Protection of Rights and the Maxims of the Law: From Gratian to *Gaudium et spes* and Beyond

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I. Introduction:

This paper addresses two seemingly different concerns that, upon closer inspection, are, in fact, related. It considers, first, the ways in which *Gaudium et spes* has been received by the American legal community. Although it may come as a surprise to many, American legal academics make regular and vigorous use of *Gaudium et spes* in pressing their claims in a variety of contexts.

The reasons for such widespread reliance on an ecclesiastical document are doubtless varied: one might observe that there are a number of religiously-affiliated law schools in the United States, and follow this observation by noting that authors of articles placed in such reviews make disproportionate use of *Gaudium et spes*. One might additionally note that where arguments concern matters like the theological grounds for religious liberty or the resolution of internal ecclesiastical disputes, it seems only fitting and proper to turn to a document like *Gaudium et spes* to explain the foundations of Catholic thought on the person, on the church, and on society. One might finally note that the principles of natural justice and human dignity espoused by the Council have found a home in the hearts of American lawyers simply through sheer persuasive force. That this might be the case should not be surprising given the Council's own desire to speak to all persons of good will and the effort by the Council to translate natural law concepts into a vocabulary readily accessible by literate lay audiences.

These are some obvious reasons to explain this reliance by American lawyers on *Gaudium et spes*. I shall, however, propose a less obvious reason in the second portion of my paper. I believe that *Gaudium et spes* speaks to something very basic about the human person that is rooted historically in a western legal tradition that first took shape in the twelfth century with the papacy's declaration of independence from the German emperor and the emergence of a systematic, scientific canon law.[1] That something is the belief that all persons share in a certain common dignity and that this sense of human dignity or human worth might be well expressed through the idiom of natural, or universal rights. *Gaudium et spes*, in other words, draws its arguments from wellsprings deep within the western legal tradition, which, in turn, take their origin in medieval canon law even if these wellsprings go largely unacknowledged in the conciliar document itself. These are, however, sources and concepts and ideas that academic lawyers intuitively appreciate as congenial to their own ways of viewing the world if only because they have helped to condition legal thought in the west for most of the roughly last eight

hundred years.

When we speak about the western legal tradition, furthermore, it is necessary to notice that it was, from its inception, preoccupied with giving recognition to rights. To take an obvious example known to most Anglo-American lawyers: Magna Carta opened with a clause guaranteeing that the king would not invade the rights of others -- specifically promising in its first substantive clause that the English Church shall be free, its rights kept whole, and its liberties unimpaired.[2] Magna Carta, which was itself shaped in its concepts and language by church lawyers,[3] was by no means unique -- clauses protecting and ensuring the rights and liberties of individuals are commonly found in medieval charters.

There seems, indeed, to be a consensus beginning to emerge among historians of constitutional thought that the twelfth and thirteenth centuries were crucially important to the development of western conceptions of rights and that the canonists of that era were in the forefront of these developments. In a series of important writings, Brian Tierney has demonstrated that twelfth-century canonists thought of natural ius ("right") as a zone of protected liberty.[iv] In successive chapters of his book on the origin of natural-rights thought, Tierney traces this idea from twelfth-century origins, through the philosophical speculation of Henry of Ghent and the polemics of William of Ockham, through conciliarists like Jean Gerson, and Spanish neo-scholastics like Francisco de Vitoria and Bartolomé de las Casas. Other scholars have examined other facets of medieval rights-thought. Annabel Brett has thus explored dozens of scholastic texts in her study of the origins of natural rights and related these texts to early modern thinkers like Thomas Hobbes.[v] In my own work, I have considered the deep and sophisticated rights-based vocabulary identifiable in thirteenth-century canonistic writing;[vi] I have also discussed in some detail the role rights played in medieval marriage and domestic relations law.[vii]

This medieval, canonistic conception of rights, I shall argue, forms part of the background against which to understand *Gaudium et spes*. In unique and powerful ways, *Gaudium et spes* drew attention to what we know from the book of Genesis: that all human persons are created in the image and likeness of God and that because of this exalted status as physical creatures endowed with reason and eternal souls, we hold a rank in the order of creation only a little less exalted than the angels.[viii] The human person is capable of reflecting upon and achieving the good in a way unlike any other earthly being. Because of these capabilities the human person is endowed with freedom, not to behave licentiously or to act contrary to the laws of nature, but to seek knowledge of and oneness with God.

What I shall argue in the second part of my paper is that this respect for personhood and individual freedom has an ancient lineage within the Church and that it was expressed and conserved through the idiom of rights. The roots of the Christian freedom given form and recognition in *Gaudium et spes* run deep -- far deeper than the personalist philosophers of the twentieth century or other contemporary movements. Indeed, one can find elements of this notion of this responsible, authentic Christian freedom in the texts of medieval canon lawyers of the twelfth and thirteenth centuries.

Given the confines of this paper I obviously cannot speak about the whole of the canonistic

rights tradition. I shall rather limit my remarks to consideration of the maxims of law intended to protect rights-holders in the exercise of their rights. But first one must acknowledge the truly remarkable range of references to *Gaudium et spes* one encounters in contemporary American legal writing.

II. Gaudium et spes and Modern American Lawyers:

Gaudium et spes speaks to modern American lawyers. I am led to open my paper with this observation because of the frequency with which *Gaudium et spes* is referenced by the American academic legal community. A few references occur in articles that are expressly concerned with matters of internal ecclesiastical discipline or law. It is not surprising, therefore, to find references to *Gaudium et spes* in discussions of the rights and responsibilities of bishops to police the reception of communion,[ix] or in efforts to establish the principles that should govern employment conditions in Church-run entities,[x] or in analyses of the moral requirements that should inform pension plans offered to Church employees.[xi] It is equally unsurprising that *Gaudium et spes* should be mentioned in an article on the juridic status of the Holy See as an international actor,[xii] or that it should be mentioned in a history of the 1933 Concordat between Germany and the Holy See.[xiii] References to *Gaudium et spes* quite properly belong in articles addressing the unique responsibilities of Catholic legal education.[xiv]

What is remarkable, on the other hand, is the extent to which references to *Gaudium et spes* have come to figure in arguments about law, public policy and jurisprudence found in American law journals. *Gaudium et spes* has thus been used in arguments in favor of the payment of just compensation to full-time workers;[xv] to inmates in American prisons;[xvi] and even to student interns.[xvii] Its concern with individual rights and human dignity, understood within a traditional theistic moral framework, has been cited as justifying a reform of the rules governing the employment of temporary workers.[xviii] *Gaudium et spes* has been cited in debates over welfare reform.[xix] Its discussion of the dignity of the human person has been invoked in asserting the need to negotiate respectfully with others in business and legal settings.[xx]

And if just compensation and sound working conditions and respectful negotiating are one side of the coin, corporate responsibility is the other. And *Gaudium et spes* has been used prominently in arguments that corporations must fulfill a broader range of duties than the maximization of shareholder value. Susan Stabile has thus argued that religious values should be utilized to constrain corporate misconduct and has supported this claim with citations to the National Conference of Catholic Bishops' call to "'strengthen our sense of community and our pursuit of the common good'" as well as to *Gaudium et spes*' requirement that society must provide conditions "'whereby men, families, and associations more adequately and readily may attain their own perfection.'"[xxi] Advocating on behalf of greater employee participation in corporate governance, Stephen Bainbridge has looked to *Gaudium et spes* as a principal source of the Catholic belief that "human dignity [is] the very well-spring of human rights."[xxii] Scott Fitzgibbon found in *Gaudium et spes*'s teaching on natural law the grounds to reject utilitarianism as sufficient by itself to furnish principles for corporate governance.[xxiii] More radically, William Quigley relied on *Gaudium et spes* as a source for his argument that the legal

fiction of corporate personality -- itself a creation of medieval canonists[xxiv] -- should be abolished.[xxv]

More generally, *Gaudium et spes* has been frequently cited as support in arguments concerning the contributions law might make to social justice. Fr. Robert Araujo has thus written:

> "Jesus made the connection between the first commandment, concerning love of God, with a second, love of neighbor. The two are inextricably related. One cannot love God without being concerned for one's neighbor. God's justice must therefore intersect our human justice. In the promulgation of the Pastoral Constitution on the Church in the Modern World [the usual English title assigned to *Gaudium et spes*], the Second Vatican Council addressed the subject of justice on at least twenty-four occasions. The frequent acknowledgement of this issue in the Pastoral Constitution brings the Great Commandment into the contemporary world."[xxvi]

Fr. Araujo is far from alone in using *Gaudium et spes* in this manner. Lucia Silecchia made repeated use of the document in her discussion of the "future of social justice."[xxvii] Robert Rodes saw the Second Vatican Council's teaching on God's presence in the world as the central foundation for contemporary efforts at social justice.[xxviii] John Coughlin found in *Gaudium et spes* an important definition of the common good of great relevance to lawyers seeking to reform societies.[xxix] Robert Scholla utilized *Gaudium et spes* as a touchstone of his analysis of social justice with the observation that:

> "'social order requires constant improvement: it must be founded in truth, built on justice, and enlivened by love: it should grow in freedom towards a more humane equilibrium. If these objectives are to be attained there will first have to be a renewal of attitudes and far-reaching social changes.'"[xxx]

Reliance on *Gaudium et spes* in debates on the relationship of moral reasoning and international law can also be documented. With respect to just-war theory, an essay in the Military Law Review by Mary Eileen McGrath recognized *Gaudium et spes* as "[t]he most important document on war, for the nuclear age Church."[xxxi] Justice Kenneth J. Keith of the New Zealand Court of Appeal asserted that *Gaudium et spes* reflected an evolving international revulsion at indiscriminate and disproportionate warfare.[xxxii] On the other hand, two recent essays have sought to use *Gaudium et spes*'s teaching as support for the American war in Iraq.[xxxiii]

Gaudium et spes has also been cited and relied upon in arguments over more general principles of international order and justice. Dan Millisor used *Gaudium et spes* to support the proposition that "[u]nderlying all particular applications of the idea of 'social justice' is the belief that there is one human family: all people of every race and nation share a common origin and destiny in God and are brothers and sisters to one another."[xxxiv] Because of this common "origin and destiny" Millisor argued that the Church had "a mission in the world" to see to the "welfare of the downtrodden . . . [and] the needs of the lowly and powerless."[xxxv] Robert Araujo understood *Gaudium et spes* to have been, in part, a call to the development of stronger mechanisms of international cooperation among states and economic orders.[xxxvi] In a very different context, *Gaudium et spes* has been included in an analysis of the right of revolution.[xxxvii] Terry Coonan, finally, relied upon *Gaudium et spes* and other documents of the magisterium to argue in favor of the protection of the rights of immigrants, who are often among the most vulnerable in a particular society.[xxxviii]

Legal philosophers have also made productive use of *Gaudium et spes* in their arguments. John Garvey has looked to the Second Vatican Council, including *Gaudium et spes*, to explore the role and responsibilities of lay Catholics in legal and public affairs.[xxxix] William J. Wagner made use of *Gaudium et spes* in explaining the relationship of freedom of the human person to make important personal decisions free of "intrusive governmental surveillance."[xl] In pleading the case for a "humanitarian jurisprudence" that would take account of basic human needs, Fr. Robert Araujo turned to *Gaudium et spes*:

> "The Council also prepared the way for potential cooperation among different people who might come to assistance of those in need. The need to realize the common link between and mutuality among all people was based on the 'growing interdependence of [people] one on the other,' largely prompted by the advancement of modern technology."[xli]

Leslie Griffin, for her part, has cited *Gaudium et spes* as authority for a manichean division among Catholics: open-minded believers willing to "engag[e] with the modern world" and "opponents of modernity" who, "[s]ince 1965 . . . have battled to limit the range and scope of the Council's reforms."[xlii] Paul Salamanca, for his part, began his essay on liberal thought with the proposition that religious belief is necessarily illiberal in some measure.[xliii] Salamanca nevertheless found within Catholicism, particularly as articulated in documents like *Gaudium et spes*, an openness to other systems of thought:

> "[T]he Second Vatican Council significantly transformed the Church in a number of respects. . . . [T]he Church restated its position on the immutability of important philosophical principles, not by denying their immutability,

> but instead by emphasizing the capacity of fallen human beings to grow in their understanding of such principles."[xliv]

James Gordley, on the other hand, sees the modern liberal vocabulary, with its emphasis on a language of neutrality drained of all content, as ultimately empty and even self-defeating: "[Liberal principles] can be used to support any conclusion about what the state may do."[xlv] On the other hand, Gordley continues, the Church, in documents like *Gaudium et spes*, has succeeded in reconciling a commitment to ultimate truth with recognition of the transcendent importance of human freedom in attaining knowledge of the truth.[xlvi]

John Finnis has also made important use of *Gaudium et spes* in his writing on jurisprudential themes. He takes as significant *Gaudium et spes*'s definition of the common good as the requirement that "the whole ensemble of material and other conditions, including forms of collaboration" be harnessed on behalf of the development of the individual within her or his community.[xlvii] Finnis reads the Second Vatican Council effectively to require society to ensure as constitutive elements of the common good "the flourishing of the family, friendship, and other communities to which the person belongs."[xlviii] In an article that sought to explore the relationship of unjust law and democratic theory, Finnis considered the development of the word and concept of "pluralism" in ecclesiastical documents, paying particular heed to its use in draft documents that would become the future *Gaudium et spes*.[xlix]

These instances of reliance upon or citation to *Gaudium et spes* in recent American legal scholarship could be multiplied significantly. *Gaudium et spes* has figured in debates over the death penalty,[l] assisted suicide,[li] and euthanasia.[lii] Its account of the modernization process of the last century has been taken as foundational for understanding the contemporary human dilemma.[liii] *Gaudium et spes* has been relied upon in debates over reproductive technologies,[liv] and has been used in efforts to defend the integrity of the marital relationship.[lv] It has been utilized in arguments about constitutional law[lvi] and has even been utilized in arguments over environmental law[lvii] and tax policy.[lviii]

It must thus be concluded that *Gaudium et spes* has been cited and utilized to support a wide range of positions in legal, policy, and philosophical debates. It would be foolhardy to attempt to reconcile these many different positions and it is unnecessary to attempt to do so in light of our own thesis. What is of interest, rather, is the fact that *Gaudium et spes* has resonated so deeply with American lawyers. What is it about the document that speaks to lawyers interested in natural law or social justice, or for that matter, in the law of war, or environmental law, or tax policy?

III. Gaudium et spes and its Rootedness in the Western Legal Tradition:

Why is it, then, that American academic lawyers, or at least a significant subset of them, have received the teaching of *Gaudium et spes* so thoroughly and embraced it so fully? Certainly, the

arguments and anthropology of the document present compelling reasons for this widespread acceptance. The respect for the integrity, indeed, the sanctity of the human person found in *Gaudium et spes* is truly remarkable. The document powerfully emphasized the truth of creation -- that we are not just randomly selected chemical reactions that have happened to come together into functioning units destined to dissolve again into their constituent parts. Rather, the human person is made in the image and likeness of God.[lix] The person is thus endowed not merely with a physical body that will die and decay and return to dust, but an eternal soul that will transcend death and live forever in direct communion with God.[lx] The human person has purposes that transcend our appetites and drives and our mere mortal frames. These insights have consequences.

Because the human person is made in the image and likeness of God, he is given both intellect and conscience. His intellect instinctively searches for the truths of human existence.[lxi] And the human conscience, which bears on it the imprint of the natural law described by St. Paul in his letter to the Romans,[lxii] seeks to learn and to understand "the objective standards of moral conduct."[lxiii]

Intellect, reason, conscience -- these, then, are the ingredients of human freedom. "[T]ru[e] freedom is an exceptional sign of the image of God in man."[lxiv] Freedom, the Council stresses, is not the blind pursuit of wants and impulses; it is, rather, the informed search for truth. Reflecting on this conciliar insight, one commentator has written: "Man is like God because he is free."[lxv] This freedom of inquiry should lead to the open embrace of God: "For God willed that man should 'be left in the hand of his own counsel' so that he might of his own accord seek his creator and freely attain his full and blessed perfection by cleaving to him."[lxvi]

Our status as the most exalted of God's earthly creatures is emphasized when the Council declares that we are the "sons of God."[lxvii] We are brought into communion with God in this world through the mystery of the Incarnation -- the Word made Flesh.[lxviii] In the profoundest act of salvation history, Jesus Christ assumed human form, "[led] the life of an ordinary craftsman of his time and place," and sanctified the ways and rhythms of daily human life.[lxix] Jesus Christ, true God and true man, thus lived, suffered, and died in human form.

The human person thus enjoys truly immense dignity and value. Through his intellect and self-reflection, the human person is capable of "know[ing] himself in the depths of his being."[lxx] He thus "rises above the whole universe of mere objects."[lxxi] Man's intellect ultimately leads to wisdom, which in turn leads to the contemplation and "love [of] what is good and true."[lxxii] These transcendent qualities of the person must be respected in the social sphere. There is thus "a basic equality between all men and it must be given ever greater recognition."[lxxiii] "Today," the Council asserted, "there is an inescapable duty to make ourselves the neighbor of every man, no matter who he is, and if we meet him, to come to his aid in a positive way."[lxxiv]

Gaudium et spes frequently put these requirements of human freedom and dignity into rights language. The "sublime dignity of the human person," the Council declared, correlated with "rights and duties [that] are universal and inviolable."[lxxv] The Council defended a robust theory

of rights that embraced both the protection of human freedom and the satisfaction of fundamental human needs:

> "[The human person] ought, therefore, to have ready access to all that is necessary for living a genuinely human life: for example, food, clothing, housing, the right to education, work, to his good name, to respect, to proper knowledge, the right to act according to the dictates of conscience, and to safeguard his privacy, and rightful freedom even in matters of religion."[lxxvi]

The Council's teaching on the dignity and integrity and the rights of the human person has deep roots and many sources. I would like in the remainder of this paper to explore a source that has been largely overlooked in writings on the Council. I should like to argue that an important source for the Council's teaching on the rights of the person lies in the Western legal tradition, especially medieval canon law's respect for individual rights. Even though juristic sources go largely unacknowledged in the conciliar documents, the ideas that were put into circulation by the medieval canonists were sturdy and proved deeply influential.

None of these ideas, perhaps, proved more sturdy and was more pervasively adopted that the suggestion that the human person is endowed with rights that must ordinarily be respected by state and even ecclesiastical authority. Many things might be said about medieval rights thought. One might observe that scholastic theologians and canonists were capable of conceiving of rights that were universal in charactre. Medieval thinkers like the theologian Hugh of St. Victor and the canonist Rufinus thus spoke of the marital rights of non-Christians.[lxxvii] Pope Innocent IV spoke of a natural right of self-governance that pertained to Christians and non-Christians alike.[lxxviii] The canonists also employed a deep and rich set of synonyms when speaking of "rights." The word ius, of course, used subjectively, signified an individual right, but a whole constellation of synonyms grew up around its usage, deepening and extending its meaning. Ius might signify a power (potestas), a liberty (libertas), a faculty (facultas), an immunity (immunitas),[lxxix] or an interest (interesse).[lxxx] That these developments in legal doctrine should occur in the thirteenth century is not surprising. After all, one sees in the philosophical faculties of that time intense and sophisticated debates on human reason, human transcendence, and the interaction of reason, divine purpose, and human volition.[lxxxi]

While it is possible to focus on any number of interesting features of this medieval rights discourse, the remainder of this paper will consider one hitherto unexplored aspect of the canonistic effort to protect individual rights: the role played by legal maxims in canonistic analysis of rights.

The term "maxim" is itself derived from the expression "maximum proposition," an analytical device current in the scholastic philosophy of the twelfth and thirteenth centuries. Maxims were used as a means of reaching generalizations derived from a group of particulars. In reviewing

Peter Abelard's understanding of "maximum proposition," Harold Berman has observed that a maxim is a proposition "that summarizes the meaning and the logic common to the particular propositions implied in it."[lxxxii]

If Harold Berman helps us to understand the origin of legal maxims in the scholastic method of the twelfth and thirteenth centuries, an essay by Ronald Dworkin helps to focus for us the nature and functioning of legal maxims.[lxxxiii] Maxims, it seems, embody and reflect legal principles that are distilled summaries of the social values and moral groundings of entire legal systems.

Dworkin's scholarship is intended as a response to the legal positivism of writers like John Austin and H.L.A. Hart. In positivist theory, the sovereign law-maker is the sole source of law. Law itself is a set of rules officially enacted by the law-maker or pronounced by those designated as the law's official interpreters. One knows what the law is, at any given moment, by consulting the positive enactments and declarations of the sovereign's will. Questions about the law's background morality, its underlying philosophy, its historical development are all left unasked and unanswered on this analysis. None of this, after all, is relevant to answering the question, "what is law." To resolve this question we need only consult the rule book given us by the sovereign. All else is mere surplusage. This analysis of the law, according to Dworkin, "is quite beautiful in its simplicity."[lxxxiv]

It is also, however, thanks to its failure to take account of legal principles, a seriously deficient account of the law. When Dworkin speaks of "principles," what he really has in mind are maxims of the law. They are propositions that articulate fundamental moral considerations that are not themselves rules, but that help explain and animate the rules.

In some respects, principles resemble legal rules. They might thus serve as standards of conduct and guidelines for action. But, Dworkin insists, legal principles are not entirely identical with rules. Unlike rules, legal principles are usually not reduced to codification. They are not part of the positive law of the land. Rather, one finds them embedded in commentaries on the law, or -- in the Anglo-American system -- utilized in judicial opinions, where they are used as a means of supporting or justifying particular conclusions about the law. Nowhere in the Anglo-American system, for instance, do we find the principle "a wrong-doer should not profit from his wrong-doing" codified as part of a larger statutory enactment.[lxxxv] But principles like this maxim of the Anglo-American law are regularly used by judges as part of the weighing and balancing process that is judicial decision-making.

Legal principles differ from rules in other respects as well. Dworkin has explained the difference thus:

> "The difference between legal principles and legal rules is a logical distinction. Both sets of standards point to particular decisions about legal obligation in particular circumstances, but they differ in the character of the direction they

> give. Rules are applicable in an all-or-nothing fashion. If the facts a rule stipulates are given, then either the rule is valid, in which case the answer it supplies must be accepted, or it is not, in which case it contributes nothing to the decision.
>
> "This all-or-nothing is seen most plainly if we look at the way rules operate, not in law, but in some enterprise they dominate -- a game, for example. In baseball a rule provides that if the batter has had three strikes, he is out. An official cannot consistently acknowledge that this is an accurate statement of a baseball rule and decide that a batter who has had three strikes is not out. . . .
>
> "But this is not the way . . . principles . . . operate. Even those which look most like rules do not set out legal consequences that follow automatically when the conditions provided are met. We say that our law respects the principle that no man may profit from his own wrong, but we do not mean that the law never permits a man to profit from the wrong he commits. . . ."[lxxxvi]

Dworkin elaborates on this argument elsewhere in his article. A principle differs from a rule in that a principle "states a reason that argues in one direction, but does not necessitate a particular decision."[lxxxvii] Principles, furthermore, unlike rules, might come into conflict. When they do, one must decide the conflict based on the "weight" or relative "importance" the different principles possess. Within a given legal system, it is impossible that two sets of rules should oppose each other at least without some other rule-based mechanism for resolving the tension. Principles operate differently: legal systems can and do operate quite effectively even where principles enunciate opposing truths. The deep truths articulated by legal principles and maxims help give play and room in the joints of a given legal order.

Ultimately, the decision whether to apply a particular principle to a given case rests with the discretion of the law-maker or the judge.[lxxxviii] In community with others -- whether legal professionals, other judges, or the larger political community -- the law-giver or judge must decide how much weight to give a particular principle, how the application of the principle is to be affected by other, opposing principles, and what the final outcome of this reasoning process should be.

This analysis is a helpful prologue for understanding the use of legal maxims by the canonists. Principles, reflected and embodied in the maxims of law, played a crucial explanatory role in medieval canon law. They were invoked to justify results and clarify reasoning in a countless

variety of circumstances. By themselves, they were not often decisive in legal debates. Their function, rather, was to set limits and to establish guidelines for arriving at reasoned outcomes. By coming to terms with the use of legal maxims at canon law can achieve a stronger understanding of the moral direction and philosophical premises of the medieval canonists.

When we look to their articulation and application of rights-based maxims, we realize that the medieval canonists were highly respectful of the possession and enjoyment of individual rights. In writing about rescripts, which had the function of conferring rights on their possessors, Hostiensis assured his readers that "one does not sin who uses one's right" (quod non peccat qui utitur iure suo).[lxxxix] A maxim of this sort emphasized the rightfulness inherent in the possession and exercise of rights. One did not run afoul of the moral law merely by claiming a privilege or a power that was legally one's own.

To be sure, rights carried with them a concomitant obligation that they be exercised wisely and well. But this obligation did not mean that right-holders lacked the discretion to determine for themselves what constituted an appropriate usage of a particular right. Rights, after all, were zones of protected liberty.

One might thus consider the right to vote: electors who enjoyed this right were not supposed to abuse it. That said, the canon law conferred on electors remarkably wide-ranging discretion. Thus a decretal letter of Pope Alexander III, Cum in Cunctis, established that to be elected bishop one had to possess maturity, moral seriousness, and appropriate learning.[xc] But it belonged to the electors who possessed the ius eligendi -- "the right of voting" -- and whose task it was to select the new bishop, to evaluate the fitness of individual candidates according to these broad, open-ended standards and to vote accordingly.[xci] Book I, title VI, of Gregory IX's Liber Extra, the title on elections, is replete with evidence that conflicting views of the suitability of particular candidates could and did lead to fierce disputes among those who enjoyed the right to vote.[xcii] When Hostiensis assured rights-holders that they did not sin by exercising their rights he implicitly assured them that it was not morally wrong to disagree in how a right such as the ius eligendi might be used. It was licit, perhaps even expected, to disagree over how to apply broad and open-ended standards in particular difficult cases.

A second maxim that played a role in canonistic thought on rights claimed that "one injures no one who uses one's right" (sic nemini facit iniuriam si utitur iure suo). This maxim seems to have orginated in a decretal letter of Pope Innocent III when he wrote, concerning a disputed election, that "so the regula iuris states, one does not seem to commit an injury who uses one's right."[xciii]

Backed by the authority of one of the most forceful of the thirteenth-century popes, it was not long before this maxim gained credence among the decretalists. Hostiensis made particularly bold use of the maxim to justify justify the right and authority of the emperor to transfer property from one subject to another. Is it a greater sin, he asked, for the emperor to give to one property that belonged to another than to acquire that property through prescription?[xciv] Answering this rhetorical question, Hostiensis responded that it was no sin at all because part of the emperor's

right (ius principis) consisted of the power to transfer ownership from one to another.[xcv] The emperor, after all, was dominus -- lord, and so was the ultimate holder of property rights in his realm.[xcvi] Hostiensis looked to Innocent III's maxim to close the argument: "one injured no one by using one's right."[xcvii] Hostiensis further supported this claim by analogizing from the powers of the pope: "I would say that the pope could validly confer on me some church, from another province or episcopate, and I could with clean conscience receive and hold it."[xcviii] Thus neither the one exercising one's rights, nor the beneficiary of that exercise sinned by reason of the transaction.

This line of argumentation reveals much about the relationship of maxims to medieval rights. A canonist like Hostiensis was not afraid to explore the scope and limits of a particular right through the use of legal maxims. The emperor and the pope were free to exercise the rights of office to their natural limits without fear of thereby injuring the rights of others. And those who were benefited by such an exercise of power could act with a clean conscience. Rights were licit powers, lawful freedoms, protected immunities, judicially-enforceable interests that might legally be asserted and recognized. This was so, obviously, for emperors and popes, but it was also the case even for serfs subject to the demands of overbearing feudal overlords.[xcix]

Another exceedingly important rights-based maxim was nemo iure suo privari debet sine culpa -- "no one should be deprived of his or her right without fault." Bernard of Parma, author of the ordinary gloss on the decretals of Pope Gregory IX, provides perhaps the most detailed exposition of this maxim. Bernard's gloss is attached to Cognoscentes, a letter of Pope Gregory the Great found in Liber Extra.[c] Bernard commenced his gloss by reiterating the obvious -- that the maxim stood for the proposition that no one was to be deprived of one's right without fault (sine culpa).[ci] He continued his analysis by inquiring into the sources of this maxim and by finding them in a pair of excerpts from Gratian's Decretum and from a decretal of Pope Alexander III.[cii]

Bernard then mustered a series of texts that recognized that under certain circumstances a party might lose rights even where one was not at fault. One might, for instance, be punished with the loss of office because of the misconduct of one's spouse.[ciii] Faced with two divergent lines of authority, one favoring the protection of rights from arbitrary deprivation, the other acknowleding the possibility that rights might be lost even without fault, Bernard resolved the tension in favor of the defense of rights:

> "Solution: the first rubric is regularly true, the contrary only occasionally so. Or, you might say that even though one might be deprived of a right without fault, this does not, nevertheless, happen without a reason."[civ]

One might say that Bernard permitted the abridgement -- not the extinction -- of a right where reasons of policy were sufficiently grave. Ordinarily, however, the presumption was in favor of protection and retention of the right at issue. Bernard closed his gloss with a verse intended to

illustrate six "cases" (casibus) in which one might lose one's right through no fault of one's own. A mixture of realism, cynicism, and legal reasoning, the verse stated:

> "Poverty, Hatred, Vice, Favor, Crime, and Rank,
> These deprive persons and places of their
> right."[cv]

In their commentaries on Cognoscentes, Hostiensis and Innocent IV agreed with Bernard's analysis but did not go into nearly the detail that Bernard had provided. Hostiensis simply declared that no one was to be deprived of his or her right sine culpa,[cvi] while Innocent IV noted the exceptions to this rule: sometimes, Innocent stated, this maxim failed in practice, while at other times one might lose one's right because a sufficient causa has effectively abridged it.[cvii]

One finds this maxim appearing repeatedly in both papal decretals and in decretalist commentaries. The decretal Iordanae involved a girl who was betrothed (per verba de futuro contraxit) when not yet ten to a man named Jordan who had carnal relations "matrimonially" with both the girl and the girl's mother.[cviii] The case presented some obvious problems: Jordan had had sexual relations with a girl not yet capable of ratifying her proposed marriage; he had also effectively committed incest by having carnal relations with the girl's mother. Jordan's copulation with the girl's mother, furthermore, brought into being the impediment of affinity, preventing future marriage between the girl and her prospective spouse.[cix]

The girl petitioned the Holy See for guidance, both for the sake of her salvation (providere salubriter) and so that she might not be defrauded of her right (ne iure suo sine sua propria culpa fraudetur).[cx] Her fear, quite evidently, was that she might be deprived of her marital rights not because of anything she did, but because of the improper behavior of her mother and Jordan. Pope Gregory IX wrote back, admonishing the girl that it would be best if she and her putative spouse both agreed to vow perpetual continence and enter religious life. Failing that, it would be permissible for Jordan to do penance for his incestuous conduct and live matrimonially with the girl, rendering the conjugal debt when asked, but forbidden to seek it himself.[cxi]

This decretal, clearly, constitutes a rich vein of material for social historians seeking to understand thirteenth-century expectations and beliefs. Notions of childhood, of marriage, of what did and did not count as permissible sexual intercourse, all vie for our attention. Our concern, however, is with the use of rights-based legal maxims to arrive at the result that Pope Gregory reached and what this reasoning process says about medieval notions of due process and rights: the girl in this case, who was not yet a teenager herself, had done nothing wrong. Jordan, her proposed spouse, however, had sinned grievously. He could no longer seek the conjugal debt -- by his misconduct, he had forfeited it.[cxii] But the girl, who evidently still hoped for a happy married life with Jordan, should not be deprived of her marital right through no fault of her own. Her interests, framed and protected by the legal maxim ne iure suo, were to be protected.

One sees this sort of analysis occurring in other papal decretals found collected in Gregory IX's

Liber Extra. The decretal Discretionem tuam of Pope Innocent III dealt with a similar situation. A certain man had contracted marriage (verba de presenti) with a woman, but did not have carnal relations with her, instead giving her to a male relative who was intimate with her.[cxiii] She subsequently escaped and sought to be restored to her legitimate husband. Innocent III agreed that this was the appropriate remedy, indicating that she would otherwise be deprived of her right through no fault of her own (cum iure suo non debeat sine sua culpa privari).[cxiv]

Innocent III invoked this maxim a second time in a decretal dealing with excommunication.[cxv] Servants of a particular lord had apparently struck a cleric, incurring the penalty of excommunication. Only the Holy Father could lift this sanction and those guilty of such a crime were ordinarily expected to travel to Rome to seek expiation. But where, as here, the master expected to suffer a grave loss (grave damni) through the prolonged absence of his servants, the local bishop might absolve from the necessity of traveling to Rome. Otherwise, the lord would suffer the loss of his rights through no fault of his own.[cxvi]

Invocation of the maxim nemo iure suo sine culpa did not, however, result in invariable success for the right-holder. As Dworkin would concede, there are sometimes countervailing principles or policies that simply outweighed a particular legal maxim. The canonists conceded this as well. Thus Bernard of Parma spoke of the loss of rights sine culpa as being "occasionally" true, and the canonists generally acknowledged that rights might be lost even without fault for sufficient causa, best translated in this context as supervening considerations of policy.

One sees an effort to justify such a loss of rights in the decretal Quanto te of Innocent III. This decretal raised the question of Christian marriages that ended when one party joined a heretical movement: May the innocent party, abandoned by her heretical mspouse, remarry? To deprive the innocent party of remarriage, it was argued, would deprive her of her marital right sine culpa -- through no fault of her own.[cxvii]

The policy considerations were large. It was, after all, during Innocent III's pontificate that the Albigensian crusade was launched in southern France.[cxviii] There was concern all about that Christians might defect to the heretics.[cxix] Under this sort of pressure, Innocent III determined that maintenance of strict matrimonial discipline was best, even if an innocent spouse might thereby lose her marital rights. Considerations of policy -- maintenance of right order and true doctrine -- outweighed the protestations of parties deprived of rights through no fault of their own.[cxx]

In addition to playing a role in the legal reasoning of papal decretals, Nemo iure suo was also employed by the decretalists to explain the results of a large number of decretals. Bernard of Parma, for instance, justified voting by proxy in elections only where the elector had been detained by a "just impediment" since otherwise the elector might be deprived of his right to vote sine culpa.[cxxi] Similarly, a composite gloss found in the Glossa ordinaria dealing with a priest stricken with leprosy stated that he retained a right to office and was to be allowed to draw sustenance from his parish even though he was unable to perform his ministry.[cxxii] To hold otherwise would be to punish him and deprive him of rights sine culpa.[cxxiii] Finally, the decretal

Thomas Monachus dealt with a monk who had lost a thumb while wrestling a bear.[cxxiv] Was he impeded from confecting the Eucharist? Bernard replied that he was not impeded, provided his action was sine culpa.[cxxv]

Hostiensis also made use of the maxim as widely as Bernard had. Concerning the acquisition of ecclesiastical benefices, he noted that once legitimately acquired, they became "perpetual."[cxxvi] One who held such a benefice acquired certain rights, such as a right to income. Hence, Hostiensis continued, one ought not to be deprived of a benefice sine culpa.[cxxvii] Similarly, Hostiensis stated that ecclesiastical constitutions should ordinarily be interpreted prospectively since a retroactive application might have the effect of depriving parties of their rights sine culpa.[cxxviii]

On the other hand, Hostiensis was also willing to use this maxim as a means of justifying exceptions to the rule. Hostiensis thus explained the removal of a rector for leprosy as a "special case" and an exception to the rule that no one was to lose his right sine culpa.[cxxix] The decree Antiqua patriarchalium, which proclaimed the proper dignity that belonged to each of the ancient patriarchal sees but also had the effect of depriving Alexandria of its former priority, was explained in a similar fashion.[cxxx] Ordinarily, Hostiensis stated, one is not to be deprived of one's right sine culpa, but sometimes particular cases present exceptions to this rule.[cxxxi]

One must finally consider the relationship of rights with papal sovereignty. Medieval exponents of papal authority were wont to make exalted claims for the powers and prerogatives of the pope. In an expansive mood, the thirteenth-century canonist Laurentius Hispanus even wrote that "the pope is said to have a divine will (habere celeste arbitrium)."[cxxxii] Did declarations of this sort mean that the pope should be understood as an austinian sovereign whose will was law regardless of reason? Whose commands stood for justice? Whose tolerances was the only source of rights in the realm?[cxxxiii]

Read narrowly, a maxim of law found in the Liber Sextus, put together at the end of the thirteenth century at the command of Pope Boniface VIII, might seem to lend credence to just such an interpretation. The pope, Boniface wrote, held all iura in the recesses of his heart (Romanus Pontifex . . . iura omnia in scrinio pectoris sui censetur habere).[cxxxiv] Boniface's language, however, was not new. The maxim was a familiar one to Huguccio, who flourished a good century before Boniface, and was known also to other canonists and even to a number of Roman-law glossators.[cxxxv]

Did Boniface VIII or his sources mean by iura "rights" or "laws?" Did they mean to assert a claim of austinian-like sovereignty over the Church? Was it possible for a robust conception of rights survive such a claim?

Boniface's predecessors clearly used this maxim of law in ways clearly intended to refer to the pope's status as the chief legislator of Christendom. This is the meaning Huguccio attached to the maxim, and this meaning was echoed by such canonists as Johannes Teutonicus and Laurentius Hispanus.[cxxxvi] Bernard of Parma used the expression as a means of describing the

papal power to dispense from provisions of the Church's common law.[cxxxvii] Hostiensis used the expression in much the same fashion to explain papal power to derogate from ecclesiastical constitutions.[cxxxviii] Innocent IV, for his part, used the expression to explain papal power to interpret or to reconcile prior inconsistent legislation.[cxxxix]

This analysis only heightens the problem we are confronting. Quite clearly, the maxim Romanus pontifex could be interpreted as indicating that the pope possessed sovereign authority over the law. The law was "in his heart." The pope might thus be understood as an austinian sovereign, capable of acting in an essentially unrestrained fashion, his will standing for reason, even his most frivolous word or deed amounting to law.

Indeed, an earlier generation of historians understood Boniface to have been making extravagant claims for papal sovereignty.[cxl] Franz Gillmann, however, effectively refuted this line of thinking when he concluded that Boniface was only claiming what his predecessors had affirmed, that is, presumptive knowledge of the positive law of the universal Church; he was not claiming a despotic power to rule all of Christendom nor asserting an unrestrained prerogative of overturning secular law.[cxli]

Even this narrow reading of the decretal, however, does not entirely resolve the problem. A firm believer in an absolute papal monarchy, a supporter of the idea that the pope had been effectively "deified" or was given "the power of absolute command," might still be tempted to read the decretal as a clear and crisp statement of Austinian legislative sovereignty: To be sure, Boniface's predecessors might have imagined there to be some constitutional limits on papal authority, but law, after all, can only emanate from the will of the sovereign and this maxim looks like good confirmation of that proposition. The pope himself, this persistent positivist might assert, acknowledged by this maxim that law must consist in general commands issued by a sovereign with the power to coerce obedience to those subject to its authority. Regarding rights, the critic might also call attention to the fact that in Latin the same word ius (plural iura) signifies both objective law and subjective right. Clearly, the critic would point out, the maxim was intended to capture both objective and subjective meanings and to make the pope the repository and source not only of all law but also of rights. Such a reading would leave very little room for rights that were anything but the mere tolerance of the ruler.

One might respond to such an argument by observing that this maxim did not exist in a vacuum. It had to be read as consistent with the rights-based maxims we have just considered. One maxim did not swallow another. Individuals were free to use their rights; they did not thereby sin; they were ordinarily not to lose their rights through no fault of their own. Maxims were not all-or-nothing propositions; they had to be weighed and balanced.

But this is not the only possible response. Additionally, the canonists developed a final rights-based maxim almost as a response to the line of objections we have been pursuing. Injuries should not arise, the canonists wrote, from the source of rights/laws (iura).

The locus classicus of this maxim was the decretal letter Qualiter et Quando, issued in 1206 by

Pope Innocent III.[cxlii] Taken as a whole, Qualiter et Quando had as its purpose the establishment of general rules for the proper conduct of episcopal inquiries (inquisitiones) into wrongdoing within the diocese. The decretal letter of 1206 would subsequently provide the foundation for decree of the Fourth Lateran Council of the same name.[cxliii] In the course of establishing guidelines on determining when fama et clamor ("general knowledge and outcry") have reached a sufficient intensity to justify opening an episcopal inquiry, Innocent III's letter cautioned its readers to use appropriate procedures, lest iniuriae arise from the source of iura.[cxliv] Thus even in the extreme case of an episcopal inquisition, due process and rights should be respected lest the source of rights become the source of injustice and injury.

At the hands especially of Bernard of Parma this maxim would come to be used as a means of describing the papacy's relationship to the rights of third parties. The decretal Ex parte involved a cathedral chapter that had reduced the number of new members in order to maximize the incumbents' income.[cxlv] The canons received papal approval of this change in their constitution in forma communi, without revealing to the Holy See the facts that lay behind it. Upon being apprised of the motive for the change, Pope Honorius III invalidated the confirmation. Bernard explained that the Pope responded as he did because the source of iura should not give rise to iniuria.[cxlvi] The Pope, Bernard reasoned, did not wish to derogate from another's right since the source of rights must not also be the source of injustice.[cxlvii]

Bernard returned to this theme in his commentary on another decretal of Pope Honorius III, Sua nobis.[cxlviii] The context was the papal effort to govern the Greek lands that had fallen into Latin hands thanks to the bloody-minded diversion of the Fourth Crusade into a war against the Byzantine Empire. Sua nobis involved the conferral of a monastery to a local church by a cardinal-legate resident in Constantinople. The conferral subsequently received papal confirmation, in forma communi. The Patriarch of Constantinople challenged the papal action and Honorius once again invalidated the papal decree. He explained that he did not wish to detract from the Patriarch's rights (iuribus patriarchalibus).[cxlix] Bernard, expanding on the decretal's rationale, reiterated that the source of iura ought not to be the source of iniuria and added that the deprivation of the Patriarch's rights, had it succeeded, would have amounted to a confounding of the ecclesiastical order.[cl]

Bernard finally used this maxim of law to reconcile an apparent contradiction in the decretal Licet in corrigendis, which had been addressed to the Archbishop of Sens and instructed him to investigate criminal wrongdoing in the neighboring diocese of Paris.[cli] The decretal also suggested that the Bishop of Paris might consider prosecuting the wrongdoing on his own initiative. In the course of issuing instructions to both men, Innocent III provided seemingly inconsistent advice: He stated that the bishop of Paris was free to impose sentences on miscreants appellatione remota -- "with the opportunity of appeal removed" -- but added that he did not mean to infringe upon the metropolitan's right to hear appeals.[clii] Invoking the maxim ne inde iniuria, Bernard of Parma reconciled the contradiction in favor of the metropolitan by stating that the decretal could not be understood as prejudicing his rights.

One sees in these commentaries the emergence of a new type of analysis sensitive to the claims

of right of members of the Christian community and even, on occasion, those outside it.[cliii] This kind of analysis was unknown to Roman law and was unknown to the writers of the early middle ages. Its starting point was a respect for freedom and autonomy. This freedom was defined in relation to the status one occupied and the functions one performed in society. Electors were free to exercise their best judgment when filling vacancies. Married persons were protected in their marital rights. Priests who contracted leprosy, even monks who wrestled bears, were not to be deprived of office because of physical disability. Emperors and bishops were protected in their rights, but so were ordinary laypersons.

Even the sovereign authority of the papacy was called upon to respect the holders of rights. To appreciate this fact, one must bear in mind the medieval context of papal sovereignty: the pope was not only the spiritual head of the Catholic Church, but a sovereign lord with real temporal power over the papal states and real coercive jurisdiction in the rest of Christendom. His word could and did topple princes, destroy empires, and launch wars. The papacy was truly a transnational state capable of exerting influence and control through a refined system of ecclesiastical courts, papal legates, and a large body of trained legal professionals who shared, with minor variations, the same general world-view. What is significant in this medieval context was the willingness of canonists to acknowledge that persons had certain rights that were fundamental -- that not even the pope, whose judgments were "divine," could behave in an arbitrary fashion. One can thus locate, in these efforts to give voice to rights and to restrain sovereign will -- even papal will -- a deep taproot of *Gaudium et spes*.

IV. Concluding Observations:

By the fifteenth century, rights talk had become a pervasive feature of what a later generation of scholars would call constitutional thought.[cliv] The maxims that we have been considering certainly played a role in these later developments. One might close with an example drawn from one of the debates at the Council of Constance, which had been convoked to resolve the Great Schism, but which involved also itself in other matters. One of the many questions the Council considered was how to bring peace to Christendom's Baltic frontier. A series of wars had been waged in the fourteenth century by the Teutonic Knights and others in an effort to convert the pagan Lithuanians. Lithuania, however, had entered a union with Poland in 1386, a union that was further strengthened in 1413, and had also taken steps to convert to Western Christianity.[clv] The Knights, however, were not deterred from continuing their military campaigns against the Lithuanians, even in the face of criticism that they were self-interested and no longer serving the greater good of Christendom.

This, then, was the state of affairs in 1415. Representing the Polish-Lithuanian cause at the Council of Constance was Paulus Vladimiri, a student at the the University of Padua of Franciscus Zabarella, one of the principal Council fathers and a distinguished canonist in his own right. Vladimiri engaged in a series of legal exchanges with representatives of the Teutonic Knights that lasted for the better part of three years.

I would like to focus on one aspect of the these exchanges -- Valdimiri's use of the legal maxims

we have been discussing in a treatise known as the Tractatus, Opinio Hostiensis.[clvi] Vladimiri asserted that not only Christians, but also non-Christians enjoyed the right of self-government.[clvii] Vladimiri turned to the legal maxims to give greater support to this claim. He noted that only a "proper cause" (causa legitima) might justify the removal of the rights of jurisdiction and dominion from infidels.[clviii] Challenging the Knights' claim that they had received letters of authority from the Holy See, Vladimiri looked to the established rules for the interpretation of papal rescripts.[clix] Foremost among these was the principle that papal privileges must be interpreted in a way that causes no prejudice to the rights of others.[clx]

Vladimiri was insistent on this point. One should not be deprived of one's rights without cause, he declared, and papal rescripts must not be interpreted as permitting such drastic action where it is not clear that the pope had "certain knowledge" of the deprivation that might be worked by his decrees.[clxi] Grounding his assertion on a text in Justinian's Codex and a text of the Liber Extra, both of which encouraged the peaceful co-existence of Christians and Jews, Vladimiri added that "it is prohibited to disturb the rights of those who wish to live quietly."[clxii] For good measure, Vladimiri noted, echoing long-standing decretalist tradition, that the pope, who is the source of all iura, must not be seen as the cause of injury or injustice.[clxiii]

In this way, the maxims we have been considering entered the larger western constitutional tradition. These rights-based maxims clearly represent not only a tradition of government respectful of the proper freedom and autonomy of the human person, but also a Christian anthropology that regarded the human person as possessed of inherent dignity and rights. Authentic freedom was recognized by the maxims. It was not a sin to use a right. The other side of this coin, of course, was that there was no right to commit a sin. Rights-language was used to exalt human freedom, but this was freedom to accompanied by self-restraint as understood by the Catholic moral tradition and by the responsibility not to abuse or misuse one's rights in furtherance of wrongful ends.

The responsibility of third parties when confronted with claims of right was supposed to be one of respect. This is the meaning of the maxim that no one was to be deprived of his or her right sine culpa -- "without fault." Individuals were not to violate the rights of others. But this maxim also imposed a duty on those in positions of authority not to infringe the rights of others. As suggested above, papal rescripts were to be interpreted on the assumption that the pope did not intend to disturb the rights of third parties. When a pope like Innocent III authorized crusaders to take a crusading vow without first obtaining the consent of their spouses -- necessary legally because the wives' conjugal rights were imperilled by the vow -- canonists were quick to limit the damage thereby caused.[clxiv] In short, the expectations and, indeed, the dignity of individual rights-holders was to be maintained and respected.

This sense of freedom coupled with responsibility and respect for human dignity remained a feature of the western legal tradition long after the waning of the middle ages, although at a theoretical level it has come to be severely threatened over the last two centuries. A jurisprudence hostile to revealed religion and sceptical of the possibility that reason might lead law-makers and the public at large to a shared understanding of rights and responsibilities has

prevailed in secular circles ever since the day of John Austin and Jeremy Bentham.

Gaudium et spes nourishes itself from the older tradition that we have been considering. It stands in wonderful contradiction to those who would deny the possibility of transcendent justice and who see in the state the source of every law, obligation, and right. It reaffirms the freedom of the person as God-given and directed to certain ends. The revival of interest in Catholic jurisprudence and the reception of *Gaudium et spes* by modern American lawyers are thus most welcome signs.

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1. I use the term "western legal tradition" in the sense used by Harold Berman, to designate a continuous legal tradition, built upon a foundation of Christian theology and Roman law, that originated in the polemics that accompanied Pope Gregory VII's effort in the closing decades of the eleventh century to free the Catholic Church from the domination of the German emperor. See Harold J. Berman, Law and Revolution: The Formation of the Western Legal Tradition (Cambridge, MA: Harvard University Press, 1983), especially pp. 85-119. Cf. Charles J. Reid, Jr., "The Papacy, Theology, and Revolution: A Response to Joseph L. Soria's Critique of Harold Berman's Law and Revolution," Studia Canonica 29 (1995), pp. 433-480 (defending Berman's thesis).

2. ". . . quod Anglicana ecclesia libera sit, et habeat jura sua integra, et libertates suas illesas . . . ." [Quoted in J.C. Holt, Magna Carta (Cambridge: Cambridge University Press, 1965), p. 316.

3. Brian Tierney, "Religion and Rights: A Medieval Perspective," Journal of Law and Religion 5 (1987), 163-175.

iv. Brian Tierney, The Idea of Natural Rights: Studies on Natural Rights, Natural Law, and Church Law, 1150-1625 (Atlanta, GA: Scholars Press, 1997). Tierney has also written numerous articles on the origins of natural rights discourse in the work of the canonists. A partial bibliography of these articles can be found in Charles J. Reid, Jr., "The Medieval Origins of the Western Natural Rights Tradition: The Achievement of Brian Tierney," Cornell Law Review 83 (1998), 437, 438, note 2.

v. See generally Annabel S. Brett, Liberty, Right, and Nature: Individual Rights in Later Scholastic Thought (Cambridge, UK: Cambridge University Press, 1997).

vi. Charles J. Reid, Jr., "Thirteenth-Century Canon Law and Rights: The Word Ius and Its Range of Subjective Meanings," Studia Canonica 30 (1996), pp. 295-342.

vii. Charles J. Reid, Jr., Power Over the Body, Equality in the Family: Rights and Domestic Relations in Medieval Canon Law (Grand Rapids, MI: Eerdmans, 2004).

viii. Psalm 8: "[W]hat is man that thou art mindful of him, and the son of man that thou dost care for him? Yet thou hast made him little less than God, and dost crown him with glory and honor. Thou hast given him dominion over the works of thy hands; thou hast put all things under his feet, all sheep and oxen, and also the beasts of the field, the birds of the air, and the fish of the sea, whatever passes along the paths of the sea." The word translated as "God" above, elohim, is plural and is frequently translated as "angels."

ix. See Gregory C. Sisk and Charles J. Reid, Jr., "Abortion, Politics, Eucharist and Politicians: A Question of Communion," The Catholic Lawyer 43 (2004), 255, 271, note 70; and Amelia J. Uelman, "The Spirituality of Communion: A Resource for Dialogue with Catholics in Public Life," The Catholic Lawyer 43 (2004), 289, 294 note 27 and 295, note 39.

x. Kathleen Brady, "Religious Organizations and Mandatory Collective Bargaining Under Federal and State Labor Laws: Freedom From and Freedom For," Villanova Law Review 49 (2004), pp. 77, 117-138.

xi. Alison M. Sulentic, "What Catholic Social Teaching Says to Catholic Sponsors of Church Plans," Journal of Contemporary Health Law and Policy 17 (2000), 1, 5, note 18.

xii. Robert John Araujo, "The International Personality and Sovereignty of the Holy See," Catholic University Law Review 50 (2001), 291, 307, note 69; 315, note 118; 331, note 192; and 356, note 326.

xiii. Ronald J. Rychlak, "The 1933 Concordate Between Germany and the Holy See: A Reflection of Tense Relations," Digest 9 (2001), 32, note 37; 33, note 47; and 38, note 77.

xiv. Mark A. Sargent, "An Alternative to the Sectarian Vision: The Role of the Dean in an Inclusive Catholic Law School," Toledo Law Review 33 (2001), 171, 178, note 30, and 180, note 32; and David K. DeWolf and Robert John Araujo, "'And God's Justice Shall Become Ours:' Reflections on Teaching in a Catholic University," Regent University Law Review 11 (1998/1999) 37, 45.

xv. William Quigley, "Full-Time Workers Should not Be Poor: The Living Wage Movement," Mississippi Law Journal 70 (2001), 889, 903, note 56.

xvi. William Quigley, "Prison Work, Wages, and Catholic Social Thought: Justice Demands Decent Work For Decent Wages, Even For Prisoners," Santa Clara Law Review 44 (2004), 1159, 1169, note 48.

xvii. David L. Gregory, "The Problematic Employment Dynamics of Student Internships," Notre Dame Journal of Ethics and Public Policy 227, 237, note 25.

xviii. Kevin J. Doyle, "The Shifting Legal Landscape of Contingent Employment: A Proposal To Reform Work," Seton Hall Law Review 33 (2003), 641, 671, note 25.

xix. Michael J. Nader, "Foreward: Towards Reconciliation and Consensus: Catholic Social Thought and Entitlements," Notre Dame Journal of Legal Ethics and Public Policy 419, 426-427; Arthur F. McGovern, "Entitlements and Catholic Social Teachings," Notre Dame Journal of Legal Ethics and Public Policy 11 (1997), 445, 453-454; William R. O'Neill, "Commonweal or Woe? The Ethics of Welfare Reform," Notre Dame Journal of Legal Ethics and Public Policy 487, 495, note 41; and Michael Warner, "From Subsidiarity to Subsidies: America's Catholic Bishops Re-Orient Their Teachings on Society and Entitlements, 1966-1986," Notre Dame Journal of Legal Ethics and Public Policy 581, 586-587 (1997).

xx. Jonathan R. Cohen, "When People Are the Means: Negotiating With Respect," Georgetown Journal of Legal Ethics 14 (2001), 751, note 25. Negotiations, the author notes, involves "attempts to get the other party to do something, or at least explores that possibility." Id., at 742. In seeking respectful negotiations with others the author looks in part to "religious traditions [that] say that human beings, created in the Divine Image, are sacred entities who merit respect." Id., at 751.

xxi. Susan Stabile, "Using Religion to Promote Corporate Responsibility," Wake Forest Law Review 39 (20040, 839, 861, note 81.

xxii. Stephen Bainbridge, "Corporate Decisionmaking and the Moral Rights of Employees: Participatory Management and Natural Law," Villanova Law Review 43 (1998), 741, 784 (1998). Bainbridge's purpose in writing was to use Catholic social teaching as a means of identifying "areas in which employees may be entitled to participate in corporate decisionmaking . . . ." Id., at 747. Robert Vischer has advanced a similar claim: "Through statements such as . . . Gaudium et Spes, which calls for worker participation in workplace decision-making, the popes have consistently focused on the ability of workers to have input in the conditions of their employment."

Robert K. Vischer, "Subsidiarity as a Principle of Governance: Beyond Devolution," Indiana Law Review 35 (2001), 103, 133.

xxiii. Scott Fitzgibbon, "'True Human Community:' Catholic Social Thought, Aristotelian Ethics, and the Moral Order of the Business Company," St. Louis Law Journal 45 (2001), 1243, 1258. Quoting Gaudium et Spes, Fitzgibbon writes: "'Deep within his conscience man discovers a law which he has not laid upon himself but which he must obey. Its voice, ever calling him to love and to do what is good and avoid evil, tells him inwardly at the right moment: do this, shun that. For man has in his heart a law inscribed by God. . . .'" Id. (quoting Gaudium et Spes, para. 16).

xxiv. See for instance, the wide-ranging study of Vera Bolgár, "The Fiction of the Corporate Fiction: From Pope Innocent IV to the Pinto Case," in Ronald H. Graveson, Karl Kreuzer, André Tunc, and Konrad Zweigert, eds., Festschrift für Imre Zajtay (Tübingen, 1982), pp. 67-96.

xxv. William Quigley, "Catholic Social Thought and the Amorality of Large Corporations: Time to Abolish Corporate Personhood," Loyola Journal of Public Interest Law 5 (2004), 109. Quigley opens his article with a bold proposition: "This paper suggests that the modern large corporations are by size, power, and operation of law either amoral or immoral and so powerful that they cannot be made to act in accordance with Catholic social thought under current legal regulations. Since other arrangements are making little progress, legal corporation personhood should be abolished." Id., at 109.

xxvi. Robert John Araujo, "Realizing a Mission: Teaching Justice as 'Right Relationship,'" St. John's Law Review 74 (2000), 591, 594.

xxvii. Silecchia argued that Catholic principles of social justice should best be used to relieve the great disparities of wealth afflicting the world: relying on Gaudium et Spes for her conception of justice, Silecchia identified poverty, death from hunger, the abuse and exploitation of children, and neglect of the elderly as among the principal concerns facing the modern world. See Lucia Silecchia, "Reflections on the Future of Social Justice," Seattle University Law Review 23 (2000), 1121, 1126-1131. Silecchia draws her conception of the paradox of wealth and poverty explicitly from Gaudium et Spes. Id., at 1125, note 11. In an earlier article, Silecchia looked to the Second Vatican Council's Gaudium et Spes as "[a] cornerstone of Catholic social thought." See Lucia Ann Silecchia, "On Doing Justice and Walking Humbly With God: Catholic Social Thought On Law as a Tool for Building Justice," Catholic University Law Review 46 (1997), 1163, 1165 and note 10.

xxviii. Robert Rodes, "Social Justice and Liberation," Notre Dame Law Review 71 (1996), 619, 624. Like Silecchia, Rodes recognizes the yawning gulf between the world's rich and poor as a central issue confronting Christians and states: "Christianity does not teach us to ignore this struggle between competing interests. What it teaches use to do is side with the victims even if we are ourselves the beneficiaries. If our prosperity is the flip side of someone else's misery, we are, like it or not, oppressors." Id., at 625.

xxix. John J. Coughlin, "The Practical Impact of the Common Good in Catholic Social Thought," St. John's Law Review 75 (2001), 293. Coughlin writes:

> "The Vatican II document Gaudium et Spes offers this definition of the common good: 'the sum of those conditions' which allow people, either as groups or as individuals, to reach their fulfillment more fully and more easily. This notion of the common good places a primacy on the flourishing of individual human beings -- spiritually, intellectually, culturally, and financially -- through participation with others. It stands in direct opposition to any system of government which denies the conditions of human flourishing. Perhaps,

without fully appreciating it, I believe that we witnessed an astounding and unexpected practical consequence of Catholic social teaching in the not so distant past. Affirmed during the 1960s at Vatican II, I would like to suggest that the concept of the common good percolated throughout the Catholic world, and would bear special fruitfulness in Eastern Europe at the end of the twentieth century." Id.

xxx. Robert W. Scholla, "Fides Quarens Iustitiam Socialem: A Jesuit Law School Perspective," Loyola of Los Angeles Law Review 37 (2004), 1209, 1225, note 77 (quoting Gaudium et Spes, para. 26).

xxxi. Mary Eileen McGrath, "Contemporary International Legal Issues: Nuclear Weapons: The Crisis of Conscience," Military Law Review 107 (1985) 191, 228. McGrath recognized that Gaudium et Spes provided an important source of Catholic teaching justifying conscientious objection. Id., at 231.

xxxii. Justice Kenneth J. Keith, "Rights and Responsibilities: Protecting the Victims of Armed Conflict," Duke Law Journal 48 (1999), 1081. "[T]he Second Vatican Council, emphasizing that inherent limits on warfare were not a mere legal quibble, made this memorable declaration: 'Any act of war aimed indiscriminately at the destruction of entire cities or of extensive areas along with their population is a crime against God and man himself. It merits unequivocal and unhesitating condemnation.'" Id., at 1089 (quoting Gaudium et Spes, para. 80).

xxxiii. Ronald J. Rychlak, "Just War Theory, International Law, and the War in Iraq," Ave Maria Law Review 2 (2004), 1, 10-11; and Joseph L. Falvey, Jr., "Our Cause is Just: An Analysis of Operation Iraqi Freedom Under International Law and the Just War Doctrine," Ave Maria Law Review 2 (2004), 65, 68.

xxxiv. Dan Millisor, "'Crusaders for Justice, Pilgrims for Peace:' Global Human Rights and Catholic Social Teaching," Ohio Northern Law Review 25 (1999), 315, 317.

xxxv. Id., at 318.

xxxvi. Robert John Araujo, "International Law Clients: The Wisdom of Natural Law," Fordham Urban Law Journal 28 (2001), 1751, 1760.

xxxvii. L. Christian Marlin, "A Lesson Unlearned: The Unjust Revolution in Rwanda, 1959-1961," Emory International Law Journal 12 (1998), 1271, 1304-1305.

xxxviii. Terry Coonan, "There Are No Strangers Among Us: Catholic Social Teaching and U.S. Immigration Law," The Catholic Lawyer 40 (2000), 105, 122-123.

xxxix. John H. Garvey, "The Pope's Submarine," San Diego Law Review 30 (1993), 849, 858-859.

xl. William J. Wagner, "Christianity and the Civil Law: Secularity, Privacy, and the Status of Objective Moral Norms," St. John's Law Review 71 (1997), 515, 540.

xli. Robert John Araujo, "Humanitarian Jurisprudence: The Quest for Civility," St. Louis Law Journal 40 (1996), 715, 743 (quoting Gaudium et Spes).

xlii. Leslie C. Griffin, "Fundamentalism from the Perspective of Liberal Tolerance," Cardozo Law Review 24 (2003) 1631.

xliii. Salamanca seems to equate pure liberalism with an entire absence of belief or commitment regarding

ultimate truth. Thus Salamanca writes: "It is in the nature of religious traditions to be somewhat illiberal. Indeed, a religion that does not require its adherents to affirm at least some belief is probably a logical impossibility. Christians, for example, must believe something about the nature of Christ. Even Unitarians, who advocate tolerance of all religions, must affirm a belief in tolerance." "Looking Back -- Looking Forward: The Liberal Policy and Illiberalism in Religious Traditions," Barry Law Review 4 (2003), 97, 97.

xliv. Paul E. Salamanca, "Id., pp. 106-107. Salamanca followed this statement with a long quotation from Gaudium et Spes, para. 44.

xlv. James Gordley, "Morality and the Protection of Dissent," Ave Maria Law Review 1 (2003) 127, 129.

xlvi. Id., at 134. Gordley wrote:

"The Council declared that 'the human person has a right to religious freedom' against the 'coercion . . .of any human power.' Moreover, 'within the limits of morality and the general welfare, a man [must] be free to search for the truth, voice his mind, and publicize it. . . . It is not the function of public authority to determine what the proper nature and forms of human culture should be.' The Council also declared that religion, culture, and the state fulfill and protect human life. People are bound 'to order their whole lives in accord with the demands of truth,' especially religious truth. Furthermore, 'culture must be made to bear on the integral perfection of the human person.'To form that culture, 'human institutions, both private and public, must labor to minister to the dignity and purpose of man.' Society is a moral order that 'must be founded on truth, built on justice, and animated by love.'" Id.

xlvii. John Finnis, "Liberalism and Natural Law," Mercer Law Review 45 (1994), 687, 693 (quoting Gaudium et Spes, para. 26.

xlviii. Id. Finnis also cautions that the notion of the common good should not be misunderstood: "[T]he political community -- properly understood as one of the forms of collaboration needed for the sake of the goods identified in the first principles of natural law -- is a community cooperating in the service of a common good that is instrumental, not itself basic. . . . [I]ts proper range includes the regulation of friendships, marriage, families, and religious associations, as well as of all the many organizations and associations which, like the state itself, have only an instrumental (e.g., economic) common good. But such regulation of these associations should never (in the case of associations with a non-instrumental common good) or only exceptionally (in the case of instrumental associations) be intended to take over the formation, direction, or management of these personal initiatives and interpersonal associations." Id., at 693-694.

xlix. John Finnis, "Unjust Laws in a Democratic Society: Some Philosophical and Theological Reflections," Notre Dame Law Review 71 (1996), 595, 596, note 3. Finnis cautions against misuse of the term "pluralism:" "To the extent that there is lack of agreement on basic issues, to that extent there is an obstacle to genuine community. This obstacle is in itself a great harm for a society, and so 'pluralism' of opinion on matters basic to the common good is a deficiency, an evil, something to be regretted -- not something to be held up as a standard." Id., at 596.

l. Christian Brugger, "Aquinas and Capital Punishment: The Plausibility of the Traditional Argument," Notre Dame Journal of Legal Ethics and Public Policy 18 (2004), 357, 363; Robert W. Tuttle, "Death's Casuistry," Marquette Law Review 81 (1998), 371, 378-379; and Robert F. Drinan, "Will Religious Teachings and International Law End Capital Punishment?" St. Mary's Law Journal 29 (1998), 957, 963.

li. Richard S. Myers, "An Analysis of the Constitutionality of Laws Banning Assisted Suicide from the Perspective of Catholic Moral Teaching," University of Detroit-Mercy Law Review 72 (1995), 771, 781.

lii. Richard E. Coleson, "Contemporary Religious Viewpoints on Suicide, Physician-Assisted Suicide, and Voluntary Active Euthanasia," Duquesne Law Review 35 (1996), 43, 47.

liii. Richard P. Cole, "Liberation and Empowerment: A Jubilean Alternative for State v. Oakley," Western New England Law Review 26 (2004), pp. 27, 30-31.

liv. Joseph S. Spoerl, "Making Laws on Making Babies: Ethics, Public Policy, and Reproductive Technology," American Journal of Jurisprudence 45 (2000), 93, 109, and note 26; Ralph C. Conte, "Toward a Theological Construct for the New Biology: An Analysis of Rahner, Fletcher, and Ramsey," Journal of Contemporary Health Law and Policy 11 (1995), 429, 451 and note 118.

lv. John Witte, Jr., "The Goods and Goals of Marriage," Notre Dame Law Review 76 (2001), 1041-1042; Scott Fitzgibbon, "Marriage and the Ethics of Office," Notre Dame Journal of Legal Ethics and Public Policy 18 (2004) 89, 128; Charles J. Reid, Jr., "The Unavoidable Influence of Religion Upon the Law of Marriage," Quinnipiac Law Review 23 (2004), 493, 523-524, note 144; and Vivian Hamilton, "Mistaking Marriage for Social Policy," Virginia Journal of Social Policy and Law 11 (2004), 307, 336, and note 102.

lvi. See, for example, Daniel J. Morrissey, "The Separation of Church and State: An American-Catholic Perspective," Catholic University Law Review 47 (1997), 1, 9, note 43; Richard W. Garnett, "The Right Questions About School Choice: Education, Religious Freedom, and the Common Good," Cardozo Law Review 23 (2002), 1281, 1311; and Angela C. Carmella, "A Theological Critique of Free Exercise Jurisprudence," George Washington Law Review 60 (1992), 782, 791, and note 41.

lvii. Lucia Silecchia, "Environmental Ethics from the Perspective of NEPA and Catholic Social Teaching: Ecological Guidance for the Twenty-First Century," William and Mary Environmental Law and Policy Review 28 (2004), 659, 686-688; Robert John Araujo, "Rio+10 and the World Summit on Sustainable Development: Why Human Beings Are at the Center of Concerns," Georgetown Journal of Law and Public Policy 2 (2004), 201, 218, note 80; Robert W. Lannan, "Catholic Tradition and the New Catholic Teaching and Social Teaching on the Environment," Catholic Lawyer 39 (2000), 353, 358, 380 (2000).

lviii. Deirdre Dessingue, "Prohibition in Search of a Rationale: What the Tax Code Prohibits; Why; To What End?" Boston College Law Review 42 (2001), 903, 926.

lix. Gaudium et Spes, para. 12.

lx. Id., para. 14; and para. 18.

lxi. Id., para. 16 ("The intellectual nature of man finds at last its perfection . . . in wisdom, which gently draws the human mind to look for and love what is true and good." Id.)

lxii. Romans 2: 15-16.

lxiii. Gaudium et Spes, para. 16.

lxiv. Id., para. 17.

lxv. Antonio B. Lambino, Freedom in Vatican II: The Theology of Liberty in Gaudium et Spes (Manila: Loyola School of Theology, 1974), p. 24.

lxvi. Gaudium et Spes, para. 17 (quoting Eccl. 15:14). The Council stresses that the choice to follow and cleave to God must, as a matter of theological necessity, be free: "Man's dignity therefore requires him to act out of conscious and free choice, as moved and drawn in a personal way from within, and not by blind impulses in himself or by mere external constraint." Id.

Joseph Ratzinger found paragraph 17, "[t]he section on freedom," to be among "the least satisfactory" parts of all of Gaudium et Spes. See Joseph Ratzinger, "The Church and Man's Calling: The Dignity of the Human Person," in Herbert Vorgrimler, ed., Commentary on the Documents of Vatican II, vol. V (New York: Herder and Herder, 1969), p. 136. The conciliar text failed to recognize, on the one hand, "the factual situation of man whose freedom only comes into effect through a lattice of determining factors," such as the circumstances of our birth and education and our whole social environment. Id., p. 138. And on the other hand, it fails to take adequate account of the will enslaved by sin which Martin Luther, "with polemical onesidedness," emphasized in his preaching. Id. Despite these misgivings, Ratzinger finds great importance in the paragraph: it objects to external and arbitrary constraints on freedom and "defends man as the free being who must himself decide to be himself." Id., p. 139. Similarly, it resists the kind of indifference to moral norms that leads to indifferentism and the false idea that freedom means absence of responsibility. Id. And, finally, the paragraph emphasizes "man's moral responsibility in opposition to any kind of determinism." Id.

lxvii. Gaudium et Spes, para. 24.

lxviii. Id., para. 33.

lxix. Id.

lxx. Id., para. 14.

lxxi. Id.

lxxii. Id., para. 16.

lxxiii. Id., para. 29.

lxxiv. Id., para. 27.

lxxv. Id., para. 26.

lxxvi. Id., para. 26.

lxxvii. Charles J. Reid, Jr., "Toward an Understanding of Medieval Universal Rights: The Marital Rights of Non-Christians in Early Scholastic and Canonistic Writings," (forthcoming, Ave Maria Law Review (2005)).

lxxviii. Innocent IV, Apparatus in V Libros Decretalium (Frankfurt, 1570) (reprint, 1968), X.3.34.8, v. pro defensione. Exploring the implications of this commentary, see especially James Muldoon, Popes, Lawyers, and Infidels: The Church and the Non-Christian World, 1250-1550 (Philadelphia: University of Pennsylvania Press, 1979), pp. 5-15. Innocent IV invoked rights language to explain the relationship of the papacy to the Jewish community of Europe. In 1244, Innocent followed in the footsteps of his predecessors when he instructed Louis IX of France to burn copies of the Talmud and its commentaries, although in 1247 he changed his mind at the request of the Jewish "masters" of Paris. In agreeing to establish a papal commission to review the status of the Talmud and in instructing the King of France to cooperate, Innocent stated that in his role as supreme pontiff he was under an obligation to defend the rights of all persons ("summus pontifex . . . tenetur reddere cuilibet iura sua"). Innocent IV to Louis IX, of France (12 August, 1247) (document no. 187) in Schlomo Simonsohn, The Apostolic See and the Jews: Documents (Toronto: Pontifical Institute of Mediaeval Studies, 1988) vol. 94, pp. 196-197. The legate appointed by Innocent ultimately rendered a negative decision, recommending that Jews be denied access to the Talmud. See Solomon Grayzel, The Church and the Jews in the Thirteenth Century (New York: Hermon Press, 1966), pp. 275-280, note 3. What is important for our purposes was Innocent's invocation of rights language at the time he decided to reopen the question of the Talmud.

lxxix. See Reid, "Thirteenth-Century Canon Law and Rights," supra, pp. 312-331.

lxxx. See, for instance, Innocent IV, Apparatus, X.1.3.43, v. vel quattuor ("fatemur tamen, quod alii quorum interest, si volunt pro suo iure coram eodem iudice, quod admittendi sunt . . ."). Innocent here was treating rights and interests as equivalent terms when he declared that all who had an interest in litigation should be admitted before the judge so that they might litigate their right.

lxxxi. These debates are well documented in Edouard-Henri Wéber, La personne humaine au xiiie siècle. L'avènement chez les maîtres parisiens de l'acception moderne de l'homme (Paris: J Vrin, 1991).

lxxxii. See Berman, Law and Revolution, supra, p. 140. See also Peter Stein, Regulae Iuris: From Juristic Rules to Legal Maxims (Edinburgh: At the University Press, 1966), pp. 156-159 (tracing the development of maximum propositions in scholastic philosophy).

lxxxiii. Ronald Dworkin, "The Model of Rules," University of Chicago Law Review 35 (1967), pp. 14-46.

lxxxiv. Id., p. 18.

lxxxv. For a classic application of this principle to deny unjust enrichment in the case of wrong doing, see Riggs v. Palmer, 115 N.Y. 506 (1889). The case involved a grandson who killed his grandfather in order to take under the older man's will. The New York Court of Appeals denied recovery even in the absence of a statute prohibiting a slayer from recovering an inheritance because "[n]one shall be permitted to profit by his own fraud, or to take advantage of his own wrong . . . ." Id., at 511.

lxxxvi. Id., p. 25.

lxxxvii. Id., p. 26.

lxxxviii. Id., pp. 32-40.

lxxxix. Hostiensis, Summa (Lyon, 1537) (reprinted, Aalen: Scientia Verlag, 1962), Bk. I, De Rescriptis, sec. 24.

xc. X. 1.6.7.

xci. Charles J. Reid, Jr., "Roots of a Democratic Polity in the History of Canon Law: The Case of Elections in the Church," Proceedings of the Canon Law Society of America 60 (1998), pp. 150, 164-169.

xcii. The title De electione (X.1.6) consists of sixty excerpts from decretals, many of which were issued in the course of hotly-disputed election contests.

xciii. X. 1.6.31 ("sicut iuris regula dicit, non videtur iniuriam facere qui utitur iure suo . . . .") Id.

xciv. Hostiensis, Summa, Bk. II, De prescriptione rerum immobilium, sec. 4.

xcv. Id.

xcvi. Id. Hostiensis conceded that there were those who asserted that the emperor's lordship should be understood did not reach to private property and was properly limited to the power of governance (ad iurisdictionis tuitionem et defensionem).

xcvii. Id. ("sic nemini dacit iniuriam si utitur iure suo").

xcviii. Id. "Sic dicerem et in papa quod bene posset mihi et ego cum sana conscientia ipsam reciperem et tenerem."

xcix. I explore the relationship of the conjugal debt/right to feudal power in Power Over the Body, Equality in the Family, supra, pp. 122-126.

c. X. 1.2.2.

ci. Bernard of Parma, Glossa Ordinaria, X. 1.2.2, v. culpa caret. The edition consulted is: Decretales D. Gregorii Papae IX: Suae integritate una cum glossis restitutae (Rome: 1582).

cii. The three texts include: D. 56, c. 7; C. 16, q. 7, c 38; and X. 2.13.7. All three texts connected the deprivation of rights and powers with fault, though none used the maxim at issue.

ciii. Among the texts Bernard cited were: D. 34, c. 11 (denying admission to the priesthood to one whose wife has committed adultery); D. 34, c. 12 (permitting the dismissal of a priest whose wife has committed adultery): C. 27, q. 2, c. 20 (permitting a wife separated from her husband without consent to return to him); and X.3.3.4 (permitting priests who entered concubinage to return to their duties following a long penance). Cf. D. 22, c. 6 (justifying the elevation of Constinople to the second most powerful see in Christendom, even at the expense of Antioch and Alexandria, whose stature were thereby diminished).

civ. Glossa ordinaria, X.1.2.2., v. culpa caret.

cv. X.1.2.2. v. culpa caret:

> Paupertas, odium, vitium, favor, et scelus ordo,
> Personas spoliant et loca iure suo."

cvi. Hostiensis, Lectura (Venice: Apud Iuntas, 1581), X.1.2.2., v. culpa.

cvii. Innocent IV, Apparatus, X.1.2.2., v. culpa: "Fallit in casibus . . . . Vel etiam ibi causa suberat, et sine culpa . . . ."

cviii. X. 4.13.11.

cix. Id.

cx. Id.

cxi. Id.

cxii. On the rules governing the forfeiture of the conjugal debt, see Reid, Power Over the Body, supra, pp. 117-119.

cxiii. X. 1.13.6.

cxiv. Id.

cxv. X. 5.39.37.

cxvi. Id.

cxvii. X. 4.19.7.

cxviii. See most recently Aubrey Burl, God's Heretic: The Albigensian Crusade (Gloucestershire, UK: 2002), pp. 33-34.

cxix. X. 4.19.7. Innocent worried that parties might use the pretext of falling into heresy in order to escape their marital obligations and move to other unions or liaisons.

cxx. Id.

cxxi. Glossa ordinaria, X. 1.6.52, v. venire: "Et ideo cum iusta causa est impeditus iure suo privari sine culpa sua non debet . . . ."

cxxii. Glossa ordinaria, X. 3.6.4, v. administrationis.

cxxiii. Id. The medieval canonists were attentive to the loss of rights that might follow upon contracting a dread disease like leprosy and took steps to protect the ill party. On leprosy and marital rights, see Reid, Power Over the Body, supra, pp. 119-122.

cxxiv. X. 1.20.7.

cxxv. Glossa ordinaria, X.1.20.7, v. deformitatem. It was perhaps just as well that Bernard did not explain how one was to tell whether the cleric was at fault in such circumstances.

cxxvi. Hostiensis, Lectura, X. 3.24.4, v. in vita sua.

cxxvii. Id.

cxxviii. Hostiensis, Summa, Bk. I, De constitutionibus, sec. 21.

cxxix. Hostiensis, Lectura, X. 3.6.4, v. ministrentur: ". . . [E]t notavit hic casum specialem esse, in quo quis privatur iure suo sine culpa, sc., propter vitium lepre."

cxxx. X. 5.33.23.

cxxxi. Hostiensis, Lectura, X. 5.33.23, v. Constantinopolitana: "Sol. haec regula est, quod nemo privatur iure suo sine culpa sua. Fallit in casibus, quod dic ut not., supra de constit., c. cognoscentes . . . ."

cxxxii. Laurentius Hispanus, 3 Comp. 1.5.3, v. puri hominis, Admont. 55, fol. 110r (quoted in Kenneth Pennington, Pope and BishopS: The Papal Monarchy in the Twelfth and Thirteenth Centuries (Philadelphia: University of Pennsylvania Press, 1984), p. 18, note 14).

cxxxiii. The reference to "austinian sovereignty" is a reference to the jurisprudence of John Austin (1790-1859), widely reputed to be one of the principal founders of modern legal positivism. For an authoritative edition of Austin's most famous work, see The Province of Jurisprudence Determined, Wilfred E. Rumble, ed. (Cambridge, UK: Cambridge University Press, 1995).

cxxxiv. VI* 1.2.1.

cxxxv. Franz Gillmann, "Romanus pontifex omnia in scrinio pectoris sui censetur habere," Archiv fúr katholischen Kirchenrecht 92 (1912), pp. 3-17 (discussing decretist an decretalist usages of this term); Franz Gillmann, "Romanus pontifex omnia in scrinio pectoris sui censetur habere," Archiv für katholischen Kirchenrecht 106 (1926), pp. 156-174 (a second article of the same title discussing decretalist usages of the maxim); and Ernst Kantorowicz, The King's Two Bodies: A Study in Medieval Political Theology (Princeton: Princeton University Press, 1957), p. 28, note 15 (reviewing the treatment of this expression by the glossators).

cxxxvi. See Gillmann, "Romanus pontifex" (1912), pp. 6-10 (reviewing early canonistic usages of the maxim). The maxim has its origin in Roman law. See Codex 3.28.35 ("Neque enim credendum est Romanum principem qui iura tuetur huiusmodi verbo totam observationem testamentorum multis vigiliis excogitatam atque inventam velle everti").

cxxxvii. Bernard of Parma, Glossa ordinaria, X.2.28.44, v. iuris quaestio: "De hoc potes habere exempla, scil., utrum laicus vel aliquis in minoribus ordinibus constitutus eligi possit ad dignitatem vel minor XXV annis vel aliquis possit habere plura beneficia de iure communi. De hoc nulla probatio apud Papam est necessaria, cum ipse habeat ius in scrinio pectoris sui . . . ."

cxxxviii. Hostiensis, Summa, Bk. I, De constitutionibus, sec. 12 ("Qualiter constitutio derogatur").

cxxxix. See Gillmann, "Romanus pontifex" (1912), p. 11.

cxl. See Gillmann, "Romanus pontifex" (1912), pp. 3-4 (reviewing prior scholarship).

cxli. Id., p. 17. Indeed, the words of Boniface's decretal makes this point. Boniface disclaims any special knowledge of local customs and statutes and declares that such local rules are presumptively consistent with subsequent papal constitutions unless the contrary is shown.

cxlii. X. 5.1.17.

cxliii. X. 5.1.24.

cxliv. X. 5.1.17 ("Si circa venerabilem fratrem nostrum Novariensem episcopum debitum inquisitionis ordinem observastis intentionem et discretionem vestram in Domino commendamus. Si vero qualibet occasione praetermisistis eundem, ne levi compendio ad grave dispendium veniatur, ad huc ipsum ordinem tempore opportuno volumus observari, ne inde nascantur iniuriae, unde iura nascuntur").

cxlv. X. 1.2.12.

cxlvi. Bernard of Parma, Glossa ordinaria, X. 1.2.12, v. confirmatione: "Per tales confirmationes non intelligit Papa iuri alicuius derogare. . . . Quia inde non debet nasci iniuria unde iura oriuntur. . . ."

cxlvii. Id.

cxlviii. X. 2.30.9.

cxlix. Id.

cl. Bernard of Parma, Glossa ordinaria, X. 2.30.9, v. minui: "Quin non debet inde procedere iniuriarum occasio unde iura nascuntur. . . . Et quia si sua iura unicuique Episcopo servantur, quid aliud, quam ut ordor ecclesiasticus confundatur?"

cli. X. 1.31.12.

clii. Id.

cliii. See supra note --.

cliv. See Tierney, The Idea of Natural Rights, pp. 207-254.

clv. Stanislaus F. Belch, Paulus Vladimiri and His Doctrine Concerning International Law and Politics (The Hague: Mouton, 19650, vol. I, p. 131.

clvi. This text is reprinted in Belch, supra, at vol. II, pp. 846-884. The text is intended as an answer to the argument of the thirteenth-century canonist Hostiensis, who had denied the possibility that infidels -- non-Christians -- could enjoy the right of self-government.

clvii. Id., pp. 869-871.

clviii. Id., p. 873.

clix. Id.

clx. Id.

clxi. Id.

clxii. Id., p. 869 ("quia iura eos quiete vivere volentes prohibent molestare"). The texts Vladimiri relied upon included: Codex 1.9.14 and X. 5.6.2.

clxiii. Id.

clxiv. Since the conjugal debt was a right with foundations in natural and divine law, it was seen by the canonists as disruptive of the established order. Innocent III's decision, Hostiensis wrote derisively, was a "most special case" (specialissimus casus), because "it seemed to make the crusading vow even more important than the vow of continence, for which spousal permission had to be obtained." Reid, Power Over the Body, p. 125.