LAW AND THEOLOGY IN THE MIDDLE AGES

G. R. EVANS

Law and Theology in the Middle Ages

Law and Theology in the Middle Ages examines the tension between ecclesiastical and secular authority in mediaeval Europe by focusing upon the relationship between legal and theological responses to concepts such as justice, mercy, fairness and sin. Central themes, such as the fundamental differences between virtue and keeping the peace, and sin and breaking the law, are used to illustrate a wide range of practical and theoretical areas of dispute in a clear and accessible way.

A unique introduction to a fascinating subject, *Law and Theology in the Middle Ages* is a thought-provoking exploration of the relationship between the academic study of law and theology in the Middle Ages.

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Preface

'I am going to discuss the question why the catholic Church was not a federal state,' said Frederick William Maitland in a letter to A. V. Dicey about July 1896.[1] Mediaeval theology and the history of the study and practice of the law in the Middle Ages are both now established disciplines, each with its specialist scholars. The mediaeval student did not necessarily make the same distinctions. It was not even clear to Maitland that it was necessary to draw them, and much of the originality of his work lies in its cross-reference between the areas of study which have since been boxed artificially into compartments.

Maitland was driven partly by the perceptions, which came upon him as he explored the territory, that there were connections. He mentions in a letter to James Bradley Thayer that not much was yet known about 'our ancient modes of trial'.[2] But he was also moved by the need to persuade his readership of the importance of what was to be learned from the study of mediaeval law. 'Important conclusions are to be gained thereby.'[3] More recent work has concentrated on the implications for political theory and there is now no question of the 'importance' of the study of mediaeval law in that area. 'To sketch in outline the growth of the *Corpus Iuris Canonici* from the appearance of Gratian's *Decretum* to the outbreak of the Great Schism, is, in effect, to record the process by which the Church became a body politic, subject to one head and manifesting an external unity of organization.'[4]

Far less has been done in a systematic way on the relationship of law and theology. This is a study which thus moves perforce across disciplinary boundaries which have been more sharply drawn since Maitland's day. It does so without apology. Just as a liturgy carries a theology in every line, so canon law and law at large in the Middle Ages ride upon theology, and theology provides a rationale and underpinning and challenge to its principles. It was undeniably an uneasy relationship but it was inescapable that there should be some relationship; there was too much common ground of subject-matter for there to be any possibility of keeping the two disciplines truly distinct.[5] It is the purpose of this book to explore their relationship through the eyes of the mediaeval theorists and practitioners who wrestled with the problem.

Abbreviations

Anselm of Canterbury, *Opera Omnia*	Anselm of Canterbury, *Opera Omnia*, ed. F.S. Schmitt (Rome/Edinburgh, 1938–68)
Aquinas, *ST*	Aquinas, Thomas, *Summa Theologiae*, *Opera Omnia* (Parma,1852–73), 25 vols
Baldus	Baldus, *Super Decretalibus* (Lyons, 1551)
Baldus, *Digest*	Baldus de Ubaldis, *Commentarius ad Digestum vetus* (Venice, 1616)
CCCM	*Corpus Christianorum Continuatio Medievalis*
CCSL	*Corpus Christianorum Series Latina*
CSEL	*Corpus Scriptorum Ecclesiasticorum Latinorum*
Digest	*Digesta Iustiniani Augusti*, ed. T. Mommsen (Berlin, 1870), 2 vols
Gratian, *Decretum*	Gratian, *Decretum, Corpus Iuris Canonici*, ed. A. L. Richter and E. Friedberg (Leipzig, 1881)
Horn, *Aequitas*	Horn, Norbert, *Aequitas in den Lehren des Baldus* (Graz, 1968)
Irnerius, Fitting	*Summa Codicis des Irnerius*, ed. H. Fitting (Berlin, 1894)
Isidore, *Etymologiae*	Isidore, *Etymologiae*, ed. W. M. Lindsay (Oxford, 1911)
Lottin	Lottin, O., *Psychologie et morale aux xiie et xiii siècles*, V (Louvain, 1959)
Magerl, *Typologie*	Fowler-Magerl, L. *Ordines iudiciarii et libelli de ordine iudiciorum, Typologie*, Fasc. 63 (1994)
MGH	*Monumenta Germaniae Historica*
PL	*Patrologia Latina*, ed. J. P. Migne (Paris)
Quellen	*Quellen zur Geschichte des Römische-Kanonischen Prozesses im Mittelalter*, ed. L.Wahrmund (Innsbruck, 1905–31)
Summa 'Elegantius'	*Summa 'Elegantius'*, ed. G. Fransen and S. Kuttner, *Monumenta iuris canonici: Corpus Glossatorum,* 1 – (New York, 1969–)

Introduction
Law and theology

In the twelfth century Stephen of Tournai describes the embarrassment of trying to find a menu for his two dinner guests which they will both enjoy.

> I have invited the theologian and the lawyer, who have different preferences, for one delights in what is bitter, the other in what is sweet. If I write about the law the theologian will be displeased. If I write about theology, the lawyer will tear his hair. They must make allowances for one another.[1]

Law and theology were becoming 'higher degree' subjects in the developing new universities of twelfth- and thirteenth-century Europe, the period with which we shall be chiefly concerned. They attracted the ablest minds. Theology would go beyond the law in its sophistication of treatment of a topic which turned out to be of common concern, such as transubstantiation.[2] Then the law would provide a clarification from its own point of view. Or the exchange might go the other way, led by the academic lawyers with the theologians hastening in their wake.

The rivalry was unavoidable where there was so much common ground and so much of it involved vested interests. The central Middle Ages was an important period in the development of the doctrine of the Church, not merely ecclesiology itself, but also, and rather pressingly, the theory of the relation of ecclesiastical to secular authority. Stephen of Tournai comments that, 'There are two peoples in the same state and under the same king, living two lives and under two jurisdictions, clergy and laity, spiritual and carnal, *sacerdotium* and *regnum*.'[3]

One area of unavoidable competition between the two court systems, spiritual and secular, was thrown into prominence by the Becket controversy in England in the mid-twelfth century. Many offences could in principle be tried either in a secular or in an ecclesiastical court. The penalties available to a Church court, although excommunication could take one to hell in the end, were not life-threatening in this world, and so there was a good deal of incentive to get oneself tried there and not in the King's court. Henry II took exception to this. Experts were called in. The theologians and

the lawyers became involved.[4] In the same period, the English master of the epistolary art and legal author Peter of Blois describes a jostling for superiority between secular law (*leges*) and ecclesiastical laws (*canones*). He says that a case is ecclesiastical only if the cause of action is one which cannot be heard except before an ecclesiastical judge.[5] Under this rule, even quite senior members of the clerical estate could be called to account in the secular courts throughout the later Middle Ages. The bishop of Worcester was put on trial in the reign of Edward I for excommunicating servants of the King's uncle because they had arrested a thief on the bishop's lands. The bishop had erred in seeking to arrogate to himself the royal jurisdiction over thieves.[6] When powerful individuals with a great deal at stake could find themselves being called to account in this way, the theoretical questions attaching to the separation of the two jurisdictions were of more than academic interest to lawyers and theologians.

There was also an area of disputed ground over the question whether a matter belonged to the spiritual or the forensic arena. The priest exercising the power of the keys was judge of the penitent sinner. The penitent confessed and if the priest judged him to be sincerely repentant and intending to lead a new amended life, he was granted absolution, and a penalty was exacted. Theologians and lawyers debated the ways in which the role of the priest in this process differed from that of a judge in a court, who makes similar judgements and also sets a penalty. Behind that question loomed the larger one of the difference between committing a sin and breaking the law, which we shall come to in a moment. The need for practical application of theological principles in areas where law also had a practical interest was urgent with the elaboration of the machinery of the penitential system from the eleventh century.

We shall watch the theologians and the lawyers argue. For it was obvious to commentators that the authoritative texts did not tell a consistent story. A major difficulty in reconciling seeming contradictions between authoritative texts in the Middle Ages was that the option of dismissing one or the other was not really available; to do that would be to treat authority with contempt. Something rather deeper than mere academic etiquette of the day ruled out that possibility. Nor did logic allow it to be said that both were true while the contradiction was allowed to remain. The task was to show that, although different, the texts in question were not in conflict.[7] Hence the use of the formula: *diversum sed non contrarium*, and its relatives.[8]

This was not by any means a new problem for the Middle Ages. Tertullian (who died early in the third century), discusses how there can be *diversitas* without contradiction in Scripture.[9] In the fourth century, Ambrose acknowledges that even if the evangelists do not seem contrary, they are diverse. How is this to be resolved unless one says that it may be possible, by some device, to take both to be true? he asks.[10] Ambrose's contemporary Augustine suggests in the *De consensus evangelistarum* that

it is not a contradiction to include something which others omit.[11] Such principles were applied especially carefully to Scripture,[12] but other Christian authorities could not lightly be set aside either.

The same sort of problem began to present itself as soon as students of legal theory and practice set about creating bodies of authorities for themselves in which legal and theological texts often came confusingly together. The *De consonantia canonum*, the famous legal 'Prologue' of Ivo, Bishop of Chartres (*c.*1040–1116), travelled during the Middle Ages almost as a separate treatise on this problem of creating a unity out of disparate legal opinions.[13] Ivo says that he has made *excerptiones* from the letters of Popes, the *gesta* of Councils, treatises of the orthodox Fathers, and that he has tried to bring them together in a single corpus,[14] so that those who do not have the whole text at hand can at least have what they need.[15] He has arranged the material under titles. If the reader thinks at first that there are contradictions,[16] let him not immediately criticise: *non statim reprehendat*. Some are to be read strictly; some with a degree of flexibility; some with a view to justice: some in a spirit of mercy. This makes it possible to remove the contradictions, for justice and mercy are not in conflict,[17] and the 'merciful' reading of a given stricture will make it no longer in conflict with another, which is being read strictly.[18]

The guiding principle of interpretation, Ivo suggests, is that of *caritas*. The Christian physician adjusts the medicine to the needs of the patient. If sometimes his treatment is harsh, sometimes gentle, that is not contradictory of him.[19] This kind of thinking is borrowed from the theology and practice of penance, and yet it is being proposed for the use of lawyers.

A century later, the work of reconciling contradictions was still afoot. Peter of Blois makes a great fuss over the effort it has taken him in assiduous reading, turning over the volumes of laws and canons, catching 'canons' laying plans for rebellion,[20] so as to make a truce which will reconcile the contradictions.[21] Stephen of Tournai says that his purpose in his *Summa* on Gratian which contains the image of the mismatched dinner-party guests, was to create a unity out of his source materials and reduce contrarieties in the texts to harmony.[22] We find writers weaving together legal and theological references and assumptions. The fact that others resist this kind of thing with indignation shows how pressing was the urge to do so.

William of Pagula, one of the teachers of canon law at Oxford in the fourteenth century, made what he intended to be a comprehensive compilation of canon law and theology. His purpose was pastoral, the *regimen animarum*. He claims that it is disgraceful for lawyers not to know the law. He insists in his preface that it is equally shameful for the clergy not to have the appropriate equivalent knowledge which their calling requires. 'Therefore they ought to know the canon law and especially those things which canon law requires to be observed.'[23] But Marsilius of Padua and

Dante (in the *Monarchia*), writing as political theorists, both regarded lawyers with suspicion, fear and contempt.[24]

Our task is to explore the reasons why Stephen of Tournai's dinner guests would have been arguing as they came through the door, so as to get a picture of the extent of the common and disputed ground. For some came to realise that 'core principles' could be detected in the most confused laws and practices. In *Fleta*, a comprehensive anthology of the English system of the day written soon after 1290, the author says he has not tried to write down all the laws because there is such a confused multitude of them; the most he has been able to do is to try to draw out the ground-rules: 'there are indeed some *generalia* in the court, matters which frequently arise, which it has not seemed to me presumptuous to commit to writing'.[25]

Part I
Good behaviour

1 The justice of God

Adam and Eve handed themselves over to Satan by their own free will when they sinned. To the eyes of a feudal age, it seemed that Satan gained rights over them as their lord when they did that.[1] When God became man, it was alleged, Satan tried to extend his jurisdiction to Christ; but Christ was sinless and so Satan could have no rights over him. Had he lost his rights of dominion over the rest of humanity too by that attempted abuse of his rightful authority when he tried to make Christ his own? Would justice require that the wronged party, Christ, thus rightfully acquired the jurisdiction Satan had forfeited by his own unlawful act?[2]

It was important to make the case in this way, because otherwise God could be thought to have done Satan an injustice, or, to put it in more precise legal terms, to have committed what was technically in Roman law an 'actionable insult'[3] in taking mankind back for himself by the death of Christ.[4] For if all human flesh had been unclean, it would properly have remained subject to Satan and God would have been a thief of Satan's rightful property.[5] God would have been in the wrong in acting *contra ius diaboli*. But since Christ was free of sin, the Devil had no right (*ius*) over him.[6]

Not all contemporaries accepted this legally coloured version of the old story of the war between good and evil. In his *Cur Deus Homo*, the monastic theologian Anselm of Bec and Canterbury was insistent that the problem of human sin was a matter not involving any rights of the Devil at all; he gives an account of what was needed and what was done, in which only man and God are concerned. His explanation goes deeper than feudal categories. It assumes both mutual obligation, and ownership (in feudal terms) of one person by another. But it also understands there to be a moral duty of obedience to the supreme Justice (who is God himself). The 'court case' metaphor thus rides on profounder assumptions about divine justice.

As the jurist Baldus puts it in the fourteenth century, the justice of the creator was from eternity, before the world was made;[7] but the jurisconsult can speak of such things only as a creaturely human commentator. He and the theologian are both contemplating the same supernatural reality,

of God acting in the judicial process of a sinful world, with the same unavoidable limitations of understanding.

The mediaeval Christian theologian and the mediaeval Christian lawyer both have to begin from the nature of God. For such thinkers it is uncontroversial that whatever God is, he is by definition that which it is to be just and true; and more, he is substantively justice itself and truth itself.[8] It follows that his actions will reflect his justice and mercy. So in order to define or discover where 'justice' and 'mercy' lie, we need to look at the clues to be found in the divine behaviour.

Yet on the face of it, the divine behaviour is contradictory if God is not only absolute justice, but also absolute mercy. Since God cannot be at war with himself, his mercy and his justice must somehow be one. It is a paradox of this attempt to balance justice and mercy, severity and relaxation of due penalty, that justice and mercy may in fact be the same thing. It is just to help one's neighbour but it is also merciful.[9] The difference is that what is done out of obligation is just, but what is done out of compassion is merciful.[10]

Anselm of Canterbury tackles variants of this problem in the late eleventh century in the *Proslogion*, where he is concerned to demonstrate not only that God exists, but all that the faith holds about the attributes which make up his nature. These are often paradoxical. In Chapter 8 Anselm explains that God can be both merciful and incapable of suffering (*impassibilis*), even though it would seem that mercy requires fellow-feeling with sufferers. Anselm argues that this is possible because although we experience his mercy as an effect, God does not 'feel' any emotion (*tu non sentis affectum*).[11] Anselm goes on in Chapter 9 to consider the 'justice and mercy' problem directly. He asks how it can be an act of supreme justice to give eternal life to those who deserve death.[12] He argues – in line with his basic principle in the treatise that God is whatever it is better to be than not to be[13] – that it must be better for God *both* to punish and to spare than for him *only* to punish.[14] To do the first is to give sinners their deserts and that is therefore just; to do the second is in accordance with God's own goodness (*bonitati tuae condecens est*) and it is therefore also just.[15] He takes this a little further in Chapter 11, where he places side by side the two apparently contradictory texts, '*All* the ways of the Lord are mercy and truth': *universae viae domini misericordia et veritas* (Psalm 24.10) and, 'Just is the Lord in *all* his ways': *iustus dominus in omnibus viis suis* (Psalm 144.17). These he reconciles with the explanation that those whom God wishes to punish, it is just to punish and those to whom he wishes to show mercy it is just to save.[16] The justice and mercy of God are thus applied or deployed 'appropriately' for each sinner.

This Anselmian position, although it contains elements peculiarly Anselm's own, rests on assumptions set out by Augustine. Augustine argues that God condemns all men justly, for in Adam all have sinned. In the *Enchiridion*[17] Augustine says:

> Would it not have been just that such a being who rebelled against God, who in the abuse of his freedom spurned and transgressed the command of his Creator when he could so easily have kept it, who defaced in himself the image of his creator by stubbornly turning away from his light, who by an evil use of his free-will broke away from his wholesome bondage to the Creator's laws – would it not have been just that such a being should have been wholly and to all eternity deserted by God and left to suffer the everlasting punishment he had so richly earned? God would certainly have done so, if he had been only just and not also merciful. He intended that his unmerited mercy should shine forth the more brightly in contrast with the unworthiness of its objects.

Mediaeval theologians are concerned with yet another contradiction arising out of this puzzle about justice and mercy. God sets a standard of justice which is beyond the attainment of fallen humanity. It is therefore one which all human beings have in fact failed to meet, and which thus involves God himself in a sort of 'litigation' with sinful men, and in its turn it prompts actual lawsuits in the ordinary world. 'As Justinian bears witness', he says, human nature is ready and prone to sin, so that daily, one after another, quarrels start and lawsuits multiply. This in itself directly generates litigation.[18] The administration of justice, in the system and the period with which we are concerned, is inseparable from the assumption of the – 'positively pullulating' – universal sinfulness of the human condition, as Bernardus Dorna the procedural theorist of a century after Anselm, puts it.[19] At this contradictory interface the problem is whether God can possibly be just if he is demanding a standard of behaviour which it is impossible for fallen human beings to attain.

There is further underlying tension here, between an immutable standard set by God in divine law, and the legitimate *variability* of human law, both in its framing in different places, and in its application to different persons. In the famous tag, the *Digest* defines justice as the constant and enduring will to give each what is proper to him. *Iustitia est constans et perpetuum voluntas ius suum cuique tribuens*.[20] Cicero had said something very similar. In the *De Inventione* he takes it that justice is a habit or disposition of mind maintained for the common good, and respecting each as he should be respected: *Iustitia est habitus animi communi utilitate conservata suam cuique tribuens dignitatem*.[21]

The principle that justice is the will to ensure that everyone always[22] gets his just deserts, with its requirement that justice should be adapted to individuals and circumstances, makes for untidiness and for inequity. Thus a twelfth-century commentator asks, knowing he is posing a crucial question, whether right itself is immutable (*ius immobile*).[23]

There is a late fourth-century story in Jerome's first *Letter* of a trial in which the possibility is canvassed of the law saying one thing, the divine

requirements of justice another. At the proposed execution of an innocent woman mistakenly found guilty of adultery,[24] it proved at first impossible to get the sword to cut into the woman's flesh.[25] She who was condemned by the judge was absolved by the sword, says Jerome.[26] For the sword here was ultimately in God's hand.

So the administration of justice in the Middle Ages is expected to answer ultimately to a higher authority than the judiciary, or indeed the legislature,[27] of a given time and place. But at the same time, issues of justice and injustice have a well-defined forensic context, either literally or metaphorically, and in that forensic context particularities tend to challenge, and even sometimes seem to interfere with, justice at its purest and highest.

To the pragmatist lawyer, the law is simply 'a body of rules prescribing external conduct and considered justiciable'.[28] This recognition that the pursuit of absolute justice and the conduct of litigation are different things is a key point at which the theologian and the lawyer find themselves unable to speak the same language of expectations. The mediaeval theologian deals in absolutes. The lawyer adjusts his categories to the matter in hand. They are both doing so with an eye on a divine standard of justice which, while in principle absolute, is also complex in the face it presents to mankind, and especially to those, theologians and lawyers, whose professional task it is to make sense of it.

2 Sin and breaking the law

Sins and legal offences

Almost every baptised person in the mediaeval West would accept that all human beings are sinners who *deserve* to be punished, by a God whose justice may express itself in mercy and prove to be full of surprises, but cannot compromise the divine and ultimate standard. Nevertheless, it does not follow that the whole human race, placed as they are in a category of *iniusti* in the sight of God, ought to find themselves in court. The law is not interested in the sinful 'condition', or even in specific sins. For not all actual sin involves breaking the law. The law is interested in acts committed against the law.

The Church 'deals with' sin in different ways from those in which the law deals with offences, for reasons which arise out of essential differences between sinning and breaking the law.

In the public penance of the early Church, the murderer, adulterer or apostate was identified before the congregation. Everyone knew who he was. He wore special penitential garments and sat apart from the rest of the congregation. The bishop was his judge and excommunicated him, and he might be restored to the community if at all, only after he had 'served his sentence'. Although from Carolingian times[1] the penitential system ceased to be a public exposure of the serious sinner and could deal with secret sins (which might never be known except to God, the sinner and the confessor), an offence against the law has to be *shown* to have been committed before someone can be punished. It must be *visible*. Aquinas discusses the difference between legal and moral obligation partly in terms of a distinction between acts in the judicial arena which are *seen* to have been wrong; and offences of which only God may know.

In divine law, God is the judge and he is omnicompetent.[2] He sets the rules, and only he knows whether each person has kept them. Human law can impose penalties only about things on which the law-giver has competence to judge (*de quibus legislator habet iudicare*).[3] Those things must be tested openly in court; for it is on the basis of judgement arrived at in that way, that law punishes: *quia ex iudicio lex punit*.

Cicero's definition of justice in the *De Inventione* (II. 53) we have already touched on. It says that justice is a habit or disposition of mind maintained for the common good, and respecting each as he should be respected.[4] Abelard makes use of this Ciceronian definition in his *Dialogus*,[5] and it came to have a very general mediaeval currency. It introduces three principles. The first is that justice (which we might here translate as 'righteousness') is an attitude or stance of the person, understood as a rational and intellectual being, for it is in 'the mind'. The second is that justice is measurable against a 'common' rather than an individual good. The third is that it honours a social order in which some are more equal than others. That is, in its context, the implication of *suam cuique tribuens dignitatem*.

The Ciceronian definitional pattern naturally does not include the Christian concept of sin, but it does include the notion of virtue. There is a further Ciceronian subdivision of the law of nature into *religio, pietas, gratia, vindicatio, observantia, veritas*, which make up the six virtues issuing from it.[6] Cicero thus creates a link between law and virtue to set beside the complementarity of 'law' and 'obedience to law'. This makes obedience to law not mere submission, but, in that it is an act of virtue, a positive as well as a creditable act. In a commentary on the *Ethica Vetus* of 1230–40, probably produced by a Master in the Arts Faculty in Paris,[7] the commentator argues that if we are speaking theologically we ought to say that a good disposition (*habitus bonus*) necessarily precedes every good work. There will, in other words, be a 'tendency' or disposition to the virtue in question.[8]

The sinner under the law

A degree of ambiguity about the difference between sin and 'offence against the law' runs as a thread through the literature. For example, in the eighth-century *Penitential* of 'Theodore' there is a mixture of elements attributable to Theodore (of Tarsus and Canterbury) with material from other sources, among which we find (I. 12) a ruling which attempts to establish a boundary between the public domain and the (by now increasingly) private realm of penance.[9] Theodore includes in a penitential code topics clearly also forensic or judicial. False witnesses are to be excommunicated unless they expunge their sin (of breaking a commandment) by doing penance.[10] Especially culpable is the bearing of false witness out of anger or resentment (*odium*) towards the accused.[11] There is discussion of perjury in a forensic context, and the number of years of penance it ought to carry as a penalty, depending on whether it was done under compulsion by a superior (*compulsus a domino suo*).[12] In Bonizo's eleventh-century *Liber de Vita Christiana*,[13] which is mainly about penance, the subjects covered once more include judicial matters, and Bonizo draws a good deal on the Ps-Isidorian *Decretals*. Gratian's treatment of penance takes up a

good deal of space in the definitive mid-twelfth-century *Decretum*, in a way which suggests that for him too the penitential–judicial boundary remained problematic. *Quaestio* III of the Second Part of the *Decretum*, *Causa* XXXIII, became a veritable treatise with seven *Distinctiones* of its own.

In keeping with this blurring of boundaries, the sixth-century encyclopaedist Isidore slides without comment in his *Etymologies*, from talk of 'crime', to using the word 'sin'.[14] Isidore gives a long list of *crimina*, in which he deals fairly comprehensively with *peccata* too, although he is primarily concerned with those sins which are also covered by the law.[15] He also discusses the word *malum* in this part of his discussion, and thus makes the link with evil, though he deals with *malum* under a different head from *crimen*.[16] (There are two kinds of evils, he says, those a man does and those he suffers. The evil a man does is *peccatum*, the evil he suffers is *poena*, with a long list of pains and punishments.[17] *Malum* is at its worst, *plenum*, when it is both past and present, as in grief and fear.)[18]

A term whose developing mediaeval usage explicitly straddles the sin–crime boundary is *criminalia*. The Carolingian bishop Fulgentius of Ruspe speaks of *criminalia peccata*.[19] The phrase is commonplace in twelfth- and early thirteenth-century literature. The seven *criminalia peccata* are the seven *mortal sins*.[20] Peter of Celle sets the seven *venalia* and the seven *criminalia* over against one another: *illa dicuntur capitalia et criminalia, ista minora et venalia*.[21] Peter Abelard defines *criminalia peccata* as mortal (*mortifera, id est criminalia peccata*),[22] and Bernard of Clairvaux in the twelfth century confirms that *venalia non criminalia reputantur*.[23] Venial sins are not regarded as 'criminal'.

Law: the cause or the remedy of wrongdoing?

Would there be any need for law if there were no injustice already in the world for it to discourage or put right? Conversely, it may be asked, as it is by St Paul, whether the law somehow creates sin by defining what it consists in.[24] Jerome cites an ancient proverb to a similar effect, that the more law there is the more offences there are. *Summum ius summa iniuria*.[25]

Bernard of Clairvaux is sure there would have to be law (*lex*), even if everyone were just. Even God lives according to law, he explains in a letter to Prior Guigo and the Carthusians on *caritas*.[26] *Love* is the immaculate law of the Lord, which does not seek its own good but that of many. 'The law of the Lord' is said either to be that by which God himself lives (*quod ipse ex ea vivat*), or that which no one may possess except by his gift: *quod eam nullus nisi eius dono possideat*.[27]

These definitions do not put God *under* the law, as Bernard hastens to explain. 'Let it not seem absurd that I have said that God himself lives by the law: *nec absurdum videatur quod dixi etiam Deum vivere ex lege*. This

law *is* simply love. For it is love which preserves the unity of the Trinity (*ineffabilem illam conservat unitatem*). Love is law and it is God's law, and it binds in the bonds of peace (*in vinculo pacis*, Ephesians 4.3).[28] Love is the eternal law, creator and governor of the universe: *Haec est lex aeterna, creatrix et gubernatrix universitatis*.[29] Everything is made according to weight and measure and number (*Sapientia*, 11. 21), and the law of love is that measure, for nothing is left outside the law, not even law itself' (*nihil sine lege relinquitur*, *cum ipsa quoque lex omnium sine lege non sit*),[30] says Bernard. In this way, law is irresistible but at the same time non-constrictive.

The slave and the hireling do not follow the law of the Lord, but make up their own,[31] Bernard continues. Everyone can 'invent' law, but no one can cause the law he makes to be the law of God: *et quidem suam quisque legem facere potuerunt*. The definition of such spurious 'law-making' consists in the putting of self-will before the will of God: *quando communi et aeternae legi propriam praetulit voluntatem*. Then everyone is a law unto himself: *ut sicut ipse sibi lex suique iuris est, ita is quoque seipsum regeret, et legem sibi suam faciet voluntatem*.[32] Such self-made law creates a heavy yoke, which bends down the neck. The person who does not wish to bear the light yoke of the Lord subjects himself to his own punishing régime, of his own choice casting off the sweet light burden of love in favour of an insupportable burden.[33] The result is to make someone enslaved and unhappy.[34]

Bernard develops this theme of the contrast between the ease with which God's law can be borne, and the difficulty of enduring the rule of any other. One is a law promulgated by the spirit of slavery and in fear; the other by the spirit of freedom in gentleness. We are not forced to be children of God by the one and not allowed to be his children by the other. (In I Corinthians 9.20–1 Paul explains that he is not subject to the law of Moses.[35] The law is not made for the just man: *Iustis non est lex posita* (I Timothy 1.9), but for the sinner.)[36]

It would not be true to say that the just are not under the law. But they do not embrace it willingly.[37] The willing embracing of the law would make the 'laws' of the servant and hireling light and easy to bear.[38] Love 'fulfils the law' of the slave when it pours out devotion. It keeps the law of the hireling (*mercenarius*) when it controls disorderly desire (*cupiditas*).[39] Thomas Aquinas in the mid-thirteenth century says that it is a proper attribute of law to lead those subject to it to live as they ought to.[40] So it is for their good.[41] He also believes that there is a natural inclination of all created things to the good,[42] which is in conformity with this law.

The fourteenth-century Baldus de Ubaldis *Super Decretalibus*[43] approaches the question of the relationship between sin and breaking the law from the starting-point of creation and the obligation man owes to his Creator. This is in his view both a legal and a moral obligation, so he includes sin with breaking the law. There is a *duplex ius* for the human

race: *ius aut est naturale aut morale*,[44] agrees the twelfth-century *Summa 'Elegantius'*. So if not all sins are breaches of the law and not all breaches of the law are sins, there is still a great deal of overlap, and it may not be easy, or even desirable, to make them out to be the same thing. Not everything which is 'allowed' is honest,[45] comments the *Digest* in one of its *Regulae*.

While a just God is entitled to be angry with all sinners simply because they belong to the *massa peccatrix* (the 'sinful lump' of the progeny of Adam), the law makes some mechanical allowance for differences of capacity. Ignorance of the law is no excuse, says 'Irnerius'.[46] Everyone has an obligation to know and keep the law. Yet there may be reasons to forgive ignorance. Some can be excused on the grounds that they are rustics, women, soldiers,[47] and cannot be expected to know what they should do. The *Digest* recognises a difference between an act committed in anger, where the intention forms on impulse, and one done with planning aforethought.[48] It is understood, then, that motivation may affect how seriously an offence is regarded. It is commonly accepted from patristic times that it is not murder to kill by a disciplinary beating (provided, Jerome stresses, the beating is not carried out in anger).[49]

Legal theory and moral theology

In his commentary on the *Digest* (1. i. 2), Baldus de Ubaldis says that moral philosophy (*philosophia moralis*) is the mother and the door of the law (*mater et ianua*).[50] This is the *pars philosophiae* usually given in the formal academic introductions (*accessus*) to legal texts. That is to say, university lecturers would normally call law a branch of ethics.[51]

Does the law have an ultimate authority to determine choices, an authority which overrides any putative moral obligation?[52] The first problem here is that while 'legal systems are composed of hierarchies of norms',[53] there is no clear single hierarchy taking in both *moral* and *legal* obligation. The preliminary question whether theologians and lawyers would identify wrong-doing on the same or similar principles takes us at once, as we can already see, into areas of ethics which they approach from different directions.

A person acts the more unjustly the more he is drawn to act not by love of justice but by malice, says Anselm of Canterbury.[54] Anselm's tag that 'nothing is unjust in itself',[55] makes this personal choice of a good or evil purpose a defining characteristic. He thus gives us a partially 'contextual' theory of injustice.

That line of thought is more fully developed by another theologian of the next generation, Peter Abelard. Abelard comes near to Anselm's notion of what it is which makes sin 'matter' to God when he says, 'What is consent to sin but contempt of God and an offence against him?[56] He underlines, in a very Anselmian way, that it is by a kind of *lèse-majesté*

that God is offended (*ex contemptu*).[57] In Abelard's view, a 'vice of the mind' is not the same thing as a sin, and a sin is not the same thing as a bad action.[58] To be irascible is a vice, because it is a potential for wrong in the soul, even when the soul is not actually moved to anger.[59] So a vice is that by which were are made 'prone to sin',[60] that is, by which we are inclined to consent to that which it is not right to consent to. Then we either commit or omit the bad act.[61] Abelard thinks we can properly call this consent sin, which he defines as a sin of the mind which deserves condemnation, or is deemed guilt by God.[62]

Abelard is better known for holding quite strongly that what counts in deciding whether an action is sinful or not is motivation, and he would say explicitly that it is not *the act in itself* which is good or evil but the *doer's reason for doing it*. In the *Summa Sententiarum* (before 1140), the same question is raised: whether bad deeds (that is, external actions) are to be called sins. The *Summa* acknowledges that some say that all acts are indifferent in themselves.[63] There are *vicia* of the body, such as *debilitas* or blindness, which are morally neutral. There are non-moral *vicia* of mind (like being stupid), which apply to the good and the wicked alike, says Abelard.[64] Among beasts there are none which are just and unjust.[65] So 'ownership' of an act as by 'choice' a known bad act is important. Not all mediaeval thinkers would go as far as Abelard but the role of the will in making a person responsible for his sins is relatively uncontroversial, and one might underline here the role of *perseverance* in a wrong intention.

It is by no means as easy to say exactly how, or how far, intention makes an act lawful (or unlawful) as it is to sketch a 'contextual' or 'intentional' theory of moral actions from a theological point of view. But that was attempted. The lawyers were presented with questions of this sort in different ways. Canon 15 of the Second Lateran Council of 1139 refers to a situation where it is contended that the Devil has persuaded someone to lay violent hands on another.[66] Did that put the commission of the act of violence beyond the control of the perpetrator? Is the assault I commit not my fault if the Devil drives? In Distinction VI Gratian turns to the cognate question of moral responsibility for actions which seem to be beyond the control of the will, such as the emission of semen in sleep. It is argued that sin in such situations consists in taking pleasure in and consenting to what one cannot help.[67] In these and other ways persons 'forced to act' (*coacti*) for good or ill may not be held culpable.[68] Similarly, a good work done willingly (with consent) is more valuable than one done unwillingly.[69]

Practical implications: the court or the confessional?

In the privacy of the 'private'[70] system of penance, no judge is 'externally appointed' to deal specifically with the matter in hand. In one of Robert Grosseteste's letters, we find the warning that the ship of the soul should not be entrusted on the choppy and rock-strewn seas of life to a fool, a

child, or someone who knows nothing about sailing.[71] But in practice that could occur; the sinner confesses privately to the priest and no one else but God knows how he deals with it. Nevertheless, even here in the sacramental context of what is indubitably a penitential process, the priest is thought of as a 'judge'. As Jerome puts it in one of his letters:

> They [the clergy] judge us, in a certain measure, before the Day of Judgement, who in sober chastity guard the Lord's Bride.[72]

> Under the Old Law, whosoever was disobedient to the priests was either put outside the camp and stoned by the people, or else the sword was put to his throat and he expiated his contempt with his blood. But now the disobedient is either cut off by the sword of the Spirit or he is cast out of the Church and torn asunder by the jaws of infuriated demons.[73]

It continued to be natural to use the phrases 'by the priest's judgement' (*iudice sacerdote*)[74] and 'the judgements of penance' (*iudicia paenitentiae*).[75] There is also a tendency for penitential canons to be described as *iudicia*.[76] Gratian's Distinction VI deals with who the confession should be made to, and the kind of person the 'judge' of other men's sins ought to be.[77]

A judge cannot be impartial if he has information which would prejudice him against the accused. But in a penitential context, he will have that information, for the penitent will trustingly have told him everything. It is true that the judicial role in a penitential context is not to decide guilt but to apportion punishment, to weigh the circumstances and the character and degree of severity of the offence, but the confessor will still, in his pastoral role, know all sorts of things which may affect his judgement. Where a priest or bishop acted as judge it was easy for him to cross the pastoral–judicial boundary. The twelfth century found some tidying up in this respect with the appointment of an official who acts as the bishop's vicar in judicial matters.[78] But the fact that this difficulty is not sharply addressed in the Middle Ages may reflect the confusion which persisted over the judicial role of the priest in a pastoral situation.

There is ample precedent in the penitential codes as well as in the ancient picking out of serious offences as requiring public penance, for the view that some wrong acts are more serious than others; but even here not all the acts typically so stressed – adultery, murder, apostasy – are in breach of the law. They make up a mixture of breach of the law and sin. Fornication, homicide and avarice appear in the penitentials, but homicide would certainly also be matter for criminal trial.

The penitential manuals provide a guide to what will be appropriate by way of penance in given circumstances. This can be equated to some degree with the *talio* of Roman law, as well as with the 'eye for an eye' of

the Old Testament,[79] at least in that a quantitative assessment is made of what needs to be done about an offence. The principle is that just retribution should be proportionate: *ut taliter quis patiatur ut fecit*.[80] This can, as Isidore points out, be applied equally to the rendering of kindness for kindness, benefit for benefit, for example.[81] Just as physicians prescribe different medicines for different sicknesses, so for different faults are prescribed different penances,[82] say Carolingian monastic penitentials. Ivo of Chartres cites Leo the Great on the view that the appropriate penalty can change with circumstance.[83]

Hostiensis suggests that a wise priest will decide what is the appropriate penalty not only according to the offence but also according to the kind of person he has before him.[84] Proportionality also dictates that a long period of mild penance may fairly be exchanged for a shorter period of more severe penance. So there is a good deal of leeway for the priest's judgement in setting the tariff.

Riding on all this once more are questions about rigour and mercy. Rigour cannot rightly go beyond due proportion. In other words, the priest may not at will impose a substantially more severe sentence than the circumstances deserve. On the other hand, mercy can stop a long way before due proportion for the offence is reached. Ivo of Chartres sets out the options.

> In this way, if we take examples from past and present, we find certain leaders of the Church judged more strictly, according to the rigour of the laws, many tolerated offences because of the exigencies of the times, and many concealed things for the benefit of individuals.[85]

Purging offences and starting again

It cannot necessarily be assumed that the forgiven sinner, the reconciled penitent, the criminal who has discharged his punishment, will not offend again. This possibility of repeated offending raises in another way the conception that there may be a movement across the boundary between sin and breach-of-the-law. If a second penance is needed because offences are committed again, does that mean that the sins committed the first time 'return', that is, that they have to be deemed no longer to have been wiped out? Gratian acknowledges that there is difference of opinion on this point.[86]

In *Decretum*, II, Gratian deals directly with the 'repetition' of penance itself, which had of course been an issue for the early Christian centuries. In this early period, the question was whether penance *could* be repeated, that is, whether the sinner should be given a second or third chance. The third Distinction is about another aspect of the same issue, with Gratian explicitly raising the question of the connection between sin and breach of the law. He argues that if someone who has done penance then commits a