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SACRED RULES, SECULAR REVELATIONS:

THE CONCEPTIONS OF RIGHTS IN PRE-MODERN EUROPE

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I. INTRODUCTION

This paper is an attempt to reflect on the methodological approaches that I bring to 'reading law' in my current project on understandings of individual rights in the legal and theological texts of the twelfth- and early thirteenth-century Middle Ages, entitled 'Sacred Rules, Secular Revelations: The Conceptions of Rights in Pre-Modern Europe'.[1]

It is first necessary to say something about my own intellectual background, which informs the methodologies that I employ in this research. I am an historian and lawyer. Following my undergraduate training in law and history, I worked as a lawyer in private and in-house roles off and on for more than five years. In one of these 'off' periods, I completed my PhD in the discipline of history, although the subject matter of my thesis dealt with legal history, intellectual history, history of law, and the history of ideas. For a time I taught medieval history in Australia and the United States. In a subsequent, but not contiguous, 'off' period, I published this PhD thesis as a monograph (Taliadoros 2006b). My current role is the third 'off'

period from law practice: I am employed as a post-doctoral research fellow in the discipline of historical studies and as a tutor and lecturer in a faculty of law. The point of this brief biography is to emphasise my approach as that of an historian of law and ideas and of a lawyer, rather than that of a 'legal historian', with the narrower connotations that the latter term implies.

The project 'Sacred Rules, Secular Revelations' aims to explore the interaction between law and theology during the so-called 'twelfth-century renaissance', the period between approximately 1050 and 1250 when Western Europe experienced an intellectual, cultural, and social transformation that scholars liken to the later Italian Renaissance (Haskins 1927).[2] It will focus particularly on perceptions of what we today might call 'individual human rights', but what medievals called something else, in the texts of lawyers and theologians of the twelfth and thirteenth centuries.

Before examining what this 'something else' is, it is necessary to pause a moment to consider the very idea of 'medieval human rights'. To many the phrase may appear to be an oxymoron. Certainly, the popular image of the Middle Ages is as the 'Dark Ages' and, more broadly, with religious and preternatural superstition and ignorance (see Freedman and Spiegel 1998). But, as Haskins has shown (Haskins 1927), the twelfth century in particular was an age of re-birth, re-discovery, and reform. It, too, was an age which famously, if controversially, witnessed the 'rise of the individual' (Morris 1972; Southern 1995; cf. Bynum 1982). Therefore, a concomitant focus on individual or human rights should not surprise us. This new affectivity is exemplified in the flourishing of courtly love poetry and vernacular literature (Dronke 1986) and a more intense and personal religiosity (Constable 1996), all of which characterised a cultural shift towards the individual.

At the same time, the twelfth century witnessed the establishment of paradigmatic or 'canonical' texts in law and theology. In Roman law, the re-discovery of one of its most

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[2] Medievalists have now moved beyond Haskins's use of the term 'renaissance' as a corrective to Burckhardt's depiction of the Middle Ages as the 'Dark Ages', and the teleology implicit in that approach observed by Ankersmit (2001), as recent studies demonstrate (Colish 2003, Jaeger 2003 and Melve 2006).

important texts, the *Digest*, in northern Italy in the late eleventh-century, sparked the beginnings of a renewed scientific study of Roman civil law. With the presence of this book, containing the collective sophisticated wisdom of the Roman jurists, a true scientific jurisprudence could be applied to the other texts of the Roman corpus, namely the *Institutes*, the *Code*, and the *Novels;* the four works collectively comprising the complete body of Justinianic Roman law, known as the *Corpus iuris civilis* (Brundage 2008: 78). A generation of scholars emerged who commented on, criticized, and applied this learning; they were known as the glossators, after the glosses that they inserted in the texts with their insights and observations. These include figures such as Johannes Bassianus (d. 1197), Rogerius (fl. c. 1162), Placentinus (c. 1135-1192), Martinus (1100-1166/1178?), and Bulgarus (1100-1166). Many of these twelfth- and thirteenth-century texts are available in reliable editions, expertly prepared by Weigand (Weigand 1967) and Kuttner (Kuttner 1937), although a considerable amount of this material is available only in manuscript form.

In canon law, the *Concordia discordantium canonum*, later known as the *Decretum,* for the first time around 1140 collected the numerous florigelia of patristic texts and maxims, church council determinations (both ecumenical and Western), earlier canons from Burchard of Worms and Ivo of Chartres, and liturgical extracts together in a single corpus. It both summarised the development of the law of the Christian Church in the first eleven centuries of its existence and provided the foundation for canonical jurisprudence until the twentieth century (Landau 2008: 23). The *Decretum,* collated by the mysterious Gratian, perhaps in more than one recension (one some time shortly after 1139 and the other some time prior to 1158) (Winroth 2000: 139-43), spawned a whole new generation of legal commentaries concerning its discordances as well as the provisional and often open-ended comments (*dicta*) suggested by Gratian. This generation of canon lawyers, who flourished from the second half of the twelfth century, were known as the 'decretists', including Paucapalea (writing before 1148), Master Rolandus (fl. c. 1150), Rolandus Bandinelli (later Pope Alexander III in 1152-58), and Rufinus (fl. c. late 1150s) (Kuttner 1937).

Influenced by this trend to codify and arrange, biblical scholars converted their Biblical exegeses and commentaries of the Bible into something more systematic for the schools: witness the *Sententiae libri quattuor*, or the *Four Books of Sentences* of Peter Lombard (1095x1100 – 1160), composed around 1155-58 (Colish 1994:72). The *Four Books of Sentences* purported to gather together the relevant biblical, patristic, and ecclesiastical authorities in respect of the seven sacraments. Book one dealt with the Trinity; book two with Creation; book three with the Incarnation; and book four with the Sacraments. The Lombard's work became the standard textbook for theologians for the remainder of the Middle Ages. The *Four Books of Sentences*, according to some, almost displaced the Bible as the definitive text on theology in the high Middle Ages.

Against such an historical background, the present project explores medieval theological and legal discourses on individual human rights. At the outset, it is necessary to acknowledge the limits of a purely historical approach. As Douzinas eloquently puts it, summarizing the kind of history Friedrich Nietzsche and Michel Foucault attacked (Douzinas 2007: 26):

> History is presented as the forward march of all-conquering reason, which erases mistakes and combats prejudices. For historicism, the seed of a value was sown at some point in the past, it grew through generations and inspired people who fought for its realisation. After many trials and tribulations, the philosophical potentiality becomes finally historical actuality.

The remedy against such historicism, argues Douzinas, is to apply a 'genealogical' method that focuses on 'the contingent conditions and unforeseen circumstances out of which values grow' (Douzinas 2007: 27).

To avoid this charge of teleologically equating modern concepts of rights with medieval understandings, this project is informed by several theoretical, philosophical, and contextual frameworks. First, it is necessary to determine the relationship of right and duty, a concept which has long preoccupied thinkers over the centuries: Jeremy Bentham (1748-1832) (in his *Anarchical Fantasies* in 1816) queried to what extent an individual could be considered to

possess a 'natural' right if it was merely to be the beneficiary of someone else's duty, and reasoned that all propositions involving rights were straightforwardly translatable into propositions involving duties. His ruminations followed on the heels of seventeenth-century rights theorists such as Hugo Grotius (1583-1694), John Selden (in his *De Iure Naturali et Gentium iuxta Disciplinam Ebraeorum* 1640), Thomas Hobbes (1588-1679) (in his *Leviathan* 1651) and John Locke (1632-1704), whom many regard as establishing the classic texts of rights theory. More recently, the philosopher Wesley Hohfeld tried to cut across this bifurcation between the terms 'right' and 'duty' by instead identifying legal relations as one of either four 'jural correlatives' (rights or 'claim rights' and duties; privileges, including legal liberty, and no-rights; powers and liabilities; and immunities and disabilities) or four 'jural opposites' (not relevant for the present purposes) (Hohfeld 1923). In short, theorists of rights considered that the less dependent on duty a right was, the greater was its validity as a substantive normative value.

Such discussion considered a related issue, namely whether rights were 'subjective' or 'objective'. If they were objective, they were beyond human control, a normative value that existed independently of humankind. In contrast, a subjective right was within human control, enforceable as an individual right. Villey (Villey 1975) recognised this intellectual shift, from objective to subjective, as a 'watershed' in the history of natural rights, and as having occurred by the seventeenth century. Many scholars see evidence for it in Hobbes' *Leviathan*, a view commonly accepted today (Strauss 1953).

But Villey himself and others located this shift in medieval thinkers. He was of the view that this occurred in the fourteenth-century medieval nominalism of William of Ockham's *Breviloquium*. Prominent medievalist, Professor Brian Tierney (Tierney 1997) has suggested, however, that it was twelfth-century canon lawyers who transformed the term *ius naturale* (natural law, or right) from signifying an objective notion of law to a subjective one. *Ius naturale* or natural law was the medieval equivalent of human rights (Finnis 1980: 198). Tierney's case for a twelfth-century origin to rights language is as follows. He begins with the question: 'When did the phrase *ius naturale*, which traditionally meant cosmic harmony or objective

justice or natural moral law, begin to acquire also the sense of a subjective natural right (Tierney 1997: 47)?'

Unpacking this inquiry, let us begin with the phrase *ius naturale*. Tierney's concern was with the moment in history when *ius* (literally translatable as 'law' or 'right') changed from meaning 'objective law … [to] subjective right' and *naturale* from meaning a 'primeval state of affairs … [to] an intrinsic permanent characteristic of any being, as when we speak of "the nature of man"' (Tierney 1997: 48). He argues the semantic shift from objective law to subjective right had not occurred before this. Greek (e.g. Sophocles), Stoic, and Roman thinkers conceived of natural rights as having this 'intrinsic' quality (as a natural law inherent in mankind), but not as subjective; in contrast their law was inexorable and divine: in the words of the classical Roman law jurist Julius Paulus the *ius* was 'what is right and good' (Tierney 1997: 46; but contrast Douzinas 2007 who posits a subjective notion of cosmopolitanism in the era of the Greek philosopher Zeno).

But in the twelfth century, Tierney continues, the phrase *ius naturale* changed from a meaning of 'cosmic harmony or objective justice or natural moral law … [to] acquire the sense of a subjective natural right' (Tierney 1997: 46-47). In particular, this occurred in the writings of the medieval decretists Rufinus, Ricardus Anglicus, and Huguccio. Illustrative of this is Rufinus's *Summa* composed around 1160 as a commentary on Gratian famous compilation of canon law texts. In commenting on Gratian's definition of natural law (*ius naturale*), he stated that it was 'a certain force instilled in every human creature by nature to do good and avoid the opposite. Natural *ius* consists in three things, commands, prohibitions and demonstrations'.[3] The third of these is most significant as he used *demonstrationes* to mean 'descriptions' or 'indications' of behaviour that were 'licit but not required. So in one of its meanings, *ius naturale* referred to an area of permitted behaviour where 'nature does not command or forbid.' This initial subjective definition of *ius* was important, as was the following tripartite division, especially the third of

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[3] Tierney 1997: 62-63 n. 68: 'Est itaque naturale ius vis quedam humane creature a nature insita ad faciendum bonum cavendumque contrarium. Consistit autem ius naturale in tribus, scilicet: mandatis, prohibitionibus, demonstrationibus ….'.

permissible acts. In short, Rufinus exemplified some of the decretists recognition of licitness or a sphere of personal autonomy in the concept of *ius naturale*.

As explanation for this emphasis on the individual as the subject and agent, that is on medieval notions of individual or natural rights – what we might recognise today as 'human rights' – Tierney points to the characteristics I have outlined earlier regarding the twelfth century 'renaissance', namely that it was a period marked by concern for the individual, as well as with legal innovation and development.

II. AN ALTERNATIVE APPROACH

The approach that I am adopting in my project 'Sacred Rules, Secular Revelations' seeks a re-assessment of Tierney's theory concerning the twelfth-century origin of individual rights, as well as contributing more generally to debates on theories and origins of rights language. I outline this alternative methodology in what follows. In brief, my hermeneutic utilises traditional historical, theological, and legal historical approaches, but in a manner that transcends the traditional boundaries separating these disciplines. This transdisciplinarity, therefore, marks my approach as both grounded in, but running contrary to, previous scholarly studies in this area. Further, the simultaneous emphasis on praxis, or the application of rights in practice, has the potential to provide new insights and understandings for contemporary understandings of the origins of human rights.

My previous work has examined the phenomenon of the later-twelfth-century Anglo-Norman 'lawyer-theologian' (cf. the 'Anglo-Norman' canonists in Kuttner-Rathbone 1983), and this putative figure's likely use of a 'universal jurisprudence' which combined law and theology. It is these figures and their treatises, letters, *acta* (administrative records of their actions as officials), and commentaries which suggest themselves as possible sources for articulations of the rights-type of language discovered by Tierney in the twelfth-century canonists. I label them 'lawyer-theologians' to emphasise their singular identity. They were, first and foremost, lawyers and bureaucrats. Most of them had received training in the schools of Paris or Bologna in the arts

and then had proceeded to higher studies in law or theology or both. Their works were generally what we today would call inter- or cross-disciplinary in that works of an ostensibly 'legal' disposition included elements of theological influence, whether by way of scriptural quotes and biblical moralising or more sophisticated use of scholastic theological reasoning and argumentation. On the other hand, works of a seemingly theological or religious bent, such as discussion on aspects of the Eucharist for example, also included legal references through analogies to legal doctrine or concepts.

There is no *reportorium* of these lawyer-theologians, as their identity is fluid and organic. Often identifying such figures requires reading their texts 'against the grain': in other words, reading theological texts with an eye to their legal import and perusing legal works with a view to their theological significance. I have provisionally identified five such figures as worthy of this kind of study; the list follows below.

The first is Master Vacarius (*c.* 1115/20-*c.*1200). He trained in law at Bologna at the time of the Four Doctors and came to the household of the Archbishop of Canterbury in the 1140s and thence to York after 1159. His most famous work is the *Liber pauperum*, a selection of texts from the key Roman law sources designed for students and composed in Lincoln around the 1170s or 1180s (although the date for this is much disputed: Landau 2009; cf. Boyle 1983). He also wrote other works on marriage, Christology, and heresy at around this same time (Taliadoros 2006b). The second lawyer-theologian is Gilbert Foliot (*c.*1105/10-1187/8). His letters and charters were composed in the period *c.*1139-77, when he was, respectively, abbot of the Benedictine house at Gloucester from 1139, bishop of Hereford from 1148, and bishop of London from 1163 until his death in 1187/8. He was likely educated in the arts, theology, and law, probably in Paris in the 1120s and 1130s (see Taliadoros 2006a). The third person of interest is Bartholomew of Exeter (d.1184), who was also likely educated in the arts, theology, and law at Paris, although a decade later than Gilbert, in the 1140s. He was part of the ecclesiastical household of Canterbury from 1138 (under Theobald, at the same time as Vacarius) and from 1161 he was first archdeacon and then bishop of Exeter. He penned his *Penitential*, a listing of sins and penances for confessors and curates alike in the early 1160s. This was extremely popular in its day judging by the number of extant manuscripts, and

unusual for its use of law (Taliadoros forthc. a). The significance of penitential literature in providing the foundation for subjectivity has been emphasised recently in a critique of international law and development (Beard 2007: 16-52).

Peter of Blois (the Younger) (1125/30-1212) is best known for his famous letter collection, which he redacted or edited and collected twice, first in 1202 and then shortly before his death in 1212. He too studied arts at Tours in the 1140s, then law at Bologna mid 1140s, and theology at Paris from about 1155 onwards. After several positions at court on the Continent he came to Canterbury in 1174 as letter writer and later chancellor where he remained for the rest of his career (see Taliadoros forthc. b). The final figure is Ricardus Anglicus (b. early 1160s – 1242) whom we first hear of as a canonist and master at Paris in the 1180s, then as a master in law at Bologna in the 1190s, before returning to England where he was prior of the Augustinian canons at Dunstable between 1198 and 1202, where he served until his death. During this time, he served as an administrator, advocate, historian, and, after 1215, theologian. His works include several commentaries on Gratian composed in the 1180s and 1190s and the 'new' decretal law in the late 1190s. One of these works is the *Distinctiones decretorum*, a very late (1196-98), and almost redundant, commentary on Gratian which is characterised by its elliptical, clipped, aphoristic distinctions.

As can be seen, the provenance of these figures is predominantly Anglo-Norman, although their training in the schools of Italy and France mean that they retained links and connections beyond these nominal borders. Further, as opposed to Tierney's more abstract and theoretical study of canonical commentators and academics, my proposed analysis of the texts of these medieval-theologians reflects how Gratian and the decretist commentators themselves were applied and used in practice. This is particularly so in the English context, whose first treatises of the nascent Common Law, namely Glanvill's work in 1187-89 and Bracton's treatise of the late 1230s, are produced at a time coinciding with broader legal and theological developments as well as the phenomenon of these lawyer-theologians. The approach that I bring to this project will supplement Tierney's linguistic or semantic analysis of twelfth-century canonists in several important respects. It will include in its sample the texts of theologians and Roman lawyers, not just canonists as per Tierney. Further, my analysis will focus on twelfth- and

thirteenth-century Anglo-Norman England, the locality which produced the canonist Ricardus Anglicus, whom Tierney relies on as one of his examples of a subjective understanding of law (*ius*). Although Continental influence was strong in disseminating law and theology to England, the reforms of Henry II at the same time set the foundations for the beginnings of the court and jury systems which were to form the English Common Law (Brand 1992). Both these theoretical and practical approaches to law coalesced in the texts of the English lawyer-theologians. Tierney did not sufficiently examine these unique circumstances in England that contributed to both theoretical and practical influences on law formation. Tierney's neglect of these matters is understandable, given his stated focus on the specific term *ius*—a word more likely to have currency in the works of canonists than theologians. I discuss below further medieval cognates to the modern notions of 'rights' and 'law'.

My approach goes beyond acknowledging that medieval theologians and lawyers shared some areas of common interest (such as sacramental and ecclesiological matters: de Ghellinck 1948; Häring 1976). Such an analysis that simply combines law and theology is not new: Villey does this in exploring the origin of subjective rights, arguing that Ockham's metaphysics created the necessary intellectual environment for a jurisprudence of individual rights. In addition, the similarities between lawyers and theologians in the scholastic method of dialectic and deduction developed in the schools, is well-established (e.g. Holopainen 1996; Gouron 2000).

I suggest a more complex understanding of links between theologians and lawyers. Of particular significance is the way I will consider the interaction of law and theology in practice. It seeks to answer the question: how did lawyer-theologians apply notions of the *ius commune* (i.e. the term used to describe both canon and Roman law as part of the legal landscape of medieval Western Europe: Calasso 1954; Pennington 1994; Bellomo 1995) and of theology to everyday practical examples in their texts? In answering this, I adapt an approach taken by John Baldwin in his *Masters, Princes, and Merchants*, 1970. Baldwin's study of twelfth- and early thirteenth-century scholastic theologians and lawyers in the Parisian scholastic milieu challenges the type-casting of scholasticism as a learned and academic, yet wholly abstract, method. In particular, it brings into question the notion of Roman law as merely academic, that is an abstract 'learned law' (Van Engen 1997). Instead, Baldwin's study reveals that these

schoolmen applied legal and theological principles to resolving everyday problems and conflicts in Parisian political and social life, notably to conflicts in the schools, the courts, and in business (cf. also Biller 2000). In a similar way, I will be investigating Anglo-Norman lawyers and theologians applying proto-concepts of individual rights in everyday contexts.

In extending the contexts and applications in which law and theology can be examined in medieval intellectual life, this project, additionally, incorporates and modifies approaches taken by the late Leonard Boyle (1986) and Augustine Thompson (1992 and 2006) to medieval 'pastoral' writings. These scholars suggested that mid-twelfth and early thirteenth-century penitentials and confession instruction manuals utilised literary and didactic techniques in a quite different way from previously, in their conscious aim to facilitate and enhance communication with the parishioner. They termed this genre of writing 'practical' theology. In a similar manner, I explore the concept of practical theology in the writings of lawyers, one such example being usury. In that case, scholastic arguments drawn from biblical and patristic authorities determined a normative stance prohibiting usury (Noonan 1957).

On the basis of what I have outlined above, therefore, I envisage the following structure being employed to understand these disparate legal and theological sources. First, it is necessary to preface the study with an introduction that outlines the difficulties that any historical examination of a modern concept of human rights, specifically accusations of anachronism, entails. Rather, my research aims to examine 'proto-concepts of individual rights'. At first instance, it is necessary to distinguish different medieval conceptions of law linguistically. To name just a few examples of the potential for misunderstandings: *ius* ('law' in English; *Recht* in German, *droit* in French, *diritto* in Italian) means a legal system understood as a whole, and the general principles underlying such a legal system, or the expression of those general principles; *lex* ('ordinance' in English; *Gesetz* in German, *loi* in French, and *legge* in Italian) is the most general word for a written enactment; and *constitutio* ('enactment'), meaning any kind of legislation, whether ecclesiastical or secular. The important thing to emphasise here is this study's careful balancing of the search for 'origins' in rights language (and the concomitant teleology that this implies) and the need to strictly understand such terms and their constituent texts in their historical and cultural contexts.

I will then study medieval concepts linked to modern 'equivalents' of rights language concepts through two different but simultaneous kinds of inquiry. The first type of inquiry, what can be termed a 'down-up' model, provides specific instances where interactions of law and theology are examined and inductively give rise to broader themes of individual rights. Examples occur in the studies I (and others) have cited above in the twelfth-century context involving Anglo-Norman figures, such as Master Vacarius, Gilbert Foliot, Peter of Blois ('the Younger'), Bartholomew of Exeter, and Ricardus Anglicus. The second kind of inquiry is the 'up-down' model, which looks at certain themes which are a) relevant to medieval notions of individual rights and b) indicate a real interaction and consideration of law (both canon and Justinianic Roman law) and theology. These provisionally include the following: "each according to his own" (*ius suum cuique tribuere*), a concept which resonates with modern legal themes of equity, distributive and social justice (Kuttner 1980); individual and constitutional rights (Nederman 1990, 1996, 1998); due process and notion of fair hearing relevant to modern judicial notions of procedural fairness; freedom to marry (Reid 1992, 2004); the secular and sacramental powers of the ordained clergy as exemplars for broader entitlements; the legal-theological licences and constraints relating to orthodoxy and heresy; and usury and ethics (Noonan 1957).

III. CONCLUSION

To speak of 'human rights' in a medieval context may be anachronistic and misleading, but highlights the findings of important scholarship that has sought to draw lines of continuity between medieval understandings of *ius* and modern notions of 'individual rights'.

Tierney's thesis has established the starting point for all medievalists on this terrain. This is despite trenchant criticism from political scientists, such as Cary Nederman, who have pointed out the narrow semantic range of Tierney's exploration of *ius naturale*. Instead of taking a literal translation of the term, Nederman argues, one should look for interpretations of the term as referential to the political sphere, in particular the freedom from of the individual from despotic rule (Nederman 1990, 1996, 1998). While this critique shows a certain bias towards

law as politics, it does interrogate medieval notions of *ius* on a broader plain. It therefore complements, rather than disposes of, Tierney's thesis. Likewise, my approach seeks to pursue already-established lines of investigation.

An alternative approach I suggest uses Tierney's study as a launching pad for a wider analysis of evidence and context. The texts of the lawyer-theologians, did not discuss law or rights in the abstract, but in practical contexts. In examining the works of such figures as Master Vacarius, Peter of Blois, Gilbert Foliot, Bartholomew of Exeter, and Ricardus Anglicus, and the uses to which these writers applied their knowledge of law and rights, I hope to provide a more nuanced picture of medieval conceptions of individual rights and thereby highlight some of the limitations in the prevailing scholarly approaches to understanding this area.

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