celebration of Mass, partaking of the Eucharist, and access to the confessional and ultimately access to the cemetery would be important access points to feeling more secure in their salvation. The cost of coercing the clergy and rejecting the authority of the Church was a smaller cost, up until the point where the Church responded by threatening excommunication. It was a fine line to walk. Second, their resistance highlights the destabilization of life which the interdict generated. It upset the rulers, no doubt, but further upset their subjects (who expressed frequent frustration with inquisitorial presence) [838], and local rhythms of life and the marketplace. Historians have suggested that in cities with strong inquisitorial presence, trade and commerce slowed out of a concern for potential church action and confiscation[839]—it is not a stretch to imagine a similar shadow hanging over the interdicted city. Third, it was a resistance of authority and the assertion of the authority of the Church and ecclesiastical censures. It is perhaps for these reasons that the interdict was ultimately an unsuccessful kind of censure. In early modernity, as protestant (and Catholic) historians reflected on its practice, they argued that if examined closely, it was clear that the interdict itself was the 'cause of dissensions, schisms, wars, and other great calamities; and hardly anything good ever came to the Church from them, and often, a great deal of evil instead.'[840] From the retrospective view of the Church, one of these 'great calamities'—not caused by the interdict, but readily apparent in the theory and fact of its application—was the loss of their exclusive authority over the life of the *civitas.*

**Section VI: Conclusion**

Charles, Louise, and Richard Tilly began their *The Rebellious Century: 1830-1930* with a vignette from German playwright Friedrich Schiller and his poem "Das Lied von der Glocke":

> Woe to the cities in whose midst lies tinder!
> The people, breaking their chains,
> Take to self-help in terrible ways.
> Howling rebellion grabs the bell-ropes
> And sounds for Violence the bells consecrated to Peace.[841]

The Tilly's found in this refrain a lament about the lack of restraint of the revolutionary spirit which marked popular rebellions from the French Revolution onwards to set up the "problem" of their study. They did not observe in this refrain that both 'self-help' (*Eigenhilfe*)—and, as I have shown in this chapter, the 'seizing of the bell-ropes'—were medieval legal concepts that underwent extensive

[838] Clark, p. 231: At Carcassone a plot was supposedly hatched in 1284 to seize and destroy inquisition records and in 1295 citizens ran their inquisitor out of town and assaulted his fellow Dominicans.'; Davis 51-59; Given, 231.
[839] See the previous chapter.
[840] Ludovico Ellies Du Pin, *De Antiqua Ecclesiae Disciplina Dissertationes Historicae,* [Coloniae Agrippinae 1691] Diss. III, p. 289.
[841] Schiller, "Das Lied von der Glocke": "Weh, wenn sich in dem Schoss der Städte / Der Feuerzunder still gehäuft, / Das Vollk, zerreissend seine Kette, / Zur Eigenhilfe schrecklich grieft! / Da zerret an der Glocken Strängen / Der Aufruhr, dass sie heulend schallt." In *The Rebellious Century, 1830-1930* (Harvard University Press, Cambridge 1975), pp. 1-2.

development in both canon and civil law.[842] I have shown here that the interdict, and other ecclesiastical censures, were not simply the case of an organization exercising jurisdiction over its members. The material requirements and tools prohibited by the interdict were the same materials and tools used for public life and civil administration, if not also political constitution. The lines between spiritual and temporal matters were not only blurry but at points inseparable—to silence the bells which publicly called Mass also silenced the bells which opened the criminal courts or called town councils. This heightens the importance for developing a historically sensitive understanding of ecclesiastical authority and politics, without resorting to the blunt contrast of "Church" and "State".

By the end of the 16th century, the common claim that '*Campanillia* are marks of the church' would have already rung of nostalgia. [843] Bell-towers and bells were ubiquitous, no longer particular to churches, and no longer exclusively in the jurisdiction of the Church. They still of course were deeply meaningful for religion: "The Bells are to the whole parish what a Church Organ is to an assembled congregation. They wake up the heart's affections, and lead us in our praises to God."[844] The interdict was a Catholic punishment through and through, but it was nevertheless an attractive bundle of sanctions and policies for ecclesiastical and temporal authorities to imitate; injunctions against preaching were used in England early in the history of the Anglican Church,[845] prohibiting assemblies as a form of collective punishment or political control, and as I showed above, removing bells or prohibiting their ringing from occupied territories was thought to be a srategy both of european states (France) and the Ottoman Empire. The persistence of these strategies and censures, and their gestures back to the interdict, justify close attention to the theory of punishment implied by the interdict and its intended effects, as well as a close consideration of the bell. Hobbes wrote that "The tongue of man is a trumpet of warre, and sedition"[846]; that much louder then the organ of collective speech and action, public and ecclesiastical, which hung in every church tower of every *civitas* in medieval Europe—and, that much louder its silence.

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[842] Self-help was applied in a number of cases, the most notable being the rights of and relief measures for the poor, as well as self-defense and reprisals. Respectively, see Taliadoros, J. (2013). "Law, Theology, and Morality: Conceptions of the Rights to Relief of the Poor in the Twelfth and Thirteenth Centuries." *Journal of Religious History*, 37(4), 474-493, pp. 476-478; and on war, Greenwood, R. (2014). "War and Sovereignty in Medieval Roman Law." *Law and History Review*, 32(1), 31-63.

[843] Remiro de Goñi (1481-1554), *Tractatus de immunitate ecclesiarum*, Apl. 2, ns. 4-5, fol. 88v in TUI 13.1, 86r-113v.

[844] Blunt, *The Use and Abuse of Church Bells* (1846)

[845] In 1553. Gilbert Burnet, *The Abridgment of The History of the Reformation of the Church of England* Book 1 [London 1683]

[846] *De Cive,* Ch. 5.

'War and victory depend on the capture and generally the overthrow of cities; it is a business that can't be done without injury to the gods. The destruction of the city-walls is also the destruction of its temples; the slaughter of citizens is also the slaughter of priests; the plunder of sacred property is not dissimilar to the plunder of 'profane' property.'[847]

Tertullian, *Apologia,* XV.14, from Cicero's *Republic*

"The law was sacred. Yes, but rebellion might be sacred too. It flashed upon her mind that the problem before her was essentially the same as that which had lain before Savonarola—the problem where the sacredness of obedience ended, and where the sacredness of rebellion began."

George Eliot, *Romola.*

## 5. The Boundaries Problem: *Res sanctae* and the Construction of the *Civitas*

*Introduction*

Before the people of Israel marched around the walls of Jericho for seven days with the ark of the covenant, shouting and blowing trumpets, Joshua sent two spies into the city. The spies found refuge in the kindness of a prostitute (*meretrix*) named Rahab who hid them under piles of flax on the roof of her home which was attached to the city walls. The spies swore an oath to Rahab's safety and she lowered them over the wall by rope. Days later, at God's command, the people of Israel completed their marching; as many hymns and spirituals have memorialized, the walls of Jericho "came tumblin' down".[848] In the classical tradition, it was the new walls of Rome which provided fruit for mythmaking. Livy's *second* account of Remus' death, the "commoner story", was that Remus

> leaped over the new walls in mockery of his brother, whereupon Romulus in great anger slew him, and in menacing wise added these words withal, 'So perish whoever else shall leap over my walls!' Thus Romulus acquired sole power, and the city, thus founded, was called by its founder's name.[849]

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[847] Tertullian, *Apologia,* LCL 250, pp. 140-141, with adjustments. "Porro bella et victoriae captis et eversis plurimum urbibus constant. Id negotium sine deorum iniuria non est. Eaedem strages moenium et templorum, pares caedes civium et sacerdotum, nec dissimiles rapinae sacrarum divitiarum et profanarum."

[848] Rahab's status as a "prostitute", translated as *meretrix* in the Vulgate, mattered to early Christians and the theologians who followed; Jesus's feet were washed at Luke 7:37 by a 'woman of the city, who was a sinner' (*mulier quae erat in civitate peccatrix*), who has almost always been interpreted to be a *meretrix*. While theologians saw in these examples the promise of a particular kind of redemption, Rahab was a robust prefiguration of the Church—the Church in the body and soul of a *meretrix.* Rahab's faithfulness, and in turn, her treason to Jericho, is obvious. Notice also however that Rahab's home on the walls of Jericho would have been illegal in Roman law, but not medieval custom. As much as Jericho was a part of the medieval historical and theological imagination (and then curiously faded in Early Modernity where authors opted for Babylon as the metaphor of choice), it picked up traction in the 19th century in enslaved communities. The "Joshua" song (or "Joshua Fit the Battle of Jericho" or "Joshua Fought the Battle") was first published in 1882, but likely dates to the early 19th century. M.G. Slayton, *Jubilee Songs* (1882).

[849] The older translation captures a worthy flare for the dramatic. Livy, *Ab Urbe Condita.* LCL 114, pp. 24-25. See also Dionysus Halicarnassus, I.87 and Ovid, *Fasti*, 4.843. These accounts absolve Romulus of the actual murder, which they claim was performed by an assistant named Celer.

Plutarch imagined Romulus bent over the ploughshare: "as Romulus was digging a trench where his city's wall was to run, [Remus] ridiculed some parts of the work, and obstructed others. At last, when he leaped across it, he was smitten."[850]

Jericho and Rome were two stories in an arsenal of widely known and cited examples about the origin, purpose, and 'sanctity' of walls in legal texts—Jericho had been preserved in Joshua 5:13-6:27 and various sacramental liturgies, while the Romulus and Remus story had been preserved at Dig. 1.8.11. Canonists, theologians, and canon lawyers could pick and choose the stress placed on these walls. Jericho could be like Babel (Genesis 11), a hubristic imitation of the heavenly city. Rahab and Rahab's house could be a vehicle for, or prefiguration of, the Church itself. At the same time, walls might be metaphors for God's protection, Jerusalem and (or) the heavenly city, or a reminder that the walls are a symptom of the worldly city[851]; walls ought then to inspire a yearning for a time of perfect peace yet to come. Walls were normatively flexible objects, which canon and civil lawyers could knit into arguments that, in turn, weaved antiquity and biblical history, Plato and Cicero, and architecture with medieval law.

In the history of legal and political thought, walls were often connected to the founding and destruction of the city and furthermore to the 'identity' of the collective inhabitants and corporate body[852], but it was unclear if they were constitutive of the *polis* or *civitas.* Aristotle had denied it, arguing that it "would be possible to build a single wall around the Peloponnese", but this could not make those adversarial communities within it a *polis.*[853] Isidore echoed Aristotle in a maxim that would be repeated for centuries: 'a *civitas* is not the stones of the city, but its inhabitants.'[854] In Plato's *Laws,* the Athenian provocatively doubted whether walls were not better left "sleeping in the ground"—but if a political community *did* need a wall, it would be better that the private houses of citizens be arranged "so that the whole city may form a single wall" and "the whole city will have the form of a single house".[855]

In this chapter, I focus on the property status of walls and their legal relationship to the medieval and renaissance *civitas*. Scholars across humanities disciplines have treated walls—physically or conceptually—as architectural phenomena[856], as moments of urban or social

[850] Plutarch, "The Life of Romulus".

[851] Theological commentaries thrived on intertextual connections; sin, Cain's city, Nimrod's city, Sodom and Gomorrah, Babel and Babylon, Jericho, and Rome could all be expressions of the same theme or concept. So, too, could the "City of God" be found in Rahab. They could just as easily represent the walls of the world, of sin, figurations of Sodom and Gomorrah, Babel and Babylon, Jericho and others—Gregory Register 2.68 (March 29, 1075), Luther on the Psalms—as they could the walls of Jerusalem (Ezra 4, Revelation, etc.). Luther himself recognized this duality in his commentary on Psalms 18.

[852] Sara Menzinger, "Mura e identità civica in Italia e in Francia meridionale" in *Cittadinanze medievali. Dinamiche di appartenenza a un corpo comunitario* (2017).

[853] Aristotle, *Politics,* 1276a 25-28. Aristotle's next example is, strikingly, Babylon—a city so large (and unsustainable) that when one part was captured, the rest of the city within its walls did not discover their defeat for three days.

[854] Isidore, *Etymology,* 15.

[855] Plato, *Laws,* 6.778d. The Athenian's skepticism about the absolute necessity of walls is only mirrored by one author below: Cino at C.1.2.7.

[856] Fontana-Giusti, Gordana. "Walling and the city: the effects of walls and walling within the city space", *The Journal of Architecture*, 309–45, Volume 16, Issue 3, (London & New York: Routledge 2011).

development, as units of analysis in securitization studies[857], immigration[858], and critical theory[859]. A now dated debate in the disciplines of anthropology and sociology distinguished between the "sacred" and "profane", though recent scholarship has shown these categories as coordinates for transformation; where they do invoke these categories, even in the context of walls, they do not recover the European legal history which shaped and continues to shape the boundaries between the "sacred", the "holy", the "secular", and the "profane". [860] The legal history of walls has been recently investigated in Italian by Sara Menzinger, but this chapter is the first such treatment in English. The closest scholarship has emerged out of legal theory in the late 20th century—considerations of order and territory from Carl Schmitt to Hans Kelsen. Schmitt had argued that "*nomos* can be described as a wall, because, like a wall it, too, is based on sacred orientations."[861] But from the World Wars to Rousseau, Cornelia Vismann offers what is effectively a theoretical update of Plutarch's Romulus for contemporary readers:

> The primordial scene of the nomos opens with a drawing of a line in the soil. This very act initiates a specific concept of law, which derives order from the notion of space. The plough draws lines — furrows in the field — to mark the space of one's own. As such, as ownership, the demarcating plough touches the juridical sphere. The space of what is owned marks either a private or a public sphere of control

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[857] Max Stephenson, Jr. and Laura Zanotti, eds. *Building Walls and Dissolving Borders: The Challenges of Alterity, Community and Securitizing Space* (Routledge 2013).

[858] Migdal, J. (ed.) 2004. *Boundaries and Belonging: States and Societies in the Struggle to Shape Identities and Local Practices*. Cambridge: Cambridge University Press; Shirlow, P., Murtaugh, B. 2006. *Belfast: Segregation, Violence and the City*; Fassin, D. 2011 "Policing Borders, Producing Boundaries. The Governmentality of Immigration in Dark Times." *Annual Review of Anthropology.* See also Wendy Brown, "The Sacred, the Secular and the Profane: Charles Taylor and Karl Marx" in van Antwerpen, et al. eds. *Varieties of Secularism in a Secular Age* (Harvard University Press, 2010).

[859] Challenges of disciplining aside, see Callahan, *Sensible Politics: Visualizing International Relations* (2020); Larrie Dudenhoeffer, *Walls Without Cinema: State Security and Subjective Embodiment in Twenty-First-Century US Filmmaking* (2021); and Alba Griffin, *Reading the Walls of Bogota: Graffiti, Street Art, and the Urban Imaginary of Violence* (2023). And of course, Wendy Brown, *Walled States, Waning Sovereignty* (2010). I offer a legal historical account of the action of "fencing", but with a special eye to whether it necessitates the 'sacred' or the 'secular'; this might importantly limit how either can help make sense of contemporary sovereignty. After quoting Jost Trier on the fencing of the shrine to entrust a space to the divine, Brown notes "just as enclosure lies at the origin of the sacred, it also marks out the beginning of the secular"—Rousseau's "true founder of civil society" was also a fence-builder. "Thus would the walling of the nation-state be the death rattle of landed nation-state sovereignty, possibly even signifying a certain theological reminder in its wake." In pursuit of the "theological reminder" of walls, I will be casting some doubt on the 'secular' Rousseau. Brown, pp. 43-44.

[860] Recent scholarship underscores how "sacrality" is produced and artificial. Mircea Eliade, *The Sacred and the Profane: The Nature of Religion* (1957); Henri Lefebvre, *The Production of Space* (1991); Christian Schmid, *Henri Lefebvre and the Theory of the Production of Space* (2022). Scholars investigating the creation of "sacred" spaces often invoke the frameworks I'll be discussing in this chapter, including the roles of authority and governance over such spaces, as well as their congruity with liberal or secular societies; Section I and III below can provide additional historical context to these discussions. For example, see R.D. Jones, "The makeshift and the contingent: Lefebvre and the production of precarious sacred space", *Environment and Planning D: Society and Space* (37(1), 177-194. Special thanks to Jesús Gutierrez for working through this point.

[861] Schmitt, *The Nomos of the Earth in the International Law of the Ius Publicum Europeaum* (Telos Press, 2003), p. 73. See also Goodrich, Barshack, and Schütz, eds. *Law, Text, Terror: Essays for Pierre Legendre* (2006). And Minkkinnen, *Thinking without Desire: A First Philosophy of Law* (2000).

> either a possession of land or a state-territory. Cultivation defines the order of ownership in space.[862]

The plough-drawn boundaries where the piles for the walls would be set marked the beginning of a particular order, and by extension, the beginning of a particular kind of authority and rule as perhaps a "coconstitutive relation of sovereignty, theology, and closure."[863]

Technically, according to the Roman law, walls were a specific kind of thing—a *res sanctus*—which was a special kind of protected and inviolable object (Dig. 1.8.9 and Institutes 2.1). We could call them 'sacred' and indeed many scholars and historians do. However, given that the Roman law juxtaposes *res sanctae* with a *different* class of objects called *res sacrae,* the language of "sacred" becomes immediately unhelpful. This linguistic and conceptual translation issue caused just as many complications for medieval readers as it does contemporary scholars; namely, it means that there is a difference between the city-walls as 'sacred' (*sanctus*) objects in the law, and as 'sacred' (*sacer*) objects in religion. This "confusion"[864] was reinforced by daily practice: Bishops and church leaders led processionals around city-walls, washing them with holy water in a clear emulation of the ceremony of baptism, but implicitly 'consecrating' the walls—they were, through such a civic-ceremony, now 'sacred' (*sanctus*) *and* 'sacred' (*sacrae*).[865] In what follows, I will keep the Latin to aid in these distinctions, but I will only translate *sacrae* as 'sacred'.

In this chapter, I argue that the legal status of walls and the various civil and canon legal interpretations of walls gives insight to the physical and metaphysical conception of the medieval and renaissance *civitas*; namely, it shows the Church to be deeply intertwined with the borders and boundaries of the political community. In previous chapters, I noted in passing that inquisitional executions often took place outside of the city-walls so as not to pollute the *civitas* or the Church; and, I showed that during times of military occupation, a city's gates were left open and the bells which announced the closing of the gates were silenced, reminding inhabitants of their defenselessness. Here, I provide the legal and contextual logic behind those observations to present walls as a site of jurisdictional conflict. This site drew attention in theory and practice from analyses of authority and sovereignty or public safety and utility in legal texts, to *consilia* and recorded legal disputes about finance and construction, to historical examples of construction, reconstruction, and demolition.

This chapter orbits around two medieval legal questions: (1) Could city-walls be built without the permission of the sovereign? (2) Could the *ecclesia* be compelled to contribute for the construction or repair of city-walls?[866] To trace the development of the answers to these questions, however, we have to first identify the original property status of walls in the Roman law and the contextual relationship of ecclesiastical authority to the walls themselves. Because this history

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[862] Cornelia Vismann, "Starting From Scratch: Concepts of Order in No Man's Land", pp. 46-47. Also Chris Fynsk, "A *Nomos* without Truth," *South Atlantic Quarterly,* 104, no. 2 (Spring 2005).

[863] Brown, *Walled States, Waning Sovereignty,* p. 47. Notice however Brown's claim that the fence "founds and relates *sacred* space and sovereign power". Emphasis added.

[864] When a jurist used the terms synonymously, as I show Bracton and many others doing in Section I, it is easy to label it as a confusion because it is a departure from the technical distinctions of the Roman law. However, if what I show in Section II, as well as the rest of the project in the blurred lines of public, religious, political life is correct, then what some scholars have called a "confusion" might be an *accurate* representation of a confusing—but internally coherent—political and legal practice.

[865] After the completion of the Leonine Walls in Rome, Pope Leo led an entourage in procession around them on June 27, 852. For processions, see below (Section II).

[866] As in previous chapters, these questions were empirically popular and frequently written about in legal texts.

can't be cleanly told chronologically, I use a parallel temporal structure to investigate both legal questions one after the other.

Section I sets the legal context for the property status of walls in Roman legal thought, but also investigates the shifting interpretations of *res sanctae* until they stabilized in the Renaissance; jurists reached an equilibrium in which they recognized technical differences between *res sacrae* and *res sanctae,* but following Bracton and others, employed them as synonyms while retaining both categories. City-walls would be called "*sacrae vel sanctae*" ('sacred' or 'holy'), although the closer readers of the *Institutes* would complain about the textual inaccuracy of doing so. While I can't explain why these categories collapse into one another (while remaining nominally distinct), I use the *Siete Partidas* and other late-medieval legal texts to suggest that *res sanctae* might easily be brought within the umbrella of ecclesiastical concerns because of the expansiveness of the 'holy' (*sanctus*) in medieval thought; the Church, Pope, Empire, and the Spirit which helped all three spread their influence across Europe were all "*sanctus*". Jurists like Lucas de Penna would have to extract *res sanctae* out from under this umbrella, in accordance with Roman legal texts, to stress the *public* authority and its protections (*sanctiones*) which properly underscore *res sanctae*.

Section II suggests that the apparent confusion inherent in the blurred lines between *res sacrae* and *res sanctae* above are better understood in the context of a much older conflict between authorities, in which Bishops were regularly understood to be responsible for the physical and spiritual defense of the *civitas.* In their role as "*defensor civitatis*"—a Roman administrative position generalized to a guardian and protector of the city—they built and rebuilt city walls as well as led ceremonies and processions in peace and war to consecrate them. I briefly demonstrate that historical evidence from the 6th century onwards attests to the Bishop and Church's role in the city's construction and defense, thus breaking any meaningful distinction between *res sacrae* and *res sanctae* even before Bracton: walls might be *res sanctae* by legal technicality and protected by the Bishop's legal and public authority, but they were also *res sanctae* by legal technicality, specially consecrated and dedicated to God by the Bishop's spiritual authority.

Because *res sanctae* were protected by legislative action, they were inherently linked with authority and 'sovereignty' (*imperium*). Section III stresses that walls were no different, though jurists developed a scaffolding of legal argumentation that left the distinction between *res sacrae* and *res sanctae* behind. Who could build or repair walls and what procedures must be followed to build or repair them licitly? Using Roman legal passages about public works, medieval jurists stressed the principle that a city could not build or rebuild its walls without the permission of the proper superior. On closer inspection, this maxim which seems to affirm a standard solution to decision-making and authority in medieval legal thought breaks down precisely because of the importance and local intensity of walls. That is, while the standard answer was always that a *civitas* could not build or repair its walls without approval of the *princeps,* the standard exception was cases of necessity: where such consultation was impossible, as in cases of emergency or necessity, the people could rebuild their own walls by their own authority. Other jurists stressed another exception: the consent of the *princeps* might only be necessary if the *civitas* would be using 'public' funds (not those of a *universitas* or individual). Here, custom would overrule written law: as Pier Filippo Corneo (1419-1493) would observe, most *civitates* simply claimed authority over the city-walls and issued permissions on their own regardless of the legal status of the community. Taken together, I suggest that regular controversies about the walls of the *civitas* were not compatible with rising regional conceptions of authority, which would eventually culminate in sovereignty, *patriae,* and nation-states. The tension between the local and the 'national' or 'royal' is readily apparent from the 14th century onwards.

Section IV takes up the conflict between civil jurists and canonists on precisely the question of construction and repair. Could the *ecclesia* (the local church), or local clergy, be compelled to contribute money or labor for the construction or repair of walls? Invoking standard arguments about ecclesiastical immunities, many canonists said no, except again in cases of emergency. Others divided the question—why were the walls being built? Would they be expected to provide labor, or just money? What kind of tax? Could the secular courts compel ecclesiastical payment, or was it strictly voluntary and enforceable only by ecclesiastical courts? In the answers to these questions, I find a developing story about the kinds of values invoked by jurists: necessity, security, piety, utility, and vigilance. Despite the strength of ecclesiastical immunity, the canonists could not escape this web of justifications and the question eventually stabilized in a way that pulled the *ecclesia* back into the construction of public works—back in line with Roman legal principles, but against earlier medieval conceptions of a strict line between *spiritualia* and *temporalia*, between ecclesiastical and secular concerns. The *ecclesia* could be bound to contribute to city-walls precisely because the city-walls protected the entire community; some jurists invoked the famous maxim *quod omnes tangit* to stress that the *ecclesia* and clergy were a part of the *city* in its political, legal, and corporate entirety. Others appealed to canon law to argue that not only was the participation of the church often necessary, but that it served the public utility or common good; they often drove the nail home—'what could be more pious than paying to build and rebuild the city around them'.[867] Public works were *pious* endeavors (a special kind of canon-legal work), too. After a winding path, we find the *ecclesia* playing their public-legal part in the "imperial machine" once again, but unlike their medieval 'warrior-bishop' predecessors, no longer in the sole seat of authority.

**Section I: *sacrae, religiosae, sanctae*—Sacred Things, Religious Things, 'Inviolable' Things**

This category of Roman property law is woefully understudied, even relative to the fields of Roman legal scholarship and legal historiography. Some recent works on *res sacrae* have stressed cultural and political elements to "sacred property" in Classical Rome.[868] David J. Bloch has, to my knowledge, written the only detailed account of *res sanctae.*[869] Scholarship on Ecclesiastical property, including an excellent recent monograph by Mary Fagan, has often drawn on the notion of *res sacrae* without always connecting it back to its Roman legal origins.[870] The scholarship that does exist is unanimous in one respect: these categories were deeply confusing even to Imperial jurists, and it wasn't a fully developed or coherent system to them either. As I will try to show here, medieval jurists were not able to make it coherent, and it wasn't historically interesting or legally significant enough to attract attention except as a curiosity for 17th century jurists.[871] In short, it was messy in antiquity and messy in medieval law too.

Take Henry Bracton for instance. Ernst Kantorowicz noted that Bracton "confuses *res sacrae, religiosae,* and *sanctae,* because he uses the term *quasi sacrae* for both the *res publicae* and the *res sanctae.*"[872] That is, Bracton's categorization of property identified "non-

[867] Johann Friedrich Schmid, *Consiliorum,* Consilum IX, columns 113-114, ns. 39-42.
[868] Olga Tellegen-Couperus, ed. *Law and Religion in the Roman Republic* (Brill 2012); Olga Tellegen-Couperus, "Sacred and Civil Law", pp. 157-164; James Rives, "Control of the Sacred in Roman Law", pp. 165-180.
[869] David J. Bloch, "Res Sanctae in Gaius and the Founding of the City".
[870] Helnut Goerlich and Torsten Schmidt, *Res sacrae in den neuen Bundesländer: Rechtsfragen zum Wiederaufbau der Universitätskirche in Leipzig.* (2010).
[871] Johan-Conrad van Hasselt, *Dissertatio Iuridica Inauguralis de Sanctitate Moenium et Portarum* [Rhenum 1729].
[872] Kantorowicz, *Kings Two Bodies,* 187, n. 302.

ecclesiastical" things which were owned by nobody (*res nullius*) as *res quasi sacrae*, therefore blurring public or fiscal property with the "sacred" (or *quasi* sacred). Kantorowicz continued, "the 'holiness' of city-walls could not have meant very much to Bracton, nor the fact that it was a sacrilegious act to leap over a wall." This section aims to clarify some of the boundaries between them so that we are careful not to "blunder" over these distinctions, as F.W. Maitland wrote, but also to recover precisely the "holiness of city-walls" that apparently escaped Bracton.[873]

The Roman reckoning with "sacred" objects does not come down to us as a contemporaneous body of thought; it was an intellectualization of long-standing rules and customs.[874] Sextus Pompeius Festus (2nd century) summarized the key difference between the sacred *(sacrum*), the holy (*sanctum*) and the religious (*religiosum*): '*sacrae* is a building which has been consecrated to God, *sanctum* is the wall which encircles a town (*oppidum*), and *religiosum* is the tomb in which a dead person is buried or interred.'[875] Consecration required a specific action by those with authority—the pontiffs—and so Cicero writes that "public property could not receive a sacred character through rites performed by private citizens".[876] Private citizens could only create *religious* sites, specifically through burial. "Holy" things—*res sanctae*—were seemingly more difficult to pin down, even for Cicero. In *De Natura Deorum,* Cicero's Lucilius reflects:

> You have indeed made a slashing attack upon the most reverently and wisely constructed Stoic doctrine of the divine providence. But as evening is now approaching, you will assign us a day on which to make our answer to your views. For I have to fight against you on behalf of our altars and hearths, of the temples and shrines of the gods, and of the city-walls, which you as pontiffs declare to be *sanctos* and are more careful to hedge the city round with religious ceremonies than even with fortifications; and my conscience forbids me to abandon their cause so long as I yet can breathe.[877]

The walls are "*sanctos*", consistent with Festus' summary above, and the Roman legal passages below. However, Lucilius here links the pontiffs to a "sanct-ification" of the walls, as if walls derive their "holiness" and importance came in part from Roman Religion.[878] Were the walls "holy" because they were attached to Roman religion or because of their property status?

*Institutes and Digest*

By the time of Gaius' *Institutes,* the categories of Roman law had sufficiently hardened enough to be systematized:

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[873] Maitland, *Bracton and Azo,* (1894) Publications of the Selden Society, Volume 8. note on p. 97. "We return to *res sacrae.* Bracton blunders over the distinction between *sacer* and *sanctus*, which has disappeared from the current Latin of his time. He makes the walls of a town *res sacrae* instead of *res sanctae."*

[874] Stein, *Regulae Iuris*; Schofield, "Cicero for and against divination", JRS 1986.

[875] Sextus Pompeius Festus, *De verborum significatu,* 348-350L: "Inter sacrum autem et sanctum et religiosum differentias bellisime refert: sacrum aedificium, consecratum deo; sanctum murum, qui sit circum oppidum; religoisum sepulcrum, ubi mortuus sepultus aut humatus sit, satis constare ait."

[876] Cicero, *De Legibus,* 2.22-24

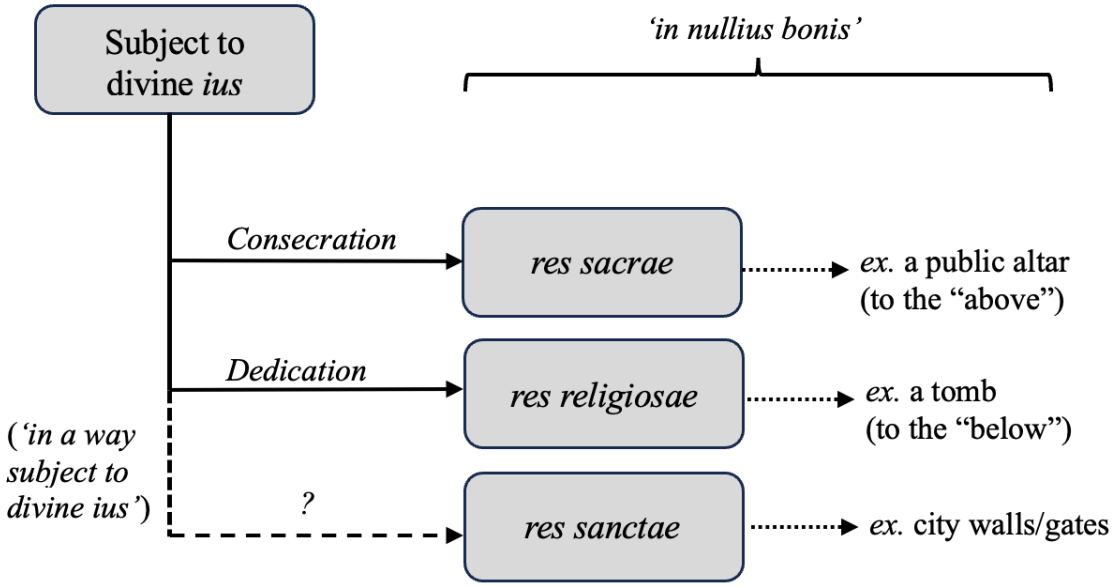
[877] Cicero, *De Natura Deorum*, III.94, LCL 268, pp. 380-381.

[878] Valeton, "De templis Romanis," *Mnemosyne* 20 (1892), 338-390.

> The leading division of things is in two classes: they are subject either to divine *ius* or to human *ius.* Subject to divine *ius* are *res sacrae* and *res religiosae. Res sacrae* are those consecrated to the gods above; *res religiosae* are those dedicated to the gods below. That alone is considered *sacrum* which has been consecrated (*consecratum*) under the authority of the Roman people (*populi Romani*), for instance by *lex* or senatusconsult passed to that effect. On the other hand, a thing is made *religiosum* by the act of a private person, when he buries a corpse in his own land, provided that the dead man's funeral. ... Moreover, *res sanctae,* such as the walls and gates of a city, are in a manner subject to divine *ius.* Now what is subject to divine *ius* cannot belong to anyone, whereas what is subject to human *ius* belongs in general to someone, though it may belong to no one. ... Things subject to human *ius* are either public or private. Public things are regarded as belonging to no individual, but as being the property of the corporate body. Private things are those belonging to individuals.[879]

Notice that the difference between 'sacred' and 'religious' things hinges on the authority which lends them their significance. Those things deemed special by the 'state' are deemed 'sacred'—those things deemed special by the individual—and perhaps any individual—are deemed 'religious'. For a simpler illustration, note the ambiguity of *res sanctae:*

**Gaius' *Institutes*, 2.2-11.**




[879] Gaius, *Institutes,* 2.2-11. Trans. Zuletta, pp. 66-67.

Contrast, however, the version of this categorization by the time of Justinian's *Institutes,* 2.1.8-10*:*

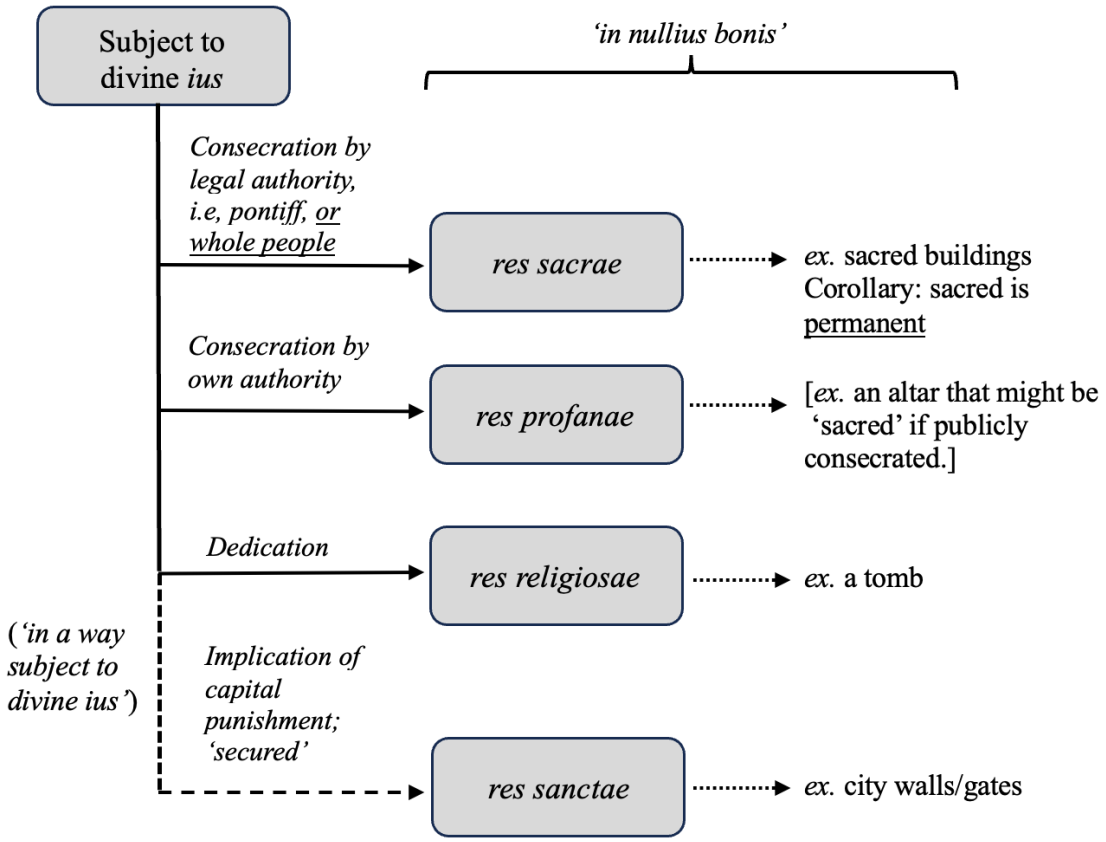
> Things are *sacra* which have been duly consecrated by the pontiffs, as sacred buildings and offerings, properly dedicated to the service of God, which we have forbidden by our constitution to be sold or mortgaged, except for the purpose of purchasing the freedom of captives. But, if any one by his own authority makes anything as it were sacred to himself, it is not sacred, but profane. But ground on which a sacred edifice has once been erected continues to be sacred, even after the building has been destroyed. .... 'Hallowed' things (*santcae*) also, as the walls and gates of a city, are to a certain degree subject to divine law, and therefore are not a part of the property of any one. The walls of a city are said to be *sanctos* inasmuch as any offence against them is punished capitally; so, too, those parts of laws by which punishments are established against transgressors, we term sanctions *(sanctiones*).

And lastly, the Digest at 1.8.6 and 8, both authored by Marcian, reads:

> Things sacred or religious or sanctified are no one's property. Things sacred are then those which have been consecrated by an act of the whole people, not by anyone in his private capacity. Therefore, if someone makes a thing sacred for himself, acting in a private capacity, the thing is not sacred but profane. When a temple has once been consecrated, then even on destruction of the building the site remains sacred. Being religious is, however, a quality which every single person can impose on a site of his own free will by burying a corpse in a place which one owns. Whatever has been defended and secured against human mischief is sanctified (*sanctum*). The term (*sanctum*) derives from the word *sagmina. Sagmina* are certain herbs which legates of the people of Rome customarily carry to ward off outrages, just as ambassadors of the Greeks carry the things which are called *cerycia.*

Once again, for a simpler illustration of these two accounts, notice the addition of what we might call popular sovereignty to the process of consecration, as well as a continued ambiguity as to what actually makes something "*sanctus*" beyond general protection by *sanctiones*:

**Justinian, *Institutes,* 2.1.8-10 and *Dig.* 1.8.6-8**




We can identify two main principles that are consistent across these different accounts. First, *res sacrae, res religiosae,* and *res sanctae* were all *res nullius*—however, *res nullius* within the context of quasi-divine law, not human law. That distinction is crucial, because *res nullius* in human law were precisely the kinds of objects that *could* become property.[880] These objects belonged to "nobody" and were permanently outside of personal patrimony. Second, *res sanctae* have a fuzzy relationship with divine and human law. This is explicit in both texts, where *res sanctae* are "in a manner" or "to a certain degree" subject to divine *ius,* and we would imagine are "in a manner" subject to human *ius.* What that second manner is, however, is and would remain unclear. Specifically with respect to *res sanctae,* it would appear that the missing piece of the taxonomy is an account for the ways in which *res sanctae* are also *public*. This indeed seemed natural to some of the classical jurists.[881]

[880] This is the distinction between *res nullius* and *res nullius in bonis*. Steinberg, "The Artist and the Police (VIII. 3)". In *The Decameron Eighth Day in Perspective* (pp. 59-88). University of Toronto Press, 2020.
[881] Michael Crawford, "*Aut sacrom aut poublicom",* pp. 93-98 in ed. Peter Birks, *New Perspectives in the Roman Law of Property: Essays for Barry Nicholas.* Clarendon Press, Oxford, 1989.

As Michael Crawford observed, sacred *res* and religious *res* "may both be either public or private."[882] Nevertheless, there is a clear distinction drawn between public *res* and sacred *res,* even though sacred *res* may in many aspects share qualities with public *res.* Stealing public property, for example, was met with the charge of *peculatus.* Stealing sacred property, by contrast, was met with the charge of *sacrilegium.*[883] Crawford writes: "In the middle and late Republic, then, it appears that there were three kinds of *res,* sacred, public, and private; and that the more important boundary was in some contexts between the first two and the last, not between the first and the last two. The age of Cicero witnessed both the apparent emergence of greater complexity and attempts to understand that complexity."[884]

However, in Justinian's *Institutes,* these other public or common property relationships were already captured in the categories of *res communes, res publicae,* and *res universitates.* All that was left was *res nullius* and *res singulorum,* and walls (and gates) could certainly not be the latter. The legal texts that would dominate medieval legal thought were torturously ambiguous then on *res sanctae,* and specifically the boundary between *res sanctae* and *res sacrae*.

Accursius grasped the most important distinctions between *res sanctae* and *res sacrae*, but added a handful of glosses that would shape all direct albeit brief commentary on these passages in the following centuries, but which would also work their way into commentaries on other aspects of Roman law. In his traditional legal dialectic style, Accursius' imagined student grasps the distinction between *sacer* and *religiosus,* but asks for clarification about *res sanctae* and why they possessed that classification. Accursius answered that the walls of the city were *sanctae* because by the authority of law, they were protected from transgression and trespass from capital punishment. Accursius added with flair, '*Sanctos*, that is *firm,* not from chalk or lime, but from the firmness of the law'. While it was implicit in the *Institutes,* Accursius mirrored the authority which creates '*sacred*' things (the pontiffs) by stressing the legal quality of the protection of walls; they derive their protection from laws, and laws are produced by legitimate law-givers. The laws in question were criminal, punitive, "*sanctiones*". Accursius maintained the ambiguity around "*res quodammodo divini iuris*". But he also raised a problem found elsewhere in medieval Roman law: the *Digest* was clearly referring to Rome's walls and foundations and so should these principles only apply to Rome? Or did they also extend to 'other cities and *castra*'? Accursius maintained that anything regarding the walls would need the authority of a presiding officer.[885] However, he also provocatively noted, 'or perhaps it could be allowed for a corporation, but not for an individual' (*vel forte universitati licet non privato*)—this would form the basis of jurists suggesting that special cases, a *universitas* might be able to take action with their own funds because it was not 'private' usage. More on that momentarily.

*The Siete Partidas*

The *Siete Partidas* provides an important point of reflection in this blurry history because they were sufficiently independent from the later Roman civil legal commentary tradition in Europe,

[882] Crawford, 94.
[883] Crawford, 94.
[884] Crawford, 95.
[885] Accursius at *Institutes* 2.1, 'sancte quoque'.

while also drawing commentary and citations in Latin.[886] In the *Third Part,* we find a familiar distinction employed in an unfamiliar way:

> All property which is sacred, religious, or holy, and set apart for the service of God is not subject to the ownership of any man, nor can it he included in his possessions; and although priests may have control of it they do not own it, but hold it as guardians and servitors, and because it is their duty to protect such property, and to serve God in it and by means of it.[887]

The Latin gloss authorized by Gregory Lopez in the 1550s reads:

> *Res sacrae,* and *religiosae* and *sanctae* do not belong to anyone specifically: even though such things are guarded by clerics, and they receive the fruits of ecclesiastical goods to sustain their livelihood, and whatever remains is spent on charitable causes, such as providing for the nourishment of the poor or orphans, supporting impoverished virgins, facilitating marriages, redeeming captives, repairing churches, and similar endeavors.[888]

These things were still *in nullius bonis*, but now *res sanctae* could "be guarded by clerics". They also seemed to be a part of ecclesiastical goods. The legal context was the potential alienation of Church property which had been permitted by Justinian's *Novel 120* explicitly in the cases mentioned here by the glossator.[889] There was, in other words, a string of continuity between the exceptions of ecclesiastical property under the Romans, the Spanish, and then some 16th century Spanish jurists fluent in both systems of law.

A following title confirms that walls (and gates) are still "*sanctus*": "*Como los muros, e las puertas delas cibdades son llamadas santas cosas.*" Both 'emperors and philosophers' established the law that 'no man should deface them by breaking them or forcing them open, or passing over them by means of ladders or otherwise, or under them in any manner, but should only go through them by the means of gates'. The penalty was capital punishment, 'because anyone who enters a town or city like this does not do so like a man who loves and honors the place, but as an enemy.

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[886] In particular, a later Latin gloss on 3.28.15 connects these passages to Albericus, Baldus, Angelus, Corneo, and others.

[887] *Siete Partidas* 3.28.12.

[888] The gloss: "In nullius bonus sunt res sacrae et religiosae aut sanctae: licet tales res per clericos custodiantur, et propter hoc habent ipsi fructus rerum ecclesiasticarum quibus mensurate vivant, et quod superfuerit, in pias causas impendant, sicut in pauperum aut orphanorum alimentis vel virginum pauperum, maritatione, captivorum redemptionem, et ecclesiarum reparatione et similibus." See *Tercera Partida* [Salamanca, 1555], fols. 157r-158v. Compare also *La Tercera Partida,* [Lyon, 1550], fol. CIXv, with the gloss of Alfonso de Montalvo (1405-1499).

[889] Because ecclesiastical property was sacred, the Roman law was uncomfortable with normal methods of alienation. Here, Justinian allowed Church land (especially in the provinces) to be sold or permanently leased, but when the Church was unable to pay the taxes it owed to the imperial government or when it was unable to repay its creditors. Scholars have suggested this was a reaction to the plague; he also exempted them from fiscal responsibility for unproductive land and tried to ensure they wouldn't lower their rents too far. In effect, the Empire was creating fiscal incentives for the cultivation of land in reaction to the bubonic plague. The political exception was nevertheless limited to cases where the Church had superfluous movable property, which they might either sell to other churches (and therefore keep it within ecclesiastical holdings) or melt them down to sell. Even in this last case, such proceeds could only be put towards ecclesiastical debts or the redemption of captives. Novel 120.

Romulus, who was the lord of Rome, established this regulation.[890] The continued emphasis on the potential for capital punishment is worth closer investigation elsewhere, particularly because most trespasses on city walls didn't trigger capital punishment, and many other 'holy' things did not carry the extreme 'sanction' of death for violation.[891] I will also leave the curious role of Romulus in the Spanish interpretation of this law for a different place.[892]

Taking a step back, the medieval individual was surrounded by Roman legal categories being interpreted by jurists in ways both consistent with and departing from the original Roman law. Culturally and socially the law might not have been a consideration at all. The Church cemeteries were '*religious'* because they dealt with the burial of bodies beneath ground, but the Church understood these grounds to also be '*sacred*' because of ecclesiastical procedures of consecration.[893] City-walls were "hallowed" or "holy" (*sanctus*) because they were protected by 'sanction', but much of the vocabulary of the Church also specialized in "*holy* things" that were not actually *res sanctae,* properly understood. This is not a significant observation: the Church could comfortably label things *sanctus* without invoking the Roman legal category of *res sanctae*. What is clear, however, are the ambiguous boundaries around the concept of *sanctus* itself. Perhaps the easiest distillation of the concept is ultimately what the jurists would retreat to repeatedly: that anything which was *sanctus* came with some certain protection. Perhaps even this distillation could be applied to presumably theological texts. The Vulgate of Exodus 19:5-6 records God's covenant (*pactum*) with the people of Israel that they will be in his possession (*mihi in peculium*), and that among the whole earth, the people of Israel will be His kingdom of priests (*mihi regnum sacerdotale*) and His "holy" nation (*gens sancta*).[894] But the Church was, through and through, *sacer.*[895] And here, perhaps it is a matter of combining the powerful 'sacrality' of the Church with the power of coercion and legal sanction that might transform some *res sanctae* into the quasi-*sanctus.*

*Azo, Bracton, and Confused Traditions*

Azo's commentary is especially interesting because his reconstruction of Justinian's *Institutes* drifts as much from the *Institutes* as Bracton would drift from Azo. Azo's style is

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[890] The Latin gloss: "Sancti dicuntur muri et portae civitatis aut villae, quos nisi per ianuam transcendere nulli licet, alias poena capitis punietur, nam Romulus fratrem contra legem per muros quia exiuit, et non per portas decapitavit." *Tercera Partida* [Salamanca, 1555], fols. 157r-158v.

[891] Even after the *sanctus/sacer* distinction faded for jurists and their commentary strayed from the *Institutes,* their protection by capital punishment always remained. Pietro de Monte, *Repertorium utriusque iuris,* at 'Murus'.

[892] Namely, the *Siete Partidas* reverses Remus' crime to *exiting* the walls. *Siete Partidas* 3.28.16: 'Remus and Romulus were two noble, distinguished, and powerful brothers, who originally settled Rome and surrounded it with walls, and after both of them together had founded it and encompassed it with walls, a controversy arose between them as to what the city should be called, and which one of them should be the lord of it, and they agreed to cast lots, and that the party who won should be the master of the city, and should give it whatever name he thought proper. The lot fell to Romulus, and he gave it the name of Rome, and established regulations and rules in accordance with which the people should live and support themselves. Among the rules which he established was one that no man should enter the city or leave it except by the gates and that whoever entered or left it elsewhere by means of a ladder or in any other way over the walls or under them, should lose his head in consequence; and therefore, *because his own brother broke this rule, and left the city by scaling the walls he was decapitated*. Wherefore, said Lucan, the first walls of Rome were bathed in the blood of the brother of its lord.' I have found no classical or late-antique account with this reversal.

[893] Volp, Ulrich. *Tod und Ritual in den Christlichen Gemeinden Der Antike*. Brill. 2015.

[894] Exodus 19:5-6.

[895] Farag, *What Makes a Church Sacred?*

distinctive; it relies on multiple distinctions to capture a variety of different qualities, rather than clearly delineating categories and objects as in the *Institutes.* When Azo first distinguishes things 'inside' and 'outside' of the patrimony of individuals, he writes that 'things *extra patrimonium* however are called *res sacrae et communes*. I add a third part to this division, which is that some things are neither a part of one's patrimony or outside of it, as in cases of use and usufruct, as well as servitudes like *actus, via,* and *aquaeductus*.' *Res sanctae* are notably absent, and Azo walks through a number of other distinctions found in the *Institutes* (including roads as *publicum* and *communia*) before finally returning to the differences between *sacrae, religiosae,* and *sanctae.*

When Azo *does* return to *res sanctae*, he has a series of striking additions to what is found in the original Roman legal text:

> Therefore, something is called *sanctum* when it is defended and protected from the wrongdoing of humans. The law that imposes this penalty is called a 'sanction'. Sometimes, an Imperial constitution is also called a 'sanction', and sometimes the collection of the whole law [is]. Municipal walls cannot be repaired without the authority of the ruler or presiding authority, nor can anything be added or placed on them [without their consent]. Perhaps it is not allowed for individuals, but might be allowed for the community. Or, it might not be allowed for personal benefit, but might be allowed for public utility. ... Humans are called 'sancti' because of their 'sanctitate'. ... By the law, *res sacrae et religiosae et sanctae* which do not belong to any individual, university or public, but are the property of God, according to human law.[896]

Azo's reading draws on the importance of authority and law in the construction of walls but recognizes exceptions to the potential hard rules set elsewhere. Azo is the first to introduce 'public utility' directly, a concept which would govern later legal writings (Section IV below). Azo also offers a small comment on the 'sanctity' of human life, which would not be repeated elsewhere. Lastly, Azo nominally sticks to the Roman legal claim that these things were *res nullius* (although he admits some confusion between *res nullius* and *res nullius in bonis*, which he goes onto clarify), but he also takes the 'quodammodo divini iuris' interpretation to mean that these things were *in bonis Dei*—that is, in the property of God. If humans were also "*sancti a sanctitate*", then it might follow that humans were the property of God too.[897]

Bracton flipped around Azo's order of this section of the *Institutes* and cut heavily, including the provocative suggestion about human nature.

> Truly sacred, religious, and holy things do not belong to anyone's property. For what is of divine law does not belong to anyone's property, but rather falls under the jurisdiction of God's judgment over human affairs. Sacred things also include walls and gates of cities, and they are called holy because the penalty of capital punishment is established for those who commit any wrongdoing against these consecrated walls, by violating them, entering them by means of scaling ladders or any other way, as it is considered hostile and detestable to enter by any means other than the

[896] Azo at *Institutes* 2.1.

[897] Whether Azo is taking a proto-Lockian position is unclear. Azo would go on to say that ownership principles could 'not apply to things that were so inherently no one's property that even nature does not allow them to be owned by anyone, such as free people. They are exempt from anyone's ownership or commerce'.

> gates. That which is defended and protected from human injustice is called holy, and that law is specifically called a sanction that imposes punishment on the wrongdoer. However, it is not allowed for anyone to repair municipal walls for their private benefit, but for the public good.[898]

Kantorowicz's reading of Bracton's reading of Azo introduced this section. Maitland argued that "Bracton blunders over the distinction between *sacer* and *sanctus,* which has disappeared from the current Latin of his time. He makes the walls of a town *res sacrae* instead of *res sanctae*."[899] If Maitland was correct about the language of Bracton's own time, then we might press on how much of a "blunder" this was; furthermore, while Bracton here and elsewhere blurs the lines between *res sanctae* and *res publicae*, he also preserves the somewhat confusing line that 'sacred' things like walls are 'sancti' by virtue of legal protections. Taking Bracton at his word, it would seem that what is 'sacred' is also protected by law and legal punishment (specifically, capital punishment). This is not only a plausible textual reading, but a plausible contextual one.

It is with these facts in mind that we can return to the line between *res sanctae* and *res sacrae.* We can show fairly easily that the line was blurred. Lucas de Penna wrote that in an 'abusive sense', 'all buildings are called walls, both *sacra* and *publica*'.[900] Paulus de Castro (1360-1441) wrote that "sacrilege" was the violation of "*sacrae vel sanctae*".[901] Philipp Corneo (1419-1492) wrote that city-walls were either "*sacri aut sancti*" in one *consilum*[902]*,* and "*sancti seu sacri*" in another[903]. In the mid-sixteenth century, Jacobus Novellus asked whether the walls of a city could be 'alienated' because they were considered "*sacri et sancti*".[904] For the historically curious 17th and 18th century jurists, this confusion was obvious but lacked explanation. In 1729, one jurist would simply say that 'in our law, the wall is not called *sacer*, but only *sanctus*, and yet if *sanctus* is taken in a general sense, it encompasses not only the *sacer* but also the *religiosus. ...* But on this matter, it is often taught that '*sacrum'* and '*sanctum*' are always confused or used interchangeably (*confundi saepius*).'[905]

Why should there be such confusion, even for the most skilled medieval jurists? In part, because the law is complicated; Lucas de Penna was responsible for an extensive tradition of commentary based on his own misreading of Dig. 43.6.2; there, Ulpian and Hermoginian had written that 'sacred places' enjoyed special protections against defacement and nuisance, and therefore 'to do anything to the walls, doors, and other sacred places that will cause damage or nuisance is not permitted.'[906] Lucas used this passage to suggest that the 'walls of the city are called sacred (*muri civitatum dicuntur sacri*)'.[907] We cannot know whether Lucas's mistake

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[898] Bracton, *De Legibus,* 1.12. §8.
[899] Maitland, *Azo and Bracton*, p. 97.
[900] Lucas de Penna at C.10.49.3.
[901] Paulus de Castro, Dig. 48.13.9[11pr].
[902] Corneo, *Consilia,* Vol. 2, Cons. 237.
[903] Corneo, *Consilia,* Vol. 2, Cons. 33.
[904] Novellus, *De Iure Prothomiseos,* n. 115-116.
[905] Johan-Conrad van Hasselt, *Dissertatio Iuridica Inauguralis de Sanctitate Moenium et Portarum* [Rhenum 1729]. See also Pignatelli, *Consultationum Canonicarum,* Tom. 1, Consult. 54, ns. 41-42; and Arnoldi de Reyger, *Thesauri Iuris,* 'De Muris' p. 401. Readings of the *Institutes* were the most common place for these arguments. See Angelo Gambiglioni at *Institutes* 2.1, § Nullius and § Sacrae res sunt; Baldus at *Institutes* 2.1, § In alienum. Lastly, Johannes Corasius (1512-1572) took the identical line as Accursius, but quoting a gloss on Accursius which brought the Cicero from above in—that 'the walls of a city (*urbis*), Cicero says, the pontiffs declare to be *sanctos*.'
[906] Dig. 43.6.2.
[907] Lucas de Penna at C.10.49.3.

occurred in his reading of the *Digest* passage or in his writing of his interpretation; in either case, the consequence of his gloss was to erase the context of "sacred buildings", and strongly imply for later jurists that "walls and doors" of the *city* were 'among *res sacrae*' as opposed to the "walls and doors" of specifically 'sacred places'.

Again, the *public* swing of the 'sacred' was equally Roman (though in this context, less technically precise), equally late-antique (now borne by Bishops and the Church), and equally late-medieval, in which the difference between the "*sacer"* and "*sanctus*" had lost some of its meaning because they were both ubiquitous, and because what was 'sacred' was often *public* and what was "*sanctus*" was both. Corneo, whose *consilium* equated walls as "*sancti seu sacri"* wrote that 'Walls are said to be *sacri* because they are destined for public use, and therefore they appear to be considered within public law as things that don't belong to particular individuals.' Similarly, he wrote, '*res sacrae et res sanctae* belong to nobody. And city walls, according to the law, seem to be public, just like public roads, rivers, and forests...'[908] Here, Corneo was seemingly hopelessly confusing *res publicae* and *res nullius in bonis.* But it might be more accurate to imagine that for Corneo, these things simply were equivalent enough—an implied equiparation, through the logical step of the equivalency of *res nullius in bonis.*

Even for Bartolus, who didn't comment on *res sanctae,* did develop the context of *res communes* and *res publicae* in a way that's helpful for this point. Bartolus wanted to stress the difference between common and public where he saw other jurists mixing them. A public road was public, he wrote, in that it was 'public not just for one people but, just as a river was used for the navigation of all peoples, so the road is used by all peoples.' For this reason, even if an influential person owned the land on both sides of the road wanted too move it, they could not, 'because it affects everyone, and what affects everyone must be consented to by everyone (*quia omnes tangit et quod omnes tangit ab omnibus concedi debet*).[909] This style of argument would be employed later to describe precisely why clergy and the Church must be bound to provide the funds for the construction not only for roads, but also bridges and walls: they touch and benefit all, so must include the consent, endorsement, and finances of all.

We can, as François Hotman did, use Plutarch as a punching bag for a final demonstration. In an account widely cited by medieval jurists, Plutarch argued that walls were *sanctus,* but gates were not (contrary to both *Institutes*). His first justification was that walls were supposed to be inviolable—they could not be climbed over, trespassed, or transgressed without triggering intense punishment for the trespasser. However, gates were created to be walked through, and furthermore, plenty of sordid, dirty, and awful things were carried in and out of gates. He cites dead corpses as one example, as in Rome and elsewhere bodies were often buried beyond the city-walls. Gates were, in other words, necessarily unclean in a way that walls were not. Plutarch intertwined this practical objection with a historical one: when the founders of cities were engaging in the ceremony of marking the boundaries of the city, they yoked a plow to a bull and cow. The plow would overturn the dirt where the walls would begin to be built, but they would *lift* the plow to mark where the gates would be. That is, if the action of *plowing* was what provided the walls their special quality, then the gates were literally un-plowed and un-'holy' in contrast to the walls.[910]

Plutarch's reading of the boundary of *sacer* and *sanctus* carries the signature confusion that would leave its imprint on Bracton and other after—walls and gates were "*quodammodo divini iuris*". That is, they had *something* to do with the divine, divine authority, and divine ceremonies,

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[908] Corneo, *Consilia,* Cons. 33. n. 6.
[909] Bartolus at *Institutes* 2.1. Notice the principle of QOT here, discussed below in Section IV.
[910] Plutarch, *Quaestiones Romanae,* Question 27.

if not also 'religion'. Indeed, many of the accounts of the founding of Rome's walls, as well as the procedures for founding other cities and towns, included religious ceremonies, augurs, and special procedures from priests and pontiffs. These actions, however, would mark the walls and gates as being *res sacrae*; Plutarch might be right, then, that gates lacked a special 'consecration' if the plow was considered a necessary aspect of the ceremony of consecration. However, the walls and gates were made—perhaps redundantly—*res sanctae* by legal authority by instituting capital punishments for violation of that which might already be 'sacred'.[911]

The legal authority which created *res sanctae* might also be consecrated themselves. Angelus Gambiglioni, in tracing the authority of consecration, noted that Emperors were once priests (*Imperatores erant sacerdotes*); it was Christ that separated the spiritual authority and temporal authority in terms of administration, but without abdicating any authority. Both swords, ecclesiastical authors had often claimed, were found in the Pope, though the exercise of the temporal sword was entrusted to the Emperor.[912] This standard account takes additional meaning in the context of the nature of consecration. 'It appears' Angelo wrote, 'that the Emperor *is* consecrated, as is stated in the Decretals; therefore, it seems that he *could* consecrate' things. Canonists like Hostiensis rejected this argument, but the interest for my argument lies not in the question of whether the consecration of the Emperor created a transitive power, but in observing that the Emperor's *consecration* by Pontifical authority transformed the Emperor *into* a *res sacer*; violating the Emperor in any number of ways would then properly be *sacrilegium*—'sacrilege'. Furthermore, Gambiglioni and the rest of the canonists' maintenance of the exclusive authority of consecration for the Pope was not only an argument for Papal sovereignty, but, as it often did, placed the Pope as a direct inheritor of Roman republican and imperial authority.

*A crucial clarification*

In the sections that follow and the two main legal controversies I reconstruct, jurists don't return to the property status of walls.[913] They would have been aware of the distinction of this subsection, certainly. But to answer legal questions about authority and payment they had no need to look to the property status of *res sanctae* in order to answer their questions. I'm tracing this path here for two reasons. First, because the property status of walls tells us crucial things about what *walls* were *about* in the classical legal imagination; this was intelligible to some early jurists even though it seems like the distinction between 'sacred' and 'holy' faded for a number of reasons. But the fading of this distinction was, I think, not a departure from Roman practice, but a return to it—or a return to a time when Emperors were priests and priests were engaged in providing public goods and public ceremonies. There is something quintessentially *Roman* about the lack of a meaningful distinction between religious and public ceremonies, but now the authority was Christian. That is, if Maitland was right that the *sacer/sanctus* distinction disappeared by Bracton, my argument in this whole project is stronger. The jurists in this narrative had *less* resources—and certainly less cause—to attempt to distinguish between the things that we wish they did.

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[911] Hotman makes a slightly different argument, less sympathetic to Plutarch. *Commentarius in Quatuor Libros Institutionum Iuris Civilis* [Lyon 1588], at *Institutes* 2.1. This is closer to Johan-Conrad van Hasselt, *Dissertatio Iuridica Inauguralis de Sanctitate Moenium et Portarum* [Rhenum 1729] Ch. 3.

[912] Angelo Gambiglioni at *Institutes* 2.1.

[913] Paulus de Castro and Corneo (Cons. 33 and 247) are two exceptions, and others surely exist. But this is a broadly consistent and curious feature of *consilia* and commentaries.

Second, the language of *sacer* and *sanctus* would persist *outside* of these categories, especially in the Church. In modern translations, both words are often translated as "Sacred", or they are distinguished as "sacred" and "holy", which is equally unhelpful. But *some* jurists did come back to walls in the context of 'sacrilege', and with a decisively political bent; Paulus de Castro wrote that 'sacrilege' was a 'violation or misuse of *rei sacrae vel sanctae* for private use'. 'Sacred', he carefully notes, is different from *sanctum*, because the 'sacred' was a thing that had been consecrated. But *sanctum,* he notes, comes from the '*sanctiones*' attached if those things are violated, and so those who violate them commit a *'quasi sacrilegium*'. He continued:

> The same applies to the actions of a ruler. Every act of a ruler is considered to be protected by *sanctiones* because of their *vim*. Therefore, to doubt the legitimacy of such an act question the ruler's power is *quasi sacrilegium.* This is the second sense of '*sanctum*', which refers to something that is secure and protected from human harm, such as the walls and gates of a city, against which a crime is *quasi sacrilegium*. ... The same applies to enemy legates who are granted security under the *ius gentium and* should not be harmed. The same principle applies to those who have security under the *ius civile,* such as those attending a fair or those who have received specific protection from a ruler. ... Thus breaking the safe conduct announced by a king would constitute 'sacrilege'.[914]

In Paul's mind, the relevancy of *res sanctae* extended to all things which were protected by specific public and legal *sanctiones*, including the actions and pronouncements of rulers. In the same stroke, however, breaking *public* 'sanctions' amounted to sacrilege.[915] This line of thought ran parallel to another: that violating 'sacred or religious' things is an action 'against religion and against God' is considered an 'injury to all'; things which 'pertain to the republic' (*pertinet ad rempublicam*), like 'city gates and walls', were similar.[916]

The distinctions above were largely legal. Surely, we cannot imagine that any author invoking the general terms of *sacer* or *sanctus* intended any connection back to these distinctions. But it is telling that the structure of the distinction—property, places, violability, punishment, and law—remain even after *sanctus* had been adopted by the Church for centuries. In Isidore's *Etymologies*, we find the etymology of "a *sanctum*" in Chapter 15 (Buildings and Fields), which is also where we find the definition of cities. Here is his description:

> Sanctums (*sanctum*) according to the ancients are the outer precincts of temples. The 'Holy of Holies' (*sanctum sanctorum*) is the inner part of the temple to which no one had access, excepting only the priest. It is called the Holy of Holies because it is holier than the outer oracle, or because it is holier in comparison with the sanctum, just as we speak of the Song of Songs, because it excels all songs. A sanctum is so called from the blood (*sanguis*) of sacrificial victims, for among the ancients nothing

[914] Paulus de Castro at Dig. 48.13.9[11pr], n. 2, fol. 82v in Venice 1568. Paulus clarifies that 'if the king grants general safe conduct to everyone within a kingdom, violating *that* pronouncement would not be sacrilegious, as it involves individuals offending one another while *all* are under the general protection.'. The issue is an inequality of protection, although Paulus is unclear here on why.

[915] cf. Tiberius Deciani, *Tractatus Criminalis,* Tom. II, Lib. VI, Cap. XIII, ns. 8-9. [Turin 1593], fol. 31f: "Hoc autem etiam notandum sacrilegium proprie non spectare ad res sanctas et religiosas proprie sumptas. Sanctae enim res dicuntur ut muri civitatum, religiosae ut sepulchra."

[916] Jacob de Arena, *De Actionibus,* § Sequens illa divisio, n. 2, fol. 300v [1541].

> was called holy (*sanctus*) except what had been consecrated and sprinkled with the blood of a sacrifice. Again sanctum, what is known to have been sanctified. Moreover to sanction (*sancire*) is to confirm, and to defend from wrong by imposing punishment. Thus both laws and city walls are said to be holy (*sanctus*).[917]

It is with the 'holiness' of the city walls that we can close this section; walls were a specific kind of legal object, protected by the authority of law, from the authority of lawgivers. Walls are necessarily about community, cooperation, and authority. But they also demarcated an internal space from an external space; the former contained human beings living and bound by a shared law, while the latter was by definition an uncontained and hostile environment.

As in Athens, the walls set aside a space within which certain kinds of actions were impermissible; we can see the same in the awkward dance that accompanied public executions, from Christ to the Spanish Inquisition. Jesus had been executed outside of the walls of Jerusalem, on a hill called Golgotha; while the Church, now in the position of sentencing, could comfortably damn individuals to capital punishment during the Inquisition, they could not carry the execution out themselves. Instead, they 'relaxed' the subject into secular hands. In Spain, as in Pisa and Florence for a time, these executions took place outside of the city walls—in Spain, called the *quemadero.* It is with some irony that the *quemadero* of Seville, first built outside of the city walls in 1481 was only destroyed in 1809 as Napoleon's troops were advancing towards Andalusia, and its materials were used to fortify the gates of Seville.[918] The materials crafted to build the explicitly un-sacred execution places—what one would call the 'horrendous testimony of human ferocity' (*horrendo testimonio de la ferocidad humana*) for the holy inquisition—were recycled into the *sanctus*.[919]

**Section II: 'Defensors Civitatis': Medieval Changes—Context, Law, Theory, and Practice before 1350**

In the 9th century, Danes attacked the city of Paris. According to one chronicler, Paris was on the brink of defeat; when things seemed most hopeless, the people cried out in prayer for the help of St. Germanus of Auxerre (c. 378- c. 442). The 'earth echoed' with the cries of their voices, harmonized with the 'bells of the temples' ringing in 'righteous clamor'. The earth 'trembled', the rivers 'roared', and St. Germanus listened. He appeared, 'engaged in the great battles of Mars,' defeating the Danes and pushing them from the walls and the bridges around the city.[920] Later, citizens testified to seeing St. Germanus circling the city walls and blessing them with holy water. Stories like this abound in medieval hagiographical literature, military chronicles, and local histories. They mark a series of contextual changes that are necessary to consider before turning back to the legal questions at stake—the responsibilities and communal justifications for city defense, construction and reconstruction of the boundaries of the city, and 'common utility' itself.

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[917] Isidore, *Etymologies,* Ch. 15, p. 305 in Barney et al.

[918] Adolfo de Castro, *Historia de los Judios en España* [Cádiz 1847], p. 116, fn. 1. According to Alonso de Fuentas in *Cuarenta cantos de diversas y peregrinas historias* [Seville 1545], the craftsman who constructed the *quemadero* was the first person executed for being a 'Judaizer'.

[919] Adolfo de Castro, *Historia,* p. 116, fn. 1.

[920] *Abbonis Bella Parisiacae Urbis,* lines 269-292 in *MGH—Poetae Saxonis Annalium de Gestis Caroli Magni Imperatores,* Libri Quinque, p. 106. For regional context, see Rosamond McKitterick, *The Frankish Kingdoms Under the Carolingians 751-987,* Ch. 9.

Bishops, alive and dead, were 'defenders' of the city in multiple respects. In part, this was a simple inheritance from Roman law and administration. *Defensors civitatis* were a formal position within the Roman Empire, and Augustine latched on to their role in his *City of God.*[921] The role functionally and legally transformed in Late Antiquity[922], and in parallel, Bishop's took up its proverbial mantel.[923] In canon law, canonists like Tancred (c. 1185—1230/6) would write that the *defensor civitatis* and a Bishop are comparable (*defensor civitatis, cui episcopus comparatur*)—a mode of equiparation.[924] Here, I'm interested less in the Roman legal or administrative aspects of the Bishop's role as 'defender'; rather, I am interested in the ways that the Bishop was engaged in the active and passive 'defense' of the city, specifically with respect to the city-walls. The mythology and ceremony around St. Germanus' actions stress not only the specialness of his actions but the specialness of the walls. Germanus' blessing of the walls was equally a consecration and reconciliation—the latter, a purge of evil and sin that I described above in the procedures following an interdict.

What matters for this section is less the walls as *sanctus,* but rather the walls as *sacer*—the city-walls as objects of consecration, made 'sacred' by the authority of ecclesiastical authorities. They may have been *sanctus* by the already antiquarian Roman law, but they were now being additionally steeped in religious ceremony and liturgy in peace and war. I will suggest in Section IV that the immunities claimed by canonists in particular were in tension with these historical contexts; the move by jurists (of both laws) to stress that the Church was deeply engaged with public utility and security *generally* (QOT), but also *specifically* because of their past engagement. I'll begin with the physical church, then branch out to the city, before closing with the city and church as allegories for one another—an allegory that jurists and theologians could not escape, which tied together the earthly city with Jerusalem and Heaven, but also with Babel, Jericho, and the *civitates* which ultimately descended from Cain.

*The Physical Church, the City as Church, and the Church as Metaphor*

Churches were consecrated buildings and part of the process for consecration included blessings and baptismal liturgies. From at least the eighth century, liturgical books record liturgies that imitate baptism, including sprinkling the walls with holy water and marking walls and pillars with oil in the sign of the cross.[925] These would persist through the Reformation, and even into Anglicanism in the 17th century.[926] Ruth Horie has examined these traditions in great detail.[927] These consecration and dedication ceremonies include an imitation of Jericho, and "by circling the

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[921] Peter Iver Kaufman, "Clerical Leadership in Late Antiquity: Augustine on Bishops' Polemical and Pastoral Burdens"

[922] Sebastian Schmidt-Hofner, "Der *defensor civitatis* und die Entstehung des Notabelnregiments in den spätrömischen Städten", in *Chlodwigs Welt: Organisation von Herrschaft um 500,* ed. Mischa Meier and Steffen Patzold, Roma Aeterna, 3 (Stuttgart 2014), pp. 487-522. cf. Cédric Brélaz and Els Rose, eds. *Civic Identity and Civic Participation in Late Antiquity and the Early Middle Ages* (Brepols 2021); R. M. Frakes, "Late Roman Social Justice and the Origin of the *Defensor Civitatis*," Classical journal 89 (1994): 337-48; Frakes, *Contra Potentium Iniurias: The Defensor Civitatis and Late Roman Justice* (Munich 2001).

[923] João Carlos Furlani, "Defensor civitatis et defensor christianorum: a influência do bispo no Império Romano tardio", *Revista Ágora,* Vitória, n. 24 (2016), pp. 81-97.

[924] Clarke, *Interdict,* p. 236. Citing Tancred on X.1.31.3.

[925] Christopher Irvine, *The Cross and Creation in Christian Liturgy and Art;* GG Willis, *Further Essays in Early Roman Liturgy,* Ch. 3.

[926] John Wickham Legg, *The English Orders for Consecrating Churches in the Seventeenth Century* (London: 1911).

[927] Ruth Horie, *Perceptions of Ecclesia: Church and Soul in Medieval Dedication Sermons.*

Church three times, we are delineating a border around the building, and declaring that this Church is set apart for God"[928]; it was also in imitation of the purification of the City of Jerusalem from Nehemiah 12:27-47, in which the priests and Levites 'purified themselves, the people, the city gates, and the wall'.[929] In Late Antiquity, Bishops continued these rituals along a new landscape of political communities, some of which were legally "*civitates*". According to Geneviève Bührer-Thierry:

> In the Alemannia region, just as in Bavaria, most of the episcopal seats were founded in the seventh century, often in old Roman cities, but with the patronage of the Frankish king or local princes. North of the river Main, the seats of the bishoprics were founded between the eighth and ninth centuries, over the course of the evangelization of the region, but it was tradition to respect the obligation to found the seat of a diocese in a city. Thus several small, barely fortified towns found themselves suddenly elevated to the rank of civitas. In all events, the bishops were confronted with the necessity of building, restoring or inventing, or simply creating places fit to be the seat of a bishopric. Little by little, they developed new cities, referring themselves to the only model they knew, that of the Roman city, which was both a political and sacred space. [930]

Bührer-Thierry notes the example of Thangmar, an 11th century chronicler, who referred to cities as a "*sanctum locum*" instead of "*civitas*". This seems to have been an intentional distinction because he readily identified Italian cities as *civitates* or *urbes*, but only used *civitas* to describe a local city after the city had been 'sacralized'. That is, in the case of Hildsheim, it was only after Bishop Bernward (c. 960-1022) "reconstructed the city walls, installed the relics of the martyrs St Timothy and St Exuperius, which he had brought from Rome, in the cathedral church" that it could be called a *civitas.* The bishop "first establishes the city as a sacred space which he has himself ordained, resonant with the Roman tradition." [931] Bernward was mourned as a "*defensor patriae*", "a term found in all the fifth-and sixth-century *vitae,* which shows the systematic synthesis between a bishop and his city".[932] It was a natural analogy to imagine the Bishop as a legal and political inheritor of the position of *defensor civitatis,* but with an additional layer of social and theological duties in accordance with their spiritual responsibilities of pastoral care.

Bührer-Theirry writes that "a bishop of the Late Roman Empire" was "a *defensor civitatis* par excellence, a protector of the population", shouldering the "responsibilities related to the upkeep of the city" as well as defending the subjects against internal oppression from tax collectors and external oppression from enemies.[933] The church, or rather, the Bishop, was expected to defend the city in prayer and in material life; scholars have argued that 9th and 10th century chronicles stress that Archbishops and Bishops were expected to protect the church, defend the city, its inhabitants, and the property of its inhabitants from would-be attackers. Indeed, in France, "Ottonian rulers made them the main body responsible for the protection of their cities."[934]

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[928] Horie, *Perceptions of Ecclesia.*
[929] Nehemiah 12:27-47.
[930] Geneviève Bührer-Thierry, "Bishops as City Defenders in Early Medieval Gaul and Germany", in *Between Sword and Prayer,* p. 37.
[931] Bührer-Theirry, "Bishops as City Defenders", pp. 29-30.
[932] Bührer-Theirry, "Bishops as City Defenders", p. 39.
[933] Bührer-Theirry, "Bishops as City Defenders", p. 25.
[934] Bührer-Theirry, "Bishops as City Defenders", p. 25.

Their municipal responsibilities as the "primary builder", a political and fiscal agent looking after the poor, and indeed their place as the figurehead for military and strategic resistance meant that they were also engaged in the literal construction of cities; episcopal cities, furthermore, were centers of power and authority, and needed further protection and defenses. Bishop Bernward surrounded his episcopal city with walls and watchtowers that dwarfed any in Saxony.[935] These walls were already entrenched in military strategy and defense[936], but they sprung up amidst a "growing militarization of the upper clergy" and a broadening expectation that the Church would fund and organize royal and imperial military projects. For the Franks, Churches were erected as if they were military outposts, extending the reach of the Frankish state.[937] This seems to be the case both in practical and theoretical dimensions. That is, missionary centers were set up in fortified positions[938]; and, extending a missionary outpost to a certain peripheral point created a new peripheral-center—still distant, but a reliable waypoint for the edges of one's influence.

It is well known that Carolingian rulers were quick to employ Christian frameworks and resources to help ground and extend their power, culminating in Charlemagne's coronation in 800. But this also meant that their worldview brought the *ecclesia* both within their jurisdiction and the imperial project. Because they 'assumed, as a matter of course, that they themselves directed and led the *ecclesia',* they 'laid claim to public services that churches had to provide from their possessions', and 'especially military services'. Churches provided troops, money, or other resources like carts and tools, in addition to prayer.[939] The famous Archbishop Hincmar of Rheims raised over 5,000 pounds of silver for Charles the Bald's military tributes in 877.[940]

There are also several accounts—some of which would be integrated into canon law—in which the clergy of a city engaged in direct or indirect spiritual warfare, and sometimes, direct and indirect warfare themselves. Clergy would march with the army, issuing special ceremonies and engaging in special liturgies to transform the army into a holy arm of God.[941] At home, they would stand on the walls. The author of the *Hystoria de via* wrote: "our bishops and priests and clerics and monks, all dressed in sacred vestments, leaving with us, carrying crosses, praying and imploring God that He might make us safe and guard us and liberate us from all danger and all evils"; then "they stood upon the walls of the city holding saintly crosses in their hands, signing and blessing us. And we, thus ordered, and protected by the sign of the cross, began to exit from the city through the doorway, which is called the Mohametrie."[942] Here again the walls appear as ecclesiastical objects, mirroring the processional of a church. Chronicles imagined some bishops as engaging in a "liturgical" military action, by which they engaged in prayers and "propitiary

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[935] Thangmar, *Vita Bernwardi*, ch. 7, p. 284. 33 "Sanctum quoque locum nostrum murorum ambitu vallare summa instantia aggressus, dispositis per gyrum turribus, tanta prudentia opus inchoavit, ut decore simul ac munimine, velut hodie patet, simile nil in omni Saxonia invenias".

[936] Radosław Kotecki, Jacek Maciejewski and John S. Ott, "The Medieval Clergy and War: A Historiographical Introduction". Note that "During the Middle Ages almost every free man who owned land had close contact with the military profession".

[937] Charles Mériaux, "'Qui verus Christianus vult esse': Christianisme et 'paganisme' en Gaule du Nord à l'époque mérovingienne," in *Le problème de la christianisation du mondeantique*, ed. Hervé Inglebert, Sylvain Destephen, and Bruno Dumézil (Nanterre: Presses Universitaires de Paris Ouest, 2010), pp. 359–373.

[938] Parsons, "Some Churches of Anglo-Saxon Missionaries"

[939] Patzold, *The Carolingian Local Ecclesia*, pp. 543-544.

[940] Patzold, *The Carolingian Local Ecclesia*, pp. 543-544.

[941] Stephan Baluzi, *Miscellaneorum,* Lib. 5 [Paris 1700], pp. 113-115.

[942] Gaposchkin, *Invisible Weapons: Liturgy and the Making of Crusade Ideology,* pp. 99-100.

processions along the city ramparts, as was done by the Gallic bishops of the fourth and fifth centuries. Like them, they act as "living relics" as they process along the ramparts."[943]

At the metaphorical level, dead saints provided another entry-point into analogy. Relics enabled medieval thinkers to imagine a set of spiritual protections; some were placed outside of the city-walls, like a relic watchtower that would also wade off invaders. Some were brought into the city on special occasions. In the case of the Parisian invasion above, Germanus's body had recently been brought within the city walls. That is, the city had become *like* a tomb, or perhaps even a church, or at least a cemetery, all of which were *res sacrae*. The city was, at the very least, *like* ecclesiastical property. It is then the nature of ecclesiastical property which best explains Germanus's reconsecration of the walls—much as would have been done in church construction, or if a homicide (or promiscuous sexual acts) had been done in the Church. The city was a church.

*Processions, Benedictions, Consecrations*

St. Germanus's mystical consecration was one of many more literal consecrations, which were either a part of, or implied within, processions. I'll briefly sketch out some examples here, which are by no means exhaustive.

The Romans had a practice called *circuitus murorum*—a processional led by a conquering army around the walls of a city before entry. This practice seems to have persisted in Gaul under the Merovingians and then the Carolingians.[944] In the medieval period, this processional ritual was adopted for the dedication of churches, the appointment of new bishops, a liturgical plea for divine protection, and naturally, the victory of Christian armies over conquered cities. For Bishops, this conquering was electoral, and the Bishop 'cleansed the whole city' (*universam urbem lustravit*).[945] Sergio Bertelli writes:

> Gregory of Tours tells us that when the Franks laid siege to Saragossa in A.D. 541, they saw women dressed in black, their heads covered with ashes, walking around the perimeter of the walls, and it was said that the capital of the Vasates, Bazas, was saved from an Arian attack because the relics of Saint John the Baptist were carried in procession around its walls. The same thing happened at the beginning of the sixth century at Orleans, with the relics of Saint Anianus. In the seventh century the bishop Leodegarius hastened to Autun to support a siege with a procession around the battlements, during the course of which all the gates were sanctified with prostration and special prayers. Although these are rather early examples, one can still say that ritual cleansing was still attentively observed in the Middle Ages and the early modern period.

Bertelli suggests that in 1443, Alfonso the Magnanimous traced the old walls of Naples from the city's foundation, "as if there remained a residual memory and tradition of a sacred route, changed but still ideally present, even when the millennial stones no longer existed."[946] Dating back to at least the 6th century, chronicles record Bishops sprinkling holy water on the soldiers of cities and

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[943] Bührer-Theirry, "Bishops as City Defenders", p. 37.
[944] Michael McCormick, *Eternal Victory: Triumphal Rulership in Late Antiquity, Byzantium and the Early Medieval West*. Harvard University Press, 1990.
[945] Sergio Bertelli, *The King's Body* (Penn State University Press, 2001), pp. 76-79.
[946] Sergio Bertelli, *The King's Body*, p. 77.

on the city wall during warfare.[947] On June 27, 852, Pope Leo IV celebrated the completion of what is now known as the Leonine Walls in Rome; seven cardinals led a procession of clergy who walked barefoot around the walls, sprinkling holy water on the walls themselves: "Among other things, he enjoined that the cardinal bishops should bless water so that the office of the prayers they might be zealous in casting that water in every direction to hallow the wall as they cross it. They humbly fulfilled what he had ordered."*[948]*

An argument could be made that these were processes of communication, ways to inform subjects about boundaries and providing them the ritual space to commit them to memory in a shared and repeated mental mapping process. In England, Wales, and the early United States, parish churches engaged in a ceremony called "beating the bounds", also around the time of Ascension Day, where the laity parade around the "bounds" of the parish. Susanna Throop writes that this "was not only a territorial proclamation but also and more importantly a ritual cleansing, a purification of space".[949] These processionals often included hymns which pronounced purification, or the *consecration* of the walls and the city within it. The army and its tools had already been purified: contemporary excerpts often record the walls and siege towers being "blessed and sprinkled with holy water, a common Christian step when preparing for battle that was intended as an act of purification symbolically similar to the sacrament of baptism."[950] It stands to reason that the conquered city needed to be purified and quasi-baptized next.[951] It was, perhaps, a kind of ritual purification in war.[952]

Gaposchkin records several instances of these processionals during the Crusades. During the First Crusade, at least four processions (30 December 1097, 25–27 June 1098, 8 July 1099, and 10 August 1099*)* were led around the walls of Jerusalem, in imitation of Jericho. After the city fell to the crusaders, Godfrey of Bouillon led another procession.[953] These were a part of "liturgical tactics" of spiritual warfare, where the soldiers and clergy were reminded explicitly of Jericho: Guibert of Nogent wrote, "the bishops remembered what had once happened at Jericho, that the walls of the perfidious city had fallen when the Israelites' trumpets sounded, and they marched seven times around the city, carrying the sacred ark, and the walls of the faithless city fell down."[954] In Bruges, by the early 14th century (c. 1303), citizens engaged in a special civic procession (*Heilig Bloedprocessie*) around the city walls on Ascension Day to celebrate the liberation from French tyranny. The procession followed a relic with the Blood of Christ—a cloth bearing the blood of Jesus, which Joseph of Arimathea had purportedly used to wipe Christ's face after His death.

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[947] *The Chronicle of Pseudo-Joshua the Stylite,* 58. In David Gyllenhaal, "Citadels of Prayer: The Christian Polis under Siege from the Summer of 502 to the Summer of 626", pp. 159-174 in Nicholas S.M. Matheou, Theofili Kampianaki and Lorenzo M. Bondioli, eds. *From Constantinople to the Frontier: The City and the Cities,* Brill 2016.
[948] *Liber Pontificalis,* ed. Duchesne, II, pp. 123-125; see also Krautheimer, *Rome: Profile of a City, 312-1308* (Princeton, 1980), pp. 117-20. See Timothy Reuter, ed. *Alfred the Great: Papers from the Eleventh-Centenary Conferences* (2017).
[949] Throop, "Rules and Ritual on the Second Crusade", p. 90.
[950] Throop, "Rules and Ritual on the Second Crusade", p. 89.
[951] McCormick, *Eternal Victory*, p. 343.
[952] Bachrach, *Religion and the Conduct of War,* p. 81.
[953] Gaposchkin, *Invisible Weapons: Liturgy and the Making of Crusade Ideology,* pp. 436–437.
[954] The liturgy may have endowed meaning to the crusade; but the crusade in turn imbued the liturgy with meaning.

Crusaders had discovered the relic and brought it to Bruges.[955] These kinds of actions were repeated at Nicopolis (1396).[956]

This kind of tradition would linger; according to John Garrand and Carol Garrand, Orthodox ecclesiastical officials in Moscow treated the city as Holy and a rebuilt Jerusalem, and "monks regularly consecrated the city's walls, suspending religious processions around them only in 1765, when the walls themselves began to collapse." Their observation and gloss of a coffee-table book published in honor of Moscow's 850th anniversary is astute:

> The English version [of the book] states that "Gates (sometimes towers too) had holy icons outside and [inside] in front of which icon-lamps were often burning," testifying that the "Orthodox town's people hoped not so much for the strength of material town's walls, but for God's power and prayers of saints," which invisibly protect it. The entire population witnessed the priest's consecration of the gates. Living inside walls whose very gates were consecrated must have itself forged a sense of "us" versus a "them" outside the sanctified border. In a sense, the city itself became a church.[957]

With the city 'become a church', the *ecclesia* was in a privileged authoritative position which also triggered expectations, duties, and obligations. They had long been engaged in spiritual warfare, but they were also engaged in the active defense of the city, sometimes in the mold explicitly as *defensors civitatis.*

My argument here is that the following two sections—outlining the questions of authority and immunity latent in legal controversies about the construction and repair of city-walls—can be better understood by remembering the long contextual role that the bishops played in the city. For example, Remigius de Gonny (1484-1554) writes that churches might be bound to contribute for 'pious works', especially for the 'repair of walls'; 'according to the gloss, the *ecclesia* is not bound unless there is an imminent necessity, in which case the Bishop should (*debet*) compel it.'[958] In Section IV, I show that this "should" (*debet*) could be grounded in a number of values, from 'piety' or 'necessity' here to 'public utility' or the 'common good' or even 'security'. But the Bishop's specific role in the authorization of Church funds for these purposes (discussed in Section III) should not be extracted from their own long history of standing in protection of the Church *and* city as *defensors civitatis*. It may have been an expectation and even a strong expectation, linked back to this general history of the Bishop's defense of the city. But it also suggests that the Church could be obliged to act even if the obligation was "imperfect"; it still required the Bishop's authorization, although the Bishop's role was to *enforce* a standing obligation rather than generate a new obligation through law. A Bishop's refusal to enforce their obligations might be taken as ammunition for secular compulsion—the secular arm might not be overruling ecclesiastical authority, but rather aiding the ecclesiastical officials in recognizing the duties and requirements outlined in the law.

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[955] Theodosios Tsivolas, *Law and Religious Cultural Heritage in Europe.* Springer, 2014. p. 85.

[956] At Nicopolis in 1396, the clergy organized intercessory processions around the walls, just as in Jerusalem in 1099. "But merciful God did not hearken to these prayers," said the chronicler who reported this, "very likely because those for whom they were said, had shown themselves unworthy of grace."

[957] John Garrand and Carol Garrand, *Russian Orthodoxy Resurgent* 2014, pp. 79-80.

[958] Remi de Gonny, *Tractatus de Charitativo Subsidio* [Lyon 1551], p. 291.

*Space, Authority, Periphery*

We also cannot escape the physical space of the *civitas*: in episcopal or metropolitan cities (cities with Bishoprics or Archbishoprics, respectively), Bishops and Archbishops often resided in palaces:

> In the eleventh and twelfth centuries a visitor to any of these cities would also have found a "palace" at its center: its tower located it from afar and its massive walls bespoke wealth, military. power, and public authority. This palace was the bishop's. It flanked the city's central sacred space, the cathedral, and like the communal palace that de-centered it in the urban fabric, it too represented lofty ideals: those of civic unity, individual and collective salvation, good lordship, and a right ordering of society.[959]

As Maureen C. Miller noted, architectural historians had not been interested in episcopal palaces except for specific constructions in some Italian communes.[960] For this chapter, what matters is the relationship of these palaces to the city-walls. First, the "episcopal church, or cathedral, was usually within the walls of the old Roman city"; that is, scholarship in history, archaeology, and architecture has found that "continuity on the urban site was the most common pattern for Italian sees".[961] This continuity (as opposed to a gravitational move from the periphery or even outside of the city to the center) entrenches the episcopal palace and court in a place in the city—often within and attached to the 'sacred' spaces of classical Roman urban politics. I'll quote Miller at length:

> In some cities—such as Sarsina, Faenza, Trieste, Ivrea, and Pavia—the bishop's *cathedra* was at the very heart of the Roman center, on or near the forum. More often the episcopal complex was perched on the edge of the late Roman city. The Lateran, the papal residence in Rome, grew up just within the walls at the Porta Asinaria, and the *episcopium* in Ravenna nestled against the old city walls, incorporating one of its towers into the residence. The episcopal complexes at Pesaro, Florence, Rimini, Trent, and Novara were also just within the oldest urban walls. Others, if not directly associated with a city gate, were located in relation to major arteries. The cathedral and episcopal residence in Parma were at the edge of the Roman city but on an

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[959] Miller, *The Bishop's Palace,* p. 1.

[960] Miller, *The Bishop's Palace,* pp. 1-2, fn. 1: Nestore Pelicelli, *II vescovado di Parma* (Parma, 1922); R. Zanocco, "Luogo e vicende del palazzo vescovile di Padova nel medioevo," *Bollettino diocesano di Padova* 12 (1927): 593-603; Federico Frigerio and Giovanni Baserga, "II palazzo vescovile di Como," *Rivista archeologica dell'antica provincia e diocesi di Como 125-26* (1944): 9-104; Giuseppe Pistoni, *II palazzo arcivescovile di Modena, Deputazione di storia patria perle antiche provincie modenesi*, Biblioteca n.s. 33 (Modena, 1976); Maria Ortensia Banzola, "Il palazzo del vescovado," *Parma nell'arte* 14 (1982): 25-51; Rauty, Palazzo; Emanuele Barletti, *II palazzo arcivescovile di Firenze vicende architettoniche dal 1533 al 1895* (Florence, 1989). Wolfgang Braunfels, "Tre domande a proposito del problema 'Vescovo e citta' nell' alto medioevo," *II romanico pistoiese nei suoi rapporti con l'arte romanica dell'occidente*, Atti del I Convegno internazionale di studi medioevali di storia e d'arte (Pistoia, 1966); Michael Thompson, *Medieval Bishops' Houses in England and Wales* (Aldershot, 1998).

[961] Miller, *The Bishop's Palace,* p. 18: See also Cosimo Damiano Fonseca and Cinzio Violante, "Cattedrale e citta in ltalia dall'VIII al XIII secolo," in *Chiesa e citta: Contributi della Commissione italiana di storia ecclesiastica comparata aderente alia Commission internationale d'histoire ecclesiastique comparee al XVII Cong;resso internazionale di scienze storiche* (Madrid, 26 agosto-2 settembre 1990) (Galatina, I990), pp. 8-9.

> important late antique thoroughfare leading to Brescello, a crossing on the Po river that was already a significant communications center in the time of Augustus. Turin's complex was located just off the cardo maximus, which continued through the Porta Romana linking the city and its northeastern suburbs. Rivers could also influence location: Verona's cathedral and residence were right on the bank of the river Adige, and the episcopal centers in both Piacenza and Cremona were on canals connecting to the Po.[962]

Other scholars have observed that episcopal palaces and royal palaces were often offset from each other within the city; in Italian Communes like Parma, the Episcopal palace was near the city-walls on one side of the city, while the royal palace was near the city-walls on the other side of the city.[963] They formed two nodes of a spatial politics, each with their own gravity, but meeting and crossing one another across the city.

Back to episcopal palaces: even if the examples above are extraordinary cases of the location of episcopal palaces, consider the additional dimension that the legal history above adds to the connection between architecture and authority. The walls and gates of the city are 'holy' (*sanctus*) by law, and here, in some cases, episcopal palaces—"hallowed" and 'sacred' (*sacrae*) in their own right—are "nestled" against them or are "directly associated with a city gate". Alternatively, they are alongside "major arteries" of the city—a fact which would later become crucial for the burden of repair I discuss in Section IV. The local seat of ecclesiastical authority was, in some cases physically built into the boundary of the city—the original boundary from the city's foundation in some cases, or the contemporary boundary as it existed. This, then, presented a more literal reading of Tertullian: the destruction of the city-walls is also the destruction of its temples, the *episcopium,* the *cathedra,* or the baptisteries attached to the city-walls. Miller concluded that the walls of the city, looking both inwards towards the political community and outwards at the missionary landscape beyond them, was "where the bishop's real work lay, and his abode looked out on this less hallowed ground. This site held a complex of structures that, together, constituted the bishop's seat.[964] Miller's account, I suggest, maps equally well onto the Roman legal conceptions of authority which jurists had internalized into discussions of the significance of walls. After all, the *pomerium* which delimits the edge of the city looked, like Janus, in two directions. Everything outside of the 'sacred' boundary was external, but the civil, military, and economic goal of the Roman *civitas* was almost always to extend this boundary as far as was sustainable. The world beyond the walls was "less hallowed ground" in a metaphorical sense, but un-hallowed ground in a legal sense—but, perhaps, not for long.[965]

I'll close this section with Bertelli again: "The *circuitus murorum* seems to me an ethological recognition of territory. As Clifford Geertz has written, when kings travel through their land, showing themselves publicly, attending festivities, conferring honors, exchanging gifts, defeating rivals, "they mark it," just as the wolf and the tiger mark their own habitat with urine,

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[962] Miller, *The Bishop's Palace,* p. 18.
[963] Areli Marina, *The Italian Piazza Transformed: Parma in the Communal Age*.
[964] Miller, *The Bishop's Palace,* pp. 18-19.
[965] cf. where the Bishop might fit into the 'domination' of the internal and external in Wendy Brown, *Walled States, Waning Sovereignty,* p. 46: "Thus, the medieval city walls whose ruins still litter European soil may have functioned as protection, but were performatively and symbolically most important in marking off the city from the vast space of the countryside. Never only a means of walling out, these walls served to bound, establish, and consecrate the entity dominating the surrounding countryside."

almost as if it were a physical extension of their own bodies."[966] Though "the Bishop has no territory" was a fundamental legal maxim of the medieval and renaissance legal period, we might doubt the physical, spatial and legal 'markings' offered by the Bishop's long relationship with the city-walls, and at times, their residence on or alongside them.[967]

**Section III: Authority, Sovereignty, and Expectations of Security (*securitas*)**

One scriptural passage appears cited in support of wall-construction[968]: Ezra 4. After the Babylonian Exile, Ezra records in part the rebuilding of the Temple of God. The allies of King Artaxerxes wrote to him with a grave concern:

> be it known to the king that the Jews who came up from you to us have gone to Jerusalem. They are rebuilding that rebellious and wicked city. They are finishing the walls and repairing the foundations. Now be it known to the king that if this city is rebuilt and the walls finished, they will not pay tribute, custom, or toll, and the royal revenue will be impaired. Now be it known to the king that if this city is rebuilt and the walls finished, they will not pay tribute, custom, or toll, and the royal revenue will be impaired. [...] You will find in the book of the records and learn that this city is a rebellious city, hurtful to kings and provinces, and that sedition was stirred up in it from of old. That was why this city was laid waste. We make known to the king that if this city is rebuilt and its walls finished, you will then have no possession in the province Beyond the River.[969]

Artaxerxes concurred with his allies: "make a decree that these men be made to cease, and that this city be not rebuilt, until a decree is made by me."[970]

Buried in this popular example is both sides of the authority argument about walls; the King's position is not only strategic, but legitimate; the jurists would agree on multiple points—that a rebellious city ought to have its walls condemned or gates forced open, and that they should not be rebuilt; that strong fortifications would make a place more difficult to compel to recognize the authority of law; and that the permission of the prince should be necessary to rebuild old walls. But jurists—sympathizing no doubt with the theological narrative—could use the same example to stress the importance of supporting walls for God's people, specifically against worldly, un-believing kingdoms. Building walls could be legitimate resistance against outsiders, defending Christendom as well as the lives and properties of laity, clergy, and even *alieni* within the city-walls. In emergencies, especially under the threat of war, why shouldn't a community be able to defend themselves even without the consent of the Prince or sovereign? The structural legal point was clear to Bartolus: drawing boundaries is a mark of a free people, but redrawing boundaries is a mark of sovereignty. Necessity pushes this principle to its legal extreme, which in turn, I argue, pushes towards more local conceptions of authority, if not broadly towards popular sovereignty.

*The Construction and Repair Debate*

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[966] Sergio Bertelli, *The King's Body*, p. 77.
[967] For this maxim and legal alternatives, see the next chapter.
[968] Rolandus de Valla, *Consilia*; Gonny, *Tractatus de Charativo,* Q. 62, n. 101.
[969] Ezra 4:12-16. ESV.
[970] Ezra 4:21.

In the Roman law, public works only needed the consent of the Emperor if they would be undertaken at public expense; where public works were constructed at the expense of a private individual, no consent was necessary (C. 8.11.5). The same law provided a blanket permission for those who would 'restore' anything that was in a state of disrepair. So long as these works did not damage the *civitas,* an individual gained the benefit of occupying and using that object as their own; they could not own it, properly, but 'thanks' were due to them for 'ornamenting the city' (C. 8.11.3). Where the Emperor gave their consent to use public expenditures for public works, everybody was bound to 'willingly contribute services towards the restoration or construction or ports, aqueducts, and walls' (C. 8.11.7). Walls, however, enjoyed special protection. Dig. 1.8.9.4 reads that "It is unlawful to rebuild the walls of municipalities without authorization of the Emperor or of the governor, nor to build anything on top of them." Lastly, C. 11.70.3 read that "a third of the rental which annually paid for the places and lands of the city should suffice with the restoration of the public walls." These texts seem mutually contradictory, or at least, ambiguous as to when and where the consent of a proper authority was required, especially if regular revenues were already set aside for the purpose of repair, or if wealthy individuals volunteered their own funds for the tasks.

The fundamental principle stressed by medieval jurists was that of Dig. 1.8.9.4: walls were too politically, strategically, and militarily important to allow communities to construct or repair them without the consent of the *princeps.* Albericus de Rosate wrote that it 'isn't possible without the permission (*licentia*) of the princeps'.[971] In some cases, the *civitas* was also a fortified outpost (*castellis*), and so more explicitly linked to the military of the kingdom; in such contexts, it didn't seem controversial at all.[972] Broadly, this maxim was a part of every analysis of the construction/repair controversy into the 16th century, up to for example Jacob Rebuffi and François Marc in the French kingdom.[973]

It was a crucial theoretical claim about authority and the constitution of a community. Bartolus was the most explicitly political in his use of the question; in his comment on Dig. 1.8.9, Bartolus wrote that 'Municipal walls are not permitted to be rebuilt without the authority of a judge or the Prince. But is no one able to build [walls] *de novo*? It seems that they can, as at Dig. 1.1.5.'[974] There—in his explanation of the *ius gentium*—Bartolus wrote that communal building was certainly licit according to the *ius gentium,* and that certain associations of individuals were natural and 'not illicit, but licit'. However he notes a clarification: 'unless a fortress or town was being build in order to rival another *civitas,* in which case it could not be done. I would respond here that it speaks specifically of *castris* not to be built within the borders of the Empire without the permission of the Prince.'[975] That is, walls—like the buildings and communities they contained—had always been *about* authority and followed *ius gentium* principles of political and social organization. Where a people was the *princeps* they could give the permission to build and rebuild as they saw fit; where they recognized a superior, that superior would always hold the authority to

[971] Albericus de Rosate, *Dictionary,* at 'Muri civitatis'.
[972] Angelus de Ubaldis at C.11.70.3, fol. 274r
[973] Jacob Rebuffi, *Lectura Super Tribus Ultimis Libris Codicis,* C.11.70.3, [Turin 1591], fol. 153v; and, François Marc, q. 460, ns. 7-10.
[974] Bartolus at D.1.8.9, fol. 30v.
[975] Bartolus at D.1.1.5, n. 7, fol. 8v in Venice 1603.

permit and deny construction and repair of walls.[976] This particular tradition was especially strong in feudal commentaries.[977]

Given the simplicity and strength of this point, it is surprising that although it would remain a part of the analysis, jurists accepted a host of exceptions and qualifications. After a lengthy discussion about the material founding of a new *civitas*—first a furnace must be built, then walls and fortifications, and then a church or temple[978]—Lucas asked 'who should carry out such construction and repairs?' The walls

> when done *de novo,* should be done at public expense or by a private individual. In the first case [public expense] it is not allowed without the authority of the *princeps.* In the second case [at private expense], it is allowed. When it is said "at public expense" (*sumptu publico*), it is understood as "by the *fisc* or *reipublicae",* and namely that of the Romans. For that is properly called *res publica.* Hence, the people of a *civitas* or municipality may, at their own expense, build new public walls (*moenia publica*) without the permission of the ruler, as long as it does not lead to the competition with another city and does not provide a cause for sedition. However, repairs or renovations can be carried out much better (*multo magis*) without the authority of the ruler by the governor (*praeses*). Therefore, it is the duty of the appropriate governor (*praeses*) to ensure that such works are carried out diligently. For they should inspect sacred buildings and public works (*aedes sacres et opera publica*) to see if they are in good condition, or what repairs are needed.... There [in the provinces], the authority of the *princeps* and the *praeses* are equiparated.[979]

Lucas drew on the same intuition as Bartolus above; both imagined that walled-cities were likely fountains of 'competition' and material for 'sedition' and so all construction or repair questions should take the possibilities of both into account. But after remarking that the Prince's authority was necessary for walls funded by public expense (the *fisc*), Lucas stressed that walls could be built at private expense without the Prince's consent. He concluded the passage by allowing delegated authorities at a distance from the *princeps* to authorize and oversee construction or repair—Lucas identifies this authority as a *praeses*, but also calls them a *curator*. They are the assigned ruler, protector, guardian, and even *defensor* of the *civitas*, imbued with the 'equivalent' authority of the *princeps* specifically in the Roman provinces or on the periphery of the Empire. Here, the argument is about simplicity: why should the *civitas* have to run the question to the top of the ladder when a *defensor* had been appointed to look after the city-walls and public works in that *civitas*? Even though Lucas's argument was that the supreme authority was present (or represented) in the city in the office of the *praeses*—and therefore the consent of the *princeps* was

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[976] In a gloss on Roman prohibitions of building in "sacred" places, Bartolus reflected on cases where people had built houses attached to or on top of the city-walls—something explicitly prohibited by the Roman law, unless permission of the Prince had been granted. However, Bartolus wrote that these people 'have permission from the people and the community of this city, because the people are free and subject to nobody, they are the Prince in this city, and therefore can give the permission [to build].' That is, we're dealing with 'purely positive' law, as Corneo put it above. The people have complete control over the walls–to build and to repair them, to give permission to live on them and within them, to move them in and to move them out. Bartolus at D. 43.6.2.

[977] See Jacobini de Sangeorgio, *Tractatus Feudorum* [Bologna 1575] pp. 29-31.

[978] Lucas de Penna at C.10.49.3, n.7, p. 269.

[979] Lucas de Penna at C.10.49.3, n. 9, p. 270.

still sought after—the loosening of strict imperial of consent towards local administration and the role of this "protector" was an indication of potential avenues for later exceptions. These exceptions would largely come through the public/private expense distinction.

One such exception, even for fortified towns and cities, was public defense. Nicholas Boherii (1469-1549) wrote a *universitas* could 'construct and build new or old walls without the permission of the prince, as long as they do so at their own expense'.[980] At their own expense, 'he is permitted by law to make towers and even other accessories in his own country without the permission of the prince for the protection of himself and his property'.[981] There was, according to Boherii, a sort of arms-race to construction: 'The King of France is said to encamp at the edges of his kingdom to rival (*aemulatio*) the King of England, and vice versa', and so many barons and soldiers who have 'sufficient jurisdiction' (*iurisdictionem omnimodam*) could build castles and other fortifications. Boherii's observation is interesting because it pivots to jurisdiction; but the jurisdiction mentioned requires that they have the right 'according to their own authority to build castles and buildings in their land (*sua loca*), as they by their own will can invest, construct, and build (*ut in eis habent volentes se ibi collocare, construere, et aedificare*)'. Otherwise, Boherii writes, *other princeps* will simply invade and 'subjugate them to the plow'.[982] This was a special kind of destruction, implying the death of the corporate community.

Writing in the mid-16th century, Rolandus de Valle would boil it down simply to finance *because* of their necessity for defense and security. 'Walls', he wrote in one *consilium,* 'provide security (*securitatem*) to the inhabitants of the city'. Referencing Lucas de Penna, the *Code* on public works, the canon law, and then Aristotle, Rolandus then issued a blanket judgment: walls should be newly built where they don't exist, or firmly repaired and strengthened (*innovari*) where they do: 'for what benefit would there be to fortify everything if there was a dangerous opening for an enemy at a single point?'[983] With this context, Rolandus would then stress that construction at public expense required the consent of the *princeps*, but that 'even without consulting the prince (*etiam inconsulto principe*), the corporations of a city or village could fulfil the necessity of walls by building or repairing them at their own expense' (unless, drawing on Bartolus and Lucas above, it was done out of rivalry (*nisi fiat ad aemulationem civitatis*)).[984]

This financial exception in the context of defense is crucial because it would be employed in the opposite direction—against the *princeps*—on the question of a *duty* to fund construction and repair *after* the rise of a national conception of the political community. That is, what started off as an exception to justify why and how private citizens, corporations, and the cities themselves could provide for their own *local* defense was then turned against the *princeps* to argue that it was the King's singular duty to provide for a *national* defense. A late 17th century collection of *Decisiones* included one case in which the controversy was about royal corporations, and whether royal corporations in the Kingdom of Sicily were immune from collections for construction and repair of city walls (discussed further in Section IV below). The author's conclusion, and use of but departure from the Roman law, is noticeable:

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[980] Boherii, *Tractatus de Custodia Clavium Portarum Civitatum.* At n. 43, he maintained the previous line that construction at public expense was unlawful without the consent of the Prince, and also that nobility whose castles had been condemned could not be reconciled and rebuilt their fortifications without the permission of the prince. The latter argument is about a specific civil penalty; see below.

[981] Boherii, *Tractatus de Custodia Clavium Portarum Civitatum,* n. 44.

[982] Boherii, *Tractatus de Custodia Clavium Portarum Civitatum,* n. 45.

[983] Rolandi a Valle, *Consiliorum sive Responsorum,* Tom. II [Venice 1579], Cons. 84, fol. 150v.

[984] Rolandi a Valle, Cons. 84, n. 9. See also Boherii*, Tractatus de Custodia Clavium Portarum Civitatum*, ns. 46-47.

> Based on the decisions made by the Roman Camera, the burden of constructing and repairing the walls of the *universitatum Regni* does not fall on the King, but falls on the universities themselves. However, the *universitates* should not be disturbed in their construction of fortifications and castles for the defense of the city, and thus not for the repair of castles. This is best demonstrated by the *Pragmatica* of King Ferdinand I from 1483. Similarly, under common law (*ius communi*), wall repairs and construction can be done without the Prince's consent, except in the case of a fortification (*fortellitium*), in which case the King's consent is required because such fortifications are founded on the borders of the Kingdom against enemy invasions. Furthermore, even though it is lawful (*licet*) to enclose oneself in walls under the law of nations (*ius gentium*), it is nevertheless a burden (*onus*). The establishment of cities dates back to the beginning of the world, during the time of Cain. However, there is a difference when walls are built for the purpose of being the stronghold of the entire Kingdom, as then it becomes the burden (*onus*) of the King to protect the Kingdom from enemies through tributes and duties.[985]

Besides the striking contrast of the different systems of law relevant to the question, Nicolai Cageta's analysis underscores a new consideration: local versus national defense, and the duty of providing for national defense.[986]

Another example will stress a different change: the question of authority and local administration. Pier Filippo Corneo (1419/20-1492) wrote a widely cited *consilium* regarding a man with the surname Baptista and the town of Todi. [987] Todi is a town south of Perugia, and at the time of Corneo's writing was expressly *not* one of the famous Italian cities which 'did not recognize a superior'. That is, it was not one of Bartolus's famous 'free cities' or 'free people's which was a 'prince unto itself' (*civitas sibi princeps*); it was definitively a subordinate jurisdiction and territory, in the legal power of another city. Baptista had built a birdhouse for pigeons (*columbarium*)[988] on the town-walls at his own expense but without the permission of the *princeps.* The town council had given him permission for construction, however. The city of Todi argued that the construction was illegal, and that they were within their rights to destroy the *columbarium*—however, they argued further that it was now communal property, and so instead, desired to take possession and lease it out to others for revenue. Furthermore, they denied that they ought to compensate Baptista for his expenses in building the *columbarium*, even if they were to take possession of it. By Corneo's own presentation of the case, it could have been a simple

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[985]Nicolai Caietani Ageta, *Annotationes pro Regio Aerario ad quaestiones examinatas per Spectab. Dom. D. Annibalem Moles, Regiam Cancellariam meritissimum Regentem [...]* Pars Prima, [Naples 1692]. At §3, Quaest. IX, pp. 371-377.

[986] The second comes from the Decision discussed above at the end of Section III—Nicolai Ageta's commentary on a Sicilian town. [175-188]

[987]Petri Philippi Corneo, *Consiliorum sive Responsorum,* Vol. II, [Venice 1582], Cons. 237. fols. 314v-215r.

[988] It was either a birdhouse for pigeons or a sepulcher for urns. In Rome, as in medieval cities, there existed a kind of sepulcher for the ashes of the dead, in which urns could be inserted into rows of dark niches. These resembled birdhouses, and both were therefore called *columbaria.* The context of a birdhouse or dovecote makes more contextual sense in this case, even though after a close reading I couldn't find definitive evidence that one or the other was correct. Many cities had dovecotes built into the city walls, and it became a mark of nobility in Italy and France, coming with particular rights and privileges. That aligns nicely with Baptista's claims here. See Jacqueline Mussett, "Le droit de colombier en Normandie sous l'Ancien Régime", *Annales de Normandie* (1984) 34.1, pp. 51-67; Claude de Ferriere, *Commentateurs anciens et modernes sur la coutume de paris,* Tom. I, Paris 1685, Tit. I, Art. 70, p. 393.

solution: Baptista simply did not have the proper permission and the law was clear that the construction was therefore illegal. After constructing the city's case, Corneo wrote:

> It does not appear then that Baptista can retain the said *columbarium* by claiming the expenses he incurred by repairing the walls and constructing the *columbarium*. He knew that the walls were not his own, and he should have known that the prior authorities (the council) could not grant him the authority to repair the walls or construct the *columbarium,* considering the provisions of common law (*ius communis*) and municipal law (*ius municipale*).[989]

Just as somebody could not build something on another's property without their permission without expecting it to become that other person's property, so in this case would any work and labor performed by Baptista become owned by the city of Todi. The *columbarium* wasn't actively harming the walls, or the community, in which case the city of Todi would have had the superseding right to simply destroy the construction.[990]

But, Corneo wrote, 'none of this hinders me from saying otherwise in this consultation.' Corneo's reasoning started out with the status of walls recounted above in Section I:

> It must be noted that the city walls do not belong to the cities or their communities, but are either 'sacred' or 'holy' (*aut sacri aut sancti*). ... But *res sanctae aut sacrae* don't belong to anybody's property. It is stated explicitly that *res sacrae, religiosae, et sanctae*, like walls and gates, cannot belong to anybody, but in a sense belong to divine law.[991]

The first mistake made by the city of Todi was imagining that the walls belonged to them as property that could be owned. If Baptista was guilty of anything, it was in attempting to detain (*detinet*) a thing which 'was attached to a *res sacrae*' (*qui adhaeret rei sacrae*), and therefore the appropriate remedies of law regarding *sacred* objects could instead be pursued.

Corneo didn't deny that Baptista hadn't sought out the proper authority—he would develop a counterargument to that below—but he did at this stage claim that it was 'most equitable' if the Legate would concede Baptista use of the *columbarium,* because 'he has made expenses in good faith for the purpose of repairing the walls of the city', and 'by his own expenses he has improved the *res sacrae* himself'. This was a decision made for the utility (*utilitati*) and convenience of the republic, as the city is more secure on that side due to Baptista's building.' Furthermore, 'it would seem harsh and unfair to deprive Baptista' not only of his expenses, but also grant the benefits of those expenses to another individual.[992]

The last problem for Corneo's defense was the issue of permission. The fact of the case that Baptista *had* asked for permission from the town council would be crucial, as it would allow Corneo to develop an argument that, I suggest, shows a clear movement towards the priority of local administration. Baptista had gotten permission from the priors of Todi, who Corneo claimed

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[989] Corneo, Cons. 237, n. 8. fol. 314r.
[990] Angelo Gambiglioni at *Institutes* 2.1, § Sanctae quoque res. Angelo cited Johannes Faber in examples like this (where individuals were resting wood or poles against city walls), arguing that if the work is harmful to public use, then they could be destroyed; if not harmful, then the castle or city could charge the peasant a fee for their 'use' of the walls."
[991] Corneo, Cons. 237, n. 10. fol. 314r.
[992] Corneo, Cons. 237, n. 14. fol. 315v.

'represented the community' (*communitatem repraesentantes*).[993] If anybody was at fault, then, it was the priors for issuing permission they had no authority to grant. But why should Baptista have assumed their permission was sufficient? Corneo argued that 'although it may not be in accordance with the law, it is nevertheless widely observed that private individuals have houses built on top of city walls for their own uses, and these are considered to be under private use, as experience, that great teacher instructs us.' In Todi, it was both well-known and observable that there were private houses attached to or on the city-walls. 'Thus, by general custom, (*generali consuetudine*) it seems that this [law] has been usurped', he wrote.[994] None of the inhabitants of these houses had received permission from the *princeps,* and so the dominant assumption must be that it was either permitted, or they had obtained permission from predecessors in the city. It mattered that Todi was not a free city, because that would have ended the question—Bartolus wrote at Dig. 43.6.2 that though building houses on walls was a legal violation of *res sanctae/res sacrae*, anywhere in which the 'people is the *Princeps* in that city' (*populus est Princeps in hac civitate*) it was permissible.[995]

At the city level, the community was both permitted and obligated to 'build new walls' and 'repair old ones' *without* the permission of the *princeps* or *praeses* in general. Custom, Corneo wrote, 'is the best interpreter of the laws'.[996] Custom was clear here: the walls were *res sacrae,* and as such, the walls do not belong to the said community, and the community itself does not have rights *in* the walls; and although the permission of the prince or *praeses* is required by law, it does not seem to be required by custom. This is especially true when it is done by the *universitas* itself, or by another acting on behalf of the *universitas.*'[997]

Corneo's reasoning was useful to Petri Caballi (d. 1616), who extended Corneo's observation of custom to multiple cities in which walls were still *res sacrae* or *res sanctae* but individuals had prescribed the ability to live on them or attached to them, in Tudi and Perugia, and his hometown of Pontremoli. Caballi's distillation is important because he emphasized both the property status of the walls and the problem of sovereign permission.

> Since these constructions are considered 'holy' (*sanctae*), and do not belong to the property of anyone, the consent of the community or representatives of the community would not seem to be sufficient, since they are not in possession or ownership of the constructions. Instead, the consent of the *princeps* or *praeses*, or their equivalent today, such as the Legate, the Senate, the Governor, or Lieutenant, is required. However, the community can make decisions on this matter, as the walls seem to be entrusted more to their care (*cum potius eius curae*) than to the Prince and his officials.[998]

It reads as a contradiction because Caballi, like Corneo, recognized the requirements of the law; what they argued was that this question was not 'expediently solved by the rigor of the law'. The relevant authority for these questions might have been those at the "top" of the chain of authority—the *princeps,* or 'their equivalent' as Caballi said, whose power was 'equiparated' with the *princeps,* as Lucas de Penna had written. Instead, in a process that's visible already in Lucas de

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[993] This was a part of the argument I won't reconstruct here. The priors are assumed to be able to act on behalf of the *universitas*, and therefore their permission comes from the *universitas* as a whole.
[994] Corneo, Cons. 237, n. 15. fol. 315v.
[995] Bartolus at Dig. 43.6.2.
[996] Corneo, Cons. 237, n. 18. fol. 315v.
[997] Corneo, Cons. 237, n. 21. fol. 315r.
[998] Petri Caballi, *Resolutiones Criminalium,* [Florence 1609], Casus 100, ns. 48-49, p. 193

Penna's writing, the relevant authority for these questions was based on proximity; this proximity was further based on the natural local associations described in accounts of the *ius gentium* (Dig. 1.1.5), and the requirements of security and defense.

In many communities, let alone episcopal cities, the salient or legally relevant authority was the Bishop. In 1351, the Bishop of Albi made a grant to the city of Albi to collect duties from wine and fruit auctions. A recent plague, resulting famine, and consequential financial pressures had stressed the Church's finances just as it had the city's.

> Considering that our beloved and faithful consuls and the community of our city of Albi have, had, and will have in the future, many expenses and burdens to bear, both for the repair and the maintenance of the walls, ditches, and fortifications of our city, as well as the roads and bridges of the aforementioned city and its belongings, and for many other diverse necessities and expenses that they have and will have to support every day in the future. Due to the decline in population, which occurred to the mortality that prevailed, as God saw fit, in the year of our Lord 1348, because of the famine in the surrounding areas of the city .... . Due to the decline in population and other diverse burdens imposed on the same consuls and community in previous times, they have been unable to carry out the construction and repair of the walls and moats of Albi as they used to, and the inhabitants of the city receive lesser revenue and consequently, our Church at Albi and other ecclesiastical persons receive a smaller portion of the tithes, from which our aforementioned church and ecclesiastical persons suffer notorious and significant damage, and it is presumed that they will suffer greatly in the future.[999]

The community at Albi had sought some kind of solution from the Bishop. Taking into consideration that:

> the condition of the Church of Albi is improved, and our said city, the jurisdiction of which is known to belong solely and jointly to us and our Church of Albi will be stronger, safer, and better. ... The consuls themselves may now receive, demand, and collect the revenues from all auctions held in Albi, and the fees of wine criers and other goods whatsoever that belong to auctions or criers of the city of Albi.[1000]

The charge was annual, 'a quintal [30-50kg] of refined wax in eight twists (*tortiliis*), as a symbol of the jurisdiction of our city, to be paid on the eve of the Nativity of the Lord, within our Episcopal residence.' Shared burdens from a shared crisis required some negotiation of ecclesiastical immunities, but the Church could always demand something in return.

*Destruction of Walls as Penalty*

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[999] Clement Compayré, ed. *Études Historiques et Documents Inédits sur l'Albigeois, le Castrais et l'Ancien Diocèse de Lavaur* [Albi 1841], No. XVIII: 'Concession faite en 1351, par M. Arnauld Guillaume de la Barthe, évéque d'Albi, aux Consuls de cette ville, sur les droits provenant des encans, des criées des vins et des fruis de courtage', pp. 182-185. Hereafter '1351 Concession at Albi'.

[1000] 1351 Concession at Albi, p. 183.

This related question has appeared above; Nicholai Boherii had observed that building or repairing walls at the public expense was illicit without the consent of the *princeps,* as was rebuilding walls or castles which had been condemned by the *princeps* for some particular crime.[1001] Jurists were interested in the question for the substance of the question, but also because of what it reflected about the intention of punishment. Take cases of divorce, or where a slave was condemned to slavery as a punishment, or penalties were applied for disobedience or stubbornness (contumacy), in which no time limit was placed on the original punishment. Jurists wondered whether a punishment was strictly punitive for the original crime or whether it was corrective; if the individual changed their behavior and ceased to be 'disobedient', might the punishment stop? As was often the case, simple questions had complex solutions drawing in surprising analogous cases. At Dig. 48.5.34, Bartolus wrote that punishments which 'omitted' time penalties related to the question of 'whether a city or *castrum* that was condemned and resulted in the destruction of its walls can be rebuilt. Dino said that it had been determined that they could not be rebuilt because it should be understood that they were destroyed permanently (*perpetuo*)'. Andrea Barbatia (c. 1400-1474)[1002] agreed as did Peter Ravenna (1448-1508)[1003]. At C. 9.47.10, a condemned slave is 'understood to remain in bondage permanently.' But for something like contumacy, it seemed that 'when contumacy ceases, the penalty also ceases.'[1004] The takeaway was that a city's disobedience was more significant than simple stubbornness; their walls were issued to be destroyed because of an uncorrectable contumacy or simply as a worthy punishment.

This question is important for my argument because the "punishment" of the destruction of walls can only be understood if the full significance of the city-walls is appreciated. The city's corporate legal identity thus depended on the walls; the destruction of the city-walls suggested a destruction of the city's corporate legal identity, including its privileges. However, the Roman law provided comfort here. Dig. 11.7.36 read, "When a place is captured by an enemy, it always ceases to be religious or sacred (just as freemen become slaves in such circumstances); but if the place is rescued from this unfortunate state, it returns, as it were, by a sort of *postliminium* and is restored to its former state."[1005] This was, of course, part of the immortality of the *populus*, and the logic of *postliminium* also included a legally fictive suspension of time not unlike the interdict discussed above.

Roman law and legal procedure provided an additional significance to the destruction of walls, specifically through the example of slavery and adultery above. That is, one common element of Roman punishment was *capitis diminutio*—"the loss of *caput* (the civil status of a person which implies the legal ability to conclude legally valid transactions and to be the subject of rights recognized by the law) through the loss of one of the three elements thereof, freedom, Roman citizenship, or membership in a Roman family."[1006] There was an accordant *restitutio in integrum* which, as in other cases, would restore the individual to their position before the punishment. Because jurists had connected the examples of the destruction of city-walls and punishments for adultery and other crimes committed by enslaved persons at Dig. 48.5.34 and elsewhere, it was possible for jurists to imagine that the destruction of a city's walls for a crime was the legal equivalent of a *capitis diminutio*. Above, when Nicholai Boherii wrote about invasion

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[1001] Boherii, *Tractatus de Custodia Clavium Portarum Civitatum,* n. 44.
[1002] Andrea Barbatia (c. 1400-1474), *Consliorum,* Vol. III, Cons. 23, n. 13.
[1003] Petri Ravennatis, *Alphabetum Aureum* [1511], fol. 82v at 'Murus'.
[1004] Bartolus at Digest 48.5.34, n.1, fol. 161r in [Venice 1590].
[1005] Digest 11.7.36, trans. Watson, with adjustment.
[1006] Berger, *Encyclopedic Dictionary of Roman Law,* p. 380.

of an enemy *princeps* to an un-walled or underprepared community, he wrote that the consequence would be a 'subjugation to the plow'.[1007] This was a symbolic and literal undoing of the act which created the city—a plowing of the *pomerium* and the boundary line where the city-walls would be built. But it was also a symbolic "ruining" of the civic status of the city—a corporate *capitis diminutio*.[1008]

As practical as this consequence of invasion appeared to some jurists, others wanted to qualify it. Pierre Rebuffi wrote that if city-walls were destroyed because of 'war, or otherwise by unjust causes' then they could be treated differently than if a proper authority had destroyed them because of an offence. Rebuffi cited 26 considerations for public walls, but noted especially that when the walls of a city were 'destroyed by the actions of a tyrant or men, then privileges were not lost*'.* 'The same applied if the walls have collapsed, or a majority have collapsed, due to old age.' [1009] If the walled status of a community was therefore important for the privileges of the community, then Rebuffi needed to return to the definition of a *civitas* or *villa murata.* This led to these passages being expressly political, or at least, expressly constitutional, in the sense that they attempted to determine the threshold at which a community rose to a particular level of development. Rebuffi wrote that 'in cases of doubt, judgment should lean towards considering a place a walled town if it was surrounded by walls and has a large population', as 'this allows for educated and suitable individuals to be entrusted with parish churches.' That is, Rebuffi preferred an error in favor of development because it provided the city with additional resources. He concluded, 'the term *villa murata* should be understood by common usage. While some argue that a place should not be called a walled town unless there are fairs and markets, but this cannot be true. It is the presence of a populous community within the walls that make it a walled town.'[1010]

The destruction of a city's walls as a consequence of sedition or conquest wasn't a hypothetical case. Numerous accounts from antiquity supported the logic, and contemporary accounts stress an active concern about the destruction of walls in conquered territory. In 1468, Charles the Bold 'destroyed' the city of Burgundy. He did not wipe the city out and salt the earth, but did the legal equivalent:

> Following the Burgundian victory at Brusthem (1476), Charles the Bold dictated a severely repressive sentence, abolishing the civic constitution in its entirety, dismantling the city walls, removing the treasured *perron* (symbol of civic dignity and jurisdiction) to Bruges, confiscating firearms and artillery, and imposing fines so high that many *liégeois* inhabitants were forced to sell their personal belongings.[1011]

If citizens were to restore the status of the community—a social *restitutio in integrum propter capitis diminutionem*—they would have to expel the standing authority, repair and restore the city-walls, but also reclaim authority over the walls themselves. Practically, this would also include a

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[1007] Boherii, *Tractatus de Custodia Clavium Portarum Civitatum,* n. 45.
[1008] Johan-Conrad van Hasselt, *Dissertatio Iuridica Inauguralis de Sanctitate Moenium et Portarum* [Rhenum 1729], p. 5.
[1009] Petri Rebuffi, *Tractatus de Nominationibus,* fols. 301-439 in *TUI* 15.2 [Venice 1584], Quaestio 16, n. 14, fol. 329r. Medieval jurists famously debated about whether the laws of a tyrant had to be obeyed (see Bartolus, *Tractatus de Tyranno*), or whether their contracts needed to be honored. Here, the same is applied to whether their destruction of parts of the city were legally consequential.
[1010] Petri Rebuffi, *Tractatus de Nominationibus,* Quaestio 16, n. 15, fol. 329r.
[1011] Catherine Saucier, *A Paradise of Priests,* p. 177.

request for the keys of the gates, and authority over all of the offices which served to protect the walls. It is telling, then, that after lengthy fights about who bore responsibility for paying for the city-walls, priests and laity alike protested in demand precisely for the "keys" of the city—after all, 'the custody of the keys belongs to rulers (*dominis*) by the *ius gentium* and *ius civile*'.[1012] Before getting to the *Pfaffenkriege* and physical spats over the keys of the city, it will first be necessary to show how "expense" exception of this section immediately raised the question of how these funds were to be collected. Could secular judges compel ecclesiastical persons? Were Bishops strictly obligated to enforce collections if necessary? What reasons could be presented to justify these collections?

**Section IV: The Boundary of Ecclesiastical Immunities: Piety, Utility, Necessity and Construction of Walls**

As discussed above in Chapter 2, the Romans had a counterintuitive approach to public burdens, offices, and exemptions from those burdens and offices. While the Roman law had an extensive system of immunities, these rarely applied in cases which served the Empire. For example, at C. 12.50.21, the imperial constitution held that "no person of whatever order or rank nor the holy church nor the property of the imperial patrimony shall be exempt from furnishing transportation on the highways or byways during the time of an expedition."[1013] This passage was clear enough to medieval jurists: Bartolus wrote, 'Even the Church is not exempt from *angariis et perangariis* during a time of military expedition', in part because a military campaign threatened the people with plundering, displacement, and murder—that the clergy should be burned with taxes and 'other sordid burdens' (*onera sordida*) was a small price to pay.[1014]

The imperfection of ecclesiastical immunities was, in the context of Roman law, uncontroversial. But for the Church, in the context of practical administration and self-government, it was a direct challenge to ecclesiastical liberty.[1015] The Church codified protections of ecclesiastical liberty and ecclesiastical immunities into Church councils from at least the start of the 13th century, *specifically with regard to public construction.* The council at Avignon (1209) read:

> Since the Church of God and ecclesiastical persons hold a benefice in the house of the Lord, whether they are exempt from burdens and levies according to canonical and civil laws, and altogether considered immune from any undue exactions, while being subject to divine reverence and fear, we strictly prohibit, under the penalty of anathema, in every way, that laypersons from now on demand or presume to extort lodgings, procurations, exactions, or any kind of levies from them. On the contrary, both churches and religious houses, as well as the aforementioned persons, should be preserved in full liberty (*in plenissima libertate conservent*).[1016]

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[1012] Boherii, *Tractatus de Custodia Clavium Portarum Civitatum*, n. 72.
[1013] C. 12.50.21, trans. Blume.
[1014] Bartolus at C. 12.50.21. See also Caroli Ruini, *Consiliorum seu Responsorum* [Venice 1591], Cons. 230 [220], fols. 239[293]r-295v, esp. ns. 10-13. The end of this edition is a mess of printing mistakes.
[1015] See Antony Black's emphasis on ecclesiastical liberties, Black, *Political Thought in Europe, 1250-1450.*

[1016] Concilium Avenionense MCCIX, Cap. 7, col. 788 in *Sacrorum Conciliorum,* Vol. 22 [Venice 1778]. via *Corpus Synadolium*

This pronouncement concluded with a statement against the 'coercion' by which 'laypersons' attempted to 'extort' (*extorquere*) income from the churches 'by the justification of walls' (*ratione murorum*).[1017] The Council at Worcester (1219) prohibited any ecclesiastical property from being taken:

> for the purpose of constructing walls around cities or towns (*burgos*). ... If necessary, the instigators shall be warned to return what has been extorted (*extorta*). If they do not do so within eight days, the city or town shall be subject to an interdict, without waiting for the presence of the Bishop or his official.[1018]

The Council at Tereul (1357) proclaimed a 'long and constant outcry from the clergy of our diocese, who hold temporal dominion and exercise other secular judgments and offices, reaches us repeatedly'. The chief complaint was a:

> prejudice of the Church's rights.... Many of them banish and restrict the entry of these same clerics and ecclesiastical persons from regions, cities, castles, towns, or territories, and deprive them of their freedom of action. Moreover, certain individuals, seeking to diminish or impair ecclesiastical liberty, attempt to impose piety fees, exactions, contributions, taxes, and collections for secular and profane burdens and works, such as the construction of moats, walls, or any other expenses, upon churches and ecclesiastical persons.[1019]

At the councils of Western and Northern Europe, then, ecclesiastical immunities were under assault not from "secular" courts, but from "laypersons" looking to build and repair the walls of cities and towns. These "laypersons" were of course also Christian.

It should be noted that in Spain, there is a remarkable difference in the pronouncements of Church councils. At the Council at Braga (1301), the Council announced that ecclesiastical persons who denounced other ecclesiastical persons would be fined 10 *libras* which were to be expressly allocated for the construction of city-walls.[1020] This seems to have been tied simply to practice. King Sancho IV of Castille (1258-1295) wrote that it was customary for a 'good man to collect the money for the walls, which the clergy, the orders, and the vassals of the Church were obligated to give for the construction of the walls'.[1021] Furthermore, in a letter destined for the Council of Leon, the King wrote:

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[1017] Concilium Avenionense MCCIX, Cap. 8, col. 788.
[1018] Worcester (1219), Cap. 7 via *Corpus Synadolium*. [Cheney and Powicke, *Councils & Synods,* I, pp. 52-57.]
[1019] Tereul (1357), Cap. 2 via *Corpus Synadolium.* [*Synodicon Hispanum,* Vol. 14, pp. 418-431].
[1020] Braga (1301), Cap. 5, via *Corpus Synadolium* [*Synodicon Hispanum,* Vol. 2, pp. 32-38].
[1021] "De mi Infante D. Sancho fijo mayor et heredero del muy noble D. Alfonso, por la gracia de Dios, Rey de Castilla, de Leon, de Gallica, de Sevilla, de Cordova, de Murcia, de Jahen, et del Algarbe, al Cabildo de la Iglesia de Leon, salud et gracia. Pedro Perez, Canonigo de Leon et vuestro Personero, me dixo que vos soliais dar un ome bono, que recabdase los dineros de los muros, que an a dar los Clerigos et las Ordenes et los vasallos de la Iglesis, et meterlos en labor de los muros por cuenta et por recabdo et que asi usastes en tiempo del Rey Alfonso et del Rey Fernando et del Rey mio padre fasta agora poco tiempo ha que dio sus cartas a otros omes legos, y de la villa que los cogiesen contra aquello que ovisteis usado. Onde vos mando que se asi lousastes que dedes un ome bono de entre vos que los recavde, et los meta en labor de los muros por cuenta et por recabdo segund ovistes usado en los tiempos sobredichos, et non lo de facer por carta que el Rey dio callada la verdat. Et de defiendo, que ninguno non sea osado de vos lo embargar." In Manuel Risco, ed. *España Sagrada,* Tom. 35, 'Memorias de la Santa Iglesia esenta de Leon' [Madrid 1786], Appendix 13, pp. 449-450.

> And because those of the Church have a large portion of the city walls with the Church and with the houses of the Bishop and the Canons that are near the walls, and that they are responsible for maintaining, repairing, and guarding them during times of war, it has always been customary that one person from the Church's side, and another from the Council's side collect these revenues and account for them, and then invest them in the labor of the walls where they are most needed. And this practice was always upheld until your aforementioned council.[1022]

That is, the Church, ecclesiastical officials and staff, and perhaps even the Archbishops and Bishops themselves were materially, logistically, and culturally embedded in the city and the city-walls. This conciliar history predates the substantive questions of this chapter and subsection but demonstrates yet again that even the famous conception of ecclesiastical liberty cannot be extracted from material and local considerations—ecclesiastical communities survived at different levels of integration with the cities around them, but all integrated specifically with the city-walls.

In this subsection, I show that the concern for jurists was not the obligation to fund the city-walls—the church broadly accepted this obligation—but the concern was about enforcement. Rather than treat the clergy as existing outside of the constitution of the *civitas,* jurists included ecclesiastical persons in the corporate body. This allowed them to show clearly that they were being equally benefited by public and common services, which in turn triggered a proportional burden to help pay for them. Ecclesiastical immunities were not sufficient to keep Churches and ecclesiastical persons from paying tributes or taxes to fund public works, including the construction of city-walls. However, we might read a strong reaction against this legal argumentation in the custom of the Saxon legal "Burgbote", a chartered immunity from contributing towards the construction and repair of walls and city-defenses.[1023] Immunity or not, canonists drew the line at enforcement: secular courts and secular powers could not compel the Church to pay. In this subsection, I argue that this is not the interesting part of the question: the interesting part of the question is that the Church accepted that it was strongly obligated—that Bishops were "imperfectly" obligated to *continue* their defense of the city-walls that I illustrated in Section II.

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[1022] "Et porque los de la Iglesia tienen una grand parte de los muros de la cibdat con la Iglesia et con las casas del Obispo et de los Canonigos que son acerca de los muros, et hanlos de mantener et de refacer, et guardar en tiempo de guerra fu siempre usado que un home de parte de la Iglesis, et otro de parte del Concejo recabdasen de per medio estas rendas et meterlas per cuenta et per recabdo en labor de los muros alli hu mas havia mester, et esto fu siempre asi guardado fasta que vos Concejo sobredicho por cartas que gamastes del Rey mio padre, callada la verdat, tirastes la Iglesia de aquel uso en que y era et el Obispo por si et por su Iglesia pidiome merced que tornase en aquel estado en que solia ser sobre este fecho. ... E yo tove por bien de lo facer, et dille ende mi carta. Agora enviome desir que vos le embargabades aqueste uso por razon de una mi carta que ganastes despues de mi callada la verdat de aquestas cosas. Et esto non tengo yo por bien; porque vos mando que non pasedes contra aquella carta que yo di al Obispo et a la Iglesa sobre estarazon et complidla en todo segund vos mando et non fagades ende al por ninguna manera." In Manuel Risco, ed. *España Sagrada,* Tom. 35, 'Memorias de la Santa Iglesia esenta de Leon' [Madrid 1786], Appendix 14, pp. 450-451.

[1023] (John Cowell and) Thomas Manley, *The Interpreter, Containing the Genuine Signification of such Obscure Words and Terms Used either in the Common or Statute Lawes of this Realm* [1672], at "Burgbete" [alt. Burgbote]: "Coumpounded of Burg, *castellum,* and Bote, *compensatio,* signifies a Tribute or Contribution toward the building or repairing of Castles or Walls of Defence, or twoard the edifying a Burough or City; from this divers had exemption by the ancient Charters of the Saxon Kings, whereupon it is usually taken for the liberty it self. ... Fleta sayes, '*Significat quietantiam reparationis murorum Civitatis vel Burgi*', Lib. I, Cap. 47."

Given that most parties agreed that Churches and ecclesiastical persons *were* obligated to fund the construction and repair of city-walls, what *is* interesting is the change in justifications that we can witness in the legal texts. I argue that we can demonstrate a developing story about the kinds of values invoked by jurists: necessity, security, piety, utility, and vigilance. Despite the strength of ecclesiastical immunity, the canonists could not escape this web of justifications and the question eventually stabilized in a way that pulled the *ecclesia* back into the construction of public works—back in line with Roman legal principles, but against earlier medieval conceptions of a strict line between *spiritualia* and *temporalia*, between ecclesiastical and secular concerns. The *ecclesia* could be bound to contribute to city-walls precisely because the city-walls protected the entire community; some jurists invoked the famous maxim *quod omnes tangit* to stress that the *ecclesia* and clergy were a part of the *city.* Others appealed to canon law to argue that not only was the participation of the church often necessary, but that it served the public utility or common good; they often drove the nail home—'what could be more pious than paying to build and rebuild the city around them'.[1024] Public works were *pious* endeavors (a special kind of canon-legal work), too.

*Ecclesiastical Immunities: The Strong View*

The strong view of ecclesiastical immunities held that the Church was almost maximally independent from secular authorities; nothing could be extracted or asked from the Church without Episcopal or Papal permission, and furthermore nothing ought to be expected from them. This view was renewed at the Lateral Council of 1521, were Pope Leo X declared:

> We renew all the apostolic sanctions in favor of ecclesiastical freedom against its violators, and since it has been prohibited in the Lateran and General Councils under the penalty of excommunication that Kings, Princes, Dukes, Counts, Barons, Republics, and all other Authorities presiding over kingdoms, provinces, cities, and territories in any way whatsoever, impose and demand collections, tithes, and other burdens on the clergy, prelates, and any other ecclesiastical persons, not even accepting them from those who give or consent voluntarily, and openly or secretly providing aid, favor, or counsel in these matters, shall thereby incur the penalty of excommunication and the same shall apply to the republics, communities, and universitates that commit any offense in this regard, they shall be subject to ecclesiastical interdict. Moreover, prelates who consent to the above without the express permission of the Roman Pontiff shall incur by that very fact the penalty of excommunication and deposition, and we decree and ordain that henceforth, those who presume such acts, even if they have been qualified as mentioned before, shall be considered incapable and disqualified for all lawful acts.[1025]

The Church councils cited above substantiate that there was, in Europe, a strong view on ecclesiastical immunity—that even in this fringe but crucial case of the construction or repair of city walls, the Church could not be obligated to provide financial or material support. But one further text supports the strong view, this time from the Emperor Frederick II. Frederick II issued

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[1024] Johann Friedrich Schmid, *Consiliorum,* Consilum IX, columns 113-114, ns. 39-42.

[1025] Lateran Council of 1521, Session 9 [May 5, 1514]. Latin from Antonius de Monte, ed. *Concilium Sanctum Lateranense novissimum* [1521], fol. 131v-133r

a decree on his coronation day in 1220, which was later interpolated into Justinian's *Code* (after C.1.3(6).2), where it drew direct commentary from jurists who called it by the *incipit* of §2, "*Item nulla communitas*." I will produce the beginning of the edict in full translation for now[1026], making emphasis in underline:

> Frederick, by the grace of God, Emperor of the Romans and always Augustus, to the dukes, marquises, counts, and all the peoples whom the rule of our clemency governs, greetings and favor.
>
> On the day when we received the imperial crown from the hand of our most revered father, the Supreme Pontiff, we took care to publish certain laws for the honor of God and His Church, which we have commanded to be recorded on this present page, to be made public throughout our entire empire. We order, through these imperial writings, that each one of you diligently and unwaveringly observe them in your respective territories. These are the laws.
>
> 1. For the honor and glory of the empire, and to the praise of the Roman prince, nothing seems to contribute more than that, after purging certain errors and completely abolishing unjust statutes, the Church of God may flourish in full tranquility and enjoy secure freedom (*secura gaudeat libertate*). Indeed, the wickedness of certain unbelievers and perverse individuals has so abounded that they do not hesitate to fabricate their own statutes against ecclesiastical persons and the freedom of the Church, contrary to apostolic discipline and sacred canons. Therefore, since the Church, which ought to seek nothing but good, desires nothing that does not please us with the same agreement of wills, we, Frederick, by the grace of God, Emperor of the Romans and always Augustus, declare and order by this edict that all statutes and customs, which cities or places, authorities, consuls, or any other persons have attempted to enact or uphold against the liberties of the Church and ecclesiastical persons, in violation of canonical or imperial sanctions, shall be declared null and void, and we command that within two months of the publication of this edict, they shall be completely abolished from their chapters. And if they should attempt similar acts in the future, we decree by law that they shall be considered null and void, and we strip them of their jurisdiction, and furthermore, we have commanded that the place where such actions are presumed to have occurred shall be subject to a fine of one thousand marks. As for the authorities, consuls, governors, lawmakers, and writers of said statutes, as well as the advisors of their respective regions, and those who have passed judgments according to said statutes or customs, from now on, they shall be infamous by law (*ipso iure infames*), and we establish that their judgments and other legitimate acts shall to some extent not be binding. If they are found to be in contempt of this constitution for a year, we command that their property be seized throughout our entire empire with impunity (*bona eorum per totum nostrum imperium mandamus impune ab omnibus occupari*), while other penalties established against such individuals in a general council shall remain unaffected.

[1026] Despite the influence of this decree and commentaries on it, I have not found it in translation. *Monumenta Germaniae Historica,* Legum Sectio IV, Constitutiones et Acta Publica Imperatorum et Regum, Tom. II [Hannover 1896], Friderici II Constitutiones 22, n. 85: Constitutio in Basilica Beati Petri, Nov. 22. pp. 106-109. via *DMGH.*

2. (*Item nulla communitas vel persona, publiva vel privata...*) Likewise, no community or individual, whether public or private, shall impose or enforce collections, exactions, burdens, or requisitions upon churches or other pious places or ecclesiastical persons, and if they do so, and when requested by the Church or the empire to make amends, they refuse to comply, they shall refund triple the amount and shall be subject to imperial banishment, and this banishment shall by no means be remitted without due satisfaction.

3. Moreover, any community or individual who persists in excommunication for the sake of the freedom of the Church for a year shall be subject to imperial banishment by law, from which there shall be no exemption unless they have previously obtained absolution from the Church.

4. We decree that no one shall presume to bring an ecclesiastical person to secular judgment in criminal or civil matters contrary to imperial constitutions and canonical sanctions. If anyone does so, the plaintiff shall lose their legal standing, the judgment shall not hold, and the judge shall be deprived of their power to issue judgments.

5. We also establish that if anyone presumes to deny justice to clerics or ecclesiastical persons and is requested to otherwise three times, they shall lose their jurisdiction.

6. We condemn, declare as infamous, and banish the Cathars, Patarenes, Leonists, Speronists, Arnaldists, Ciroumoisos, and all heretics of both sexes, by whatever name they may be called. We decree perpetual infamy upon them, confiscate their property, which shall not be returned to them, so that their children cannot inherit it. It is far more grave to offend eternal majesty than temporal majesty. Furthermore, those who are found to be notable by mere suspicion, unless they demonstrate their innocence through appropriate means of exoneration according to the consideration of suspicion and the nature of the person, shall be regarded as infamous and banished by all. If they persist in such a state for a year, they shall be treated as heretics from that point onward.

As stressed throughout this project, no legal questions exist in siloes. Frederick II pivots from ecclesiastical immunities to topics we have already seen—legal *infamia* and property confiscation (Chapters 2 and 3, respectively). For this chapter, my focus is on §2: "No community (or individual) whether public or private" can impose taxes on Churches or ecclesiastical persons, without a clear exception. This text was incorporated into the *Corpus Iuris Civilis,* where jurists had to confront its unambiguity.

Some ultimately accepted it. Andrea Barbatia authored a widely cited *consilium* in which he concluded that none of the arguments in the rest of this subsection could stand up to the simple protection of ecclesiastical immunities.[1027] While Barbatia offers other arguments I will reconstruct below, his takeaway was that the Roman and Canon law could be understood to be 'corrected' by "*Item nulla communitas*". He wrote, 'Hostiensis himself corrected his own opinion' in response to it. Today, [Hostiensis] says, churches are exempt from all of these burdens (*oneribus*), whether they concern public or private utility, and thus the entire provision [of the

[1027] Andrea Barbatia, *Consiliorum sive Responsorum,* Vol. III [Venice 1580], Consilium 1.

canon law] does not apply today.'[1028] Barbatia's argument demonstrates two important facts. The first is that "*Item nulla communitas*" was a strong pronouncement of ecclesiastical immunities that all jurists would have to confront, or even embrace, into the 17th century.[1029] The second is that "*Item nulla communitas*" was a *departure* from norms of the Roman and Canon law—a 'correction', as Barbatia put it. However, it was not a permanent or persuasive departure: where jurists argued for exceptions to "*Item nulla communitas*", they were not departing from a tradition of strong ecclesiastical immunities, but rather were recovering a pre-existing commitment to, among other things, "public utility".

This stronghold was a minority position, held almost exclusively by Barbatia and Peter Anchoranus.[1030] All but the most ardent canonists were uncomfortable with a strict application of ecclesiastical privileges, precisely because of their resistance to deny the obligations presented by 'public necessity', 'public utility', or 'security'. In other words, while the principle of ecclesiastical immunities was clearly expressed in an imperial edict, and in a theory of a clean division of temporal and spiritual jurisdictions, it was ultimately contextually unsustainable.[1031] Instead, jurists pivoted to clarifications. Given that the Church *was* expected to provide funds for construction and repair of city walls, what kind of burden could be imposed on them? What paths for coercion or compulsion were available if they refused? What justifications could be employed to trump ecclesiastical immunities?

*Ordinary vs. Extraordinary; Sordid vs. Not-Sordid*

The first such clarification jurists made was the quality of the burden imposed on the Church or ecclesiastical persons. The Roman law distinguished between "ordinary" and "extraordinary" burdens, though it is also important to recall that "burdens" (*onera*) were a condition of civic membership. That is, an individual or corporation could not enjoy any benefit of existing in a community without subjecting itself to a proportional burden. The difference between an "ordinary" and an "extraordinary" burden rested on authority and timing. Each could then be "sordid" or "not sordid". Jurists would largely agree that the Church was immune from all burdens except for "extraordinary, non-sordid" burdens—special taxes for special purposes, and specifically, public works like rebuilding bridges, roads, moats, and walls.

Guilelmo de Cuneo's treatise *De Muneribus* was widely cited, and it was important that the burden in question was a *munus*—Cuneo wrote that despite the variety of meanings for *munus, munus* 'means the same as *officium*'. The question therefore was about eligibility for "offices" or "duties", which were also "burdens." Cuneo's first distinction was between 'sordid' and 'not sordid' *munera*; 'dirty' burdens were those that required personal labor (*cum labore personae*). 'Not-dirty' burdens included collections, 'such as when a collection is induced for the repair of bridges or roads; it can also be said that a collection is not sordid when it is done for public collection (*pro collecta publica*) or for public burdens (*pro munere publico*).' Cuneo continued

[1028] Andrea Barbatia, *Consiliorum,* Vol. III, Consilium 1, n. 12, fol. 4v.
[1029] Jacob Pignatelli, 3.15, n. 43, which reads in part: 'Furthermore, because it is expressly prohibited by the latest novella of Frederick [*Item nulla Communitas*], as it is deemed contrary to the freedom and privileges of the Church. Panormitanus reports that it has specifically responded and been judged according to its advice. It is stated that no other course can be safely pursued, considering the utmost importance that is given to religion.'
[1030] Remi de Gonny, *Tractatus de Charativo,* Quaestio 62, n. 101.
[1031] Remi de Gonny, *Tractatus de Charativo,* Quaestio 62, n. 79.

that 'some of these patrimonial *munera* are ordinary, and some are extraordinary.[1032] Bartolus, Baldus, and Barbatia all held that an "ordinary" burden was imposed by a law, decree of the senate, or constitution.[1033] An "ordinary" burden was furthermore owed at predictable, regular, and specific times.[1034] For example, Cuneo wrote 'Ordinary *munera* are those that have a certain time frame and can be foreseen (*quae habent cert temporis demonstrationem*), as in tributes or similar taxes which are collected every five years or annually.' Extraordinary burdens on the other hand, were called such because 'they do not have a certain prescribed time period, such as holidays'.[1035] "Extraordinary" burdens were also those that took place outside of the context of regular law—those not passed by a particular authority, or those passed for a specific cause. Cuneo continued, 'some things are extraordinary by law,' and 'some things are extraordinary by accident'; 'other extraordinary patrimonial or property *munera* that are not ordered by the law or the constitution remain at the discretion of the *princeps,* and such things cannot be induced except through the *princeps*.[1036]

The Church was usually understood to be exempt from all sordid *munera*, ordinary or extraordinary; furthermore, its broad immunity from legal pronouncements against it also meant that even ordinary "not-sordid" *munera* would violate ecclesiastical liberty. What was left was "extraordinary" and "not-sordid" *munera*. This was the opening to break through Ecclesiastical immunity. According to Odofredus,

> Sometimes the Church is subject to honorable burdens, such as the canonical impost and the arrival of the Prince, and the joyful offering and all those things that pertain to piety or public utility (*pietatem vel publicam utilitatem*). The *munera* that pertain to sudden expenses also fall on the Church's shoulders, as well as those that respect public utility (*publicam utilitatem*). Therefore from the aforementioned distinction, you should understand the question by repeating that the Church does not undertake sordid burdens. ... Collections should then not be extracted from Churches unless there is a pressing need and when the city is unable to bear the expenses. In such cases, the collections should not be undertaken without the consent of the Pope.[1037]

For Odofredus, it was normal to suggest that the Church could step in in cases where the city could not provide for itself. The Church could submit—with the consent of the Pope, perhaps—to 'honorable' (*honesta*) burdens in service of 'public utility', which Odofredus also links to piety. The upswing, for Odofredus, was simply enforcement.

> These collections should be imposed on Churches with the consent of the Pope, except in the cities of Lombardy and Tuscany, who don't hear these words; instead, they compel churches and clergy to pay their contributions [without consulting the Pope]. However, they sometimes regret their actions afterward, as it has had adverse effects in those cities, especially cities in the power of Tuscany.[1038]

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[1032] Gulielmi de Cuneo, *Tractatus de Muneribus,* fols. 18-19 in TUI 12. n. 19. See also Petri Antiboli, *Tractatus de Muneribus,* fols. 19-50 in TUI 12.
[1033] Andrea Barbatia, *Consiliorum,* Vol. III, Consilium 1, n. 13.
[1034] Remi de Gonny, *Tractatus de Charativo,* Quaestio 62, n. 37.
[1035] Cuneo, *Tractatus de Muneribus,* n. 21.
[1036] Cuneo, *Tractatus de Muneribus,* n. 22.
[1037] Odofredus at C.1.2.5.
[1038] Odofredus at C.1.2.5.

The jurisdictional facts of law could not stand up to the real authority of cities in Lombardy and Tuscany, although Odofredus suggests that their willful ignorance was ultimately poor public policy. In his commentary on a related law, Odofredus concluded that 'generally, the Church should not be shouldered with sordid or extraordinary *munera*, but the exception is when there is a surprise 'burden' (*sarcinam repentinam*).' Odofredus' clever use of synonyms here suggests a difference between the legal "weight" of ordinary *munera* and the real "weight" of the surprises that take place outside of normal rhythms of life—the arrival of a Prince, the invasion of an enemy army, a plague, a fire, a famine. In such cases, the Church functioned as a sort of 'rainy-day' fund; it could step in and shoulder emergency burdens, though with the participation and consultation of the Pope (or the Pope's designated authorities).

This was immediately applied to city walls. Most jurists used passages on ecclesiastical immunities to argue that the Church and ecclesiastical persons were obligated to pay collections or taxes for specific exceptions, as in construction and repair. Their arguments often needed another dimension—an invocation of a particular reason why the Church was expected to shoulder this burden and not the *civitas* or another party. Remi Gonny noted that according to the canon law, 'churches have immunity from sordid and extraordinary *munera,* except those related to the repair and construction of roads, paths, highways, and bridges.' But 'Innocent states that *munera* relating to piety fall under the Church'.[1039] Before turning to the values invoked by Odofredus and Innocent—piety and public utility, for example—one more distinction is worth considering.

Even where jurists accepted that the Church was bound to contribute for the repair of walls, 'as it is done out of necessity for the public and themselves', this only applied to walls built or repaired *out of necessity* and not 'ornamentation'. Jacob Buttrigarius continued, 'a wall is either for decoration, and then the Church does not need to contribute, or it is out of necessity, and they should contribute.'[1040] This distinction is interesting, because it suggests a skepticism that all city-walls are truly necessary, especially in some of their decoration, or the materials used to adorn the tops of the walls to impress subjects and travelers.[1041] The case made by Buttrigarius was that there is an essential necessary quality to a city wall, but not everything about the city walls (or roads, bridges, or moats) were necessarily 'necessary'.[1042] Baldus was more explicit in his judgment: 'if a city wanted to build new walls spontaneously for the ornament and pomp of the *civitas*, then Churches are not bound to contribute.'[1043] Elsewhere, Baldus paired ornament with immediate danger: 'Jacob says that if the walls are built for the ornament of the city, the church is not required to contribute, but if they are built out of necessity, for example, because of war or the suspicion of war, then the Church is required to contribute.'[1044] While curious, the pairing of warfare (or suspicion of warfare) and ornamentation did not imply that peace-time wall-building was more likely to be ornamental. Pope Gregory, Lucas de Penna, Rolandus de Valle and others stressed that

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[1039] Remi de Gonny, *Tractatus de Charativo,* Quaestio 62, n. 38.
[1040] Jacob Buttrigarius, at C.1.2.7.
[1041] House-walls were also subjects of property questions, namely about whether their ornamentation could increase their value. Pietro de Monte at 'Murus' wrote 'a wall is not considered more valuable even if it is painted or decorated'. This raises an interesting legal contrast between the substance of an ornamented wall and the substance of a painted canvas or tablet (*tabula picta*). See Marta Madero, *Tabula Picta: Painting and Writing in Medieval Law.*
[1042] Jacob Buttrigarius, at C.1.2.7, citing Peter Ancharanus X.3.49.04 and François Marc, *Decisiones,* Quaestio 78.
[1043] Baldus, Consilium 312. Given that non-jurists wrote about the "ornamentation" of palaces and private homes with statues, pillars, artwork, sculptures, and various additions of metals, it is possible that the "ornamentation" of city walls was also an extension of these private, perhaps royal, expressions of wealth, which did not add to the fortification.
[1044] Baldus at C.1.2.7.

building walls in times of peace was not only strategically valuable, but improved the quality of labor, and was an obligation of all cities.[1045] Thomas Sanchez followed the same line.[1046] Jacob Rebuffi (1450-1528), on the other hand, avoided ornamentation and substituted "voluntary", perhaps picking up on the stress of "spontaneity" present in Baldus' comment: 'if the construction of walls is done voluntarily the Church is not obligated; however, if it is done out of necessity, such as in the face of an imminent war, then they are obligated.'[1047] There was a clear incentive then for cities to claim a 'suspicion' or 'imminence' of war, because it settled all questions of immunity.

Unfortunately, the jurists did not explain how to distinguish between ornamentation and necessity, nor did they clearly outline who was to judge the question of "necessity" or "pomp". What is clear, however, is that jurists were aware that walls were a place that could be ornamented, and for a purpose—to demonstrate the honor and status of a city, the wealth of inhabitants, or the strength of the military. They were sources of civic pride. But so, too, were the buildings of the Church. An "Old English Political Song" from the time of Henry VIII (1491-1547) goes in part:

> Stronge be the walls abowte the stondis;
> Wise be the people that within the dwelles;
> Freshe is thy river with his lusti strands;
> Blithe be thy chirches, well sownyng are thy belles;
> Rich be thy marchauntis in substaunce that excells;
> Faire be thy wives, right lovesom white and small;
> Clere be thy virgyns lusty under kellys.
> London, thou art the flowre of cities all. [1048]

The Church was a part of making London the "flowre of cities all", but perhaps it was immune from contributing to certain parts of the decor.

*A Competition of Values: Piety, Security, Utility, Vigilance*

I showed above in Odofredus' brief commentary that some jurists linked the Church to the *civitas* and public works through "piety" and "public utility"; others above have also included "necessity". What I show in this section is that not only did the Roman law function as a constraint against strong views of ecclesiastical immunity, but it also altered and amended the imperial edict "*Item nulla communitas*". The negotiation between a commitment to the Church's obligation, general uncertainty about the values or principles creating that obligation, and controversy about enforcement mechanisms ultimately highlight a shift from a technical notion of "common utility" to a broad notion which more closely approximated the *quod omnes tangit* principle, 'what touches all'. There were two versions of this principle, a "half-QOT" and "full-QOT": the full-QOT held that what touches all touches the Church, and what touches the Church requires the Church to also contribute to; the half-QOT held that what touches all was *important* in a number of ways or

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[1045]Lucas de Penna at C.10.49.3; also Rolandus de Valla, Consilium 84, n. 7.
[1046] Sanchez, discussed below, also cited Rebuffi, Aviles, Ricardus, Mexia, Guilielmus Benedictus, Azebedo, Dueñas, Saliceto, Gregory Lopez, Guttierez, and Guido Papae, in addition to several of the authors discussed already.
[1047] Jacob Rebuffi, C.10.49.3, n. 3.
[1048]*Fraser's Magazine for Town and Country,* Vol. VIII (July to December 1833) [London], December 1833, "Old English Political Songs" 717-732, p. 725

according to a handful of values, and that the Church was bound to support those values, but not *because* it had specifically been touched by the benefits.[1049] This move also brought the clergy and the Church into the *civitas* at a constitutional level and fortified an already composite view of pious and public works. Civilians could therefore invoke the "piety" of public construction and know that "piety" was a difficult value for the Church to reject.

Cino da Pistoia's (1270-1336) commentary on the *Code* is in interesting window into a canon and civil law already reconciled by the early 14th century. Cino held that Churches could be obliged to give money for the construction or repair of city walls. The justification, however, could not simply be "public utility" (*publica utilitas*) in the same way as the argument worked to oblige Churches to fund roads or bridges, because it was clear that faulty roads or bridges might prevent 'goods and other things' from being brought into the city.

> This is not the case with walls because a city can often survive without them (*saepe enim contigit et sine muris civitas manet in quaerete*). However, it seems likely that these doctors would agree that if public utility does require the defense of the walls, perhaps because of enemies or neighboring tyrants, then the Church *is* obliged to contribute because the reasoning would be the same.[1050]

Cino is the only jurist I have found to briefly doubt whether walls might be necessary for the *civitas* at all, and he followed in the lonely footsteps of Plato's Athenian in the *Laws.*

The early commentaries on these passages stuck to a narrow interpretation of "utility" supported by the Roman law. That is, according to the Roman law, a homeowner could be held responsible for repairing the road which was on or adjacent to their property, at their own expense. Where a road was not on the property of any individual but ran through an area of country or province with multiple users and inhabitants, then the area or province was expected to contribute equally (or proportionally). Royal or imperial roads were the roads that connected two *civitates* in a particular territory. These had their own exceptions and rules, but what matters for us first is that the Church was largely understood to be subject to them. Paulus de Castro wrote, therefore, that if the property in question was attached to the house or property of Church, then the burden of collection was simply *real* and belonged to the Church (that is, neither *ordinary* nor *extraordinary,* but a property burden that the Church has no protections from). Jacobus de Arena and Bartolus upheld these 'real' burdens at C.1.2.7—underneath the property relationship between the Church and their land was also a principle of *direct* utility that would later be contrasted to *indirect* utility.[1051]

If the road 'pertained to the whole area of those who had or could use the road' (*ad totam viciniam qui habet usum vie illius*), then the burden fell on the whole vicinity—not on the Church directly. As a member of the area, the Church was obliged to contribute 'according to the rule of benefits', though a secular judge could not compel the Church to pay. The obligation and burden

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[1049] Because some of these jurists don't use the formal QOT articulation, it's difficult to state with certainty whether the argument is related to QOT where it doesn't appear. Gonny, for example, mixes the specific and general 'touching', but doesn't fully connect the Church to obligations generated from that. This half-QOT seems present in Lucas de Penna and onwards, but it is fully present—using the same sources, and roughly the same materials—in Thomas Sanchez.

[1050] Cino at C.1.2.7.

[1051] Bartolus at C.1.2.7; Jacobus de Arena at C. 1.2.7; Bartholomeus Saliceto at C.1.2.7. There was, in other words, a difference between burdens that touch property and burdens that touch persons; the Church's immunities in such cases were personal immunities. See also Lucas de Penna at C.10.49.3.

existed but needed to be carried out by the Bishop.[1052] This rule of benefits was actually a principle of citizenship: to take the benefits of a *civitas*, one must be subject to its burdens. Baldus wrote that 'this duty [to pay for the repair of city walls] pertains to the protection of all citizens, so all should contribute'.[1053] Jacob Menochio (1532-1607) would later claim that this was a 'common law' (*ius commune*) principle.[1054]

Remi de Gonny wrote, 'Church and clergy are only obligated to the burdens for public and royal bridges and roads, and not for private roads, unless [the private roads] served the common interest (*interesset commune*) of the vicinity', in which case the Church is obliged to contribute proportionally. Furthermore, 'the Church is obliged to contribute to the burden of repairing a well or local oven that is in the vicinity of the Church, as it follows the natural principle of sharing advantages, as the Church benefits from the well or road and has communal interest in it.'[1055] Ripa concurred, arguing in his *Responsa* that where something served the 'common utility of the clergy and laity', the Church was therefore subject to the 'burden' (*onera*).[1056] Gonny's summary of this 'common conclusion of the jurists' was that 'whenever there is a necessity, the Bishop must compel the churches to contribute in a proper and measured manner to ensure safety (*incolumitati*) and the public welfare (*publicae saluti*)".[1057] Jacob Rebuffi (1450-1528) argued that 'all citizens' (*omnes cives*) were bound to contribute to the construction and repair of walls.[1058] Rebuffi embraced a robust sense of private property rights, but showed the weight of collective utility. His thought experiment was a wealthy individual who had been tagged to contribute proportionally to the 'collective restoration of the walls'; 'would it be permissible for them to build walls around their own property to avoid contributing to the common restoration?' Rebuffi argued no: 'It benefits everyone for it to be done collectively; if it only benefited them individually, then their argument would not hold water because it does not align with the collective interest. It is more important to consider what benefits the community as a whole, not just private individuals. Furthermore, one cannot separate themselves from the community and serve only their interests.'[1059]

"Necessity" was a chief justification then, both to sidestep rules about extraordinary burdens, but also to trigger the possibility for immediate local action. However, it was often paired with other values. Lucas De Penna wrote that 'no one is excused when necessity or utility (*utilitas*) arises for the construction of walls'—a few lines later, it was for the 'utmost benefit (*commodum*) and necessity as determined by your [royal] authority'.[1060]

In these cases, as we saw earlier with Odofredus, necessity was often connected to piety. In part, this was due to the Roman legal exception about *res sacrae* mentioned above in Section I—that is, items consecrated for divine use could not be sold, *except* in cases of the redemption of captives. This was a 'pious' action, surely worthy of the 'sacred' quality of the object. However, canonists in the 13th century drew a sharp distinction between piety and utility—a distinction that would quickly fade. Innocent and Hostiensis, for example, argued that burdens related to piety fell under the jurisdiction of the Church; Hostiensis, further, argued that 'extraordinary *munera* related

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[1052] Paulus de Castro at C.1.2.7.
[1053] Baldus, Consilium 312. The point after this was that it's not extraordinary.
[1054] Jacob Menochio, Consilium 721, ns. 27-28.
[1055] Remi de Gonny, *Tractatus de Charativo,* Quaestio 62, n. 53.
[1056] Ripa, *Responsoria,* Lib. 2, Chap. 22.
[1057] Remi de Gonny, *Tractatus de Charativo,* Quaestio 62, n. 65.
[1058] Jacob Rebuffi at C.10.49.3.
[1059] Jacob Rebuffi at C.10.49.3.
[1060] Lucas de Penna at C.10.49.3.

to piety, such as the repair or construction of roads and bridges, are applicable to the Church. However, duties that pertain to public utility (*utilitatem publicam*) do not fall under the Church's responsibilities.' Hostiensis argued that 'duties related to piety include the repair of roads and bridges, assistance to the poor, and providing aid to the lord in times of necessity. Duties related to public utility include defending the public interest in the Prince's army against the Saracens and similar enemies.'[1061]

Gonny wrote that a Church could be compelled to contribute for the redemption of captives, because the Church was 'the mother of captives':

> If sacred and religious goods could be sold for the redemption of others, they could be sold for the redemption of the Church's own members. These laws, though they generally refer to the redemption of outsiders, apply even more so to the redemption of one's own, as the Church is obligated to provide this support. The Church considers this assistance an extraordinary act of piety, as it is given out of compassion in times of necessity.[1062]

'Piety' could also be generalized to public works. Gonny later wrote that 'clerics and Churches are not immune from burdens related to acts of piety or public utility (*publica utilitas*), such as the construction and repair of roads, bridges, foundations, and similar structures. The same applies to the construction and repair of aqueducts, bridges, and city walls.'[1063] Gonny's reconstruction of the logic however was vague. 'When necessity or utility is at stake, no one is exempted from the construction of new walls or the repair of existing ones, as stated by Lucas de Penna. Similarly, in the construction or repair of city moats and gates, clerics and churches are obligated because it involves the public interest. Lucas stated that clerics should contribute just like other land owners for the purpose of building or repairing roads and bridges'.[1064] Back in the context of necessity and danger, Gonny wrote:

> 'The same applies to avoid robberies, fires, captivities, and many other evils caused by the arrival of a hostile company (*societatis hostiliter*) against the city, if they are to be redeemed through money and otherwise impossible to resist. For here, both the interests of the laity and the clergy are at stake, as they both suffer damages to their possessions, and where there is benefit, there is also a burden. There is no greater piety than defending one's *patria*, the weak, and the poor from enemies. Likewise, the burden of piety also applies to prevent fires, the risk of captives, and many other evils.'[1065]

This also included helping the *civitas* 'liberate itself from a plague'.[1066] Thomas Sanchez would later echo the Church's role in fighting plagues, pests, or famines.[1067]

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[1061] Hostiensis at C.1.2.7.
[1062] Remi de Gonny, *Tractatus de Charativo,* Quaestio 62, ns. 27-28.
[1063] Remi de Gonny, *Tractatus de Charativo,* Quaestio 62, n. 36.
[1064] Remi de Gonny, *Tractatus de Charativo,* Quaestio 62, n. 36.
[1065] Remi de Gonny, *Tractatus de Charativo,* Quaestio 62, n. 43.
[1066] Ripa, Responsio 22.
[1067] Thomas Sanchez, *Consiliorum Moralium,* Lib. II, Cap. IV, Dub. LV, n. 22. [Lyon 1634], p. 390.

The kind of public utility or necessity provided by the walls was security (*securitas*), as Lucas de Penna had written in a comment on the *Code*.[1068] Rolandus de Valla wrote that 'walls (*moenia*) provide security to the inhabitants of a city.[1069] Rolandus quoted Gregory and Aristotle on the necessity of fortifications of a city for the protection of the entire province.[1070] By extension then, the taxes which supported the defense of a city were also in support of peace; Andrea Barbatia wrote that 'for the sake of maintaining peace, the common rules of canons and even divine law can be set aside'. He continued, 'it is not surprising that both the Church and the laity are bound by this tax for the preservation of peace, as they both benefit from it.'[1071]

It's impossible to tell from the legal sources whether the connection between piety and self-defense or security was a reflection of wars and conflict between Christian and Islamic nations, as implied by Hostiensis. Joannes Antonius de Nigris Campani (1502-1570) wrote:

> The limitation [of ecclesiastical immunities against financial burdens] is the construction or repair of walls that might be necessary due to an imminent threat of war. If the city is under siege or at risk of being plundered and the inhabitants, including clergy and churches, are in danger; in such cases, they may be obligated to contribute for the sake of the common utility (*de communi utilitate*) of both the laity and clergy. Indeed, Jacob Buttrigarius, Baldus, and Lamberinus de Ramponi hold this opinion that clergy and Churches can be obligated in such cases. They argue that clergy have a duty to watch over and protect the city (*tenentur vigilare pro custodia et tuitione civitatis*) and for this reason, it is permissible to fortify churches for the defense of the faithful. This view is supported by the teachings of Joannes Andrea and Innocent, who emphasize the importance of defending the homeland (*patria*) and protecting the weak and vulnerable from pirates and enemies. The well-being and safety of many are secured in such endeavors. ... In cases of great necessity or piety, where seeking recourse to the Roman Pontiff would be impractical or risky, a deliberation of the clergy and the bishop would be sufficient to make a decision.[1072]

So far, there hasn't been coherent argumentative path from 'utility' to the strict obligation of the Church to contribute to the construction of city walls. That is, all of the values invoked thus far—piety, necessity, public utility or common utility—depended on a general relationship of the Church to the *civitas* or the roads, walls, and bridges in their vicinity. Or, the values invoked thus far were generated from a Church's specific property relationship to an area—they take specific or direct advantage (*utilitas*) from a road, or a furnace, or the walls.[1073] This was not yet an argued

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[1068] Lucas de Penna at C.11.42.1.1, in which the law reads, 'For in this way, both the defense of the city (*civitatis*) will be ensured by the protection of the fortified walls, and the pleasure of restoration will be provided, with the necessary measures taken for security, and will be presented through the passage of time'.

[1069] Rolandus de Valla, Consilium 84, n. 4.

[1070] Rolandus de Valla, Consilium 84, n. 6: 'For what benefit is it to fortify everything if there is a dangerous opening for the enemy at a single point? As Gregory, and Aristotle, say, it is like wanting to enclose walls around a city, but locating them in easily accessible regions and mountainous areas. Therefore, we must pay attention to the walls, both for their decoration, befitting the city, and for their military advantages.'

[1071] Barbatia, Vol. III, Consilium 1.

[1072] *Repetitionum ad Constitutiones Clementis Papae,* Vol. 6, Pars II [Coloniae Agrippinae 1618]. Ioannes Antonius de Nigris Campani, *Repetitio in Extravagan. Sedes Apostolica, De Vi. et Hon. Cle.* , n. 292.

[1073] Remi de Gonny, *Tractatus de Charativo,* Quaestio 62, n. 55.

general and strict duty for the Church; the principle *quod omnes tangit* could do that, but it wasn't invoked in early forms of the argument. Instead, jurists like Lucas de Penna approximated the position. Lucas wrote that civil and canon law were at odds about the obligations of the Church to provide for city walls, even though their projects were analogous.

> It is just as great a matter of interest for the republic to build a church in a specific place which otherwise could be built in multiple and diverse locations as it is for them to build city walls, which are necessary to be built in opportune and strategic places for the defense of the entire city and its inhabitants, as the security of the city is provided by their construction.[1074]

Lucas also maintained that in times of peace or war, each person should contribute proportionally to an 'estimation of their own labor' (which Lucas wrote, 'often equals an amount of money'). In times of war, 'all inhabitants should personally participate in this work. Even we soldiers, it is said, worked with one hand and held the sword with the other, for each builder was girded with a sword on their waist.'[1075] In a different passage, Lucas wrote that 'walls or fortifications provide custody, procurement, and defense', as Cicero had argued.

> Although by nature, humans congregate into cities, they still sought protection for their cities. And at the beginning, it is inherent in all living beings to protect themselves, their life and body, and immediately to acquire all that is necessary to live, such as food or shelter, and so on. And if they do not have a place that they can secure what has been laboriously sought, what has been sought after will be wasted.[1076]

This account of human nature, an almost anthropological account of the origin of cities, drawn in part from Cicero, grounds the rest of Lucas' argument at C.11.41.1, which stresses the obligation of clerics and laity to provide for city walls. Taken together, the argument is that there are necessities of life which humans created walls to protect; these walls continue to protect such necessities, and as such, touch every thing and moment of human life. This universal benefit for every member of the community came with a corresponding burden—to defend the walls which defend the human community. This, I think, is the duty side of the maxim *quod omnes tangit.* That is, the epigraph at the start of this chapter from Tertullian reflects a sentiment that many of the jurists thus far had also argued: that the destruction of a city's walls would also be the destruction of the holy places within it and the plundering of the property inside, religious or non-religious. There are two ways to read this quotation—first, that the fall of the city walls would create a direct harm to the Church and ecclesiastical property; the Church had a vested interest then in protecting their own property by an indirect defense of the city walls. The second way to read this quotation is to take the corporate identity seriously; that the destruction of the city walls itself—without any additional harm on property—was a substantive loss. The defense of the Church was therefore a defense of the city; a defense of the walls was also a defense of the Church. The ambiguity between interpretations can be understood in a 1554 decision which argued that 'city walls contribute and

[1074] Lucas de Penna, C.10.49.3, n. 5.
[1075] Lucas de Penna, C.10.49.3, n. 6..
[1076] Lucas de Penna at C. 11.41.1.

equally provide security (*securitatem*) to all inhabitants', and therefore the Church was included in 'all'.[1077]

Compare now Jacob Menochio's Consilium 1000. Menochio offered an early consideration towards the whole state, which would become a hallmark of 16th century jurisprudence:

> Ecclesiastics are not exempt from these civil laws, neither by human nor divine law, as long as these civil laws do not contradict Ecclesiastical liberty. Rather, these laws are instituted for the proper administration of the Republic. Since the clerics themselves are part of the republic, and share the same common King or Ruler with the laity, they are subject to the laws that are common to the entire Republic, as long as they do not conflict with their exemption and liberty. Especially, as Molina says, since the governance of the Republic relies on laws that are common to all citizens. It is not the prerogative of the Supreme Pontiff to establish such laws, but rather the Prince in temporal matters.[1078]

Arguments like these stressed that the Church was obligated to perform extraordinary duties that pertain to emergency, necessity, or public utility; what was left was to tie these together with piety, as Innocent had implied centuries before.

The advantage to piety was that it was a specific principle about caring for the poor; that which protected the poor was therefore automatically pious, and it was easy to generalize that walls, bridges, moats, roads, and public sanitation projects benefited the poor. But, crucially, the invocation of piety is an explicit invocation of the worthiness of providing and protecting for the poor, not the more general virtue of "charity".[1079] Joannes Antonius de Nigris Campani (1502-1570) moved from Innocent's exception for pious causes straight into public utility, the city walls, 'imminent necessity' (*necessitas imminet*).[1080] Odofredus wrote that it was an 'honorable burden' to contribute in 'joyful offering and all things that pertain to piety or public utility', and therefore 'the duty of repairing bridges and roads is indeed an office of piety (*officium pietatis*).[1081] Lucas de Penna combined 'piety, utility, and necessity', arguing that the construction of walls concerned 'both public utility and piety'.[1082] Contributing to the building of walls fell in line with the classical Roman legal exception; it was on the same plane as using ecclesiastical property to help redeem captives in a time of war. As Johann Friedrich Schmid wrote, 'nothing could be more pious than defending the *patria*'—of course, then, clergy and the Church were bound to contribute to the building and repair of walls, because the 'Church is not free from extraordinary burdens induced by necessity, utility, or pious causes.'[1083]

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[1077] Joannes Francisci Sasci, *Decisiones Sacri Senatus Pedemontani* [1570], Decisio 68, n. 9.
[1078] Jacob Menochio, Consilium 1000, n. 37.
[1079] Panormitanus, Consilium 3.
[1080] Ioannes Antonius de Nigris Campani, *Repetitio in Extravagan. Sedes Apostolica, De Vi. et Hon. Cle.* n. 286.
[1081] Odofredus at C.1.2.7.
[1082] Lucas at C.10.49.3.
[1083] Johann Friedrich Schmid, *Consiliorum,* Consilum IX, columns 113-114, ns. 39-42. "nullam maiorem esse pietatem quam defendere patriam". Schmid cites Albericus on piety and then Jason de Mayno.

*Just War, Vigilance, and Finance*

In the beatitudes as recorded in the Gospel of Matthew, Jesus proclaimed "Blessed are the peacemakers"; blessed, then, would be the wall-builders and wall-defenders who protected the city. Other scholars can attest to the Church's long history with theories of just war. [1084] Canon lawyers and theologians often carved exceptions for participating directly in violence from general principles of peace; however, canon lawyers had little problem allowing the Church to provide resources, weapons, or transportation for the military. Civil lawyers, drawing on Roman law, would argue that their financial and material support was not only permissible, but required. City-walls were an intermediary stage where the Church could contribute to the defense of the city without taking up actual arms (though they might be required to do so anyways).

As defensive constructions, essential to the safety but also the origin of the community, the legal texts above stress that construction 'should be carried out at all times, whether during pressing war or in times of peace, when the people are at leisure'; Rolandus de Valla, like Lucas de Penna, argued that it was better to work on the walls 'during times of peace when the inhabitants have free and available resources to address such matters, rather than during pressing wars when it can be difficult to establish and secure those fortifications; walls should always be handled in times of peace, because they are poorly constructed when they are urgently needed'.[1085] Canon law took this line and argued that it was even more necessary then for the clergy to fortify the city while there was such an opportunity, 'in order that when the enemy approaches, with God's permission, they will not find anything to harm them but will retreat in confusion'.[1086] The clergy could help scare off potential invaders in other ways. Remigio de Gonny wrote that in cases of 'imminent war', collection for the walls could be imposed on the clergy.[1087] But Gonny also wrote that 'ecclesiastical men are required to guard city walls against enemies just like the laity, since everyone is generally compelled to ensure the better protection of the city through vigilance.'[1088]

Stephani Baluzii (1630-1718) articulated this principle in a retrospective after using Jericho as a comparison—Jericho's walls were cursed, and many cities had 'dared to rebuild the cursed city'. Only 'the House of Rahab, the Holy Church, was spared from the destruction of the city, and as the worldly buildings fell, it grew into a temple of the Lord, both in the building of its morality and its walls.' That is, Rahab's House was permitted to build its own walls which would dwarf Jericho's in durability, without taking on Jericho's curse. Furthermore:

> Ramparts and other instruments of war are placed on top of the sanctuary above the body of blessed Peter [on St. Peter's Basilica, Vatican City]. Although we dare not judge that this is evil, we certainly judge it to be from the evil of those who, by their malice of rebellion (*rebellionis malitia*), force such things to happen. I am compelled to recall a certain saying of the blessed St. Augustine, who in his book of questions on the Old and testaments, says among other things, 'Why was the sentence given that whoever takes up the sword will perish by the sword, when an avenger is permitted to kill someone with a sword? To the Apostle Peter, it was allowed to cause terror (*terrorem faceret*), but not to kill. The same wrote that 'Those who are

[1084] The classic example is Frederick H. Russell, *The Just War in the Middle Ages.* Cambridge, 1975.
[1085] Rolandus de Valla, Cons. 84, n. 7; cf. also Andrea Barbatia, Cons. 1.
[1086] Gregory, Register, Book 6, Chapter 4. Rolandus de Valle, n. 7.
[1087] Remi de Gonny, *Tractatus de Charativo,* Quaestio 62, n. 101.
[1088] Remi de Gonny, *Tractatus de Charativo,* Quaestio 62, n. 37.

> repelled by some fear so that they may not do evil, perhaps something is provided for them.

This, then, was the logic for why the Church was able to build fortifications and station armed clergy at its walls: to cause terror. He continued:

> We believe that what is done in the vicinity of the Saracens, as we have heard, can be considered lawful. They carry arms into the high towers of churches or monasteries, whose display also terrifies spiritual men so that the barbarians do not invade holy places. They would dare to invade if they knew that these places were not fortified with any defense instruments.

The Church, then, was actively engaged in strategic deterrence. Furthermore, canon lawyers and theologians had already recognized that 'extreme necessity' was an acceptable principle to ground exceptions to the law:

> Sometimes, even clerics or monks appear on the walls there, armored or shielded, not with the intention of harming anyone, but to terrify enemies and to repel them in any way from the attack on holy places. Sometimes they even throw javelins or stones down to ward off the enemy. It is indeed an inordinate thing to do, but it is rightfully tolerated to avoid greater danger and to deter barbarians, with no intention of killing anyone. Spiritual men are not allowed to do this because they would rather be killed than kill, no matter how much armor or display of arms keep enemies away from hurting themselves. However, if this kind of armor is provided by the legitimate authority, nothing inordinate is done in this regard. For even the Apostle Paul, when he foresaw his own ambushes, provided for his protection with the arms of the Roman authorities. If those thirsty for his blood had fallen into them, he would not have been guilty of homicide, but a just revenge would have been inflicted on them, and their blood would have been on their own heads, as the charge of their own destruction would have been attributed to them, not to anyone else. The protection of armor that was then given to one ecclesiastical person is now recognized as given to the universal Church, so that it may have armed ministers, defending the Church, or accompanying the bishop for his protection, and helping with what is right, even if homicides happen from them.[1089]

Let us then take stock. The Church, like the Apostle Paul, but also like Muslim armies, was permitted to fortify city-walls, stand armed clergy atop them, and even fortify Churches themselves, for the purpose of causing terror and discouraging would-be invaders.

*Panormitanus*

The arguments above were made before and after Panormitanus (1386-1445), who offered a comprehensive but hard "no". Joannes de Campi wrote that 'it seems to have been the more commonly accepted opinion of the ancients, up until the time of Panormitanus, that in the

[1089] Stephan Baluzi, *Miscellaneorum,* Lib. 5 [Paris 1700], pp. 113-115.

aforementioned cases, the Church and clergy are obligated to contribute to the repair of roads, walls, and similar structures.'[1090] Panormitanus's famous argument was a response to a local case: a lord, at the request of his subjects, had ordered the construction of walls in the village in order to provide protection for the people living there, 'so that they may live more safely in the face of hostile incursions'. The controversy was that there was a monastery in the vicinity, which had possessions and houses in the village; given their entanglement and property interests in the town, the lord argued that the monastery should contribute proportionally to the expenses incurred by the construction of the walls, while the monastery responded with a strong view of ecclesiastical immunities.[1091] Panormitanus admitted that the arguments of utility, vigilance, necessity, direct utility, piety, and even the resistance to tyranny were plausible, but ultimately argued that the clergy could not be compelled in any way to contribute even in these cases. His argument wasn't complicated—he simply denied that any of the values above could issue a strong enough exception to overcome the strength of ecclesiastical immunities, which proclaimed an "anathema" over anyone who would try to compel the Church to act.

Using primarily the canon law, Panormitanus also argued that all ecclesiastical property, everything 'consecrated to the Church, whether it be an animal or land, becomes the holy of holies, and belongs by right to the priests; therefore, they should not serve worldly and public purposes, because once dedicated to God, it should not be transferred for human use.'[1092] Panormitanus therefore invoked a strong distinction between the Church and the world:

> The public law also encompasses the clergy [...]. Therefore, since laypeople are worldly and primarily benefit from the worldly republic, they should promptly bear the burdens of the worldly republic, while the goods of the churches, which belong to God, should serve the spiritual republic. We see a similar situation in individuals. For secular soldiers fight for the world, while heavenly soldiers fight for God. And thus, the former deal with temporal matters, while the latter deal with spiritual matters ....[1093]

Panormitanus was aided by "*Item nulla communitas*", and claimed that even Hostiensis had 'corrected his opinion' such that 'today, the churches are immune from all these burdens, whether concerning public or private utility'.[1094] Panormitanus himself recognized that this was to a degree a departure from custom: 'Many other ancient scholars have followed other opinions, but I don't concern myself with them because we have the lanterns of the law, such as the glossators of both laws, Johannes Andrea, Hostiensis, and Bartolus, who support this opinion—Who would dare to consult an opposing opinion especially against religion, when there is substantial reasoning in favor of religion?'[1095]

The striking emphasis of Panormitanus' decision is about coercion; he accepted that if a situation arose from necessity or common utility, the Bishop and clergy could meet and deliberate, and if they found that the laity's resources were insufficient, they could then give voluntarily without coercion.[1096] However, even Panormitanus had to admit a final exception—where the city

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[1090] Ioannes Antonius de Nigris Campani, *Repetitio in Extravagan. Sedes Apostolica, De Vi. et Hon. Cle.* n. 286.
[1091] Panormitanus, Vol. I, Consilium 3.
[1092] Panormitanus, Vol. I, Consilium 3, n. 1.
[1093] Panormitanus, Vol. I, Consilium 3, n. 2.
[1094] Panormitanus, Vol. I, Consilium 3, n. 2.
[1095] Panormitanus, Vol. I, Consilium 3, n. 2.
[1096] Panormitanus, Vol. I, Consilium 3, n. 2.

of Tuscany was 'oppressed by infidels, and there was sudden and unforeseen fear', as in 'urgent necessity', the clergy would be obligated.[1097] This extreme case was a far cry from the monastery, whose resources were already devoted to piety and the poor, and to whom a tax to help construct city walls of the village even under the claim of "security" would nevertheless be an obstacle to 'divine worship' and 'religion'.[1098]

The return to Panormitanus here suggests that even at its strongest point, the argument about ecclesiastical immunities was not about the obligation itself, but the enforcement of the obligation; ecclesiastical immunity was an immunity from *coercion* to do that which it might otherwise be obligated to do voluntarily. I read the jurists as arguing for something like an imperfect obligation on behalf of the Church—in many cases, the jurists even admitted that the Church should and would be expected to act. They "should" and "must" contribute to the defense of the *civitas,* but secular compulsion would nevertheless be a violation of ecclesiastical liberty. It was the Bishop's responsibility, with the deliberation of the clergy, to respond appropriately to necessity or the common utility. This strain of the argument can be found in Gonny's writings where the Church is 'bound' (*tenetur*) but not compellable by a secular judge[1099], and Lucas de Penna where the Church was bound to a 'promise' but could not be compelled by secular judge[1100]. Paulus de Castro held that 'it was necessary to resort to the Bishop to compel' that which was obligated.[1101] Joannes Antonius de Nigris Campani argued that the Church was 'obligated' (*tenetur*), but could only be compelled by an ecclesiastical judge.[1102] The canon law had also maintained an obligation, but specified that the Bishop should demand something from clerics and laity in the face of necessity.[1103]

It would also seem that compulsion was the contextually contentious element of the obligation. It was this compulsion that would spark the *Pfaffenkriege* below but was also observed by jurists like Odofredus. Odofredus stressed that the consent and 'deliberate judgment' of the Pope was necessary to avoid such conflict, but that cities in Lombardy and Tuscany 'who do not wish to hear these words ... compel churches and clergy to pay contributions. However, they sometimes regret their actions afterwards, as it has had adverse effects on those cities, especially in the territories of Tuscany.'[1104] Just because the Church and its canon lawyers spoke doesn't mean that secular or temporal authorities listened.

*Two Examples*

To close this subsection, I want to sketch two different kinds of examples. The first is a historical case of conflict over ecclesiastical immunities in a German town where we can see the structure and consequences of the conflict without seeing the formal legal argumentation. The second is a legal opinion by Thomas Sanchez, who presents the inverse—all of the pieces of this chapter put together with a fully developed justification for the limits of ecclesiastical immunity.

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[1097] Panormitanus, Vol. I, Consilium 3, n. 2.
[1098] Panormitanus, Vol. I, Consilium 3, n. 2.
[1099] Remi de Gonny, *Tractatus de Charativo,* Quaestio 62, n. 58.
[1100] Lucas de Penna at C.11.41.1.
[1101] Paulus de Castro at C.1.2.7.
[1102] Ioannes Antonius de Nigris Campani, *Repetitio in Extravagan. Sedes Apostolica, De Vi. et Hon. Cle.* n. 286.
[1103] *Decreti Pars Secunda,* Causa 16, Quaestio 1, c. 40, 'Generaliter Sancimus'. Ordinary gloss at 'Collationibus',
[1104] Odofredus at C.1.2.5/7.

*Pfaffenkriege*

Walls were legally contentious primarily when 'secular' authorities wanted to extract taxes from ecclesiastical persons to pay for them. Taxes, tributes, and other financial payments were the source of most conflicts between the Church and various temporal authorities. In German history, these examples of jurisdictional conflict which produced a disruptive if not rebellious response from the clergy were called *Pfaffenkriege.* I want to briefly use one such conflict regarding the Lüneberg Saltworks to stress the historical complexity of the cases respecting ecclesiastical immunities, but also their close relation to walls, property confiscation, torture, and capital punishment—the themes of several of the chapters of this project. My sketch here will be but an abstract of Hergemöller's account[1105], in which I'll skip over not only important historical developments, but also its anti-climactic resolution.

The Lüneberg Saltworks was a large-scale salt mining operation at a location used by humans since prehistoric times; by some estimates, in the 13th century, the industrial operation was capable of producing over 300,000 tons of salt a year.[1106] The Lüneberg Saltworks were originally owned by the dukes of Welf; the feudal authority of the dukes over the saltworks was purchased by wealthy individuals in the early 13th century, which was in turn secured by their purchase of the right to elect the 'Saltmaster' (*Sodmeister*) in 1228. Various financial difficulties for the dukes led them to mortgage or sell their ownership stakes[1107] in the saltworks by the end of the 13th century. As they were no longer engaged in the company, the dukes could only extract value from the saltworks through politically imposed customs duties.[1108] Hergemöller writes, 'By the end of the 14th century, the Lüneberg saltmasters and various salt prelates had largely displaced the territorial and noble rights and rents.'[1109]According to Verdenhalven, in 1370, half of the 216 pans were owned by religious institutions, while the other half were owned by secular owners. Of particular note were the 108 owned by roughly sixty citizens or bourgeois families because the ownership of the rents of these pans were predominantly in the hands of monasteries and churches.[1110] Hergemöller observed then that by 1474, the ownership of rents by higher clergy was roughly 80%, they had also newly acquired 50 of the remaining saltpans, resulting in ecclesiastical ownership of 75% of the total number of saltpans.

This, then, was the structural context for the brewing conflict between the ecclesiastical and secular hands over the Lüneberg Saltworks in the mid-15th century.[1111] The first sign of conflict

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[1105] Bernd-Ulrich Hergemöller, *Pfaffenkriege im Spätmittelalterlichen Hanseraum,* Vol. I. (Böhlau 1988).

[1106] 600,000-700,000 *zentner* ('hundred units'), converted to US tons. [Verdenhalven 1951, S. 5].

[1107] There were three kinds of relevant ownership or usufructuary rights in this context. (1) Pan ownership (*Pfannenherschaft* [*dominium*], (2) Permanent income in the form of *Chorus* or *Wispelgut,* and (3) Simple rent. Hergemöller writes, '*Pfaffenherschaft* is the ownership right to a salt pan and the authority over a Saltmaster; these owners were mostly external prelates, while the Saltmasters were council members of Lüneburg.' Hergemöller, p. 113.

[1108] Hergemöller. p. 112.

[1109] Hergemöller, p. 113.

[1110] Hergemöller, p. 113.

[1111] A lot happens before the 'war' breaks out. In the late 14th century, there are treaties signed between the estates and territorial lords in 1392, which are reflected in the city's urban statutes. The city took on pledges from the dukes, and offered pawn letters in exchange. The prelates complained of losses. Pope Boniface IX intervened and argued that salt-rich nobleman were obliged to help debt repayment. With a climbing debt, the city struggled to obtain privilege from the dukes to pass the burden of the debt onto the wealthy rather than the people of the city. Competition from Saxon and Baie salt then threatened the monopoly of Lüneberg salt, which triggered protective measures to ban the export of salt that wasn't from Lüneberg by King Sigismund in 1417. In the 1420s and 1430s, regional instability and

relevant for our purposes is a letter from Pope Martin V (r. 1417-1431) from March 23, 1418. Martin was a lawyer, trained at the University of Pavia. He wrote to the Archdeacon of Modestorpe to stress that the distribution of salt revenues must be carried out fairly, in such a way that the funds for the city's protection should be paid *from* the revenues, without endangering the rights of the ecclesiastical owners and the payment of Church tithes. Hergemöller writes that 'This privilege clearly differentiated between two groups of prelates, one part being the *maior et sanior pars* of the religious persons who were willing to agree to the city's position regarding the revenues from the salt works, while another part was driven 'by blind greed and disrupting the community peace', who refused to contribute their proportional share of revenues from the saltworks.'[1112] Further financial pressure led the city to redraw its agreements in 1421, 1424, 1430, and 1431. The 1431 agreement imposed an annual payment of the 'fourth penny' on salt sales for the clergy for 10 years to help repay the public debt—a debt which only continued to rise.[1113] By 1446, this tax would no longer be sufficient to cover the interest on the city's debts.[1114]

It didn't help that the city continued to incur *new* debts, in this case, specifically to repair and construct city walls. In 1454, financial reports stress that the construction of the city walls of the previous decades had cost no less than 370,000 marks. While the historical cause of increased fortification is disputed in chronicles from the 1430s and 1440s, what matters is the consequence: Döring wrote, 'due to the looming threat of war, the city had to be fortified and strengthened in great haste and urgency and all its locks had to be improved and maintained with many soldiers'.[1115] Hergemöller notes that these city walls were also protection of capital: 'these fortifications naturally served to protect the saltworks and thus secure the material income of the prelates, and so the Lüneberg councilors felt compelled to once again request assistance from the salt prelates.'[1116] This compounded the dire financial circumstances of the city, and pushed the city to the brink of bankruptcy. The solutions for getting the city out of its predicament were divided along ecclesiastical and secular lines. Failed negotiations would continue from 1447 to 1449, and at issue was the precise amount of the debt (over 600,000 marks); the clergy offered a one-time payment of 100,000 marks on the condition that the city (or its wealthy traders) would match. The traders refused.[1117] The clergy went on strike, refusing any further contributions, and gained Papal support in 1449.

Here, all lines of expected hierarchy and power break down. The city requested for the Holy See to help annul previous agreements and treaties. In 1450, these efforts were successful, and the Curia ruled that payments to clergy should cease, and focus be made to debt reduction. (However, two Lübeck cathedral canons drug their feet.) The Duke Adolf of Schleswig and the Bishop of Lübeck took charge of the negotiations, without avail. Bishop Johann III of Verden

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tensions between secular and religious rulers created conflicts between secular authorities and the Archbishop of Hamburg-Bremen. Cities, including Lüneberg, spent excessive money in supporting Abbot Boldewan van Wdnedn for the Bishopric. The summary is this: life in politically, feudally, and ecclesiastically entangled Europe was expensive for corporate bodies.

[1112] Hergemöller, p. 120.

[1113] Hergemöller, pp. 120-124.

[1114] Hergemöller, p. 127.

[1115] Hergemöller, p. 124.

[1116] Hergemöller, p. 124. The final piece of the contextual puzzle was that in 1441, Diderik Schaper was elected as provost of Lüne. Hergemöller writes that Schaper gathered 'a circle of like-minded individuals, plotting measures against the city. These were the 'Garden Knights', consisting of clergy, members of the lower nobility, and dissenting citizens. In soucres favorable to the council, Schaper is also depicted as a corrupt cleric who as the supervisor of the pious nuns of Lüne, allegedly embezzled more than 16,000 guilders.' Hergemöller, p. 125.

[1117] Hergemöller, p. 128.

proposed an alternative, in which the prelates would pay taxes valued at 61 cents on the dollar. Ecclesiastical persons quickly objected that they would not only be losing money on their salt but would have to dig into reserves just to pay the tax. The city turned to political machinations, forcing a former provost to escape the Benedictine Monastery he was taking shelter in while hiding in a manure cart. The city was, as it was, caught between secular and ecclesiastical authorities, neither of whom were necessarily looking out in their best interests.

Over the next twenty years, the dispute between the city, the clergy, the papacy, and various regional powers would attract the interest of Nicholas of Cusa and lead to a chain of ambushes and arrests, imprisonments, house-arrests[1118] and executions; the Pope would excommunicate the city council multiple times, demanding new elections, while putting the city under an interdict at least twice. Citizens marched on the town in 1454 and demanded as their first request the surrender of all of the city keys, the physical and symbolic means of control and governance. When the council hesitated and suggested that negotiations should take place first, the situation began to escalate towards violence. One of the Sixty, the representatives of the citizen body against the council, cried out, "Such talk, such talk—we want to have [the keys]."[1119] The council members capitulated, and handed over the keys to the city gates. Two days later, they turned over the keys to the towers and the moats. But the new representatives could not escape accusations of mismanagement and corruption and they too were removed from office in 1457. Two final episodes are worth noting, both in response to a new treaty signed by the city to confiscate ecclesiastical salt properties.

First, the clergy issued a Reprisal Bull against the city of Lüneberg, a common tool[1120] which authorized almost anybody—cities, territorial lords, lower nobility, and others—to harm or

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[1118] The notion of house arrest, and the power of citizenry to enforce house arrest against city officials, is a fascinating aspect of this episode. Facing imperial excommunication in 1456, A new opposition group had formed against the Sixty, made up of 'pious people' who Hergemöller suggests were especially annoyed at the financial and property windfalls of the new councilmembers. This 'pious' crowd, Hergemöller writes, was convinced 'that the imperial punishments hung over the municipality like a sword of Damocles'—the Lübeck canons had forbidden them from giving their consent, which they otherwise would have given. This party also demanded restitution of the goods which had been confiscated from the old council. Most important, however, was that the custody of the keys of the city and the towers to be handed over to *them.* One of their demands was the fulfillment of 'a papal bull declaring everyone worthy of holding a council position, regardless of their own, wendish or illegitimate birth'. Hergemöller writes:

> In the following days, the careful, targeted, and energetic restitution of the old council was completed. On November 18, 1456, citizens and residents gathered at the churchyard or the Franciscan monastery of Our Dear lady and, once they reached the number of sixty, they marched to the marketplace. There, their numbers quickly grew to 2,000. Led by Ludeke Möller, they once again demanded the keys and all the letters that the new council had requested and received from the old council. When these were handed over, the seals were cut off to invalidate them legally. On the feast day of St. Elizabeth, November 19, Duke Bernd ... accompanied by numerous citizens and the old council, went to the town hall and addressed the assembled new council members.
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> 'Rise, you who are called the council of Lüneberg, and surrender the council seats! You no longer serve the citizens as a council! You have not acted on their best interest! Therefore, you shall go into your houses and not leave, except by the will of the citizens! Furthermore, the citizens want to choose another council, which our gracious lord, who leads them, shall confirm!' Hergemöller, p. 161-162.

[1119] Hergemöller, pp. 145-146.

[1120] Fedele, *The Medieval Foundations of International Law,* pp. 441-589; Jacob Giltaij, "Roman law and the *causa legitima* for reprisal in Bartolus", *Fundamina (Pretoria)* Vol. 20, n. 1. Jan. 2014; Lesaffer, Randall. "Grotius on Reprisal". *Grotiana* 41.2 (2020): 330-348; Van den Brande, Philippine Christina. "'Remedium repraesaliarum': The Medieval and Early Modern Practice and Theory of Reprisal within the Just War Doctrine." *Grotiana* 41.2 (2020): 305-329.

cease trade with Lüneberg's merchants, licensing ambush, robbery, and even murder.[1121] Second, in October of 1458, the city conducted a trial against Olrik Schaper and Johann Dalenborg (former officials); they were executed. Hergemöller writes, 'It can be presumed that the council's aim in these executions was not so much retribution and punishment but rather deterrence and integration effects that seemed necessary given the current situation. Both delinquents were buried near the Gertrudenspital in unconsecrated ground by a stone where the "*kacke herlöpt*" (where the sewage flows).'[1122]

After an ultimate compromise was reached in 1462 (though other aspects of the conflict would continue through 1471 when Emperor Frederick III lifted his imperial ban and decree of confiscation), this last injustice would have to be remedied. As was often the case, true reconciliation needed physical and ceremonial signs to be constructed and performed in the city. Johan Springintgud's brother organized for his remains to be transferred from the grounds of Michaelishof to St. John's, and pushed for a reconciliation chapel to be built in 1463—the tower where Springintgud had died also came to be known as 'Springintgud'. The old council member and Saltmaster Johann vom Lo built a chapel in 1466 dedicated to the local patron saint Marianus. Hergemöller writes that Reinecke has suggested that this was a 'concession by the Saltmaster to his *Pfannenherren.'* Hergemöller continues, 'in addition to these rational-functional interpretations, it should be added that the chapel of the holy martyr primarily had symbolic value: as a foundation and memorial of the restored peace between God and the world, the saints and believers, between the clergy and the laity.[1123]

Complex episodes like these are striking because it stresses the integration of swaths of ecclesiastical and civil law into almost genuinely unresolvable conflict. Where a city was on the verge of bankruptcy, the clergy and the Church had little choice but to negotiate about the degree of their contribution, not deny their obligation to help make payments towards the city's debts. They did however fiercely defend what they took to be overt attempts to seize ecclesiastical property, or efforts to dip repeatedly into ecclesiastical property and finances when the problem was not yet solved. But even the canon and civil legal requirements of consultation with Bishops and Popes provided no support here: the long journeys to Rome, civil unrest, and disputes between canon lawyers themselves meant that the center of conflict remained the streets and council halls in Lüneberg. Great jurists and authorities like Nicholas of Cusa could not end conflict with their opinions—nor could the production of charters, the drawing of new treaties, or repeated pronouncements of documented rights and liberties.

The intricate details of the case above also stress the durability of Roman legal and theological symbolism. For the citizens above, their repeated demands for the keys to the gates and the city walls were perhaps first and foremost, or even only, a practical concern. However likely or unlikely it is that they perceived any deeper significance to the keys, it could not have

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[1121] Hergemöller, p. 174. It's also underappreciated in the theoretical significance of the Pope's authority that this authority still had to be *communicated*—all of the episodes above were met with skepticism, doubts about forgeries, doubts about the intention, and even doubts about whether the Pope was being actively deceived by those around him. When the Pope wrote that the councilors were released from their oaths, it still takes a messenger and then an announcement of this release, and then the audience might still not believe it. And actual forgeries and backdating *happened*—the example given by Hergemöller is that a bull dated March 21, 1458 by Pope Pius II said that the reprisal bull should be disregarded for seven years, but Pope Pius II wouldn't have taken office until August 19, 1458.

[1122] Hergemöller, p. 180.

[1123] Hergemöller, p. 190. The founding of the Theoridic Guild 'was more about the manifestation and proclamation of regained power and authority'—'he was one of the most popular knight patrons and thus corresponded to the restored council's newfound self-perception. The process of reinstatement had begun on his feast day.'

escaped the attention of jurists. Nicholas Boherii (1469-1539) had written a treatise about the keys to the city gates, in which keys were symbols of sovereignty and jurisdiction.[1124] It was also about contracts—the *traditio clavium,* the indication of a property transfer where immovable property contained movable property.[1125] But both aspects were inextricable from the ultimate delivery of the keys—that of Christ to Peter. Popular movements in and outside of the context of *Pfaffenkriege* demanded the keys to the city walls and gates—control over the 'sacred' or the 'holy', but practical authority over the boundaries of the community.

*Thomas Sanchez: "Full-QOT"*

Thomas Sanchez gave a detailed analysis of the limits of ecclesiastical immunity which ties this whole chapter together.[1126] The specific legal question he asked was 'whether ecclesiastical persons should be held liable for the imposed tax in matters concerning the common benefit of the laity and the clergy and are pious, such as for the construction and repair of bridges, roads, walls, roads, or fountains and the protection of towns from enemies, plagues, and others.'[1127] Sanchez wrote that there were several fundamental principles (*fundamenta*) that were agreed to by all. First, ecclesiastical persons are immune in terms of their persons and all of their goods that are not used for trade; they are exempt from any secular jurisdiction (*iurisdictione saeculari*) and so any taxes, tolls or impositions against the clergy ought to result in excommunication for those attempting to infringe on ecclesiastical liberties. Second, he recognized that the immunity of clergy from tolls (*gabellis*) was a human law, and no secular Prince, no matter how superior (*quantumvis summus*), can derogate from this exemption or immunity by his own laws or authority. Therefore, 'any laws imposing tributes on the clergy cannot bind them (*non ligabunt*).' Only the Pope could change this law or make exceptions to it. He cited a long train of jurists, and many Spanish jurists, confirming this limitation on 'secular' authority.[1128] The corollary principle was that any law which was prejudicial to the Church could not oblige them (*non obligare*) unless it was explicitly approved by the Pope 'for it is a tyranny (*tyrannidem*) to demand taxes from clerics without permission of the Pope.'[1129] Any privileges borne by the clergy extended to their property and thus their property enjoyed the same protections.[1130] But notice an immediate exception drawn directly from the *Siete Partidas: '*But there are certain things which you, by your own good will, exempt the Church, which the clergy cannot avoid, such as in the case of bridges.'[1131]The third foundation was that jurists wrote about the utility of the Church (*utilitatem Ecclesiae*) in two ways:

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[1124] Boherii, *Tractatus de Custodia Clavium Portarum Civitatum,* n. 76.
[1125] William M. Gordon, *Studies in the Transfer of Property by Traditio* (University of Aberdeen, 1970); Boaz Cohen, "*Traditio clavium* in Jewish and Roman Law", in Cohen, *Jewish and Roman Law: A Comparative Study,* Vol. 2 (Gorgias Press, 2018). cf. Isaiah 22:22.
[1126] Thomas Sanchez, *Consiliorum Moralium,* Lib. II, Cap. IV, Dub. LV, pp. 386-390.
[1127] Sanchez, Dub. LV, titled 'Do Ecclesiastical persons have the obligation to pay a tax imposed on those things which pertain to the common benefit of laypeople and Clerics, and are also pious, such as for the construction and repair of bridges, roads, walls, the road, fountains, or for the purpose of watching over and protecting towns from enemies, plagues, and so on?'
[1128] 'Thus holds' Covarrius, Bellarminus, Ledesmus, Blasius Navarrus, Gregory Lopez, Guttierez, Otalora, Perez, Rebuffis, Calderinus, Decius, Antonius, Joannes Andrea, and Panormitanus.
[1129] Sanchez, Dub. LV, n. 21.
[1130] Sanchez, Dub. LV, n. 2.
[1131] "Pero algunas cosas ay, en que tu vo por bien lasan ta Iglesia, que no se pudiessen escusar los clerigos, assi como en puentes."

> The first way is proximately and directly, such as when someone devastates a field in which the Church has possessions and a contribution is imposed [from the Church] to expel them. The second way is remotely and indirectly, and through a certain consequence, as in the repair of walls, roads, city fountains and so on.[1132]

But Sanchez was unsatisfied with this distinction. Instead, he redrew these lines to add a third way:

> The first way [to talk about the utility of the Church] is proximately and directly, such as when some laypersons or clergy devastate properties and it is necessary to send someone to guard the properties or to repair the road in front of the Church or to clean the necessary well for the whole neighborhoods where the Church is located. The second way is most remotely (*remotissime*), because it yields to the public utility (*publicam utilitatem*) and the common good of the entire kingdom (*commune bonum totius regni*), and since the clergy are a part of the kingdom, it consequently yields to their utility. The third way is a middle manner, neither most remotely nor most directly, but remotely and indirectly, such as for the repair of walls or bridges of this city or for the protection of this city, in which the clergy are inhabitants.[1133]

Along these lines, then, it was widely accepted that the clergy were not obliged for things that were for the 'utility of the Church' in the second way—abstractly, or most remotely. The Church needed to be less peripheral for their inclusion to trigger obligations of 'utility' or 'benefit'. The reason, Sanchez wrote, 'was that every tax [in this sense] would necessarily be for the public utility, otherwise it would be for *private* utility, and would be unjust.' If the clergy were obligated to pay every tax, their clear and attested immunity would be meaningless.[1134]

But clergy were almost unilaterally obligated to contribute to things that were for the 'utility of the church' in the first sense—directly and immediately—because 'it pertains to the private utility of the Church and the clergy since it touches them so closely (*ita proxime tangat*). This was Sanchez' attempt to summarize the rulings of Bartolus, Paulus de Castro, and many others,[1135] as well as give theoretical grounding to the Roman law principles discussed above. In such cases, as when the road in front of the Church needs repair, Sanchez clarified that 'it is not necessary to consider whether there are town revenues or not'; the reason was that 'town revenues, being destined for the common utility (*communis utilitatis*) shouldn't be used for endeavors that were first and foremost "private"—that is, closest in proximity and almost exclusive to the property next to the road. In such cases, then, it also couldn't be necessary to seek the Pope's consent, because this case didn't treat 'public utility', but rather, the 'private utility' of the clergy. Sanchez noted that these had implied to some jurists that secular courts could therefore compel clergy to contribute in such cases.[1136] Sanchez disagreed, relying on the jurists above who conceded an obligation, but required an ecclesiastical authority to enforce it. Sanchez's final argument for this kind of utility was:

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[1132] Sanchez, Dub. LV, n. 3.
[1133] Sanchez, Dub. LV, n. 3.
[1134] Sanchez, Dub. LV, n. 4.
[1135] Sanchez, Dub. LV, n. 5.
[1136] Sanchez, Dub. LV, n. 8.

> what clerics are required to contribute in this case should be approved by everyone, not just by the laity, because what affects everyone must be approved by everyone (*quod omnes tangit ab omnibus approbandum est*).[1137]

Sanchez had therefore settled two of the three cases dealing with public utility. All that remained was the middle case: neither proximate nor remote, such as in the case of bridges, roads, and walls that were not on or attached to ecclesiastical property.

Following precedent, there were four familiar questions: were clergy obligated to provide for it, whether consent of the Pope was necessary, could a secular judge compel them to provide, and fourth, how this kind of utility might be mistaken for or blur with the others, namely, the remote utility which concerns the entire kingdom.

For this third way, Sanchez wrote that there were two threads of argumentation. The first thread was that most jurists agreed that the Church was not obligated to provide for roads, walls, or bridges, drawing on the canon law at X. 3.49.04. This law treated the construction of ditches for the defense of the city, which included the clergy and the laity; this did not absolutely forbid their contributions, but rather forbid them under excommunication 'unless the Bishop and the clergy have perceived such great necessity or benefit that without any hesitation they should consider providing assistance through the churches for the revelation of common necessities or benefits, where the resources of the laity are not sufficient.' The laity—the non-clergy—ought in such cases receive these 'with humility and devotion and with gratitude', but not assume that they were obligatory. They should treat them as voluntary because the text said 'without coercion', leaving it to the will of the clergy, and it orders the laity to 'give thanks as if it had been given freely'.[1138]

The second thread held that the Church was obliged according to natural law first—that he who enjoys the benefits should suffer the losses, and the clergy benefit from bridges, walls, and roads, just like the laity. And, several civil, canon, and in Sanchez's case, Spanish laws (drawing on Roman civil law), made it clear that the clergy could be bound. "*Ad Instructionem*" was just one case. The Spanish laws quoted by Sanchez read as follows:

> In the bridges that places newly build, where they are necessary for the common good of all, and in maintaining those that have been built, so that they are not lost, and in the roads of the major highways and other communal routes, the clergy are obligated to assist the laity and pay their share, just like the other lay residents.[1139]

> If in cities or towns it is necessary to build roads, bridges, walls, and if there are separate funds for the common good, they must be spent first, and if they are not sufficient, or if there is no common fund, the residents must contribute, and the clergy cannot avoid this, because since the benefit of these works belongs to everyone in common, it is right for everyone to contribute.[1140]

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[1137] Sanchez, Dub. LV, n. 10.

[1138] Sanchez, Dub. LV, n. 12.

[1139] *Siete Partidas* 1.6.54, "En las puentes que nuevamente facen los lugares, do son menester puera pro comun al de todos, y en guardar las que son fechas, como se mantengan e no se perdian, y en las calzadas de los grandes caminos y de las otras carreras que son comunales, son tenidos los clerigos de acudir a los legos, e da pagar cada uno dellos, assi como los otros vezinos legos." As transcribed and cited by Sanchez, Dub. LV, n. 13.

[1140] *Siete Partidas,* 3.32.20, "Si en las ciudades, o villas han menester hazer calzada, puente, muros, si han rentas apartadas de comun, deven de ser primeramente despendidas, y sine cumplieren, o no vuiese alguna cosa comuna,

> In the taxes that are for the common good of all, such as the repair of walls, roads, highways, bridges, fountains, the purchase of boundaries, or expenses incurred to watch over and protect the town and its boundaries in times of need, in these matters, when the council's own funds are insufficient, the clergy must contribute, because it is for the common good of all and an act of piety.[1141]

These drew heavily from Roman civil law principles, in which the Church was a part of the administrative and communal aspect of the empire, including this last pivot to 'piety'. The canon law offered no direct critique of these positions. The interpretive principle then, that the civil law was binding in the absence of canon laws, should apply (the interesting corollary, stated more strongly here by Sanchez than others, was that all civil laws which did not contradict canon law should be explicitly approved by the Church).

For Sanchez, the question turned on coercion—specifically, coercion of lay judges over ecclesiastical persons. If there was no coercive power for the lay judge to compel the payment from ecclesiastical persons or clergy, than no ecclesiastical liberty was violated by the broader argument that the church was still obliged to pay, but with the certification of ecclesiastical judges. When the question was left 'to the discretion' of the clergy, Sanchez wrote, 'it is not understood as free will but as judgment and reason governed by rules'. The exception of the canon law, then, that 'unless the Bishop and the clergy believe that aid should be given through the churches' did not refer to their pleasure of their will, but to their judgment as regulated by a good man's reason.[1142] That is, 'if it is merited, it is owed'. This means that the obligation was a thick obligation—the Bishop, as a 'good man', was not generating the obligation through their judgment; he was recognizing his and the Church's standing obligation and choosing to enforce it.

Nowhere was this clearer than in the familiar case of necessity—where clergy were obligated by the canon law to guard the walls of the city. Sanchez presented a handful of different interpretations of this text. First, one might imagine that it only applied to cities that were under the temporal dominion of the Church, such as the city of Terracina. That is, the clergy's obligation stemmed from a *temporal* principle of self-defense, through the Church's *temporal* jurisdiction in the city. Second, one might imagine that it only applied in cases where Christian cities were invaded by Islamic armies (Saracens), 'who frequently attacked due to their proximity to the borders.' Third, it might not refer to the clergy specifically, but rather to the 'servants, peasants, and similar individuals were not generally subjected to forced labor'. But these had all been rejected by the great canon lawyer Panormitanus, who argued that 'the true and common interpretation was based on the extreme necessity that the city cannot be protected from invasion without the clergy, and therefore the clergy are bound to contribute'.[1143]

There might be host of limitations, most already mentioned—whether the walls were ornamental or necessary, whether they were frequently traveled or obscure, whether the Church possessed assets at all (as the Franciscans famously didn't), or whether the laity had sufficient

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deven los moradores pechar et cetera, y desto no se pueden escusar los clerigos, que pues la pro destas labores pertenece comunmente a todos, derecho es, que todos ayuden." As transcribed and cited by Sanchez, Dub. LV, n. 13.

[1141] *Siete Partidas,* 1.3.11, "En los pechos, que son para bien comun de todos como para reparo de muros, o de calzada, o de carrea, o de puente, o de fuente, o de compra de termino, o de costo, que se haga para velar, y guardar la villa, y su termino en tiempo de menester, en estas cosas tales a fallecimiento de propios del concejo, deben contribuir los clerigos, porquanto es pro comun de todos y obra de piedad.' As transcribed and cited by Sanchez, Dub. LV, n. 13.

[1142] Sanchez, Dub. LV, n. 13.

[1143] Panormitanus at X.3.49.2.

funds on their own. Sanchez pointed out that Azevedo had argued that if the clergy had income from the town for something, they could be obligated. The sufficiency limitation was the first to go—'these contributions, being for the common good of both the laity and the clergy' meant that 'all should contribute'.[1144] Again, the obligation to step in and provide a service that benefitted the community was not a question: the question was whether they could be compelled, and by whom. Sanchez phrased it even stronger—the principle was that clergy could not be compelled (*cogi)* to sell their possessions, but 'due to common necessity and the public good (*communem necessitatem et publicum bonum*), this principle fails'. In times of necessity and public grain shortages, churches were obligated (*tenentur*) to bring any surplus wheat to be sold in the marketplace. In the grain crisis of 1558, Sanchez notes that the jurists approved of a policy to do just that even though it 'harmed the Church' (*licet ipsis damnum inferat propter publicum bonum*). This extended to all property of the Church, and jurists from Bartolus to Azebedo and Gregory Lopez had held that clergy are obliged to send their property along with ships to transport provisions and necessities for the republic; while this didn't come from the canon law, it was nevertheless binding 'when there is a great and urgent necessity for the republic due to the public good' (*magna et urgens reipublicae necessitas ob bonum publicum*).[1145]

That they were obligated was therefore a settled question. But what about the permission of the Pope and whether their obligation is voluntary or compulsory?[1146] One thread of argument stated that the permission of the Pope wasn't strictly necessary. As Sanchez reads it, the canon law requirement to consult the Pope was for *new* measures that were imposed directly on clergy—that is where 'imprudence' can occur. But Sanchez seemed to think that if the question was rather a request, being made for the Church to contribute alongside the rest, in matters that directly concern the common good and from which they derive no less benefit than the laity, then it would be inappropriate to presume that they were acting against 'law and natural reason'. While striking, this was not necessarily a grand departure from canon lawyers—Hostiensis had written that when the Emperor or King imposed burdens directly on the Churches, that it would be unlikely that the Pope should want to derogate from those orders. In other words, Hostiensis, and others, presumed a certain degree of harmony between the Church and the 'secular' authorities, especially on matters of the common or public good.[1147]

A stronger view held that it was strictly necessary to consult the Pope as Balbus and others had written. This view could even run counter to delegated authority; that is, a Bishop might be understood to be obligated to consult the Pope before they could offer compensation or permission to the laity. The problem was that this strict requirement fell apart under the scrutiny of necessity: jurists, including the hard-fast canonists, agreed that 'in cases of imminent necessity, where consultation with the Pope is not possible without scandal and danger to others, the deliberation of the bishop and clergy would be sufficient: the reason for this is that *necessity has no law*.'[1148]

If the obligation was real, and the permission of the Pope was not strictly necessary (but widely encouraged), the question of compulsion was next—could the church or ecclesiastical

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[1144] Sanchez, Dub. LV, n. 20, which reads in part: 'It is first inferred that if laypeople are obliged to contribute to a tax or any other toll for the repair of roads or similar things, that the clerics are also obligated to contribute. The reason is that such a toll is substituted in place of the aforementioned burdens to which the clerics are obligated [the burden to physically repair the road], and the collected amount imposed for certain burdens is regulated according to the natural burdens it replaces.'

[1145] Sanchez, Dub. LV, n. 24.

[1146] Sanchez, Dub. LV, n. 25.

[1147] Sanchez, Dub. LV, n. 26.

[1148] Sanchez, Dub. LV, n. 28.

persons be compelled to contribute by a 'secular' judge? Again, there were two opposing threads. In Roman civil and Spanish civil law, it was easier to maintain that the 'secular' judge could compel clergy, but it was always done through exception: 'We command that no judge or lord shall coerce clerics, churches, or monasteries to pay or contribute, except in those cases provided by the law...'[1149] There, the exception was in cases of bridges. But in the canon law, some jurists had recognized that clergy could be summoned before laity regarding 'real burdens that directly concern the matter itself'—that is, not being summoned as an ecclesiastical person *because* they are an ecclesiastical person (and regarding an ecclesiastical matter), but rather being summoned because that possess temporal goods in that town: the "subject" being drawn into the lay court was the property of the clergy first, and the person of the clergy only incidentally.[1150] For theologians, this outlined the stakes for the plight of the Dominicans and Franciscans who were deeply concerned about worldly property and its consequences; the Gospels, too, recognized that the possession of property made 'rendering unto Caesar' a possibility, and the more property 'in the world' that the Church possessed the more likely it was that it could be drawn into the courts 'of the world'. Ecclesiastical immunities, strongly presented, could keep these forces at arm length, but that was all.

This then was the justification that clergy engaged in business should pay taxes, and could be compelled by a 'secular' judge to pay because the 'secular' judge was therefore 'seizing the property' of the clergy and not touching the person. Furthermore, a 'secular' judge could make the decision about whether the clergy was engaged in business. (Once again, for the theologically minded scholar, this was all the more reason to discourage clergy from engaging in business activities.) Balbus had written that even according to the letter of the canon law, ecclesiastical persons could not be compelled to pay taxes by a secular judge, 'usual observance' ran to the contrary—'the express and manifest tolerance of the Pope and the universal Church, because lay officials execute the collection of contributions from clerics through their goods and the fruits of their benefices, and this is considered a tacit dispensation to do so when the tolerance of the Pope and the Church concurs.'[1151] Another Spanish jurist named Olanus wrote that 'received practice' was that clergy were 'summoned by a secular judge and compelled to make the said contribution'.[1152] The Spanish jurist Quesada argued that laypersons have jurisdiction over the Church (*iurisdictionem in Ecclesiam*) when a tax like the above is demanded from the Church.[1153] Spanish jurist Aviles argued that if an ecclesiastical judge refused to comply with the demand, then a secular judge (or the King) could step in and compel them.[1154] In France, Rebuffi cited numerous cases where clergy were 'coerced' by the Royal Senate of Paris; 'the judgment of the royal judge is enforceable, whether the judge condemns someone to carry out repairs or provide money for the repairs. (In France, this was less controversial—the privilege of Boniface VIII

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[1149] *Siete Partidas,* 1.3.3: "Mandamos que ningun juez, ni señor no apremie clerigos, iglesias, ni monasterios, que pechen, xi contribuyan et cetera, salvo en aquellos casos, que se contienen en la ley deste titulo, que comienza, Exemptos, que es la ley 11." As transcribed and cited by Sanchez, Dub. LV, n. 30.

[1150] Sanchez, Dub. LV, n. 30.

[1151] Balbus, *Consilia,* Decis. 68, n. 39.

[1152] Juan Martínez de Olano, *Concordia et Nova Reductio Iuris Communis* [Burgis 1575], at 'C', ns. 38-39, pp. 59-60.

[1153] Antonio de Quesada, *Diversarum Quaestionum Iuris Liber* [Salmanticae 1573], Cap. 14, ns. 14-15, pp. 50-56.

[1154] Francisco de Aviles, Cap. 23, esp. gloss at 'Den orden', fols. 213v-216v. At n. 11, Aviles writes, 'But if a bishop refuses to order the clerics to contribute in such cases, I would say that the matter should be brought before the king, so that the king himself can command the Bishop to order his clerics to contribute in such matters. And if the Bishop still refuses to comply, the King should take action against him, since the Bishop is subordinate to the king (*sub rege est*).

allowed the king to compel the clergy to make contributions.)[1155] On France, Guillelmus Benedictus and Mexia stated that a layperson can compel the clergy 'either when there is urgency or when the ecclesiastical judge, when requested, neglects or unduly delays the matter, considering that we see ecclesiastical judges being rebellious (*rebelles*) in such cases and excessively remiss.'[1156]

The alternative was that a secular judge had no authority or jurisdiction over ecclesiastical persons, and so the clergy in question should be summoned before an ecclesiastical judge; this of course was the hard line position of canon law, and as annually repeated in the Bulla Coenae. Sanchez still maintained that the laity could make requests 'humbly' and 'without coercion or exaction', and that the ecclesiastical judges and persons should respond voluntarily. The analogy was geographical—'just as a judge from Granada cannot seize the property of a resident of Cordoba for a debt, because the former does not have jurisdiction over the latter's court and the property is ancillary to the person, similarly, a cleric is not subject to the forum and jurisdiction of the laity.'[1157] Ecclesiastical authority was also the higher value:

> to desire a secular judge to deprive clerics of their exemption and compel them to contribute, and to want to determine this matter, which is purely ecclesiastical, concerning ecclesiastical persons and ecclesiastical exemption, by one's own authority, by compelling clerics, is clearly unjust, especially since in ambiguous religious matters, the highest reason is that which favors religion...[1158]

This stronger position even included examples where the cleric was engaged in business—they were still obligated to pay their tax as laypeople would be, but their can't be compelled by the same judge as the layperson. Sanchez wrote, 'although clerics are sometimes obligated to comply with civil laws, they can be compelled to do so not by secular judges, but by the ecclesiastical judge'. Again, this was limited by necessity:

> Note that where there is a great risk of delay and the ecclesiastical judge, when requested, refuses or delays more than necessary, the goods of the clerics could be seized by the authority of the lay judge for a proportional share of the burdens, because the king has the right to protect the kingdom even against ecclesiastics when the ecclesiastical judge refuses and there is a risk of delay.[1159]

The final remaining part of the question was then how to adjudicate cases where it seemed that something benefited the clergy in the second way—remotely—because it treats the utility and necessity of the entire kingdom. Sanchez was finally ready to come to a conclusion:

> If the king were to have urgent common necessities, both for the clerics and the laity, such as in times of war, and the goods of the laity were insufficient to provide the necessary remedy, then the clerics would be obligated to contribute to such

[1155] Sanchez, Dub. LV, n. 30.
[1156] Sanchez, Dub. LV, n. 30.
[1157] Sanchez, Dub. LV, n. 31. The territorial imagery implies that a church is in a sufficiently different geographical imaginary space than the rest of the city around them. For more on this complicated conception, see the next chapter.
[1158] Sanchez, Dub. LV, n. 31.
[1159] Sanchez, Dub. LV, n. 33.

> necessities. ... no one should have immunity during a time of expedition, even if it is a royal house or a sacred Church, which are not corrected by canon law but rather assisted. Also, because natural reason dictates that everyone should help the Prince in that necessity for the common good. ... Therefore, we can give the general doctrine that when the general benefit of the laity and the clerics is discussed, the clerics are obligated.[1160]

Ecclesiastical immunities or privileges were naturally waived during imminent necessity—going back to Baldus, 'public utility must be preferred to any privilege, and because a general grant of immunity does not exclude a case of contrary public utility.' The Pope's permission was still required (or, in extreme emergency, a deliberation of the Bishop and the clergy). Sanchez invoked a case involving Granada. The King had requested the city of Granada to contribute a sum of money to

> defend the Indian fleets against the heretics who were threatening those parts, just as the rest of the Kingdom was contributing; the city of Granada agreed, but on the condition that the king would grant the city the authority to decide on the means by which the sum was to be contributed, and that no one, whether noble or cleric, would be exempt from the contribution, and if necessity, the permission of the Pope would be obtained. The King agreed, and without any permission from the Pope, the city made its decision, such that the heads of rams, which were previously given by the order of the command of the city itself to the poor for half a silver coin, were now sold at the price of three silver coins, and this excess price was applied to the contribution.[1161]

Once again, the Church's strict obligations to provide taxes came equally from their membership in the community such that they were 'touched' equally by crises, from responding to plagues to the 'heretical' rising nations around it.

*Conclusion*

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[1160] Sanchez, Dub. LV, n. 35.

[1161] Sanchez, Dub. LV, n. 37-40. The city also decided that from the price of each ram sold in the market, two silver coins would be paid as tax—whether the seller was a layperson or cleric. The clergy questioned whether they were also bound to pay the tax, but also objected on economic grounds that the laity were selling their rams at a higher price in account of the tax (and so if the clergy were *purchasing* the ram, they were subject to the burden of a higher price. The city's response was that the market in Granada for Rams and their entrails was high *before* the tax as a privilege and favor—they were sold at much lower prices elsewhere. Therefore, the city was now 'yielding to its right and establishing a good way of governance'. Sanchez's opinion on the case was that burden on the clergy in this was unjust; the laity seemed to be able to bear the tax themselves, and at the very least the Bishop and clergy should have been given the opportunity to deliberate and offer their consent. The city did not make a formal request to the ecclesiastical court for them to make the payment, but tried to jump to compulsion; furthermore, the dispute about the immunity had not been taken (as appropriate) before an ecclesiastical judge. But in the case of the ram, Sanchez argued that this did not violate the privileges of the clergy, 'even though it results in the clergy purchasing the rams at a higher price; it is not proven to be an unjust tax simply because the clergy are indirectly burdened'. Surely, if the 'tax is imposed with the intention of harming and extorting money from the clergy that cannot be extorted in any other way, it is unlawful; but if the tax is not imposed with such intent, but rather because the clergy were not exempt to it, and if the tax is not imposed disproportionately on goods frequently purchased by the clergy, then it is lawful, and the clergy have no path forward on the case.

Despite the prevalence of civil and canon legal authorities stressing the strength of ecclesiastical immunities, various maxims about utility, necessity and the public good, or even the famous principle "*quod omnes tangit*", cases still had to be litigated; they were still contentious. In general strokes, the path of the above jurists is as follows: Before Panormitanus (1386-1445), it was possible to justify the Church's obligation to provide for the construction and repair of walls or roads along civil legal principles. They even were, according to Bartolus, obligated to assist in imperial military campaigns.[1162] Panormitanus broke from tradition in issuing a hard and fast rejection, carving a strong view of ecclesiastical immunities which would remain prevalent.[1163] The following jurists had to confront Panormitanus, and in doing so, roped in various justifications, which included stressing that the Church was a *part* of the community, and had obligations that trumped ecclesiastical liberty or immunity—or to be more precise, that there could be 'full harmony concerning the liberty of the Church and the necessity of the public'.[1164]

## Section V: Conclusion—Savonarola, The Lord's Prayer, and the Trouble of "Hallowed" Things

In Florence, as late as the mid 14th century, executions of various criminals took place outside of the Porta della Giustizia, whose gates in the east only opened for "public" executions. Bodies of the worst kinds of criminals were sometimes dismembered and left outside of the walls, unburied and therefore unconsecrated, but also un-religious and left to nature, excluded in death from the city and religion alongside the lepers who also lived outside of the walls. By the time of Savonarola's execution in 1498, something had changed; Savonarola was not executed on the periphery or outside of the city, as he might have been a century before. Instead, he was burned alongside two others in the heart of the Piazza della Signoria, the square outside of the Palazzo Vecchio. The Piazza della Signoria was the urban and political counterweight to the Baptistery of San Giovanni, both "ideologically loaded", and paired in a rapidly advancing Renaissance art, including Brunelleschi's development of linear perspective.[1165] Scholars have rightly suggested that Savonarola's execution in this place required in part a "Christianization" of execution itself.[1166] If executions were so impure that they needed to take place outside of the 'sacred' boundaries of the community, then it was a short jump to doubt whether they ought to take place at all. If they could be made 'holy' then they could comfortably take place within the walls, if not at the very heart of the civic space itself. Scholars have also argued—following primary source

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[1162] Bartolus at C.12.50.21.

[1163] That Panormitanus was recognized as breaking from tradition, see Campani above.

[1164] Sabelli, *Dictionary,* at 'Ecclesia*',* n. 20: 'Where there is full *concordia* concerning the liberty of the Church and the necessity of the public, the clergy should be bound by the ordinary burdens imposed on their gods before they enter the Church. They should be obligated by the public necessities with the consent of the Pontiff, and in extreme cases, even unwillingly, they may be compelled by the laity.'

[1165] Anthony Grafton, *Leon Battista Alberti: Master Builder of the Italian Renaissance*, p. 93

[1166] Adriano Prosperi, *Crime and Forgiveness: Christianizing Execution in Medieval Europe*, Harvard University Press, 2020, esp. Ch. 23. This was not the necessary *cause* for bringing executions with the city walls; Brucker writes that in one case in 1400 of the conspirator Sanminiato de' Ricci, "a crowd assembled in front of the church of Santa Croce. Fearing that sympathizers might rescue Ricci from the *podestà*'s retinue, the Signoria ordered his execution next to the church, instead of at the customary site outside the city walls." Brucker, *The Civic World of Early Renaissance Florence,* p. 174.

accounts—that executions like these were a civic "ritual cleansing", a purification of the community through fire, or even a "sacrifice".[1167]

In the grand ceremony of Savonarola's execution—in which the ecclesiastical defrocking was modeled after the Roman legal procedure for dishonorably discharging soldiers[1168]—scholars have often noted that the executioners filed down the gallows because they seemed to resemble the three crosses at Golgotha. But it is the shift to a theatrical and public space inside of the walls of the city, seemingly at the cooperation of the Inquisition and the city's guard, that remains striking as an early *public* execution *within* the publica and not outside of it—a break from legal tradition, which as Adriano Prospero pointed out, was later reversed in the 17th and 18th centuries as communities moved executions back outside of the public eye but also physically to the periphery of public space, if not outside of it, too.[1169] Savonarola's ashes were scrupulously collected in a (failed) attempt to prevent the creation of relics, and were dumped into the Arno River—again, denying his body the right to rest under consecrated ground, but furthermore outside of "religion" in the strict legal sense: the water was not a tomb and it tolerated no burial.[1170] Some contemporary scholars pass over the details of this scattering, jumping straight to life in Florence in the absence of Savonarola. None that do discuss it capture the physical consequence better than Paul Strathern. At the Ponte Vecchio:

> the cartloads of ashes were unceremoniously dumped into the waters of the Arno, their remnant dust-clouds gradually settling onto the surface, where they were carried off downstream by the current, over the weir and beyond the city walls, through the green Tuscan countryside towards the river mouth, where the waters dispersed into the sea.[1171]

The day after the execution, the Piazza della Signoria was cleansed by the Church; the public square was restored to a 'holy' space.[1172] San Marco, Savonarola's Church, was also cleansed, and its famous bell moved outside of the city walls to a convent. It, too, was restored to a 'holy' space. This last doublet of cleansings is telling, especially if the execution itself is viewed as a civic cleansing; the commune was responsible for cleansing the republic of Savonarola, at the Church's request and condemnation, but the Church would still be responsible for cleansing the square and the public after the execution just as it would return to cleanse the Church that birthed the heresy in question. Whether Savonarola's rebellion itself was "sacred", as George Eliot mused in *Romola* in the epigraph above, is a different puzzle.

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[1167] Weinstein, *Savonarola: The Rise and Fall of a Renaissance Prophet* (Yale 2011), pp. 295-297. Martines, *Fire in the City,* pp. 274-277. Trexler, *Public Life in Renaissance Florence,* pp. 51-52. In Savonarola's case, they often observe that his death was an ironic response to his *capannucci,* the burning of materials in the Piazza to "cleanse" the community, *il Falò delle vanità*.

[1168] See Dig. 49.16.13. Savonarola and the two bishops with him were dressed in Dominican robes, then defrocked, then had the instruments ceremonially removed, and lastly had their heads and faces shaved, before being 'relaxed' into secular hands for the actual execution.

[1169] Prosperi, *Crime and Forgiveness,* Ch. 14. For the 'theatrical' and public significance of the audience in the 18th century, see Foucault, *Discipline and Punish.*

[1170] In 1364, an execution took place in a boat *on* the Arno as a clever work-around for an execution within the city limits. In his *Florentine Histories,* VIII.9, Machiavelli tells the story of a man named Jacopo, who was dug up from his grave along the walls to be dragged through the city and dumped in the Arno.

[1171] Paul Strathern, *Death in Florence,* Ch. 25.

[1172] Brucker, *Renaissance Florence.*

Richard Trexler noted that the boundaries between secular and religious life in "public" Florence were fluid; Churches and Palaces were both public spaces, but they were both protected from "profane" actions, cordoning them off as "sacred" to an extent. This chapter has extended the complexity of the "sacred" public life but also challenged the language of "sacred" and "holy" itself. Roman property law contained a highly specific but ambiguous set of terms to describe 'religious', 'sacred', and 'holy' things; city-walls occupied one (and later two) of these categories. Bodies could be all three. We lack the ability to translate and precisely articulate the boundaries between these categories not by mistake—as Maitland suggested about Bracton—but because the categories could shift and blur together. The paradox about the "*sanctus*"—the 'holy'—is that the category of 'things protected by public sanction' is broad and obviously ever-present, but the alternative translation of "hallowed" rings hopelessly old-fashioned. Both 'holy' and 'hallowed', furthermore, continue to imply a theological element that they do not necessarily contain.

At Matthew 6:9-13, Christ provided an example for how to pray. The Lord's Prayer is famous now in the English version, adopted in England at the request of King Henry VIII in his early disputes with the Catholic Church. Thomas Cranmer, the Archbishop of Canterbury, amended William Tyndale's translation to its now common form:

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| Pater noster, qui es in caelis, | Our Father which art in heaven, |
| sanctificetur nomen tuum. | Hallowed be thy name |
| Adveniat regnum tuum. | Thy Kingdom come, |
| Fiat voluntas tua, | Thy will be done, |
| sicut in caelo et in terra. | In earth as it is in heaven. |
| Panem nostrum quotidianum da nobis hodie, | Give us this day our daily bread. |
| et dimitte nobis debita nostra sicut et | And forgive us our debts, as |
| nos dimittimus debitoribus nostris. | we forgive our debtors. |
| Et ne nos inducas in tentationem, | And lead us not into temptation |
| sed libera nos a malo. Amen. | but deliver us from evil. Amen. |

"*Sanctificetur*" was Jerome's translation of the original Greek "ἁγιασθήτω", from a bundle of related words like ἁγίζω [I make holy] and ἅγιος [devoted to the gods, sacred, or holy]—a consecrated thing or place, often through a sacrifice or purification ritual.[1173] While "hallowed" is still a familiar translation, it disguises the ceremony, the process, the ritual of making something '*sanctus*'.

In Gelasius' famous letter to Emperor Anastasius, he wrote that there were "two [things] by which the world is governed: *sacra* and *regalis*. This two-powers doctrine would pair nicely with a two-swords doctrine and a perpetually influential distinction between "Church" and "State". This chapter should raise questions about the ways in which power might be 'sacred' (*sacer*), but it will also point out that the 'holy' (*sanctus*) appears somewhere in between, if not shared by both powers. In the same stroke, the "Holy Roman Empire" which would come five centuries after Gelasius was the *Sacrum Imperium Romanum,* or *Heiliges Römisches Reich*—the same Empire that Voltaire would say is "neither holy (*saint*), nor Roman, nor an Empire." The French *saint* comes from the Latin *sanctus* (not *sacrum*), and the German *Heiliges* means both 'holy' and 'sacred'. Despite a real etymological and classical legal difference between the 'sacred' (*sacer*) and the 'holy' (*sanctus*), the blurry lines I detailed above are apparent from the 14th century

[1173] See also Genesis 2:3—'God blessed the seventh day (*benedixit*) and declared it holy (*sanctificavit*), for on it he rested from all his work of creation'.

onwards. They persist with us today, even for the translators of the Roman law. In an unassuming *Digest* passage on "teachers of the liberal pursuits", we find Ulpian making a pair of interesting observations:

> Are philosophers also to be included among the teachers? I should not think so, not because the subject is not hallowed (*non reliogiosa res est*), but because they ought above all to claim to spurn mercenary activity. Likewise, governors should not hear cases involving teachers of civil; knowledge of civil law is indeed a most hallowed thing (*res sanctissima civilis sapientia*).

I have left Alan Watson's translation stand to underscore the continuing difficulty of parsing the differences between the 'hallowed' and the 'most hallowed'—or the 'religious' and the 'holy' (*sanctus*), in this case. There have been some historical readers who were sensitive to the original difference—here again John Adams appears a careful reader of the law. [1174]

Getting *sacer* and *sanctus* right means recognizing the differences of procedure, of legitimate authority, and of undoing. The *sacer* was fixed to divine ceremonies and proper consecration by the proper authority. The *sanctus* was fixed to political ceremonies and proper legal protection authorized by the sovereign or the people. Nothing was either by nature: both were created and artificial. Anything could be *sacer* or *sanctus.* Notably, both were distinct from the 'religious'—recall that any private person could make a thing religious themselves simply by burying it on land they owned. The religious was within the jurisdiction of every private person; the *sacer* and the *sanctus* were public and communal. The undoing is where the difference is most important: something which was *sacer* was permanently *sacer*—it could never lose its sacrality. If it was improperly consecrated at the start, then it was *profane*. But something that was *sanctus* was not necessarily permanently *sanctus*; if it was destroyed, it would lose its status until it was rebuilt. But by its origin, the *sanctus* might cease to be *sanctus* as soon as it was no longer protected by public sanction and criminal punishment.

However, the structural persistence of the *sanctus*—the 'inviolable', if not the 'holy'—means that walls, borders, gates, people, rights, and so on are likely to stay 'holy', even after they are no longer translated as 'holy'. What the Roman law demonstrates is ample opportunity to classify things as 'holy', or 'in a manner subject to divine law' as it is human law, and a long tradition of this 'holiness' having nothing to do with religion. They also have very little to do with property: it would cause a nearly constant confusion that the walls of the city were not owned by the city, or the people within it, or *anybody*. They were *res nullius* but could not be occupied or owned. But, they provided an essential service about which duties could be directed, taxes could be collected, lawsuits could be filed, and wars could be started.

Walls occupy a unique place in this history because they were a practically necessary if not also a theoretically crucial stage of communal development and cooperation. Walls were both material and legal objects and from their material and legal objectivity came their political and philosophical objectivity. That is, my focus is on the legal materiality of literal walls—walls as objects, which I show were important sites for jurisdictional conflicts—conflicts about authority

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[1174] John Adams, "Notes on the History of Mt. Wollaston", October 19, 1802: "For that we gave the King the Title of sacred Majesty, which is the [~~only~~] most proper Title of Princes, and the Word a mere civil Word, and never applied in Scripture to any divine things but Sanctus used always. Mr Knox called the in. of S—— by the same title; yet by no [~~means~~] reasons could he be drawn to yield to these Things, although they were allowed by diverse of the Ministers and the Chief of Plymouth." Notice both strikethroughs.

and sovereignty, but also public safety, the common good, utility, duty, and even the constitutional question of the corporate entity which lived within the walls. But the walls are, first and foremost, material composites—and the medieval jurists were unsurprisingly specific about the kinds and qualities of brick and cement and the process for patching and repair. Walls were not the only 'sacred' object but are a conveniently large target for historians of ideas. Similar parallel histories, likely with important differences, could be told about the gates, bridges, moats, roads, highways, and canals that appear on the periphery above.

Now we can end where we began: Romulus, bent over the ploughshare, marking out where the boundaries of his city would be built, 'sanctifying' the ground and the walls that would come. It is no great exaggeration to stress the importance of this moment for the literal definition or constitution of the community. Dig. 50.16.239.6-8 reads:

> The term *urbs* is derived from *urbo; urbo* is to mark out by plow. And Varus says that *urbus* is the name for the curved part of a plow which is customarily used in the foundation of an *urbs. Oppidum* is derived from *opes* (protection) because walls are built for its sake. 'Territory' is the totality of the fields within the boundaries of any community and some people say that this is derived from the fact that the magistrates of the place concerned have the right within its boundaries of terrifying, that is suppressing.[1175]

Territory, then, is itself delimited by and contains various sets of 'holy' boundaries. Above, I showed how the clergy were justified in their defense of the city because they were instilling "terror" in potential invaders. Walls—and the Church that supported them and was often built into them—were a crucial component of the definition of the *civitas,* the *urbs,* the *oppidum*, and indeed, *territorium.* Walls, then, are the necessary prehistory of any concept of territory. Grotius would later write:

> And this Derivation of the Word *Territory* given by Siculus Flaccus, *à terrendis Hostibus,* from terrifying the Enemy, seems as probable as that of *Varro; à terrendo,* from treading upon, or that of *Frontinus, à terrâ*, from the Earth; or that of *Pomponius* the Lawyer, *à terrendi jure,* from that Power to terrify which the Magistrates have. Thus Xenophon, in his Book concerning Tributes, says, that the Possession of Lands is held in Time of War by Fortifications, which he himself calls Τείκη, καὶ ἐρύματα, Walls and Retrenchments.[1176]

It is to territory, to the *ius terrendi,* and to the Church's shaping and claiming of both that we now turn.

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[1175] Dig. 60.16.239.6-8, trans. Watson with adjustments.
[1176]Grotius, *De Iure Belli ac Pacis* III.6.4.2, 1322-1323. ed. Barbeyrac and Tuck.

"The earth (*terra*) is the Lord's and the fullness thereof (*plenitudo*), the world and those who dwell therein, for he has founded it upon the seas and established it upon the rivers."

Psalm 24:1[1177]

"And Jesus came to them and said, 'All authority in heaven and on earth (*terra*) has been given to me. Go therefore and make disciples of all nations (*omnes gentes*), baptizing them in the name of the Father and of the Son and of the Holy Spirit, teaching them to observe all that I have commanded (*mandavi*) you. And behold, I am with you always, to the end of the age (*saeculi*).'"

Matthew 28:18-20, 'The Great Commission'

## 6. *Terra,* Terror, and Territory: The Church and Coercion in Public Life

*Introduction: Keys to the Kingdoms*

The early followers of Christ in the Roman province of Judea had always formed a universal, evangelical, missionary, and even colonial organization; their purpose was to spread the 'good news' (*evangelium*) to 'all nations' (*omnes gentes*), requiring an immediate scattering of believers around and across the Earth to '*all*' peoples. The realization of the Great Commission would be a truly universal (*catholicus*) community. That this organization would take the form it did—calling itself by the Greek and Latin hybrid of *ecclesia* ('assembly'), structured in familiar Roman hierarchical and aristocratic offices, that it should be at first tolerated, then antagonized by, and finally adopted by the Roman Empire—was accidental. The "Church" was also imperial in two senses; it inherited through its birthplace, its language, and its first generations of believers many Roman imperial values, strategies, and most of all, networks; as it spread its 'good news', it did so first through Roman provinces and along Roman roads, which in the first century reached modern day England, formed a loop around the Mediterranean, and were stretching past the Black Sea. What started as an undercurrent through the *urbes, municipia,* and *civitates* of Rome rose to the level of the *imperium*; but its status as official religion of the Empire in the fourth century was also just a boost to an already ongoing project. [1178] Even if Christ's disciples had begun as being 'in' the world but not 'of' it, the young Church had come quite far.[1179] In and after the Reformation, these auspicious but humble beginnings gave ammunition to reformers in and outside of the Catholic Church to argue about decay, change, overreach, and the need for a new politics, if not a new Church.

Pietro Giannone (1676-1748) was one such reformer—an Italian historian, jurist, and theorist of ecclesiastical authority. He was excommunicated, imprisoned in 1735, and lived the final twelve years of his life in prison in Turin. His *History of the Kingdom of Naples* (1723) was placed on the Inquisition's *Index Librorum Prohibitorum*. It is in his history that we find a familiar argument for anticlericalism and the long history of the Church-State distinction. Pietro was not an immensely respected historian and was accused of not handling primary sources with care or

[1177] According to Durandus and the *Pontificale Romanum,* this Psalm, among others, was used as a part of the ceremonies for dedicating Churches. Durandus, *Rationale divinorum officiorum.* See R. Horie, *Perceptions of Ecclesia: Church and Soul in Medieval Dedication Sermons*, pp. 3-4.
[1178] Peter Brown, *The First Urban Christians;* Brown, *Society and the Holy in Late Antiquity.*
[1179] John 17:14; this parallels but has no relation to the distinction between *in territorio* and *de territorio* below.

critical engagement.[1180] This makes his argument above more compelling as a relic of the familiar and comfortable framework which my project has been written against. A string of passages from the English translation of 1729 reads:

> The Ecclesiastical State then, altho' it had been settled in such Splendor by Constantine, and had acquir'd a most excellent external Polity, and had increas'd its Regulations, yet, nevertheless, in those Days, and down to the Reign of Justinian the Emperor, it had not gone beyond the Bounds of its Spiritual Power. ... The Church had not yet acquir'd *Justitia Contentiosa,* nor Jurisdiction, neither had she a Court of Justice, nor Territories in the Manner and with the Power she possesses them at this Time over all Christendom; since these depend not upon the Keys, neither are they properly of Divine Right, but rather of Human and Positive, proceeding chiefly from the Concessions or Permissions of Temporal Princes, as we shall shew clearly in the Progress of this History.[1181] [...]
>
> Thus it is, that the Church, to this Time, had not acquir'd that complete Judicial Power, which the Laws call Jurisdiction, over her Priests, and much less over Laicks; neither had she as yet what the Civilians call *Jus Terrendi*, and consequently no complete Jurisdiction, nor a distinctive coercive Power; neither were her Judges Magistrates, who could pronounce these three essential Words, Do, Dico, Abdico; for which Reason she could not, by her own Authority, imprison her Ecclesiasticks, as in France to this Day it cannot be done without imploring the Assistance of the Secular Power.[1182] [...]
>
> Besides, 'tis certain, that in these Ages, the Church had no Power of inflicting Corporal Punishments, of Banishment, much less of Mutilation of Members, or of Death: and in the more heinous Crimes of Heresy, it belong'd to the Princes to punish the Delinquents with Temporal Punishment, and for keeping their Dominions in Peace and Tranquillity, and purging them of those seditious People, who disturb'd the Quiet of the Commonwealth, they establish'd many Edicts, wherein they set down the Penalties and Punishments due to their Crimes: of which Laws, the Books of the Theodosian and Justinian Codes are full. Neither could the Judges of the Church in those Days condemn in pecuniary Mulcts; and the Reason was, because

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[1180] One near contemporary chided the reader for falling captive to Giannone's 'deceit and sophistry, like a wretched stump or log, they fell into his traps.'. Lodovico Agnello Aastasio [Ludovici Agnelli Anastasii] (Archbishop of Sorrento), *Opus* [Naples 1751] pp. 232-233.

[1181] Pietro Giannone, *The Civil History of the Kingdom of Naples,* Vol. 1, trans. James Ogilvie [London 1729], Book II, Section III, p. 107. He continues, "There is a great Difference betwixt the Keys and the Sword, as also betwixt the Keys of Heaven, and Law Pleas which belong to Magistrates: And Divines are agreed, that the Delivery of the Keys, and the Power of Binding and Loosing given by Christ Jesus our Lord to his Apostles, import only the Conferring of the Sacraments, and the most important Effect of Excommunication, which is the only Penalty the Ecclesiasticks can as yet impose on themselves and the Laicks, besides injoining of Penance; but all that depends on penitential Justice, if we may so term it, and not purely on litigious; or rather on Censure and Correction, than on absolute Jurisdiction. The Sword implies a precise and formal Constraint, which depends properly on the Temporal Power of the Princes of the Earth, who, as St. Paul says, carry the Sword for Punishing the Wicked, and the Security of the Good. And really our Souls, over which the Ecclesiastical Power properly extends, are not capable of a precise Constraint, but only of being stirred up, which is properly *Persuasion*."

[1182] Giannone, *The Civil History of the Kingdom of Naples,* Vol. 1, Book II, Section III, p. 109.

> she had no coercive Power, and, according to the Roman Laws, the Magistrates only, who had full coercive Power, could impose Fines; but afterwards, altho' the Church had neither coercive Power nor Exchequer, yet she took upon her to do it, and applied the Fine to some pious Use, giving it to Monks, Prisoners, of for the Building of Churches; concerning which we shall have a new Motive for Reasoning.[1183]

Pietro is *right* in some respects; the Church did not originally have an extensive legal catalogue of rights and procedures, nor did it originally possess the various civil, fiscal, or criminal rights named by Pietro. And, many of the jurists in the chapters above would have agreed that the Church *could not* possess these rights, properly speaking. Even if the Church was shown by custom or (false) prescription to be exercising these rights, it was doing so improperly and against the *ius commune* or *ius civile* or even the *ius gentium.* Indeed, the controversies examined in every chapter above could only be controversies because there was an established line of juridical thought stressing that the *ecclesia* or the *episcopus* could not exercise the kinds of civil or temporal rights at the heart of the controversy. At the same stroke, these could only be controversies if there was not also a strong movement to contradict these established traditions of interpretation. Crucially however, none of the jurists who argued that the Church could possess a *fisc* and exercise the *ius confiscandi* (for example) would have agreed that this was the Church going "beyond the Bounds of its Spiritual Power"; they were protesting the circumscription of ecclesiastical authority of their own times, which certainly was not the same circumscription imposed by Pietro Giannone or others. What the chapters above show is that the action of circumscribing, delineating, or assigning to 'spheres' is often ill-equipped to handle and analyze these ideological, theoretical, and legal controversies.

I have yet to directly engage the question of temporal and ecclesiastical authority which often starts with the invocation of the "two keys" or "two swords" doctrines implied by the image at the front of this project. My argument thus far has been that the specific rights and privileges maintained by some jurists on behalf of the Church problematize the normal interpretations of ecclesiastical authority. Each example above demonstrates another blurred line between the "temporal" and the "spiritual" that defy disentanglement. The Church was embedded in civil, temporal, and legal processes for the creation of citizens, juridical procedures of testimony and torture, the confiscation of property and other 'treasury'-rights, political and social assembly and communication, and the literal building and repair of the community itself. In each case, the Church was claiming the ability to exercise a right formerly possessed by the Roman Senate, the Roman Treasury, Roman Provincial Governors, and even the Emperor himself. These included 'regalian' rights—'royal' rights, thought to accompany sovereignty.[1184] As I showed above, however, jurists did not argue that the Church possessed all of the rights of temporal sovereignty; instead, they argued that the Church could exercise particular rights through 'equiparation', through custom, or through necessity, without triggering the whole of temporal sovereignty. They could seemingly pick and choose from the toolbox of sovereignty.

To the renaissance and early modern jurists theorizing sovereignty and the state, this was an untenable situation. Even for some medieval Catholic reformers, the blurred lines between the Church and politics often resulted in the violation of ecclesiastical liberty; the immunities and

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[1183] Giannone, *The Civil History of the Kingdom of Naples,* Vol. 1, Book II, Section III, p. 109.

[1184] The primary text for this development is the *Liber Feudorum,* specifically 2.55(56), 'Quae sint regalia', which drew commentaries from civilians and canonists, Bartolus and Baldus famously included. Dante Fedele addresses the latter.

liberties enjoyed by the Church were designed to protect the Church just as much as they helped temporal politics stay more ordered.

The historical narrative of secularization—of sovereignty, of politics, of the public sphere and of political theoretical concepts broadly—finds allies in these early modern authors. Machiavelli, More, Bodin, and Hobbes can all be grouped as pointing out, to various degrees, the necessity for a simpler conception of politics: an answer to the jumbled mess that the patch-work quilt of medieval authority and jurisdiction had left. The form of the question often assumed that something was wrong; the Church had, at some point, "overstepped" various boundaries, leading both to the Reformation and to the need to extract politics and the state from her and her authority.

In this concluding chapter, I pick up where the last chapter left off—territory—and address the legal question of the Church's *territorium*.[1185] In doing so, however, I also use territory as an opportunity to make a historiographical response to Pietro Giannone and contemporary scholars like Stuart Elden—something like "neither had she [the Church] as yet what the Civilians call *Jus Terrendi*, and consequently no complete Jurisdiction, nor a distinctive coercive Power".[1186] Stuart Elden's *Birth of Territory* shows marvelously that "territory" was a fluid concept, constantly contested, but in the western tradition, eminently legal. The move of early modern jurists and historians to make territory a property of the sovereign state—a move which inspires Elden's own reading of the preceding history—was itself a move against the Church. That is, medieval and early modern jurists would argue on technical terms that the Church or a Bishop did not possess *territorium,* nor did they possess the *ius terrendi,* rightly understood. As with the other patterns above, there was a substantive argument that the Church and a Bishop did in fact possess both. This is hinted at even by Giannone—if the Church "as yet" [the 6th century] had not acquired the *ius terrendi,* it was in its future.[1187] This chapter will not tell the whole history of *how* the Church acquired the *ius terrendi,* but instead will reconstruct the argument for *why* the Church possessed it. This argument relied on the legal developments accounted above in the chapter on Fiscal Rights, and implicitly in the previous chapter on walls.

The argument turned on coercion. Nobody could dispute that the Church had coercive authority over its own members; they could excommunicate them, place them under an interdict, order them to give up their property if they were condemned as heretics. They had strongest coercive control over the clergy and had a sophisticated system of ecclesiastical judges and courts

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[1185] Because walls demarcated a space of authority but also protected the community, they lead into "territory" in both respects; within them, the magistrates have the power of *ius terrendi,* but just beyond the *pomerium* is a world of potential threats and dangers, which carry their own power of 'inducing terror'. In the invasion of Paris example from the last chapter, the Chronicle noted: 'Pergamon is surrounded by deadly enemies of the city (*ab hostibus urbis*), which everywhere endured a fierce struggle, and the walls, watchtowers, and all the bridges fought as one, as the vast sea battled against the land. The warships thundered mightily, and citizens were leaving the city; the trumpets shouted (*clamant*): 'Everyone, gather your belongings!' The city and its citizens were invaded by terror all at once (*Urbs terrore, simul cives, invaditur omnis*); there was no place in the city where one could be hidden from the fight (*Nullus in urbe locus fuerat, qui bella laterat*).' *Abbonis Bella Parisiacae Urbis,* I. 230-237, p. 104.

[1186] I discuss Legendre below, but see also Ullman, *Luca de Penna,* p. 61: "As regards the scope of the validity of customs, Lucas applies the principle of contracts—'*de juris efficacia illi tantum debent stringi consuetudine, inter quos est inducta*'—that the customs of one State have no effects on the legal status of another State, because the State, being an organized entity, has the '*jus terrendi et distringendi*' only over its own citizens and, accordingly, has no right of interference with those of another State. Nevertheless, he recommends the observance of customary rules of a neighbouring State, when they are reasonable, not 'contra jus', and when the statute law contains no regulation relating to the particular item, [C.11.20.1, n. 3]."

[1187] For the same, see Henry Maurice, *A Defence of Diocesan Episcopacy in Answer to a Book of Mr. David Clarkson* [London 1691], pp. 370-382, but more throughout.

to handle the cases within their ecclesiastical jurisdiction. This capacity to coerce came with a problem: it was not immediately clear *why* it didn't extend to every lay person. As I showed above in the case of an interdict, collective disciplinary actions could not distinguish between Christian and non-believer, so the silencing of the church-bells affected all indiscriminately. Theoretically, this should have raised an objection to whether such an action was an overreach of ecclesiastical authority and jurisdiction. The militant Church, furthermore, was at war against a world of unbelievers and heretics; they, too, fell within the Church's reach if only so far as they became a legal "enemy", whose property (or a portion thereof) was owed to the Church. And, the canon law maintained that the Church was the proper judge of all oaths as well as the proper judge of all crimes against nature, even among unbelievers.[1188]

This Church used the interdict as a tool of discipline alongside excommunication; they started multiple inquisitions, leading to the torture and execution of Christians and Jews alike. They coordinated crusades, but at the city level supported the defense of the city against enemies, if not also imagining the clergy standing on the city walls to "terrify" would-be attackers. And, at the level of individuals, for whom the Church held the promise of salvation, limbo, or eternal damnation, the fear of God was as much in play as the fear of the absence of God. This same Church employed the priests and bishops on whom the eternal salvation of every Christian depended on; their keys could lock and unlock the doors of heaven. Church was a coercive agent through and threw, and few disputed it; they simply challenged its limits. If inducing terror within a geographical space is at all an indication of a path towards territory, then the medieval Church deserves close attention.

Because of the logic of medieval civil and canon law, the conceptual weight fell on the power to coerce, not the limits on the potential subjects of this coercion. It is obvious that the Church had the power to coerce its members. But, when the members of the Church and the members of the community largely overlap, it becomes difficult to practically and theoretically distinguish the Church's powers over the in-group and the Church's powers over the whole. In fact, the logic of equiparation meant that the Church's powers over the in-group sufficiently overlapped with and looked like the powers exercised over the whole, and therefore the Church was a legally and logically similar entity to the secular authority over the whole community. Through equiparation, the Church then either appears like an entity with powers over the out-group, or "state"-like powers within the secular "state". The tools employed and refined by the Church over its own members and unbelievers still bear the Church's impression—and so where they were also used or adopted by secular authorities, the Church's role in them will need to be excavated further—but they also weren't dramatically changed by either the Reformation or the introduction of Westphalian sovereignty. The quality of relationships, duties, and obligations of individuals to this kind of Church persist even after its power is splintered, abandoned, or secularized.

What if we treat the Church's *territorium* as real, and take its *ius terrendi* seriously? What changes on the conceptual map of European political thought? I suggest here that the Church's "territory", as presented below, underscores the oversimplicity of contemporary models of the European "Church", as well as the European "State"; in particular, recent histories of sovereignty and territoriality follow the lead of the early modern jurists who were attempting to carve a unified, cohesive, and continuous "state" as an alternative to the messy medieval and renaissance status quo. This continuity, and specifically the internal continuity of power over space, falls apart with respect to the territoriality of the Church. Furthermore, the Church's "territory" and *ius terrendi*

[1188] Panormitanus, 7.224: 'The Church has jurisdiction over the sins of unbelievers (*infideles*) against nature'.

stresses, as the chapters above have, the importance of not only considering "quasi-state" or "non-state" actors with coercive power, but perhaps also reimagining politics outside of a "state"-centric model altogether.

Here, as elsewhere, I am setting aside the *temporal* jurisdiction of the Church—other scholars have focused on the civil and canon legal dimensions to this aspect. Baldus is one great example. Baldus had argued that the Church did exercise temporal jurisdiction, namely within papal territories, but that this was a creation of human institutions (*ex institutione et providenti humana*'.[1189] Though Rome could belong to the Church,[1190] Canning wrote that Baldus, like Bartolus's view, was: 'In those lands the Roman church exercises jurisdiction which belonged to the Roman empire and it admits this They do not therefore cease to be part of the Roman people; the administration of these provinces, however, is conceded to another.'[1191] That ecclesiastical states existed, and that the Papacy had extensive territorial holdings, is both true and interesting, and has important conceptual currency in renaissance and early modern political thought, from Machiavelli's discussion of Ecclesiastical Principalities in the *Prince*, to Hooker's "Ecclesiastical Polity" and Hobbes's "Christian Commonwealth;[1192] The Church had extensive territorial claims, over land and sea.[1193] But the conceptual boundaries are more striking when we set aside the Church as an exerciser of temporal sovereignty and move once again to circumstances where they were actively recognizing that they were *not.*

I begin by showing that civil and canon lawyers agreed to an extent that the Bishop properly possessed the *ius terrendi,* and that their "diocese" was equivalent to a "territory"; for some it was a straight synonym, while for others it was an ecclesiastical parallel. Church councils from the 13th century onwards refer to the space within the Bishop's jurisdiction as "territory", and their clear access to coercive methods, tools, and rights helped convince some 15th and 16th century jurists that a Bishop could possess an armed retinue to help them enforce and carry out arrests and punishments even without the help of a secular authority; their "territory" came with the *ius terrendi,* and their *ius terrendi* helped underscore their "territory. However, 15th and 16th century jurists also observed that there was something juridically uncomfortable with this view. In Section II, I briefly show that the development of the maxim "The Bishop has no Territory" was part of a broader rejection of the various rights that the Church had come to claim over the previous centuries: many of them were *regalian* rights, or rather, rights only appropriate for sovereigns. However, we ought to be careful that this maxim is taken as a claim rather than a point of legal-historical fact; that early modern jurists believed it was "improper" for the Bishop to possess

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[1189] Canning, *The Political Thought of Baldus,* p. 158: "He considered papal temporal jurisdiction in papal lands to be a purely human creation: '[The Church] has temporal jurisdiction from human institution and providence'. ... According to Baldus the pope operated imperial jurisdiction in the papal patrimony. The administration of imperial jurisdiction was divided between the emperor and the pope in the *terrae imperii* and the *terrae ecclesiae* respectively: '[The emperor] does not have imperial administration everywhere for he has *imperium* divided with the pope, so that the lands of the Roman church are not subject to the emperor directly or indirectly.'" Citing Baldus, *additio ad* Guilelmus Durandus, *Speculum iuris,* 2.2.3, p. 248 (ed. Frankfurt, 1592) and Baldus Cons. 2.37, fol. 11v, Cons. 4.40 in Venice 1575.

[1190] Canning, *The Political Thought of Baldus,* p. 160. 'The city of Rome belongs to the Church, not Caesar' (*urbs Romana est ecclesie, non Cesaris*). Baldus ad D.V. Proem. ad. v. 'quoniam omnia', fol. iv.

[1191] Canning, *The Political Thought of Baldus.* p. 47. Bartolus at Dig. 49.15.24.

[1192] For examples close to the canon, see Machiavelli, *Prince,* Ch. 11; Hooker, *Laws of an Ecclesiastical Polity;* Hobbes, *Leviathan,* Part III.

[1193] The Church's territory over land is obvious, but at sea we frequently encounter the Church claiming tithes owed from fishing within 'ecclesiastical' waters in the Mediterranean, especially around Sardinia. In the canon law, see X.2.26.17, *Liber Sextus* 6.1.17, Clem. 2.11.2, and D.63.30.

"territory" and the *ius terrendi* should not distract from the political-legal reality that they *did* possess it.

In Section III, I use Jacob Pignatelli's conception of nested territoriality (or literally, 'territory within another territory') to press on the conceptual challenge of a territorial Church. Pignatelli, like centuries of jurists before him, had worked with a confusing distinction: the Church was *in* the territory (*in territorio*) of secular authorities, but was not *of* the territory (*de territorio*) of secular authorities. They were in the state, but "outside" of it at the same time. Treating the tens of thousands of Churches across the infant "states" of Europe almost as embassies presents an alternative to recent histories of sovereignty and territoriality that imagine cohesive and continuous borders without looking inward at the internal gaps and holes in jurisdiction, territory, *and* sovereignty. A more accurate view of the early modern state under construction by jurists and political theorists looks less monolithic, more pluralistic, and indeed quite a bit like Swiss Cheese. However, as I have shown above, the rights, tools and logics that helped support the Church's "territoriality" were tied to local, material, and legal objects and spaces; these persisted even after the early modern conception of territory and sovereignty took hold, and were furthermore exported to new colonies and territories worldwide. Though the Church was, by that point, fractured, it was nonetheless still pulling the same levers for a different set of imperial machines. I conclude this chapter, and this dissertation, with a return to the prison or penitentiary—another institution and symbol of the Church's *ius terrendi,* as well as the "state's".

**Section I: The Bishop and the *Ius Terrendi***

Before "A Bishop Has No Territory" became a French legal maxim in the 15th and 16th centuries in support of a new conception of temporal sovereignty, a Bishop *had* territory. So did the Church, in several respects. The argument of Early Modern jurists would be about sovereignty, that bishops were not sovereigns, and therefore did not only not possess territory according to the letter of the law, but also that they never could have possessed territory. Intellectual histories like Stuart Elden's account of territory help break from those constraints; foregrounding the logic for how the Bishop and the Church were intertwined with territory and territoriality can help underscore the contingency of Early Modern thought, but also forecast how a clean juridical redefinition of territory might not cut as deeply into the concept of territory as it was lived and practiced. My interest here is the ways in which the Bishop's "territory" might escape this juridical redefinition. The Church's flexibility in its use of the vocabulary of spatial and temporal authority was especially varied: "Whereas in the East the word *paroichia* established itself for the local church, the terminology in the West long remained unsettled: here, in addition to *paroecia, ecclesia, territorium, fines episcopatus,* and *dioecesis* were also used."[1194] In particular, the "diocese" was effectively a juridical synonym for "territory", a fact which was frequently observed in one direction, but not the other, and not often by contemporary scholars: jurists would gloss the word "territory" by clarifying, 'that is, the *diocese* of the Bishop', but they never glossed the word

[1194] Hubert Jedin and John Dolan, eds. *History of the Church*, Vol. II. *The Imperial Church from Constantine to the Early Middle Ages,* by Karl Baus, Hans-Georg Beck, Eugen Ewig, Hermann Josef Vogt, trans. Anselm Biggs (Burns & Oates London, 1980). In the primary sources, see Alciatus, *De Verborum Significatione,* Lib. IV [Lyon 1548] pp. 555-557: 'There are four terms that have the same meaning: *territorium, comitatus, districtus,* and *dioecesis.'*

"diocese" with 'that is, the *territory* of the Bishop'. The territoriality of the diocese is therefore hidden, but real.[1195]

Before the 'right of inducing terror' (*ius terrendi*) was a meaningful part of the definition of territory for jurists and theorists and before it could only apply to what is effectively the modern state, the common etymology of territory had more to do with *terrae* than "terror".[1196] The Church presents an obstacle to both parts of the etymology. First, insofar as *territorium* had to do with *terrae,* land, and fields around and between *civitates,* the Church had plenty of all; before 900 C.E, scholars estimate that the Church "directly owned approximately one-third of all cultivated land in western Europe, including 31 percent of such land in Italy, 35 percent in Germany, and 44 percent in norther France"[1197] According to David Herlihy, this declined by 1200, in part due to secular confiscation of Church property.[1198] Ordinarily, ecclesiastical property was difficult to alienate, though we have evidence of monasteries purchasing and swapping parcels of land to gain a more coherent set of properties; otherwise, the Church leased its land, even perpetually, to 'secular' hands.[1199]

Recall the formal definition of territory from the Roman law, which immediately followed the definition of an *urbs* (city) and *oppidum* (walled town): "'Territory' is the totality of the fields within the boundaries of any community and some people say that this is derived from the fact that the magistrates of the place concerned have the right within its boundaries of terrifying, that is suppressing."[1200] In the Roman legal tradition, "territory" was always going to be bound to land and the boundaries of some kind of human settlement, *civitas* or otherwise. In the last chapter, I gestured at a number of ways that the Bishop was deeply integrated in boundary-making and boundary-protecting, and it is therefore unsurprising that the Bishop's role would be to some degree "territorial". Maureen Miller's interpretive gloss on the external spatial dimension of the Bishop's palace was not the focus of her book, but it is crucial for mine:

> This tendency for the episcopal complex to be perched on the very edge of the city was not just an accident of Christianity's late arrival on the grid of Roman urban design. Not just chance located the bishop's house at a gate looking out of the "civilized" urban center to the world beyond the walls, or on a road, canal, or river wending its way deep into the countryside. His urban flock certainly claimed the bishop's attention: Augustine's sermons imply a contentious and willful

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[1195]Rodolphe de Kamphausen, *Lexicon Kamphausen,* 1593, p. 310. And, William Fulbecke (1560-1603), *A direction or preparatiue to the study of the lawe wherein is shewed, what things ought to be obserued and vsed of them that are addicted to the study of the law, and what on the contrary part ought to be eschued and auoyded:* "Dioecesis, the gouernment of a certaine prouince by the Bishop, for as a territorie is so called, *quatenus iudex ius terrendi habet*, so a diocese as farre as a Bishop hath *ius administrandi sacra*."

[1196] The takeaway for Early Modern jurists and for contemporary scholars, as told by Elden, is that the 'right of inducing terror' was a constitutive part of sovereignty; that is, as a part of the consolidation of 'royal rights' (*regalia*) underneath the umbrella of 'sovereignty' (*summa potestas*), as articulated by Bodin, the right of inducing terror, and along with it, the proper understanding of *territory,* could only apply to what is effectively the modern state.

[1197] Ekelund, Robert B., Jr., Robert F. Hébert, Robert D. Tollison, Gary M. Anderson, & Audrey B. Davidson. *Sacred trust: The Medieval Church as an economic firm*. New York: Oxford University Press, 1996.

[1198] David Herlihy, "Church Property on the European Continent, 701-1200". *Speculum* 36(1), 81-105 (January 1961), pp. 92-93. See also Charles M. North and Carl R. Gwin, "Religion and the Emergence of the Rule of Law", pp. 127-155 in Ilkka Pyysiäinen, ed. *Religion, Economy, and Cooperation,* De Gruyter 2010; Gilchrist, J. (1969). *The Church and economic activity in the Middle Ages*. London: St. Martin's Press.

[1199] Wood, *The Proprietary Church.*

[1200] Dig. 50.16.239.6-8.

> congregation whose grasp of basic Christian principles seems to need constant reinforcement. But early Christian narratives reveal a passionate interest in the world beyond the walls, in the missionary territory of the late-antique countryside. [...] This was where the bishop's real work lay, and his abode looked out on this less hallowed ground. This site held a complex of structures that, together, constituted the bishop's seat.[1201]

There is a host of examples of the Church referring to this space as *territorium*, but not necessarily in ways that departed from either the Roman legal origins or their careful missionary eyesight. This goes back at least to the Council of Orange in 441, which referred to Church property within the *territorium* (meaning "diocese") of the Bishop.[1202] Church synods at Toulouse (1229), Saint-Quentin (1231), Logroño (1240), Albi (1254), Badoajoz (c. 1255), Fritzlar (1259), Compiègne (1270), Hereford (1277), Avignon (1279), Bologna (1279), Trent (1279), Poitiers (1280), Vienne (1289), Alcalá de Henares (1291), Aschaffenburg (1292), Bremen (1292), Mende (1292-1295), Angers (1298), Basel (1299), and Anse (1300) all employ the vocabulary of "territory" to discuss temporal and ecclesiastical lands, often with respect to a question of jurisdiction or enforcement of penalties.[1203]

Even where the term was applied to the *civitas* (or below in Old Spanish, the *çibdat*), it was not without an ecclesiastical overlay. Take for example the council of Badoajoz (c. 1255), in which the second and third capitulary treated burial and tithing:

> Let the faithful be buried in the Church as it designates the boundaries. Let Christians be buried in the see if they die in the said city, or in its territory. And this territory we deem to be from the river of Olivenza onwards, and onwards from the domains of our villages Valverde, Los Reveltados, Val de Sevilla, El Albufera, and Talavera, which villages are already divided by certain boundaries, and from Guadiana as it bends towards the head of Carbonera, and from there to the tower of Sagrajas as it extends to the meadows of Botova. [...] Furthermore, we decree that each citizen and their dependents and household members, from the produce they gather in the city's territory, from the rearing of their animals, even if they are born and grazed in the villages, from beehives and hunting, and, in short, from all the things they cultivate and raise and from all the things they earn in any manner, without deducting any expenses, shall pay to the Church of the city where they are parishioners, all their tithes, both of crops and personal income. [...] And if by chance they cultivate and raise in the territory of another village, they shall pay half of the tithes to that Church of the village where they cultivate and raise and the other half to the Church where they receive the sacraments.[1204]

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[1201] Miller, *The Bishop's Palace,* pp. 18-19.
[1202] Wood, *Proprietary Church,* pp. 15-16.
[1203] Toulouse 1229, Ch. 31; Saint-Quentin 1231, Ch. 16. et al. See *Corpus Synodalium.*
[1204] *Synodicon Hispanum, V,* pp. 9-14. Taken from the *Corpus Synodalium.* Cap. 2-3: "Que los fieles se entierren en la yglesia, y señala los terminos. E los christianos sean soterrados en la see, si en la dicha çibdat o en su territorio murieren. E este territorio queremos que sea del rio de Olivençia aquende, e aquende de los regnados de las nuestras aldeas Valverde e los Reveltados e Val de Sevilla e el Albufera e Talavera, las quales aldeas ya son por çiertos terminos partidas, e desde Guadiana asi como va orne a la cabeça de la Carbonera, e dende a la torre de Sagrajas en como se estiende hasta las mestas de Botova. Otrosí, ordenamos que sea este territorio de Xebora asi como va a la cabeza de la Liviana, e dende como va a Tajaboláas, e dende el Rostro de Val de Alboquerque con su altesa, asi como viene a

We might first note the important communicative role played by ecclesiastical legislation in demarcating and reinforcing the boundaries of the community. In this decree, which was required to be read out to the laity, the Church Councils provided an oral map to outline and define the boundaries of the community. In the rest of the two capitularies, ecclesiastical jurisdiction piggybacks the *territorium* of the *çibdat*. They share the same boundaries but ecclesiastical "territoriality" is more fluid: it touches the individual producer through their baptism and reception of the sacraments even if they travel outside the *territorium* of the city. They still owe tithes to their home parish, but due to the strength of a second "territorial" Church at the place of production, their duty is now split.

The canon law embraced the language of *territorium* as a suitable description of Episcopal jurisdiction, and its glossators and commentators used the Roman law as a source to define it. There were two key passages for this reading, both from the *Decretum*. In the first, the law held that all basilicas that have been constructed or are being constructed in various places 'should be under the authority of the bishop in whose territory (*territorio*) they are located'.[1205] This unambiguously attested to the Bishop's authority within a geographical space and identified this space as *territorium.*[1206] In the second passage, this *territorium* was explained to be unique to each Bishop such that we might easily imagine cases where their territories might clash:

> If anyone, for any opportunity of their own, directs a bishop to build a church in the territory (*territorio*) of another city, they shall not presume to perform the dedication, which belongs to the one in whose territory (*territorio*) the church is erected. However, let this favor be reserved for the bishop who is the builder, that he may ordain the clergy he desires for his own cause, but let him ordain those who belong to the one whose territory (*territorium*) it is, or those who are already

yuso de la carrera de Canpomaior, e dende como va derechamient al rio de Caya. 3) De la forma y frutos que se han de diezmar. Otrosí, ordenamos que cada un çibdadano e los sus collazos e domésticos de su casa, de los frutos que cogieren en el territorio de la çibdat, e de la crianza de las sus animalias, aunque nascan e pascan a las deegdas en las aldeas, e de las abeias e de la cazas, e, brevemient, de todas las cosas que labraren e criaren e de todas las cosas que ganaren en cualquier manera, non tirando ningunas espensas, paguen a la eglesia de la çibdat donde fueren parroquianos, todos sus diesmos, asi prediales como presonales. E el çibdadano que cogier sus frutos en la aldea, pague la meatat a la eglesia de la çibdat donde fuere parroquiano, salvo los parroquianos de la nuestra see catedral, que an de pagar las dos partes del diesmo a la dicha see. Otrosi, el aldeano que cria e labra e caza en el territorio del aldea do morare, pague conplidamient todos los diesmos, asi prediales como presonales, a la 15 eglesia de esa misma aldea do morare. E si por aventura labra e cria en el territorio dotra aldea, pague la meatat de los diesmos a aquella eglesia de la aldea do labra e cria, e la otra meatat a la eglesia donde reçibe los sacramentos eclesiásticos. E de las abeias e de la crianza de las animabas pague la meatat de los diesmos a aquella eglesia en cuio territorio naçieron e paçieron e bivieron todo el año, otramiente pague los diesmos enteramient a la eglesia donde fuere parroquiano. E si por aventura el aldeano fuere çibdadano, porque tiene casa probada propia en alguna parroquia de la çibdat, por la cual ragon es tenudo de las Pascoas e las otras fiestas solepnes de onrar en la eglesia donde es parroquiano presonalmente, pague la meatat de los diesmos e de las premiçias a la eglesia sobredicha, si non fuere parroquiano de la eglesia catedral, que le deve pagar las dos partes de los diesmos e de las premiçias, como dicho es."

[1205] C.16 q.7 c.10: Tit. "Omnes basilicae ad eum pertinent episcopum, in cuius territorio positae sunt".

[1206] This was useful for ecclesiastical authors in other ways. Sethina Watson, *On Hospitals: Welfare, Law, and Christianity in Western Europe, 400-1320* (2020). Ch. 7. "The first (3.31.1) was a statement by Gregory VI (1045–6), another obscure authority excavated by Bernard. It clarified that, should it be unclear in which diocese a territory lay, then a basilica in that territory would be consecrated by the bishop who had last exercised jurisdiction there."

> ordained, and let him be content with having them. And all governance of that church shall pertain to the one in whose territory (*territorio*) the church has risen.[1207]

This conception of territory was an internal conception for the Church: Bishops and parish priests alike could not perform dedications or other offices (including perhaps the sacraments) outside of their territory and "jurisdiction" without permission.[1208] The gloss on "*territorio*" clarified that *territorium* and "diocese" were equivalent terms, and then quoted the *Digest* as a definition. Taken together, it is clear that at this point that it was simply natural to imagine the Bishop as having authority over "the entirety of fields within the boundaries of that city" because all ecclesiastical (and some civil) obligations were generated by the Bishop's own authority within those boundaries. It made little difference whether the Bishop's authority was technically only over "souls", as Reformation and Early Modern authors would later argue, because the Bishop's authority was also very much over the bodies of those living within their "territory".[1209]

This was a strict requirement—canon lawyers maintained the Roman legal principle that jurisdiction and territory went hand in hand, such that when an individual left the territory of the Bishop any sentence pronounced against them was no longer strictly enforceable. The *Liber Sextus* (1.2) confirmed the Bishop's territory in this regard, but limited it: 'When a bishop promulgates a sentence of excommunication in his statute against all those who commit theft, his subjects who commit theft outside his diocese are by no means considered bound: Since obedience is not duly rendered to one who exercises jurisdiction outside his territory with impunity.'[1210] The gloss at "diocese" confirmed that the Bishop had ordinary jurisdiction over the whole diocese and could sit as judge and issue sentences; the gloss on territory confirmed that this was 'his own' (*suum*), using once again the Digest's definition of *territorium,* and adding the quality of the *ius terrendi*, 'that is, the right to remove others (*submovendi ius*) within those boundaries'.[1211] The commentary provided a case—if a Bishop authored a statute that a cleric could not grow long hair or carry arms under the penalty of excommunication, the cleric was not bound to obey the statute if they traveled outside of the 'territory' of the Bishop. Statutes were not personal, in other words, unlike *infamia,* excommunication, or the ambulatory interdict, which followed an individual 'like leprosy'.[1212]

These canon law sources sparked a long tradition of jurists who argued that a Bishop has "territory", properly speaking, though it might also be called a "diocese".[1213] Canon lawyers like

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[1207] C.16.q.5.c1.

[1208] This was a point of emphasis (and still might be) in modern canon law. R.P. Remigio Maschat, *Cursus Juris Canonici,* Tom. 2 [Madrid 1888], Decretalium Tit. 29, 284, q. 2, r. 1, p. 180.

[1209] Joannes Baptista Ciarlinius, *Controversiae Forensium Iudiciorum,* Book 2, Cap. 220, ns. 61 and 72.

[1210] *Liber Sextus,* Lib. 1, Tit. II: "Ut animarum periculis obvietur, sententiis per statuta quorumcumque ordinariorum prolatis, ligari nolumus ignorantes. Dum tamen eorum ignorantia crassa non fuerit, aut supina. Statuto episcopo quo in omnes qui furtum commiserint, excommunicationis sententia promulgatur, subditi eius furtum extra ipsius dioecesim committentes, minime ligari noscuntur: Cum extra territorium ius dicenti non pareatur impune." On judging and jurisdiction, see Aquinas, *Summa Theologica,* II-II, Q.67.1; See also Martini Bonacinae, *Opera Omnia,* Tom. 1, [Venice 1683], Disp. 1, Quaest. 1, Punct. 11, ns. 6-12. On these canon law passages, see also Josephi Grau et de Suñer, *Dissertationum in Gratiani Decretum,* [Cervariae Lacetanorum 1759] Ad c. 16. q. 11, Dissertatio V, Cap. II, pp. 216-218.

[1211] Ordinary Gloss at *Liber Sextus* 1.2.

[1212] Ordinary Gloss at *Liber Sextus* 1.2.

[1213] Joseph Mascard, Conclusio 106, ns. 3-4. See also Franciscus Aretinus, Cons. 42, Jason de Mayno Cons. 23, and Decius Cons. 146. On the colloquial equivalency of diocese and territory, see: Feliciani de Oliva e Souza, *Tractatus De Foro Ecclesiastico,* Pars Tertia, Quaestio XIV, n. 16 [Coloniae Allobrogum 1733], p. 100; Martini Bonacinae, *Tractatus de Censuris,* Editio Secunda [Milan 1621], Quaestio Prima, Punctum 11, ns. 1-2, p. 38; Godscalco Rosemondo Endoviense, *Confessionale sive de modo Confitendi* [Antwerp 1559], Fol. 180v; Valentín Lampérez y

Dominicus de Sancto Geminiano (c. 1375-1424)[1214] and Philippus de Franchis (fl. 1461)[1215] had no qualms with the concept of Episcopal territory in the *Liber Sextus.* Because "territory" was not yet an exclusively maximal or supreme concept as it would be once it was paired with sovereignty, jurists straddling the canon and civil laws had one more problem to face: nested, stacked, or overlapping territories. In one *consilium,* Carlo Ruini (1456-1530) analyzed the territory of a county—a county which was a part of the principality of Hesse and definitively subordinate. Yet, they still possessed a 'special and specific *territorium,* that of a smaller entity' (*speciale et proprium territorium quod est universitas minor*). But notice how Carlo also reverses the etymology of the term: 'Territory is derived from the Latin word "terrendo," meaning to terrify, and therefore wherever someone has the power to terrify, all that is said to be part of the territory, according to Panormitanus in Consilium 20.'[1216] This lower bar to territoriality—the practical 'power to terrify', which might even sidestep a "right" to the 'power to terrify—had the potential to blast open the conception of "territory" itself; terror is an easier threshold to cross than jurisdiction.

Canon lawyers stressed that the excommunication in particular was a 'terror'-inducing tool, though Panormitanus argued that for excommunication to have a valid form, the judge must have the intention *of* excommunicating a subject rather than simply 'of terrifying' them—the threat was not the *thing.*[1217] The sentence of excommunication was harsh, and it was a contentious historical and theological subject; St. Augustine had expressed concern about the kind of fear felt by Christians who had fallen off of the path of truth:

> What need is there to intimidate (*terreri*) those whose silence already reveals their fear (*territos*)? They cannot pass by as if they are healthy, for the diligence of medicine is necessary for those whose wound is hidden. Even if they do not need to be frightened, they need to be taught, and as I believe, they can be more easily taught while the fear of severity asists the teacher of truth, so that with the help of the grace of the Lord, they may understand and, even by speaking, overcome what they dare not speak of.[1218]

A Church whose scriptures talked often about the fear of God still had to negotiate between a healthy fear and an unhealthy one, especially if faith ought not or could not be strictly coerced. Gregory the Great distinguished between two kinds of 'fear'—an anticipated future fear and a present one:

> For those who differ from the Christian religion, it is necessary to gather them through gentleness (*mansuetudine*), kindness (*benignitate*), admonition, and persuasion (*suadendo*) to the unity of the faith, so that the sweetness of preaching

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Blázquez [Valentinus Lamperez et Blazquez], *Disciplina vetus ecclesiastica* [1696] Explicatio Bullae, Part XXX, p. 155; Joanne Baptista Braschio, *De Libertate Ecclesiae ac de Immunitate* [Lyon 1718], Cap. 18, n. 12, p. 238; *Jean Bréhal Grand Inquisiteur de France et la Réhabilitation de Jeanne d'Arc* [Paris 1893] Liv. IV, Ch. 1, p. 114.

[1214] Dominicus de Sancto Geminiano, *Lextura super sexto,* 6.1.2.

[1215] Philippus de Franchis, *Lectura super sexto* , 6.1.2, [1499] fols. 6v-7r.

[1216] Carlo Ruini, *Consiliorum seu Responsorum,* Tom. 1 [Venice 1591], Cons. 22.

[1217] Panormitanus at *Liber Sextus* 1.16.1.

[1218] Jacobus Latomus, *De quaestionum generibus quibus Ecclesia certat* [1525], unpaginated [p.26, beginning 'antequam ipsa pestilentia manifestissimo...'].

> and the anticipated fear of the future judgment may invite them to believe, rather than repelling them with threats (*minis*) and terrors (*terroribus*).[1219]

Gregory was likely sensitive to the real coercion taking place in Christendom. Take coerced baptisms and forced conversion, for example, which though broadly speaking caused most theologians discomfort, was nevertheless a feature of the missionary and militant Church from Charlemagne to Vitoria.[1220] This 'terror' of God, of ecclesiastical authority, of sin, and the consequences thereof, stick with Christianity through Luther and the Reformation.[1221] After all, the civil law was clear that while the use of armed force was sufficient to induce fear, it was not the only cause of the kind of 'terror' which might produce implied "territory".[1222]

Augustine's own theory of coercion is a standing interpretive puzzle[1223], but recent scholars like Robert Markus have argued that his was a "theory of coercion by the Church, not by the state"—the Church could attempt to coerce the "innermost consciousness", because that *forum* was within the Church's jurisdiction.[1224] External coercion, however, could belong exclusively to the state.[1225] This was true 'coercion', and jurists employed this language even to describe the Church's power over 'secular' matters. Paulus de Castro wrote that ecclesiastical 'power' is said to be 'greater' so that it can 'coerce the secular [power]'.[1226] However, this limited 'inner' jurisdiction does not hold up tot he Church's clear power, if not also jurisdiction over, bodies, property, and the rhythms of public and political life.

The *ius confiscandi,* discussed at length above, was equally a measure of the the *ius terrendi*, even if it wasn't always articulated as such. Kaspar von Schmid wrote that by the 'customs of the Kingdom of France', Bishops who had 'no territory and temporal jurisdiction'

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[1219] Gregory the Great, *Registre des Lettres,* Book 1, Epist. 34.

[1220] Moore, "The Frankish Church and Missionary Warfare", pp. 46-87; C.R. Boxer, *The Church Militant and Iberian Expansion, 1440-1770,* 1978.

[1221] Luther employed the language of theological fear of the (divine) law extensively. In his commentary on Galatians alone, Luther wrote, "For although the law is the best of all things in the world, it still cannot bring peace to a terrified conscience but makes it even sadder and drives it to despair" (p. 89); "For the law was given to terrify and kill the stubborn and to exercise the old man," (p. 90) and "the stubborn, proud, and hardhearted, before whose eyes nothing must me set except the law, in order that they may be terrified and humbled." (p. 90). "Therefore when I see that a man is sufficiently contrite, oppressed by the law, terrified by sin, and thirsting for comfort, then it is time for me to take the law and active righteousness from his sight" (p. 91); "In order to retain [the glory of His deity], He is compelled to send forth His law, to terrify and crush those very hard rocks as though it were thunder and lightning" (p. 100); "Terrified by the law, he despairs of his own strength; he looks about and sighs for the help of the Mediator and Savior" (p. 103) in Hans J. Hillerbrand, ed. *The Protestant Reformation: Selected Documents* (Palgrave Macmillan 1968).

[1222] Pietro de Monte, *Repertorium* [Padua 1480], v. 'Terror'. Dig. 43.16.3 discusses a handful of circumstances which could sway whether somebody had been 'ejected by force of arms', including simple intimidation.

[1223] Moore, "Frankish Church and Missionary War in Central Europe", p. 52: "Love inspired, love awakened, were the basis for knowing and believing the Christian religion, according to Augustine of Hippo (354–430); faith has its "locus in the deepest and innermost consciousness." The irony of Augustine's later arguments on behalf of religious coercion have often been noted, as the spiritually sensitive convert of The Confessions later called for the use of force against the Donatists, those African clerics who refused communion with those who had betrayed the faith under the pressure of persecution. How could Augustine not have observed the conflict between his theology of history and his late theory of coercion?

[1224] Robert Markus, *Saeculum: History and Society in the Theology of St. Augustine* (Cambridge University Press, 1988), p. 152.

[1225] Hobbes, *Leviathan,* Chs. 31-32, and 43; and also Locke, *Letter Concerning Toleration.*

[1226] Paulus de Castro at Dig. 5.1.58, 'The ecclesiastical power is said to be greater in order to restrain the secular' (*Ecclesiastica potestas dicitur maior ad coercendum secularem*).

therefore had 'no right to confiscate the immoveable property, at least the patrimonial property of the clerics ... Confiscation is done through the *ius terrendi,* which is *merum imperium,* and a jurisdiction which is not within the competence of Bishops who have no territory.'[1227]

Most of the time, the connection between terrifying to territory was civil, and Carlo gives the example of the people of Florence who have 'the power to terrify' the people of Pistoia and Arezzo. These, too, were stacked, according to Ruini:

> However, within the same territory of a kingdom, there may be other specific territories. Not only any duchy or county of the kingdom but also any city governed by an authority with jurisdiction is said to have its particular territory. Just as a whole province is said to be the territory of an archbishop or archbishopric, similarly, each bishop of the same jurisdiction is said to have territory in their diocese [...] Sometimes, even the diocese itself is referred to as territory.[1228]

Into the 16th century, jurists continued to refer to the Bishop's diocese as territory, or even 'spiritual territory', with specific reference to the power to coerce individuals within those boundaries. Lelio Giordano (d. 1583) wrote that the Bishop's 'pure authority implies the ability to have one's own armed retinue'; 'the Bishop has a *forum* or territory throughout the entire diocese, and therefore, he can punish all delinquents within it.' Giordano meant this literally: as I showed above, the Church was often expected to request temporal authorities to do the work of arrest, torture, and execution, even to the point where the Church would 'relax' the individual into the arms of the city. But Giordano took an even stronger position: 'it is not always necessary to invoke secular force, and in cases where the situation requires it, the secular arm can be compelled to provide assistance'. That is, the 'pure authority' of the Bishop (which included their power of imposing an interdict or excommunication) did not 'deny them the ability to exercise his own authority to apprehend; in ecclesiastical crimes, such as heresy, sacrilege, and rape, although he can excommunicate, he can also apprehend and arrest laypeople.'[1229]

The great Cardinal Tuschi (1535-1620) also noted that the Bishop's jurisdiction and authority also gave them the right to have an armed retinue. This helped in the execution of ecclesiastical justice: the Bishop seemed to have the right to arrest laypersons anywhere within their diocese, 'because it is necessary for the defense of justice and his jurisdiction to have an armed retinue, and because he is the official of the city [...] and the diocese assigned to the bishop is in the place of *territorium*'.[1230] After all, the Bishop was called an 'official of the community' because 'the entirety [of the community] consisted of sacred, public, and private matters'.[1231] In this capacity, it was therefore clear to Tuschi that the Bishop also possessed a *fisc* and the *ius confiscandi,* so long as the proceeds were put to pious causes; but the powers of confiscation and execution were specifically "territorial" rights: 'the diocese is, in fact, in the place of the *territorium* of the Bishops, and it carries the same meaning as *territorium*.'[1232]

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[1227] Kaspar von Schmid, *Commentarii ad Processum Summarium et Edictalem,* Tom. 1 [Monachii 1695], Controversia XVIII, n. 3.
[1228] Carlo Ruini, *Consiliorum seu Responsorum,* Tom. 1 [Venice 1591], Cons. 22, n. 5, fol. 32v.
[1229] Lelio Giordano, *Tractatus de Maioribus,* [Venice 1572], Cap. 8, n. 26, fol. 33v.
[1230] Cardinal Tuschi, *Practicarum Conclusionum Iuris,* Tom. 3 [Rome 1605], Conclusio 253, p. 207.
[1231] Tuschi, Conclusio 253, n. 5.
[1232] Tuschi, Conclusio 253, ns. 6-14.

In a vacuum, it made perfect sense to discuss ecclesiastical crimes in the context of ecclesiastical jurisdiction and ecclesiastical territory.[1233] Indeed, many of the jurists who admitted the *territorium* of the Bishop and the Church were stressing a spiritual parallel to temporal territory. The challenge was every citizen possessed both a body and a soul, both of which could be subject to ecclesiastical jurisdiction, while only the body was subject to temporal jurisdiction. When Charles de Moulin argued that the Bishop in his diocese, and the Archbishop in his province have 'ordinary and spiritual jurisdiction', it was accompanied by the *ius terrendi et monendi*'; therefore, 'just as the temporal judge can banish his lay subject from his temporal jurisdiction, the Bishop or Archbishop can banish his cleric from his spiritual jurisdiction.'[1234] (Elsewhere, de Moulin would strongly argue against the Bishop's possession of 'real' territory[1235]). This included anxieties about prescription which plagued theories of temporal sovereignty and government, including Bartolus; Vincentio Petra wrote that it would be 'monstrous' if anyone acquired territory *underneath* the Bishop, 'because there would be two heads in the same place, that is, the native Bishop, and the prescriptive acquirer, which is repugnant by nature.'[1236] Laurentius Kirchoff (1528-1580) wrote:

> It is beyond doubt that some jurisdiction and coercion belong to them in the Church; otherwise, without discipline and correction, they would not be able to fulfill their duty. This, however, is said to be twofold: one belongs to the people, the other to the clergy. For they have the right to admonish, chastise, and exclude from the sacred communion the people entrusted to them, in case of a serious offense and contumacy that harms the Church. By exercising such power, the authority of legitimate magistrates is not diminished, because they will still be able to punish wrongdoers by coercion and legitimate punishments.[1237]

Giovanni Francisco Leone, also writing at the end of the 16th century, claimed that the 'territory of the Bishop is expressly proven' by the canon law; 'no one except the Bishop has territory by the *ius commune* in the diocese, where the entire diocese is the Bishop's territory in spiritual matters.' The Bishop was, he wrote, 'the judge of bodies and souls'.[1238] The same was held by Jacopo Beretta (fl. 1562) who argued further that:

> whoever has territory has the power to imprison their subjects, because territory signifies the superiority of coercion, as Oldradus wrote in *Cons.* 176, and the execution is carried out on the subjects of the executing territory, and that a "diocese" is the same as "territory". Albericus de Rosate, in his *Dictionary,* at the word "diocese" says that diocese signifies a spiritual place, just as territory signifies

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[1233] Carolus de Grassis, *Tractatus de Effectibus Clericatus* [Panormi 1617], ns. 617-619.
[1234] de Moulin was responding to Joannis Galli, *Quaestiones,* Quaestio 63 [1530]: "Je dis donc que tout ainsi comme le iuge temporel peult bhannur de sa iurisdiction temporelle son subgect lay, tout ainsi peult le diocesain ou archevesque bannir son clere de sa iurisdiction spirituelle. Qultre il ne pronunce riens sur le temporel, ne du temporel, mais sa chose spirituelle comme son clere subgect il met hors par bande sa iurisdiction spirituelle." Charles de Moulin, *Omnia Quae Extant Opera,* Tom II, [Paris 1681], P. Quaestiones Joannis Galli, Quaestio LXXXII, p. 569.
[1235] Charles de Moulin, *Omnia Quae Extant Opera,* Tom II, [Paris 1681], Quaestio LXXXII, p. 606.
[1236] Vincentio Petra, *Commentarius ad Constitutione Apostolicas,* Constitutio IV, Callisti III, Tom. 5 [Venice 1729] p. 85. See also the similar question of inferior bishops: Pietro de Monte, *Repertorium,* 'Territorium': 'Who is said to have territory, and whether an inferior bishop can be said to have territory; note what Joannes Andrea has to say...'
[1237] Kirchhoff, *Consilia sive Responsa,* Vol. 1 [Frankfurt 1605], Consilium 5, n. 8, p. 33.
[1238] Joannes Francisco Leone, *Thesaurus fori Ecclesiastici*, [Venice 1606], Part 1, Ch. 9, n. 30.

> a temporal place. Therefore ... it follows that a Bishop can carry out executions on them as if they were subjects of their territory in appropriate cases. Perhaps what [adversaries] have adduced was true in the ancient law at the time when bishops did not have ordinary jurisdiction or territory, as discussed by Cino and Baldus.[1239]

Here, Beretta provided the same historiographical claim as Pietro Giannone—the Church did not always possess the *ius terrendi,* but they did "now"; Beretta stated it as a matter of fact, though, where Giannone would state it as a matter of lament.[1240] In a different *consilium,* Beretta suggested that the Bishop was also an ordinary judge even against the King in spiritual matters which was part and parcel of his spiritual "territory": the Bishop's '*territorium,* that is, the *ius terrendi et submoventi et insuper coercendi*,' was perhaps limited to spiritual matters, and he ought therefore to 'frighten and control with the ecclesiastical scepter and leave the power of exercising the material sword to the temporal judge as the canon law holds'.[1241]

But even for Beretta, the inertia of custom meant a reconciliation between the canon law, which often *resisted* giving the Bishop extensive punitive, carceral or coercive power, and practice. What started as a question of whether the Bishop could have an armed guard was at the same time a question about the *ius terrendi,* and indeed the complete extension of episcopal authority. I'll quote the full conclusion of this *consilium* to show the long reach of the simple right of an armed guard:

> If it can be conceded that a Bishop can order the arrest of offenders and their imprisonment ... then it is also commonly held that they can be beaten with rods or chastised. This is done without the aid of secular authorities, and is usually carried out by Bishops. Likewise, they can also subject them to torture and confine them in iron cages, which is reported to be a common practice throughout Italy, as Alciatus attests, stating his belief that custom holds sway in these matters. Indeed, all of these actions cannot be carried out without the assistance and hands of armed executioners. Therefore, it is necessary to acknowledge that an armed retinue must be granted to Bishops. Bartolus emphasizes that this particularly applies to ordinary jurisdiction. All of these points seem to be further confirmed by a valid analogy, as if a law permitting personal vengeance in certain cases is deemed to also allow the calling of allies and relatives to carry it out. The same can be said with even greater force in this question, where the Canons permit and grant the Bishop, who is the ordinary judge, to establish an armed retinue if he cannot execute these actions without arms. After considering these matters extensively, it is clear that imprisonment is granted to Bishops. ... While Bishops have the power to order the imprisonment of clerics, they have adopted certain methods to carry it out, even if they lack an armed retinue, which according to the Canons, they ought not to possess. As for the punishments of silence, verbal abuse, torture, and confinement in cells—these are not difficult to administer through the ordinary ministers of the Bishops without relying on a militant armed retinue. ... Ordinarily a Bishop does not execute or punish lay-people for crimes over which he has jurisdiction. ... As for the assertion that clerics can be tortured or beaten with rods and lashes, it is well

[1239] Jacopo Beretta, *Consiliorum,* Lib. 1 [Venice 1582], Cons. 3, ns. 26-27, fol. 7v.
[1240] See also Reinhard König, *Theatrum Politicum Tripartitum,* Pars 1, Cap. 35, n. 141.
[1241] Jacopo Beretta, *Consiliorum,* Lib. 1 [Venice 1582], Cons. 4, n. 17.

> established by strict law that they should not be subjected to such treatment by the hands of laypeople, even if the contrary is commonly observed.[1242]

The pragmatism to some of Beretta's argument would not disappear. In the 18th century, Bishop Carlo Gagliardi (1710-1778) marked his sharp disagreement with civil and canon lawyers, drawing on the *Liber Sextus* and the *Clementine Constitutions* to underscore—almost comically—that the Bishop in his territory or diocese has the 'right to intimidate their subjects with at least a little coercion and exile' (*ius etiam terrendi modica saltem coercitione habent et submovendi exilio*).[1243]

Monasteries were an interesting exception; they operated as a kind of extra-territorial bubble outside of the reach of the Bishop. One jurist observed that a Bishop might ban playing dice in his diocese, but this command could not touch the playing of dice in a Monastery—the Bishop did not have episcopal jurisdiction there, because the Monastery was outside of their territory (even if it was surrounded by their territory). However, he noted, the Monastery might be in the "territory" of the Abbot—once again we confront the flexibility of stacked territoriality.[1244] The Abbot's territory was a pocket of subordinate, or perhaps 'subaltern' jurisdiction—not supreme in any sense, but the main relevant jurisdiction for those under his care, and strong enough to keep the Bishop (and Prince) at arm's length. It is wholly consistent with my argument in the previous chapter both that cloisters and monasteries were famous for their walls which served as a physical reminder of their separation from the rest of the world, but were also exempt from even the most encompassing taxes and tributes for construction and repair in the provinces around them.[1245]

In broad strokes then, this was the long tradition of the Bishop's territory. Giovanni Battista Ciarlini (d. 1650) summarizes these steps again, but late enough to be an active response to the maxim I discuss in the next section:

> It is not true that a Bishop does not have a territory, for indeed he does have it, and the Diocese stands in place of that territory. He can perform the same functions as those who possess a territory, as the texts prove. Likewise, he has the power over all matters that pertain to his territory, and he has authority within his Diocese, as the texts and my previous statements confirm. Indeed, Peregrinus says that a Bishop is similar not only to a Praetor but also to a Governor, even though he himself admits that Bishops and Abbots do have jurisdiction, but not territory. However, it is well-known that the Bishops have an openly acknowledged territory, as can be seen in the aforementioned texts. It is not surprising, therefore, that a Bishop and his Vicar are called Officials of the community and the city to such an extent that they are not

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[1242] Jacopo Beretta, *Consiliorum,* Lib. 1 [Venice 1582], Cons. 4, n. 40, fol. 16r.

[1243] Carlo Gagliardi, *Institutionum iuris canonici communis neapolitani,* Vol. 3 [1768], at 3.4.13, p. 87.

[1244] Giovanni Luigi Riccio [Joannes Aloysio Riccio], *Resolutiones,* [Coloniae Allobrogum 1621], Resolutio 177. p. 199.

[1245] In medieval culture, the division between the religious and secular included the Church in both sides. The *religious* Church was sustained by the monasteries, closed off by walls from the world to live and work in solitude, prayer, and often silence, asceticism, and poverty. The *secular* Church was the Church sustained outside of those walls; it was *in* the world but not *of* it. The 'secular' world could therefore be intensely theological and religious, often sacred, and sometimes holy. For post-medieval conceptions of the 'secular' or 'secularization', this world is almost unintelligible using the same vocabulary. To carry any account through the medieval period to the early modern, one must move from one meaning of the 'secular' to another; but, crucially, it's a horizontal shift, not a categorical one. It's a changing of hands, not of forms.

> prohibited from executing the sentence of an external judge or being brought before a foreign court, just as they are not prohibited from executing the sentence of a Bishop or Vicar, or being brought before their court in matters that concern them. Furthermore, a Bishop and his Court have a treasury and a fiscal procurator, and they have the right to confiscate and impose penalties, even on laypersons, provided that the monetary penalties are distributed to pious places, as is attested to by Covarrius and others, in accordance with the more credible and common opinion.[1246]

This legal tradition stretched from ecclesiastical councils and synods, to the canon law, to centuries of civil and canon legal thought and commentary: the Bishop had a territory.

**Section II: The Bishop has No Territory—a Maxim and a Historiographical Problem**

But the Bishop did *not* have territory, at least according to French jurists from the 15th and 16th centuries. In his excellent article on the origin of this maxim, Tyler Lange wrote that this was "found nowhere in Roman law, canon law, or commentaries thereto", and was a product of French jurists searching for "comprehensive sovereignty" between 1402 and 1596, culminating in the work of Jean Bodin. [1247] We do find, however, its opposite, though Lange did not sketch any of the prehistory from Section I. This maxim is a convenient example for the development of Early Modern legal and political thought: sovereignty, like territory, the state, and likely many other concepts, were carved out of a chaotic and pluralistic medieval fabric. They were, in each case, reacting to a set of perceived problems about the order of politics. Even if many medieval and renaissance jurists argued that the Bishop did possess the *ius terrendi* and "territory", properly understood, Early Modern (especially French) jurists saw it as their mission to show why this was a mistake: only sovereigns could possess territory and the *ius terrendi,* along with all of the other "regalian" (royal) rights, which included the *ius confiscandi* and the ultimate say over the construction of walls, roads, and bridges. To have "properly" exercised these rights, the medieval Church would have to have been a "state", or an entity with *merum et mixtum imperium,* or perhaps, a "sovereign".

To be clear, it wasn't any of these. Jurists went to extremes, even when they granted *merum et mixtum imperium* to a Bishop, to clarify that its temporal jurisdiction was limited and not in the same category as temporal power.[1248] Most argued however that the supporting argument for why the Bishop could not have territory was because it was not the kind of entity that could have territory. For this reason, Oldradus, Rebuffi, Baldus, Petrus Belluga, and Menochio argued that "Diocese" and "Territory" were confused for each other, but '*territorium* properly respects the secular Prince, while *dioecesis* truly respects the Church'. [1249] Hobbes would later argue that the Church had never claimed civil sovereignty for itself at all.[1250]

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[1246] Giovanni Battista Ciarlini, *Controversiarum Forensium Iudiciorum,* Ch. 50, n. 28, p. 259.

[1247] Tyler Lange, "The Birth of a Maxim: 'A Bishop Has No Territory'", *Speculum,* January 2014, Vol. 89, No. 1. Lange, p. 129.

[1248] Franciscus Merola, *Disputationem in universi,* Cap. 5, 'De Iurisdictione Episcoporum', Dubiium VI, pp. 405-406, ns. 71-83: 'A Bishop in his diocese has not only simple jurisdiction but also pure and mixed authoriy. ... Furthermore, he can imprison clerics and punish offenders, even if they are foreigners, because for offenses committed in the Bishop's diocese, the forum of the Bishop applies. These actions pertain to *merum imperium.*'

[1249] Menochio, Cons. 1000, ns. 81-86.

[1250] Hobbes, *Leviathan,* Ch. 42: "Lastly, it hath not been declared by the Church, nor by the Pope himself, that he is the civil sovereign of all the Christians in the world". p. 381 in Curley.

The "territoriality" of the Church was also a threat to its omnipresence and abstract significance; Pierre Legendre has argued that the principle that 'the Church has no territory' (*Ecclesia non habet territorium*) was less a limitation of the Church than it was a confirmation of its special character, a "centralism", which Legendre suggested was inspiration for the French state's own self-conception of authority.[1251] It was a legal expression of Matthew 18:20, that the Church could be anywhere and everywhere, 'for where two or three are gathered together in my name, I am there among them'.[1252] The Church's lack of territory was one of its distinguishing features as a blended human and spiritual association; it didn't *need* territory. It was a *corpus mysticum,* after all.[1253] As one 19th century commentator on the canon law reflected, drawing inspiration from both verses at the top of this chapter:

> The Church does not have territory, that is, it does not have a place where it has the right to exercise the power divinely conferred upon it. Territory indeed belongs to civil rulers. ... However, since the Church is a society that is *catholic* by its very nature and institution, the entire world is the territory of the Church, according to the divine will expressed in Matthew 28:18-20, Mark 16:15 and elsewhere; did not Christ, who is God, have the right to establish His Church in this territory, and, in fact, did He not establish it for all?[1254]

Historically, it did possess land and authority within geographical spaces and it would recognize geographical limitations to its authority. Jacques le Goff pointed out that the clash between a limitless Church and spatially confined one was obvious to 11th century authors, specifically because of the rise of Islam.[1255] The Church was meant to be a universal association but it was clearly not in possession of the lands and souls occupied by its neighbors in North Africa and Eastern Europe. The Church had to juggle territory in two senses—one in which it did not possess *territorium,* as a virtue, and one in which it did, as a fact.[1256]

This Early Modern pivot about territory is therefore the perfect example for the two stages of historiography currently taking place in contemporary scholarship. Bodin, like other jurists (medieval and Early Modern) denied that it was appropriate for the Church to be exercising any of the rights discussed in this project. They were overstepping boundaries—improperly exercising and attempting to exercise rights which were not and could not be their own. The first wave of historiographical scholarship, exemplified by the work of Maitland and Figgis and all the way up

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[1251] Pierre Legendre, *Ecrits juridiques du moyen age occidental,* London 1988, pp. 529-531. Also, Peter Goodrich, ed. *Law and the Unconscious: A Legendre Reader,* p. 132.

[1252] Matthew 18:20.

[1253] Drawing on Legendre, Goodrich stresses this further than the civil or canon law can substantiate. But, he also sketches this principle on top of the traveling authority of the Prince and the Prince's court, which was Habermas's take on the limitations of the medieval "public". See Peter Goodrich, *Law in the Courts of Love: Literature and other Minor Jurisprudences,* p. 101.

[1254] Pierre de Brabandère, *Juris Canonici et Juris Canonico-Civilis Compendium,* Tom. 1 [Burgis 1882], p. 17. Also, Christianus Pesch, *Praelectiones Dogmaticae,* Tom. 1 [Friburgi Brisgoviae 1894], p. 228, n. 383.

[1255] Jacques le Goff, *La civilisation de l'occident médiéval,* Flammarion, 1997, p. 121. le Goff, *Medieval Civilization, 400-1500,* p. 145. Elden, *Birth of Territory,* p. 140.

[1256] This includes a third alternative, where the Church possessed universal territory, as a virtue. Feliciani de Oliva e Souza, *Tractatus de Foro Ecclesiae* Secunda Pars, Quaestio XXII, n. 46. [Coloniae Allobrogum 1678] p. 93: 'In ordinary matters, however, the delegated Apostolic can seek the assistance of the secular arm in any diocese of the Christian world because the entire world, in this regard, is his territory, just as it is for the Supreme Pontiff, whose role he represents and whose mind all writers share there.'

to Grzymala-Busse, rejects Bodin's conclusion but accepts his logic: perhaps the Church was exercising these rights properly because they were a "state", if not "the" state. The Church might then be a competitor for sovereignty, a partner in its development, a model or laboratory for innovation in the rise of the state.

This approach seeks to interpret medieval legal and political thought while still looking through Early Modern eyes. The second approach attempts to set aside Bodin's (and other's) anxieties, but also the necessity of the "state" or "sovereignty" as salient concepts for interpreting the Church. This remains faithful to the most dominant legal tradition of ecclesiastical thought: that the Church always maintained that it was not a temporal sovereign (except in the cases where it was—Ecclesiastical States or Papal Territories). That is, to take the first approach attempts to understand the Church without listening to its most resolute claim; to take the second approach attempts to understand the Church, at the risk of writing a legal and theoretical history divorced from the most important conceptual developments of Early Modernity.

Chief among these was the principle *cuius regio, eius religio*—the grand declaration of Westphalian sovereignty, that each ruler or state (*regio*) could determine their own religion (*religio*) within their territory. This was a principle adamantly parasitic on territory and strictly observed cartographic boundaries.[1257] Indeed, my argument here both challenges and supplements recent accounts of juristic responses and contributions to the "emerging territorial state"[1258], and the "foundation of the modern states system"[1259]A more careful reading of the territoriality of the medieval Church helps avoid a common mistake: that the "state church" was the necessary model of Westphalian religion and sovereignty and that the territoriality of the Church was attached to a cohesive and continuous conception of state territoriality and state borders. Sharon Achinstein writes, "in the midst of European states' scramble for trade and settlement, territorial disputes, and conquest and reconquest, along with denominational plurality from the start, it was impossible to effect a state church in many of these spaces of conquest. Territorial definitions of religion evaporated, especially in the Carribean".[1260] I think Achinstein is right in an important respect—the *Westphalian* territorial definition of religion may have evaporated; but it left behind a much *older* conception of territoriality that remained and was not only consistent with but actively conducive to conquest and the colonial "Church".

The dominant view of Early Modern jurists has, I think, been captured by Stuart Elden[1261], but a few examples of the alternative to Section I that he did not discuss will be helpful to illustrate how the early modern conception of territory was shaped by the state. Charles Loyseau's notable

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[1257] Branch, *Cartographic State.*

[1258] von Freidenberg "Cuius regio, eius religio: The Ambivalent Meanings of State Building in Protestant Germany, 1555-1655" pp. 73-91, p.84 in Howard Louthan, Gary B. Cohen, and Franz A.J. Szabo ed. *Diversity and Dissent: Negotiating Religious Difference in Central Europe, 1500-1800* (Berghahn Books 2011). See Christoph Besold's juridical writings for the *jus terrendi* and 17th century politics.

[1259] Phillip Windsor 1984, p. 45: "The Westphalian system represented some remarkable achievements: the absolute sovereignty of a state rested on a dual basis whereby internal authority was matched by freedom from external interference; and in this way the principle of *cuius regio, eius religio*, codified in the Religious Peace of Augsburg, laid the foundation of the modern states system."

[1260] Sharon Achinstein, "New World Behn: Toleration, Geography, and the Question of Humanity" pp. 35-57, p. 42. in Alison Conway and David Alvarez, eds. *Imagining Religious Toleration: A Literary History of an Idea, 1600-1830* (University of Toronto Press, 2019).

[1261] Elden, *Birth of Territory,* Ch. 9.

account of Ecclesiastical justice from his *Five Books on the Law of Offices* started with the "two powers" doctrine.[1262] Loyseau's historical argument was like Giannone's above:

> it is certain that the Church existed for a long time without this extensive contentious justice that is has now. This would not have been the case if it were purely according to divine law. Not that it should be inferred from this that ecclesiastical justice is the cause or that it is abusive or useless. Rather, this stems from the corruption of our morals, which continue to worsen.[1263]

The early Church had exercised justice in a number of ways, notably in judging disputes regarding religion internal to the church, as an alternative to avoid litigation in civil courts, and for the correction of morals and theology of lay Christians.[1264] This last function was important, and based in the scriptural passage at Matthew 18:15-20 which included the donation of the two keys.[1265] Like Bodin had argued his *Six Books,* early and medieval ecclesiastical government took advantage of ecclesiastical censure, but in doing so walked in the footsteps of the Roman censors.[1266] This is why, Loyseau wrote, the Bishop was called ἐπίσκοπος—an inspector, a guard, an overseer, and an enforcer of the morals of the Church.[1267] The Bishop, and the Bishop's court, therefore had 'knowledge' or 'cognizance' over three kinds of cases: disputes of the faith which it judged by setting policies, disputes between Christians which it judged through arbitration, and then minor offences which it judged through direct correction and censure.[1268]

To Loyseau, it was clear that the Church did not possess 'perfect justice' (*iustice parfaite*), or jurisdiction (*iurisdictionem*), because their actions were historically referred to as '*notitionem, iudicium, iudicationem, audientiam*', but never '*iurisdictionem*''. The Church, and its ecclesiastical judges, could therefore 'judge' but not with full jurisdiction—they 'only have the

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[1262] Loyseau, *Les cinq livres du droit des offices* [Paris 1666], Ch. 15, p. 132: "Il y a deux puissances en ce monde, par lesquelles il est gouverné, la spirituelle et la temporelle".

[1263] Loyseau, *Les cinq livres du droit des offices* [Paris 1666], Ch. 15, p. 136: "De fait est certain, que l'Eglise ha de long temps subsisté, sans avoir cette ample iustice contentieuse, qu'elle ha de present: ce qui n'eust esté, si elle estoít purement de droit divin. Voire chacun sera d'accord, qu'il y avoit plus de pieté et pureté en la primitive Eglise, lors qu'elle ne l'avoit point, qu'a present. Non que de là il faille inferer que la iustice Ecclesiastique en soit cause, ni qu'elle soit ou abusive, ou inutile, ains cela procede aviourd huy de la corruption de nos meurs, qui vont tousiours en empirant: de sorte qu'il faut de confesser, que maintenant il est bien plus b esoin de cette iustice, q'en la primitive Eglise."

[1264] Loyseau, *Les cinq livres du droit des offices* [Paris 1666], Ch. 15, p. 136: "Toutesfois il est vray de dire que mesme en la primitive Eglise, les Ecclesiastiques n'estoient pas du tout sans quelque forme ou commencement de Iustice, ains est aisé à prouver qu'ils cognoissoient de trois sortes de causes. Premierement la cognoissance des differens de la Religion ne leur a iamais esté déniee, non plus qu'aux Prestres du Paganisme, 'Quando unquam auditum est, in causa fidei laicos de Episcopo iudicasse?' Dit sainct Ambroise à l'emperour Theodose en son epistre 32. Aussi estoit-ce le droit commun de Rome et de Grece, que toute communauté licite cognoissoit de ses propres negoces, et en faisoit des reglemens où la loy de Solon est rapportee."

[1265] Matthew 18:15-20: "If your brother sins against you, go and tell him his fault, between you and him alone. If he listens to you, you have gained your brother. But if he does not listen, take one or two others along with you, that every charge may be established by the evidence of two or three witnesses. If he refuses to listen to them, tell it to the church. And if he refuses to listen even to the church, let him be to you as a Gentile and a tax collector. Truly, I say to you, whatever you bind on earth shall be bound in heaven, and whatever you loose on earth shall be loosed in heaven. Again I say to you, if two of you agree on earth about anything they ask, it will be done for them by my Father in heaven. For where two or three are gathered in my name, there am I among them." ESV.

[1266] Bodin, *Republic,* 6.1.

[1267] Loyseau, *Les cinq livres du droit des offices* [Paris 1666], Ch. 15, p. 137.

[1268] Loyseau, *Les cinq livres du droit des offices* [Paris 1666], Ch. 15, p. 137.

power to hear the parties and resolve their disputes, but not to enforce their judgments and bring them into effect.'[1269] As discussed above at length,

> regardless of any increase in Ecclesiastical justice, all Church judges have always been compelled to invoke the secular arm, meaning temporal justice, to enforce their judgments. This is because, as is commonly said, the Church does not have territory, meaning in effect that it does not possess perfect jurisdiction, and the judges of the Church are not Magistrates who can pronounce those three essential words: *do, dico,* and *addico*—the imperatives give, declare, and assign.[1270]

Loyseau maintained that 'it has always been observed, and continues to be the case today, that they cannot, by their authority, imprison ecclesiastical persons without seeking the assistance of the secular arm'. As strongly as Loyseau phrased the claim, he immediately recognized an exception, citing le Maistre: 'the Church judge can imprison those who are found within his jurisdiction.' The *Liber Sextus* confirmed as much, including the power to arrest—however, 'this is not the case in France'.[1271] It also couldn't have been a necessary feature of ecclesiastical power because ecclesiastical prisons didn't exist until the time of Pope Eugene I (d. 657).[1272]

After noting a handful of examples in which France had departed from canon law and in which canon law had departed from earlier law and custom, Loyseau stressed that:

> This is how the Church has never had and still does not have territory (i.e, the *ius terrendi*), and consequently does not have perfect jurisdiction, which is attached to territory, as mentioned before. For its justice has not been expanded in terms of form and internal power, but it has been greatly extended in terms of matter and external power, that is, in its scope. This expansion has been achieved through concessions from the Princes and the voluntary submissions of the people.[1273]

This history began with Constantine and was recorded in the Theodosian Code—a move that, if it were observed to its fullness, 'would almost annihilate temporal jurisdiction, or at least 'temporal jurisdiction' would serve very little other than to carry out the order of the ecclesiastics.'[1274]

In closing, jurists were sensitive to the conflicts induced by the overlap of ecclesiastical and temporal jurisdictions. Jurists were no more alien to the "Church" and "Caesar" than Christ's audience who had heard Him clearly distinguish between pathways of rendering property and obligations. But corporation theory also allowed jurists to explore new ways of sorting legal life; Canning observed Baldus's originality on this point:

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[1269] Loyseau, *Les cinq livres du droit des offices* [Paris 1666], Ch. 15, p. 137.
[1270] Loyseau, *Les cinq livres du droit des offices* [Paris 1666], Ch. 15, p. 137.
[1271] Loyseau, *Les cinq livres du droit des offices* [Paris 1666], Ch. 15, p. 138.
[1272] Vollaterranus, *Anthropology,* Lib. 22.
[1273] Loyseau, *Les cinq livres du droit des offices* [Paris 1666], Ch. 15, p. 138.
[1274] On this passage in Loyseau, see also the commentary by Johannes Limnaeus, *Notitiae Regni Franciae,* Tomus Alter [Argentorati 1655], Lib. III, Cap. IV, fol. 65v: "Voyla comment L'Eglise n'a iamais eu, et n'a point encor à present de territoire (id est, ius terrendi, comme dit la loy l. pupillus, §. territorrium, de verb. signif.) ni par consequent de parfaite iurisdiction, quae adhaeret territorio, ainsi q'il a este dit cy-devant. Car sa iustice n'a point esté amplifice, quant à la forme, et au pouvoir interne, mais quant a la matiere et pouvoir externe c'est à dire, quant à son estendue elle a este grandement augmentee, soit par les concession des Princes, soit par la submission volontaire des peuples, ce qui ne sera point hors propos de specicier de temps en temps, comme par forme d'histoire."

> Baldus does, however, produce two statements which in a highly original way treat the emperor's duty to adhere to the *utilitas publica* in his dealings with the Italian city-republics, and illustrate further the limitations on his freedom of action. The first concerns the cities of both the *terrae ecclesiae* and the *terrae imperii*: 'Innocent says, "To whom does a city of the church belong?" The answer is that it belongs to the church, but more so to the citizens whose city it is. Bologna belongs to the church, but more so to the Bolognese, because the church possesses no authority there except as the republic whose likeness and name it bears."[1275]

Baldus could sidestep the dueling 'land of the church' and the 'land of the empire' by introducing the 'land of the people'. In the same stroke as the concept of territory can be mapped on to the development of an impersonal "state", it can also be mapped onto the concept of the *patria*—a mystical corporate body that, during this time, started to appear more bounded, more coherent, more continuous.[1276] But this was the same *patria* which could be gained or changed through baptism; it was a *patria* whose gates were jointly patrolled by the priests and temporal authorities.

**Section III: Jacob Pignatelli and Nested Territories—'*de territorio*' vs. '*in territorio*'**

Jacob Pignatelli (1625-1698) was an Italian theologian and canon lawyer. In his discussion of ecclesiastical jurisdiction and privileges, Pignatelli invoked a classic Roman and canon legal principle with a new spin: it is precisely because judges cannot exercise jurisdiction outside of their territory that a secular authority cannot exercise judgment over a church, let alone *the* Church. The Church is an 'extra'-territorial entity, at least in theory. In practice, this was ridiculous—the Church (and churches) existed in physical and geographical space, inside and outside of city walls, and clearly within the visible and lived boundaries of territory. Pignatelli's reconstruction of a distinction between being "in" and "of" territory was his escape. The Church could be "in" territory in a physical sense, without being "of" territory in a jurisdictional sense. Recovering these two moves helps explain why the Church is impossible to map onto ordinary conceptions of spatial and political authority and Pignatelli's late 17th century perspective offers an invaluable retrospective tool for reconsidering the territoriality of the Church.

First, canon lawyers had often used Roman legal principles of jurisdiction to make claims about ecclesiastical and 'secular' judges. In the *Liber Sextus* passage above (1.2), the canon law confirmed that sentences imposed by a Bishop ceased to be enforceable "*extra territorium*"; put differently, 'jurisdiction *coheres* with territory', as the other famous maxim goes.[1277] Rather than argue that a 'secular' judge had no authority over the Church and could not compel ecclesiastical persons to pay a particular tax, jurists could therefore argue that 'a secular judge cannot resort to the Church and extract their property without the permission of the Bishop ... because no one can exercise jurisdiction outside their own territory'. Pignatelli drew an analogy: 'a delinquent in Spain, upon moving to the Kingdom of France, is exempt from the jurisdiction of Spanish judges'.

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[1275] Canning, *The Political Thought of Baldus,* p. 90.
[1276] Kantorowicz, *The King's Two Bodies,* pp. 232-272.
[1277] Fedele, *The Medieval Foundations of International Law,* p. 209; Zenobi, *Borders and the Politics of Space in Late Medieval Italy,* p. 27; Dietmar Willoweit, *Rechtsgrundlagen der Territorialgewalt: landesobrigkeit, Herrschaftsgewalt und Territorium in der Rechtswissenschaft der Neuzeit* (Bohlau 1975). And Elden, *Birth of Territory.*

In the earlier part of this period the relevant territorial jurisdiction could be quite narrow, pertaining to a particular *civitas;* one's *origo* and *civitas,* the fountains of their juridical and social obligations, were intensely local, as was the proximal "territory" which surrounded them. But already in Spain in the early 15th century and soon thereafter in France, jurists argued that one's civil obligations were translatable to the *patria* which encompassed all the *civitates* within a set of boundaries. The development of jurisdiction and territoriality are unextractable from the development of the *patria* and indeed the 'nation'.

But this principle could not clearly explain why a French 'secular' judge could not issue judgment on a French 'ecclesiastical' person—both occupied the same "territory" under the same monarchy. Pignatelli, like other jurists, recognized as much, but needed a way to preserve independence while recognizing temporal entanglement:

> However, even though the Church is said to exist within the territory (*in Territorio*) of a secular Prince, it is not considered part of the territory (*de territorio*) of the Prince. ... For these terms contain a significant difference between being in the territory (*in territorio*) of the Prince and being of the territory (*de territorio*) of the Prince, according to Peter Ancharanus and many other authorities. Furthermore, one term entails subjection while the other does not; they are both considered to be outside the territory (*extra territorium*), and within the territory but exempt (*in territorio sed exemptum)*. This means that they have their own distinct and separate territory within another territory (*separatum territorium in alieno territorio*).[1278]

While Pignatelli cites a number of authorities, he recognized that many influential authorities disagreed with him. Baldus, for example, had argued that the Church was "of the" territory of the Prince, and that this was to the Church's advantage because it grounded an obligation for the Prince to protect the Church as he was obligated to protect all of his subjects.[1279] *In territorio* and *de territorio* were old distinctions, framed by Baldus, Paulus de Castro, and Bertachini onward.[1280] Giovanni Domenico Rinaldi (1627-1711) argued that the 'argument, which states that the Church, as a territory within the secular prince's territory, does not grant the Ecclesiastical judge the right to proceed, collapses. This is because the Church has its own territory and thus the right to proceed based on the location of the committed offense'.[1281]

What Pignatelli imagined, perhaps, was akin to an embassy—bubbles and pockets of protected territory and jurisdiction dispersed throughout the world, "in" a state to some extent, but "outside" of it in the law, and certainly not "of" the state in any real way. Jurists were experienced with 'exempt' places in the ecclesiastical sense, such as monasteries, which were also "*in territorio*" of the Archbishop, but "*extra territorium*" with respect to jurisdiction or superiority.[1282] This might even be a contextually tenable analogy, in that the Camposanto Vecchio (the Old Cemetery) in Pisa was rumored to be filled with a shipload of soil from Jerusalem after the Third Crusade[1283]; even though *this* was not a widespread practice, the economy of relics to create a

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[1278] Pignatelli, 5.5.35.
[1279] Baldus Cons. 468 n. 19.
[1280] Bertachini, *Dictionary,* at 'Ecclesia'; Paulus de Castro, Cons. 132.
[1281] Raynaldi, *Vota ... Opus Posthumum* [Venice 1735], Cap. I, § 10, p. 120, n. 84.
[1282] Pietro de Monte, *Repertorium,* at 'Territorium'.
[1283] This soil was delivered around 1203; note that the *camposanto* is literally, a *campus sanctus,* a 'holy' field. Cemeteries were legally a part of the boundaries of the church. The *Camposanto Vecchio* in Pisa is next to the (leaning) bell tower and is on top of the ruins of the old baptistery. See Neta B. Bodner, "Earth from Jerusalem in the Pisan

corporeal sacred space emanating from the heart of the cathedral does confirm the already sacred, protected, immune, and exempt space of the Church, let alone its jurisdiction. It was, above all, a 'holy' (*sanctus*) and *protected* place, in part due to these relics, which is why reliquaries and shrines were sometimes built outside of the city-walls as a sort of early-defense system against outsiders.

The embassy analogy is complicated slightly by what Pignatelli immediately says about the "territory" of the Church. Writing after the concept of "territory" was reaching its "modern" form as outlined by Stuart Elden, Pignatelli was delightfully old-fashioned in his approach to Episcopal territory.

> Those Doctors [who wrote about the territory of the Church] cannot be said to speak improperly ... For at most, some impropriety can be recognized regarding the place (*locum*), which is materially situated in composing the territory, but not regarding the jurisdiction which constitutes the form of the place in being *of* the territory. For this is full in relation to the Bishops, and null in relation to secular princes. The reasoning, however, is derived from the definition of territory, which is nothing other than a certain space of land enclosed by certain boundaries, like certain fences, and protected by jurisdiction. ... However, these things apply to Churches. For they have a certain space of land, as is clear in itself, and this is a material part of territory. They also have jurisdiction under the Bishop, by which this space of land is protected as a formal part. Hence, when both the material and the formal parts coincide, a properly defined territory arises. Especially because territory does not imply ownership of the land, because this also is in the hands of the subjects, but rather [it implies] jurisdiction and coercive superiority.[1284]

This fullness of territory then is the territory possessed by the Church *inside* the same fullness of territory possessed by the secular Prince. It is a jurisdictionally distinct territory, oftentimes existing within a geographically identical set of boundaries—two territories, occupying the same space, but along different planes of authority.

Pignatelli did not think that this coexistence of authority detracted from either territory, and argued that no special grant or renunciation needed to take place from either party with respect to the other's subjects. Instead, he argued that 'equivilance (*aequipollentia*) consists in the fact that the jurisdiction that belongs to the Prince with respect to his subjects is granted to the Bishop with respect to his own, and that the Prince is prohibited from exercising jurisdiction not only over the persons subject to the Bishop but also over the Churches'. The Prince's jurisdiction is 'limited so that it does not extend within the boundaries of the Churches'.[1285] Nor did Pignatelli think that this 'separation' (*separatio*) was perfect: the Prince could still exercise certain acts of jurisdiction "*in Ecclesias*", including extraditing murderers, raiders, and other criminals—but this seemed to confirm rather than detract the 'distinct' and 'separate' territory of the Church, which was truly 'their own' (*suum proprium territorium*).[1286] On this last point, Pignatelli also departed from a strand of legal thought which treated the Church as an absolute place of refuge, even for

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Camposanto", pp. 74-93 in Renana Bartal and Hanna Vorholt, eds. *Between Jerusalem and Europe: Essays in Honour of Bianca Kühnel* (Brill 2015).

[1284] Pignatelli, 5.5.35, n. 37.

[1285] Pignatelli, 5.5.35, n. 40.

[1286] Pignatelli, 5.5.35, n. 41.

murderers—Alciatus, for example, disagreed, and argued that the stronger argument for ecclesiastical immunity implied that 'when this offender is in the Church, he is outside the *territorium* of the civil judge'.[1287]

While my focus here is on Pignatelli, these principles had been applied by other jurists in the 17th century and before. Cardinal Tuschi (1535-1620) argued that the Church, as the 'house of God', is 'inside the territory, not of the territory' of secular powers:

> The Church is not considered *de territorio* of a secular Prince, even if it is *infra territorium*. ... Although [territory] often yields to the ownership of the land, it is distinct within the church, as the land is connected to the Church. Further, it has immunity, so the secular ruler cannot exercise jurisdictional or criminal powers by apprehending wrongdoers within it, which they could do if it were *de territorio*, as mentioned below—the Church protects all those seeking refuge in it from secular power (Conclusion 10) ... It can be clarified that the Church is said to be within the territory (*infra territorium*) and a part of the community (*de universitate*), similar to how the clergy is a part of the people, but only in matters that will turn in their favor (*respiciunt eorum favorem*). In other matters, however, they are neither part of the territory (*de territorio*) nor of the people (*de populo*) and are said to be exempt.[1288]

Despite the strength of this position, individual cases still had to be settled. Joannes Baptista de Thoro, writing a decision for the tribunal in Naples, pressed on the argument that a church was a true territorial embassy: a convicted murderer had been banned from Naples and its suburbs, but sought refuge in a church within Naples. There, he was arrested, but petitioned that he should be released because he was 'captured in foreign territory', where the jurisdiction of the 'secular' court could not reach. This seemed plausible, because 'the Church is not subject to the jurisdiction of a lay judge', and 'is considered to be outside the territory of the secular judge'. Furthermore, 'although the Church is located within the bounds or limits of the territory due to a certain universality, it is not considered to be part of the district where the power to induce terror and exercise jurisdiction is properly considered'. [1289] The council's verdict was that these *valid* territorial exceptions were unreasonable given the facts; drawing also on Nelli's *Tractatus de Bannitis*[1290]*,* they concluded that somebody banished from a particular territory ought also to be considered banished from all of the churches located within it.[1291] Others, including Zacharias Vietor (1585-1641)[1292], who was cited by Grotius, Julius Caponi (1612-1673)[1293], and Henricus-Günterus Thülemeyer (1642-1714),[1294] used the same vocabulary and arguments.

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[1287]Alciatus, *Regula Tertia Praesumptio XXXIII,* n. 5.

[1288]Dominicus Tuschi, *Practicarum Conclusionum Iuris, Vol. III* [1621], Conclusio 5. Sacrilege was a mixed crime, and as a mixed crime was subject to rules of mixed jurisdiction, and therefore could be punished by secular authorities.

[1289] Joannes Baptista de Thoro, *Aurei Compendii Decisionum Regalium Supremorum Tribunalium* , Pars II, [Naples 1628], p. 225.

[1290] Nelli a Sancto Geminiano, *Tractatus insignis de Bannatis* [Lyon 1550].

[1291] This then is the porousness of authority in the opposite direction—clear temporal control over access to ecclesiastical goods and services.

[1292] Zacharias Vietor Corbaccensis, *De Causis Exemptionum Imperii,* [1615], Conclusio XXVII: 'These paradoxes, which are not necessarily contradictions, arise from this: to exist in the diocese but not *of* the diocese, to exist in the territory but not *of* the territory...'

[1293] Julius Caponi [Giulio Caponi] *Disceptationum Forensium*, Tom. 4, [Lyon 1677] pp. 176-177, n. 26

[1294] Henricus-Günterus Thülemeyer, *Relationum Decisionum et Votorum,* [Frankfurt et Wezlariae 1696], Relatio XXIV, 8, pp. 855-856: 'It is a well-worn distinction among legal scholars, based on territorial jurisdiction, between

The conceptual challenge of this account of nested territories is that the Bishop's subjects and the Prince's subjects were to a great extent overlapping.[1295] In pre-Reformation Europe, with the exception of Jews and foreign merchants which made up a meaningful minority of the population, these two lists of subjects might indeed be almost identical—subjects lived as dual-citizens of two territories, negotiating fluidly between them as they moved about their daily lives. After the Reformation, the territory of the Catholic Bishop fractured and shrunk, but, so long as the new Protestant priests, rectors, and bishops still claimed ecclesiastical authority over their subjects, they were perhaps replaced by new territories. Protestant communities claimed the same power of excommunication and many of the same powers of ecclesiastical censure which were the basis for the Catholic Church's *ius terrendi* and even Hobbes would assent to the Anglican Church's power in this respect.[1296]

Carlo Ruini's reversal of the etymology of *territorium,* which might be technically inaccurate, becomes instead theoretically revealing; wherever there is 'terror' and the *ius terrendi* there is *territorium,* and wherever there is coercion there is power and jurisdiction. If "territory" was and can be detached from the "state" and if "nested territories" is a tenable concept, then theories of structural oppression, domination, and coercion at all levels of social and political life create a wide variety of territories, alongside an equally wide variety of potential sources and forms of coercion. These aren't even reliably or orderly nested; if there is an actor at the center of a system of misshapen Matroyshka dolls, navigating and escaping them won't look the same, from the inside or the outside.[1297]

I suggest here that Pignatelli's description of the Church and the Church's territory offers a new insight to the struggle of imagining the legal pluralism and jurisdictional patchwork of medieval and Renaissance Europe; I would also suggest that its comfortability with smaller jurisdictional communities, like the 'subaltern jurisdictions' of Giulio Pace or the "mini-publics" of contemporary scholarship, makes it a useful tool for imagining Early Modern and Modern politics too.[1298] It is especially useful, I think, for making sense of the Church's fragmented and widespread colonial activities; the *Ecclesia* was splintered into multiple offshoots, but the *ecclesiae* often played the same militant, imperial, and colonial part that it had been practicing for a millennium. If it had been engaged in the construction and governance of public life in Europe up to the seventeenth century it was now exporting its role around the world.

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being "de" and "in" a territory. The former implies subjection, while the latter does not necessarily. They are equivalent to being outside the territory, and being within the territory but exempt, meaning having one's own distinct and separate territory within someone else's territory.'

[1295] Historical demographic estimates are difficult to come by, especially in relation to percentages of the population. Other scholars can attest to the degrees of marginalization of Jewish, Muslim, and un-orthodox Catholics before the Reformation; after the Reformation, the various sects of Protestants formed a new group of Christians who were now "outside" of the Bishop's territory too.

[1296] Hobbes, *Leviathan*, Ch. 42, 102-103, 123-124. See also Collins, Jeffrey R. "Thomas Hobbes, Heresy, and the Theological Project of Leviathan." Hobbes Studies 26.1 (2013): 6-33. Sommerville, Johann P., and Johann P. Sommerville. "Hobbes on Church and State." *Thomas Hobbes: Political Ideas in Historical Context* (1992): 105-134.

[1297] This is Laure Benton's concern about the use of "nested territories" in literatures on legal pluralism; these 'nests' begin as an attempt to describe a pluralistic structure, but often produce "hierocratic" models often resembling solar systems.

[1298] Setälä, Maija, and Graham Smith. "Mini-publics and deliberative democracy." The Oxford handbook of deliberative democracy (2018): 300-314; Ryan, Matthew, and Graham Smith. "Defining mini-publics." Deliberative mini-publics: Involving citizens in the democratic process (2014): 9-26; Jackson, Robert H. "Quasi-states, dual regimes, and neoclassical theory: International jurisprudence and the Third World." *International Organization* 41.4 (1987): 519-549.

Thomas Hobbes observed as much. In the passage quoted in the introduction to this project, which inspires its title, Hobbes challenged his readers to "consider the originall of this great Ecclesiasticall Dominion". My arguments in the chapters above have, at worst, helped clarify Hobbes's claim:

> And if a man consider the originall of this great Ecclesiasticall Dominion, he will easily perceive, that the Papacy, is no other, than the Ghost of the deceased Romane Empire, sitting crowned upon the grave thereof: For so did the Papacy start up on a Sudden out of the Ruines of that Heathen Power. The Language also, which they use, both in the Churches, and in their Publique Acts, being Latine, which is not commonly used by any Nation now in the world, what is it but the Ghost of the Old Romane Language? ... The Ecclesiastiques are Spirituall men, and Ghostly Fathers. The Fairies are Spirits, and Ghosts. Fairies and Ghosts inhabite Darknesse, Solitudes, and Graves. The Ecclesiastiques walke in Obscurity of Doctrine, in Monasteries, Churches, and Church-yards. The Ecclesiastiques have their Cathedrall Churches; which, in what Towne soever they be erected, by vertue of Holy Water, and certain Charmes called Exorcismes, have the power to make those Townes, Cities, that is to say, Seats of Empire. The Fairies also have their enchanted Castles, and certain Gigantique Ghosts, that domineer over the Regions round about them.[1299]

Hobbes's target was clearly Catholicism. However, his internal claims in this passage cannot be limited to Catholicism exclusively. I have argued above that the delimitation of city boundaries, the extra-territoriality of "Monasteries, Churches, and Churchyards," the 'solemn' procedures for convening public assemblies, and various tools of public and private discipline all bore the imprint of ecclesiastical authority; these may have started off as 'obscurities of doctrine', but they became embedded in legal thought and city statutes. These produce, quite rightly, "Seats of Empire", though for the Anglican, Lutheran, Calvinist, and later Puritan, Quaker, Presbyterian, and Baptist "fairies", their towns and cities were not constructed out of "enchanted Castles". They were, nevertheless, 'sacred'—and, I argue, eminently 'imperial' and political, despite the best efforts of Bodin, Hobbes, Locke, and various other Enlightenment and Early Modern theorists.

If Pignatelli's account is plausible, consider now the rhythm of public life as accounted and circumscribed by the examples in the chapters above. On Sundays, feast-days, and celebrations of baptisms, weddings, and funerals, individuals leave one territory and enter another; they exit and re-enter the jurisdiction of temporal authority. The porous boundaries of both ecclesiastical and temporal authority underscore limitations of both; temporal territory is cut up as if in every neighborhood there was an embassy. The well-trained Early Modern jurist would be responsible for the development of a continuous and comprehensive sovereignty, state, and territory; but as they worked, they looked out at a political and jurisdictional map of Europe that must have resembled Swiss Cheese. To the medieval jurist, canon or civil, this was an acceptable, theoretically consistent picture—it was still continuous, still bounded, still part of the same fabric of life, within which the pockets and bubbles helped define the substance of the whole community. In its missionary expansion to fulfil the Great Commission, it could not help but export and recreate—inoculate and culture, perhaps—the indigenous and colonial communities it was attempting to conquer and convert.

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[1299] Hobbes, *Leviathan,* Ch. 47.

It was on these "missions" that Catholic or Jesuit priests, newly appointed bishops for newly created dioceses, or even Protestant missionaries, engaged in the work of transplanting structures of authority: baptizing new "citizens", drawing new boundary lines, importing seeds and cultivating the land and the people in it, soliciting tithes and donations to build new Churches and schools, in which they taught Latin, English, or Spanish. They would also import the Inquisition. It was a spiritual battleground, sure, but also a physical one. The Church had been a player in the *ius gentium* for some time, though its legal historical influence on *ius gentium* principles has yet to be fully explored; it was in the 'new' world that the stakes of this game were the highest, where lands and peoples were for a brief moment perfectly outside of the jurisdiction and reach of spiritual and temporal authorities. It was a *terra nullius* perhaps even in a spiritual sense too. For 20th and 21st century theorists of sovereignty and war, it has also been likened to a "no-man's land", not unlike the embattled muddy wasteland between the trenches of the Great War. Cornelia Vismann writes that for Carl Schmitt:

> The spatial, the chthonic, the telluric law, the *jus terrendi,* has its founding scene in the cultivation of soil. It defends this ground against a law that starts not from scratch but from an already homogenized ground. Such land is associated in legal thought with Hans Kelsen's legal positivism, with empty normativism and spaceless norms. For Schmitt this geographic principle is not convincing as a basis for legal thought. At war here is abstract normativism versus concrete order, arbitrary rules versus self-legitimating lawfulness, universal law versus spatial *nomos*, empty statehood versus "*Großraum*". Briefly: the ground becomes a battleground for a *jus terrendi* versus a *ius scriptum*.[1300]

Alain Pottage writes that "Schmitt was engaged in his own battle, against the positivist vision of universal law, which presupposed the plane of cartographic space and which systematically repressed the reality of concrete ordering".[1301] My argument here has been that the Church was engaged in an "ordering" of their own, over a "space" of their own. The *terra nullius* of the west provided a structure for conflict and war, a land that the Church (and churches, through missionaries and traveling priests) was better equipped to fill and occupy. But it was not lined up on one side of the trenches versus the temporal "state"; it fought, hand-in-hand, often as the expeditionary arm, alongside both sides of the impending conflicts.

**Section IV: Conclusion**

The image affixed to the front of this project is a mural painted around 1955 by an man named Lester Smith, who was at the time an inmate at Eastern State Penitentiary. The concept of a "penitentiary" was inspired by Quakers, who hoped that time in near-complete isolation, with ordered labor and a Bible, would inspire a criminal towards *poenitentia*—regret, penitence, or repentance. In seeking *poenitentia,* they could learn how to view their time in the "penitentiary"

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[1300] Vismann, Cornelia. 1997. "Starting from scratch," in Hüppauf, (ed.) pp. 45–67. Hüppauf, Bernd (ed.). *War, Violence, and the Modern Condition*, Berlin: Walter de Gruyter, 1997.

[1301] Alain Pottage, "Our Geological Contemporary", in Justin Desautels-Stein and Christopher Tomlins, eds. *Searching for Contemporary Legal Thought,* Cambridge University Press, 2017.

as 'penance' (also unhelpfully "*poenitantia*"). Properly "penitent", they would emerge from solitary confinement and the gates of the prison a restored and renewed soul and citizen. Eastern State was the model for the American penitentiary system and the model of individual confinement for nearly a century.[1302]

The Quakers were doing little more than carrying on a long tradition left behind by the Catholic Church, though their hands stayed cleaner. The Catholic Church had funded, built, and managed prisons for centuries, before, during and through the Inquisition. The same passages above that justified how Churches might be obligated to build and repair city walls were also levied to obligate the Church to help build or repair a prison (which sometimes was in or attached to the city-walls themselves). In Pisa, the "governor" of the city's jail could only be a chaplain.[1303] Many inhabitants of these medieval, Renaissance, and Early Modern prisons were there because the Church had sent them there; some were released, others were relaxed into secular hands to die.

This final chapter on territory has stressed another way in which the focus on the delivery of the keys is inadequate for a deep understanding of medieval political theory as it pertains to the individual and their engagement with public life. I have, throughout, focused not on the keys, but on the patchy and incomplete vestiges of the legal picture around them. I have, throughout, focused on the materiality of medieval legal thought. It is fitting then that this conclusion finishes with a return to the prison: another institution and bundle of related concepts that the Church was deeply embedded in, before and through the Reformation, even into the 19th century.

Medieval legal and theological concepts are often framed as constraints—models, structures, and tools that limited what Early Modern authors and political theorists could accomplish, or that continue to taint aspects of political thought today. This is no doubt true in many respects and some of the arguments I have made in this project fall in this vein of argumentation. In other cases, and broadly overall, I have argued that the frameworks we often use to think about medieval legal and theological concepts constrain our ability to appreciate the sophistication, creativity, and possibility of medieval legal thought. In its unrestrained, chaotic, messy, flexible, and sometimes non-sensical fullness, medieval thought is brimming with possibility and imagination. This creativity, I have suggested, is hamstrung in legal and political historiography which emphasizes texts, ideas, and institutions from the top-down.

Andreas Knichen's (1560-1621) remarkable text, *De Jure Territorii,* predates Grotius' *De Jure Belli ac Pacis* by a dozen years. His previous treatise, *De sublimi et regio territorii iure,* had been published in 1600. In it, Knichen wrote:

> Therefore, the city in which the domicile of the world empire resides ... is the capital of the world, the mistress of the entire globe, the queen and mistress of the whole world, to which nothing is equal and nothing comes second. Julius Frontinus calls it the eternal city ... Dionysius of Halicarnassus believes that it is the mistress of land and sea, ruling over the whole. ... Commodus called Rome the immortal city, a fortunate colony, and the center of the entire world. ... Rome, you finally realized that you are the citadel and ruler of all nations and lands. ... Therefore, it is spread out that wherever the Emperor is, there is also his authority. ... The supreme dominion of all-encompassing and superior jurisdiction

[1302] Thibaut, Jacqueline. "" To Pave the Way to Penitence": Prisoners and Discipline at the Eastern State Penitentiary 1829-1835." *The Pennsylvania Magazine of History and Biography* 106.2 (1982): 187-222; Rubin, Ashley T. The Deviant Prison: Philadelphia's Eastern State Penitentiary and the Origins of America's Modern Penal System, 1829–1913. Cambridge University Press, 2021.

[1303] Prosperi, *Crime and Forgiveness,* Ch. 4.

> throughout the entire world belongs to the Emperor, namely the highest jurisdiction .... Only the Emperor has territory, for indeed the whole world is contained under him. ... What is said about the whole world can be seen as synecdoche or metonymy, using a common and frequent device among Roman writers. The name "Oceanus" should also be understood not to represent the entire ocean, but at least a part of it, the part it encompasses, surrounds, and traverses... [1304]

Knichen's description of the Emperor, and his inheritance of a universal empire, with supreme authority, is the commonplace backdrop of most of medieval legal and political thought. But if Thomas Hobbes and Gabriel le Bras were right in pointing out the Church's various inheritances from this Empire—and indeed if my arguments above are correct—then what of this did the Church inherit? What kind of actor or agent was the Church? A *catholicus* (universal) Church with a synecdochally universal empire of its own took advantage of the many Roman legal and institutional concepts ingrained in the Roman law as well as those stored in individuals, objects, and *civitates.* Lucian of Samosata's quip that he was an "active part of the great Imperial machine"—the anachronism in translation is a worthwhile illustration—provides the backdrop for the kinds of cogs, levers, and tools we might imagine the Church and its agents making use of.[1305]

Knipschildt wrote that 'the Empire is directly dependent on the Church'; this seems but a gloss on Baldus's claim that 'the empire and the whole world depend on the *statum* of the universal Church'.[1306] Recall also that the Cardinal Tuschi had argued that the 'whole world was, in this regard, considered the territory' of the diocesan Bishop or the Pope.[1307] That the Church was a great inheritor of the Roman Empire, and then of the Holy Roman Empire, should by now be obvious. But legally speaking, the Church could have no heirs because it could not die; what then could be inherited from the ghostly Church?

This has not been a project about the process of secularization but it has been about the Church and individuals entangled in the *saeculum*. The beginning of a recently published volume on secularization contains a persuasive vignette:

> In the 1850s, Catholic German immigrants in St. Louis, Missouri, pooled their resources together in order to erect a church. In 1889, St. Liborius Church was successfully completed: a large, Gothic-style house of worship with high ceilings, pointed arches, and plenty of space for many, many pews. A century later, in 1992, St. Liborious Church closed down due to a lack of members. Today, it has been repurposed into a thriving skateboard park, renamed "Sk8 Liborius".[1308]

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[1304] Andreae Knichen, *De Jure Territorii,* [Witteberg 1622], Cap. 1, ns. 29-43.

[1305] Lucian, *Apology for the "Salaried Posts in Great Houses",* LCL 430, pp. 206-207. cf. Lucian, *Works of Lucian,* Vol. II, trans. Fowler and Fowler, Oxford 1905, p. 32—"playing his part in the mightiest of empires".

[1306] Baldus at X.2.24.33: "the status of the universal church, upon which the empire and the whole world depend" (Somnia sunt quicquid dicitur contra statum universalis ecclesie, a quo dependet imperium et totus universalis orbis.' [Lyon 1551], fol. 315r. Compare also Knipschildt, "*imperium immediate ab Ecclesia dependet*"—the Empire is directly dependent on the church.

[1307] Dominici Tuschi, *Practicae Conclusiones Iuris,* 'T', p. 20. "Haec in Ordinariis, delegatus vero Apostolicus poterit auxilium brachii secularis postulare in quacunque orbis Christiani dioecesi, quia totus orbis est, quoad hoc, eius territorium, sicut Summi Pontificis, cuius vicem gerit estque de mente ombiumn scribentium ibidem."

[1308] Isabella Kasselstrand, Phil Zuckerman, and Ryan T. Cragun, *Beyond Doubt: The Secularization of Society* (NYU, 2023), p. 21.

The theoretical "crux" of secularization theory is that what is religious can cease to be religious, and in doing so, becomes secular—what is "secular" is also "modern", "scientific", or "natural" as opposed to "supernatural".[1309] People become agnostic or atheistic; Churches turn into skateparks.[1310] To some, this is a mark of progress; to others, it is a sign of decay. To others still, it just *is.*

The history of ideas contains many such skateparks—concepts and institutions which were formerly places developed by or with the guidance of the Church, long since shuttered and reopened under new management. However, as I have shown, *res sacrae* retain their sacrality forever; they remain, 'in a way' (*quodammodo*) subject to divine law even if they are occupied and used by others.[1311] Though the relics are long gone, and the sacraments no longer administered, the physical space also remains roughly inflected by the divine; it is constrained by the same walls, though the pews and altars within them are removed; the frescoes or statues crumble, but leave behind fragments of holy scenes and figures. And, all of the activity in the afterlife of this 'sacred' space is still viewed by light filtered by stained glass, or where the glass has also crumbled, through cinquefoil and rose windows. As surprising as it may seem, legal texts help expose these "lines of architecture" for political theorists and social scientists alike.[1312]

History is inevitably unkind to old things. On June 28 and 29th, 2023, St. Liborius Church—the oldest neo-Gothic Church west of the Mississippi—now a "sanctuary" for artists, burned to the ground in a four-alarm fire. Even this, however, will not be the end for St. Liborius; it will likely be rebuilt in a *reformatio* or *innovatio,* not wholly disrupted from its long history. What follows is neither conservation nor a wholly new construction. In the history of ideas, change rarely takes place as quickly, forcefully, or permanently as we imagine; as in this analogy, sometimes it does. It is up to us what kinds of stories we tell from within the ruins, amidst the peeling paintings, and often from the ashes.

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[1309] This is an obvious oversimplification of a long history, from Jean-Marie Guyau, Auguste Comte, Max Weber, Durkheim and many others. Emile Durkheim, *The Elementary Forms of Religious Life.* (New York, Free Press 1995); Philip Hammond, ed. *The Sacred in a Secular Age.* (University of California Press, 1985); Jeffrey Hadden, "Toward Desacralizing Secular Theory", *Social Forces* 65(3), pp. 587-611;

[1310] Isabella Kasselstrand, Phil Zuckerman, and Ryan T. Cragun, *Beyond Doubt: The Secularization of Society* (NYU, 2023), pp. 21-50.

[1311] I am bending the principle here. Recall that *res sanctae* were 'in a way' subject to divine law because of their strange legal status. Roman and medieval roman jurists would have argued that *res sacrae* were always fully subject to divine law, but they did treat long-lost *res sacrae* as existing in a state of suspension. They were technically still fully subject to divine law, but in their *postliminium* were perhaps "quodammodo" subject to divine law. This is my interpolation, for effect.

[1312] Andrew Willard Jones, *Before Church and State.*

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