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THE SAINT PAUL SEMINARY SCHOOL OF DIVINITY
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Thomas Becket and Clerical Immunity

A THESIS

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of the University of St. Thomas

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I. Introduction

We hear much more about the heroism of St. Thomas Becket, the martyr-archbishop of Canterbury, than we hear about the cause for which he made his stand. Becket's laudable courage overshadows the fact that he defied the English king over an issue which would give pause to many modern ears: Becket contended that the clergy must have absolute immunity from secular law in the area of criminal prosecution. It is no coincidence that the popular 1964 film *Becket* recast the conflict between king and archbishop as a more palatable dispute about a priest who had been punished without trial. In real life, Becket's concern went far beyond due process. The questions raised in his time about the clergy's place in Christian society have resurfaced recently in the aftermath of the scandal of clerical sexual abuse.

The earliest centuries of Christian history presumed that the clergy were subject to both ecclesiastical and secular law, and that the punishment of crime was the purview of secular authority. During the Gregorian reform movement in the eleventh century, the advocates of a new ecclesiology argued for a clerical hierarchy which was not answerable to any secular power, and the authority of the newly systematized canon law provided the basis for a clerical class which was exclusively self-policing. Thomas Becket attempted to carry the Gregorian ideals of ecclesiastical autonomy and priestly dignity to their logical conclusion by establishing clerical immunity as a political reality; both in personal debate and later in his correspondence, he argued that no secular authority was competent to impose trial or punishment on a member of the ordained clergy. After his death, the English church succeeded in establishing much of the immunity for which he had contended.

II. Legal status of the clergy in early Christian history

There was little precedent for clerical immunity from secular jurisdiction in the earliest centuries of Christian history. For the most part, early Christian authors presumed that the Christian, whether cleric or lay, would always have a dual status in temporal society and would remain subject to secular law as well as ecclesiastical law.

In the New Testament, Jesus directed his followers to “repay to Caesar what belongs to Caesar and to God what belongs to God,” implying the existence of different but legitimate sovereignties.¹ He claimed to be a king, yet he said that his kingdom was “not of this world.”² More specifically, St. Paul encouraged civil obedience, in particular regarding taxation, and he himself demonstrated cooperation with Roman law. Paul wrote in the context of a non-Christian government, but he was not afraid to assert that all authority comes from God and that the pagan ruler is “the servant of God to inflict wrath on the evildoer.”³ At times he relied on Roman rulers and Roman laws to protect him from his enemies.⁴

As far as legal judgment was concerned, there was some warrant in the New Testament for a judicial process internal to the Christian community. Paul reprimanded the Corinthians for bringing civil lawsuits before unbelievers rather than settling their affairs among themselves: “Do you not know that the holy ones will judge the world? If the world is to be judged by you, are you unqualified for the lowest law courts? Do you not know that we will judge angels? Then why not everyday matters?”⁵ However, the concept of the Church exercising its own authority in

¹ Mt. 22:15-22, *New American Bible, Revised Edition* (Charlotte, NC: St. Benedict Press, 2011). All subsequent biblical citations are from this edition.

² Jn. 18:36.

³ Rom. 13:4.

⁴ Acts 22:25-29.

⁵ 1 Cor. 6:2-3.

a formal judicial setting, much less deploying coercive power to “inflict wrath on the evildoer,” did not enter the conception of the New Testament writers.

Practically speaking, before the conversion of the Empire, Christians living in civil society had no choice but to acknowledge themselves subject to two different jurisdictions: civil law in matters such as taxation and crime, the Church in matters of moral conduct, truths of the Faith, and sacramental worship. In particular, nothing was said to imply that the ordained clergy stood any differently in relation to secular authority than did any other Christian.

The idea that the Church might have a privileged standing before the civil law could only begin to develop when the Empire became an explicitly Christian government during the fourth century. An anecdote recorded by Rufinus asserted that Constantine was sympathetic to the idea that the clergy ought to answer only to divine authority. Rufinus wrote that at the Council of Nicaea in 325, the bishops petitioned the emperor to adjudicate a dispute which had arisen between them. Constantine refused: “God has appointed you priests and given you power to judge even concerning us, and therefore we are rightly judged by you, while you cannot be judged by men.”⁶ Whether or not the story is true, Constantine did absolve the clergy from certain public obligations, but he did not put clerical immunity into law.⁷

Constantine’s successors laid down vacillating laws about the status of clerics in legal proceedings. In general, the emperors were amenable to acknowledging the Church’s competence in matters of sacramental discipline and at times even permitted its bishops to act as

⁶ Rufinus, *Historia ecclesiastica*, X.2, trans. Philip R. Amidon, in *The Church History of Rufinus of Aquileia, Books 10 and 11* (New York: Oxford University Press, 1997), 10.

⁷ Theodosian Code 16.2.1, in *The Theodosian Code and Novels and the Sirmondian Constitutions*, trans. Clyde Pharr (Princeton, NJ: Princeton University Press, 1952) (hereafter cited as *TC*). Constantine wrote to the proconsul of Africa that the divine worship offered by the Christian clergy was already an “immense contribution to the welfare of the community” and that they should be freed from mundane civil responsibilities for this duty. Eusebius, *Historia ecclesiastica*, X.7, trans. G. A. Williamson, *The History of the Church from Christ to Constantine* (Harmondsworth, UK: Dorset, 1965).

judges and arbitrators in civil suits,⁸ but they were reluctant to grant ecclesiastical jurisdiction in criminal proceedings.⁹ Clerics were nevertheless acknowledged as a unique class, and measures were taken to respect their dignity — for example, a 452 law declared that although bishops were not exempt from civil courts, they could defend themselves through a procurator instead of appearing in person.¹⁰ Justinian’s *Corpus Juris Civilis* provided that a cleric could be formally accused of a crime before a secular magistrate and then sent to his bishop for trial; if the bishop found him guilty, he was expected to depose him from his clerical office and return him to the magistrate for a sentence. If the bishop found him not guilty, the decision would have to be confirmed by the magistrate.¹¹

At first the Church was in no position to do otherwise than gratefully accept such gifts as the emperors chose to bestow. Later the bishops became more vigorous in safeguarding their legal privileges. Among the councils that claimed some degree of competence for the Church in legal proceedings involving the clergy were Carthage (397), Mileve (416), Arles (442), and Chalcedon (451).¹² A high point of clerical immunity might be found in Ambrose of Milan, who asserted that certain ecclesiastical matters were outside the emperor’s purview, such as church buildings: “Sacred things are not subject to the jurisdiction even of the emperor.”¹³ He exhorted a

⁸ Greatly to the chagrin of Augustine as the bishop of Hippo, who lamented the number of hours he was obliged to devote daily to judicial responsibilities. Frederik van der Meer, *Augustine the Bishop: Religion and Society at the Dawn of the Middle Ages* (New York: Harper & Row, 1961), 258-62.

⁹ Constantius (337-361) granted bishops sole competence in accusations against their own members, although this was phrased as a voluntary delegation of his own authority intended to deter wanton accusations against bishops by heretics (*TC*, 16.2.12). Gratianus (375-383) granted civil cases and minor offenses to the bishops’ synods, but reserved criminal cases to secular authority (*TC*, 16.2.23). Honorius (395-423) abrogated this last: “Clerics must not be accused except before bishops” (*TC*, 16.2.41). Valentinian III (425-455) once again reserved all criminal cases to the secular courts and decreed that civil cases could only be tried in episcopal courts if both parties agreed (*TC*, N. Val. 3.34). Majorianus (457-461) repealed this. See John Emmanuel Downs, “The Concept of Clerical Immunity” (JCD dissertation, Catholic University of America, 1941), 8-10.

¹⁰ *TC*, N. Val. 3.34.

¹¹ *Novellae* 123.21, in *Corpus Juris Civilis*, ed. P. Kreuger and T. Mommsen (Berlin, 1886).

¹² Downs, “The Concept of Clerical Immunity,” 9-11.

¹³ Ambrose to his sister Marcellina, in *Saint Ambrose: Letters*, trans. Sister Mary Melchior Beyenka, OP, vol. 26 of *Fathers of the Church* (Washington, DC: Catholic University of America Press, 1954), 367.

fellow bishop, speaking as Christ: “I...owe nothing to Caesar because I hold nothing of this world...Peter owes nothing. My apostles owe nothing, because they are not of this world, although they are in the world.”¹⁴ Nevertheless, although Ambrose made bold claims for clerical immunity from judgments by laymen, he did so not in the context of a judicial setting but with regards to deposition for heresy.¹⁵

Augustine sounded a note of realism a few decades later in his *City of God*. Augustine’s outlook was that the Church should anticipate existing within a foreign, even potentially hostile society up until the end of the world. He echoes Paul in saying that secular authorities should be respected in matters related to earthly peace, since a peaceful society is a common goal of both believers and unbelievers. The Church strives as much as possible to respect the “customs, laws, and institutions” established by various governments, so that “since this mortal condition is shared by both cities, a harmony may be preserved between them in things that are relevant to this condition.”¹⁶ The Church cooperates with the civil authority and prays for its success,¹⁷ but Augustine does not envision it taking an active role in directing secular government or assuming its duties. The pilgrim Church has no permanent stake in worldly affairs.

A very famous account of the two spheres of authority in which the Christian moves simultaneously was articulated by Pope Gelasius I, in a letter to the emperor Anastasius in 494:

Two there are, august emperor, by which this world is chiefly ruled, the sacred authority of the priesthood and the royal power. Of these the responsibility of the priests is more weighty in so far as they will answer for the kings of men

¹⁴ Ambrose to Justus, in *St. Ambrose: Letters*, 112.

¹⁵ At the Council of Aquileia (381), which condemned the heretical bishop Palladius, Ambrose stated: “Even if he be guilty of many impieties, we still blush that it should seem that he who claims the priesthood for himself is condemned by laymen. Both because of and by this very fact, he who awaits the layman’s sentence must be condemned, since priests must rather judge concerning laymen.” *Gesta concili Aquileiensis*, 52; trans. Lester L. Field, *Liberty, Dominion, and the Two Swords: On the Origins of Western Political Theory* (Notre Dame, IN: Notre Dame Press, 1998), 213.

¹⁶ Augustine, *City of God*, XIX.17, trans. Henry Bettenson, *Concerning the City of God against the Pagans* (London: Penguin Books, 2003), 877.

¹⁷ Augustine, *City of God*, XIX.26, 891-92.

themselves at the divine judgment. You know, most clement son, that, although you take precedence over all mankind in dignity, nevertheless you piously bow the neck to those who have charge of divine affairs and seek from them the means of your salvation, and hence you realize that, in the order of religion, in matters concerning the reception and right administration of the heavenly sacraments, you ought to submit yourself rather than rule, and that in these matters you should depend on their judgement rather than seek to bend them to your will. For if the bishops themselves, recognizing that the imperial office was conferred on you by divine disposition, obey your laws so far as the sphere of public order is concerned lest they seem to obstruct your decrees in mundane matters, with what zeal, I ask you, ought you to obey those who have been charged with administering the sacred mysteries?¹⁸

Gelasius portrays the two powers as governing two different aspects of Christian life: the priests are authorities “concerning the reception and right administration of the heavenly sacraments,” the emperor regarding “the sphere of public order.” The Christian is answerable to each one in its domain — in fact, each power is answerable to the other. In a later treatise, Gelasius emphasizes the healthfulness of this differentiation of the powers:

Christ, mindful of human frailty, regulated with an excellent disposition what pertained to the salvation of his people. Thus he distinguished between the offices of both powers according to their own proper activities and separate dignities, wanting his people to be saved by healthful humility and not carried away again by human pride, so that Christian emperors would need priests for attaining eternal life and priests would avail themselves of imperial regulations in the conduct of temporal affairs... Thus the humility of each order would be preserved, neither being exalted by the subservience of the other.¹⁹

As the first passage makes clear, Gelasius considers the priestly power superior in dignity because its sacramental ministry has an eschatological role, and the things it stewards are of far

¹⁸ Gelasius I, Letter to Anastasius, in *The Crisis of Church and State 1050-1300*, ed. and trans. Brian Tierney (Englewood Cliffs, NJ: Prentice-Hall, 1964), 13-14.

¹⁹ Gelasius I, *On the Bond of Anathema*, trans. Tierney, *The Crisis of Church and State*, 14-15.

more enduring value.²⁰ Still, this does not diminish the genuine authority of the other power; both derive from Christ's own office. The emperor is expected to submit to the priests' judgment in things related to the sacraments, but the converse is that it is not only legitimate but salutary for the clergy to be judged by him in matters of "public order."

There was little leisure for concern about a unique legal position for the clergy during the tumultuous centuries between Gelasius and Charlemagne. The disintegration of law and order in Western Europe lent weight to the presumption that an effective secular authority was necessary to protect the Church and Christian society. Also, the idea of the secular ruler as judge acquired further theological legitimacy after the papacy acknowledged Charlemagne and his successors as Holy Roman Emperors beginning in 800. It was widely understood that the Christian king was more than a "mere layman;" he stood as the leader of the visible Christian society, and protecting it from criminal wrongdoers was part of his sacred duty.²¹

In the meantime, the organizational power of the ecclesiastical hierarchy was valuable as a unifying force to fledgling empires like Charlemagne's, and the office of bishop or abbot became in many places an important position as a feudal landholder. Such officials were presumed to be subject to their overlord in affairs of land, military service, and so forth, and accordingly they were accountable to him and his courts if accused of wrongdoing. There were no exclusively ecclesiastical courts. In the Byzantine and Frankish empires, bishops were typically judged by their peers (although priests or members of the lower clerical orders were

²⁰ Gerd Tellenbach points out how in Gelasius's account the priesthood has *auctoritas*, suggesting a religious authority, while the empire has only *potestas*, connoting practical administration. Gerd Tellenbach, *Church, State and Christian Society at the Time of the Investiture Contest*, trans. R. F. Bennett (Oxford: Blackwell, 1948), 35.

²¹ See Fritz Kern, *Kingship and Law in the Middle Ages*, trans. S. B. Chrimes (New York: Frederick A. Praeger, 1956), esp. pp. 27-60, "Consecration of the Monarch."

not), but not in a specifically ecclesiastical forum; the courts overlapped and the same clerics were officials in both, so it was far from obvious that the Church had charge of the trial.²²

Leading up to the turn-of-the-millennium reform movement, the social position of the clergy was very much bound up with the rest of Christian society, and its authorities were embedded within royal governing structures. Harold Berman enumerates a number of factors which contributed to the situation: clerical marriage allowed for political alliances and inheritances; high-ranking clerics were often important secular officials by virtue of their feudal positions; much ecclesiastical property was owned by laymen; lay rulers called church councils and promulgated ecclesiastical law; and last but not least, secular and ecclesiastical courts were interchangeable. There was a “fusion of the religious and political spheres.”²³ The reform movement would wage war on all of these things. The earlier presumption that the clergy were subject simultaneously to both temporal and ecclesiastical authorities was one casualty of the conflict.

III. Ideals of the Gregorian reform

The so-called Gregorian reform, a capacious concept sometimes dated from the founding of the monastery of Cluny in 910, was one aspect of a wider movement in Christian Europe toward general reform at all levels of the Church — a movement which was initiated by lay rulers in the ninth century, took hold in the monasteries, and reached the papacy relatively late.

One current in particular, associated with Gregory VII’s papacy in the eleventh century,

²² Harold Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Cambridge, MA: Harvard University Press, 1983), 259. In addition, the “False Decretals” forged around 850 in Rheims asserted that a bishop on trial must have the right to appeal to Rome at any point in the proceedings, but this claim would not be recognized in practice for some time. Klaus Schatz, *Papal Primacy: From Its Origins to the Present* (Collegeville, MN: Liturgical Press, 1996), 70.

²³ Berman, *Law and Revolution*, 88.

engendered a distinct ecclesiology and theology of Christian society.²⁴ Its proponents sought to distinguish the ecclesiastical hierarchy as an independent temporal power in its own right. They claimed the clergy for their own temporal sovereignty, denying that the clergy owed allegiance to the authorities of the secular sphere. Among other things, they asserted the clergy's right to police its own by maintaining a separate judicial system.

The earliest reformers were prepared to put up with a good deal of control by secular authorities over the Church's temporal affairs, since they shared a common goal — the major moral vices targeted by the reform, simony and clerical marriage, were reprehensible to prelates and lay Christians alike. The Frankish and German emperors reiterated and enforced the Church's prohibitions in these areas. When the papacy arrived relatively late to the party, beginning with Leo IX's papacy in 1049, the early papal reform councils focused on "simoniacal heresy and the evil of clerical marriage."²⁵ These abuses were attacked passionately as heresies, but there was no difficulty at first with lay rulers exercising control over papal and episcopal appointments and other matters of ecclesiastical administration.

However, theological movements were afoot which signaled a more profound change in the way the Church understood itself in the world. The pursuit of clerical immunity from secular authority developed in the context of what came to be virtually the slogan of the papal reform, the "liberty of the Church."

The medieval concept of *libertas*, drawing upon church charters and theological treatises of the early medieval period, meant more than freedom from external compulsion; it was characterized more as a positive reality than as the mere absence of restraint. In its most

²⁴ On the divergence of the Gregorian reformers' project from the goals of the wider reform movement, see Gerd Tellenbach, *The Church in Western Europe from the Tenth to the Early Twelfth Century*, trans. Timothy Reuter (Cambridge, UK: Cambridge University Press, 1993), 293.

²⁵ Adam of Bremen's account of the Council of Mainz (1049), trans. Tierney, *The Crisis of Church and State*, 32.

fundamental theological sense, liberty was a paradox: it meant the freedom to be a servant of God, the supreme authority.²⁶ In Paul's words: "You have become freed from sin and have become slaves of God."²⁷ With regards to the law which governed the Christian's conduct as a servant of God, liberty was viewed in the context of the complementarity of moral rights and duties. A given person or entity might have more or fewer responsibilities and hence more or fewer "liberties."²⁸ A local church, for instance, might be said to become "more free" when it was given more extensive faculties to administer the sacraments.²⁹

Leading up to the eleventh century, the clergy were increasingly characterized as being particularly set apart for servitude under Christ, and for this reason required to be free from other authorities in order to fulfill their duties as Christ's servants. Humbert of Silva Candida, one of the reform-minded cardinals at Rome in the mid-eleventh century, lamented: "They who ought to be freer than all, whose inheritance is God Himself, and who therefore are the property of God, are less valued than any others. The lowest serf is subject to his own lord, but the clergy are expected to serve strange masters."³⁰

There was increasing conviction that the *libertas* of the clergy meant freedom from lay authority, so that the clergy could pursue a divinely appointed mission of governing the visible Church.³¹ In practice, when the reformers spoke of the *libertas Ecclesiae*, they typically meant the freedom of the ecclesiastical hierarchy to be self-governed, to be ruled by its own laws, and

²⁶ Tellenbach, *Church, State, and Christian Society*, 2.

²⁷ Rom. 6:22.

²⁸ A distinction from the Roman legal concept of freedom, which sharply distinguished the freedom of persons from the status of slaves as "things." Even the least powerful members of medieval society were said to have certain "liberties." Ellen Meiksins Wood describes the transition to feudal society as a shift from a black-and-white free/slave distinction to "a complex continuum of dependent conditions." Tellenbach, *Church, State, and Christian Society*, 18-22; Ellen Meiksins Wood, *Citizens to Lords: A Social History of Western Political Thought from Antiquity to the Middle Ages* (London: Verso, 2008), 171.

²⁹ Tellenbach, *Church, State, and Christian Society*, 22.

³⁰ Humbert of Silva Candida, *Liber contra simoniacos*, III.10, trans. Tellenbach, *Church, State, and Christian Society*, 134-35.

³¹ Tellenbach, *Church, State, and Christian Society*, 19.

especially to be ruled by the pope. They desired to be free in order to be subject to the highest authority, Christ himself, and this authority was increasingly seen as residing most fully in the pope, not in a divinely anointed king.³²

The *libertas* of the clergy entailed corresponding privileges in the thought of the reformers. In the same way that liberty was no mere absence of restraint, a *privilegium* was not a mere exemption from law. It was the practical manifestation of one's particular liberty, the means required to exercise one's proper standing before God and his law.³³ A member of the clergy needed certain privileges to fulfill his particular function. A bishop, for instance, was said to require the privilege of ruling and administering the lands and possessions that were attached to his office. Considering the office and its material manifestation as a single entity was a useful argument against simony, since some had justified the practice of paying for ecclesiastical office on the grounds that the candidate was purchasing the material possessions of the office, not the sacramental consecration.³⁴ However, this also made it difficult to maintain the old duality in the office-holder's loyalties, to view him as simultaneously subject to distinct ecclesiastical and secular jurisdictions. The Gregorian reformers eventually objected to all manifestations of this dual loyalty — they contended that a cleric ought not to be appointed by a lay ruler, hold a church as the vassal of a lay lord, or formally receive ecclesiastical property from a layman in the

³² As Schatz notes (*Papal Primacy*, 81-82), not only the diocesan clergy but also the religious orders sought liberty in being subject to the pope alone. This trend began with the monastery of Cluny, whose charter placed it under the direct authority of the pope, but was even more dramatically visible with the mendicant orders of the thirteenth century, whose forms of organization were incompatible with traditional diocesan governance structures.

³³ Humbert links the privilege of any possession with the right to pursue its proper use — the privilege of land is possessing and cultivating it; for a horse, the right to ride upon it; in the case of a position in the Church hierarchy, such as a bishopric, the privilege includes the right to rule and administer its temporal goods. Tellenbach, *Church, State, and Christian Society*, 17.

³⁴ The tenth-century monk Abbo of Fleury criticized those who claimed to be purchasing only the Church's material possessions: "It is evident that in the Catholic church the one cannot exist without the other. Or can there be fire without fuel?" The monk Wido wrote that a local church "cannot exist without its temporalities, as the soul cannot exist in time without the body." Humbert of Silva Candida argued that the one who conferred a bishopric on a candidate necessarily bestowed an entire indivisible entity, spiritual authority along with temporal administration over property, and that for this reason it was absolutely unacceptable for a layman to perform the investiture ceremony. Tellenbach, *The Church in Western Europe*, 170-77.

rite of investiture. Ultimately, one of the privileges claimed for the clergy was the *privilegium fori*, the privilege of being judged only by fellow clerics. Pope Paschal II defended the claim to exclusive jurisdiction with Paul's words: "Who are you to pass judgment on someone else's servant?"³⁵

The second and most dramatic phase of the papal branch of the reform, the pontificate of Gregory VII (1073-1085), discarded entirely the concept of the cleric as subject to two autonomous spheres of authority. Gregory argued for a supreme, "un-judgeable" temporal authority exercised by the pope in particular and by the clergy in general. He wrote that it was part of the nature of the priesthood to judge and condemn earthly authorities, and that the reverse was a reprehensible sacrilege. The gist of his argument is that since priests enjoy supreme authority in the administration of the sacraments, it is impossible for them to not have the same preeminence in earthly affairs:

To whom, then, the power of opening and closing Heaven is given, shall he not be able to judge the earth? God forbid! Do you remember what the most blessed Apostle Paul says: "Know ye not that we shall judge angels? How much more the things that pertain to this life?"³⁶

Gregory took in its most literal sense the old axiom *prima sedes a nemine judicatur*, "the first see is judged by no one."³⁷

Gregory's most striking (and infamous) rhetoric comes from his defense of the supremacy of priestly authority, but with regards to the question of clerical immunity from secular jurisdiction, the more significant issue was the exclusivity of priestly authority in its own

³⁵ Rom. 14:4; Tellenbach, *Church, State, and Christian Society*, 135.

³⁶ Gregory VII, Letter to Hermann of Metz (1081), trans. Tierney, *The Crisis of Church and State*, 68.

³⁷ *Prima sedes* had been part of the canonical tradition since the fifth century, primarily in the context of the conundrum of whether a pope could be deposed from his office. It acquired a stronger juridical connotation after Charlemagne exonerated Pope Leo III of various criminal charges in 800. It was included, along with other robust assertions of papal supremacy in both ecclesiastical and secular governance, in the eleventh-century *Dictatus papae* — a document which cannot be associated with Gregory's direct authorship but which undoubtedly represents his ideals. Schatz, *Papal Primacy*, 73-75.

purview — a purview which was no longer confined to the priest's sacramental ministry, but now included every aspect of his life and responsibilities. The question of the cleric's double identity as temporal official and ordained minister was the source of the best-known conflict of the reform period, the Investiture Contest. Gregory and his supporters denied the right of the lay sovereign to confer authority on a cleric in the investiture ceremony, and more fundamentally, denied the sovereign's right to choose the candidate for the office.³⁸ They did not acknowledge the fact that in much of Europe, a prelate automatically became a temporal ruler by virtue of his office — as Brian Tierney puts it, “the management of material estates does not become a spiritual activity simply because bishops are set in charge of them”!³⁹

After the initial heat of the dispute had abated, more pragmatic leaders acknowledged that in practice the Church's temporal authority existed alongside others who occupied the same space. Significantly, the Investiture Contest ended in a compromise which set a precedent for future turf wars between clerical and secular rulers. Pope Calixtus II and Emperor Henry V agreed to the Concordat of Worms in 1122. The emperor conceded that bishops would be elected by the clergy in accordance with ecclesiastical law, but he retained considerable influence over the choice: the emperor could present a nominee; the election was to occur in his presence where, in the event of disagreement, he could provide “assent and assistance to the party which appears to have the better case;” he had veto power, since he could either receive or refuse the

³⁸ As Z. N. Brooke points out, the dispute over investiture, although it has given its name to the colorful battle of wills between the pope and emperor, was in fact secondary to the issue of control over ecclesiastical appointments. While Gregory did begin to enforce the formal prohibition against investiture by laymen that had been promulgated by a Roman synod in 1059, investiture is barely mentioned in the impassioned correspondence between him and Henry IV. The breach between them had actually begun years earlier with a dispute over who had the right to appoint a candidate for the archbishopric of Milan. Nevertheless, investiture was a perfect symbol of what was at stake — who had authority over which aspects of the clerical persona? — and it was on these grounds that the conflict between the papacy and the empire was temporarily settled. Z. N. Brooke, “Lay Investiture and Its Relation to the Conflict of Empire and Papacy,” in *Church and State in the Middle Ages*, ed. Bennett D. Hill (New York: Wiley, 1970), 90-91.

³⁹ Tierney, *The Crisis of Church and State*, 87.

homage of the elected candidate. The symbols of authority were distinguished: the bishop would confer the ring and staff, while the emperor's part of the ceremony would use a royal scepter.

The arrangement acknowledged, both in practice and in the imagery of the ritual, that the clerical hierarchy and the kingship both had a legitimate claim on the bishop's loyalty and a legitimate jurisdiction over him in their own spheres.⁴⁰

In the years of Gregory's immediate successors, the papal branch of the reform focused on practical steps to increase the Church's standing as a political entity in its own right. It did not assert authority over all human affairs, but it sought autonomy in the areas which it did claim as its purview, including oversight of the clergy.⁴¹ The project of increasing the Church's temporal presence and autonomy did not necessarily reflect the consensus of the Church or even of the episcopate; however, it influenced the policy of the papacy for the next several centuries, and as will be seen, it was the worldview that motivated Thomas Becket.

⁴⁰ Concordat of Worms, trans. Tierney, *The Crisis of Church and State*, 91; see also Bennet D. Hill, "The Age of the Gregorian Reform Movement," in *Church and State in the Middle Ages*, ed. Bennett D. Hill (New York: Wiley, 1970), 64.

⁴¹ Walter Ullmann famously argued that the project of the medieval papacy was, and had always been, the establishment of a *societas* coterminous with *Christianitas* which was ruled by the clerical class: *Medieval Papalism* (London: Methuen, 1949); *The Growth of Papal Government in the Middle Ages*, 2nd ed. (London: Methuen, 1962). Alfons Stickler and Friedrich Kempf argued to the contrary, that at least early in the reform, theological writers took for granted the independence of secular authority and did not seek to subsume all its functions under clerical power: Alfons Stickler, "Concerning the Political Theories of the Medieval Canonists," *Traditio* 7 (1949-1951), 450-63; Alfons Stickler, "Sacerdozio e Regno nelle nuovo recherch  attorno ai secoli XII e XIII nei Decretisti e Decretalisti di Gregorio IX," in *Sacerdozio e Regno da Gregorio VII a Bonifacio VIII* (Rome: Pontificia Universit  Gregoriana, 1954); Friedrich Kempf, "Die p pstliche Gewalt in der mittelalterlichen Welt," *Miscellanea Historica Pontificalis* 21 (1959), 153-66. The ensuing scholarly debate is summarized by Christopher P. Hill, "Gilbert Foliot and the Two Swords: Law and Political Theory in Twelfth-Century England" (Ph.D. dissertation, University of Texas at Austin, 2008), 28-39, available at <http://www.lib.utexas.edu/etd/d/2008/hillc21629/hillc21629.pdf> (last accessed July 29, 2015).

IV. Developments in canon law

For the purposes of the debate over clerical immunity, one of the most significant developments during the century between Gregory and Becket was the crystallization of the new claims in canon law. Along with the new emphasis on the Church as a temporal reality came the development of new structures to respond to temporal needs, including the systematization of a sophisticated body of law to regulate the Church's internal government in both spiritual and temporal matters.

The eleventh and twelfth centuries saw a renewed interest in law in general and in its ability to govern the relationships between various spheres of society, including not only the law of the institutional Church but also mercantile law, royal law, manorial law, and urban law.⁴² However, canon law was seen as more than simply one of the many systems on offer. All just law was understood to participate in the eternal justice of God, but canon law was considered to have a particularly close relationship to the eternal law: it was based on divine revelation as found in Scripture and magisterial tradition, and therefore was more reliable than laws determined by human endeavor. As such, canon law trumped forms of positive law which originated from merely human wisdom.⁴³ The most significant of the twelfth-century law texts, Gratian's *Decretum*, cites many authorities to argue that "enactments of princes do not stand above ecclesiastical enactments, but are subordinate to them." At the same time, secular law is said to be praiseworthy, especially when it protects the Church, and deserving of obedience so long as it does not conflict with canon law.⁴⁴

⁴² Berman, *Law and Revolution*, esp. 85-119.

⁴³ Tellenbach, *Church, State, and Christian Society*, 24.

⁴⁴ D. X, pt. 1, trans. Augustine Thompson and James Gordley, *The Treatise on Laws: Decretum Dd. 1-20 with the Ordinary Gloss* (Washington, DC: Catholic University of America Press, 1993).

Canon law was not new in the Gregorian period, of course; bishops, councils, and popes had made laws since the time of the apostles, including both “religious” laws about sacramental discipline and practical rules for life in civil society. The very antiquity of the accumulated canons was a large part of their authority. What was new was the interest in collecting them, organizing them, and at times editing them to serve the new ideal of the Church’s temporal autonomy.⁴⁵

The most ambitious of the new compilations was the one completed around 1139 by the Bolognese scholar Gratian, the *Concordia Discordantium Canonum*, better known in shorthand as the *Decretum*. It was so definitive that it put an end to its own genre. Gratian’s work was remarkable for its effort to synthesize the thousands of canons, reconcile their contradictions, and derive from them abstract legal norms. It was already ubiquitous and quasi-official by the time of the Becket dispute twenty years later: the papal chancery presumed its correspondents’ familiarity with it; Alexander III, the pope during Becket’s time, was a respected canonist by profession and wrote a *summa* of Gratian’s work; and Becket himself studied the *Decretum* in exile and drew upon its authorities to argue for the privileges of the clergy. In particular, two areas of law covered by the *Decretum* were directly pertinent to the Becket dispute: the jurisdiction of ecclesiastical and secular courts over clerics, and relatedly, the extent of the Church’s capacity to inflict judicial punishment.

Gratian directly addressed clerical immunity in Causa 11 in the second part of his work. He gives a fictional example in which several clerics sue a fellow cleric in a secular court over a

⁴⁵ David Knowles remarks that during this period of Church history, canon law briefly overtook theology proper as the dominant discipline. Put another way, the ordering of the Church’s temporal life through law became the dominant theological interest of this period. David Knowles, *The Evolution of Medieval Thought* (New York: Vintage Books, 1962); Stanley Chodorow, *Christian Political Theory and Church Politics in the Mid-Twelfth Century: The Ecclesiology of Gratian’s Decretum* (Berkeley: University of California Press, 1972), 3.

property dispute. Gratian then poses a broader question: Should a cleric be tried before a secular judge?⁴⁶

Gratian lists authorities on both sides of the question, including popes, councils, theologians, and even secular lawmakers. The majority prohibit bringing a cleric into a secular court, although there are also a number which assert the legitimate superiority of secular law in secular matters. Gratian then provides a dense summary:

By all these things one understands that action should not be brought against clerics in secular courts, that just as the judges of the Holy Church are administrators of the things of the church, so also no one except secular judges should undertake secular matters. And just as he who makes canons has the power to interpret them, so also should he interpret the secular laws who gives them force and authority. In criminal causes clerics should not be accused except before their bishop. This is what was previously established by law and by the canons, that no cleric should be brought for a criminal cause before a secular judge without the consent of his bishop; if he will not amend his ways, then he should be deposed and delivered over to the court.⁴⁷

Gratian supports clerical immunity by citing various secular laws, including the Theodosian Code and the Capitularies of Charlemagne, but ultimately he bases it on divine authority.⁴⁸ Significantly, he notes the argument that that bishops should be subject to the pope *ex officio* and to the king *ex possessionibus* — the compromise which had quieted the Investiture Contest, and a position for which he cites no less an authority than Augustine — but he denies that this means clerics are subject to the king's courts.⁴⁹ Instead, he identifies clerics as persons

⁴⁶ C. 11, q. 1. The 36 *causae* which form the second volume of Gratian's work have never been translated into English. The Latin text is found in *Corpus Iuris Canonici*, ed. E. Friedberg, 2 vols. (Leipzig, 1879-81). The translations here are original, made with the help of the medieval French translation edited by Leena Löfstedt, *Gratiani Decretum: la traduction en ancien français du Décret de Gratien*, 5 vols. (Helsinki: Societas Scientiarum Fennica, 1992).

⁴⁷ C. 11, q. 1, c. 30.

⁴⁸ Chodorow, *Christian Political Theory*, 220-21.

⁴⁹ C. 11, q. 1, c. 26.

set apart from secular jurisdiction, distinct from “secular persons.”⁵⁰ Clerics are not like ordinary men, who are subject to both sovereignties; the business of the cleric, whether spiritual or temporal, is *de facto* the business of ecclesiastical authority.⁵¹

Gratian distinguishes between criminal and civil cases and acknowledges that the latter have a secular character, since they deal with worldly possessions. Nevertheless, when clerics are involved, the Church is to judge the case regardless of the nature of the litigation, and the prohibition against bringing clerics to a secular court applies equally to each situation. At the same time, Gratian allows for scenarios in each type of case where part or all of the task might be delegated to the secular courts:

Actions against clerics should not be brought before secular judges, either in civil or criminal cases, provided that the case is not a civil one which the bishops do not wish to hear, or a criminal one for which the cleric has been deposed.⁵²

In civil cases, the bishop might waive his right of jurisdiction over the more mundane dealings of his clergy in favor of a secular court. In criminal cases, in which the cleric’s own person was at stake, the secular courts could only acquire jurisdiction if the Church chose to expel the cleric from the canonical clerical state. Gratian does not explicitly describe the circumstances in which a cleric would be removed from the clerical state, but it seems reasonable to infer that he envisions this occurring in the situation described in canon 30 above, where the accused cleric “will not amend his ways” and it is beyond the Church’s power to restrain him.

A closely related question is taken up later in Gratian’s work, the question of judicial punishment. If the clerical hierarchy is primarily responsible for judging and punishing its own members, what form ought this punishment to take? It could not simply mirror the practice of the

⁵⁰ C. 11, q. 1, c. 47: “The pleas of secular persons are called secular in the epistle of St. Clement, as one understands by what follows: ‘The laity, one and another, do those tasks which we have said do not pertain to you.’”

⁵¹ Chodorow, *Christian Political Theory*, 220-21.

⁵² C. 11, q. 1, c. 47.

secular courts, because the canon law prohibited clerics from imposing corporal punishment. Gratian cites the Council of Toledo (675), which stated that those responsible for administering the sacraments could not condemn anyone to a “judgment of blood” such as mutilation or death.⁵³ Also, physical punishment was considered unseemly for the cleric, who stood *in persona Christi*.⁵⁴ The clerical judges were left with two alternatives. One was to eschew corporal punishment altogether and rely on non-sanguinary penalties such as fines or imprisonment, or on ecclesiastical sanctions such as loss of office or of clerical status altogether. The other was to permit a non-clerical authority to prescribe and carry out the sentence, circumventing the objection to inflicting punishment on one *in persona Christi* by first removing the offender from the clerical state. The latter was fraught with complication because it obliged the ecclesiastical government to navigate the relationship between its own authority and that of the lay power intervening on its behalf.

There was a long tradition for regarding coercive punishment as part of the divinely ordained duty of the secular power, often expressed in terms of the biblical metaphor of the two swords.⁵⁵ As noted above, even figures like Paul and Augustine, who were speaking of a not necessarily Christian government, described the main responsibility of secular authority as maintaining temporal peace for both Christians and unbelievers. In the eleventh century, the

⁵³ C. 23, q. 8, c. 30.

⁵⁴ Aquinas later observed that clerics ought not to mete out corporal punishment partly because their purpose is to imitate Christ, who was meek and passive when attacked, and partly because they are reserved for “spiritual welfare,” which is above “corporal slaying.” *Summa theologiae* II-II, q. 64, art. 4, in *Summa theologiae: Complete English Edition in Five Volumes*, trans. Fathers of the English Dominican Province (Notre Dame, IN: Christian Classics, 1981). As recently as canon 985 the 1917 Code of Canon Law, a man who issued a capital sentence as a judge was rendered irregular for holy orders.

⁵⁵ There has been much academic debate over the image of the two swords and its evolving meaning in political theology, especially about the nature of the “spiritual sword” and about whether the Church was considered to possess the “material sword” at any given point. The scholarship is summarized in Hill, *Gilbert Foliot and the Two Swords*, 28-39.

Roman cardinal Peter Damian offered this view, reprising Gelasius's account of the two complementary powers:

The priesthood is defended by the royal protection while the kingship is sustained by the holiness of the priestly office. The king is girded with a sword so that he may go armed against the enemies of the church. The priest devotes himself to vigils of prayer so that he may win God's favor for king and people... The former is established to coerce evil doers and criminals with the punishment of legal sanctions; the latter is ordained for this, to bind some with the zeal of canonical rigor through the keys of the church that he has received and to absolve others through the clemency of the church's compassion.⁵⁶

A century later, John of Salisbury articulated the Gregorian corollary of this principle: the king is "a minister of the priestly power, and one who exercises that side of the sacred offices which seems unworthy of the hands of the priesthood."⁵⁷ Gratian himself cites many authorities to argue the familiar position that the secular power ought to come to the Church's aid when physical force is needed to protect its interests.⁵⁸

Several passages from the *Decretum* seemed to imply that the case of a deposed cleric was one in which the secular power might intervene to accomplish what the Church's priests could not themselves do. A number of canons among those cited by Gratian stated that the deposed cleric should be "delivered over to the court," *traditur curiae*. The most familiar meaning of *curia* was that of a place or court of law, and during the Becket dispute some concluded that this meant the cleric should be handed over to a secular court for physical punishment after his ecclesiastical trial.⁵⁹ However, this was not the unambiguous consensus of

⁵⁶ Peter Damian, Letter to King Henry IV (1065), trans. Tierney, *The Crisis of Church and State*, 38-39.

⁵⁷ John of Salisbury, *Policratus*, IV.3, trans. John Dickinson, *Policratus: The Statesman's Book of John of Salisbury* (New York: Russell, 1963), 9.

⁵⁸ Alfons Stickler concluded that Gratian's terminology distinguishes between secular authorities per se, whom the Church "exhorts," and individual laymen, whom the Church can "order" to act on its behalf. Alfons Stickler, "Magistri Gratiani sententia de potestate ecclesiae in statum," *Apollinaris* 21 (1948), 101.

⁵⁹ Charles Duggan, "The Becket Dispute and the Criminous Clerks," *Bulletin of the Institute of Historical Research* 35 (1962), 8.

the sources which Gratian cited, especially when considered in their original contexts.⁶⁰ In Gratian's own commentary on the sources, *traditur curiae* sometimes includes the idea of consignment to secular justice, he did not directly equate the two. As noted above, Gratian did foresee the possibility of secular authority taking a hand in the punishment of an accused cleric in a situation where "the cleric has been deposed," but the implication of this passage is that this should occur only at the bishop's initiative, and as the exception in the case of an incorrigible offender, not the rule.

In summary, the *Decretum* lent bite to the reformers' bark by providing a substantial body of authorities to support the clerical hierarchy's right to govern legal proceedings involving its own members. Gratian allowed that secular authority might have some role in trial and punishment in certain situations, but not in such a way as to supersede the Church's primary right of jurisdiction over members of the clergy.

V. English precedent for clerical immunity

However vigorously the canons might assert clerical privilege, the Becket conflict occurred in the context of the English legal and political situation, where the precedent for clerical immunity was ambiguous.

⁶⁰ The original meaning of *traditur curiae* in Roman law was that a deposed cleric was no longer exempt from general civic duties and was returned to the state of a *curialis*. The Pseudo-Isidorian forgeries of the ninth century include a canon which states that a cleric who disobeys or conspires against his bishop may be *curiae tradatur*, but the idea of allowing secular power to intrude upon a bishop's domain would have been contrary to that author's motives, and the phrase may have meant simply the bishop's own power to remove the cleric from his office. Gregory VII, whose belief in the Church's jurisdictional autonomy is beyond question, used the term in the context of a deposed cleric being consigned to public servitude. Ivo of Chartres wrote in 1096 of a cleric who was confined in a secular prison as *curiae traditum*, although he strongly disapproved of the situation he was describing. Duggan, "The Becket Dispute and the Criminous Clerks," 10-12.

Anglo-Saxon law had not recognized a fundamental difference between law for the clergy and law for the laity, but some distinction was acknowledged. It was generally undisputed that clergy had a special honored status and deserved particular protection, especially since an unmarried clergyman was in some sense without the protection of tribe or kin.⁶¹ Pastoral manuals, such as Theodore's Penitential in the seventh century, commented that clergy ought to be subject to the judgments of their bishops, but it is not clear whether this meant bishops exclusively, or exactly what sort of judgment was intended.⁶² Practically speaking, as long as there was no exclusively ecclesiastical court system, there was no real separation of jurisdiction; bishops likely had some involvement in cases involving accusations against their clerics, but these took place in the same shire and hundred courts to which the rest of England had recourse.⁶³ As on the Continent, the king made ecclesiastical law regarding clerical discipline; Alfred's late ninth-century laws, for instance, directed a bishop to remove from orders a priest who had committed homicide.⁶⁴

William the Conqueror became king of England in 1066. He did so with papal approval, in light of his stated goal of restoring liberty and proper ecclesiastical governance to the Church in the disorganized country (the irony does not appear to have struck anyone during the later dispute).⁶⁵ William set about putting England's house in order, which entailed among other things establishing a more efficient judicial system. While William was generally supportive of the moral aims of the reform, including opposition to simony and clerical marriage, his administration did not keep pace with Gregorian ideals for clerical privilege in the judicial

⁶¹ Berman, *Law and Revolution*, 65.

⁶² R. H. Helmholz, *The Canon Law and Ecclesiastical Jurisdiction from 597 to the 1640s*, vol. 1 of *The Oxford History of the Laws of England*, ed. John Baker (Oxford: Oxford University Press, 2004), 56.

⁶³ W. L. Warren, *Henry II* (Berkeley: University of California Press, 1973), 462.

⁶⁴ Helmholz, *The Canon Law and Ecclesiastical Jurisdiction*, 36.

⁶⁵ Tellenbach, *The Church in Western Europe*, 199.

forum. William issued an ordinance establishing a separation of jurisdiction between secular and episcopal courts:

I have ordained that the episcopal laws shall be amended, because before my time these were not properly administered in England according to the precepts of the holy canons. Wherefore I order, and by my royal authority I command, that no bishop or archdeacon shall henceforth hold pleas relating to the episcopal laws in the hundred court; nor shall they bring to the judgment of secular men any matter which concerns the rule of souls; but anyone cited under the episcopal laws in respect of any plea of crime shall come to the place which the bishop shall choose and name, and there he shall plead his case, or answer for the crime. He shall not be tried according to the law of the hundred court, but he shall submit to the justice of God and his bishop in accordance with the canons and the episcopal laws. Moreover, if anyone, puffed up with pride, shall refuse to come to the bishop's court, he shall be summoned three times, and if, after this, he shall still fail to appear, he shall be excommunicated; and if the strength and justice of the king and his sheriff shall be needed to carry this into effect, this support will be forthcoming.⁶⁶

The ordinance allocated jurisdiction not based on the status of the individual litigant, but on the nature of the litigation: cases were separated depending on whether they concerned the “episcopal laws” or the king’s laws. Notably, William committed himself to backing up the Church with force if this should be necessary to enforce its judgment — a step that the majority of European kingdoms did not take (although the legal procedures for this cooperation would not be fully worked out until the thirteenth century).⁶⁷

William’s kingship was a theocratic monarchy in which, to quote the contemporary historian Eadmer, “all things spiritual and temporal alike waited upon the nod of the King.”⁶⁸ The papacy’s attempts to regulate ecclesiastical affairs were consistently rebuffed not only by the monarchy but also by the English episcopate, especially Archbishop Lanfranc of Canterbury,

⁶⁶ Ordinance of William I on Church Courts, trans. Helmholz, *The Canon Law and Ecclesiastical Jurisdiction*, 108.

⁶⁷ Helmholz, *The Canon Law and Ecclesiastical Jurisdiction*, 106-11.

⁶⁸ Eadmer, *Historia Novorum in Anglia*, 9, trans. Geoffrey Bosanquet, *Eadmer's History of Recent Events in England* (London: Cresset Press, 1964), 10.

who worked hand in glove with the king. Rome tolerated the situation out of sympathy for William's efforts to restore law and order, as well as out of fear of jeopardizing England's loyalty to the papacy.⁶⁹ Open schism seemed nearer a generation later when Archbishop Anselm, whose conscience was more delicate than those of his predecessors, sided with Rome against the king over the provocative issue of investiture. Happily the king, archbishop, and pope were able to anticipate the compromise at Worms by some fifteen years: in the Concordat of London in 1107, the king renounced investiture, although he still retained considerable indirect control over the election and had the right to receive homage from the chosen candidate.⁷⁰ W. L. Warren comments on the significance of this compromise:

It meant the abandonment of the attempt at a clear separation of clergy and laity: henceforth the line of separation was to be drawn instead between the spiritual and secular aspects of the clerical persona. The sharp distinction between the Church and the World harboured by the revolutionaries of the Gregorian era now dimmed, and the clergy found themselves with dual loyalties to Church and State — loyalties that were demanding but ill-defined.⁷¹

Legal jurisdiction was undoubtedly one of the areas that was as yet ill-defined. Although the Conqueror's ordinance had reserved criminal cases to the secular courts, in practice the treatment of jurisdiction over accused clerics was ambiguous. It was notable that Archbishop Lanfranc had to find a pretext to help William try Bishop Odo of Bayeux for treason — Odo was said to be liable to a secular trial in his capacity as an earl, not as a member of the clergy. A similar case was brought against the bishop of Durham during the reign of the next king, although its outcome is not certain.⁷² The anonymous *Leges Henrici Primi*, from the early twelfth century, states plainly: "The bishops should have jurisdiction of all accusations, whether major

⁶⁹ Warren, *Henry II*, 404-5.

⁷⁰ Tellenbach, *The Church in Western Europe*, 272-73.

⁷¹ Warren, *Henry II*, 412.

⁷² Helmholz, *The Canon Law and Ecclesiastical Jurisdiction*, 107.

or minor, made against those in holy orders.”⁷³ Still, it is not obvious whether this is descriptive or prescriptive, a statement of fact or of ideal.

The English bishops got a taste of *libertas* during the reign of King Stephen (1135-1154), when the unsettled political situation prevented the king from taking much oversight of ecclesiastical affairs and obliged him to make concessions to maintain the bishops’ support. In his 1136 charter at Oxford, Stephen conceded to the bishops a number of liberties, including clerical immunity: “Jurisdiction and authority over ecclesiastical persons and over all clerks and their property, together with the disposal of ecclesiastical estates, shall lie in the hands of the bishops.”⁷⁴

A few years later in 1139, the bishops were outraged when the king imprisoned one of their number, Roger of Salisbury, on charges of treason, without first accusing the bishop in an ecclesiastical court. The bishops convened to conduct Roger’s trial themselves. The king’s representative resorted to the justification Lanfranc had supplied fifty years earlier: he claimed that Roger had not been imprisoned not in his capacity as a cleric but as a royal official. This time the bishops would have none of it. The bishop of Winchester, Henry of Blois, opened the discussion by commenting that the imprisonment of bishops by secular rulers used to be a frequent occurrence, implying that there were different expectations now. He stated that the charges and investigation should have occurred in an ecclesiastical procedure in accordance with canon law, not a secular sentence without trial. The trial ended inconclusively after King Stephen

⁷³ *Leges Henrici Primi*, LVII.9, in *Select Charters, and Other Illustrations of English Constitutional History*, 9th ed., ed. W. Stubbs (Oxford: Oxford University Press, 1921); trans. Warren, *Henry II*, 462.

⁷⁴ Second charter of Stephen (1136), in *English Historical Documents*, 2nd ed., 2 vols., ed. D. C. Douglas and G. W. Greenaway (London: E. Methuen, 1979-1981), 2:429.

appealed to Rome, but the bishops' anger did lasting damage to the king's political position. The climate had changed since the days of William and Lanfranc.⁷⁵

By the time Stephen was succeeded by Henry II in 1154, it was evident that regardless of who had the better argument in theology or canon law, the English bishops had bitten off far more than they could chew by assuming responsibility for all clerical jurisdiction in the country. Their resources were inadequate to deal effectively with the scope of clerical crime. There were many clerics in England, the vast majority of whom were not priests but members of the minor orders. For most of them, there was little to distinguish them from laymen in way of life: many had families to support; the majority were poorly educated and did not possess an ecclesiastical benefice; supervision or discipline by the bishop was infrequent. The ecclesiastical justice system was ineffective and handicapped by the canonical prohibition on corporal punishment.⁷⁶

A Norman cleric, Nicolas of Mont-Rouen, described a conversation he had in 1163 with King Henry II's mother, Empress Matilda, in which they assessed the situation together:

Bishops do ordain clerks indiscriminately, without title to churches, from which it follows that a crowd of ordained men fall into shameful acts through poverty and idleness. Such a one is not afraid to lose his church, because he is assigned to no church. He does not fear penalty, because the Church will protect him. He does not fear the bishop's prison, for the bishop prefers to let him live unpunished than take on himself the trouble of feeding and guarding him.⁷⁷

The chronicler William of Newburgh, writing forty years later, criticized the bishops of this period for their negligence:

The bishops however, while anxious rather to maintain the liberties or rights of the clergy than to correct and root out their vices, suppose that they do God service, and the church also, by defending against established law those

⁷⁵ Edward J. Kealey, *Roger of Salisbury, Viceroy of England* (Berkeley: University of California Press, 1972), 190-200; Hill, *Gilbert Foliot and the Two Swords*, 73-77.

⁷⁶ Warren, *Henry II*, 460-61.

⁷⁷ *The Correspondence of Thomas Becket, Archbishop of Canterbury*, ed. and trans. Anne Duggan, 2 vols. (Oxford: Clarendon Press, 2000), no. 41, p. 167 (hereafter cited as *CTB*).

abandoned clergy, whom they either refuse or neglect to restrain, as their office enjoins, by the vigour of canonical censure. Hence the clergy, who, called into the inheritance of the Lord, ought to shine on earth, in their lives and conversation, like stars placed in the firmament of heaven, yet take licence and liberty to do what they please with impunity.⁷⁸

Even when a cleric was brought to judgment, his ecclesiastical trial might well be perceived as toothless by comparison with its secular counterpart. The ecclesiastical courts avoided physical methods of obtaining proof, such as ordeal or battle, and most often fell back on compurgation, in which the accused was required to prove his innocence by supporting his own declarations with the oaths of others who vouched for his credibility.⁷⁹

Clerical crime was by no means the only issue in need of housekeeping when Henry II became king in 1154. In the aftermath of the civil wars during Stephen's reign, violent crime was in fact a widespread problem at all levels of society, not just among the clerical class. Nevertheless, the situation was still deplorable, and the idea of atrocities committed by members of the clergy was, as it is today, particularly scandalous.

VI. Becket's arguments for clerical privilege

At this point, the stage was set for the conflict between Henry II and Thomas Becket. It was not like the debate between Gregory VII and Emperor Henry IV a century earlier, when both sides supported their positions with passionate theological arguments. In this case the theology

⁷⁸ William of Newburgh, *Historia Anglica*, IV.2, trans. Joseph Stevenson, *The History of William of Newburgh: The Chronicles of Robert de Monte* (London: Seeleys, 1856), 466.

⁷⁹ R. H. Helmholz, *Canon Law and the Law of England* (London: Hambleton Press, 1987), 136-38. Helmholz argues that compurgation was less of a farce than it might appear. Certain restrictions were designed to weed out those who seemed most unlikely to pass it. Also, the acquittal rates were not significantly different than those of trials conducted with traditional methods of proof in the secular courts. Nevertheless, it is easy to understand how such a process could have appeared scandalously lenient in comparison with the severe practices to which a layman was subject in the secular courts.

was one-sided, supplied almost exclusively by Becket, and none of it was original to him. However, the dispute over clerical immunity was a playing out of the implications of the new vision of the clergy's position in society: the Gregorian ideal of a self-governing clerical hierarchy had to come to terms with the realities of existing in a society whose ruler had a legitimate duty to protect his realm.⁸⁰

Henry II was crowned king of England in 1154, but wars in his continental lands kept him away from England for much of the first decade of his reign. During this period, several incidents exposed the drawbacks of regarding the clergy as self-policing and unaccountable to secular authority.

Late in Stephen's reign, a cleric of the diocese of York, the archdeacon Osbert, was charged with murdering his own archbishop. Osbert claimed that as a cleric, he could only be tried by the Church. Stephen disagreed on account of the magnitude of the crime, but when Henry became king he consented with misgivings to allow the ecclesiastical courts to handle the case. The results cast no credit on the Church. The case dragged on for a year without either proving or disproving Osbert's guilt, and when Osbert was at last ordered to support his innocence by compurgation, he promptly appealed to Rome and the entire process was derailed (a situation which is unfortunately familiar in modern canon law as well). The ecclesiastical courts had not yet developed procedures that would permit the effective administration of justice

⁸⁰ Becket's story is exceptional in medieval historiography for the extensive written record which has survived. Dozens of biographies of Becket and chronicles of the dispute were written in the aftermath of his murder. Particularly significant are the two *Lives* by William FitzStephen and Herbert of Bosham, both of whom were Becket's constant companions and eyewitnesses to the main events of the dispute. Others include the account of Roger of Poitigny, believed to have been Becket's servant in exile, and the anonymous *Summa Causae inter Regem et Thomam*, a chronicle of the early years of the conflict. The Latin originals of these and other documents related to the dispute are found in *Materials for the History of Thomas Becket, Archbishop of Canterbury*, ed. J. C. Robinson, 7 vols. (London: Longman, 1875-1885) (hereafter cited as *MTB*). Michael Staunton has translated a number of excerpts from the various accounts in two works: *The Lives of Thomas Becket* (Manchester: Manchester University Press, 2001) and *Thomas Becket and His Biographers* (Woodbridge: Boydell, 2006). The translations below from the medieval accounts are mostly from these two compilations.

in accordance with the principles of canon law. Even the then-Archbishop of Canterbury, Theobald, blamed the miscarriage of justice on “the subtlety of the law and the canons.”⁸¹

In addition to Osbert’s case, the trial of an alleged blackmailer in 1158 was frustrated by the invocation of clerical privilege. The king objected, but he was called away from the country before he could organize a secular trial.⁸² The following year a counterfeiter in Normandy was released from prison on account of his clerical status, although he still had to forfeit his possessions and go into exile.⁸³

Henry settled his affairs on the Continent and returned to England in 1163. Restoring effective royal administration, including reforming the judicial system, was now one of his chief priorities. In the matter of clerical crime, he no doubt anticipated the assistance of Thomas Becket, lately his chancellor and now the newly appointed Archbishop of Canterbury.

The king heard complaints about the ineffectiveness of ecclesiastical judgments, including the allegation that over a hundred murders had been committed by clerics since his coronation.⁸⁴ When the king attempted to prosecute three of the worst crimes, Becket quickly intervened to retrieve the accused clerics for the Church. Becket was not insensitive to the fact that the ecclesiastical courts were perceived as scandalously lenient, and he felt the need to impose a less toothless punishment than the loss of clerical status.⁸⁵ However, he proceeded to antagonize both the king and his fellow bishops by imposing a sentence of banishment on one

⁸¹ Warren, *Henry II*, 464.

⁸² Charles Duggan, “Bishop John and Archdeacon Richard of Poitiers: Their Roles in the Becket Dispute and Its Aftermath,” in *Thomas Becket: Actes du Colloque international de Sédieres*, 1973, ed. R. Foreville (Paris: Beauchesne, 1975), 77.

⁸³ Carolyn Polling Schriber, “The Decretal *In Litteris* and the Case of Henry the Counterfeiter,” *Comitatus: A Journal of Medieval and Renaissance Studies* 19/1 (1988), 46-47.

⁸⁴ Warren, *Henry II*, 465.

⁸⁵ Nicholas of Mont-Rouen, the same messenger who spoke with Empress Matilda about the bishops’ scandalous neglect of clerical crime, urged Becket at this time: “If you love the Church’s liberty for God’s sake, show by words and deeds that these practices displease you.” Becket did later write to his fellow bishops from exile, reminding them of their obligation to combat clerical crime. *CTB*, no. 41, p. 169; *CTB*, no. 95, p. 413.

cleric and branding on another, both of which overstepped royal prerogatives and the latter of which affronted the canonical prohibition on corporal punishment.⁸⁶ In the months that followed, there were several more clashes between the king and the new archbishop over areas in which Becket had contravened the law of the land.⁸⁷

The question of jurisdiction over clerics was finally raised in the open at a council in Westminster in October 1163. Henry told the eleven English bishops that clerics convicted of major crimes ought to be “deprived of the protection of the Church” and turned over to royal officers for corporal punishment. He argued that physical punishment was more likely to deter future crime, and that its severity was appropriate since the clergy ought to be held to a higher standard of moral conduct. Unexpectedly, he also presented an argument from canon law: his advisers cited canons from Gratian’s *Decretum* which included the concept of *traditio curiae*, interpreting these to mean that the accused cleric was to be handed over to the secular court for physical punishment after his ecclesiastical trial. Henry’s proposal was an abrupt departure from the status quo, but it was in some ways a limited one: the king did not demand that the cleric be tried in a secular court, but only that the secular court should administer the punishment after the Church had found fault; nor was he claiming jurisdiction over every offense, but only over major crimes which presumably involved a more dangerous suspect. The proposal resembled the process outlined in the *Corpus Juris Civilis*, where a bishop could judge a cleric guilty, deprive him of clerical orders, and return him to the regular court for sentence.⁸⁸

⁸⁶ William FitzStephen, *MTB* III.43-46, trans. Staunton, *The Lives of Thomas Becket*, 79; Roger of Poitigny, *MTB* IV.22-25, trans. Staunton, *The Lives of Thomas Becket*, 77.

⁸⁷ These included Becket’s excommunication of one of the king’s vassals, William of Eynsford, without regard for the king’s traditional veto right; and Becket’s provocative refusal to pay the “sheriffs’ aid,” a tax formerly collected by the sheriffs which Henry proposed to be paid directly to the royal exchequer. Warren, *Henry II*, 457-59.

⁸⁸ Warren, *Henry II*, 466-67.

Becket delivered a lengthy rejoinder to the king. According to one eyewitness, he argued on theological grounds that the king had no right to assert jurisdiction over the clergy. He described two distinct spheres of legitimate authority within the Church:

My lord king, sacrosanct Church, mother of all kings and priests, has two kings, two laws, two jurisdictions and two penalties. Two kings, Christ the heavenly king and the earthly king; two laws, human and divine; two jurisdictions, priestly and lay; and two means of coercion, spiritual and corporal.⁸⁹

With regards to governance of the clergy, the two spheres do not overlap: “Kings have no jurisdiction in these things.” The clergy are set apart entirely for their own law:

Clerics, by reason of order and office have Christ alone as king... And since under their own king, the King of heaven, not worldly kings, they are ruled by their own law, and if they transgress, are penalized by their own law, which has its own penalty.⁹⁰

As for the suggestion that clerics be subjected to corporal punishment, Becket appealed to the dignity of the priesthood; he protested that the body which performs a sacred office at the altar should not be disfigured or humiliated, “lest in man the image of God should be deformed.”⁹¹ He denounced the combination of degradation from orders and corporal punishment as a kind of double jeopardy, saying that “God does not judge twice in the same matter.”⁹² He

⁸⁹ Herbert of Bosham, *MTB* III.268, trans. Staunton, *Thomas Becket and His Biographers*, 104. Herbert says that he is not reproducing Becket’s speech verbatim but that he has captured its substance. Some of the other contemporary biographies rather unconvincingly portray Becket delivering a full canonical argument with extensive quotations from the *Decretum*, but in the case of Herbert’s account, it is much more credible that Becket could have given something like this rebuttal off the cuff. As Staunton notes, another contemporary source records that Becket gave a sermon before the king several months earlier in which he discussed the distinction between the royal and priestly “kingdoms.”

⁹⁰ Herbert of Bosham, *MTB* III.268, trans. Staunton, *Thomas Becket and His Biographers*, 104.

⁹¹ Warren, *Henry II*, 467.

⁹² The objection to double punishment was unusual, but Becket was not the first person to make the argument in his day. It originated from a phrase in Jerome’s commentary on the prophet Nahum. Duggan, “The Becket Dispute and the Criminous Clerks,” 15-18.

argued that the *traditio curiae* texts referred to degradation from clerical orders, not punishment by a secular court of law.⁹³

Henry made no attempt to refute this manifesto on theological or canonical grounds. He fell back on an appeal to the fact that secular jurisdiction over clerics had been the norm for much of England's recent history. He requested each bishop to swear a general oath promising to uphold the "customs" of the past. Led by Becket, the bishops consented to take the oath in conditional language only, with the caveat that they would observe the customs "saving their order."⁹⁴

Henry, having failed to obtain a general promise from the bishops, resorted to specifying the prerogatives he wished to secure. In the weeks following Westminster, Becket was persuaded by a papal mission and his fellow bishops to offer a personal pledge to the king that he would obey the customs of the realm, without the provocative clause about his order. The king, not satisfied, summoned the bishops to a council at Clarendon in January 1164.⁹⁵ The bishops arrived apparently under the impression that they would be called upon to echo Becket's expression of loyalty in a general form. To their dismay, they found themselves confronted with a demand that they take an unconditional oath to observe a carefully defined list of "customs," the Constitutions of Clarendon.

The list Henry presented at Clarendon has been preserved in a form which indicates which of the sixteen propositions were condemned or tolerated by Pope Alexander III. They outlined various prerogatives of the king in areas of intersection between ecclesiastical and royal government. R. H. Helmholz categorizes the canons by three objectives: defining jurisdiction in

⁹³ Warren, *Henry II*, 466.

⁹⁴ Warren, *Henry II*, 469.

⁹⁵ Roger of Poitigny, *MTB* IV.27-37, trans. Staunton, *The Lives of Thomas Becket*, 87. The Clarendon palace is now in ruins, but a memorial erected there in 1844 reads: "The spirit awakened within these walls ceased not until it had vindicated the authority of the laws and accomplished the Reformation of the Church of England." Tom Beaumont James and Christopher Gerrard, *Clarendon: Landscape of Kings* (Bollington: Windgather Press, 2007), xvii.

matters such as advowson, oaths, and clerical crime; regulating legal procedures used in the ecclesiastical courts; and asserting the king's rights regarding episcopal actions such as elections, travel, and excommunications.⁹⁶ Some of them, such as a canon about homage to the king by a newly appointed bishop, merely confirmed the status quo, but others, such as a prohibition on appeals to Rome without the king's consent, meant a contravention of canon law that had not been hitherto required in the bishops' lifetimes. In particular, canon 3 articulated a new policy for jurisdiction over clerics:

Clerks charged and accused of any offence, when summoned by the king's justice, shall come to the king's court to answer there concerning what seems to the king's court ought to be answered there, and in the ecclesiastical court for what seems ought to be answered there, but in such a way that the justice of the king sends men into the court of Holy Church to see in what way it is tried there. And if the clerk should be convicted or confesses, the Church ought no longer to protect him.⁹⁷

The wording of the canon is notoriously vague (“what seems ought to be answered there”) and lacks the precision typical of Henry's laws. The most commonly accepted interpretation is the following: every cleric accused of a crime was to be formally accused before a royal justice and then sent to the Church for trial, where the proceedings would occur in the presence of a royal official; and if the accused were found guilty, he was to be returned immediately to the royal justice for a sentence of corporal punishment.⁹⁸

Certain elements of this scenario were palatable from the point of view of canon law: the ecclesiastical court retained the trial, there was no mention of the controversial *traditio curiae*; the Church was exonerated of double jeopardy and of blood punishment insofar as it had no involvement in the final sentence. In fact, if the law had envisioned this as a procedure to be

⁹⁶ Constitutions of Clarendon, *MTB* I.18-33, trans. Staunton, *The Lives of Thomas Becket*, 91-96; Helmholz, *The Canon Law and Ecclesiastical Jurisdiction*, 115-16.

⁹⁷ Constitutions of Clarendon, c. 3, trans. Staunton, *The Lives of Thomas Becket*, 93.

⁹⁸ Duggan, “The Becket Dispute and the Criminous Clerks,” 3.

followed in exceptional cases when the Church found itself unable to restrain a particularly contumacious offender, this would have corresponded to the approach described in Gratian's *Decretum*. However, if the king intended this to be the *de facto* manner of proceeding, that the ecclesiastical trial was to take place under the oversight of his own officials, and that his court would be able to issue a sentence of blood punishment in every case — and considered in light of the rest of the document, this interpretation is the more likely — it was clearly at odds with the letter and the spirit of canon law.⁹⁹

Becket and the rest of the bishops were appalled by the canons. While canon 3 represented the issue which had sparked the situation, many of the other canons struck at the same root — the question of whether the Church was answerable to any secular power for the regulation of its own affairs — and were objectionable to the bishops for that reason. Even those among them who were sympathetic to the king's concerns on specific issues had good reason to hesitate before swearing an unconditional oath to a number of propositions in direct contradiction with canon law, whose rigid specificity left little room for further negotiation.¹⁰⁰

The bishops deliberated for days, and how they made up their minds is not clear. Gilbert Foliot, the bishop of London, provided the account written soonest after the event, and he described all the bishops standing united against the Constitutions until Becket suddenly capitulated and announced that he would perjure himself.¹⁰¹ Some of Becket's biographers thought that he had yielded to threats of imprisonment or death. Becket did eventually agree, without explaining himself or consulting the other bishops, to take the oath, and to accept a

⁹⁹ Warren, *Henry II*, 481; Duggan, "The Becket Dispute and the Criminous Clerks," 27.

¹⁰⁰ Warren, *Henry II*, 477, 482. Several contemporaries, including Henry's mother Matilda (*CTB*, no. 41, p. 165), commented that Henry had made a major tactical mistake in committing the canons to writing — the precision of the laws now precluded the negotiated compromises which had concluded previous disputes between kings and prelates. Warren notes that Henry "had a weakness for defining his rights" at this early point in his reign, for just a few months earlier Henry made a similar diplomatic error in demanding an unprecedented written agreement from his Welsh and Scottish vassals.

¹⁰¹ *CTB*, no. 109, p. 509.

chirograph of the document, signifying his assent. Whatever his decision was, it was one for which he immediately professed remorse. Immediately after leaving Clarendon he repudiated his oath, donned penitential garb, and abstained from celebrating Mass; and he certainly did not slacken his opposition to the king's position on clerical crime.¹⁰²

Within the next nine months, Becket's relations with the king deteriorated so far that he was forced into exile. Henry brought a spurious accusation against Becket for embezzlement, apparently intending to inflict the maximum humiliation by involving him in the very sort of secular trial against which he had taken his original stand.¹⁰³ Becket was given no opportunity for a proper legal defense, and he left the trial before hearing his sentence, denying the capacity of the king's barons to pass judgment on him as a bishop: "I am your father, while you are nobles of the palace, lay potentates, secular persons. I will not hear your judgment."¹⁰⁴ Becket fled to France the next day, beginning six years of exile marked by diplomatic fencing among the king, the archbishop, and the papal curia. Becket would carry on the dispute not in person but in his letters to both friends and enemies.

VII. Becket's elaboration of his position in his correspondence

During his exile in France, Becket had leisure to elaborate on his ideological position by studying theology and especially canon law.¹⁰⁵ Becket's correspondence presents a valuable contemporary record of his own views, unlike the later hagiographies heavily influenced by reverence for him as a martyr. His letters provide further context for his stand on the question of

¹⁰² Herbert of Bosham, *MTB* III.289-92, trans. Staunton, *The Lives of Thomas Becket*, 97-99.

¹⁰³ Warren, *Henry II*, 485.

¹⁰⁴ William FitzStephen, *MTB* III.68, trans. Staunton, *The Lives of Thomas Becket*, 114.

¹⁰⁵ This was a cause of distress to his friend John of Salisbury, who reproached Becket for spending time in legal study rather than prayer: "Who ever rises contrite from the study of civil or even canon law?" *CTB*, no. 42, p. 173.

clerical immunity and similar clerical privileges. Even if clerical immunity meant a departure from English custom, Becket considered it to be an accurate reflection of the supremacy of ecclesiastical power, whose ministers stood outside the purview of secular authority. Their immunity was not merely a fitting state of affairs but part of the Church's essence, the fruit of Christ's passion.

Notably, one argument that Becket did *not* seriously attempt was an appeal to tradition for clerical immunity. On the one hand, early in the conflict, he certainly portrayed the situation as an unprecedented, even apocalyptic assault on the English church. Writing to Pope Alexander immediately after the tense scene at Westminster in October 1163, Becket painted a picture of descending chaos and storm. He wrote that “neither the decrees of the holy fathers nor the laws of the canons, whose very name is detested among us, can now protect even the clergy, who have been exempt hitherto from their jurisdiction by a special privilege” (apparently a reference to the concession in King Stephen's 1136 charter).¹⁰⁶ In an accompanying letter to a member of the papal court, he wrote:

The liberty of Holy Church is being attacked here in so many ways that we can scarcely bear to see or hear them. Every day new things come forward and demands unheard-of in previous ages are made. The Law is silenced, and the rule of the canons is denied to the fellowship of the Lord; clergy are subjected to new laws and tossed about at the pleasure of the lay power.¹⁰⁷

Becket evidently believed Henry to have a particular vendetta against ecclesiastical liberty; in all his letters preserved over the six years of his exile, there are few that lack a reference to the king as a roaring lion seeking to subjugate the Church.

However, as seen from the English legal history traced above, absolute clerical immunity did not have precedent in England farther back than a few decades, and Becket implicitly

¹⁰⁶ *CTB*, no. 12, p. 31.

¹⁰⁷ *CTB*, no. 14, p. 37.

conceded this by declining to argue to the contrary. At no point in the course of the debate did Becket or his supporters attempt to prove that any specific tenet in the Constitutions of Clarendon contradicted the “ancient customs of the realm.”¹⁰⁸

Instead, like his predecessors in the Gregorian movement, Becket characterized his position not as restoring a previous golden age of liberty, but as working toward a new just ordering of society. He and his friends recalled the saying of Gratian, who was in turn quoting Augustine: “The Lord said in the Gospel, ‘I am the Truth.’ He did not say, ‘I am custom.’ And so, when truth has become manifest, let custom yield to truth.”¹⁰⁹ In exile, Becket shifted from protesting that the royal demands were unprecedented to denouncing them as longstanding but nonetheless evil abuses. He wrote to Empress Matilda about the Constitutions of Clarendon: “If former kings sought them, they ought not to have sought them.”¹¹⁰ To Pope Alexander, he described the Constitutions as “customs, or rather perversions, which are not only opposed to the canons and the laws, but wholly inimical to the Gospel of Christ.”¹¹¹ Finally, he warned the king himself: “The Lord says, ‘Keep my laws’; and again, he declares through the Prophet, ‘Woe to them who make unjust laws and set down injustices in writing to oppress the poor in judgment and deprive God’s humble people of their right.’”¹¹²

Becket’s fullest statement on his ideal of “right order in the world,” in Gerd Tellenbach’s phrase, is found in three letters addressed to the king in the summer of 1166. Becket explained his motivation for these letters as fatherly solicitude for the correction of an erring son. In them he describes his view of the clergy’s place in Christian society.

¹⁰⁸ Warren, *Henry II*, 463 n. 4.

¹⁰⁹ Gratian, D. VIII, c. 6; quoting Augustine, *De baptismo*, III.6 (9). The canon was recalled in this context by the biographers FitzStephen (*MTB* III.47) and Herbert (*MTB* III.280). Gregory VII made the same point while arguing against the long precedent of lay investiture. Berman, *Law and Revolution*, 258; Schatz, *Papal Primacy*, 86.

¹¹⁰ *CTB*, no. 40, p. 157.

¹¹¹ *CTB*, no. 115, p. 557.

¹¹² *CTB*, no. 74, pp. 295-97.

Becket's position on the two powers is Gregory VII's: "It is certain that kings receive their power from the Church, and the Church receives hers not from them but from Christ." The Church is composed of "the clergy and the people." Clerics have authority to "conduct ecclesiastical affairs so that they may direct the whole to the salvation of souls," while secular princes "have the ability to conduct secular affairs, that they may bring the whole to the peace and unity of the Church." Since secular rulers derive their authority from the Church, they have no power, among other things, to "draw clergy to secular judgments."¹¹³

Becket described the king's responsibility as maintaining peace and unity; but clearly he did not consider clerics part of this concern, as he expressed in his third and most severe letter to Henry. In this letter, Becket was particularly dependent on Gratian for his authorities.¹¹⁴ He recalled the famous account of the two powers from Gelasius, although he omitted the qualification that the priesthood's supremacy relates to sacramental ministry.¹¹⁵ He cited additional excerpts attributed to Gelasius: "Priests should never be judged except by the Church, nor is it for human laws to lay a sentence on such men;"¹¹⁶ and, "in fact it was always the law that judgments relating to priests came from priestly council. For no matter what kind of priests they are, even if they should fall into human error, it is never thought that they can or should be smitten by the secular power, as long as they do not go beyond the bounds of the faith."¹¹⁷ He

¹¹³ *CTB*, no. 74, p. 297.

¹¹⁴ In addition to Becket's reliance upon Gratian's work in this letter, one of the earliest biographies of Becket — the one composed by William of Canterbury in 1172-74 — gives a defense of clerical immunity which is little more than a condensed version of Gratian's *Causa 11* (the one discussing jurisdiction over clerics), supplemented by a *summa* of the *Decretum* written by the Bolognese monk Rufinus (later Pope Alexander III). William of Canterbury presents the composition as Becket's oral argument at Clarendon, but the text corresponds to the sources so exactly that it almost certainly was composed with them at hand. It may well represent the fruit of Becket's studies in exile. Charles Duggan, "The Reception of Canon Law in England in the Later-Twelfth Century," in *Proceedings of the Second International Congress of Medieval Canon Law*, eds. S. Kuttner and J. J. Ryan (Vatican City, 1965), 359-64, with the two texts shown side by side at 378-82.

¹¹⁵ *CTB*, no. 82, p. 339. Becket was not citing Gelasius directly, but Gregory VII's selective paraphrase of the "two powers" quote, which appears in the *Decretum* at D. 96, c. 10.

¹¹⁶ *CTB*, no. 82, p. 337; *Decretum*, D. 96, c. 12.

¹¹⁷ *CTB*, no. 82, p. 331; slightly adapting *Decretum*, D. 96, c. 15.

recalled the anecdote related of Constantine, who said that a cleric was “reserved to the judgment of God alone” and “cannot be judged by anyone” — “meaning,” Becket added, “a secular judge.”¹¹⁸ He observed that it was unfitting to pass judgment on priests not only because of their roles as the fathers, teachers, and guides of secular authorities, but because they particularly represent the *persona Christi*.¹¹⁹ Becket nowhere addressed the possibility that members of the clergy might themselves pose a danger against which the Church might require the protection of secular power.

The firmness of Becket’s position can be attributed in part to the fact that for him, as for other reformers, the temporal autonomy of the Church was not merely a congenial state of affairs. The *libertas Ecclesiae* was essential to the Church, part of the patrimony of Christ’s redemption. Not only did Becket remind the king that “Christ founded the Church and purchased her freedom with his blood,” but he wrote also to Empress Matilda that the Passion obtained the “privileges and dignities” of the Church.¹²⁰ He told a friend that “the case which [the king] conducts against us is between him and God, because we seek nothing more from him than what the eternal God left to his Church as an everlasting testament, when he took flesh for her sake.”¹²¹ To his fellow bishops, he described the *libertas Ecclesiae* as “the soul of the Church,” “without which the Church can neither live nor have strength.”¹²² He saw a close connection between Christ’s passion on the cross and the present struggle: he exhorted the bishops, “Let us die with him; let us lay down our lives to liberate his Church from the yoke of slavery and the affliction

¹¹⁸ *CTB*, no. 82, p. 333; *Decretum*, C. 12, q. 1, c. 15.

¹¹⁹ *CTB*, no. 82, p. 335.

¹²⁰ *CTB*, no. 74, p. 297; *CTB*, no. 40, p. 157.

¹²¹ *CTB*, no. 151, p. 713.

¹²² *CTB*, no. 95, p. 393.

of the oppressor — the Church which he founded, whose freedom he bought with his own Blood.”¹²³

Before moving on from Becket’s own expressions of his views, it is revealing to compare his position to the opinions of his contemporaries in the ecclesiastical world. Becket has been portrayed as taking a radical position on the question of clerical immunity in particular and of ecclesiastical liberty in general, of regressing to “pure Gregorianism” and ignoring a century of development and nuance since the bald assertions of the *Dictatus papae*. Certainly Becket frequently portrayed himself as the lone defender of truth *contra mundum*. In fact, Becket’s theology was no more extreme than that of other prominent churchmen of his day; it was his inflexibility in its practical application that alienated him from his contemporaries.

Clerical immunity itself was widely supported by the English hierarchy. As noted above, it had been the accepted status quo for thirty years before Becket became archbishop. All the English bishops had resisted the king’s demands at Westminster, and again at Clarendon before Becket ordered them to follow his own capitulation. In addition, they remained united against further restrictions on ecclesiastical government which the king attempted to impose in 1169.¹²⁴ Pope Alexander considered several propositions of the Constitutions of Clarendon to be at least tolerable, but the one relating to jurisdiction over clerics he specifically condemned.¹²⁵

As for the underlying ideology of ecclesiastical autonomy, Alexander, who was in general tactful and diplomatic, did not scruple to write to Henry in 1166:

¹²³ *CTB*, no. 95, pp. 389-91. Interestingly, Becket’s language was reiterated as recently as Vatican II’s Declaration on Religious Freedom: “The Church should enjoy that full measure of freedom which her care for the salvation of men requires. This is a sacred freedom, because the only-begotten Son endowed with it the Church which He purchased with His blood. Indeed it is so much the property of the Church that to act against it is to act against the will of God.” Second Vatican Council, Declaration on Religious Freedom *Dignitas humanae* (December 7, 1965), §13, at www.vatican.va (last accessed on September 2, 2015).

¹²⁴ Warren, *Henry II*, 499.

¹²⁵ Staunton, *The Lives of Thomas Becket*, 93.

As the clergy are distinguished from the laity in manner of life and dress, so also is clerical jurisdiction wholly distinct from lay jurisdiction. Wherefore if you improperly subvert this ordering of society, and if, usurping to yourself the powers which belong to Jesus Christ, you establish new rules oppressive to the churches and the poor in Christ at your pleasure, introducing, even, those customs which you call ancestral, you yourself will, at the unescapable last judgment, be undoubtedly judged in like manner... It is not only decent for you but also expedient not to confound Church and State.¹²⁶

The ablest spokesman of the conservative tendency among the English episcopate was the bishop of London, Gilbert Foliot, a scholar and canonist who became Becket's ecclesiastical nemesis during his six years of exile. Foliot rebuked Becket in his powerful letter *Multiplicem nobis*, where he stated the theological case for the secular power having a legitimate stake in the Church's temporal interests. He pointed out that not every privilege of the Church derives from divine law or the fruits of the Redemption, but that "by human law the Church possesses many things which have been bestowed upon her by the grant of men alone," and that the clergy are subject to the human rulers who are responsible for human law.¹²⁷ His articulation of the Gelasian "two powers," unlike Becket's, does justice to the parity expressed in the original:

Therefore, since there is a twin power from God, one sacerdotal, the other royal, they confirm by the authority of the fathers that each takes precedence of the other according to its nature, and can be judged by the other according to its nature.¹²⁸

If anyone could be expected to support the king's right to judge a priest in temporal matters, it seems that it would be Foliot — but even Foliot upheld clerical immunity. At the height of the tension between king and episcopate in 1169, Foliot wrote to the king, reprimanding him for having apprehended two clerics and tactfully insisting that they be turned

¹²⁶ *MTB* IV.553-54; trans. Warren, *Henry II*, 527.

¹²⁷ *CTB*, no. 109, p. 519.

¹²⁸ *CTB*, no. 109, p. 521.

over to the Church for trial.¹²⁹ The fact that a prelate as erudite and articulate as Foliot (and one who personally disliked Becket) agreed with Becket on the issue for which he had taken his original stand, implies the breadth of its acceptance among the English clergy.

Where Becket actually diverged from his fellow bishops, and where he drew their particular criticism, was his failure to adopt the attitude of tactful compromise and restraint which had characterized his predecessors' relationships with previous kings. Becket lacked a spirit of long-sighted forbearance and the recognition that ideals must sometimes give way in practice, an attitude which had been implicit in the English compromise over investiture and later in the Concordat of Worms. By one account, Becket told the bishops at Westminster that there was no need to seek a compromise with the king, because Christ would come to the aid of his bride; he upbraided them for wishing to "make allowance for the evil of these times."¹³⁰ On the other hand, Becket's fellow bishop Arnulf of Lisieux urged him not to wrangle with the king over legal details and reminded Becket that there was no shame in promising reverence and obedience to a legitimate king.¹³¹ Gilbert Foliot believed that the battle of wills at Clarendon could have been avoided; he argued that Henry was not absolutely opposed to negotiation over the prerogatives he claimed and that a tactful approach could have placated him without defying him outright.¹³² Foliot reminded Becket that longstanding customs could not be done away with at a blow and recalled previous bishops who secured concessions for the Church by patience and diplomacy: "These men would have achieved little or nothing if they had rushed to take up weapons."¹³³ As the nineteenth-century historian Frederic William Maitland said of the English

¹²⁹ *The Letters and Charters of Gilbert Foliot*, ed. A. Morey and C. N. L. Brooke (Cambridge: Cambridge University Press, 1967), nos. 169 and 197; Duggan, "Bishop John and Archdeacon Richard of Poitiers," 77.

¹³⁰ *Summa Causae Inter Regem et Thomam*, MTB IV.203, trans. Staunton, *The Lives of Thomas Becket*, 81.

¹³¹ *CTB*, no. 45, p. 199.

¹³² *CTB*, no. 109, p. 535.

¹³³ *CTB*, no. 109, p. 529.

bishops: “Popes, and popes who were no weaklings, had taught them by precept and example that when we are dealing with temporal power we may temporise.”¹³⁴

In summary, Becket viewed Christian society as divided into two spheres of jurisdiction, with the clergy falling unequivocally under their own temporal governance as an extension of the liberty gained for the Church by Christ’s passion. Many of his contemporaries shared his ideal of a self-policing clerical class, but Becket differed from them in his rejection of the attitude of pragmatic compromise which had achieved earlier victories for ecclesiastical autonomy.

VIII. Resolution of clerical immunity in England

After Becket’s death, the dispute over clerical immunity was resolved in favor of the Church’s right to self-governance over clerics, but with compromises that implicitly admitted the inevitability of some role for secular authority in a matter which concerned the public good.

The circumstances leading up to Becket’s murder had almost nothing to do with the issues surrounding clerical immunity, which in fact receded into the background during the last few years of the controversy. When the king and the archbishop were at last formally reconciled in the summer of 1170, they did not even attempt to plaster over their original disagreement — the Constitutions of Clarendon were passed over in complete silence.¹³⁵ A few months later, policy questions were temporarily forgotten in the international horror over the murder of the archbishop.

Clerical immunity was not discussed at the first and largely symbolic meeting between the king and the papal legates at Avranches in May 1172. The legates prescribed acts of

¹³⁴ Frederic William Maitland, “Church, State, and Decretals,” in *Roman Canon Law in the Church of England: Six Essays by Frederic William Maitland* (1898; reprint ed. New York: Burt Franklin, 1968), 57.

¹³⁵ Warren, *Henry II*, 506.

repentance for the king and made provisions for restitution to those who had suffered on Becket's behalf. The only item of discussion directly related to the Constitutions was that the king agreed to not prohibit appeals to Rome, although he could still require security from anyone whose appeal appeared detrimental to royal interests. Significantly, Henry was not made to repudiate Clarendon himself before being reconciled with the Church; he was only asked to release the bishops from their oath. The open-ended nature of the truce implied that the remaining issues were to be worked out in further negotiations, as the matter of appeals had been. Evidently Pope Alexander did not mean to stand inflexibly on principle.¹³⁶

The specific provisions of Clarendon were addressed in the second round of negotiations in 1175-1176, where clerical immunity was discussed along with other clerical privileges. The king agreed to consign jurisdiction over clerics to the ecclesiastical courts. However, the pope agreed to an exception with regards to offenses committed against the forest law, an area of great importance to the king.¹³⁷ The king conceded in principle that he did not have absolute right over the Church's temporal interests in his realm, and particularly over the person of the cleric; however, the forest law exception granted him a good deal of the jurisdiction he had wanted anyway.¹³⁸

For the next phase of English history, the Church's judicial autonomy regarding the clergy resembled Becket's ideal. When a cleric was arrested for a felonious offense, he would be confined in the bishop's prison, the Church would formally "claim" him before the king's justices, and the ecclesiastical court would proceed to its own trial, which usually consisted of

¹³⁶ Warren, *Henry II*, 531.

¹³⁷ Charles Duggan, "The Significance of the Becket Dispute in the History of the English Church," *Ampleforth Journal* 75 (1970), 373; Warren, *Henry II*, 390-95. The forest law governed large tracts of England, possibly as much as a third, over which the king had special prerogatives. Henry enforced it meticulously, not only on account of his beloved pastime of hunting but also to exploit valuable natural resources.

¹³⁸ Warren, *Henry II*, 539.

compurgation.¹³⁹ The division of duties proposed at Clarendon, wherein a cleric would be tried by the ecclesiastical court and punished by the secular court, never caught on. Rome tended to regard ecclesiastical penalties, like suspension from office or loss of clerical status, as sufficiently severe. Occasionally the courts resorted to non-sanguinary punishments such as imprisonment in the bishop's prison or in a monastery.¹⁴⁰ At first Pope Alexander III concurred with Becket's objection to double punishment (*At si clerici*, 1178). Later, Innocent III made provisions for situations in which a cleric might be degraded and handed over to secular punishment (*Novimus expedire*, 1209), but as Gratian had envisioned, it was a decision left to ecclesiastical authority, and the Church was expected to ensure that capital punishment did not occur.¹⁴¹

In practice, clerical immunity was subject to certain limitations. In addition to the forest law exception, clerical immunity came to be only applied to felonies, and minor offenses could still be prosecuted.¹⁴² Certain transgressions, such as illicit marriage, could result in a loss of privilege.¹⁴³ Unlike some places on the Continent, the English church enjoyed immunity in criminal cases only; civil cases continued to be allocated based on the nature of the litigation.¹⁴⁴ The English bishops complained occasionally that the canon law was not being respected in its entirety, but by and large they maintained a spirit of pragmatic compromise — from which Becket had been an anomaly — and did not rush to provoke the English crown over every

¹³⁹ Helmholz, *Canon Law and the Law of England*, 125; Frederic Pollock and Frederic William Maitland, *The History of English Law*, 2nd ed., 2 vols. (1898; reprint ed. London: Cambridge University Press, 1968), 1:441-43.

¹⁴⁰ Warren, *Henry II*, 540.

¹⁴¹ Duggan, "The Becket Dispute and the Criminous Clerks," 23-25.

¹⁴² Frederic William Maitland, "Church, State, and Decretals," 60.

¹⁴³ Robert Génestal, *Le 'Privilegium Fori' en France du Décret de Gratien à la Fin du XIVe Siècle* (Paris: Leroux, 1921), 62-80.

¹⁴⁴ In France, for instance, the clergy's right to have their civil cases heard in the ecclesiastical forum was by and large respected during the later Middle Ages. Even in France, though, subsequent laws ate away at the clergy's near-absolute immunity until much of their business had been brought within the pale of civil law. See R. H. Helmholz, "Western Canon Law," in *Christianity and Law: An Introduction*, ed. John Witte, Jr. and Frank S. Alexander (Cambridge: Cambridge University Press, 2008), 77; Frederic William Maitland, "Church, State, and Decretals," 60.

transgression. The Fourth Lateran Council (1215) even warned clerics against trespassing on secular jurisdiction in the name of the *libertas Ecclesiae*.¹⁴⁵

At the same time, ecclesiastics recognized that if they were to be credibly self-governing, there must be an end to the situation lamented by Empress Matilda, where bishops refused to prosecute clerics because they did not want to take the trouble of imprisoning them, and of cases like Archdeacon Osbert's, where a lack of legal sophistication impeded the timely administration of justice. Pope Alexander III was the first pope to order bishops to conduct a formal judicial investigation of clerical crime. The Fourth Lateran Council reiterated: "We decree that prelates of churches should prudently and diligently attend to the correction of their subjects' offenses, especially of clerics, and to the reform of morals. Otherwise the blood of such persons will be required at their hands."¹⁴⁶ The council established the inquisitorial procedure of gathering proof to improve the effectiveness of criminal trials.¹⁴⁷

Overall, although the manner in which clerical immunity was implemented in practice was more circumscribed than Thomas Becket would have thought decent, it broadly corresponded to the principles of ecclesiastical autonomy and priestly dignity which he had expounded.

¹⁴⁵ Lateran IV, c. 42: "Just as we desire lay people not to usurp the rights of clerics, so we ought to wish clerics not to lay claim to the rights of the laity. We therefore forbid every cleric henceforth to extend his jurisdiction, under pretext of ecclesiastical freedom, to the prejudice of secular justice. Rather, let him be satisfied with the written constitutions and customs hitherto approved, so that the things of Caesar may be rendered unto Caesar, and the things of God may be rendered unto God by a right distribution." *Decrees of the Ecumenical Councils*, ed. Norman P. Tanner, 2 vols. (London: Sheed & Ward, 1990), 253.

¹⁴⁶ Lateran IV, c. 7.

¹⁴⁷ The process is outlined in considerable detail in c. 8; the history of its implementation is described in Lotte Kéry, "Inquisitio - denunciatio - exceptio: Möglichkeiten der Verfahrenseinleitung im Dekretalenrecht," *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Kanonistische Abteilung* 87 (2001), 226-68.

IX. Postscript

The Catholic Church in the last several decades, and in our local archdiocese very recently, has also experienced the scandal of clerical crime. As in Becket's time, the problem is not unique to the clergy, but it is particularly painful to find it among those who hold a position of trust and moral authority in the Church. The greatest scandal has been caused when superiors have chosen not to approach secular law enforcement for judgment of accused priests, a course of action which is often interpreted as condoning and exacerbating the original crime.

On the one hand, unlike the situation in Becket's time, the American church is in no position to exercise a judicial system on par with secular civil law. Although certain concurrent jurisdictions are still officially recognized in the civil forum (military law, for instance), the Church is not one of them and cannot rely on physical coercion to enforce its laws. On the other hand, Becket's ideal of a protected jurisdiction for the clergy is in some ways still implicit in canon law. The 1917 Code of Canon Law affirmed clerical immunity and prescribed penalties for anyone who compelled a cleric to come before a secular court.¹⁴⁸ The current Code, in effect since 1983, omits this canon and is silent on the question of involving clerics in secular legal proceedings. With regards to child sexual abuse specifically, the twentieth-century Holy See directives on the canonical prosecution of this crime reinforced the impression of a self-governing clerical class with exclusive competence over its own: to try an accusation against a

¹⁴⁸ "Clerics shall in all cases, whether contentious or criminal, be brought before an ecclesiastical judge, unless it has been legitimately provided otherwise in certain places." Canon 120, §1, in *The 1917 or Pio-Benedictine Code of Canon Law in English Translation*, ed. and trans. Edward N. Peters (San Francisco: Ignatius Press, 2001). Canon 2341 lists the penalties, which vary according to the rank of the accused cleric.

priest, every member of the judicial process also had to be a priest, and the solemn obligations of confidentiality suggested the avoidance of civil law involvement.¹⁴⁹

One revealing anecdote comes from the scandal in the Archdiocese of Dublin. In November 1994, a priest canonist of the Archdiocese wrote a letter to his archbishop in which he expressed his frustration at the way the situation was unfolding:

It is my opinion that there is a gross over-reaction on the part of many of our Church authorities to this whole “paedophile crisis.” I heard the Cardinal [Cahal Daly] on yesterday’s radio specifically saying that, if there is a reasonable suspicion against a priest in this area, he should be turned over to the police for investigation and for whatever may follow from that. This is panic; it is also wrong. It takes no account whatever of the Church’s own canonical procedures in dealing with situations of this kind — procedures which long have been acknowledged and accepted by the civil courts. There is, in my view, a real danger in all of this that some of the local churches may, unthinkingly, try to solve their problems at the risk of abandoning the autonomy which the Code of Canon Law, now clearly based on Vatican II, has established for the Church itself.¹⁵⁰

This view, and in general the ecclesiastical approach to clerical sexual abuse which seems to have occurred in many cases — where an accused cleric was tried in secret or more often merely rebuked, and then quietly relocated — smacks of Becket’s defense at Westminster: “Clerics, by reason of order and office, have Christ alone as king...And since under their own

¹⁴⁹ In the twentieth century, the Holy See provided two instructions to bishops regarding how to handle crimes of sexual abuse: the *Instructio de Modo Procendi in Causis Sollicitacionis* in 1922, and its re-promulgation in 1962 as *Crimen Sollicitationis*. The Congregation for the Doctrine of the Faith stated recently that these earlier instructions were narrowly intended for the unusually delicate situation in which a crime had been allegedly committed in the context of the sacrament of confession, and therefore the accused priest could not be questioned in full for fear of violating the seal of the confessional, hence the heightened emphasis on confidentiality. Whatever the intentions of the instructions, they were used in a broader context and were interpreted in many cases as implying an obligation to avoid the civil forum. Congregation for the Doctrine of the Faith, “Historical Introduction for the Revised Norms on Dealing with Clerical Sex Abuse of Minors and Other Grave Offenses,” *Origins* 40/10 (July 22, 2010), 152-154; John F. Wirenius, “‘Command and Coercion’: Clerical Immunity, Scandal, and the Sex Abuse Crisis in the Roman Catholic Church,” *Journal of Law and Religion* 27/2 (2011-2012), 423-94.

¹⁵⁰ Letter from Monsignor Gerard Sheehy to Archbishop Desmond Connell, in Yvonne Murphy et al., *Commission of Investigation’s Report into the Catholic Archdiocese of Dublin* (July 2009), §24.37, available at <http://justice.ie/en/JELR/Pages/PB09000504> (last accessed September 10, 2015).

king, the King of heaven, not worldly kings, they are ruled by their own law, and if they transgress, are penalized by their own law, which has its own penalty.”

It is premature to conclude based on anecdotal evidence that Becket’s convictions were the primary motivation for modern-day bishops and religious superiors to choose to deal with clerical crime in-house. For one thing, many religious institutions, not just the Catholic Church, have taken this attitude toward criminal behavior among their leadership.¹⁵¹ Still, it is difficult not to note the congeniality of Becket’s ideals to such an approach. If there is any lesson to be drawn, it might be one of caution against an attitude of regarding civil law as a hostile intruder in a rightfully ecclesiastical domain. It is a modest positive sign that the Congregation for the Doctrine of the Faith has recently encouraged bishops’ conferences to prioritize cooperation with civil law when dealing with cases of alleged abuse, although the Holy See has yet to issue a document on this issue which speaks of civil law as a positive force for justice.¹⁵²

X. Conclusion

Early Christianity presumed that the clergy were subject to both ecclesiastical and secular law, and that the punishment of crime belonged to the purview of secular authority. During the Gregorian reform movement, the advocates of a new ecclesiology argued for a clerical hierarchy which was not answerable to any secular authority, and the newly systematized canon law provided the theological basis for a clerical class which was exclusively self-policing in criminal law. Thomas Becket attempted to carry the Gregorian ideals of ecclesiastical autonomy and

¹⁵¹ Marci A. Hamilton, “The Waterloo for the So-Called Church Autonomy Theory: Widespread Clergy Abuse and Institutional Cover-Up,” *Cardozo Law Review* 21/9 (2007), 225-45.

¹⁵² Congregation for the Doctrine of the Faith, “All Bishops’ Conferences Required to Draft Guidelines to Handle Sex Abuse Cases: Circular Letter,” *Origins* 41/3 (May 26, 2011), 40-43. Both the twentieth-century directives and the more recent norms *Sacramentorum sanctitatis tutela* (2001, revised 2010) were completely silent about the role of civil law. Local episcopal conferences, by necessity, have been much more proactive in this regard.

priestly dignity to their logical conclusion by establishing clerical immunity as a political reality; both in personal debate and later in his correspondence, he argued that no secular authority was competent to impose trial or punishment on a member of the ordained clergy. After his death, the English church succeeded in establishing much of the exclusive self-jurisdiction for which he had contended. Becket's ideals about the relationship of the clergy to the rest of Christian society are a caution as the Church begins to work toward healing from the scandal of clerical sexual abuse.

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