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DISCIPLINE AND ORDER IN THE PRE- CONSTANTINIAN CHURCH: THE CONSTANTINIAN SETTLEMENT OF THE FOURTH CENTURY

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INTRODUCTION

When, in 284 A.D., Diocles, an ambitious professional soldier who had come from the province of Illyria, came to the imperial office by means of the bloodshed and violence which had become established with tedious, if not chilling, repetitiveness as the habitual mechanism for effecting changes in the imperial leadership for longer than most citizens of the empire would likely favor, there was probably little immediate indication that the turmoil which had affected the Empire of Rome for fifty bleak years was about to subside. Yet that is precisely what transpired.¹ It was just as though strident, discordant sounds echoing in a symphonic

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¹ There is a profusion of pertinent references in the literature for this period. One of the better sources in English is *The Imperial Crisis and Recovery, A.D. 193-324* in **THE CAMBRIDGE ANCIENT HISTORY** (12th ed. 1961) [hereinafter **ANCIENT HISTORY**]. The brilliant interpretation by Mikail Rostovtzeff is also of great utility. M. ROSTOVITZEFF, **THE SOCIAL AND ECONOMIC HISTORY OF THE ROMAN EMPIRE** (P. Fraser rev. ed. 1952). A work of considerable merit, much in the same vein, is that of A. JONES, **THE LATER ROMAN EMPIRE: A SOCIAL, ECONOMIC AND ADMINISTRATIVE SURVEY** (1965) (two volume set). A recent contribution, as interesting and informative as it is significant, is a study of the religious ferment in the Roman Empire in the period under scrutiny in this exercise by Robin Lane Foxe. R. FOXE, **PAGANS AND CHRISTIANS** (1987).

hall, seeming on the verge of coming to a cacophonous crescendo were suddenly to become harmonious and melodic, a phenomenon which would appear inexplicable unless one were to advert to the hitherto absent direction provided by the baton of the director.

Diocles personally executed the praetorian prefect, Aper, who had been involved, if not the actual assassin, in the death of the previous *augustus*, Carus. The two sons of Carus, Numerian and Carinus, had both met violent deaths as well, and so, with the support of the legions, Diocles, adopting a latinized form of his hellenic name, Diocletian, claimed imperial authority. As emperor, he was destined to initiate the remarkable recovery process which finally brought an end to the precarious instability with which the imperial office had been burdened in the five decades since the extirpation of the Severan dynasty, a renewal which emerged, not without strains, as the result of radical modifications in the imperial system of governance which he introduced. The dramatic personal contribution of Diocletian to the process of recovery was, in fact, eventually superseded by the utterly remarkable cast given to the historical development of Rome, indeed of the phenomenon which we call Western Civilization, by the charismatic figure who emerged as his ultimate successor, Constantine the Great.

It is palpably beyond the scope of this exercise to attempt anything beyond the most meager portrayal of the unprecedented developments occurring during the so-called "dominate" begun by Diocletian and modified by Constantine. That sort of undertaking has, at any rate, been well done by countless other interpreters far better qualified to do so than this writer. However, a sense of the extraordinary climate of ferment which characterized the latter years of the third century of the Christian era and the first quarter of the fourth century of the Christian era and the is indispensable to bring this exercise to closure. With that in mind, a cursory delineation of some, at least, of the more salient developments of that period will be attempted; there has, of course, been great reliance upon various sources.

I. A RESUME OF DEVELOPMENTS AFFECTING THE IMPERIUM, 284-324 A.D.

Within a year of his accession as *augustus* in 284 A.D., Diocletian, as an integral part of his program of reform, implemented a "shared *imperium*," designating another Illyrian soldier, Maximian, as *co-augustus*. Diocletian, who selected the deity, Jove, as his personal patron, reigned, from Bithynia, in the eastern regions of the empire; Maximian, whose divine patron was Hercules, governed the western half of the empire, ruling from Milan.²

² In addition to items already cited, several other works have been helpful in the organiza-

In 293 A.D., chiefly at the instigation of Diocletian, a further division of authority was implemented with the appointment of two *caesari*, Galerius in the east and Constantius in the west. At the urging of Diocletian, Galerius accepted as his wife, Valeria, the daughter of Diocletian. Constantius, although he was bound stably, and, it would appear, emotionally, if extra-legally, with Helena, nonetheless took as his spouse at civil law a stepdaughter of Maximian, Theodora. Constantius, who seems to have been the most effective military commander of the reigning "tetrarchy," was faced with the immediate challenge of subduing the rebellion of Carausius in Gaul and Britain, a task which he had been substantially accomplished by 296 A.D. In the eastern portions of the empire, the legions of Diocletian and Galerius completed successful campaigns the following year, 297 A.D., against the Persians.

Although theoretically exercising a "shared" imperial authority, Diocletian appears to have exhibited a predominant leadership in the new scheme of governance. In 295 A.D., it was he, who by edict, instituted a formal policy of official antagonism to the Manichaean cult, which, emanating from Persia, provoked imperial suspicion on "political" as well as "religious" grounds. Manifesting a dedication to the heritage of spiritual and cultural values of Roman antiquity, Diocletian cultivated pagan religious practices. He urged upon citizens a return to marriage customs of former times. In a more practical vein, he assumed the primary responsibility for the official measures adopted in efforts to address the general economic malaise which permeated the empire; by the expedient of sweeping edicts, he established a policy of "fixed prices" as the fourth century began. Aided, abetted, and in all probability positively encouraged by his *duce*, Galerius, Diocletian promulgated a series of edicts, from 301-304 A.D., which formed the legal basis for the persecution of Christianity, which, as matters eventuated, though technically in force throughout the empire, was conducted with far greater intensity in the eastern provinces. In the western regions, Maximian was half-hearted in enforcing the new policy of legal harassment of Christians, and Constantius, who was himself a devotee of the monotheistic worship of *Sol Invictus*, the "sun deity," apparently was inclined to manifest a tolerant attitude toward the Christian adherents and the communities and congregations which they formed.

In 305 A.D., Diocletian, experiencing declining health and failing vigor, abdicated and persuaded Maximian to do the same, though his fellow *augustus* did not share his waning physical stamina. Perhaps Diocletian was determined to test the stability of the tetrarchate's system for

tion of this resume. Mention can appropriately be made of a couple of them: T. BARNES, *THE NEW EMPIRE OF DIOCLETIAN AND CONSTANTINE* (1982); R. GRANT, *AUGUSTUS TO CONSTANTINE* (1970).

providing for orderly succession of the *imperium*. Constantius became *augustus* in the west and Galerius succeeded Diocletian in the east. Two new *caesari* were appointed, Maximin Daia in the east and Severus in the west.

Whatever expectation Diocletian may have entertained, that the system which he had devised for shared governance would peacefully prevail through an interval of transition, must have been sadly shaken in the immediately ensuing years. Constantius died while on campaign in York in 306 A.D. Despite the spontaneous insistence of the legionnaires that his son, Constantine, succeed to the office of *augustus*, Galerius, exercising predominant authority, demurred and insisted that Severus assume this position, with Constantine to become *caesar*. Precisely at this juncture, Maxentius, the son of the abdicate, Maximian, rebelled at Rome, emerging as a pretender to the highest imperial office in the west. Constantine, for his part, contending with an insurgency by Franks, turned a deaf ear to the blandishments emanating from the usurpers in Rome who sought his support, though he did wed Fausta, Maximian's daughter, the sister of Maxentius.

Though he embarked upon a military campaign to crush the upstart Maxentius, Severus was unable to quell the rebellion and, falling captive, was executed by Maxentius. Yet another expedition, this led by Galerius, failed in efforts to impose punitive measures on Maxentius. In the midst of this turmoil, Constantine managed to remain aloof of the civil strife, continuing to devote his military energies to the control of barbarians in Gaul. The callous murder of Severus perpetrated by his son seems to have occasioned great disillusionment by Maximian, who, abandoning Rome, the seat of the rebellion, sought safety for a time with Constantine and his daughter, Fausta, in Treves. From his sickbed in retirement, Diocletian, for his part, collaborated with Galerius in branding Maxentius as a usurper. A new *augustus* for the west was named, Licinius.

By 311 A.D., Galerius, who throughout had maintained a posture of hostility toward the Christians, was himself much debilitated. Shortly before his death, he issued edicts which revoked the official persecution which had waxed and waned for eight years. Maxentius, the usurper, had, from the time of his rebellion, tended to manifest a lenient attitude to the Christians in those territories where he maintained his rather durable rebellion, and Constantine, for his part, had matched or exceeded his father's tolerant posture vis-à-vis Christian communities in provinces under his supervision. Maximin Daia, by contrast, had vigorously pursued the letter and the spirit of the persecutory legislation in those areas, stretching from Egypt to Asia Minor, in which he exercised direct control. Maximin showed little disposition to implement with any alacrity the edicts abrogating the persecution, which, by personal initiative, he had exacerbated. Moreover, Maximin Daia evidenced his personal ambition to re-

place Galerius as *augustus* in the east. Licinius, however, claimed that office and Constantine supported him. The formal designation of an *augustus* for the west was deferred in the midst of the civil strife, though Constantine clearly enjoyed the favor of Licinius (and the practical support of the battle-tested veterans of the legions).

At long last, Constantine was prepared to move. Discounting contrary pagan auguries and sensing and seizing the available opportunity, in 311-312 A.D., Constantine mounted a military expedition against Maxentius, invading the Italian peninsula from Gaul. Despite the discrepancy in their respective forces, which numerically favored the usurper, Constantine routed Maxentius' legions in important but indecisive battles in the Cisalpine region. At length, Constantine led his troops to the threshold of Rome itself, strongly fortified since Aurelian's reign some fifty years previously. With more valor than discretion, Maxentius sallied forth from Rome with his army and was soundly defeated at the celebrated battle by the Milvian Bridge; Maxentius perished and Constantine was greeted with great enthusiasm in the ancient capital city, where he was proclaimed unrivaled *augustus*. Solidifying his position in the western half of the empire, Constantine invited Licinius, the other *augustus*, to Milan early in 313 A.D., at which time the marriage of Constantia, the sister of Constantine, to Licinius was celebrated. A protocol of sorts emerged from this meeting of the *augusti*, resulting in the promulgation within territories governed by Licinius of the sweeping grant of toleration for the Christian religion and its adherents which had already become a crucial element of Constantine's policy in the west. Licinius returned from this celebrated meeting and shortly thereafter moved forcefully against Maximin Daia, who, by agreement of the *augusti*, was degraded and reduced and, in the final denouement, defeated and killed by Licinius.

Differences between Constantine and Licinius quickly worsened and in 314 A.D., Constantine led his army against the *augustus* of the east, defeating and pursuing the legions of Licinius across Pannonia and into Thrace. Licinius' suit for peace at this juncture was accepted by Constantine and hostility was suspended for an interval of some nine years. Eventually, however, open civil war was burst forth, and in 323 A.D., Constantine returned to the east to lead his legions against Licinius. In June of 324 A.D., a final and decisive land battle in the vicinity of Adrianople, coupled with successful naval excursions conducted under the leadership of Crispus, Constantine's son, signaled the definitive defeat of Licinius. The shared *imperium* envisioned by Diocletian was finally extinguished and sole rule of the entire empire, east and west, was concentrated in the hands of Constantine "the Great."

II. INTERPRETING SOME ASPECTS OF "THE IMPERIAL RECOVERY"

In describing the congeries of historical events which unfolded in the Empire of Rome in the third century of the Christian era,³ Henry Chadwick has borrowed a term and an image often used in descriptions of the recovery experienced by a "depressed" American society in the mid-1930's which was associated with the programs introduced by President Franklin Delano Roosevelt, a recovery as much "spiritual" in nature as it was social and economic:

It is astonishing that the Roman Empire survived the crisis of the 3rd century, A.D. Already by 200, a serious trade recession had begun to his the Mediterranean world and people spoke anxiously of a falling birth-rate. In the middle years of the century, the legions suffered fearful defeats from Persians, Goths and other Germanic tribes, and the ferocity of internal civil wars brought the enterprises of imperial government to the verge of disintegration. This was averted by the 'new deal' imposed first by Diocletian . . . then by Constantine the Great.⁴

An age of "rust and decay" had left the empire virtually ruined. As a gradual process of assimilation of barbarian and oriental influences occurred, the political, social, and economic foundations of "Roman" (or "Latin") organization eroded. Intellectual and spiritual values exhibited marked evolutionary change and urban civilization degenerated. Yet, a remarkable transformation transpired, a "recovery," with the emergence of a form of governance, the "Dominate," which, for all its novel aspects, did, nonetheless, pay a measure of service to the imperial heritage of more stable former times. The system of government was alternately shaped by Diocletian (the *tetrarchy*) and Constantine (a principle of heredity) yielding a stability which stood in dramatic contrast to the ceaseless turmoil of preceding decades. Emperors served for protracted periods: Diocletian from 285 A.D. to 305 A.D. and Constantine for more than three decades. Though not altogether delivered from usurpation and civil strife, peaceful succession did finally emerge from the evolution of *tetrarchy* and its modes to a monarchical form established under Constantine. The repulse of the barbarians and related *desiderata* were obtained,

³ In addition to volumes previously cited, mention is appropriately made of several other helpful works which have been useful in the preparation of this section: T. BARNES, *EARLY CHRISTIANITY AND THE ROMAN EMPIRE* (1984); R. GRANT, *EARLY CHRISTIANITY AND SOCIETY* (1977); Gaudemet, *La Formation du Droit Seculier et du Droit de L'Englise aux Ive et Ve Siecles* in 15 *INSTITUT DE DROIT ROMAIN DE L'UNIVERSITE DE PARIS* (1956). Helpful insights have been gleaned from H. JOLOWICZ & B. NICHOLS, *HISTORICAL INTRODUCTION TO THE STUDY OF ROMAN LAW* (3d ed. 1972); M. SORDI, *THE CHRISTIANS AND THE ROMAN EMPIRE* (A. Bedini trans. 1986).

⁴ H. CHADWICK, *THE OXFORD HISTORY OF THE CLASSICAL WORLD* 808 (1986) ("Envoi") (emphasis added).

however, at some cost: there came to be almost total concentration of power in the hands of the emperor, and former political institutions, such as the senate, were reduced to insignificance.

In an economic environment beset by disorganized work, declining productivity, commerce ruined by the insecurity of sea and roads, and a contracting market for industrial goods, the salient trait of commercial life was "gradual impoverishment." Diocletian attempted, vainly as it turned out, to check the runaway inflation by fixing prices, which served mainly to drive goods off the market. Constantine was to fuel the economic fire by flooding the market with currency. In the long run, it appears that the restoration of stability of governance was of pivotal importance in the curbing of inflation and restoration of a stable economic environment.⁵ Roman law and the legal system were markedly affected.⁶

The constitution of Caracalla of 212 A.D., which extended citizenship to practically all residents of the empire had, as well, offered general access to (the hitherto rather exclusive) "private law." The distinctions in status which constituted the basis for the retention of the *ius honorarium* theoretically ended. In fact, however, the authority of the magistrates tended to expand and, gradually, new class distinctions emerged, as *honestiores* were differentiated from *humiliores*. There was a subtle geographic shift in the locus of legal influence toward the orient; Beirut became an important center for legal study. "Post-classic" Roman law vested growing authority in the emperor. Coupled with the development of the concept of the "divine" emperor came an interpretation that contravention of imperial constitutions had overtones of sacrilege. Far and

⁵ It is fascinating to reflect on measures adopted for effecting economic revitalization, "price-fixing" and tinkering with the monetary supply, initiatives with poignant echoes in the twentieth century. It is palpably impossible to endeavor to decipher the economic history of the period to any extent. A recommended study is contained in M. FINLEY, *THE ANCIENT ECONOMY* (1973), mildly critical of M. ROSTOVZEFF, *supra* note 1 (an otherwise fine work on the subject). Finley opines that Rostovtzeff and his followers tend to sometimes excessive facility in affirming that archeological data provide "confirmatory" evidence of suppositions. Adopting a more theoretical approach, the author suggests that a "liberal" economic attitude in republican Rome (agriculture was extolled; tax-collecting was deplored!) ill prepared the institutions of government to remedy the depressed circumstances of the third century. Confer, as well, a fine review article by M.W. Fredericken. Fredericken, Book Review, 65 *J. ROMAN STUD.* 164, 164-71.

An interesting document relating to the "price-fixing" measures adopted by Diocletian, a papyrus emanating from Phrygia containing the text of the edict, has been discussed by Michael Crawford and Joyce Reynold. Crawford & Reynold, *The Publication of the Prices Edict: A New Inscription from Aezani*, 65 *J. ROMAN STUD.* 160, 160-63 (with illustrative plate). A "fixed and fair" price was laid down for all commodities, "to insure adequate supply, that all will obtain necessities," and, significantly, "to eliminate greed." *Id.*

⁶ Here, interpretations suggested by Jean Gaudemet have been of particular utility in developing observations and reflections. See Gaudemet, *supra* note 3, *passim*.

away the most important sources of law were the imperial constitutions, "ad edictum," a trend which had first manifested itself in the time of the Severan rulers and which was vigorously taken up by Diocletian and Constantine at the apogee of the "recovery." Generality, not specificity, became the characteristic note of legislation. *Ius* came eventually to be regarded as dependent for its authority upon the imperial *constitutiones*.⁷

Dramatic developments were affecting the religious climate and environment within the empire.⁸ Common attitudes prevailed in an "age of anxiety," with antipathy bordering on hatred for the frailty of the human condition, with importance attached to the supernatural (both the divine and the demoniacal), with exaggerated significance attributed to dreams and prophecies, and most characteristically, with an abiding, "mystical" yearning for identification or union with the deity. After the middle years of the third century, the living heart had gone out of paganism and was sought elsewhere, in the oriental cults, in men's personal worship of Mithras, in a stronger emphasis upon the divinity of the emperors and an attendant growing drift into monotheism, deriving from and contributing to the worship of the emperor.

In the urban areas especially, attracting adherents from all social divisions, Christianity offered unworldly equality. It preached, and, in its better manifestations, practiced, love in a world of widespread brutality. It offered certainty and won conviction where the futility of Greek philosophy and its pretensions was widely perceived. Though still the persecuted *religio illicita* of a relatively small, but growing minority, Christianity was progressing sufficiently during the interval of our reflection so that it cast an increasingly pervasive pall upon the eroding, failing pagan religious substructure of imperial society.

III. SOME OBSERVATIONS REGARDING CONSTANTINE

Few indeed are the individuals in any line of human endeavor to whose names there is appended, with any quotient of propriety, the quali-

⁷ This theme is emphasized by Gaudemet. See *id.* at 28, 72, 108. Two constitutions promulgated by Constantine dramatically illustrate the principle. See CODEX THEOD. 9.43.1 (of 23 Sept. 321 A.D., in which Constantine orders destruction of notes of Ulpian and Paulus commenting upon the work of Papinian); CODEX THEOD. 9.43.2 (of 27 Sept. 327 A.D., in which Constantine states: "All opinions which are contained in the writings of Paulus, since they have been accepted by the duly constituted authority, shall be confirmed and shall be given effect with all veneration," and, therefore, "are valid when cited in court.").

⁸ In these interpretation, acknowledgement is made of the excellent, previously-cited, study by R. FOXE, *supra* note 1, which, as the author notes, builds upon syntheses developed by Johannes Geffeken. See Geffeken, *The Last Days of Greco-Roman Paganism* in 8 EUROPE IN THE MIDDLE AGES (S. MacCormack trans. 1978); see also E. DODDS, *PAGAN AND CHRISTIAN IN AN AGE OF ANXIETY: SOME ASPECT OF RELIGIOUS EXPERIENCE FROM MARCUS AURELIUS TO CONSTANTINE* (1965).

fiction, "the great." Recall Alexander, the driven Macedonian conqueror of the ancient world; the Frankish monarch, Charles, whose reign signaled the commencement of humankind's "middle ages"; Cyrus, the Persian satrap; Frederick, the eighteenth century king of Prussia; an odd Egyptian pharaoh; three of the long line of popes of the Roman Catholic Church; one or another Russian czar of the pre-revolutionary period; such are those who have merited the unusual distinction of being regarded, either by the scholarly arbiters of history or by the populace as "great." It is, no doubt, a commentary on the influences prevalent in the democratic American political ambient that no figure from government has, in the span of two centuries now, acquired the title by popular acclaim, though fictional wizards, prizefighters and certain entertainers have expropriated it. Be all that as it may, by every standard of measurement utilized by either scientific historians or enthusiastic plebeian masses, Constantine was truly a "great" and remarkable person.⁹ One of the most respected and insightful contemporary interpreters of the adventure of human experience has dubbed Constantine an "erratic block," who "diverted the stream of human history."¹⁰

⁹ In assessing and interpreting the unique role of Constantine, items previously cited have been helpful. In addition to these, special mention must be made of certain other works, of which two are exceptional: T. BARNES, *CONSTANTINE AND EUSEBIUS* (1981); Baynes, *Constantine the Great and the Christian Church* in 15 PROCEEDINGS OF THE BRITISH ACADEMY (1929). I have found some other useful material. See Coleman, *Constantine the Great, Three Phases: the Historical, the Legendary, and the Spurious* in 55 STUDIES IN HISTORY, ECONOMICS AND PUBLIC LAW (1968). A simple but informative English-language biography is L. HOLSAPPLE, *CONSTANTINE THE GREAT* (1942). Several of the popular surveys have proven to be useful sources of insights, including: H. CHADWICK, *THE PELICAN HISTORY OF THE EARLY CHURCH* (1978); J. DANIELOU & H. MARROU, *THE CHRISTIAN CENTURIES: THE FIRST 600 YEARS* (V. Cronin trans. 1964); Baus, *From the Apostolic Community to Constantine*, in 1 THE HISTORY OF THE CHURCH (H. Jedin & J. Dolan ed. 1980) [hereinafter Baus, *Apostolic Community*]; Baus, *The Imperial Church from Constantine to the Early Middle Ages*, in 1 THE HISTORY OF THE CHURCH (H. Jedin & J. Dolan ed. 1980) [hereinafter Baus, *Imperial Church*].

Of inestimable value has been the critical translation by Clyde Pharr. C. PHARR, *THE THEODOSIAN CODE AND NOVELS AND THE SIRMONDIAN CONSTITUTIONS* (1952). The corpus of Eusebius dealing with Constantine, the *Historia Ecclesiae*, the four books *de Vita Imp. Constantini*, the *Oratiou quam inscripsit 'ad sanctorum coetum*, and the *de Laudibus Constantini*, are all contained in 20 PATROLOGIA GRAECA. Lactantius' historical work, *DE MORTE PERSECUTORUM*, is found in the 27 CORPUS SCRIPTORUM ECCLESIASTICORUM LATINORUM. The pertinent historical writings of Optatus of Milevis are in the 26 CORPUS SCRIPTORUM ECCLESIASTICORUM LATINORUM [hereinafter CORPUS SCRIPTORUM].

¹⁰ Baynes, *supra* note 9, at 3. Baynes' volume is especially helpful for its survey and evaluation of modern critical historical analysis of Constantine, with consideration devoted to authors who have addressed the so-called "religious" question (Burkhardt, Keim, Zahn, Boissier), to those concerned with "political" aspects of Constantine's reign (including Brieger and Schwartz), and to commentators who have focused upon the sociopolitical/economic program implemented by Constantine, from Seeck (whose anti-Christian bias is regarded as

Born about the year 272 A.D. near the Danube, the son of Constantius, a gifted and thoughtful military leader whose abilities, as already noted, occasioned recognition and extraordinary advancement in the "tetrarchy" devised by Diocletian, and Helena, a woman of palpably exceptional human qualities notwithstanding what has been regarded as a humble background, Constantine, from a very early age, gave evidence of unusual talent. Politically astute, a bold and skillful military strategist, gifted with charisms of leadership, patient, and opportunistic, Constantine has intrigued observers and commentators for centuries, allured and attracted by the altogether imponderable depth and breadth of his human resources. There is a dark side to Constantine's complex character; acting upon suspicions which, in the clear purview of hindsight, may have been groundless, he caused the deaths of his son, Crispus, and his wife, Fausta—a series of deeds which appear to have occasioned great (and quite understandable) remorse, perhaps the greater because of the sensitive faculties of spirit which he manifested, unusual traits in the otherwise callous imperial figures of his time.

Throughout his life, and especially, it would appear, at significant moments of decisive action, Constantine reports spiritual experiences. Contemporary scientific historical analysts have, for the most part, forsworn attempts to "rationalize" this aspect of Constantine's personal, autobiographical recollections. As a young man, he claims to have undergone a distinct mystical experience at one of the pagan shrines of Apollo. His father's predilection for the monotheistic worship of *Sol Ivictus* may have exercised an influence upon his comprehension of religion and religious phenomena. At the very threshold of his most significant military victories, he speaks of tangible external indications and internal manifestations portending supernatural contact with the divinity acknowledged and worshipped by the Christians. References to these experiences were reported by Constantine with increasing candor over the duration of his reign. It is beyond question that he directed that standards and other military paraphernalia be marked with symbols of particular significance to the Christian religion. The *labarum*, suggesting both the cryptic *chi-rho* acronym for Christ and the Christian symbol of the cross, was prominently carried into battle on the *vexilla* of Constantine's legions, and once he was established in the imperial office, was reproduced on some, at least, of the coins minted during the latter years of his tenure.¹¹ He insisted that, prior to engagements, his own warriors recite a prayer with

having colored his critical interpretations) to Batiffol (whose pro-Christian sympathies influence his analysis). In 1955, the 10th International Congress of Historical Studies devoted its entire program to a discussion of Constantine's impact upon history. See M. SORDI, *supra* note 3.

¹¹ See Coleman, *supra* note 9, at 45-47 (an interesting explication of this entire matter).

profound, if muted, nuances of Christian influences and urged this practice upon his co-augustus, Licinius.

Immediately upon his emergence as the dominant figure in the western provinces, he offered legitimacy to Christians and to Christianity, and with the passage of time and the increasing stability of his hegemony, he moved from toleration to clear preference in his official posture toward the Christian religion which he came, eventually, to embrace and profess as personal creed. His own spiritual progression to full adherence to Christianity was gradual, literally culminating with his request for and acceptance of baptism, the Christian ritual of initiation, precisely at the time of his death. Long before that, however, he had offered an enduring testimonial of his personal understanding of the Christian religion in an oration which he delivered to an ecclesial assembly gathered, most commentators agree, at Antioch about the year 324 A.D.¹²

As emperor, Constantine lent the weight of his vast secular authority to patently sincere efforts to reconcile internal disputes within the "great church" within the empire. In the west, he was vigorous and persistent in attempts to achieve the reconciliation of the so-called "Donatist" controversy, a dispute focused primarily in North Africa relating to ecclesiastical discipline affecting the reconciliation of Christian adherents who, in various degrees, had lapsed from fidelity to their religious convictions during the season of persecution and having particular reference to the validity of certain ministerial functions performed by real or alleged *lapsi*. In the east, he manifested equal determination to avert dissention affecting doctrinal matters associated with efforts to elaborate human understanding and definition of significant divine mysteries in the so-called "Arian" controversy.

In the very midst of pressing preoccupations and efforts to solidify the borders of the empire against barbarian intrusions, Constantine exhibited an abiding, lively and rather well-informed interest in matters affecting the Christian church to which he was personally attracted. He was generous in bestowing substantial material resources to Christian officials for ecclesial purposes and commissioned the construction of several significant church edifices in Rome and elsewhere, though his munificence in this respect is sometimes exaggerated in uncritical sources. He did convey important civil-legal authority to the leaders of the Christian congregations.

The cumulative effect of the unfolding program of preference shown by the emperor to Christian congregations in the individual local commu-

¹² The text of the so-called "Oration to the Assembly of the Saints" is given by Eusebius. 20 PATROLOGIA GRAECA 1253/43-1315/16. One of the best available contemporary elucidations of this significant document is that of Robin Lane Foxe. R. FOXE, *supra* note 1, at 627-35. The significance of the oration is underscored by T. BARNES, *supra* note 9, at 73-75.

nities throughout the empire and to the "great church" which was virtually coextensive with the boundaries of the empire had dramatic impact upon the status of Christianity in civil law, with important ramifications for procedures related to the administration of temporal goods. While it is impossible in these pages to touch upon all or even many of the aspects of the "Constantinian settlement" with the Christian church, it is instructive to consider at somewhat greater depth certain matters associated with ecclesial administration in the purview of the Roman civil legal system affected by the dramatic developments flowing from Constantine's favorable dispositions.

IV. CONSTANTINE AND THE JURIDIC STATUS OF THE CHURCH

With the accession of Constantine to the exercise of an *imperium* neither shared nor disputed, the Christian congregations located in the separate, individual *municipia* of the empire and the "great church" which combined the disparate local *ecclesiae* in a single entity united in the profession and practice of a univocal religion entered a new, unprecedented era marked by definitive, categoric acceptance in the purview of the civil legal system.¹³ Within the narrow temporal parameters of but a quarter century, the Christian church(es) passed from circumstances of formal, organized persecution, "declared illegality," to the enjoyment of undisputed, official preference. This drastic change both reflected and involved significant developments in the civil legal status of the church.

When Diocletian seized imperial authority in 284-85 A.D., the church had enjoyed a season of relative pacific development of some twenty or more years' duration. The last "formal" persecution had been pursued by Valerian, beginning in 257 A.D. This bitter and pervasive campaign which the emperor launched against the church had been brought to a conclusion with official formality by Valerian's son and successor, Gallienus, who promulgated the formal legislation bringing the persecution to an end in 261 A.D., in the aftermath of the military debacle which saw Valerian fall captive to Persian enemies. Some utility will be served in examining the documentation relating to this persecution. While the actual texts of the imperial constitutions initiating and abrogating the formal policy of actions against the church are lacking, pertinent documentation is, nonetheless, extant.

There is evidence that Valerian published an imperial constitution, a

¹³ Two volumes of extraordinary merit and utility are aptly noted in this particular regard: Bovini, *La Proprieta Ecclesiastica e La Condizione Giuridica della Chiesa in Eta Precostantiniana* in PUBLICAZIONE DELL'ISTUTO DI DIRITTO ROMANO (A. Giuffre ed. 1948) (published by University of Rome); Munier, *L'Eglise dans L'Empire Romain (IIe-IIIe siecles): Eglise et Cite* in 2 HISTOIRE DU DROIT ET DES INSTITUTIONS DE L'EGLISE IN OCCIDENT t.2 (Cujas ed. 1979).

customary legislative device, in 257 A.D., which provided for the apprehension of the ecclesiastical leaders, to wit, the bishops, by civil authorities in the disparate regions of the empire, and for the banishment of these leaders to exile. The executive order proscribed ecclesial assemblies and prohibited Christians, individually, it would appear, and certainly corporately, from entering the cemeteries. This is the clear sense of the imperial enactment emerging from the records of appearances of Dionysius, bishop of Alexandria, and Cyprian, bishop of Carthage, before magistrates.¹⁴

A second legislative enactment was promulgated by Valerian in the following year, 258 A.D., exacerbating the ferocity of the persecution, calling for, or at the least authorizing the execution of recalcitrant ecclesial officials and for the punishment of certain lay Christians, property owners and persons of substance whose adherence to Christianity was palpably a source of support for the beleaguered congregations. Allusions to confiscation in documents lead to the conclusion that properties utilized by the Christian collectivities were predominately if not exclusively "privately-owned."¹⁵

¹⁴ EUSEBIUS, 7 HISTORIA ECCLESIAE 11:6-11 records the appearance of Dionysius and some companions before Aemilian, the deputy-prefect in Egypt. In committing Dionysius to exile, Aemilian said:

[Y]ou shall be sent to the parts of Libya and [remain] in a place called Cephro. For this is the place I chose in accordance with the command of our *augusti*. And it shall in no wise be permitted to you or to any others to hold assemblies or to enter the cemeteries as they are called. If anyone be proved not to have gone to the place that I commanded, or be found at any assembly, he will bring peril upon himself, for there shall be no lack of the necessary vigilance.

A NEW EUSEBIUS: DOCUMENTS ILLUSTRATIVE OF THE HISTORY OF THE CHURCH TO A.D. 337 267 n.233 (J. Stevenson trans. 1983) [hereinafter NEW EUSEBIUS]. This compendium is the most recent revision of the valuable collection of ecclesial monuments and documents originally assembled by the late B.J. Kidd.

The *Acta Proconsulari* of Cyprian relate that the proconsul, Paternus, at Carthage, instructed Cyprian that he must, "obeying the mandate of the emperors, go into exile in the city of Curubis." 3 CORPUS SCRIPTORUM, *supra* note 9, at 3, cx-cxi. The magistrate continued, "They [the emperors] further ordain that no meetings be held in any place, and that the Christians shall not enter their cemeteries. If any transgress this ordinance, he shall suffer death." The translation is from NEW EUSEBIUS, *supra*, at 260 n.227.

¹⁵ In EPISTLE LXXXI, Cyprian wrote as follows:

Many various and uncertain rumours are going about, but the truth is as follows: Valerian has sent a rescript to the senate directing that bishops, presbyters and deacons should forthwith be punished; that senators and men of rank, and Roman knights, should lose their dignity and be deprived of their property, and if, when deprived of their possessions, they should still continue to be Christians, then they should lose their heads also; that matrons should be deprived of their property and banished; that whosoever of Caesar's household had either before confessed or should now confess, should forfeit their property and be sent in chains as conscript to Caesar's estates.

The abrogation of this legislative framework was accomplished by an imperial constitution issued by Gallienus in 261 A.D. For an understanding of the precise status of the Christian congregation in civil law following upon the promulgation of this document, available evidence must be considered in conjunction with what is known of the executory initiatives which formally occasioned and exacerbated the persecution. The essence of Gallienus' edict may be characterized as a *restitutio in integrum*.¹⁶ No great constitutional "recognition" of Christianity resulted. It appears that congregations could return to unmolested assembly and to use of cemeteries. Confiscated places of assembly were returned; since these appear to have been privately owned properties in the purview of the executory legislation instituting the persecution, the "restoration" is devoid of specific reference to the competence at civil law of the ecclesial communities to own property.¹⁷

It is a matter of crucial importance to possess a clear understanding of the juridic status of the church in consequence of the abrogation of persecution enacted by Gallienus in 261 A.D. There had been vigorous discussion of the matter in the literature.¹⁸

NEW EUSEBIUS, *supra* note 14, at 259 n.226 (translation).

The *Acta Proconsularia* of Cyprian related that the proconsul, Galerius (succeeding Paternus), in sentencing Cyprian to death, accused him of irreligion and fomenting unlawful assemblies, hostile to the gods and religion of Rome. The sentence was invoked in the names of Valerian and Gallienus, emperors. 3 CORPUS SCRIPTORUM, *supra* note 9, at scii-sciii.

¹⁶ *Restitutio in integrum* was understood in Roman law as an exercise of the *imperium*. Originally, as a remedy to inequitable circumstances, it was a discretionary tool of the praetor. In the later principate it had become a *beneficium* which effected a reversion to *status quo ante*. See A. BERGER, ENCYCLOPEDIA OF ROMAN LAW 682 (1953).

¹⁷ We do not possess the text of the edict of Gallienus abrogating the persecution. Eusebius, in 7 HISTORIA ECCLESIAE 13, cites very carefully the text of a letter addressed by the emperor to "Dionysius, Pinnas, Demetrius and other bishops," in which Gallienus, alluding to the (unpreserved) edict, assures the recipients of his letter of his "intent that the places of worship should be given up; therefore, you may also use the ordinance contained in my rescript so that none may molest you." NEW EUSEBIUS, *supra* note 14, at 267 n.234 (translation). We do not have certain knowledge of the addressees. Continuing, Eusebius states, without citing any document, that Gallienus also wrote to other bishops authorizing the "recovery" of the cemeteries.

¹⁸ Whereas Timothy D. Barnes and Marta Sordi are categorical in identifying Gallienus' order as constituting a *de iure* recognition of the Christian collectivities, others, even in inclining to this opinion, are more reserved. See T. BARNES, *supra* note 3, at 49-50; M. SORDI, *supra* note 3, at 116-18. Thus A.H.M. Jones acknowledges that there is difficulty in identifying the "legal title" for the supposed "legitimate status," (a conclusion which amounts in fact to an endorsement of *de facto* [only] recognition). A. JONES, *supra* note 1, at 895 (second volume). After devoting an entire chapter to analysis of the best current theories and analyses, Giuseppe Bovini opts for a confusing conclusion which identifies the churches as "collettiva" and not "corporative," with aptitude to possess immoveable property "como person fittizia." Bovini, *supra* note 13, at 142.

The better opinion postulates a *de facto* ambient in which the church and churches

In the years intervening between the conclusion of the persecutions instigated by Valerian and the reign of Diocletian, the church communities developed in circumstances of *de facto*, not *de jure*, juridic status, enjoying a precarious relief from molestation by the government, which was itself struggling through a season of unparalleled instability. Some ecclesial structures were controlled and maintained by the individual congregations, a matter of *possessio* and not *dominium ex iure Quirinium*. The expedient of utilizing privately-owned buildings for ecclesial purposes continued and very likely predominated.¹⁹

When Diocletian determined upon the course of persecution of Christianity and the Christians, in 303 A.D., he issued a series of edicts imposing the program. From all indications, Diocletian came to this decision with hesitation, almost with reluctance. Galerius, the *caesar*, seems to have influenced the *augustus*. Stories circulated suggest that the emperor was moved to indignation when a reading of the auspices by pagan priests was disturbed and the auguries foreboding when a number of Christian members of the imperial court marked the sign of the cross upon themselves, just as the rites were being performed. Another recital mentioned by Lactantius, indicts the mother of Galerius, a devotee of pagan deities, as influencing her son and his imperial superior to act against the Christians. In any event, after Galerius and Diocletian concluded deliberations during a winter season at Nicomedia, 302-303 A.D., the decision to institute a formal persecution of the Christian sect was cast. In February of 303 A.D., praetorians literally dismantled "the church building" at Nicomedia, coincident with the publication of formal *constitutiones ad edictum*.²⁰

existed following the Valerian persecution and Gallienus' edict. See Baynes, *supra* note 9, at 71-72; J. DANIELOU & H. MARROU, *supra* note 9, at 224-25; see also Baus, *Apostolic Community*, *supra* note 9, at 389-90 ("The situation of the Christians, even under the emperors since Gallienus, was in no way guaranteed by law. It was self-deception when some Christians thought that a tolerant attitude of individual emperors and some high officials brought some definitive change."). Most persuasive is the argument proposed by Charles Munier. See Munier, *supra* note 13, at 272-73. Aligning his position with that enunciated by Duchesne and Waltzing, he opts for the categorical conclusion that the ecclesial collectivities up to the time of Constantine remained devoid of legal caput. The crucial point is that Christians after the time of Gallienus still remained susceptible to cognito.

¹⁹ The *Libri Pontificalis* report that during the time when Marcellus was bishop of Rome, 308-309 A.D., the number of tituli was twenty five. Even at this late date, a private home was established as a site for ecclesial activities. "*Matrona quidam nomine Lucina vidua quae fecerat cum viro suo Marco anno XV et in viduitate sua habuit annos XVIII suscepit beatum virum aue domum suam nomine beati Marcelli titulam dedicavit, ubi die noctuque ymnis et orationibus domino Iesu Christo confitebatur.*" *Gestorum Pontificum Romanorum—Libri Pontificalis*, in 1 *MONUMENTA GERMANIA HISTORICA SER. 9* 43-44 (T. Mommsen ed.) [hereinafter *Libri Pontificalis*].

²⁰ One of the very finest interpretations of these events is that of de Ste. Croix, *Aspects of*

The principal thrust of the executory legislation is directed against people, not property. True, razing of churches is specifically urged and the demolition of the "church building" in Nicomedia is graphically described in the sources. However, the confiscations entailed in the conduct of the persecution are associated chiefly with (propertied) Christian individuals, who were subjected to severe penalties in the legislative fabric of persecution. Church officers, and the "presidents" mentioned would be the bishops. They were singled out for extreme treatment. The scriptures were seized from the places in which they had been hidden and destroyed.²¹

the 'Great' Persecution, 47 HARV. THEOLOGICAL REV. 75, 75-114 (1954). Eusebius provides an account of the persecution and the edicts which constituted its legal basis in the *Historia Ecclesiae*, 8,2:4-5, and the *Peri ton en Palaistine martyresanton*, 3, 1. A graphic account of the origins of the persecution is provided by LACTANTIUS, DE MORTE PERSECUTORUM 11-13.

Although the imperial edicts have not been preserved, Eusebius provides the gist of the enactments:

[A]n imperial letter was everywhere promulgated, ordering the razing of the churches to the ground and the destruction by fire of the scriptures, and proclaiming that all those who held high positions would lose all civil rights, while those in the households, if they persisted in their profession of Christianity, would be deprived of their liberty. Such was the first document against us. But not long afterwards, we were further visited with other letters, and in them the order was given that the presidents of the churches should all, in every place, be committed to prison, and then afterwards, compelled by every kind of device to sacrifice.

NEW EUSEBIUS, *supra* note 14, at 287 n.248 (translation).

The so-called "fourth edict," of 304 A.D., is described by Eusebius in the book on the martyrs of Palestine: "When the second year came round . . . imperial edicts then visited upon us for the first time in which by a general ordinance, the command was given that in the several cities all the people in a body should sacrifice and offer libations to the idols." *Id.* at 289 n.250 (translation).

The sole further illuminating note on the edicts mentioned by Lactantius is the specific recital of civil rights of which individual Christians were deprived:

[A]n edict was published, depriving the Christians of all honours and dignities; ordaining also that, without any distinction of rank or degree, they should be subject to torture, and that every suit at law should be received against them; while, on the other hand, they were debarred from being plaintiffs in questions of wrong, adultery or theft; and finally, that they should neither be capable of freedom, nor have right of suffrage.

Id. at 286 n.247 (translation).

²¹ The conduct of the persecution in the scattered individual cities and towns varied in accord with the disposition of the imperial officials. In the west, neither Constantius nor Maximian were disposed to pursue the policy with any great vigor and the local magistrates seemed, clearly, to have taken their cue from the *augusti*. By contrast, in the provinces of the east, the persecution was conducted with great intensity.

Optatus of Milevis reports on events occurring on May 19, 303 A.D., in the town of Cirta in Africa. The "mayor" of the town, one Munatius Felix, confronted Paul, the bishop of the local church at the house where the Christians used to meet (*domum in qua christiani conveniebant*), and ordered a search of the site which uncovered sixteen men's tunics, eighty-two women's tunics, thirty-eight veils, forty-seven pairs of women's slippers, a candle,

In the territories which were under his direct supervision, including Egypt and Asian provinces as far north as Taurus, Maximin Daia exacerbated the severity of the persecution by issuing edictal legislation urging upon local officials particular vehemence in their harassment of Christians.²² Apparently, the renewed impetus which the *caesar* endeavored to

a silver lamp, a silver box, and material which was confiscated. Present were three presbyters, two deacons, four "subdeacons" and some cemetery workers. No lectors were present; the official conducted a search of the individual homes of six lectors and sequestered writings believed to be scriptures at two or three of them. No one was placed in custody, nor was any action taken toward razing the "domum" or the homes of the lectors. The incident is recited in the appended *Gesta apud Zenophilum* conjoined to the writings of Optatus in 26 CORPUS SCRIPTORUM, *supra* note 9, at 186-88. The paucity of material goods is likely characteristic of the local church communities at the time of the persecution. However menacing the investigator's manner may have been, his treatment of the Christian adherents was not drastic. Timothy D. Barnes opines that the clothing was destined for needy co-religionists, to whom it was distributed from the "church building." T. BARNES, *supra* note 3, at 23.

A document contained in the Oxyrhynchus material refers to the persecution. One Copteus, identifying himself as a "lector of the former church" at Chysis (*anagnostes tes pote ekklesias*) reports to Aurelius Neilus, who, acting on the orders of Aurelius Athanasius, procurator of the *rei privatae*, and Neratius Apollonides, magistrate *rei privatae*, concerning the surrender of all goods of the "former church" (*en te auto pote ekklesia*) saying that there is "neither gold, nor silver, nor money, nor clothes, nor beasts, nor lands, nor property from grants or bequests, excepting only the bronze gate which was found and delivered to the *logistes* for transport to Alexandria." THE OXYRHYNCHUS PAPYRI v. 33 #2673 (1968) (published by the series, GRECO-ROMAN MEMOIRS, edited, with translation and notes, by Peter Parsons, John Rea and Eric G. Turner). The reference to the *rei privatae* is significant; under the reorganization of the imperial treasury initiated during the Severan dynasty, the *rei privatae* came to be an integral part of the emperor's resources; the confiscation, then, occurring during the persecution enriched the imperial treasury. Interestingly, too, the editors wonder whether the reference to "clothes" could refer to "vestments." Given the evidence noted above in the search and seizure conducted at Cirta, clothes for needy members of the congregations may have been habitually stored in church buildings. The letter from Copteus to the magistrates has been dated to the year 304 A.D.

In North Africa, where the persecution was pursued with moderate zeal by magistrates, we know that an outspoken deacon, Felix, was sought by authorities. When the local bishop at the time, Mensurius, refused to give Felix over from his place of refuge in the bishop's own house, he, Mensurius, was threatened with exile. The account, given by Optatus of Milevis, tells also of Mensurius' concern that the "many gold and silver ornaments" of the local church might be confiscated, against which possible action, the bishop gave them in safe-keeping to senior members of the congregation. This entire episode is hardly grave official treatment, though the incident was decidedly unpleasant. Remarkably, authorities did not enter Mensurius' house to dislodge Felix! See Optatus, 26 CORPUS SCRIPTORUM, *supra* note 9, at 15.

²² In 303 A.D., Maximin Daia ordered local authorities to put into effect an imperial constitution calling for the prompt reconstruction of the temples. He ordered that everyone, even infants at the breast, be constrained to sacrifice and to taste the sacrificial *oblata*. All articles in the public markets were to be ritually offered, with implicit "contamination" in the Christians' perception of such goods. Guards were to be stationed at the public baths to coerce ritual gestures by those utilizing such facilities. Maximin called for the appointment

engender in the persecution was unpopular with many in the population who had tired of the relentless oppression of palpably inoffensive fellow citizens. Notwithstanding this public sentiment, the suffering of Christians in areas in which Maximin Daia held sway intensified.

By the year 311 A.D., Galerius was debilitated from physical ailments and manifested a weariness with the strain of enduring continuing civil strife. On the occasion of his *vicennalia*, he was prompted to call a halt to the failing policy of official hostility to the Christian religion and its adherents. On the 30th day of April in that year, he promulgated a constitution which, by edict, terminated the so-called "great" persecution which had begun some eight years and two months earlier. The imperial legislation contained a grudging indication that the original intent of the persecutory policy had been to coerce adherents to the Christian religion to return to the customs and mores of antiquity. In view of the adamant posture of Christians, Galerius noted, with implicit reluctance, he was abrogating the legislative framework of persecution. His edictal enactment in this instance is of signal importance for the status of the Christian church and its local congregations.²³

Here is the language of *collegia* and of the *ius coeundi*. The explicit reference to the necessity of preserving public order is clearly resonant of the civil-legal heritage touch *collegia*. The use of the term, *coventicula*, is likely studied. While it would connote a "meeting house," it could also connote a collectivity which might utilize such a facility. It is not the precise legal term of art. *Collegium*, however, is a significant word, nonetheless, with considerable linguistic and conceptual moment. The edictal instrument does not appear to reflect any grasp, total or partial, of an

of zealous priests for the pagan shrines and set about provoking a campaign of propaganda, spreading scurrilous stories of the "testimony" of false witnesses who described lewd elements of the Christian ritual. See EUSEBIUS, 8-9 HISTORIA ECCLESIAE 14:9, 4:2-5:2.

²³ Lactantius presents the text of Galerius' edict, with its terse Latin phraseology. 27 CORPUS SCRIPTORUM, *supra* note 9, at 213 (translating LACTANIUS, DE MORTE PERSECUTORUM 34). Reluctantly acknowledging that the policy was failing and that despite persecutory initiatives, Christians, refusing to give up their deviant ways and return to ancestral worship, were continuing to assemble in diverse places in large numbers (et per diversa various populos congregarent):

[W]e therefore in consideration of our most mild clemency, and of the unbroken custom whereby we are used to grant pardon to all men, have though it right in this case also to offer our speediest indulgence, that Christians may exist again and may establish their meeting houses, provided that they do nothing contrary to good order (*ut denuo sint Christiani et conventicula sua componant, ita ut ne quid contra disciplinam agant*).

NEW EUSEBIUS, *supra* note 14, at 296 n.256 (emphasis added). Concluding, the emperor stated that further instructions would be issued to magistrates for the implementation of this edict. Poignantly, he called for the Christians (and all citizens) to pray for the empire and for his own "good estate." *Id.*

"empire-wide" collectivity, a "great church," but it clearly does provide legal sanction for local congregations, both to exist, and, with the provision that nothing be done to upheave public order to make use of the *ius coeundi*. In striking contrast to the order issued fifty years earlier by Gallienus, in which the salient point was relief from "molestation," this instrument envisions a series of *collegia licita* possessed, under the usual civil-legal conditions, of the *ius coeundi*.

Events, as note has been made *supra*, continued to unfold at a dizzying pace in the political sphere. Shortly after issuing the edict of toleration, Galerius succumbed to his terminal illness; Lactantius proclaimed his succession to the office of *augustus* in the east, a claim which Maximin Daia attempted to contest. Constantine marched against the usurper, Maxentius, and prevailed. He was acclaimed as *augustus* in the east. Against this rapidly-evolving background the two *augusti* convened in February of 312 A.D., at Milan. Their political relationship was afforded a measure of consolidation by the arranged marriage of Constantine's sister, Constantia, to Licinius. It seems they devised a common strategy to confront the pretensions of Maximin Daia, which was palpably of consequence and concern. No sooner did Licinius return to the eastern provinces than did he commence military action against Maximin. There is also irrefutable evidence that the *augusti* discussed and decided upon a precise strategy for the common action they intended to implement with regard to the Christian religion and its adherents.²⁴

Building upon the "toleration edict" of Galerius, Constantine and Licinius struck upon a policy toward the Christians which entailed not only "toleration" or "religious liberty" (to use a modern phrase for which no then-contemporary nuance would exist), but which made provision for the restoration of all confiscated properties. Upon his return to the east, Licinius took pains to issue formal documents for the execution in the provinces of that part of the empire of the implications of policy emerging from the "protocol" which he and Constantine had agreed upon in their deliberations at Milan. These important civil-legal documents have been retained.²⁵

²⁴ A great deal of attention has, over the years been devoted to the so-called "Edict of Milan." See, e.g., T. BARNES, *supra* note 9, at 318 n. 4 (bemoaning "unfortunate" use of that phrase). Charles Munier summarizes contemporary scholarship by noting that it is "inexact" to speak of any such instrument. Munier, *supra* note 13, at 281. An excellent analysis of the present state of scholarly interpretation of the so-called "Edict of Milan," is provided by Norman H. Baynes. Baynes, *supra* note 9, at 71-74. A good commentary is given by LAWLOR & OULTON, 2 THE ECCLESIASTICAL HISTORY 309-14.

²⁵ Lactantius has preserved a version of the document promulgated, most scholars agree, by Licinius at Nicomedia on June 15, 313 A.D. 27 CORPUS SCRIPTORUM, *supra* note 9, at 231f. Eusebius has provided a version, substantially identical to that recorded by Lactantius, but containing an introductory paragraph which makes specific allusion to already-published

Clearly, persons of every status who chose to do so were free to embrace the Christian religion. If the edict of Galerius allows individuals to follow the Christian way of life without molestation, as it were by a matter of privilege, the protocol which reflects the agreement struck between Constantine and Licinius enunciates the principle that Christians, or those who would prefer to follow any religious persuasion, do so as a matter of right. Galerius spoke in his edictal constitution of clemency and a grant of pardon, coincidentally implying that the profession of the Christian religion entailed *culpam*. The recognition implicit in the instrument reflecting the "Constantinian" vision was devoid of any insinuation that Christianity or its profession entailed fault. The document of 312 A.D. and the dispositions of Constantine, certainly, and Licinius, perhaps coerced by his fellow *augustus*' persuasive tact (or military might), is not one of clemency extended but of liberty proclaimed.

The restoration of property is an unmistakable advance on the edict of Galerius. There is clear recognition of the circumstance of fact that some property which had been confiscated during the persecution had been seized from private individuals. However, there is a clear inference,

civil/legal instruments (most likely, Galerius' edict and the accompanying instructions to the magistrates). EUSEBIUS, 10 HISTORIA ECCLESIAE 5:2-24. In both his own name and that of Constantine, Licinius indicates:

[O]ur pleasure to abolish all conditions whatever which appeared in former documents. . . with regard to the Christians, that every one of those who have a like desire to observe the religion of the Christians may now make it his aim to observe that very thing freely, simply, without any disturbance or molestation. . . We have granted to the said Christians free and unrestricted facility to practice their religion.

27 CORPUS SCRIPTORUM, *supra* note 9, at 231f. The instrument goes on to guarantee that ". . . each one may have free facility to practice the worship of his choice [of any rite or any religion]." *Id.* Thereafter, addressing the novel feature of restoration of confiscated properties, the document continues:

[I]n regard to the legal position of the Christians, we have thought it fit to ordain this also, that if any appear to have bought, whether from our exchequer or from any others, the places at which they were used formerly to assemble . . . that the same be restored to the Christians, without delay and doubt, without any payment or demand of price. . . All these things must be delivered over at once and without delay . . . to the corporation of the Christians [Latin: *corpori christianorum*; Greek: *somatio ton christianon*]. And since the Christians are known to have possessed not only those places where they were accustomed to assemble, but others, belonging to their corporation [Lactantius alone adds 'or their churches'] and not belonging to individuals, . . . you will order them to be restored without any doubt or dispute to the Christians, that is, to their corporation and assemblies.

Id. (Latin phraseology: *loca ad quae convenire . . . (et) . . . alia etiam habuisse noscuntur ad ius corporis eorum* (here, Lactantius alone adds: *id est ecclesiarum*), *non hominum singulorum, pertinentia . . . lisdem christianis id est corpori et conventiculis eorum reddi iubebis*; the Greek translation made by Eusebius, or from which he assembled his recital of these events, uses the words, *esti to somati auton kai te synodo*, for the Latin terms, *corpori et conventiculis*).

as well, that at least some of the confiscated lands and buildings belonged to the ecclesial congregations. A very careful selection of terms is noted. Although, as in the case of Galerius' edict, the technical word, *collegium*, is not used, two significant terms are utilized: *corpus* and *conventiculus*. That these words signify entities possessed of formal juridic personality is clearly indicated with the accompanying assertion that rights associated with property are vested in them: *alia etiam habuisse noscuntur ad ius corporis eorum . . . pertinentia*. Some authorities assert that the recourse to disparate terms belies a distinction in the minds of Constantine and Licinius between the "great church" of the entire Mediterranean littoral, understood as a single juridic entity, and the separate and distinct local ecclesial congregations scattered across the empire.²⁶

Comprehension of the full impact of the "protocol" emanating from the meeting at Milan in 312 A.D. between Constantine and Licinius is facilitated in part by examination of yet another civil-legal monument. Galerius had died soon after promulgating the "edict of toleration" which he issued in 311 A.D., on the occasion of his *vicennalia*. The *caesar* in the east, Maximin Daia, had, as noted above, been particularly virulent in his attitude toward the Christians, and he was loathe to introduce the legislation abrogating official persecution in the provinces in which he ruled. External political factors, however, converged to cause him to swallow his blatant, persistent hatred for the Christian religion and its followers and to move to the abolition of officially-sanctioned persecution. Pressed by Licinius (who was acting with the full support of Constantine), Maximin blindly sought ways to bolster his crumbling hegemony. While actually in retreat from the pursuing legions of Licinius, he grudgingly and with palpable and obsequious exaggerations (if not outright falsehoods), issued an edict bringing to an end the persecution.²⁷

²⁶ This is the approach of P.J. Duff in his well-regarded volume on the subject. P. DUFF, *PERSONALITY IN ROMAN PRIVATE LAW* 171 (1971). Duff comments: "For Constantine, the main thing was to enable the services of the church to be resumed; the ownership of the buildings (a technical matter) was of quite secondary importance." *Id.* However, he is most careful not to exclude either of the two most likely "owners," the universal church (*corpus christianorum*) or the individual churches or congregations (*conventicula*). Duff here is actually reiterating conclusions formulated by Ludwig Schnorr von Carolsfeld. See L. SCHNORR VON CAROLSFELD, *GESCHICHTE DER JURISTISCHEN PERSON* 167 (1933). Duff acknowledges the difficulty in determining the precise meaning of von Carolsfeld's arcane reasoning, but affirms his conclusion, "[i]f I understand him correctly . . ." P. DUFF, *supra*, at 171.

²⁷ Eusebius provides the text of the edict in 9 *HISTORIA ECCLESIAE* 10:7-11. Although he was energetic and bitter in his personal antagonism toward the Christian religion, Maximin Daia, adopts an apologetic tone, explaining that in the conduct of the persecution, he had been merely implementing directives given by Diocletian and Maximian. He acknowledges that many of the magistrates had practiced extortion and exhibited greed. He claims that he had previously issued orders to the local authorities to the effect that "if anyone should wish to follow such a custom or religious observance . . . such a one should adhere to his purpose

Clearly echoing the principal elements contained in the "protocol" of Constantine of Licinius, endeavoring to evoke the illusion that the liberality of the document is of his own invention, Maximin does introduce one significant term, *dominium*, in describing the technical nature of the control which the ecclesial collectivities enjoy over "houses or lands" by right. Maximin Daia also explicitly acknowledges that in the pursuit of the persecutory program, government officials acted often enough in a spirit of greed for personal aggrandizement.

The principal architect of the legislative framework which contained the radical alteration of the civil-legal status of Christianity and the disparate Christian congregations was Constantine. Despite the fact that the first formal instrument which has been preserved is the edict issued by Galerius in 311 A.D., there are indications that the substance of the tolerant official disposition of the empire vis-a-vis Christianity had been devised by Constantine. Similarly, although Licinius promulgated the documents reflecting the "protocol" struck by the *augusti* in their deliberations at Milan early in 312 A.D., clearly the impetus for the initiatives which Licinius took was provided by Constantine. The persecutions did enrich the imperial treasuries, and it would appear that Licinius was not personally committed to the program of toleration, restoration, and preference for Christians and Christianity. Eventually, he would resume harassment of the adherents to the Christian way of life and eventually, this would exacerbate differences between Constantine and himself, differences which culminated in the two seasons of civil strife which antedated his embarrassment and death. Patently, Maximin Daia was insincere in his executory document of 313 A.D., issued in desperate straits as an attempt, futile as it was to be proven, to generate support for his eroding base of power. The elements of his legislative enactment were clearly borrowed directly from the pro-Christian policy advanced by Constantine.

Proximate to the time of his meeting with Licinius at Milan, Constantine took unprecedented measures in behalf of the Christian congre-

without hindrance and be prevented by no one and have a free hand without fear or suspicion, to do whatever he pleases." *Id.*

Toward the end of the edict, Maximin Daia, professing to remove all doubt, permits "each one to join in the religious practice from choice, freely . . . and permission has been granted for them to build churches . . . and, moreover, if any houses or lands which formerly belonged to Christians passed to the public treasury or a municipality, even if it were given as a gift to someone, we order restoration." LAWLOR & OULTON, *supra* note 24, at 293-294 (volume one). See 20 PATROLOGIA GRAECA 851-56 (Latin: *ut si quae domus aut locus ad ius christianorum ante hac pertinentia. . . cuncta ad pristinum jus ac dominium christianorum revocentur*; Greek: *ei tines oikiai kai choria tou dikaiou ton christianon*). Eusebius reports that this edict, issued in 313 A.D., soon before the death of Maximin Daia, was originally composed in Latin.

gations, and extant documents attesting to specific initiatives are, unquestionably, reflective of other, similar activities for which no precise record exists. He issued detailed instructions to local imperial officials calling for the prompt restoration of ecclesial properties. He provided gifts of money to the church communities.²⁸

If, after the persecution in the mid-third century, Gallienus had, by means of imperial *constitutiones ad edictum*, abrogated the policy of official antipathy toward Christianity, the resultant civil-legal status of the church would have been ambivalent and perilous. The Christian congregations and their individual members were to be "unmolested." Confiscated properties, most of them belonging to individuals anyway, were to be returned. At best, a fragile situation of *de facto* "toleration" was restored. A kind of *restitutio in integrum* occurred in 261 A.D. This, in turn, had been thrown into confusion with the persecution enacted in a series of imperial edicts in the first years of the fourth century. Personal liberties and civil rights of individual Christians were infringed. Properties, for the most part held by persons or families numbered among the adherents to Christianity, were susceptible to confiscation. The few "church buildings" could be simply torn down by cohorts of legionnaires. Scriptures and other implements utilized in Christian cult, as though possessed of some intrinsic magical qualities, were destroyed. Christian leaders, the bishops, presbyters, and deacons, were subjected to calculated penal and punitive measures. This legislative framework was formally abrogated by Galerius. Echoing Gallienus in one respect, Galerius professed to manifest "clemency to those who had exhibited the "fault" or "crime" of Christianity. The return to an "unmolested" exercise of Christian adherence was countenanced. Non-Christian residents of the empire were, in fact, subjected to the legislation; they were effectively "enjoined" from pursuing harassment. The one notable advance in the abrogating edict of Galerius as far as the Christian communities were concerned was

²⁸ Eusebius, in 10 *HISTORIA ECCLESIAE* 5:15-17, reproduces the text of a letter of instructions transmitted in 313 A.D. to Anulinus, proconsul in Africa, regarding the restoration of ecclesial properties. The same author and source reports of Constantine's gift to Caecilian, Bishop of Carthage, of a sum of money for distribution among the local congregations in Africa, Numidia and Mauretania, another initiative undertaken in the year 313 A.D. *Id.* at 6:1-5. Stipulations attached by the emperor to this endowment suggest that it was his intent to help provide for the sustenance and maintenance of clergy in the areas identified.

This latter benevolence is utterly without precedent in Christian experience, of course. The emperor, it must be recalled, derived *ex officio* the role of *Pontifex Maximus* with roots deep in pagan antiquity. This may have prompted a sense of responsibility for some of the interventions which he made in Christian ecclesial affairs. The pagan priesthoods in Egypt had long enjoyed officially-sanctioned and derived endowments. Note has been made of the favor displayed by Maximin Daia to the officers of the pagan religious cults. Constantine was clearly motivated to make similar provision from the state treasury for Christian clergy.

an implicit recognition of some licit status as *collegia*. A potentially positive consequence of this recognition was the express permission given to build places of assembly. Qualifications were conjoined to this new *concessio*.

The "Constantinian settlement," however, clearly advanced upon the mere toleration enunciated by Galerius. The unmolested exercise of a religion which continues to be somehow "suspect" is no longer at issue. Christians (all residents of the empire, for that matter) enjoy, by right, a freedom of choice in the religious expressions. This is a formidable and novel civil-legal development. Furthermore, the restoration of confiscated properties is demanded. It is not, as in the case of Galerius' constitution, a matter of tolerating in some ambiguous fashion the possession of some places of religious assembly by "Christian *collegia*" to whom a vague grant of licit status has been accorded. Rather, an empire-wide collectivity and its disparate local manifestations are recognized as possessed of property rights; there is no ambiguity; capacity (*caput*) for *dominium* is specified. This is no (mere) *restitutio in integrum*!

However dramatic were the consequences for the Christian church and its local congregations as the result of the initial phases of the "Constantinian settlement," events continued to unfold which occasioned clarification of the civil-legal status of Christianity during Constantine's long reign. It is apparent that the emperor's understanding of the Christian "entity" underwent growth and development throughout the duration of his reign, with attendant consequences in civil-legal recognition accorded. One highly significant aspect of this process is associated with the manner in which Constantine perceived the special role of bishops in the Christian collectivities.

A series of events beginning to unfold in 313 A.D. and continuing thereafter is graphically illustrative of the developing attitude of Constantine toward the Christian bishops, with important ramifications touching upon the civil-legal recognition which the emperor accorded the ecclesial officials.

For decades, the ecclesial communities in North Africa had been experiencing dissension affecting the discipline for reconciling to full privileges of Christian life those adherents who had indulged in proscribed, "sinful," behavior. Long a center for rigorous attitudes, the churches in North Africa enrolled some who viewed lapses during seasons of persecution as virtually unforgivable offenses, so that *lapsi* were thought of as irreconcilably separated from "communion." Certainly, no official ministerial functions performed by *lapsi* would be "valid," or so the rigorists reasoned. In the immediate aftermath of the "great" persecution of the early fourth century, internal squabbling broke out in the environs of Carthage on this very question. Allegations were raised by some disaffected, rigorist factions within the Christian populace that the bishop of

the local congregation, Caecilian, was improperly vested with his ecclesial position, have been consecrated or ordained by one who was a *traditor*, that is, one who had, during the recent persecution, "handed over" to imperial officials certain sacred items associated with cult, a lapse deemed by the proponents of the stern interpretation as being irreconcilably perverse. It will hardly be surprising to add mention of the fact that the opponents of Caecilian seem to have harbored other resentments against the incumbent bishop.²⁹

The disgruntled Christians opposed to Caecilian made an appeal directly to Constantine in the spring of 313 A.D. Their cause and complaints were transmitted to the emperor's attention by the civil proconsul in Africa, Anulius, to whom they had access.³⁰

The emperor, for his part, evidently judged that a potential rift in the Christian community in Carthage was a matter of serious concern, in the face of which he adopted a novel expedient: the emperor appointed the bishop of the local church at Rome, Miltiades, to serve as head of a small group, enlisting as its other members the bishops of three communities in the Province of Gaul (Autun, Cologne and Arles) and one Marcus (of whom no more is known) and directed this body to investigate the matter. In effect, Constantine, as a secular ruler, and it must be recalled, envisioning himself as *Pontifex Maximus*, accepted the "*libellus*" presented by the dissidents in Carthage and commissioned Miltiades and those who were associated with him in the enterprise, to conduct a procedure which was possessed of both appearance and substance of juridic authority, competent and sufficient, or so Constantine clearly thought, to

²⁹ The name assigned in history to this rigorist faction, "the Donatists," derives from the name of one or other of the two exponents who shared the common name, Donatus. The best description of the background and development of the "Donatist" movement is provided by a bishop from Milevis in Numidia, Optatus. See 26, 34 *CORPUS SCRIPTORUM*, *supra* note 9 (*CONTRA PARMENIAN* and *EPISTLE LXXXVIII* [of Augustine]).

³⁰ Thus, no sooner did Christians come to enjoy an unprecedented exercise of individual and corporate civil liberty in regard to their religion than they were pressing religiously-related claims in secular, civil-legal and administrative channels. *OPTATUS, CONTRA PARMENIAN* 1, 22, provides the text of the formal complaint which the "Donatists" urged against Caecilian. *AUGUSTINE, EPISTLE LXXXVIII* 2, has the text of the letter which Anulius transmitted to Constantine reporting the dissent in the local congregation at Carthage.

The proconsul, Anulius, reported to Constantine in date of April 15, 313 A.D., that he had endeavored to reconcile the disputants in Carthage, but "was approached by certain persons, followed by a great throng of the populace, who held that Caecilian must be opposed, and presented me in my official capacity with two documents . . . and demanded with insistence that I should send them." *Id.* See 34 *CORPUS SCRIPTORUM*, *supra* note 29, at 408. The translation is provided in *NEW EUSEBIUS*, *supra* note 14, at 316 n.270.

The Donatists, plying Constantine with compliments, besought him to "command that we be granted judges from Gaul; for between us and other bishops in Africa, disputes have arisen." *OPTATUS, CONTRA PARMENIAN* 1, 22. The translation is that from *NEW EUSEBIUS*, *supra* note 14, at 317 n.271.

provide for the resolution of the controverted issue.³¹ There is a provocative congeries of elements in this matter. The controversy ensued with the denunciation of a group of *delators*. There is little doubt that Constantine empowered Miltiades and his conferees to conduct a process which is indistinguishable from the *cognitio extra ordinem*. The emperor placed at the disposition of the convened ecclesiastical officials the use of the *basilica* on the Lateran hill in Rome which was part of the patrimony of his wife, Fausta.³²

The "Donatist" group refused to accept the contrary decision emanating from the proceedings supervised by Miltiades at the Lateran palace and appealed again to Constantine. While it is not opportune in this exercise to relate the entire history of the so-called "Donatist controversy," note can be made of the developments which did occur. Constantine, manifesting impatience, nonetheless arranged for a further process, effectively convoking an ecclesiastical "council," which assembled at Arles in 314 A.D. When in the course of the deliberations of that council, which convened at the invitation (and insistence) of the emperor, the Donatist case was rejected by the gathered bishops, the emperor hardened his pos-

³¹ In 10 HISTORIA ECCLESIAE 5:18-20, Eusebius provides the text of Constantine's letter or commission to Miltiades. The emperor relates that Anulius, the proconsul, has transmitted documentation "from which it appears that Caecilian, the bishop of the city of the Cartheginians, is called to account on many charges by some of his colleagues in Africa." The emperor expresses his concern that the religious dissent could impact adversely upon the stability of the social ambient. Consequently, he states:

It seemed good to me that Caecilian himself, with ten bishops, who appear to be his censors, and such ten others as he may deem necessary to his suit, set sail for Rome, that there a hearing may be granted him in the presence of yourselves and moreover of Reticus and Maternus and Marinus also [the bishops of Autun, Cologne and Arles, respectively], your colleagues, in such a manner as you may perceive to be in accordance with the most sacred law. . . . I have subjoined to my letter copies of the documents that were sent to me by Anulius . . . [and after you have read them] you will gauge by what method the most careful investigation can be made of the suit, and a just decision arrived at.

20 PATROLOGIA GRAECA 887f. The translation is from NEW EUSEBIUS, *supra* note 14, at 317-18 n.272.

³² After enjoying the use of this basilica for the conduct of the commission entrusted to him by the emperor, Miltiades apparently came to the possession, and eventually the ownership, of the property, the site of the first "church" benefaction made by Constantine. The "gradualism" which is characteristic of Constantine's policy favoring the Christian congregation(s) is once again reflected in the manner in which the Lateran palace came to the "patrimony" of the church. Optatus of Milevis has a terse but informative report of the proceedings, in CONTRA PARMENIAN 1, 23-24. He notes that an expanded number of bishops participated in the exercise, identifying fifteen bishops from cities in Italy as additional members of the commission. Evidence disclosed during the conduct of the process indicated that it was the accusers, not Caecilian, who had been involved with *lapsi*. Not a shred of evidence surfaced to implicate Caecilian, whom the commission deemed worthy of merit. 26 CORPUS SCRIPTORUM, *supra* note 9, at 26-27.

ture against the dissidents. Some punitive initiatives were visited upon Donatist followers in North Africa by civil authorities, while further investigations were pursued, including the examination of the allegation that Felix, who had been one of the consecrators of Caecilian, had been a *traditor*. Again, as Felix was adjudged innocent, his accusers found that they had, themselves, been exposed as having compromised the integrity of their religious commitment during the persecution. At length, the emperor, weary of the ceaseless bickering within the Christian community in the environs of Carthage and doubtless uneasy with the maintenance of any severe civil punitive measures against the dissident faction, resolved to leave the matter to the judgment of the deity and called off the stringent civil measures which he had temporarily invoked against the Donatists. The internal controversy wore on within the church in the occident for much of the fourth century.

On the precise point, however, that the commission given by Constantine to Miltiades and his confreres had unmistakable overtones of the exercise of a delegated share of the *imperium* by and with which a civil magistrate would engage in the procedure *cognitio extra ordinem*, it is instructive to consider remarks made by Constantine in a letter which he addressed to Caecilian and his accusers in 314 A.D., directing them to appear at the conciliar meeting which was to be held at Arles. In references to the unsuccessful efforts undertaken for the resolution of the controversy at the sessions conducted at the Lateran palace under the presidency of Miltiades, Constantine clearly indicates that the ecclesial commission was engaged in procedures of civil-juridic consequence.³³

³³ Optatus provides the text of the Emperor's letter. 26 CORPUS SCRIPTORUM, *supra* note 9, at 204-06 (*Appendix 3*). The authenticity of the appendices in the *corpus* of Optatus' writings has been questioned; however, in *Constantine the Great and the Christian Church*, Norman H. Baynes summarizes well contemporary scholarly consensus that the appendices are, indeed, authentic. Baynes, *supra* note 9, at 75. The verbiage which the emperor employed about the process at the Lateran palace is most telling:

I thought it well, in order to settle this quarrel, that Caecilian, the bishop of Carthage, against whom vehemently different persons often petitioned me, should go to the city of Rome with seven of his supporters, and that some of these who had deemed for to bring certain charges against him, should appear as well. I also ordered some bishops from the Gauls to proceed to our above-mentioned city of Rome, that, both they and the bishop of the city of Rome, and others who should join them in the inquiry, by the integrity of their lives and praiseworthy manner of living, might bring to a fitting conclusion the matter which seems to have been stirred up. Now they have brought to my knowledge, by the written Acts of their meeting, all that had been done in their presence, affirming also by word of mouth that their judgment was based upon equity, and declaring that not Caecilian, but those who thought fit to raise charges against him, were guilty-so that, after their judgment was given, they forbade the latter to go back to Africa.

NEW EUSEBIUS, *supra* note 14, at 319 n.273 (translation).

The unprecedented expedient of conveying civil-legal authority to ecclesiastical leaders is as significant an innovation as any other which is documented in the "Constantinian settlement," though one which, curiously enough, is seldom accorded much attention. Although the procedures adduced for the resolution of the "Donatist controversy" in North Africa (and the west) did not eventuate in a totally satisfactory conclusion, the emperor had struck upon a precedent which continued to appeal to him as useful when he was disposed to intervene in ecclesiastical disputes.

Thus, he had recourse to the convocation of a "church council" a decade later when the so-called "Arian crisis" erupted in the eastern provinces of the empire; the "Council of Nicaea" was the result. Furthermore, again manifesting the "gradualism" which characterized his program of recognition for the Christian religion, Constantine came to convey to the bishops jurisdictional authority of the *imperium* with attendant secular civil-legal ramifications. Thus, in 321 A.D., Constantine, by edict, promulgated legislation providing that manumission conducted in the presence of a bishop was valid.³⁴ More striking was the imperial constitution which recognized the courts of the bishops (*iudicium episcopale*) as competent for the adjudication of all civil suits. The emperor acknowledged the good character of the bishops (consider his characterizations in the document instructing Caecilian and his opponents to appear at the council at Arles, as noted above); secular courts may have had venal and corrupt magistrates; nevertheless, it is a striking acknowledgement of what the emperor calls *legem christianam* to have the imperial legislation regard it as effectively interchangeable with the contemporary civil law.³⁵

An integral element of the gradually-evolving official policy of Constantine toward the Christian church seems, then, to have been a recognition of the special role of the bishops. True, the very first of his civil-legal initiatives affecting the Christian religion which followed upon his emergence as uncontested *augustus* identify the collectivities, the *corpus christianorum* and the *conventicula*, to which legitimate juridic status was conveyed. Yet, the emperor manifested a tendency to afford particular attention to those in the office of bishop. His identification of an altogether unprecedented role in the secular civil-legal sphere for the Christian bishops belies his disposition in this respect. In yet another facet of the emerging policy for regularizing the circumstances of the Christian

³⁴ See THEODOS. COD. 4.7.1 (a constitution addressed to "Bishop Hostiud," of April 18, 321 A.D.).

³⁵ THEODOS. COD. 4.7.2. (a constitution of uncertain date, but reiterated in CONSTITUTIONES SIRMUNDIANAE Tl.1, addressed to "Ablavius, the Praetorian Prefect," given in date of May 5, 333 A.D.).

religion and its *collegia* and adherents within the empire, Constantine seemed inclined to look first to the official leaders in the church communities. The area of particular focus in this respect is heredity.³⁶

With the emergence of the Christian church and churches as *collegia licita* possessed of a formal *caput* for the exercise of *dominium*, the matter of heredity, legacies, and donations made *causa mortis* had to be addressed. The limitations imposed in Roman law upon *persona incerta* in this respect had to be considered. A very limited number of precedents did exist, instances in which a pagan deity of one of the pagan cults had, by extraordinary civil-legal intervention, been recognized as competent to receive bequests or, in special circumstances, to be constituted *haeres*. Appropriate civil-legal initiatives were required in the case of the Christian juridic person(s).³⁷

Two constitutions *ad edictum* reflect the development occurring under Constantine's imperial rule in this respect. On April 1, 320 A.D., the emperor recognized formally the capacity of individuals in various significant circumstances to accept gifts, inheritances, and legacies.³⁸ Fully fifteen months subsequently, the emperor issued yet another edict

³⁶ Any discussion of heredity in the Roman legal system must be carefully nuanced. The salient concept entails "succession," and not, as in the Anglo-Saxon legal tradition, the broader parameters of benefaction and legacy. In classic Roman law, the heir literally "steps into the shoes" of the deceased, not only accepting the bequests of an inheritance, but assuming, as well, the liabilities. The concept of "patrimony" is closely affiliated. See V. ARANGIO-RUIZ, *ISTITUZIONI DI DIRITTO ROMANO* 508-09 (12th ed. 1949). It was not possible for a *persona incerta* to be instituted *haeres*, a procedure which necessitated *caput* in the first place, to even approach the magistrate for the requisite authorization (*hereditatis petitio*) to come to the legally-recognized acquisition of the patrimony (*bornorum possessio*).

There is a good discussion of heredity in Roman law in the magistral volume by Pietro Bonfante. P. BONFANTE, *ISTITUZIONI DI DIRITTO ROMANO* 523ff (rev. 9th ed. 1932). There is also helpful material in the analysis of Fritz Schulz. F. SCHULZ, *CLASSICAL ROMAN LAW* 203ff (1961).

³⁷ The question of inheritance by the Christian collectivities is one which impacts quite directly upon the position of those who postulate that the edict of Gallienus in 261 A.D. effected *de iure* legitimacy for the church(es). If their hypothesis is valid, it is strange that the regularization of matters affecting heredity was not resolved until the time of Constantine's "settlement."

³⁸ THEODOS. COD. 8.16.1, an imperial constitution addressed "To the People," makes provision that:

Those persons who were formerly considered celibates in the ancient law shall be freed from the threatening terrors of the law, [so] that they shall live as though numbered among married men and supported by the bond of matrimony and all shall be able to accept anything to which they are entitled. Nor indeed shall any person be considered childless, and the prejudices attached to that name shall not harm him.

Id. The translation is that of Clyde Pharr in *The Theodosian Code*. In his accompanying notes, Pharr comments that according to the previous law, unmarried and childless persons were not allowed to accept gifts, inheritances or legacies beyond a certain very limited amount. See C. PHARR, *supra* note 9.

in which provision was made for leaving bequests to the ecclesial collectivity.³⁹

There was, then, first a legislative measure which is unquestionably couched in terms of the emperor's desire to facilitate the regularization of the church in regard to legacies and bequests by focusing upon the individuals who were bishops. Only subsequently, was specific legislation promulgated by Constantine directly focusing upon the Christian *collegia* in this precise regard.

CONCLUSION

It is possible to draw conclusions regarding the essential character of the "Constantinian settlement" which affected the civil/legal status of the Christian churches. Appropriately, the note of "gradualism" can be applied to developments. The thesis that Constantine desired first and foremost that Christian services be restored and only subsequently dealt in a reflective manner with the civil-legal status of the ecclesial collectivities appears to have much weight. Withal, it is appropriate to say that immediately upon the establishment of his imperial hegemony, Constantine did offer formal, explicit recognition of Christianity as *religio* not merely *tolerata*, but *licita*. While a great many terms are used to denote the Christian collectivities, *corpus*, *conventicula*, *concilio*, the salient point is that legitimate status was unequivocally conveyed by the imperial authority. The precision distinguishing collectivities, the "catholic" church of the entire empire in contradistinction to the separate local congregations, *collegia* in their own right, gradually emerged in the legislative framework of the "Constantinian settlement." From the earliest moments of his gradually-evolving program of favor exhibited toward the Christian religion, Constantine evidenced a disposition to recognize and deal with the duly-constituted bishops of the ecclesial communities in a special manner. Benefactions designated for ecclesial purposes were presented to bishops for administrative tasks such as disbursement. Imperial authority was shared with the bishops, even in matters of strictly secular, civil-legal concern. If civil-legal recognition of the ecclesial collectivities as juridic personalities possessed of comprehensive *caput* was the hallmark of the "Constantinian settlement," coincident with the developments attaching to that phenomenon was the recognition in civil law by the emperor of the special administrative role of the bishops, more often explicit in legis-

³⁹ THEODOS. COD. 16.2.4 (an imperial constitution of July 3, 321 A.D., addressed "To the People" providing that "every person shall have the liberty to leave at his death any property he wishes to the most holy and venerable council of the Catholic church, *santissimo catholicae venerabilique concilio*."). The translation is that of Clyde Pharr in *The Theodosian Code*. C. PHARR, *supra* note 9.

lative initiatives than tacit. The historical development of the Christian church was shaped dramatically by the "Constantinian settlement;" for the church, things would never be the same.

