Conscience and Authority in the Medieval Church

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Introduction

There is a theory that no author writes more than one book. He or she can publish thirty novels, or history books, or write in every available genre like Robert Louis Stevenson. But for each author these all boil down to the same book in different guises. The theory is not the same as the one that sends a publisher scouting for talent in the belief that 'everyone has a book in them'. But both theories, in so far as true, reflect the same fact about all of us. We set out on life with a set of values unique to ourselves—the configuration of things we think good or bad, people we think of as friends or foes. Experience makes us adjust these values, and it is the adjustments we want to share. Since these indirectly reflect their starting points, they form a pattern as unique to each one of us as a thumbprint.

I have not written many books, and anyway this would not be the place to discuss whether they fit this theory. But I have, like many university lecturers (from long before administrators began cracking whips behind them), written quite a number of 'papers'—mostly elicited by invitations to contribute to academic gatherings or collective volumes; and in my own case, at least, debate is unnecessary. Most of my papers, if not all, are in a way the same one in different disguises; and reflect my own course of readjustment. Like many children born in the 1930s, I grew up with a somewhat rationalistic (perhaps somewhat Marxistic) version of 'the Whig Interpretation of History'. History, despite appalling setbacks and obstacles, was ultimately moving towards our brave new world—which in the strictly 'Whig' version was British parliamentary government. The Middle Ages came off badly.

It was my doubt in this judgement that made me a medievalist. The very concept of 'the Middle Ages', as a distinct period bereft of the virtues vaunted by the periods before and after it, invited investigation. We all allowed that the Greeks had been rational, and the Romans well ordered; and that fact that our brave new world was both rational *and* well ordered was, I somehow thought, due to the successive achievements of the Renaissance, Reformation, Enlightenment, and French Revolution (sharing credit in different proportions for different people), all of which, to make their contribution, had put things medieval behind them, coining

the vocabulary to keep it there: 'Gothic' (meaning barbarous), 'scholastic' (meaning obscure and barren), and so on. The medieval church was chief victim. It stood for everything 'positively medieval'. In so far as I was not absorbed with balsawood aeroplanes or collecting the numbers of railway engines, I assumed that medieval people all believed what popes told them to believe, or got burned as heretics. Some historical misconceptions are 100 per cent fantasy. Others have an infinitesimal grain of truth and blow it out of proportion. My own view of the Middle Ages hovered between these categories.

Then doubts began. Putting the medieval church in a black binbag to throw it away could do *it* no harm. The people concerned were long dead and out of harm's way. But we might do harm to ourselves, I reflected, if misconceptions about the past were to distort our view of our own place in the world, and where it was going. So I encouraged the doubts. At school I dropped physics to study history—with a brilliant master, as it happens. I went on to take a university degree in history; and when that was done, and I was asked to pick an area of history I wanted to investigate more closely, I chose the medieval church, and let the doubts run free.

They have been doing so ever since, and underlie most of the papers I have written on medieval religion. That includes the five offered in this volume. All relate to the theme announced in the volume's title, and I have put them together for that reason, and because in different degrees they have become difficult to access in the volumes where they were first printed. The first three essays form a trio about confession, the formal procedure by which an individual was meant to bare his or her conscience to a priest. The first of the trio examines the early history of this procedure, before law and literature on it became abundant after 1215. The next two, taking that early history for granted, look at some of the practical consequences of confession, especially in the thirteenth century. The consequences included a rising awareness, among church authorities, of the need for priests who were competent to conduct confessions. So a fourth essay was invited in to estimate, from the sermons by one archbishop in one city, how far this and related demands constituted a selling point for the mendicant orders. The fifth essay switches its angle by 180 degrees, to look at authority on the offensive. It examines the functioning and malfunctioning of the one legal mechanism which the church authorities possessed for expelling, from the *societas christiana* of which they were custodians, a person they judged unworthy of membership.

To combine five pieces of different origins risks anomalies, which can distract a reader who tackles them in series. One risk is repetition. To

reduce its more jarring effects I have adjusted some wording, and added an occasional cross-reference, these to reassure readers that, if they think a topic touched on in one essay has already been mentioned in another, their memory is not at fault.[1] For remaining discontinuities I can only apologize. To remove all of them would have meant re-writing the essays on a scale not only daunting in itself, but a threat to the identity of the essays.

The other main danger in a collection of this kind results from the passage of time. The oldest essay, number three, first appeared thirty-three years ago. Time is fickle to historians. They spend their lives trying to rescue other people's achievements from oblivion, only to see their own vanish into it with humiliating speed. (Look at the contents list of an old Cambridge History. Who remembers their authors now?) The ageing process in historiography needs its own pathology. Many factors are at work in it, not all of them obvious. One factor more potent than we perhaps realize is the flux of social orthodoxies. One generation—millions of those individuals, readjusting their own unique sets of values—reacts against the previous one, then in turn suffers reaction from the next. Their undulations produce a constant change in the kinds of historical question thought worth asking, and the assumptions appropriate to its treatment. An old account of the battle of Waterloo may be tactically precise but dates itself with a phrase like 'our troops fought magnificently'. If I thought the questions these essays address were no longer worth asking I would not be republishing them. I actually think the opposite; and since this was the only assumption I brought to their creation, I hope that on that count, at least, age has not wearied them.

A more tangible ageing factor in historical writings is 'research'. I give that word inverted commas for two reasons. One is a lurking scepticism about the novelty we claim for our discoveries. To get us up in the morning we have to believe our discoveries are new, but often they are new only for *us.* My own awareness of this factor was sharp in respect of the fifth essay. Several facts which surprised me when I read about them—for instance, the sovereignty of conscience—were well known to medieval theologians, and presumably are to modern ones. But they seem to have got obscured in my own early education. Everyone's education has to obscure some things to give precedence to others—which is where the readjustments play their part.

The second ground for those inverted commas is another kind of scepticism, this one about how we human beings acquire knowledge.

[1] When an addition of this kind is in danger of being confused with the original text I have marked it with an asterisk (*).

Thirteenth-century philosophers thought a lot about this subject: epistemology. A theory took root then, borne in on Latin translations of Aristotle who had thought it before, that human beings acquire knowledge by empirical observation, subsequently analysed by reason.[2] There is an enormous amount to be said for this view, though it may not explain everything (for instance, where the great poets got their best lines from). It was perfectly adapted to the natural sciences, scholars of which in the following centuries employed it, with dazzling results we all know. In the last century, however, the results have been so dazzling that, as in the advance of a mighty empire, scientific epistemology has edged its epistemology into areas less responsive to it. Everything now has to be 'research'. Hardly anyone did 'research' in history when I was in college. At least, they did not call it that, except perhaps in institutions needing money from governments that went with the trend. None of this meant there were not some excellent historians. But what made them excellent was a quality we called learning, which meant a body of knowledge, selectively accumulated over years of enquiry and reflection, which equipped its possessors to form judgements carrying conviction, about human affairs—affairs whose complexities involve degrees of infinity which dwarf those of natural science. (To get the scale of the complexities, ask any neurologist about a single human being. Then multiply, and extend through time.)

Research in the scientific sense does, for all that, continue in historical fields, and from time to time comes up with genuinely new items of evidence or grounds to discredit old ones. In the fields relevant here, the novelties of most consequence have been critical editions of medieval texts previously without them. The essay most affected by the appearance of a new edition is number four. It was based on sermons then only in manuscript, but now in a critical edition, whose consequences for the reading of that essay are identified in a note immediately preceeding it. Except in that instance, for reasons stated there, I have added references to these new editions only where it seemed practicable. As to evidence now discredited, I am aware of two examples in the first essay, one concerning the supposed—or formerly supposed—Irish origin of tariffed penance,[3] the other, a pair of 'Carolingian' episcopal decrees now known

[2] E. Gilson, 'Pourquoi S. Thomas a critiqué S. Augustin', *Archives d'histoire doctrinalee et littéraire du moyen âge*, 1 (1926–7), 5–127; Gilson, 'Saint Thomas Aquinas', *Proc. Brit. Acad.*, 21 (1935), 29–44, esp. 32.

[3] A. J. Frantzen, *The Literature of Penance in Anglo-Saxon England* (New Brunswick, NJ: Rutgers University Press, 1983), 19–60. See p. 22 below.

to be forgeries.[4] Both discoveries have been recognized in the footnotes and, in the former case, by the softening of a corresponding allusion in the text.

Otherwise, I have left the texts as they were first printed.

* * *

The decision to do so created special problems in respect of the first essay. Its conclusions have been challenged,[5] and to reprint it without comment might imply contempt for the challenges. That is the opposite of what I feel. The mere fact of the challenge, though, paradoxically adds to the grounds for leaving the essay unchanged. Not only would any changes made to meet the challenges, once begun, never end. More importantly, the essay has become part of a dialectic, which promises rich harvest when it has run its course. I must not cheat, now, by pretending to have said at the beginning something I did not say, or vice versa. I have to say that I have an even more important motive for not changing the essay. I see no reason to. The evidence in it has its own authority. I was lucky to find it, while reading through miracle-literature, as it happens, on quite a different set of problems; but that does not entitle me to interfere with it now.

The conclusions to be drawn from it may be a different matter. They raise big issues, bigger than the original essay had room for, bigger than this Introduction will have room for. For that very reason they deserve a few words now, if only to indicate how big they are. I hope to achieve this by drawing attention to certain passages in the essay which bear directly on these issues and may, if re-read, reduce grounds for disagreement.

Let me start by summing up, as fairly as a participant can, what the quarrel is about. 'Confession before 1215' asks to what extent regular private confession, by lay people to a priest, was practised before a well-known decree on the subject by the 1215 Lateran Council, which enjoined it on everyone and stimulated activity in its regard. The essay concludes that such regular private confession was not in fact widely practised much before the twelfth century. Those who dissent from me have published evidence to suggest the opposite. Because this counter-evidence (as I shall call it) comes mostly from before the millennium and

[4] R. R. Means, 'The frequency and nature of early medieval penance', in P. Biller and A. J. Minnis, eds., *Handling Sin: Confession in the Middle Ages* (York: York Studies in Medieval Theology, ii, 1998), 35–61, on 37 n. 13.0

[5] S. Hamilton, *The Practice of Penance, 900–1050.* Royal Historical Society, Studies in History, New Series (Woodbridge: Boydell, 2001), 14–16, 209; *cf.* Means, 'Frequency', esp. 36–7, 53–4; and Means, 'The historiography of early medieval penance', in A. Firey, ed., *A New History of Penance.* Brill's Companions to the Christian Tradition, 14 (Leiden–Boston: Brill, 2008), 73–95, on 90–1.

from the continent, that is, from Carolingian and Ottonian empires, the following remarks will have that area and period especially in mind.

I have two reasons, one 'soft', one 'hard', for defending my essay as it stands. The passages to which I wish to draw attention fall in two clusters, corresponding to the two reasons. The first cluster comes on pages 36–45, and identifies exceptions, already clear in the post-millennium evidence, to the otherwise negative picture that evidence conveys. The exceptions are:

(1) laity facing imminent death, who are often found wishing to confess to a priest

(2) persons in religious orders, who confess on a regular basis

(3) laity living within the range of a renowned centre of pastoral initiative, often more or less alone in its generation (like Fulda in the ninth century, Laon in the early twelfth, Paris later)

Given slight flexibility in definitions, such counter-evidence as I have so far seen fits one or other of these categories. For example, in Cologne *c.*1000, laity were seen waiting to make Easter confession *more ecclesiastico.* If Cologne is cast as a tenth-century 'Paris', a case not hard to argue, that fits exception (3). Another arresting piece of counter-evidence concerns Charlemagne's soldiers as they prepared for battle: they confessed their sins to priests, brought there for the purpose.[6] These soldiers I would want to put under exception (1), perhaps with help from exception (2)—by analogy with the military religious orders we know from the twelfth century. None of this counter-evidence, as I read it, tells us much about the extent of regular lay confession in the rural vastnesses of those empires. My first reason, then, is a reluctance to accept such counter-evidence as proving a general thesis.

To estimate whether it can do so, to the satisfaction of both sides, would involve a much longer review of evidence than can be undertaken here. This kind of question is debated in major specialist periodicals, in various languages. I say 'kind' of question because the question about evidence of confession invokes two more questions of the same kind. One is about education. Were there enough priests, sufficiently well instructed, to hear confessions across the empires under consideration? The other is whether (since we academics do sometimes underestimate the cost of education) the economic surplus of the empires concerned was sufficient to support an appropriate level of clerical education?

[6] D. Bachrach, 'Confession in the *Regnum Francorum* (742–900): the sources revisited', *Journal of Ecclesiastical History*, 54 (2003), 3–22.

In a more appropriate forum I would gladly defend a sceptical position on all three of these questions. All have invited learned debate, likely to continue. But they have one feature in common. All are questions of estimated degree, and therefore by their very nature open to negotiation and eventual compromise, whoever writes about them. I have contented myself with stating a sceptical starting position, as my soft reason—soft because negotiable—for leaving as it is the contrasted picture, before and after the millennium, presented by 'Confession before 1215'.

While renouncing a general review of evidence I hope, nevertheless, to be allowed to insert here one cameo, because, while proving nothing, it so precisely illustrates the contrast I am defending, between two periods, that it has an authority analogous to that of an eye-witness. It is a double cameo, inviting us to 'look on this picture, and on this'. Its first image is from the ninth century. The bishop of Lyons from around 800 to his death in 840 was the learned and combative Agobard. Agobard wrote enough learned works to fill a volume in the *Patrologia.* The only codex containing these works was under a bookbinder's knife, ready for destruction, one day in or near 1600, when a humanist walked in, spotted the codex and saved it. One of the works thus rescued was Agobard's treatise on superstitions. The sophisticated Spaniard here vents incredulous astonishment at the superstitions he has found in the region round Lyons, superstitions which he says are universal, among rich and poor, in and out of the town. Italian enemies of the Franks have sent manned sky-ships to bombard Frankish crops. Some sky-ships have landed, and their crews been seen walking about. More serious and widespread is a belief in native weather-makers, who are paid—more regularly than anyone pays tithes to the clergy—to guarantee good weather, but who are lynched if crops are ruined by storms. Agobard writes that people who believe such things—he excepts no class or category—are no better than s*emifideles*, indeed in strict theory not *fideles* at all.[7]

That evidence survives by a fluke. Without it, we would have no reason to think the ninth-century Lyonnais other than another good Christian diocese, with perhaps an aura of sanctity from the city's early martyrs, peopled by peasants who confessed their sins regularly, as laid down by

[7] *De grandine et tonitruis*, in Agobard' s *Opera omnia*, ed. L. van Acker. Corp. Christ., Cont. Med., vol. 52 (Turnhout: Brepols, 1981), 3–15. Universality in region: § i.1–3; § ii.1ff; §iii.2–3; §vii.15, etc., Lynching: § ii.8–15; § xvi.1–8. Walking and talking: § ii.1; § ii.13–15; § vii.17–24; § xvi.6–8. *Semifideles*: § xi.19; *plenitudo infidelitatis*: §xv.14–16; *cf.* § xvi.23–6. Comment: E. Boshof, *Agobard von Lyon.* Kölner historische Abhandlungen, 17 *(*Cologne-Vienna: Böhlau, 1969), 170–85. Jean Papire Masson: 1. H. Liebeschütz, 'Wesen und Grenzen des karolingischen Rationalismus', *Archiv für Kulturgeschichte*, 33 (1951), 17–44, esp. 33–7.

idealistic imaginations in Aix-la-Chapelle. Agobard has let the cat out of the bag. Two cats, in fact. He has told us how he discovered these beliefs, namely by walking and talking round the diocese. Once, on such a walkabout he had personally intervened to save the lives of some alleged weather-makers, already bound by a mob and prepared for execution by drowning.

Four centuries later, in roughly the same region, a comparable superstition stirred comparable astonishment in another learned Lyons divine, the Dominican friar, Stephen of Bourbon. It is to Stephen that we owe our knowledge of the cult of 'Saint Guinefort', a supposedly heroic dog which was thought to procure, from its grave, certain quasi-miraculous benefits for its female devotees. How had Stephen learned of this cult? Not, like Agobard, by merely walking and talking. Stephen belonged to the Dominican shock-troops enlisted to give effect to the pastoral decrees of the 1215 Council. He had learned of 'Saint Guinefort' while hearing womens' confessions, a procedure of which Agobard's writings, on superstition or anything else, breathe not a word.[8]

So much for my soft reason for upholding the drift, at least, of the conclusions in 'Confession before 1215'. My other reason is 'hard', because less open to compromise. It touches not only the essay just named, but with different degrees of directness, all the essays in this volume.

It concerns evolution in law. For law does evolve, continuously. Sometimes we catch it in the act. More often we do not, partly through lack of documentation but also, quite as often, through an element of self-deception that haunts all legal utterance. Whether we see it directly or not, evolution in law is dictated by the very conditions of its creation. Communities of conscious beings have norms. Individuals sometime break the norms. Communities then have to protect the norms, usually by sanctions painful to the offender. This mechanism has been at work in all human societies that have ever existed, and it extends even to social animals like baboons or ants. While the three constituent parts of the mechanism remain sturdily constant, their content is infinitely variable and therefore, at speeds which increase in proportion to their subjects' degree of consciousness, subject to change. Change in one part—norms, breaches, or sanctions—sends impulses of change to the others. In human communities the norms and sanctions (even the breaches, in the case of 'martyrs') often have a divine element. This casts divine power as the party injured

[8] Étienne de Bourbon, *Anecdotes historiques*, ed. A. Lecoy de la Marche. Société de l'Histoire de France (Paris, 1877), cap. 370, pp. 325–8. Comment: J. Cl. Schmitt, *Le saint lévrier* (Paris: Flammarion, 1979).

by breaches, and the source of the sanctions. For those of us who study history, the consequence is a broad strip of 'debatable land', between laws conceived respectively as religious and secular.

These speculations have special application to penance and confession, and do little more than spell out implications in a second group of passages in 'Confession in 1215'. This time the passages are on pages 28–9 and 47–8. The implications, in so far as they need clearer elucidation, find it in another trinity, of three distinct aspects of the subject: one ostensibly spiritual, another ostensibly legal, a third ostensibly political—'ostensibly', in all cases, because, as will be seen, the character of each aspect merges with that of the next when they are brought together.

The ostensibly spiritual constituent is penance as a notion. Its character can be grasped from any Christian prayer-book, of any period. The prayer-books commonly contain a formula for collective repentance. Participants say they are sorry for their sins, and undertake to prove that they are sorry, and to make every effort to avoid sins in future. We might think that if that undertaking was sincere the relevant page could be torn from the prayer-books as not needed in future. In fact the formula stays, for next time, century after century. This can mean one of only two things. Either that the supposed penitents are hypocrites, and have even enshrined hypocrisy in their liturgy (that charge has occasionally been made, but never stuck), or—the only alternative—the scope for human moral improvement has no limit. However hard we try, there is always room to do better.

It follows that the scope for repentance, too, is infinite. A saintly ascetic who has let his thoughts wander during prayers has reason to repent. So does a cold-blooded murderer. The penance open to each of them is of the same essence. The difference is one of register. Also (this is the point to notice here) of social implication. A religion which tells devotees to love their neighbours endorses, automatically, laws accessory to their general welfare—discussion being left for what that precisely means in particular circumstances. Some sins are therefore also what we now call crimes. Certain religion-driven jurisdictions have tried to equate the two. But even these are obliged, by the very limitations of human existence (e.g. because some sins are unknown to anyone but the sinner), to recognize the difference. Thus a community which can bear with an absent-minded ascetic can less safely tolerate a murderer, whose example may spread and endanger everyone, or who may himself strike again unless his repentance is rock-fast guaranteed (or at least its effect: he can settle with God on the gallows).

Today we distinguish between sin and crime. But this distinction results from precisely the evolution to which attention is drawn in

'Confession before 1215', and the present comment on it. The same bifurcation can be found in related vocabulary, notably in words with ancestral connection to the Latin *poena*, for instance (on the 'crime' side) 'penalty' and 'punishment', and (on the 'sin' side) 'repentance', 'penance', and 'penitential'.

That word brings us to the so-called Penitential books. These are the ostensibly legal constituent in our triple compound. All early rules on penance had their home in canon law, or made it their home if they had none before. Canon law was the body of rules, assembled over the centuries, for holding the church together and true to its principles. The rules applied to clergy in all matters and laity in ecclesiastical ones. Canon law was born with a dilemma, a double character, which it never escaped. For all the wide range of sources it would draw on, Roman law conspicuous among them, its fundamental source (because it was Christian) was the bible. Both Testaments. But the message of the New Testament, in apparent dissent from the Old, is that law is not what religion is really about. Not that the Gospels abolished the old commandments. On the contrary, they added commandments of their own. But these were of kind (e.g. 'be thou perfect') which made certain what had only been probable, that all would fall short, and that anyone who wished to avoid the consequences had no recourse but to Christ, *qua* redeemer.

When medieval philosophers got into their stride in the thirteenth century, they would distinguish four categories of law. Only the first, *lex positiva*, covered what we today normally mean by 'law'; that is, the rules we have to obey to avoid sanctions wherever we happen to live. The other categories were more abstract, and for the present purpose I shall presume to lump them together as what we might think of as 'moral' law, alias (to match the philosophers' vocabulary) *lex moralis.* Canon law embraced both categories. It needed *lex positiva*, backed by sanctions, if it was to give the church coherence. But the Gospel's *lex moralis* was forever tugging away at the *lex positiva* of canon law (the tugging is palpable in several essays in this volume, for instance in Innocent III's letter quoted on pages 195–6).

This brings us to the third aspect of our trinity, the ostensibly political one. It is the early Germanic kingdom. I use that term generically but will concentrate on its most influential embodiment, the Frankish monarchy, as inherited and developed by Charlemagne and his successors. The most pregnant intellectual legacy this monarchy had drawn from Rome was the concept of public authority. This was and is the authority of the elusive entity which the Romans had been unable to name more precisely than *res publica.* The authority was subsumed into Germanic kingship: the king was king because he represented public authority. Kings, nevertheless, had

to rely on many other powers they happened to have, because the idea of public authority remained for a long time little more than an idea, barely intelligible to rough minds with more immediate preoccupations. Its transformation into reality would in fact occupy all monarchies to the end of the Middle Ages, and was barely complete then.

In the Frankish monarchy the most precocious people to grasp the idea were churchmen, professionally literate and, theoretically (at least), separated from private interest by the church's own version of public authority. Symbiosis with the church had been a precondition of the Frankish monarchy's triumphs. In the day-to-day operation of law, the symbiosis had the effect of creating a broad strip of the kind of debatable land identified a moment ago. Canon law, with its own double character, was able to lodge in this debatable land as if born to it. It, consequently, became an exporter to, and importer from, the secular laws which lay on the non-ecclesiastical side of the debatable strip. Influence from its 'Gospel' side of canon law—its *lex moralis*—is palpable in Frankish secular law in (for instance) the modification or abolition of penalties of death and mutilation. In legal procedure, canon law influence lay behind the identification of intention, as distinct from external act, as the defining criterion in crime.[9]

Imports duly came the other way. They came in the form of tasks otherwise widely conceived as the sphere of secular law. The imports came with special force when and where prelates—I use the word to include both bishops and the abbots of some major monasteries—found themselves exercising public judicial authority, as a result of royal grants of immunity—the *immunitas* being a device drawn ultimately from Roman law—from the jurisdictions round them.[10] We do not know all the motives that lay behind such grants, and should not rule out, in some cases, a respect for ecclesiastical moderation similar to that which had ameliorated cruel penalties: a hope that ecclesiastical justice would be

[9] H. Mitteis, *Deutsche Rechtsgeschichte. Ein Studienbuch*. Revised by H. Lieberich. 19th edition (Munich: Beck, 1992), 100. *Cf.* also A. Murray, *Suicide in the Middle Ages*, ii (Oxford: OUP, 2000), 397–451.

[10] The precise judicial consequences of immunity remain unclear, and would in any case not have been more uniform than other specific provisions of the immunity. But their presence in the Frankish kingdom from the seventh century onwards is argued by A. C. Murray, 'Immunity, Nobility and the Edict of Paris', *Speculum*, 69 (1994), 18–39, alluding to tradition that a lord exercised justice in his estates, which would certainly have applied in some measure to bishops. New Carolingian and Ottonian motives for the maintenance specifically of ecclesiastical immunities are identified by D. Bachrach, 'Immunities as tools of royal military policy under the Carolingian and Ottonian kings', *Zeitschrift der Savigny-Stiftung für deutsche Rechtsgeschichte*, 130, Germ. Abt., (2013), 1–36, with references to further literature.

more humane. That must remain speculation. Whatever the motives, a grant of judicial immunity often meant that prelates were left, within their immunities, to confront offences of a kind we would now call crime. This put a strain on canon law. It had been born at a time when Roman secular authorities handled crime. Canon law therefore not only lacked apparatus for crime, but was restrained in handling it by the prohibition of clergy from bloodshed. Prelates with secular jurisdiction were like vegetarian owners of a cattle ranch.

It was the church's penitential system which took the strain. It was stretched to its limits. The breadth of its remit can be read in a list drawn up by an imperial agent, in 857, which enjoins priests to report to their bishop certain types of offender, for suitable penance. The offenders are: 'robbers, rapists, adulterers, the incestuous, homicides, and thieves'.[11] The list makes clear where we are standing: in the debatable land.

To put the list in its historical context let us follow up the least debatable entry in it, homicide. One of the leading current authorities on early penance and confession comments on a penitential inventory of this kind with the correct observation that homicide was 'not controversial; it was regarded as one of the most heinous sins'. The same authority goes on to say that homicide attracted the harshest penances, including—to judge from scattered accounts—substantial periods of fasting, and/or of exclusion from church, and sometimes confinement for, perhaps, a year, before the culprit, after a shaming public penance, could be readmitted to Christian society.[12]

Let us take a step back from these documents for a moment. Germanic Europe had experienced homicides from times long before there were such things as bishops or Penitentials. Documents on early Frankish secular law are fewer than those on canon law, but they attest to a disproportionately wider and older reality. As established earlier, no community could tolerate homicide. Germanic communities had from time immemorial sought to reduce homicide by a custom whose name became standardized in written German as the *Fehde* (related to our 'feud'). The *Fehde* gave to the closest relations of a homicide victim a right, indeed more than a right, a quasi-religious duty, to kill the perpetrator. Failing that, he could kill one of the perpetrator' s close kinsmen. The rules were complicated. Among the complications was the special heinousness of parricide, partly because it broke sacred laws of family loyalty but also because it disabled the normal mechanism for punishing homicide. (The special heinousness of parricide is reflected in the church's being called to put parricide in a class

[11] See p. 25 below. [12] Hamilton, *Practice of Penance*, 190.

by itself.) We only learn more clearly about the rules of the *Fehde* at times when, under pressure from an embryonic public justice, the *Fehde* is being eroded by commutation, by *wergeld* (the payment of compensation, graded according to the victim's rank), or various other kinds of compact. (The Icelandic sagas are full of these compacts, sanctioned—the Icelanders had no king—by the *althing*, the Icelandic General Assembly, whose name directly translates *res publica*.) But this was only erosion, no more; and it was a slow process. Despite its increasing encirclement by the institutions of public justice, the *Fehde* was still, in some circles, a living customary law at the end of the Middle Ages.

The *Fehde* involved bloodshed, but less, we have to suppose, than if homicides had gone unpunished. Otherwise the *Fehde* would not have endured. What public authority sought to do was reduce bloodshed still further by monopolizing an entitlement to inflict it, and then rationing its occasions for doing so. Whence the church's support for a secular jurisdiction which, after the serious experiment represented by the penitential system, she discovered she could not exercise on her own.[13]

For if the penitential treatment of crime (to use our word) had been successful, it would have lasted. But it did not. There were further experiments. One of them was the late tenth-century 'Peace of God' movement, where churchmen rallied laymen to exercise forcible restraint on robber-gangs in southern France.[14] But in the end the church's initiatives were replaced by an avowedly secular justice. The replacement happened in different ways in different regions, each at its own pace. Its crucial phase can be dated approximately to the eleventh century. Numerous changes, economic and political, then interconnected with each other, all over western Europe, finding their most conspicuous focus in the rise of the Gregorian papacy. Five centuries earlier, the loss of western Europe's mastery of the Mediterranean, *mare nostrum*, had been the most efficacious of signs that the Roman Empire had died. After the millennium,

[13] Mitteis, *Deutsche Rechtsgeschichte*, 39–48. Quasi-sacredness of the *Fehde*: K. Bosl, 'Die germanische Kontinuität im deutschen Mittelalter (Adel-König-Kirche)', in that author's collected essays, *Frühformen der Gesellschaft im mittelalterichen Europa* (Munich: Oldebourg, 1964), 80–105, esp. 989–104. Linguistic and related speculations on the origins of the *Fehde*: K. S. Bader, 'Zum Unrechtsausgleich und zum Strafe im Frühmittelalter', *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte*, 112 (1995), Germanische Abteilung, 1–63. Its endurance: A. Deutsch, 'Späte Sühne. Zur praktischen und rechtlichen Einordnung der Totschlagsühneverträge in Spätmittelalter und früher Neuzeit', *Zeitschrift der Savigny-Stiftung für Rechtsgeshichte*, 122 (2005), Germ. Abt., 113–49; with bibliography on history of the *Fehde* (or *Blutrache*), 114–15, nn. 7–10.

[14] G. Duby, 'Les laïcs et la paix de Dieu', *I laici nella 'Societas Christiana' dei secoli xi e xii*. Miscellanea del Centro di Studi Medioevali, 5 (Milan: Università del Sacro Cuore, 1968), 448–69.

Italian maritime cities, Norman adventurers in southern Italy, and crusaders in Spain, ensured that the Mediterranean again became western Christendom's *mare nostrum.* As it rose, it refloated the ghostly form of the Roman Empire, original source of the concept of public authority, which the Empire's ghost now revived in a spiritual version, destined to outface Germanic ones.

One result was a clarification in the distinction between secular and ecclesiastical justice. The church mistrusted emperors as rival claimants to the inheritance of Rome. With all the more deliberation, it patronized and encouraged kings as autonomous rulers within their own sphere. This included secular justice, of which the church was now relieved, allowing the boundary between the two spheres to become more distinct than it had been under the Carolingians and Ottonians. Once, the evangelical spirit of canon law had modified the cruelties of secular justice, and, as if in return, accepted within its cognizance those violent offences which secular justice could not or would not handle, possibly from the most optimistically Christian of motives. After the millennium the two spheres became better distinguished. The same church which had formerly restrained the bloody executions of secular justice could now, its hands free from direct involvement, urge secular justiciars to exercise the full 'rigour of justice'.[15]

These changes could not fail to affect the concept of penance, by relieving it of the criminal sectors of its range. These sectors now belonged to secular justice, which had measures more immediate than penance for dealing with homicide. Henry I and Henry II of England would have allowed a homicide no more time for penance than it took to take him to the gallows. The lay assumption of criminal justice allowed the church to specialize in the moral offences which canon law, its evangelical element hidden inside its *lex positiva*, was uniquely equipped to handle. That it welcomed this responsibility is attested by the swelling number of sermons and moral treatises that survive from the twelfth and thirteenth centuries.

All this was implied and, as I see it, some of it stated, in 'Confession before 1215'. The thesis is full of consequence, not just for our understanding of that essay, but for the background of all the essays in this volume. It invites more nuance and development than I have given it either here or in the essay. The scheme I have suggested would surely

[15] H. Beyer, 'Das Herrscherideal des *rigor iustitiae* und die Kirchenrefom in Italien des elften Jahrhundert', *Frühmittelalterliche Studien*, 46 (2012), 192–219, with more references. For Gregory VII's encouragement of monarchies as distinct from Emperors: H. E. J. Cowdrey, *Pope Gregory VII, 1073–1085* (Oxford: Clarendon Press, 1998), 569–70, 620–9 (esp. 622).

admit exceptions, and no doubt corrections of detail. There is room for negotiation even here. My reading does not have to imply a total absence, in the Carolingian and Ottonian worlds, of private confession of sins—as for instance by those Carolingian soldiers on the eve of battle. All it implies is that the pre-millennium penitential system had too many other jobs to do to allow it to make full sense of this one, and that it was only when public secular justice achieved self-conscious adulthood, in post-millennium western Europe, that the *forum internum* of private conscience could do the same.

Where I remain stubborn, in defence of the thesis in 'Confession before 1215', is in respect of the principle of evolution in law, and its application to confession before and after the millennium. The few documents we have on confession, through its different ages, may trick us into imagining that the procedure stayed the same. My argument is that the legal environment was changing—irregularly, perhaps, like a rising tide, but, also like a rising tide, changing in one direction—and that the nature of confession had to change in response.

The recognition of continuous evolution is as critical to the study of law as elsewhere. Galileo's *eppur si muove*[16] inaugurated a series of analogous moments in other disciplines, including those classed now as humanities and, among these, some in which evolution was least expected. Even as Darwin was preparing to jolt his contemporaries with his *eppur si muove* moment in respect of the stability of biological species, John Henry Newman was proving that Christian doctrine—which had been thought set like rock since the early church—was itself subject to development. The principle of legal evolution—and I mean continuous evolution, happening day and night whether we know it or not—is particularly critical for an understanding of the early medieval world, whose documents are too meagre to blazon the principle beyond danger of its being ignored, and when, consequently, the course of the evolution must be inferred from anomalies in the few documents we have. Once discovered, the principle dissolves the very concept of 'the Middle Ages' as an inert interlude between more vociferous centuries. By dissolving that concept, and by doing so revising our judgement of the ages which created the concept, it alerts us to the mechanism by which human law develops and always has developed. *Lex positiva* does not and cannot evolve on its own. It evolves in inextricable rhythm with its 'other half', its womanly *alter ego*—the mother who has nourished it, the daughter it nourishes, the

[16] For all that, [the earth] moves.

partner of its domestic unit, sometimes embracing it, sometimes fighting with it, often exchanging sidelong glances with it—namely, the *lex moralis.*

After a rhapsody of this kind it is customary for an author to finish, 'but that is another story'. That is inappropriate here. The story is the one told in these essays.