

ESSAY: THE LEGAL LEGACY OF POPE GREGORY I: IN LIFE AND IN LETTERS

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Introduction

Pope Gregory I, also known as Gregory the Great, had a profound influence on the medieval Catholic Church. Gregory was famous for his views on papal supremacy, his import of monastic principles into canon law (indeed, he was the first monk to ascend to the throne of St. Peter), and his pursuit of extensive anti-corruption reform within the Church. His taste for reorganization and improvement caused numerous changes in the Catholic Liturgy, and his vigorous promotion of Church missionary work in northern Europe resulted in the conversion of many of the Anglo-Saxon territories. Gregory's **[*304]** theological as well as organizational work in this regard was central in establishing his place as a "doctor" of the Church and as one of its four Latin fathers.

Moreover, Gregory's careful "balancing act" between the Emperor in the East and the Frankish and Merovingian Kings in the West - as well as his famous response to the invasion of Lombard forces from the North - reveal a great deal about Gregory's political acumen. As his letters show, Gregory possessed some diplomatic skill, which he appeared to use to further the goals of the Church and of Rome.

Much of what we know about Gregory comes from several hundred letters that he wrote during his time as Pope. His correspondents were many and varied - they included emperors and empresses, queens and kings, archbishops and bishops, deacons and subdeacons, patricians, praetors, physicians, notaries, abbots, and exarchs. In his letters, we see not only the contours of Gregory's theological and political edicts, but also the unique nature of his legal legacy. Frequently, these letters find Gregory acting as a supreme arbiter of what are essentially legal disputes (arising from Roman and canon law alike).

Topics addressed in Gregory's correspondence include the question of necessary qualifications for leadership positions,¹ questions of the Church's "divine and temporal" jurisdiction,² Gregory's annulment of a legal decree made by a bishop,³ "separation of powers" between the public and ecclesiastical administrations,⁴ and other subjects. And though the idea of "equal rights" as we know it was still far from being realized, it is still possible to say that Gregory's writings at times evoked a rather Jeffersonian understanding of human rights: "Omnes namque homines natura aequales sunt," he wrote - "by nature all men are equal."⁵

In this paper, I am primarily interested in Gregory's opinions, beliefs, and correspondence insofar as they relate to legal and equitable matters. Gregory addresses numerous disputes in his letters that I believe can be characterized as legal ones. For example, [*305] Gregory deals in his letters with due process requirements for Church hearings, questions of inheritance and trusts with respect to Church and non-Church property, issues relating to monastic property ownership, property issues arising from slave ownership, the proper formation of wills and testaments, and more.

The purpose of this paper is to describe Gregory's legal legacy generally. This Article includes remarks on the context in which his legal opinions were formed and offered, as well as references to his letters for additional evidence of those views.

I. Gregory in Context: His Life and Ascendance to the Papacy

Gregory the Great, also known as Gregory the Dialogist in the eastern tradition, was born around 540 A.D. to a wealthy patrician family in Rome.⁶ In 546, when Gregory was only six years old, the Goth warlord Totila led his forces to Rome in their second siege of the city.⁷ During that siege, the city's grain supplies were exhausted, and its occupants - including, presumably, Gregory - were forced to eat nettles in order to survive.⁸ Scholar Stephen Mitchell also notes that Rusticiana, a patrician's daughter who is mentioned in Gregory's letters,⁹ was "reduced to begging from door to door" during Totila's siege.¹⁰

The city finally fell to the Goths in mid-December 546, but was subsequently abandoned by them.¹¹ Between 546 and 552, the city was briefly recovered by the Byzantine general Belisarius, again besieged by the Goths, and then again recovered, this time by the Byzantine general Narses.¹² As scholar Margaret Deanesly put it, "The Rome of [Gregory's] boyhood was a beggared Rome, wasted by the Gothic wars."¹³

¹ See St. Gregory the Great, Selected Epistles, Bk. I, Ep. XXV, reprinted in 12 Nicene and Post-Nicene Fathers: Second Series 73, 80 (Philip Schaff & Henry Wace eds., James Barmby trans., Hendrickson Publishers 1995) (1895).

² Id. Bk. III, Ep. V, at 123.

³ Id. Bk. III, Ep. VI, at 123-25.

⁴ Id. Bk. III, Ep. LXV, at 140.

⁵ John M. Zane, A Legal Heresy, in Wigmore Celebration Legal Essays 255, 270 & n.42 (Albert Kocourek ed., 1919).

⁶ 6 The Catholic Encyclopedia 780 (Charles G. Herbermann et al. eds., Encyclopedia Press 1913) (1909).

⁷ Stephen Mitchell, A History of the Later Roman Empire 381 (2007).

⁸ Id.

⁹ See St. Gregory the Great, supra note 1, Bk. II, Ep. XXVII, at 107; id. Bk. IV, Ep. XLVI, at 160-61; id. Bk. VIII, Ep. XXII, at 237-38.

¹⁰ Mitchell, supra note 7.

¹¹ Id.

¹² 2 Edward Gibbon, The Decline and Fall of the Roman Empire 1400-11 (J.B. Bury ed., 1995).

¹³ Margaret Deanesly, A History of the Medieval Church 16 (Methuen & Co. 1976) (1925).

[*306] Frederick Homes Dudden, in his 1905 two-volume biography of Gregory, suggests that Gregory's father Gordianus and mother Silvia moved the family away from Rome to their Sicilian estate after Totila's second siege of Rome in 549. ¹⁴ It is clear from Gregory's letters that his time in Sicily had a considerable impact on him: Nearly eighty of his letters relate to matters in Sicily, and many of them suggest a deep knowledge on his part of the island's history and culture. ¹⁵

As a young man, Gregory took courses in Latin literature, dialectic, and rhetoric. ¹⁶ Whether Gregory at any point studied law is unclear, though some scholars strongly suggest that he did receive legal training. Jeffrey Richards, for one, notes that Gregory was educated in Rome, "the centre for legal studies," and suggests that "on the evidence of Gregory's legalistic outlook and fluency with imperial law it seems likely that he studied law too as preparation for a career in public life." ¹⁷ Carole Straw, similarly, hypothesizes that Gregory had some kind of legal education before he began work in public office. ¹⁸

John R. C. Martyn suggests that after his boyhood and education in Rome and Sicily, it is likely that Gregory worked in public offices before ascending to the rank of Rome's chief legal officer (praetor urbanus). ¹⁹ Dudden and Martyn both conclude that Gregory then became the city's prefect (praefectus urbis Romanae) in approximately 573, after his time as its head legal officer. ²⁰ Others, it should be noted, dispute this conclusion. ²¹ The prefect was the city's highest-ranked civil officer, whose duties would have included "the nominal presidency of the senate: supreme civil jurisdiction within [one hundred] miles of the capital: the provision of grain supplies: the care of aqueducts, sewers, and the bed of the Tiber: the leadership of such officials ar [sic] remained in Rome, and a large financial authority." ²²

[*307] After working as a prefect for some time, Gregory sold his patrimony, or landed estate, around 574. ²³ The following year, he founded six monasteries in Sicily, ²⁴ and a seventh near his family's home, which was dedicated to Saint Andrew. ²⁵ At this point, Gregory's monastic life truly began. In *Moralia, sive Expositio in Job* ("Commentary on Job," also known as *Magna Moralia*), Gregory describes to Bishop Leander the circumstances under which he became a monk:

When I knew you long since at Constantinople ... I then detailed in your ears all that displeased me in myself, since for late and long I declined the grace of conversion, and ... I thought it better to be still shrouded in the secular habit... . I could not change my outward habit: and while my purpose [animus] still compelled me to engage in the service of this world as it were in semblance only, many influences began to spring up against me from caring for

¹⁴ See 1 F. Homes Dudden, *Gregory the Great* 37 (Longmans, Green, & Co. 1905); 1 John R.C. Martyn, *The Letters of Gregory the Great* 1 (2004).

¹⁵ 1 Martyn, *supra* note 14, at 1-2 & n.4.

¹⁶ Deanesly, *supra* note 13, at 17.

¹⁷ Jeffrey Richards, *Consul of God: The Life and Times of Gregory the Great* 26 (1980).

¹⁸ Carole Ellen Straw, *Gregory the Great: Perfection in Imperfection* 5 (1988).

¹⁹ 1 Martyn, *supra* note 14, at 3.

²⁰ 1 Dudden, *supra* note 14, at 101; 1 Martyn, *supra* note 14, at 3.

²¹ Richards, *supra* note 17, at 30 (noting that the sole evidence of this fact is a single reference in one of Gregory's letters and suggesting that the best reading "would make Gregory urban praetor, a much less significant figure than city prefect").

²² Deanesly, *supra* note 13, at 17.

²³ Steven Chase, *Angelic Spirituality* 91 (2002).

²⁴ 1 Dudden, *supra* note 14, at 106.

²⁵ Chase, *supra* note 23, at 91.

this same world... . At length being anxious to avoid all these inconveniences, I sought the haven of the monastery... . For as the vessel that is negligently moored, is very often (when the storm waxes violent) tossed by the water out of its shelter on the safest shore, so under the cloak of the Ecclesiastical office, I found myself plunged on a sudden in a sea of secular matters, and because I had not held fast the tranquility of the monastery when in possession, I learnt by losing it, how closely it should have been held.²⁶

Gregory spent only four years at St. Andrew's before Pope Benedict I selected him to serve as Deacon of Rome. The next year, Pelagius II succeeded Benedict I as Pope, and sent Gregory to Constantinople as his secretary, in order to ask the Emperor for aid against the Lombard invaders.²⁷ In a letter to his secretary, Pelagius told Gregory that "the empire is in so critical a situation that unless God prevails on the heart of our most pious prince to show to his **[*308]** servants the pity he feels and to grant us a commander or general, then we are lost."²⁸

Gregory remained in Constantinople as Pelagius' emissary, or apocrisarius, for seven years. He was not alone - other monks from St. Andrew's accompanied him during his travels.²⁹ While in Constantinople, Gregory read and prayed with these men, and gave a series of lectures on the Book of Job that would later become the Magna Moralia.³⁰ Little more is known of Gregory's work in Constantinople, except for letters sent from the Pope to Gregory in 584 and 585. In 585, the Pope informed Gregory of the particular threat of the Lombard invasion:

The miseries and tribulations inflicted on us by the perfidy of the Lombards, in violation of their oath, are such as no one can describe. The Commonwealth in these parts is reduced to such straits that unless God inspires the heart of our Most Religious Prince to display his natural benevolence to his servants, and relieve our troubles by sending us one Master of the Soldiery or one Duke, we shall be utterly destitute and defenceless. For the district of Rome is more than any other left unguarded, and the Exarch writes that he cannot help us, as he protests that he cannot even protect the districts where he is himself. May God direct our Prince speedily to relieve our perils before the army of that most unspeakable nation prevails so far as to seize those places which still as yet belong to the Republic.³¹

In 586, with the Empire's fate uncertain, Gregory returned to Rome, where he served once again as both deacon and leader of his monastery. It was at this time that Gregory completed the Magna Moralia, in addition to a number of other major scriptural treatises.³² Gregory continued in this fashion - leading a life both secular and monastic - until the death of Pope Pelagius.³³

On September 3, 590, Gregory was elevated to the papacy, buoyed by the popular acclaim of the Roman people. Historical accounts **[*309]** indicate that his selection as Pope may have been at least in part against his will, and that Gregory may have even attempted to flee Rome prior to his consecration as Bishop of Rome.³⁴ Henry Dwight

²⁶ S. Gregory the Great, *Morals on the Book of Job*, reprinted in *A Library of Fathers of the Holy Catholic Church, Anterior to the Division of the East and West 1-3* (Edward Bouverie Pusey et al. eds., London, J.H. Parker 1844) [hereinafter *Magna Moralia*].

²⁷ 11 *The Catholic Encyclopedia*, supra note 6, at 603.

²⁸ Letter from Pope Pelagius II to Gregory (584 A.D.), in Jeffrey Richards, *The Popes and the Papacy in the Early Middle Ages 167* (1979).

²⁹ See R.A. Markus, *Gregory the Great and His World 11* (1997).

³⁰ 6 *The Catholic Encyclopedia*, supra note 6, at 781; see also *Magna Moralia*, supra note 26.

³¹ 1 Dudden, supra note 14, at 152-53.

³² 2 J.B. Bury, *The Cambridge Medieval History 239* (H.M. Gwatkin & J.P. Whitney eds., MacMillan 1913).

³³ Richard P. McBrien, *Lives of the Popes 96* (1997).

³⁴ 2 Bury, supra note 32, at 240.

Sedgwick suggests that Gregory truly desired to be "either a monk or a missionary," and that it was only with great reluctance that he accepted the Emperor's appointment.³⁵

Gregory became Pope during a particularly troubled time in Italian history. In addition to the Lombard invasions,³⁶ the peninsula was beset by numerous natural disasters. The Po River flooded its banks between 589 and 590, with disastrous results.³⁷ Major Church-owned grain stores along the Tiber were destroyed, exacerbating conditions of famine across the country.³⁸ And perhaps worst of all, the unsanitary conditions created by these calamities gave rise to terrible plagues, killing scores. As Paul the Deacon described it, "following [these floods] came a most virulent plague called inguinaria. This so devastated the population that out of a vast multitude very few survived."³⁹

As a result, much of Gregory's work upon becoming Pope can be described as emergency management. He immediately reorganized the ledgers and accounts of the Church and liquidated many of the Church's otherwise unproductive properties so as to free up funds for relief efforts.⁴⁰ Where distant Church properties had been producing food for sale, Gregory ordered the administrators of those lands to instead send all products to Rome and Ravenna to help the afflicted.⁴¹ He then created a general fund for relief and mandated that his clergymen administer these funds so as to relieve the suffering of the poor and hungry.⁴² The Church allotted to the poor a monthly allowance of food and supplies, and if a recipient was too sick to **[*310]** retrieve his or her allowance, monks would be dispatched to deliver the recipient's allowance in person.⁴³

In addition to his relief work, Gregory focused a great deal of energy on administrative and pastoral matters and reforms, including the reduction or elimination of corrupt practices among the clergy.⁴⁴ With respect to the Church lands, Gregory's letters make clear that he placed great importance on proper property management and fair treatment of farmworkers and serfs.⁴⁵ Gregory felt strongly that the Church should not only promptly pay back its many debts, but also forgive debts where demanding their repayment would force the debtors into bankruptcy.⁴⁶ In general, his letters suggest that he viewed the Church as the guarantor of property endowments throughout Italy,⁴⁷ and Gregory even referred to himself as "the steward of the property of the poor."⁴⁸ In this manner, Gregory spent a remarkable amount of his time as Pope actively involved in overseeing legal and administrative matters within his jurisdiction.

³⁵ Henry Dwight Sedgwick, *A Short History of Italy* 36 (Houghton Mifflin Co. 1905).

³⁶ See *infra* Part IV.

³⁷ Neil Christie, *From Constantine to Charlemagne* 40 (2006).

³⁸ See Alban Butler, *Butler's Lives of the Saints* 274 (Michael Walsh ed., Harper & Row 1985) (1956).

³⁹ Christie, *supra* note 37, at 500.

⁴⁰ 1 Dudden, *supra* note 14, at 248.

⁴¹ *Id.* at 248-49.

⁴² See Maria Luisa Ambrosini & Mary Willis, *The Secret Archives of the Vatican* 66-67 (1969).

⁴³ See generally Michael Frassetto, *Encyclopedia of Barbarian Europe: Society in Transformation 183-84* (2003) (stating that Gregory made "monthly donations of food to the poor, daily grants to the sick and infirm, and benefactions to monks and nuns").

⁴⁴ James Barmby, *Gregory the Great* 53 (New York, Pott, Young, & Co. 1879).

⁴⁵ *Id.* at 147.

⁴⁶ See Richards, *supra* note 17, at 96.

⁴⁷ Barmby, *supra* note 44, at 58.

⁴⁸ Richards, *supra* note 17, at 96.

Throughout his thirteen-and-a-half years as Pope, Gregory also corresponded heavily with his bishops and deacons (particularly those in Italy), with the four patriarchs of the East, with monks, abbesses, and with the laity and nobility, both in Italy and elsewhere.⁴⁹ His letters span a wide variety of subjects, from Gregory's observations on theological matters to his administrative directives.

II. Gregory and the Imperial Government

At the time Gregory became Pope, the Empire was ruled from Constantinople by the Emperor Maurice.⁵⁰ As Pope, Gregory's attitude toward the Emperor was very similar to what it had been previously: Gregory generally treated the Emperor with great deference and humility, particularly in the beginning.⁵¹ He took care in the early years to avoid embarrassing the Emperor, and attempted **[*311]** to harmonize relations between the Church and the Empire as much as possible.⁵²

The relationship between imperial and canon law in the time of Gregory was an unusual one. At times, canon law (based largely on Church council and papal decisions) and imperial law differed, at times they complemented one another, and at times the two bodies of law overlapped. As Jeffrey Richards put it, Gregory "accepted the letter of the imperial law but often modified its spirit in the interests of Christian charity."⁵³ Gregory instructed his bishops to respect the jurisdiction and decisions of the civil courts, though he also insisted that his clergy be allowed a say in those courts: "[A] wrong against man was a wrong against God... . [No] matter whether it was the oppression of a peasant or the pillage of a monastery" ⁵⁴

Gregory's opinions sometimes placed him at odds with the Emperor and with imperial law - and in those instances the language of his letters was rather strong. In one case, in an early letter to Emperor Maurice - referred to in the letter as Mauricius - Gregory protested against a law forbidding public officials to take vows and become monks.⁵⁵ In another instance, Gregory defended himself robustly against the Emperor's criticism, and in relatively stringent language, retorted to the Emperor, "I rely more on the mercy of Jesus when He comes than on the justice of your Piety."⁵⁶

Perhaps most memorably, Gregory disagreed with imperial policies legalizing slavery, though ultimately he accepted the fact of their existence. It is clear from his letters that he opposed slavery personally, and thought of it as a "sociological accident, recognized by the laws" ⁵⁷ He freed his own slaves, explaining that it is good "if men whom nature originally produced free, and whom the law of nations has subjected to the yoke of slavery, be restored by the benefit of manumission to the liberty in which they were born."⁵⁸ Indeed, Gregory appeared to have made it something of a personal mission **[*312]** to free slaves where he could, so that they could then join

⁴⁹ 1 Martyn, *supra* note 14, at x-xi.

⁵⁰ *Id.* at 19.

⁵¹ *Id.*

⁵² *Id.*

⁵³ Richards, *supra* note 17, at 108-09.

⁵⁴ 2 Bury, *supra* note 32, at 248.

⁵⁵ St. Gregory the Great, *supra* note 1, Bk. III, Ep. LXV, at 140-41.

⁵⁶ *Id.* Bk. V, Ep. XL, at 177.

⁵⁷ Edward A. Synan, *The Popes and the Jews in the Middle Ages* 39 (1965).

⁵⁸ St. Gregory the Great, *supra* note 1, Bk. VI, Ep. XII, at 191 ("Salubriter agitur, si homines, quos ab initio natura liberos protulit et ius gentium iugo substituit servitutis, in ea qua nati fuerant manumittentis beneficio libertate reddantur.") (author's translation); see also 1 R.W. Carlyle & A.J. Carlyle, *A History of Mediaeval Political Theory in the West* 114 (William Blackwood & Sons 1950).

and serve the Church.⁵⁹ In 596, Gregory sent an emissary to purchase any and all Anglo-Saxon slaves in France so "that they might be sent to Rome for their education and instruction in the true faith."⁶⁰ Similarly, Gregory's opposition to the death penalty also put him at odds, somewhat, with prevailing imperial law.⁶¹

III. The Church, the Empire, the Lombards, and the Franks

In 568, the Lombards, led by King Alboin and joined by tens of thousands of Saxons, invaded Italy.⁶² The Lombards were a Germanic, North-European people, primarily of the Arian faith, who appeared to originate in the southern part of the Scandinavian Peninsula.⁶³ At the time of the Lombard invasion, Italy had already been invaded by various foreign forces, and had already suffered the debilitating effects of foreign occupation, plague, and famine.⁶⁴ These problems doubtlessly facilitated the Lombards' early victories in Italy, particularly in Vicenza and Verona. Over the next decade, the Lombards moved further south, as far as Tuscany; Rome, however, did not fall, but remained under Byzantine control.⁶⁵

The Lombard invasion of 568 and 569 brought new property issues to the forefront, even before Gregory became Pope. The Lombards acquired much of the privately owned Roman property during the invasion,⁶⁶ and by the time Gregory became Pope in 590, the Lombards were nearing the city of Rome, already having overrun much of the Church's vast landholdings.

Rome had little reason to hope for help. The Emperor, with whom Gregory had attempted to forge cordial relations, expressed little interest in sending aid to defend Rome. Moreover, Romanus, the Emperor's exarch (representative) in Rome, was both powerless and [*313] lethargic, and the relationship between Gregory and Romanus was strained at best.⁶⁷ Entrenched as he was at his estate in Ravenna, Romanus apparently lacked either the means or the will to aid in the struggle against the Lombard invaders, and in any case had a low opinion of Gregory.⁶⁸ Then, only days after Gregory became Pope, the Lombard King Authari died, and was succeeded by Agilulf, Duke of the Lombard territory of Turin.⁶⁹ Agilulf was a "warlike and energetic prince,"⁷⁰ and Gregory had little reason to expect that Agilulf would not pursue the same goal - the conquest of Rome - as had Authari.

Up to this point, Rome had benefited from the distraction that Frankish attacks on the Lombards had provided, but even these diversions did not prevent the Lombards from reaching the outskirts of the city of Rome by 592.⁷¹ At this point Gregory must have felt keenly just how precarious his position was - alone and without allies. Gregory seized the moment to take action. He not only appointed an independent tribune to defend the city, but then

⁵⁹ 1 Martyn, *supra* note 14, at 95.

⁶⁰ John Hosack, *On the Rise and Growth of the Law of Nations* 25-26 (Fred B. Rothman & Co. 1982) (1882).

⁶¹ James J. Megivern, *The Death Penalty: An Historical and Theological Survey* 47 (1997).

⁶² Paolo Cammarosano, *Storia dell'Italia Medievale* 96-97 (2001) (source in Italian).

⁶³ Paul the Deacon, *History of the Langobards* 2-3 (William Dudley Foulke trans., Univ. of Pa. Press 1907); see also 1 *The Catholic Encyclopedia*, *supra* note 6, at 707-10 (providing additional information on Arianism).

⁶⁴ Sedgwick, *supra* note 35, at 23-24.

⁶⁵ See 2 Bury, *supra* note 32, at 196.

⁶⁶ Chris Wickham, *Framing the Early Middle Ages* 210 (2005).

⁶⁷ See 2 Henry Hart Milman, *History of Latin Christianity* 78 (New York, Sheldon & Co. 1861); see also 6 Thomas Hodgkin, *Italy and Her Invaders* 359-63 (Oxford Univ. Press 1916).

⁶⁸ See 1 Dudden, *supra* note 14, at 447; 1 Martyn, *supra* note 14, at 21.

⁶⁹ 6 *The Catholic Encyclopedia*, *supra* note 6, at 784.

⁷⁰ *Id.*

⁷¹ 2 Bury, *supra* note 32, at 244.

successfully - and surprisingly - struck a separate peace accord with Ariulf, the Lombard Duke of Spoleto and leader of the Lombard forces against Rome.⁷²

Upon the conclusion of this peace accord with Ariulf, Romanus appeared to have suddenly remembered his duties to the Empire. Romanus rallied his own troops and attacked Ariulf at Perugia, in complete disregard of the agreement Gregory had just made. The next spring, the Lombards responded in full force. The Lombards of Northern Italy, led by King Agilulf himself, once again moved on Rome in 593.⁷³ Historical accounts indicate that Agilulf and Gregory entered into negotiations that year, which continued until 595. Gregory then met Agilulf at the steps of St. Peter's Basilica, and the two came to an agreement, absent any input at all from the exarch Romanus.⁷⁴

[*314] Truth be told, it is unlikely that Gregory's political skill alone won him the critical agreement with Agilulf. Gregory probably paid Agilulf a significant sum - one scholar suggests it was five hundred pounds of gold⁷⁵ - to end the siege on Rome. In so doing, Gregory not only forged a surprising (albeit tenuous and temporary) peace with the Lombards, but also established himself, for a time, as the Empire's preeminent representative in its disputes with the Lombards.⁷⁶

Gregory's actions, however, put him in ill favor with the Emperor, who was outraged at the peace agreement Gregory had concluded. Historical accounts indicate that the Emperor wrote a critical letter (now lost) to Gregory, to which Gregory responded sharply,⁷⁷ making clear that he will find peace with Agilulf - also spelled, Agilulph - with or without the Empire's consent:

Agilulph, King of the Lombards, is not unwilling to conclude a general peace, if only the lord Patricius will consent to an arbitration. For he complains that many acts of violence were committed in his regions during the time of peace... . If reasonable grounds for arbitration should be found, he desires to have satisfaction made to himself, he also himself promises to make satisfaction in all ways, if it should appear that any wrong was committed on his side during the peace... . Act therefore wisely as you have been wont to do, that the most excellent Exarch may consent to this without delay, lest peace should appear to be refused by him, as should not be. For, should he be unwilling to consent, he indeed [Agilulph] again promises to conclude a special peace with us⁷⁸

Shortly after, the exarch Romanus died, "to the relief of Gregory and his friends,"⁷⁹ and was replaced by Paul Gallicinus, a friend and colleague of Gregory. Callinicus - as it was often spelled - looked more favorably on the ongoing peace negotiations than Romanus had, and in 598 a treaty was signed between the Empire and the Lombards.⁸⁰

The peace between the Empire and the Lombards would not last. In 601, Callinicus, emboldened by the lull in hostilities and hoping to renegotiate the agreement with the Lombards, rallied his troops **[*315]** at Ravenna and attacked the Lombard forces.⁸¹ He also abducted the daughter of the Lombard king, evidently hoping to use her

⁷² 2 Dudden, supra note 14, at 13-16; see also Richards, supra note 17, at 184.

⁷³ Richards, supra note 17, at 185.

⁷⁴ 6 The Catholic Encyclopedia, supra note 6, at 784.

⁷⁵ Richards, supra note 28, at 36.

⁷⁶ See Hodgkin, supra note 67, at 371-73.

⁷⁷ St. Gregory the Great, supra note 1, Bk. V, Ep. XXXVI, at 174.

⁷⁸ Id.

⁷⁹ 2 Dudden, supra note 72 at 32.

⁸⁰ Markus, supra note 29, at 105.

⁸¹ 2 Bury, supra note 32, at 250.

as leverage in future negotiations. ⁸² Callinicus' plan was not successful. Enraged, Agilulf responded to Callinicus' attacks by bringing the greater part of the Lombard forces south to Rome. En route, Agilulf and his troops made allies of the Eastern-European Avars, and laid waste to Pavia and Padua. ⁸³ Soon, Rome appeared to be as much in danger of Lombard siege as it ever was.

By the time of Gregory's death in 604, however, relations between the Empire and the Lombards stabilized once again. The Emperor recalled Callinicus to Constantinople in 603, and replaced him with Smaragdus, who restored peace with the Lombards by freeing Agilulf's daughter from captivity. ⁸⁴

All told, Gregory had a tremendous impact on the political dynamics between the Church, the Empire, the Lombards, and the Franks. Gregory corresponded with the Frankish royalty: in his letters we see discussions with Theoderic and Theodebert (Frankish kings), ⁸⁵ as well as with Brunichild (Queen of the Franks). ⁸⁶ Brunichild's devout love of the Church paved the way for good relations between Gregory and the Franks, and gave Gregory great influence over both Brunichild and the Frankish Church - though that warm relationship between the Church and the Franks ultimately did not last long after Gregory's death. ⁸⁷

These relationships between the Church, the Empire, the Lombards, and the Franks would reemerge after Gregory's death, with interesting consequences for the Church and its property holdings. In the early eighth century, the Lombard King Liutprand approached the Church and Pope Gregory II with a degree of friendliness reminiscent of Gregory I's negotiations with Ariulf and Agilulf. ⁸⁸ In 728, Liutprand negotiated (yet another) separate peace agreement with the papacy, and gave Gregory II a large sum of land including the towns of **[*316]** Sutri and Latium. ⁸⁹ This gift put Gregory II even more at odds with the Emperor, Leo III, who at that time sought to rein in papal independence by taxing landowners heavily (including the Church, still the largest landowner in Italy). ⁹⁰

The next Lombard king after Liutprand, Aistulf, was not as conciliatory toward the Pope as Liutprand had been. Aistulf sought to take large areas of Italian land that Liutprand had not dared to conquer, alarming Gregory and the Empire alike. ⁹¹ In 753, Pope Stephen II visited Aistulf at Pavia in hopes of negotiating for peace, but was unsuccessful. ⁹² The Empire, for its part, had already broken with Rome: Pope Zacharias' predecessor, Pope Gregory III, had misgivings related to issues of iconoclasm and the Empire's steadfast opposition to monasticism. ⁹³

⁸² Hodgkin, *supra* note 67, at 428-29.

⁸³ *Id.* at 429; see also 2 Bury, *supra* note 32, at 250.

⁸⁴ Richards, *supra* note 28, at 174.

⁸⁵ See, e.g., St. Gregory the Great, *supra* note 1, Bk. IX, Ep. CX, reprinted in 13 Nicene and Post-Nicene Fathers, *supra* note 1, at 29-30; *id.* Bk. IX, Ep. CXVI, at 32-33.

⁸⁶ See, e.g., *id.* Bk. IX, Ep. XI, at 6-8; *id.* Bk. IX, Ep. CIX, at 28-29; *id.* Bk. IX, Ep. CXVII, at 33; *id.* Bk. IX, Ep. LXII, at 73-74; *id.* Bk. XI, Ep. LXIII, at 74.

⁸⁷ 2 Bury, *supra* note 32, at 146.

⁸⁸ See 1 David Jayne Hill, *A History of Diplomacy in the International Development of Europe* 66 (Longmans, Green, & Co. 1905).

⁸⁹ *Id.* at 65.

⁹⁰ See *The Encyclopedia of World History* 173 (Peter N. Stearns ed., 6th ed. 2001).

⁹¹ See 1 Horace K. Mann, *The Lives of the Popes in the Early Middle Ages* 293 (Kegan Paul, Trench, Trubner, & Co. 1903).

⁹² 14 *The Catholic Encyclopedia*, *supra* note 6, at 259.

⁹³ McBrien, *supra* note 33, at 120.

Ultimately, Stephen II's successor, Stephen III, turned to the King of the Franks, Pepin III, reviving the good relations that the Church had enjoyed with the Franks during Gregory's papacy.⁹⁴ In his bid for Pepin's aid, Stephen made the first papal journey across the Alps to Gaul.⁹⁵ Pepin III promised Stephen III that he would restore the wide swaths of land that Aistulf had taken from the Church.⁹⁶ Pepin III made good on his promise, and by 756, the Franks had retrieved the last of the conquered lands from the Lombards, and had effected what was known as the "Donation of Pepin."⁹⁷ In return, Stephen III anointed Pepin King of Rome (patricius Romanorum) and placed the Church and its newly expanded lands under Pepin's protection.⁹⁸ In so doing, the legacy of peaceful relations between the Church and the Franks that Gregory had established was restored.

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IV. Gregory the Great and Imperial and Canon Law: Background and Procedural Issues

Gregory's use of legal language and imagery suggests a strong interest in law, and a "competence in law that few of his western contemporaries could match."⁹⁹ Even the metaphors he employed were legal in nature. For example, in *Moralia*, Gregory states his belief that when men voluntarily sin, they enter into a legal "contract" with the devil, who then has a claim upon them until "some recompense is made."¹⁰⁰ Other translations of this selection, similarly, suggest that Gregory understood the devil's claim upon a sinner to be a legal or contractual one.¹⁰¹

Moreover, Gregory's attentiveness to the legal status of Church-owned lands was matched by his more general concern for the legal sanctity of property. "As we ought not to allow property belonging to the Church to be lost," he wrote, "so we deem it a breach of law to try to take what belongs to others."¹⁰²

Gregory borrowed heavily from imperial Roman law and Justinian's Code. Indeed, no fewer than seventy-four explicit and fifty-four implicit citations to the imperial code appear in his letters and writings.¹⁰³ For instance, in determining the requirements for a fair trial, Gregory (as had the Romans) rejected the use of hearsay in favor of a rule requiring live testimony under oath of witnesses with direct knowledge of the facts.¹⁰⁴

This evidentiary determination was central to Gregory's *commonitorium* - a series of letters Gregory wrote to John the Defensor.¹⁰⁵ In these letters, Gregory decided the matter of an appeal by a Spanish bishop, Stephen, who

⁹⁴ See 2 Artaud de Montor, *The Lives and Times of the Popes 67-68* (Remigius Lafort ed., The Catholic Publ'n Soc'y of America 1911); 1 J.E. Riddle, *The History of the Papacy, to the Period of the Reformation* 319 (London, Richard Bentley 1854).

⁹⁵ See 2 de Montor, *supra* note 67-68.

⁹⁶ See Thomas F.X. Noble, *The Republic of St. Peter: The Birth of the Papal State 81-82* (Univ. of Pa. Press 1984).

⁹⁷ *Id.* at 93.

⁹⁸ See L. Duchesne, *The Beginnings of the Temporal Sovereignty of the Popes* 39 (Joseph Wilhelm ed., Arnold Harris Mathew trans., Kegan Paul, Trench, Trubner & Co. 1908).

⁹⁹ 1 Martyn, *supra* note 14, at 20.

¹⁰⁰ Straw, *supra* note 18, at 154.

¹⁰¹ *Id.*

¹⁰² 2 Bury, *supra* note 32, at 243. For a slight variance in translation, see 1 Dudden, *supra* note 14, at 306.

¹⁰³ Richards, *supra* note 17, at 109.

¹⁰⁴ Frank R. Herrmann, *The Establishment of a Rule Against Hearsay in Romano-Canonical Procedure*, [36 Va. J. Int'l L. 1, 24-25 \(1995\)](#).

¹⁰⁵ *Id.*

alleged that he had been ousted from his see without a fair hearing. ¹⁰⁶ Gregory sent John to investigate the situation, and in so doing set out the requirements for a fair trial under canon law: ¹⁰⁷

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Careful investigation must first be made to determine if the trial was held according to proper order, if some were accusers and others witnesses; then if the type of charges warranted deposition or exile, if the testimony was given under oath against [Stephen], with him present, if [the accusation] was made in writing and if he had opportunity to defend himself. Careful investigation must also be made of the character of the accusers and witnesses, of their type and reputation; whether they were unsuitable, lest perchance they had some hatreds against the said pastor; whether they gave testimony from hearsay [utrum testimonium ex auditu dixerint] or testified that they knew certainly and exactly; and whether the judgment was given in writing and the sentence recited with the parties present. If by chance these things were not solemnly done and a charge not proved which was worthy of deposition or exile, he [Stephen] should be recalled by all means to his church. ¹⁰⁸

V. Gregory the Great and Imperial and Canon Law: The Church's Treatment of Jews

Canon law under Gregory - as under all popes of his time - was based primarily on the decisions of Church councils past and present (such as the Dionysius Exiguus), and, to a lesser extent, on papal judicial decisions. ¹⁰⁹ Gregory did not, however, accept unquestioningly the mandates of the Church councils. With respect to the Church's policy toward Jews, for example, Gregory departed at times from the "hard line evident in the Jewry law of church councils" when it became necessary to step in and resolve disputes relating to Jewish populations. ¹¹⁰

[*319] For example, Gregory set aside Church policies that made legal the forced baptism of Jews, finding them legally and morally problematic. ¹¹¹ In a letter to Virgilius, Bishop of Arelate (Arles), he voices his strong opposition to the policy, though he affirms his continued interest in converting Jews to Christianity by preaching and by example. ¹¹² "For," he remarked to Virgilius, "when any one is brought to the font of baptism, not by the sweetness of preaching, but by compulsion, he returns to his former superstition, and dies the worse from having been born again." ¹¹³ Similarly, in another letter to Paschasius, Bishop of Naples, Gregory admonished, "One must act, therefore, in such a way that ... [the Jews] might desire to follow us rather than to fly from us" ¹¹⁴

¹⁰⁶ Id.

¹⁰⁷ Id.

¹⁰⁸ Id. at 25 (quoting Gregory). The original Latin reads:

Diligenter quaerendum est primo, si iudicium ordinabiliter est habitum aut si alii accusatores, alii testes fuerunt; deinde causarum qualitas, si digna exilio vel depositione fuit; aut si eo praesente sub iureiurando contra eum testimonium dictum est seu scriptis actum est vel ipse licentiam respondendi et defendendi se habuit. Sed et de personis accusantium ac testificantium suptiliter quaerendum est, cuius condicionis cuiusve opinionis aut ne inopes sint aut ne forte aliquas contra praedictum episcopum inimicitias habuissent, et utrum testimonium ex auditu dixerunt aut certe specialiter se scire testati sunt vel si scriptis iudicatum est et partibus praesentibus sententia recitata est. Quod si forte haec sollemniter acta non sunt neque causa probata est, quae exilio vel depositione digna sit, in ecclesia sua modis omnibus revocetur.

Id. at 25 n.163.

¹⁰⁹ Mark R. Cohen, *Under Crescent and Cross* 36 (1994).

¹¹⁰ Id.

¹¹¹ See St. Gregory the Great, *supra* note 1, Bk. I, Ep. XLVII, at 93.

¹¹² Id.

¹¹³ Id.

¹¹⁴ Synan, *supra* note 57, at 217.

Gregory also emphasized the importance of the inviolability of synagogues, and of proper compensation of Jewish communities for past seizures of synagogues. In one letter, Gregory wrote to Fantinus, Guardian of Panormus, concerning the sanctity of synagogues.¹¹⁵ In that letter, Gregory explains that a group of Jews had complained that Victor, a bishop, had "unreasonably taken possession of" their synagogues in the city of Panormus.¹¹⁶ Salaris had reported to Gregory that Victor took possession of and consecrated the synagogues "unadvisedly and rashly."¹¹⁷ Since a church once consecrated cannot be restored to Jews,¹¹⁸ Gregory told Fantinus that the Church was obliged to, in such situations, compensate Jews with a sum equal to the price at which the Church valued the property, so that "they may in no wise [sic] be oppressed, or suffer any injustice."¹¹⁹

Additionally, Gregory explains that Jews who had been aggrieved in this way should be able to retrieve all "books or ornaments" that were in the synagogues before they were seized.¹²⁰ Gregory concludes [***320**] that "neither damage nor ... cost ought to be brought upon [the Jews of Panormus] contrary to justice and equity."¹²¹

Gregory summarizes his legal policy toward Jews in an early letter to two of his bishops: "Just as it should not be permitted [for] the Jews to presume to do in their synagogues anything other than what is permitted them by law, so with regard to those things which have been conceded them they ought to suffer no injury."¹²²

And in a similar letter to Paschaius, Gregory asks:

Why should we lay down rules for the Jews as to how they should observe their ceremonies, if we cannot thereby win them? We should therefore so act that, being rather appealed to by reason and kindness, they may wish to follow us, and not to fly from us; and that proving to them from their own Scriptures what we tell them, we may be able, with God's help, to convert them to the bosom of Mother Church.¹²³

Of course, Gregory certainly did not advance significantly the situation of Jews in the Empire, nor did he create or recognize any significant new legal rights or privileges for them. In one letter he is seen criticizing the "perfidy" of observing Sabbath,¹²⁴ and in another he offers a partial subsidy to Jews living on Church lands who agree to convert to Christianity.¹²⁵

Gregory did, however, demonstrate a willingness to pursue more policies toward local Jewish populations that were somewhat more tolerant than those of his predecessors.¹²⁶ Notably, Gregory declined to enforce Church council decrees demanding the seizure of synagogues, and in so doing looked to the Theodosian Code, which protected synagogues from attack and destruction. Gregory refrained from citing large portions of the Code that prohibited the construction of new synagogues, set forth a death penalty for anyone who assailed formerly-Jewish converts to

¹¹⁵ St. Gregory the Great, supra note 1, Bk. IX, Ep. LV, reprinted in 13 Nicene and Post-Nicene Fathers, supra note 1, at 14.

¹¹⁶ Id.

¹¹⁷ Id.

¹¹⁸ It is unclear whether this is a matter of Church practice or Jewish custom.

¹¹⁹ St. Gregory the Great, supra note 1, Bk. IX, Ep. LV, reprinted in 13 Nicene and Post-Nicene Fathers, supra note 1, at 14.

¹²⁰ Id.

¹²¹ Id. at 14-15.

¹²² Cohen, supra note 109, at 36 (internal citation omitted).

¹²³ St. Gregory the Great, supra note 1, Bk. XIII, Ep. XII, reprinted in 13 Nicene and Post-Nicene Fathers, supra note 1, at 97.

¹²⁴ Id. Bk. XIII, Ep. I, at 92-93.

¹²⁵ St. Gregory the Great, supra note 1, Bk. II, Ep. XXXII, at 108.

¹²⁶ 2 Dudden, supra note 14, at 151.

Christianity, and characterized Judaism as "nefarious." ¹²⁷ Gregory also opposed the forced conversion of Jews **[*321]** to Christianity, ¹²⁸ as well as the expulsion of Jews from the sites at which they traditionally celebrated religious rites. ¹²⁹ In so doing, Gregory paved the way for fairer and more ethical legal and practical standards for the Church's treatment of Jews - standards "that guided the papacy for centuries." ¹³⁰

VI. Legal Disputes in Gregory's Letters

There are numerous legal disputes referenced in Gregory's letters, several of which are discussed here. ¹³¹

In Book I, Letter IX, ¹³² Gregory writes to Peter the Subdeacon. In it, he tells Peter that farmers of the Fulloniacus farm (property of the Church) are encroaching upon the boundaries of a neighboring farm, Gerdinia. ¹³³ Gerdinia has been held by the monks of St. Theodore for some time. ¹³⁴ Gregory instructs Peter to investigate the question, and decides that if the monks of St. Theodore have possessed the Gerdinia farm for forty years, then they are the rightful owners of that land, "even though it were to the advantage of the holy Roman Church." ¹³⁵ If, however, the border between the Gerdinia and Fulloniacus farms has been disputed at any point during the last forty years, then Gregory instructs Peter to, in that case, appoint arbitrators to decide the matter. ¹³⁶ In this case, Gregory demonstrates that he is willing to support a rule that can be said to resemble modern adverse possession, where, in Gregory's version of the rule, the period for such possession is forty years.

[*322] In another letter - Book I, Letter X ¹³⁷ - Gregory writes to Bacauda and Agnellus, two bishops. In this letter, he explains that a group of Jews have brought a petition to the Church for a license to continue to hold, under the Church's authority, a synagogue on Church property. ¹³⁸ Gregory notes that the sounds of the synagogue are a nuisance, as they have been audible in a neighboring church. ¹³⁹ He notes, too, that he has already decided in the past that if the voices from the synagogue can be heard in the church, the synagogue must cease its activity. ¹⁴⁰ Gregory sends Bacauda and Agnellus to inspect the synagogue, and to arrive at a determination as to whether noise from the synagogue is indeed a nuisance in the church. ¹⁴¹ If the noise is a problem in this way, Gregory

¹²⁷ 2 The Theodosian Code and Novels and the Sirmondian Constitutions 472, 489 (Clyde Pharr et al. trans., The Lawbook Exchange 10th prtg. 2008) (1952).

¹²⁸ St. Gregory the Great, supra note 1, Bk. I, Ep. X, at 77-78; id. Bk. I, Ep. XLVII, at 93; St. Gregory the Great, supra note 1, Bk. IX, Ep. VI, reprinted in 13 Nicene and Post-Nicene Fathers, supra note 1, at 3.

¹²⁹ St. Gregory the Great, supra note 1, Bk. I, Ep. XXXV, at 85.

¹³⁰ Cohen, supra note 109, at 36.

¹³¹ For a catalog of the letters referenced, see St. Gregory the Great, supra note 1 and St. Gregory the Great, supra note 1, reprinted in 13 Nicene and Post-Nicene Fathers, supra note 1. The letters reviewed are as follows: Bk. I, Ep. IX; Bk. I, Ep. X; Bk. I, Ep. XLII; Bk. I, Ep. XLIV; Bk. I, Ep. XLVIII; Bk. III, Ep. XXXVIII; Bk. III, Ep. LVI; Bk. IV, Ep. XXI; Bk. VI, Ep. I; Bk. VI, Ep. XII; Bk. VII, Ep. XXXVIII; Bk. VIII, Ep. III; Bk. IX, Ep. VII; Bk. IX, Ep. XXIV; Bk. IX, Ep. XXVI; and Bk. IX, Ep. LV.

¹³² St. Gregory the Great, supra note 1, Bk. I, Ep. IX, at 77.

¹³³ Id.

¹³⁴ Id.

¹³⁵ Id.

¹³⁶ Id.

¹³⁷ St. Gregory the Great, supra note 1, Bk. I, Ep. X, at 77-78.

¹³⁸ Id. at 77.

¹³⁹ Id.

¹⁴⁰ Id.

instructs Bacauda and Agnellus to provide another place within the fortress (presumably further away) where the Jews can worship.¹⁴² He emphasizes the importance of providing an alternate venue for worship, and forbids that "the aforesaid Hebrews ... be oppressed or vexed unreasonably."¹⁴³ Finally, Gregory notes again that while the rights of Jews should not be otherwise hindered, Jews still cannot own Christian slaves.¹⁴⁴

In this letter we see Gregory dealing with fairly pedestrian issues of noise pollution and nuisance. He determines that any nuisance or noise pollution caused by the synagogue is impermissible, and decides that a taking is a proper remedy for a serious nuisance.¹⁴⁵ However, Gregory insists that if there is to be a taking, the "government" (the Church) must provide the synagogue's attendees just compensation, in the form of an alternate venue for worship.¹⁴⁶

Book I, Letter XLII¹⁴⁷ is addressed to Anthemius the Subdeacon, in Campania, with whom Gregory would later correspond again on issues concerning the ransoming of captives. Gregory tells Athemius that he has been informed by Bishop John that monks of the Surrentum diocese move freely between monasteries and want to **[*323]** acquire property of their own.¹⁴⁸ In this letter, Gregory stresses that monks should under no circumstances be allowed to hold property, move from monastery to monastery, return to being priests (if once they were priests), or marry.¹⁴⁹ In so doing, he clearly restricts the legal rights of monks to travel, to hold property, and to marry.

The somewhat lengthy Letter XLIV of Book I¹⁵⁰ is addressed to Peter, Subdeacon of Sicily, and deals largely with the situation of the Church's peasant workers. In the first part of the letter, Gregory sets forth several economic policies, particularly relating to peasant farmers.¹⁵¹ Gregory describes the plight of Church peasants who have been paid unreasonably low prices for their corn during times of plenty.¹⁵² He then decides that the proper response is to set the price for corn at "market price" without regard to the abundance of the crop, and places limits on the amount of corn that the Church may receive from the peasants.¹⁵³ Interestingly, this notion of using a "market price" to settle a commercial dispute is not unlike the contemporary legal concept of quantum meruit, which provides a remedy for breach of contract that is calculated based on the reasonable value of one party's services. After all, Roman law did not, before Gregory's time, recognize any principle like quantum meruit,¹⁵⁴ and some scholars suggest that the principle did not in fact appear in usage until the time of the English chancery courts.¹⁵⁵

¹⁴¹ Id.

¹⁴² Id.

¹⁴³ Id.

¹⁴⁴ Id. at 77-78.

¹⁴⁵ Id. at 77.

¹⁴⁶ Id.

¹⁴⁷ St. Gregory the Great, *supra* note 1, Bk. I, Ep. XLII, at 87.

¹⁴⁸ Id.

¹⁴⁹ Id.

¹⁵⁰ St. Gregory the Great, *supra* note 1, Bk. I, Ep. XLIV, at 88-92.

¹⁵¹ Id. at 88-89.

¹⁵² Id. at 88.

¹⁵³ Id. at 88-89.

¹⁵⁴ W.W. Buckland & Arnold D. McNair, *Roman Law & Common Law* 331 (2d ed. 1952); Judy Beckner Sloan, *Quantum Meruit: Residual Equity in Law*, 42 DePaul L. Rev. 399, 414 (1992).

In addition to its implications for notions of quantum meruit, this decision is also representative of Gregory's general attitude toward the resolution of trade disputes - which is to say, that he uses a mechanism similar to quantum meruit to resolve what we might call today a "quasi-contract."

He continues on to address grain-pricing systems, and instructs Peter that the use of "unjust weights" to calculate payments should **[*324]** be forbidden. ¹⁵⁶ Gregory also concludes that burdatio (a land tax applicable to peasant farmers) "exceedingly cripples" the Church's peasants and forces those peasants to borrow heavily from local pawnbrokers. ¹⁵⁷ Gregory tells Peter to repay the peasants for their borrowings from the Church's public fund, so as to better the peasants' situation. ¹⁵⁸ This part of the letter, again, is consistent with what can be seen as an overall pattern in Gregory's letters, in which he demonstrates a reluctance to enforce commercial and contractual agreements that he finds place an undue burden on one party or another.

Finally, Gregory addresses more general social and legal issues. He determines that the marriage fees applicable to peasants are excessive and that no part of them should go to Church accounts, but that they instead should return to the farmers themselves. ¹⁵⁹ Gregory then decrees that in a situation where a person has committed a crime, only he should be punished - that punishing the family as well is unjust. ¹⁶⁰ In the final (and largest) part of the letter, Gregory addresses and resolves a number of individual legal and financial disputes. ¹⁶¹

In Book I, Letter XLVIII, ¹⁶² Gregory instructs Theodorus, Duke of Sardinia, in the proper resolution of two property disputes - one relating to the proper ownership of a monastery, and the other relating to the proper treatment of a will. In the first case, Gregory tells Theodorus that Donatus, an official working for Theodorus, seeks to lay claim to the St. Vitus monastery, of which Juliana is the abbess. ¹⁶³ Allegedly, Donatus, believing himself protected in the matter by Theodorus, refuses to allow a "judicial examination" of the case. ¹⁶⁴ Gregory instructs Theodorus to submit the matter to arbitration so that the law (rather than "a deed of virtue") can govern its resolution. ¹⁶⁵ In the second case, Pompeiana, a woman whose house includes a monastery, **[*325]** complains that her son-in-law's mother wishes to annul her son-in-law's will after his recent death. ¹⁶⁶ Gregory asks Theodorus to look into the matter and resolve it personally. ¹⁶⁷ In both instances, where a legal or judicial examination is difficult or impossible, Gregory's preference to resort to the use of an arbitrator to arrive at an equitable solution is clear.

¹⁵⁵ James Barr Ames, Implied Assumpsit, in *Lectures on Legal History* 149, 154, 156 (Harvard Univ. Press 1913); J.H. Baker, *An Introduction to English Legal History* 272 (2d ed. 1979); Sloan, *supra* note 154, at 414.

¹⁵⁶ St. Gregory the Great, *supra* note 1, Bk. I, Ep. XLIV, at 89.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 89-90.

¹⁵⁹ *Id.* at 90.

¹⁶⁰ *Id.*

¹⁶¹ See *id.* at 90-92.

¹⁶² St. Gregory the Great, *supra* note 1, Bk. I, Ep. XLVIII, at 93.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

Book III, Letter XXXVIII ¹⁶⁸ is addressed to Libertinus, Praefect of Sicily. In this letter, Gregory tells Libertinus about Nasas, a Jew who has allegedly lured Christians to worship at a local altar and has subsequently kidnapped and enslaved them. ¹⁶⁹ As Jews are forbidden under Church law to hold Christian slaves as property, Gregory notes that, if the claims are true, Nasas should probably be punished severely for such transgressions. ¹⁷⁰ However, rather than demanding immediate punishment, Gregory asks Libertinus to investigate the matter thoroughly and give Gregory his preliminary findings. ¹⁷¹ If Libertinus determines that Nasas did indeed commit these crimes, Gregory instructs Libertinus to free whatever slaves Nasas has acquired and to punish Nasas accordingly. ¹⁷² The necessity of clear legal determination prior to the imposition of punishment, in this case, is interesting.

In Book III, Letter LVI, ¹⁷³ Gregory writes to John, Bishop of Ravenna. His letter largely concerns the pallium, a garment of the Church given to its clergy as a symbol of the Church's jurisdiction. ¹⁷⁴ While the pallium had been given previously to bishops only for use during the celebration of the Eucharist or Mass, Gregory had received word that John had worn his pallium outside the Mass or Eucharist. ¹⁷⁵

As is often the case in his discussion of matters of canon law, Gregory relies heavily on historical precedent in determining the proper practice of wearing the pallium only during the Eucharist or Mass, and reminds John that the pallium belongs to the Church and is **[*326]** a mark of the Church - which is not to be taken lightly. ¹⁷⁶ Gregory notes that he has carefully searched his own archives and has found nothing to support John's ability to use the pallium in this way. ¹⁷⁷ Finally, Gregory instructs John to cease using the pallium in public in a non-Eucharist context, unless John can show precedent for his practice among his bishop-predecessors. ¹⁷⁸

In another letter, Book IV, Letter XXI, ¹⁷⁹ to Venantius, Bishop of Luna, Gregory reminds the reader that Jews are forbidden from holding Christian slaves as property. He states that any Christians found as slaves of a Jew should be freed; however, where a Christian slave has been set to work on land held by a Jew, Gregory commands that the Christian shall continue to work there, except that he shall not be considered a slave and has only to carry out the "condition of (his) tenure." ¹⁸⁰ Here we see evidence of the Church's more traditional legal view of Jews. While Gregory supports a policy of tolerance toward Jewish communities, he arrives at what is essentially a legal determination that Jews lack the right to hold Christians as personal property. ¹⁸¹

¹⁶⁸ St. Gregory the Great, supra note 1, Bk. III, Ep. XXXVIII, at 131-32.

¹⁶⁹ Id. at 131.

¹⁷⁰ Id.

¹⁷¹ Id. at 131-32.

¹⁷² Id.

¹⁷³ St. Gregory the Great, supra note 1, Bk. III, Ep. LVI, at 136-38.

¹⁷⁴ Id. at 137.

¹⁷⁵ Id.

¹⁷⁶ Id.

¹⁷⁷ Id.

¹⁷⁸ Id. at 138.

¹⁷⁹ St. Gregory the Great, supra note 1, Bk. IV, Ep. XXI, at 151.

¹⁸⁰ Id.

¹⁸¹ Id.

In Book VI, Letter I, ¹⁸² Gregory writes to Marinianus, Bishop of Ravenna, concerning a last will and testament. According to the letter, Marinianus' predecessor John wrote a will that was in many ways "burdening" to the Church, because John attempted to give away property in his will that he had bestowed upon the Church during his life. ¹⁸³ A group of deacons and clergymen petitioned the Church, arguing that these bequests should not be paid because they were illegal. ¹⁸⁴ Gregory urges Marinianus not to "lend [his] authority" or "consent" to any illegal bequests, but stresses that the clergymen may not interfere with any other bequests that John has made of property "which he had not previously bestowed upon his Church." ¹⁸⁵ Gregory then implores Marinianus to ensure that the clergymen do not, in their anger at John, "diminish[]" anything that **[*327]** John has conferred or constructed near the church of St. Apollinaris. ¹⁸⁶ Gregory explains that the Church had promised the church of St. Apollinaris to John while John was alive. ¹⁸⁷ In this letter, Gregory clearly acknowledges that someone cannot give away property that they do not legally own, but stresses the importance of opting for a legal solution to the dispute rather than allowing the clergymen to engage in self-help.

In Book VI, Letter XII, ¹⁸⁸ Gregory writes to two slaves, Montana and Thomas, whom he frees upon the occasion of the death of their master, Gaudiosus. ¹⁸⁹ Gregory also handles the matter of the execution of Gaudiosus' will. Gaudiosus left two unctae to Montana, for the purpose of paying Montana's cost at the monastery of Saint Laurence, where Montana sought to begin a profession as a monk. ¹⁹⁰ Gregory gives to Thomas the five unctae owed to him under his will, as well as the dowry Gaudiosus had bestowed upon Thomas' mother. ¹⁹¹ Gregory deals here with issues of testacy and intestacy. He notes that if Thomas dies without legitimate heirs, all of Thomas' possessions shall revert to the Church's possession. ¹⁹² If Thomas has legitimate heirs, however, then Thomas will be free to make a will giving all of his property held in life to those heirs. ¹⁹³ Gregory concludes by stressing the importance of interpreting wills and testaments in keeping with the law. "For the rule of justice and reason suggests that one who desires his own orders to be observed by his successors should undoubtedly keep to the will and ordinances of his predecessor." ¹⁹⁴

Gregory writes Letter III of Book VIII ¹⁹⁵ to Donus, Bishop of Messana (in Sicily). Faustinus has complained that his father, Peltradius, in his will, left property to Donus which was not his own to give. ¹⁹⁶ Peltradius apparently gave these things to Donus in exchange for a burial-place. ¹⁹⁷ Gregory notes that secular law mandates that an heir

¹⁸² St. Gregory the Great, *supra* note 1, Bk. VI, Ep. I, at 188.

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ St. Gregory the Great, *supra* note 1, Bk. VI, Ep. XII, at 191-92.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* at 191.

¹⁹¹ *Id.* at 192.

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ St. Gregory the Great, *supra* note 1, Bk. VIII, Ep. III, at 232-33.

¹⁹⁶ *Id.* at 232.

¹⁹⁷ *Id.*

[*328] is "bound to pay if his father has bequeathed what was not his own," in an interesting reference to imperial law. ¹⁹⁸ Gregory also reminds Donus that it is forbidden by Church law to "acquire burial-places for a human body for a price." ¹⁹⁹ Though Gregory remarks in the letter that the matter should be settled "by the law of God," his determinations as to the proper disposal of improperly-bequeathed property are almost certainly related to the law "of the world." ²⁰⁰

In Book IX, Letter VII, ²⁰¹ Gregory again deals with the proper interpretation of a will and testament when he writes to Januarius. He begins by reminding Januarius that those who become monks must give all of their property to their monastery and forego the right to make a will. ²⁰² He then discusses the matter of a will. ²⁰³ Sirica, an abbess, has attempted to leave property, particularly property held in a guesthouse, to others through a will. ²⁰⁴ Gregory instructs Januarius to examine the matter, and to verify that the property was Sirica's to grant. ²⁰⁵ If it was, Gregory states that it should be given upon her death to her monastery, per Church law, as noted above. ²⁰⁶ If, however, the property had accrued from another contract, Gregory instructs Januarius to investigate the matter and, if the parties wish, to allow the appointment of arbitrators to resolve it. ²⁰⁷ Gregory exhorts Januarius to resolve the matter in a way that promotes "mutual consent," and to take "care that no grudge may remain between the venerable places." ²⁰⁸

In Book IX, Letter XVII, ²⁰⁹ Gregory writes to Demetrian and Valerian, clerks of Firmum (Fermo). The clerks inform Gregory that, some eighteen years prior, Fabius (Bishop of Firmum) had paid eleven pounds of Church silver for the redemption of Demetrian, Valerian, and their family members, who had been held hostage by **[*329]** persons unknown. ²¹⁰ The two clerks, in writing to Gregory, express concern that now, eighteen years after the fact, the Church will attempt to claim its eleven pounds of silver from them. ²¹¹ Gregory responds that both Church and secular authority permit the use of Church funds to redeem captives, and assures them that they and their heirs "shall henceforth sustain no annoyance for recovery of the debt." ²¹² In making this determination, Gregory appears to indicate that not only was that particular expenditure a proper one for the Church to have made, but also, more generally, that the debts of an owner or employer do not descend upon the employee - or the property, as the case may be.

¹⁹⁸ Id. at 233.

¹⁹⁹ Id.

²⁰⁰ Id.

²⁰¹ St. Gregory the Great, *supra* note 1, Bk. IX, Ep. VII, reprinted in 13 Nicene and Post-Nicene Fathers *supra* note 1, at 4.

²⁰² Id.

²⁰³ Id.

²⁰⁴ Id.

²⁰⁵ Id.

²⁰⁶ Id.

²⁰⁷ Id.

²⁰⁸ Id.

²⁰⁹ St. Gregory the Great, *supra* note 1, Bk. IX, Ep. XVII, reprinted in 13 Nicene and Post-Nicene Fathers *supra* note 1, at 9.

²¹⁰ Id.

²¹¹ Id.

²¹² Id.

Book IX, Letter XXIV ²¹³ is written to Romanus. According to that letter, a woman in Campania named Rustica had written a will twenty-one years prior, in which she had made certain arrangements with respect to the foundation of a nunnery - which is referred to in Gregory's letter as a monastery - in Sicily. ²¹⁴ Namely, Rustica appointed her husband Felix to be her heir and delegated the foundation to him. ²¹⁵ However, her will specified that if Felix did not pay within one year all legacies and dues owed to her freedmen or "establish the aforesaid Monastery as she desired, then the holy Roman Church should have undisputed claim" to that property, which the Church should then use to both pay off the freedmen's debts and establish the nunnery as she wished. ²¹⁶ Interestingly, this instruction on her part appears to lie in an interesting legal netherworld between what we might think of today as a conditional will and a defeasible estate. Gregory evaluates the condition, notes that the nunnery has not yet been built, and remarks that a great deal of time has passed. ²¹⁷ He instructs Romanus to inquire into the matter, and to resolve it in accordance with justice. ²¹⁸

Scholar Dag Norberg hypothesizes that the establishment of the nunnery in Sicily, to have been paid out of Rustica's Comas [*330] estate, was probably delayed by her son-in-law Alexander. ²¹⁹ While Alexander is not mentioned by name in Letter XXIV, additional context appears to confirm that he may have had much to do with the delay in the proper dispensation of Rustica's funds. ²²⁰ Alexander appears elsewhere in Gregory's letters: "As to the money of Rusticianus, look thoroughly into the case, and carry out what appears to thee to be just. Admonish the magnificent Alexander to conclude the cause between himself and holy Church." ²²¹ Norberg notes that this is probably the same Alexander, and that Rusticiani as seen in Letter XLIV, is an error that should probably be changed to Rusticianae. ²²² Norberg then suggests that "Alexander evidently had little respect for his mother-in-law's last wishes and took advantage of every opportunity to keep what could be kept of his wife's inheritance." ²²³

Gregory writes Letter XXVI of Book IX ²²⁴ to Romanus, this time concerning the proper resolution of a property dispute over a house. Stephania, a widow, has come to Gregory with her son Calixenus, and asked the Church to restore to her a house that, she claims, her late mother-in-law illegally offered as a gift to the Church. ²²⁵ Stephania contends that Ammonia (Stephania's late mother-in-law) could not legally alienate the house, and that it belonged instead to her son Calixenus. ²²⁶ Gregory notes that one of his deacons, Cyprian, has spoken up against

²¹³ St. Gregory the Great, supra note 1, Bk. IX, Ep. XXIV, reprinted in 13 Nicene and Post-Nicene Fathers supra note 1, at 10-11.

²¹⁴ Id. at 10.

²¹⁵ Id.

²¹⁶ Id.

²¹⁷ Id.

²¹⁸ Id. at 10-11.

²¹⁹ 27 Dag Norberg, *Critical and Exegetical Notes on the Letters of St. Gregory the Great* 22-23 (1982).

²²⁰ Id. at 22; see also St. Gregory the Great, supra note 1, Bk. IX, Ep. XXIV, reprinted in 13 Nicene and Post-Nicene Fathers supra note 1, at 10-11.

²²¹ St. Gregory the Great, supra note 1, Bk. I, Ep. XLIV, at 92 (internal citations omitted). The original Latin can be found in 27 Norberg, supra note 219, at 23: "De argento Rusticiani causam subtiliter require et quicquid tibi iustum uidetur exsequere. Alexandrum uirum magnificum admone ut causam suam cum sancta ecclesia decidere debeat."

²²² 27 Norberg, supra note 219, at 23.

²²³ Id.

²²⁴ St. Gregory the Great, supra note 1, Bk. IX, Ep. XXVI, reprinted in 13 Nicene and Post-Nicene Fathers supra note 1, at 11.

²²⁵ Id.

Stephania, in favor of leaving the house with the Church. ²²⁷ Gregory, however, decides that in order to best respect Calixenus' proper legal claim, the house should be restored to Calixenus, together with Ammonia's deed of gift to it. ²²⁸ Gregory concludes that "it is better in doubtful cases not to execute strictness, but rather to be **[*331]** inclined to the side of benignity" ²²⁹ - a default principle of legal lenity common to almost all of Gregory's letters.

Conclusion

Gregory's correspondence reveals a great deal about his thinking and his views on law. Throughout his letters, several themes of his life and work are clearly visible. For instance, Gregory regularly emphasizes the importance of investigation and arbitration before legal action. We see evidence of this in several of the letters mentioned above - among them Book IX, Letter XXIV; Book I, Letter IX; Book I, Letter XLVIII; and Book IX, Letter VI - as well as in the course of Gregory's interactions with the Lombards. Moreover, Gregory's insistence on arbitration for the resolution of legally ambiguous disputes - as well as his understanding of the relationship between the Church and the Empire in such disputes - contributed greatly to the development of papal arbitration as an institution of the Church. ²³⁰

Gregory's opposition to slavery is also a theme common to both his letters and his interactions with the civilian government. As described above, his opinions on slavery often put him at odds with imperial policies on the matter. His distaste for slavery is also visible in letters such as: Book III, Letter XXXVIII; Book IV, Letter XXI; and Book VI, Letter XII. While he ultimately upheld imperial laws on slavery, Gregory took measures to free slaves where he could and, in 595, succeeded in leading the Council of Rome to issue a decree permitting any slave to become a monk without respect to his master's wishes. ²³¹

Above all, it is clear that Gregory placed tremendous importance on the proper enforcement of property rights. As Pope, he limited the power of bishops to restrict the property rights of monasteries and convents. ²³² Yet even as Gregory emphasized the importance of property rights, he stressed that property rights are not absolute, and that "if a man uses [property] only for himself ... his action [is] unjust." ²³³ So strong were Gregory's feelings on this point that they **[*332]** ultimately led him to bypass and act in the stead of one of his own archbishops, Januarius of Caralis, when his senility and propensity for appropriating property held by others and by the Church for himself became too much for Gregory to bear. ²³⁴

Notably, Gregory, in his dealings with both the Lombards and the Empire, repeatedly insisted on just compensation for takings of property. This can be seen in Book I, Letter X and Book IX, Letter XXIV, as well as in Gregory's general fastidiousness with respect to the repayment of debt and the compensation of aggrieved parties. ²³⁵ Gregory strongly opposed unjust fees or tariffs, evident in letters such as Book I, Letter XLIV and Book IX, Letter VI. In this respect, Gregory is much like Gelasius. Gelasius had "banned the exaction of fees for baptism and

²²⁶ Id.

²²⁷ Id.

²²⁸ Id.

²²⁹ Id.

²³⁰ See 11 The Catholic Encyclopedia, supra note 6, at 453.

²³¹ See Adam Serfass, Slavery and Pope Gregory the Great, 14 J. Early Christian Stud. 77, 95-97 (2006) (stating that Gregory's writings appear to indicate that he believed that slaves would prefer serving the Church to serving their masters.).

²³² Markus, supra note 29, at 71.

²³³ 1 Carlyle & Carlyle, supra note 58, at 138.

²³⁴ Richards, supra note 17, at 117.

²³⁵ See Markus, supra note 29, at 77.

confirmation, and Gregory banned the payment of fees for burial in consecrated ground, for the marriage of inferior clergy, and for the veiling of women." ²³⁶

Gregory also emphasized the inviolability of a testator's intent, though only when that intent was a legal one. In this legal stance, we can see strong similarities between Gregory and his predecessor, Pope Gelasius I. Like Gelasius, Gregory emphasized the importance of respecting the "'pious wishes' (piaae ... voluntates) and 'just disposition' (iusta dispositione) of testators," ²³⁷ as attested to by Book I, Letter XLVIII; Book VI, Letter I; Book VI, Letter XII; and Book IX, Letter XXVI.

Gregory had a strong interest, too, in using canon law to eliminate corruption among the clergy and in punishing with particular severity those clergymen who committed misdeeds. As Jeffrey Richards put it, "For the clergy to commit misdeeds was not only a betrayal of their sacred responsibilities, it was also potentially damaging to the urgently necessary business of saving souls in preparation for the Second Coming. It was therefore one of [Gregory's] primary responsibilities to maintain discipline." ²³⁸

Gregory was also particularly concerned with simony, or the sale of "spiritual gifts ... and offices" by clergymen, ²³⁹ an act that he soundly condemned at length in Book V, Letter LVIII. Gregory [***333**] declared simony to be heresy, ²⁴⁰ and his letters (including many not reviewed here - Book IV, Letter XIII; Book V, Letter VI; Book VI, Letter III, and more than ten others ²⁴¹) often include warnings against simony. Furthermore, Gregory's definition of simony was quite broad: "Flattery to obtain office could be simony [or p]erforming services for someone in the hope that office might be granted in return could be simony." ²⁴²

These themes were ones that were present both in Gregory's letters and in his works as Pope. However, Gregory's impact on canon law was probably even greater after his death than it had been during his life. In the fifth century, a Scythian monk named Dionysius Exiguus, director of the papal archives, was charged with the task of assembling all papal decrees and church council decisions to date into two collections called the *Collectio Dionysiana* and the *Collectio decretalium Dionysiana*, known as the *Liber canonum* and *Liber decretorum*, respectively. ²⁴³ His work was of great importance in the sixth and seventh centuries, as it represented the sum total of the Church's juridical decisions and knowledge. ²⁴⁴ In the eighth century, Pope Adrian sent the combined collections to Charlemagne, at which point the collection was heavily edited and updated, using information from the letters of Gregory the Great. ²⁴⁵ As a result, not only was Gregory the only Pope to have created new canon law in the sixth or seventh centuries, ²⁴⁶ but his decisions and opinions also represented the front line of a rapidly changing body of canon law.

²³⁶ Richards, *supra* note 17, at 110.

²³⁷ Charles J. Reid Jr., *Power over The Body, Equality in The Family: Rights and Domestic Relations in Medieval Canon Law 161* (John Witte Jr. ed., 2004).

²³⁸ Richards, *supra* note 17, at 108.

²³⁹ 1 Martyn, *supra* note 14, at 84.

²⁴⁰ Timothy Reuter, *Gifts and Simony*, in *11 Medieval Transformations: Texts, Power, and Gifts in Context 157, 161* (Esther Cohen & Mayke B. de Jong eds., 2001).

²⁴¹ 1 Martyn, *supra* note 14, at 84 & n.231.

²⁴² Reuter, *supra* note 240, at 161.

²⁴³ See 9 *The Catholic Encyclopedia*, *supra* note 6, at 61.

²⁴⁴ See Constant Van de Wiel, *5 Louvain Theological & Pastoral Monographs: History of Canon Law 49* (1990).

²⁴⁵ See 9 *The Catholic Encyclopedia*, *supra* note 6, at 61.

²⁴⁶ Van de Wiel, *supra* note 244, at 49.

Indeed, in a very real sense, Gregory's beliefs during life, particularly as they related to law, formed a material part of the Church's enduring canon law. So, too, did his views inform civil law - one scholar goes so far as to remark that "the foundation of the first English poor law was established under authority of Gregory the Great."²⁴⁷ In sum, Gregory's legal legacy was - and continues to be - a vital, interesting, and remarkable one.

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²⁴⁷ 1 George E. Howard, *An Introduction to the Local Constitutional History of the United States* 191 (Baltimore, Johns Hopkins Univ. 1889).