

## UC Irvine Law Review

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Volume 4

Issue 1 “Law As . . .” II, *History As Interface for the Interdisciplinary Study of Law*

Article 8

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3-2014

# Standing on Shaky Ground: Criminal Jurisdiction and Ecclesiastical Immunity in Seventeenth-Century Lima, 1600–1700

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### Recommended Citation

Michelle A. McKinley, *Standing on Shaky Ground: Criminal Jurisdiction and Ecclesiastical Immunity in Seventeenth-Century Lima, 1600–1700*, 4 U.C. IRVINE L. REV. 141 (2014).

Available at: <https://scholarship.law.uci.edu/ucilr/vol4/iss1/8>

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# Standing on Shaky Ground: Criminal Jurisdiction and Ecclesiastical Immunity in Seventeenth-Century Lima, 1600–1700

Michelle A. McKinley\*

*A church and its cemetery possess an exemption . . . for every man who takes refuge in them, on account of any offence which he has committed, or debt which he owes, or for any other cause whatsoever should be sheltered there, and should not be removed by force, or killed, or any corporal punishment whatever be inflicted upon him, nor should they surround him while in the church or the cemetery, or forbid that he be given food and drink.<sup>1</sup>*

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## INTRODUCTION

On April 19, 1676, Manuela de Muñoz awoke to a fearful sight. Manuela

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\* Associate Professor, University of Oregon School of Law. I am especially indebted to Malick Ghachem for his helpful comments and critique of the initial draft. Carlos Aguirre, Antoinette Burton, Leo Garofalo, Bob Gordon, Dick Helmholz, Kris Lane, Sarah Levine-Gronningsater, Rachel O’Toole, Karl Shoemaker, Shannon McSheffrey, Sue Peabody, and Natalie Zemon Davis were generous with their time and insights, and were wisely cautious about the scope of the Article. Victoria Anderson and the editors of the *UC Irvine Law Review* deserve special thanks for their patience, diligent research, and helpful suggestions. And thanks to all those who participated and gave feedback at “Law As . . .” II, History as Interface for the Interdisciplinary Study of Law,” the wonderful interdisciplinary legal history community that Chris Tomlins has nurtured.

1. 1 LAS SIETE PARTIDAS, at Partida 1, tit. 9, ley 3 (Robert I. Burns ed., Samuel Parsons Scott trans., 2001).

found the door leading from the inner patio of her boardinghouse to the street ajar, and suspected something was amiss. Manuela distinctly remembered that the night before, doña Tomasa de Paredes (the owner of the boardinghouse) had given the front door key to her slave Juan Popo so he could let himself out to get to his early-morning job. So when Manuela found the door open at five a.m., she was alarmed—and no doubt furious—at Juan’s carelessness. But when she went to Juan’s room to remonstrate him, she found Juan lying in bed with his throat slit open. The key and the safety latch to Juan’s door were smeared in blood. Upon hearing Manuela’s horrified shrieks, the residents of the boardinghouse flocked to the patio and to Juan’s room, where they confirmed that Juan had died from a fatal knife wound to his throat.

Amidst the ensuing tumult, the residents in the boardinghouse all agreed that they saw doña Tomasa give Juan Popo the key before she retired for the evening. Many of the residents confirmed that the night before, they saw Sebastian Matamba come to sleep in Juan Popo’s room. This was apparently a routine sleeping arrangement between the two men, and everyone in the boardinghouse seemed to know about it besides doña Tomasa. They immediately blamed Sebastian for Juan’s death, and the *maestro de campo* (colonial official) set off with a warrant to arrest Sebastian for murder.<sup>2</sup>

The record opens with Sebastian apprehended in Lima’s royal jail on May 4 (two weeks after the preceding events) with an order for his execution that night. According to the record, Sebastian was forcibly taken from the Hospital de San Ildefonso, where he sought ecclesiastical immunity. Violating the time-honored practice that granted fugitives immunity from secular officials once they sought refuge on hallowed ground, five of Lima’s *alcaldes de la sala real del crimen* (criminal magistrates) forced their way into the Hospital and arrested Sebastian. Despite the vociferous protests of the religious brethren at the hospital during the invasion and arrest, and disregarding the injunction filed by the ecclesiastical prosecutor that upheld Sebastian’s right to immunity, the royal magistrates steadfastly refused to return Sebastian to sacred ground. Instead, they maintained that premeditated murder was one of the crimes exempt from ecclesiastical immunity in Gregorio XIV’s papal bull promulgated in 1591.<sup>3</sup> The crown magistrates then argued that Lima’s crime rate had escalated to unmanageable proportions, and that the city’s residents feared for their safety and their lives—all along implying that ecclesiastical authorities were not competent to manage matters of crime control.

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2. Archivo Arzobispado de Lima [hereinafter AAL], *Inmunidad Eclesiástica*, Leg. 14, Exp. 5, Año 1676, at 22 (Fe de muerte, Juan Popó, 18 abril). A transcript of the relevant portions of this case is on file with the *UC Irvine Law Review*.

3. All of Lima’s trial records refer to Gregorio’s 1591 papal bull that exempted homicidal fugitives from sanctuary. KARL SHOEMAKER, SANCTUARY AND CRIME IN THE MIDDLE AGES, 400–1500, at 15 (2011). These exemptions reflected the canonists’ distinction between premeditated or cold-blooded murder, and manslaughter. 1 & 2 JUAN DE HEVIA BOLAÑOS, CURIA PHILIPICA 215–16 (1989). On crimes excluded from sanctuary in the *ius commune*, see R. H. HELMHOLZ, THE IUS COMMUNE IN ENGLAND: FOUR STUDIES 42–56 (2001).

More damningly, the magistrates asserted that fugitive slaves routinely sought refuge on sacred ground, where they lacked adequate control and supervision. Instead, fugitives inside religious institutions (who were dubbed *retraídos*) used their position within the church as a base for organizing more dastardly acts against the populace, empowered by the protective shield of ecclesiastical immunity.

Using a representative sample of 328 cases brought by enslaved fugitives between 1600 and 1700, this Article examines cases of ecclesiastical immunity in which secular officials forcibly removed enslaved prisoners like Sebastian Matamba from Lima's vast network of religious institutions for criminal prosecution. These cases document the everyday concerns of crime control, public safety, and the administration of criminal justice in Lima's jails and courts in the seventeenth century: a century of viceregal consolidation in one of the two most important *Audiencias* (royal courts) of the Hapsburg Empire. The records reveal the perennial struggle in consolidating states between, on the one hand, ecclesiastical ideals of clemency and intercession, and, on the other, secular imperatives of punishment and deterrence—here underwritten by the colonial racial grammar of the criminal depravity of black and mulatto men and women. During the seventeenth century, Lima's black and mulatto population (enslaved and free) practically outnumbered the white population, creating considerable challenges to ensuring public safety and racial order for those appointed to the *Audiencia* and the *Cabildo* (city council).<sup>4</sup> Public safety and racial order were twinned concerns, impacting the policies set in place to police the city and the roadways leading in from its outlying fertile valleys. These disciplinary measures included vagrancy laws, curfews for black and mulatto men and women, and restrictions on slaves' ability to congregate in large groups without a master present.<sup>5</sup> Administrative attention to problems of crime and delinquency, and

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4. Lima had a population of twenty-five thousand at the beginning of the seventeenth century. See MAURO ESCOBAR GAMBOA, PADRON DE LOS INDIOS DE LIMA EN 1613, at II (1968) (describing the population of Lima in 1614). By 1700, census figures indicated that the population had increased to thirty thousand. See Noble David Cook, *Estudio Introductorio* to MELCHOR PORTOCARRERO LASSO DE LA VEGA, NUMERACIÓN GENERAL DE TODAS LAS PERSONAS DE AMBOS SEXOS, EDADES, Y CALIDADES Q' SE HÀ HECHO EN ESTA CIUDAD DE LIMA, AÑO DE 1700, at XII (1985).

5. See, e.g., REALES ORDENANZAS SOBRE LOS NEGROS QUE HAY EN LA CIUDAD DE LOS REYES, reprinted in 1 RICHARD KONETZKE, COLECCIÓN DE DOCUMENTOS PARA LA HISTORIA DE LA FORMACIÓN SOCIAL DE HISPANOAMÉRICA 1493–1810, at 384, 384–88 (1953). These were a comprehensive set of disciplinary regulations regarding curfews, sumptuary laws, compulsory registration to track *cimarrones* (runaways), and a prohibition on all black men carrying weapons. *Id.*; Rachel Sarah O'Toole, *Castas y representación en Trujillo colonial*, in MÁS ALLÁ DE LA DOMINACIÓN Y LA RESISTENCIA: ESTUDIOS DE HISTORIA PERUANA, SIGLOS XVI–XX, at 48, 51–52 (Paulo Drinot & Leo Garofalo eds., 2005). Similar orders were repeatedly issued to regulate free and enslaved black mobility and to prevent black-indigenous sexual unions throughout the seventeenth and eighteenth centuries. FREDERICK P. BOWSER, THE AFRICAN SLAVE IN COLONIAL PERU 1524–1650, at 150–53, 156 (1974). The repetitious nature of these orders raises the presumption that Lima's population ignored the demands as impractical impositions on their daily lives. *Id.* at 153, 155. Black mobility, for example, was vital to the slaveholding household, which depended on the remittances from renting out slaves for daily wage labor. *Id.* at 156. Arms prohibition was similarly impractical, because most

concerns about the *casta* (mixed-race) population allegedly perpetrating these crimes, became more prevalent in the seventeenth century.

Despite the steadfast resistance to the church's prerogative of ecclesiastical immunity, the royal magistrates' position in these sanctuary cases was legally unfounded. They maintained that those who committed serious crimes were not eligible for ecclesiastical immunity—which of course contravened a cardinal principle (if not the *raison d'être*) of the practice. It was precisely those suspected of serious felonies who needed sanctuary. The premise of the inviolability of the church's jurisdiction rested on its ability to intercede on behalf of those fleeing criminal persecution. As such, what we see here emerging is a shift in thinking about crime, responsibility, punishment, mercy, and penance amidst Lima's growing population and portrayal of itself as the well-ordered, cosmopolitan "City of Kings."<sup>6</sup> Crime in the baroque *imaginaire* was gradually moving away from a rupture of community ties to questions of assigning individual responsibility and guilt. Crime also remained a sin against God, and the church located the primary breach within the spiritual realm.<sup>7</sup> The words *crimen* (crime) and *pecado* (sin) went through semantic changes in the documents, reflecting perceptible changes in attitudes toward the perpetrators as *reos* (criminals) rather than as *pecadores* (sinners).<sup>8</sup> The tussle between sanctuary and secular criminal punishment that unfolded throughout the seventeenth century demonstrates the simultaneity of punishment and penitence: public execution, excommunication, and exile of malefactors were forms of expulsion that reinforced social bonds among the faithful.

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enslaved black men bore the responsibility for guarding their masters' property and ensuring their masters' safety. *Id.* at 155. Others served as their masters' agents in long-distance travel, and trusted slaves conducted business affairs on their masters' behalf. See Rachel Sarah O'Toole, *From the Rivers of Guinea to the Valleys of Peru: Becoming a Bran Diaspora Within Spanish Slavery*, 92 SOC. TEXT 19 (2007) [hereinafter O'Toole, *From the Rivers of Guinea*]. On black negotiations of mobility, gender, and public space, see SANDRA LAUDERDALE GRAHAM, *HOUSE AND STREET: THE DOMESTIC WORLD OF SERVANTS AND MASTERS IN NINETEENTH-CENTURY RIO DE JANEIRO* (1988).

6. ALEJANDRA B. OSORIO, *INVENTING LIMA: BAROQUE MODERNITY IN PERU'S SOUTH SEA METROPOLIS 1* (2008).

7. Irene Fosi, in her study of the papal courts, writes, "From the middle of the sixteenth century, as the Catholic Reformation took hold, the line between sins and crimes blurred; this development inevitably tangled the jurisdictions of courts already at work in the city . . . with those of some bishops in other dioceses in the state." IRENE FOSI, *PAPAL JUSTICE: SUBJECTS AND COURTS IN THE PAPAL STATE, 1500–1750*, at 35 (Thomas V. Cohen trans., 2011).

8. We see "*reos rematados*" emerge as a legal term for criminal exiles in the eighteenth-century records. See *infra* note 39. Criminality evolved into delinquency and crimes against the public—rather than moral, domestic, or religious—order. By the nineteenth century, the word *delincuente* (delinquent) was widely used in popular and legal literature. See CARLOS AGUIRRE, *DÉNLE DURO QUE NO SIENTE: PODER Y TRANSGRESIÓN EN EL PERÚ REPUBLICANO 50–51* (2008). For similar termino-logical shifts pertaining to "fallen" and "sinful" women, see NANCY E. VAN DEUSEN, *BETWEEN THE SACRED AND THE WORLDLY: THE INSTITUTIONAL AND CULTURAL PRACTICE OF RECOGIMIENTO IN COLONIAL LIMA 60* (2001).

## I. SANCTUARY PRACTICES IN COMPARATIVE HISTORIOGRAPHY

Ecclesiastical immunity, sanctuary, and intercession have been the subjects of constant reform, expansion, and retrenchment over the centuries. By 1624, sanctuary had been abolished in England. On the continent, papalists and canonists shuttled between the extreme view of the absolute right of sanctuary as ecclesiastical privilege and, when public opinion was particularly opposed to the practice, pragmatic negotiations with secular lawmakers over the kinds of crimes exempt from ecclesiastical protection. The two most notable crimes open to negotiation were treason and homicide.<sup>9</sup>

Much of what we know about sanctuary comes from English legal history, particularly in the more studied sites like Beverly, Durham, and St. Martin-le-Grand during the High Middle Ages and the early modern period.<sup>10</sup> The conventional English narrative of sanctuary's demise chronicles the eventual triumph of centralized state power over the corrupt, aggrandizing medieval church.<sup>11</sup> Other scholars argue that the need for ecclesiastical intercession declined as secular criminal justice incorporated the virtues of fairness, trial by jury, and modern forms of proof.<sup>12</sup> Despite the rich debates in English legal history, scholars have paid far less attention to Iberian colonial sanctuary practices.<sup>13</sup> It is surprising that so much of the historiography on the practice of sanctuary has ignored Spanish America. The *Nueva Recopilación*, an important body of laws for the Spanish Empire issued in 1567, contained several references to ecclesiastical immunity. Its progeny—the *Recopilación de Leyes de los Reinos de las Indias* (issued in 1680)—fully recognized ecclesiastical immunity.<sup>14</sup> As the crown's imperial holdings grew in the sixteenth century, King Phillip II insisted on the need for immunity in the colonies and urged respect for the practice.<sup>15</sup> Besides these royal compilations, the most relevant treatise was the *Curia Philipica*, issued by printers in Lima in 1615 and widely used throughout the Americas.<sup>16</sup> The *Curia* had a lengthy

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9. See J.H. Baker, *The English Law of Sanctuary*, 2 ECCLESIASTICAL L.J. 8, 12 (1990).

10. On local custom, space, and sanctuary practices in St. Martin-le-Grand, see Shannon McSheffrey, *Sanctuary and the Legal Topography of Pre-Reformation London*, 27 LAW & HIST. REV. 483 (2009). For ecclesiastical immunity practices in early medieval France, see BARBARA H. ROSENWEIN, *NEGOTIATING SPACE: POWER, RESTRAINT, AND PRIVILEGES OF IMMUNITY IN EARLY MEDIEVAL EUROPE* 156–57 (1999).

11. For a British historiography, see J. CHARLES COX, *THE SANCTUARIES AND SANCTUARY SEEKERS OF MEDIEVAL ENGLAND* 319–20 (1911).

12. SHOEMAKER, *supra* note 3, at 2.

13. On colonial Latin American sanctuary practices, see generally Victor M. Uribe-Uran, "Iglesia me llamo": *Church Asylum and the Law in Spain and Colonial Spanish America*, 49 COMP. STUD. SOC'Y & HIST. 446 (2007). For a discussion of asylum in Iberia under Alfonso IX, see generally José María Ortuño Sánchez Pedreño, *El derecho de asilo en iglesias y sus cementerios en la legislación de Partidas*, 5–6 GLOSSAE: REVISTA DE HISTORIA DEL DERECHO EUROPEO 187 (1993).

14. *Recopilación de leyes de las Indias*, in JUAN MANZANO MANZANO, *HISTORIA DE LAS RECOMPILACIONES DE INDIAS* 446 (1956).

15. Uribe-Uran, *supra* note 13, at 452–53.

16. DE HEVIA BOLAÑOS, *supra* note 3.

section dealing with ecclesiastical immunity.<sup>17</sup> The persistence of ecclesiastical immunity in Iberia and its colonies is undoubtedly due to the power of the baroque church during the sixteenth and seventeenth centuries. This was a period of virtually untrammelled church power. Perhaps the most striking feature of ecclesiastical immunity was its longevity. The practice of claiming ecclesiastical immunity continued well into the republican period: Lima's archives document sanctuary cases brought as late as 1913.<sup>18</sup>

It is well worth pondering why this practice persisted as long as it did, in light of the English historical narrative that ecclesiastical intercession declined as secular criminal justice incorporated modern practices of trial by jury and evolving standards of evidence.<sup>19</sup> That is, however, not the subject of this Article. At the expense of comparative legal historical exercise (tracing patterns and transplants), it seems more sensible to view sanctuary as a context-dependent practice that functioned differently according to the religious, political, and cultural exigencies of the people who claimed it.<sup>20</sup> Sebastian Matamba's case gives us a fine-grained picture of the ecclesiastical practice of granting sanctuary to enslaved fugitives fleeing secular punishment in a New World context. A modern interpretation of sanctuary could feasibly incorporate the Catholic Church's activities on behalf of unauthorized migrants against federal immigration authorities in the twentieth and twenty-first centuries in the United States.<sup>21</sup>

This is not to imply that this Article ignores comparative legal historical questions. On the contrary, the Article takes seriously the universal observation of the practice of sanctuary as a demonstrable instance of church-crown conflict. I pay close attention to church-crown conflicts and the concomitant political intrigue behind high-level bureaucratic appointments, viceregal mandates, and negotiations between the papacy and the crown over the distribution of ecclesiastical and temporal power.<sup>22</sup> Nevertheless, the Article's focus is on actors located on the lower rungs of the colonial bureaucracy; complicating and coloring the lines of the sanctuary script with Lima's rapid demographic growth; and the city's delicate racial balance in a slaveholding society.

In theory, the body conferring a privilege is more powerful than the beneficiary. King Alfonso the Wise drafted the *Siete Partidas*, the body of laws

17. *Id.* at 210–20.

18. 2 MELECIO TINEO MORÓN, 2 VIDA ECLESIASTICA: PERÚ COLONIAL Y REPUBLICANO: CATÁLOGOS DE DOCUMENTACIÓN SOBRE PARROQUIAS Y DOCTRINAS DE INDIOS 807 (1998).

19. See SHOEMAKER, *supra* note 3, at 2.

20. My thanks to Shannon McSheffrey for this observation.

21. For analyses of contemporary sanctuary practices, see IGNATIUS BAU, THIS GROUND IS HOLY: CHURCH SANCTUARY AND CENTRAL AMERICAN REFUGEES (1985), and LINDA RABBEN, GIVE REFUGE TO THE STRANGER: THE PAST, PRESENT, AND FUTURE OF SANCTUARY (2011).

22. See, for example, J.H. ELLIOTT, THE COUNT-DUKE OF OLIVARES: THE STATESMAN IN AN AGE OF DECLINE (1986), for a fascinating study of the influential court adviser Count Duke of Olivares and his impact on Spanish imperial foreign and domestic policy.

from which the church's exemption was derived.<sup>23</sup> Beyond the act of conferral, the pragmatics of ensuring respect for the privilege of sanctuary remained contingent on the political power of the church. Clearly, in the Iberian kingdom, duchies, and viceroyalties, religion was deeply embroiled in politics. Any institution involving royal power, regionalism, and local governance would vary according to the political alliances of the parties. For our immediate purposes, we should remember that the crown-church alliance was particularly important in New World governance. Without an army and with a poorly organized bureaucracy, the crown used the church to ensure religious orthodoxy and, by extension, political loyalty.<sup>24</sup>

According to the terms of the *Patronato Real* (Royal Patronage), the Catholic kings executed the ecclesiastical and viceregal mandate of the administration of the Americas.<sup>25</sup> The *Patronato*, in effect, executed a unique, cost-sharing administrative arrangement between two powerful forces that were not always favorably allied. Margaret Crahan described the arrangement as follows:

[T]he monarchs now selected every cleric who would cross the seas for religious purposes. They singled out the location of each cathedral and minor chapel. As [the clergy] alone knew the geography of the distant territories, Rome had to depend on them for what information it needed to guide the expanding [c]hurch.

....

... In addition, the king required that all conciliar and synodal decisions be submitted to the Council of the Indies for approval.<sup>26</sup>

This arrangement was a perfect recipe for jurisdictional tension. Administrative heavy-handedness was due to the crown's effort to maintain an illusion of spatio-legal contiguity within the realm. Lima was severed geographically but joined spiritually and administratively to Spain. Spain was arguably the most important royal power in Christendom during the sixteenth century, and secular rule within Christian kingdoms was legitimated only to the extent that it endorsed its spiritual mandate.<sup>27</sup> As David Brading reminds us,

23. 1 LAS SIETE PARTIDAS, *supra* note 1, at partida 1, tit. 9 (describing the privileges and exemptions the churches and their cemeteries enjoyed under the *Siete Partidas*).

24. C. H. HARING, *THE SPANISH EMPIRE IN AMERICA* 169 (1947).

25. The *Patronato* was the agreement between the Holy See and Castile controlling royal power and ecclesiastical privileges. See J. Lloyd Mecham, *The Origins of "Real Patronato de Indias,"* 14 *CATH. HIST. REV.* 205 (1928).

26. Margaret E. Crahan, *Civil-Ecclesiastical Relations in Hapsburg Peru*, 20 *J. CHURCH & ST.* 93, 94–95 (1978).

27. For a helpful overview of Spanish imperial policies that drew on the medieval concept of Christendom as an organizing governmental, diplomatic, and juristic framework, see JAMES MULDOON, *EMPIRE AND ORDER: THE CONCEPT OF EMPIRE, 800–1800*, at 57 (1999) [hereinafter *MULDOON, EMPIRE AND ORDER*]. See generally COLIN M. MACLACHLAN, *SPAIN'S EMPIRE IN THE NEW WORLD: THE ROLE OF IDEAS IN INSTITUTIONAL AND SOCIAL CHANGE* 7 (1988) (showing how the sixteenth-century Hapsburg crown used scholasticism to manipulate the church politically); JAMES MULDOON, *THE AMERICAS IN THE SPANISH WORLD ORDER: THE JUSTIFICATION FOR*



Castilians “widely accepted . . . that the king’s authority was absolute since it derived directly from heaven rather than from any contract with the people.”<sup>28</sup> Chronologically, these cases unfold in jurisdictional tussles two centuries before ardent nineteenth-century republicanism held sway in the Americas, and a century before the Enlightenment-inspired reforms of the Bourbon crown. In the baroque church-state, power was embodied in both the figure of the viceroy and the Archbishop.<sup>29</sup> The authority of each was indivisible and deeply contingent on the other.

The contours of imperial alliances were not uncontested at the local level, especially if we consider the church-crown jurisdictional struggles over marriage—but this did not develop into a full-blown rescission of church jurisdiction and privilege until the Bourbon reforms of the late eighteenth century.<sup>30</sup> An imperial balance of power was incumbent on the shared mission of the viceregal administration and the church to keep the peace. Bishops and viceroys were appointed on the basis of their “wisdom, piety, and liberality”: they were counseled and exhorted to be men of justice and mercy.<sup>31</sup> Inevitably, these mandates for *buen gobierno* (wisdom and clemency) created jurisdictional frictions and tensions that could only be resolved by appealing to the Catholic monarchs themselves for intervention.

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CONQUEST IN THE SEVENTEENTH CENTURY (1994) (discussing the role of the papacy in the expanding Spanish empire).

28. D. A. BRADING, *THE FIRST AMERICA: THE SPANISH MONARCHY, CREOLE PATRIOTS, AND THE LIBERAL STATE 1492–1867*, at 22 (1991).

29. See ALEJANDRO CAÑEQUE, *THE KING’S LIVING IMAGE: THE CULTURE AND POLITICS OF VICEREGAL POWER IN COLONIAL MEXICO 10–15* (2004). Cañeque argues compellingly against the disembodied, self-conscious, individualist state as an appropriate analytical tool for seventeenth-century government in New Spain and Lima. *Id.* at 10–11. Cañeque does not embrace evolutionary or triumphalist notions of the development of the republican state; his point is to argue instead for a study of colonial power grounded in and organized around networks of loyalty and patrimonial authority. *Id.* at 13.

30. PATRICIA SEED, *TO LOVE, HONOR, AND OBEY IN COLONIAL MEXICO: CONFLICTS OVER MARRIAGE CHOICE, 1574–1821*, at 161–62, 200–01 (1988).

31. CAÑEQUE, *supra* note 29, at 88.

II. SANCTUARY IN SOCIETIES WITH SLAVERY<sup>32</sup>

Studies of ancient and medieval sanctuary practices note that slaves could not seek freedom through accessing consecrated ground.<sup>33</sup> Slaves could escape cruel masters by initiating change of ownership petitions, which may have created paths to freedom, but the conventional wisdom is that sanctuary was not coterminous with emancipation.<sup>34</sup> Nonetheless, sanctuary was an important feature in the lives of enslaved fugitives. The privilege of sanctuary raised tensions in plebeian and enslaved communities, and among elites and small-scale slave-owning households. In the sinews of these protracted and often rancorous legal proceedings, we adduce evidence of vigorous jurisdictional skirmishes on the ground among bailiffs, coroners, priests, porters, and lawyers resisting or defending the rights of enslaved fugitives to ecclesiastical immunity, even as the condition of enslavement remained unchallenged.

What was the church's stake in ensuring the rights of accused criminals who sought its protection? Put another way, what advantage did enslaved fugitives perceive in seeking ecclesiastical protection over secular courts? The record in Sebastian Matamba's case ends with his return to Lima's cathedral four months after his initial arrest. From Sebastian Matamba's perspective, claiming ecclesiastical immunity and appealing to the church for protection saved him from the garrote. Ecclesiastical courts did not impose capital punishment, which

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32. The conventional distinction between a society with slaves and a slave society relies on a problematic numerical distinction. As one commentator sensibly puts it, “[T]here is a distinction between a slave society and a society that uses slaves.” WILLIAM D. PHILLIPS, JR., *SLAVERY FROM ROMAN TIMES TO THE EARLY TRANSATLANTIC TRADE* 9 (1985). The mathematical problem emerges because a slave society, a classification typically ascribed to plantation or agricultural societies, is one in which slaves are essential to the society's modes of production. *Id.* However, Lima's slaves were overwhelmingly urban and domestic—even though its enslaved-to-free population ratio fits squarely within the numerical classification of a slave society. See BOWSER, *supra* note 5, at 100–01. The conceptual classification is also difficult because the legal activism and customary practices that Lima's slaves developed were more commonly found in a less-rigid “society with slaves.” See, for example, Alejandro de la Fuente, *Slaves and the Creation of Legal Rights in Cuba: Coartación and Papel*, 87 *HISP. AM. HIST. REV.* 659 (2007), for the case of legal activism among Cuban slaves. For the initial distinction, see IRA BERLIN, *MANY THOUSANDS GONE: THE FIRST TWO CENTURIES OF SLAVERY IN NORTH AMERICA* 8 (1998). Chris Tomlins has usefully proposed that we abandon the distinction in favor of “societies with slavery.” CHRISTOPHER TOMLINS, *FREEDOM BOUND: LAW, LABOR, AND CIVIC IDENTITY IN COLONIZING ENGLISH AMERICA, 1580–1865*, at 417 n.58 (2010). Tomlins writes, “In the North American case, virtually every mainland colony became a society with slavery; not all made the further and final move to become slave societies.” *Id.*

33. See, e.g., 1 *LAS SIETE PARTIDAS*, *supra* note 1, at partida I, tit. 9, ley 3 (“What the Law Is When the Slave of Any Person Takes Refuge in a Church.”). This provision states the following: Where the slave of any person, without the order of his master, takes refuge in a church, he should be sheltered there . . . . But if his master should give sureties, and swear not to do him any injury, the priests must remove the slave from the church, even though he should not desire to leave it, and give him up to his master . . . .

*Id.*

34. HELMHOLZ, *supra* note 3, at 33.

canonists deemed as “inconsistent with the clerical station.”<sup>35</sup> But slaves did not escape their enslaved condition. Given the limited space in the crown jail and the expedited orders of execution, enslaved prisoners with unresolved cases became sources of *corvée* labor in the city’s bakeries, public works, religious institutions, and mines.<sup>36</sup> Indeed, inferring from other cases, it is also possible that the church exercised ownership over Sebastian Matamba after receiving him—effectively confiscating the property rights of Sebastian Matamba’s owner in return for his protection. We also do not know whether Sebastian was readmitted into the enslaved kin community that he had offended (all of whom apparently believed his guilt in the matter of Juan Popo’s death).

Relying on Sebastian Matamba’s case is perilous for general observations. Among the 328 cases I examined, Sebastian Matamba’s “victory” and the brevity of his time in the royal jail were uncommon. Most often, the magistrates and jailers merely refused to comply with orders of restitution by delaying responses to ecclesiastical summons, prompting further denunciations from the ecclesiastical procurators of *rebeldía* (insubordination). Some defendants languished in jail for years, while intransigent royal prosecutors heard their cases and harangued ecclesiastical lawyers over jurisdictional principles and hierarchies of authority. Other defendants died of torture during their “confessions,”<sup>37</sup> and others simply disappeared with no legal resolution of their cases. In two cases, the prospect of intercession expedited torture and death of the prisoners, when it was evident that the church procurators’ appeal prevailed and the prisoners would be released onto hallowed ground. Many owners walked away from fugitive slaves as bad investments or resold them at lower prices. Other owners tried to resell released

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35. See JOHN H. LANGBEIN, *TORTURE AND THE LAW OF PROOF: EUROPE AND ENGLAND IN THE ANCIEN RÉGIMÉ* 29 (1976).

36. Carlos Aguirre has argued convincingly that Lima’s *panaderías* (bakeries) were key sites of discipline, punishment, and imprisonment for enslaved “rebellious” women in the nineteenth century. See AGUIRRE, *supra* note 8, at 50–51. Aguirre’s point is substantiated in seventeenth-century court documents alleging *sevicia* (cruelty) against the owners of *panaderías*, or claiming wages for subcontracted labor in the city’s numerous bakeries—indicating a continuation of gendered forms of punishment in the republican period. See Maribel Arrelucea Barrantes, *Conducta y control social colonial: estudio de las panaderías Limeñas en el siglo XVIII*, 13 *REVISTA DEL ARCHIVO GENERAL DE LA NACIÓN* 133, 139 (1996). For slaves, forced conscription in the *panaderías* fulfilled similar punitive and exploitative functions as the English sixteenth-century workhouse for prisoners. See AGUIRRE, *supra* note 8, at 50. But the fact that slaves were working for entities other than their owners raised potential problems in a slaveholding economy, where so many small slaveholding households depended on the income from their slaves’ *jornales* (day-wage earnings). See *id.* at 52. Presumably, once their slaves were consigned to the *panadería*, owners were also deprived of their slaves’ labor and earnings: an arrangement which must have been temporary or of short duration. *Id.*

37. For those accused of capital crimes, the law required the testimony of two eyewitnesses, or a confession as conclusive evidence of guilt or culpability, before a prisoner could be put to death. LANGBEIN, *supra* note 35, at 4. In the ecclesiastical immunity cases as well, enslaved witnesses were tortured as part of the evidentiary gathering process. DE HEVIA BOLAÑOS, *supra* note 3, at 229. According to the *Curia*, torturing witnesses was permissible if they were untrustworthy or persons of bad fame. *Id.* Certain categories of persons were exempt from torture, notably pregnant women, elderly persons, and women who had given birth within a forty-day period. *Id.* at 229. Other witnesses were exempt according to high rank, clerical immunity, and aristocratic status. *Id.* at 230.

slaves without disclosing the slaves' criminal records—transactions that led to numerous disputed *causas de redhibitoria* (breaches of warranty causes of action).<sup>38</sup> As the century progressed, the *Real Audiencia* issued official orders for maritime travel—which in effect meant exile out of Peru—as a way of ridding the city of undesirable criminal slaves.<sup>39</sup>

### III. THE LAW OF SLAVERY, LEGAL MOBILIZATION, AND SANCTUARY

This Article is situated within a growing body of work on slaves and legal mobilization that posits slaves as legal actors who deployed the law in ways that enabled them to gain autonomy and fractions of freedom.<sup>40</sup> Despite the inevitable unknowables in the sanctuary cases, these records lend us critical insights for the study of the legal entanglements of slaves and courts, and legal mobilization more broadly. But the gruesome details of these cases strain the thesis that the law afforded important avenues for slaves to negotiate better terms for their lives in bondage. In fact, the law operated here as an instrument of oppression, tyranny, and violence—a perfect complement to the portrayal of the law of slavery as a system of total domination. As Saidiya Hartman observes, even those historians of slavery who try to infuse our accounts with “leftist narrative[s] of political agency” collide with the grim reality of the criminal law and its naked disciplinary power.<sup>41</sup> This is, of course, a function of our sources—as historical subjects, slaves navigated and experienced the legal system in contradictory ways. Slaves look very different in the criminal law than they do as agentive subjects in the civil law. In notarial sources, slaves appear industrious, enterprising, and beatific. They drafted

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38. BOWSER, *supra* note 5, at 161.

39. *Casos de Reos Rematados*, Archivo General de la Nación. Records for criminal exile to Chile are on file at the National Archive for the eighteenth century. In the preceding century, most enslaved fugitives and “troublesome slaves” were sent out of Lima to the southern provinces as agrarian holdings expanded. BOWSER, *supra* note 5, at 97–99. Execution and exile were also demonstrably popular acts for incoming viceroys anxious to establish their authority in their new posts. One of the earliest acts ordered in 1667 by the Count of Lemos was the public execution of twenty-six mulattoes held in the public jail, and the exile of all prisoners “justly imprisoned” to Chile. CHRONICLE OF COLONIAL LIMA: THE DIARY OF JOSEPH AND FRANCISCO MUGABURU, 1640–1697, at 125 (Robert Ryal Miller ed. & trans., 1975) [hereinafter CHRONICLE OF COLONIAL LIMA]. During his first week in Lima, Viceroy Lemos inspected the royal jail and ordered the “criminals” therein to be taken to the mines of Huancavelica. *Id.* His next set of acts was similarly harsh: Lemos presided over the garroting of a *retraído* taken from hallowed ground. *Id.* at 127.

40. See, e.g., JOSÉ RAMÓN JOUVE MARTÍN, *ESCLAVOS DE LA CIUDAD LETRADA: ESCLAVITUD, ESCRITURA Y COLONIALISMO EN LIMA (1650–1700)*, at 10–12 (2005); Manuel Barcia, *Fighting with the Enemy's Weapons: The Usage of the Colonial Legal Framework by Nineteenth-Century Cuban Slaves*, 3 ATLANTIC STUD. 159 (2006) (analyzing how Cuban slaves used the colonial legal framework to their advantage); Sherwin K. Bryant, *Enslaved Rebels, Fugitives, and Litigants: The Resistance Continuum in Colonial Quito*, 13 COLONIAL LATIN AM. REV. 7 (2004); de la Fuente, *supra* note 32; Michelle McKinley, *Fractional Freedoms: Slavery, Legal Activism, and Ecclesiastical Courts in Colonial Lima, 1593–1689*, 28 LAW & HIST. REV. 749 (2010); Brian P. Owensby, *How Juan and Leonor Won Their Freedom: Litigation and Liberty in Seventeenth-Century Mexico*, 85 HISP. AM. HIST. REV. 39 (2005) (examining two cases of slaves in Mexico who successfully sued for their freedom in the Holy Tribunal).

41. Saidiya V. Hartman & Frank B. Wilderson, III, *The Position of the Unthought*, 13 QUI PARLE 183, 184 (2003).

wills, along with self-purchase and labor and apprenticeship contracts; they transmitted and transferred wealth, bought property, and leased rooms; and they bargained for the fruits of their labor. In ecclesiastical sources, slaves were often portrayed with a double image: simultaneously Catholic and potentially treacherous.<sup>42</sup> This “doubleness” had advantages: enslaved women pleading for divorce and annulment appealed to gendered images of vice and vulnerability even as they exercised agency in leaving abusive or unhappy domestic situations. Enslaved married couples appealed to the church’s support for family integrity to combat the separation of spouses and children.<sup>43</sup> But criminal records are essentially administrative documents of social control that happily (if not strategically) deployed racist and ethnocentric images of the dangers posed by black and mulatto men to the security and stability of colonial Spanish society—urging and underwriting the repressive edicts emanating repeatedly from Spain to maintain peace, security, and racial order in the colony. In sum, enslaved criminal fugitives appear as quintessentially socially dead subjects.

Reading these documents, I have followed Vincent Brown’s call to historians of slavery enunciated in his critical rendition of Orlando Patterson’s social death thesis.<sup>44</sup> Patterson’s epic study of slavery across the centuries shows repeated violations of personhood legitimated by the law.<sup>45</sup> The crimes allegedly committed by these defendants were principally against other enslaved and poor persons, lending credence to Patterson’s view of the social annihilation that occurred upon “extracting [slaves] from meaningful relationships that defined personal status and belonging, communal memory, and collective aspiration”<sup>46</sup> According to the record, Sebastian Matamba slit Juan Popo’s throat because he believed Juan had betrayed him and was going to turn him in for running away from his master. Sebastian allegedly told others in San Ildefonso that he killed Juan Popo *por soplón* (traitor or snitch) and that Juan was angry with him for stealing five pesos from his day-wage earnings. Some semblance of remorse was attributed to Sebastian Matamba by a witness who reported him as saying the following: “Estoy triste porque le dí una puñalada a un pariente mío Juan Popó por quitarle la plata que tenía por que se lo había pedido prestado y no se lo quiso dar.”<sup>47</sup>

Hence, we have unsympathetic protagonists and very little evidence of the social solidarity and networks that our agentive (or, at the least, redemptive) narratives establish as givens among enslaved and plebeian life. Slaves preyed on

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42. Patrick J. Carroll, *Black-Native Relations and the Historical Record in Colonial Mexico*, in *BEYOND BLACK AND RED: AFRICAN-NATIVE RELATIONS IN COLONIAL LATIN AMERICA* 245 (Matthew Restall ed., 2005).

43. McKinley, *supra* note 40, at 768.

44. Vincent Brown, *Social Death and Political Life in the Study of Slavery*, 114 *AM. HIST. REV.* 1231 (2009).

45. ORLANDO PATTERSON, *SLAVERY AND SOCIAL DEATH: A COMPARATIVE STUDY* (1982).

46. Brown, *supra* note 44, at 1233.

47. Testimony of Antonio Popo (May 5, 1676) (author’s notes). The mixing of first and third person pronouns is common in witnesses’ rendition of events. See JOUVE MARTÍN, *supra* note 40, at 375–98.

other slaves, stole from and killed each other, and generally treated each other in an agonistic fashion. Theirs is not a tale of Robin Hood reappropriation or highway *bandoleros* (brigands) or *cimarrones* (runaways) robbing for survival. It is rather the grim reality of crime, violence, and insecurity among the urban poor who historically have been amongst the most vulnerable to the onslaught of petty and serious crime.<sup>48</sup>

Ironically, the ecclesiastical prosecutor in Sebastian Matamba's case gives the social death thesis the most weight—arguing that there was no conclusive evidence that Juan Popo had not slit his own throat. As the prosecutor reasoned, desperate *bozales* (African-born slaves) were notorious for taking their own lives because they found their bonded lives intolerable.<sup>49</sup> How then should we read these records resisting the pull of the social death thesis? According to Vincent Brown, “Rather than pathologizing slaves by allowing the condition of social death to stand for the experience of life in slavery, then, it might be more helpful to focus on what the enslaved actually made of their situation.”<sup>50</sup> In this vein, I approach these sources from a premise of protagonism—a less semantically loaded term (I think) than agency.<sup>51</sup> I acknowledge the existential dimensions of slavery that do not inhere in redemptive narratives of community, solidarity,

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48. Although poverty is not determinative of the gendered impact of intimate violence among women, poor women historically have fared far worse as victims of violent crimes. A similar historical observation could be made for the gendered impact of lynch mobs and vigilantism on African-American men in the United States. With specific reference to crime in seventeenth-century Lima, homicide was committed along patterns of what we would classify today as black-on-black violence, in that perpetrators appeared to know each other. See BOWSER, *supra* note 5, at 172 (explaining that, in general, when blacks fought or killed, the victim tended to be another person of color; when they stole, the victim tended to be a Spaniard or an Indian). Petty theft was also internal, but larger-scale robberies were perpetrated against Spaniards, and tended to be group affairs. *Id.* at 188. We do not have reliable figures for the cases in which Spaniards killed Africans, *bozales* (African-born slaves) or *criollos*, largely because these deaths hardly ever resulted in criminal convictions. This does not imply that Spaniards were never punished if they committed murder. But the evidence is diffuse, and we see snippets of Spaniards' punishment in chronicles of daily life in Lima and in travelers' commentaries. See, for example, Mugaburu's diary entry: “Garrote for Sánchez: Monday, the 28th of the month [1668], Salvador Sánchez, a white man dressed in black was taken on foot from the court prison and . . . garroted because he had killed a Negro that had killed his brother, Tomas Sánchez . . .” CHRONICLE OF COLONIAL LIMA, *supra* note 39, at 131.

49. BOWSER, *supra* note 5, at app. D (defining the term *bozal*). According to the prosecutor, “Otro sí, ningún testigo se pone de vista que el dicho negro desesperado y con tedio de la vida el mismo se degollase lo cual es muy frecuente en los negros bozales que lo han hecho y a veces ahorcarse por su soberbia.” (author's notes). However, this view may not have been widely shared. According to Bowser's analysis of slave sale patterns in Lima, the slaves that had acquired insubordinate reputations were *Jolofos* (Gelofes) and Iberian-born black and mulatto *ladinos*. BOWSER, *supra* note 5, at 148. Bowser writes that in fact Limeño slave owners preferred “rude *bozales*” from Guinea like Juan Popo. *Id.* at 80 (“The preferred bozal, for the Peruvians . . . was the “Guinea” slave. This preference . . . was broadly extended to all blacks from West Africa.”). And indeed, doña Tomasa expressed what seemed to be genuine sadness and dismay over Juan Popo's death that went beyond the financial losses his death entailed for her household income. Transcript (on file with author).

50. Brown, *supra* note 44, at 1236.

51. See Walter Johnson, *On Agency*, 37 J. SOC. HIST. 113 (2003), for a provocative essay on privileging agency within the new social history of slavery.

tradition, and black cultural retentions. We enter into plebeian communities fully aware that they were complex, congested urban spaces of conviviality and competition, rivalry and solidarity, ethnic hostilities and racial commingling, where people coexisted in a gritty quest for survival. At the same time, we are conscious of archival silences and complicities when analyzing the penchant—indeed, the shared enthusiasm—for harsh punishment for those who ruptured the frayed social fabric of plebeian life.<sup>52</sup> Seventeenth-century Lima had no newspapers or public “print culture” to inform residents of current events.<sup>53</sup> Consequently, reports of these crimes and the public nature of their punishment were amplified through constant retelling—which invariably stoked more fears and exaggerated crime rates.

These bleak records give us a window into what retribution and justice, criminality and malfeasance, penance and punishment meant across the colonial social spectrum. Here, I focus primarily on those opinions and attitudes expressed by enslaved witnesses and victims of crime. We cannot know the guilt or innocence (let alone the thoughts or sentiments) of the defendants, because the only words they uttered throughout the entire proceedings were insistent expressions of personification with the church. During interrogation, they steadfastly repeated, “Me llamo Iglesia” (“My name is Church.”). We reconstruct the narrative surrounding these crimes completely on the basis of hearsay and confessions extracted during torture sessions. Yet, as Sebastian Matamba’s case demonstrates, his life was spared by repeating over and over, “Me llamo Iglesia, Iglesia me llamo.”

The investigative records give us a rare glimpse into the lives and criminal networks of the urban poor, the enslaved underclass, and the links forged by newly transplanted African slaves with other kinsmen—invaluable for the social historian of the Atlantic World. The defendants sought refuge in every religious institution in Lima—hospitals, churches, chapels, cemeteries, convents, and monasteries—demonstrating the relative ease with which fugitives could enter hallowed ground and the unshakeable association of protection with these religious spaces in the minds of slaves. One simply cannot underestimate the expansive network of religious institutions in seventeenth-century Lima. According to Juan Bromley’s historic survey of the city, there were forty-three churches and convents, and two hundred chapels that also included private churches.<sup>54</sup> As Nancy van Deusen writes, “The number of monasteries and

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52. On plebeian enthusiasm for harsh criminal punishment, see AGUIRRE, *supra* note 8, at 97–98, and Charles F. Walker, *Crime in the Time of the Great Fear: Indians and the State in the Peruvian Southern Andes, 1780–1820*, in CRIME AND PUNISHMENT IN LATIN AMERICA: LAW AND SOCIETY SINCE LATE COLONIAL TIMES 35, 38 (Ricardo D. Salvatore et al. eds., 2001).

53. Lima’s first newspaper, *La Gaceta de Lima*, was published in 1715 and was the earliest newspaper in circulation in Latin America. See JUAN GÜNTHER DOERING & GUILLERMO LOHMANN VILLENA, LIMA 115 (1992).

54. GÜNTHER DOERING & LOHMANN VILLENA, *supra* note 53, at 95. These religious complexes corresponded to the organization of the city into six parishes: El Sagrario (1535), San

convents, the architectural grandeur, the fascination with symmetry and order, and the ritual and public fanfare *were* all valid expressions of Lima's religiosity and of the city's persona."<sup>55</sup> The church did not abrogate the privilege of immunity or limit it to any particular consecrated site.

Consecrated ground was associated with the perimeters of the church, chapel, cemetery, convent, hospital, or other holy institution.<sup>56</sup> *Retraídos* were most commonly apprehended on church steps, but this did not lessen the church's protective force field.<sup>57</sup> Royal authorities often resisted the charge of violating sacred ground by claiming that the *retraídos* were not actually within the church's perimeter—typically with apprehensions in cemeteries. In one case, the *ronderos* apprehended two enslaved fugitives in land adjacent to a chapel that was being built for the Mercederian convent, but this was also deemed consecrated by virtue of its annexation, proposed use, and ownership by the religious order.<sup>58</sup> My review of religious sites in which enslaved fugitives sought immunity is based on the city map drawn by French cartographer Nolasco Mere in 1685.

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Sebastián (1554), Santa Ana (1570), San Marcelo (1584), Huérfanos (1612), and San Lázaro (1626). *Id.*; see also JUAN BROMLEY & JOSÉ BARBAGELATA, *EVOLUCIÓN URBANA DE LIMA*, 10–43 (1994) (listing the churches, convents, and other structures in the city).

55. VAN DEUSEN, *supra* note 8, at 155. In addition to the ubiquity of religious sites, we must also factor in the grandiosity and splendor with which they were constructed, to inspire awe in indigenous neophytes and to portray Lima's expressions of baroque spirituality.

56. DE HEVIA BOLAÑOS, *supra* note 3, at 211.

57. See, e.g., AAL, *Inmidades*, Leg. XI Exp. 1, Año 1660.

58. AAL, *Inmidades*, Leg. XI. Exp. 23 Año 1663.



**Figure 1:** Sanctuary Sites in Seventeenth-Century Lima

<b>High Frequency (8-15)</b>	<b>Mid Frequency (5-6)</b>	<b>Low Frequency (2-3)</b>	<b>One Time</b>
Catedral (15)	Colegio del San Ildefonso de la orden de San Agustín (6)	Monasterio de la Concepción (3)	Nuestra Señora del Carmen (1)
Iglesia de San Francisco (15)	Señora de la Merced (6)	Capilla de Nuestra Señora de Copacabana (3)	Nuestra Señora de las Cabezas (1)
Convento de San Agustín (12)	Hospital de San Andrés (6)	Iglesia del Convento de Guadalupe (3)	San Francisco de Paula (1)
Hospital de Santa Ana (12)	Iglesia de San Sebastián (5)	Iglesia de San Diego (2)	Santo Tomás (1)
Convento Santo Domingo (10)		Iglesia del Hospital Huérfanos (2)	Nuestra Señora de las Mercedes (1)
Monasterio de la Compañía de Jesús (10)		Iglesia de Nuestra Señora de Monserrate (2)	Convento de la recolecta de la Magdalena (1)
Iglesia San Lázaro (8)		Monasterio de los Descalzos (2)	Iglesia de Nuestra Señora del Socorro (1)
		Iglesia San Marcelo (2)	Iglesia de Nuestra Señora del Prado (1)
		Iglesia del Monasterio de Santa Clara (2)	Convento de las Mercedes (1)
		San Jerónimo (2)	
		Hospital de San Bartolomé (2)	
		Hospital del Espíritu Santo (2)	

Mere's map of the city shows the spatial distribution of sixty-nine religious complexes.<sup>59</sup> Indeed, travelers and chroniclers depicted the city as one "giant convent."<sup>60</sup> Limeños were visually reminded of the church's symbolic image of

59. See JUAN GÜNTHER DOERING, *PLANOS DE LIMA: 1813-1983*, at fig. 5 (1983).

60. As Limeño jurist and satirist Manuel-Atanasio Fuentes later reflected, "Tal cantidad de iglesias, capillas, conventos y monasterios convertía a Lima, como toda ciudad hispana, en un

piety, clemency, and protection vis-à-vis the fear inspired by the secular power of the garrote or the Holy Tribunal's *auto-da-fé*.<sup>61</sup> As chronicler Salinas y Córdova remarked, over twelve thousand people (or half the city's population) witnessed the 1625 *auto-da-fé*.<sup>62</sup> Public executions were also well attended.<sup>63</sup> Although the static view of the church as benign and merciful should be subjected to greater historical scrutiny and political specificity, the documents show no evidence that the church was cruel with regard to the treatment of prisoners—certainly not in comparison with the treatment dealt to *retraídos* in the royal jail.<sup>64</sup>

#### IV. SANCTUARY, DIASPORA, AND ENSLAVED FUGITIVES

Sanctuary was legally extended to fugitives of all social classes and racial groups who fled to hallowed ground. We suspect that wealthier Spaniards seeking relief pursued other avenues for mediation rather than the church, although the record reveals a few cases of titled, upper-class fugitives.<sup>65</sup> But many of the defendants in these cases were *bozales* or young men recently brought to Lima from the Iberian Peninsula and other colonial sites. Though the witnesses referred to Sebastian Matamba as Juan Popo's "*pariente*" (relative), we presume that Sebastian Matamba and Juan Popo were African-born slaves who had come to Peru on the same ship. Even if we allow for possible mislabeling in the baptismal and sale record,<sup>66</sup> and the problems of equating place names with natal

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gigantesco convento, con todos los vicios, defectos y virtudes que ello representa." CÉSAR COLOMA PORCARÍ, *LA CIUDAD DE LOS REYES Y LA "GUÍA DEL VIAJERO EN LIMA" DE MANUEL-ATANASIO FUENTES 15* (1998).

61. Scholars have portrayed the church's peace as one that tended to treat criminal delinquents or fugitives with clemency and mercy. See, e.g., COX, *supra* note 11, at 3–4. But the benign and rather static view of church clemency has deservedly been subjected to greater historical context and situational specificity. Recently, William Jordan proposed a "fresh look at medieval sanctuary" that disputes the liberal presumptions of ecclesiastical vis-à-vis royal punishment. See William Chester Jordan, *A Fresh Look at Medieval Sanctuary*, in *LAW AND THE ILLICIT IN MEDIEVAL EUROPE* 17, 17 (Ruth Mazo Karras et al., 2008).

62. See OSORIO, *supra* note 6, at 115.

63. *Id.* at 107; see, e.g., CHRONICLE OF COLONIAL LIMA, *supra* note 39, at 83, 85, 127, 130, 131, 210, 268 (for examples of well-attended public executions).

64. One Limeño case raises questions about the clemency and leniency associated with ecclesiastical sanctuary. AAL, *Causas de inmunidad eclesiástica*, Leg. 12, exp. 6, Año 1664. Diego de Alcazar and Francisco de la Cruz were being held in separate cells in the Hospital del Señor de San Andrés. *Id.* At midday, three officials of the criminal court entered the hospital courtyard and forcibly removed Diego and Francisco from their cells where they were being imprisoned. *Id.* In light of the violation of ecclesiastical immunity, the ecclesiastical prosecutor issued a stern order for the felons to be returned to the hospital's jurisdiction within twenty-four hours. The prosecutor further assured the court that the *same treatment* would be extended to Diego and Francisco upon their return to the hospital until the termination of the proceedings. *Id.* From the rendition of the witnesses, clearly Diego and Francisco were being held as prisoners—handcuffed and barred in separate cells. Diego and Francisco allegedly stole items of value from religious brethren in the Colegio de San Andrés, which plausibly accounts for their imprisonment inside the college.

65. See, e.g., Uribe-Uran, *supra* note 13, at 461–62 (explaining that the church protected influential members of society, such as the son of the Count of Orizaba).

66. In theory, African-born slaves received Catholic names upon their baptism, prior to embarking on their Atlantic crossing. BOWSER, *supra* note 5, at 47. However, they could also have

communities, “Popo” was a place name of the Slave Coast from Lower Guinea, and “Matamba” was deep within the kingdom of Kongo.<sup>67</sup> Sebastian Matamba and Juan Popo thus could not have been blood-related kin. Rather, they most likely forged fictive kin ties on the voyage to the Americas. More attention will be paid to the witnesses of Juan Popo’s death who claimed direct blood-kinship relations with him in their statements. For now, I want to rely on the veracity of Sebastian Matamba hailing from the Kongo kingdom, for Matamba (the place reflecting his name) was the most important seat of the kingdom after Queen Njinga established her royal seat there in 1631. Most relevant here is that Queen Njinga avowedly converted to Catholicism, and during her protracted wars with the Portuguese and her numerous detractors within the Kongolese kingdom, Njinga periodically sought refuge in Catholic churches within Matamba. As historians of Central West Africa remind us, many of the enslaved peoples imported to the Americas in the seventeenth century came from polities that had long been integrated into the religious, dietary, and cultural practices of Iberian Catholicism.<sup>68</sup> Consequently, Sebastian Matamba may have been familiar with the ecclesiastical tradition of sanctuary and protection. And *bozales* like Sebastian may have transmitted this information to others who did not necessarily have the same exposure to Catholic laws, and to creole fugitives as well.

As such, this inquiry moves the ancient and medieval tradition of ecclesiastical immunity for fugitives into a more capacious diasporic frame. It falls within the effort to expand our scholarly gaze and connect European, African, and New World practices around slavery, without losing sight of the internal political and juridical context and the local nuances of slaveholding societies.<sup>69</sup> Rather than

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been baptized in Cartagena or Panama, especially during this period. *See id.* at 53–54 (describing slave baptisms in Cartagena). And Sebastian could already have been exposed to Catholicism in Matamba, prior to his Atlantic passage. On Catholicism in Matamba, see Linda Heywood, *Queen Njinga Mbandi Ana de Sousa of Ndongo/Matamba: African Leadership, Diplomacy, and Ideology, 1620s–1650s*, in *AFRO-LATINO VOICES: NARRATIVES FROM THE EARLY MODERN IBERO-ATLANTIC WORLD, 1550–1812*, at 38, 38–39 (Kathryn Joy McKnight & Leo Garofalo eds., 2009).

67. On place names, markets, and slave provenance, see JOHN THORNTON, *AFRICA AND AFRICANS IN THE MAKING OF THE ATLANTIC WORLD, 1400–1800* (2nd ed. 1998). Thornton calculates that Popo bordered on the Volta and Allanda and may have belonged to the Oyo Empire of Yoruba speakers. *Id.* at xxii n.51–53 (citing de Sandoval’s *Instauranda*). Matamba was captured by Queen Njinga Mbandi in 1631 and became her principal seat in the Kongo kingdom. *Id.* at xxxii n.31. On Queen Njinga, see Heywood, *supra* note 66.

68. Heywood, *supra* note 66, at 39–40; John Thornton, *The Development of an African Catholic Church in the Kingdom of Kongo, 1491–1750*, 25 J. AFR. HIST. 147, 147–48 (1984) (disputing the arguments propounded by David Birmingham, Basil Davidson, and Georges Balandier respectively that Kongolese Catholicism was no more than a “light” syncretism or forced conversion by Kongolese elites and Portuguese missionaries).

69. Slavery scholars are increasingly turning to global, transatlantic, and diasporic frameworks to analyze cultural and political aspects of the slave experience in Latin America, arguing convincingly that creolization began in Africa. *See generally* Jane G. Landers, *Introduction to SLAVES, SUBJECTS, AND SUBVERSIVES: BLACKS IN COLONIAL LATIN AMERICA* 1, 4 (Jane G. Landers & Barry M. Robinson eds., 2006); THORNTON, *supra* note 67; *TRANS-ATLANTIC DIMENSIONS OF ETHNICITY IN THE AFRICAN DIASPORA* (Paul E. Lovejoy & David V. Trotman eds., 2003); Karen B. Graubart, ‘*So Color de una cofradía*’: *Catholic Confraternities and the Development of Afro-Peruvian Ethnicities in Early Colonial Peru*,

presuming that sanctuary was a legal transplant from Europe to America, I propose that the idea of sacred space associated with protection was intelligible to those who claimed asylum within the royal seat of Matamba. Although I apply an Atlantic perspective here, the Article does not cast the practice of claiming ecclesiastical immunity as an African retention in the classic Herskovits sense.<sup>70</sup> I do not claim that this is an Africanism at all. Matamba was a region within the Kongolese kingdom that granted refuge to those fleeing slave raiders, but Matamba was itself a slaveholding society, and had been a slave-*procuring* society in the previous century.<sup>71</sup> The sources are more interesting for what they reveal about the criminal networks among enslaved Africans, and how the black and mulatto underclass drew upon cultural resources to seek protection and refuge from powerful groups that sought to control and kill them. Criminal networks were successful to the extent that they inducted people they could trust—and in that sense it was logical that those who shared kinship or linguistic ties were also comrades in crime. To get a close look at these networks, let us now turn our attention to the events that unfolded in Lima's streets on October 17, 1680.

#### V. SANCTUARY, JUDICIAL ACTIVISM, AND COLONIAL PRACTICES

On the night of October 17, 1680, a band of thieves broke into don Diego Bosqueto's *almacen* (warehouse), stealing hosiery, haberdashery, textiles, silverware, and china of considerable commercial value.<sup>72</sup> Don Diego appealed swiftly to the municipal *alcaldes* to recruit more mounted *ronderos* (constabulary forces)<sup>73</sup> for the night patrol to recover his stolen property before the thieves had a chance to dispose of the goods. Given the value of the stolen goods, don Diego's standing in the mercantile community, and the large number of thieves involved, Lima's *ronderos* went into immediate action. Using vagrancy laws or putative emergency

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33 SLAVERY & ABOLITION: J. SLAVE & POST-SLAVE STUD. 43 (2012); O'Toole, *From the Rivers of Guinea*, *supra* note 5.

70. The search for African retentions is attributed to anthropologist Melville Herskovits, who argued against the idea that enslaved Africans had no cultural referents as strengths to draw upon in the slave experience. See MELVILLE J. HERSKOVITS, *THE MYTH OF THE NEGRO PAST* 294–96 (Beacon Press 1958) (1941). Herskovits also argued strenuously against the prevailing notion that African cultures were too weak to withstand exposure to European religion, language, and political institutions. *Id.* at 296–98. Though laudable in intent, new diaspora scholars take issue with Herskovits' attribution of all cultural production in the Americas to passive retention and mechanistic reproduction. For a sympathetic overview, see Andrew Apter, *Herskovits's Heritage: Rethinking Syncretism in the African Diaspora*, 1 DIASPORA: J. TRANSNAT'L STUD. 235, 235 (1991).

71. John Thornton, *Early Kongo-Portuguese Relations: A New Interpretation*, 8 HIST. AFR. 183 (1981).

72. AAL *Inmunidades*, Leg. 15, Exp. 3, Año 1680.

73. Crime control terms are used here with caution. *Ronderos* or *cuadrilleros* were volunteer patrolmen, who were remunerated on the basis of the fugitives and *cimarrones* whom they captured. See JAMES LOCKHART, *SPANISH PERU, 1532–1560*, at 190 (1968). *Alcaldes del crimen* were specially appointed criminal magistrates. BOWSER, *supra* note 5, at 162. *Ministros de vara* held a higher rank and had the power to arrest criminal suspects, but in don Diego's case, the records show *ministros de vara* also served as *ronderos* and participated in the arrests. Transcript (on file with author). Presumably, this was called for by the gravity of don Diego's theft.

powers, the *ronderos* detained anyone “*andando en deshoras*” (on the street after dark). Predictably, they patrolled the entryways to Lima’s religious institutions, in search of any potential *retraídos*.

Bernardo Terranova was arrested that night, on suspicion of membership in the criminal gang that attacked don Diego’s *almacen*. But according to Bernardo, he was in the street at that late hour because he was returning to Lima after chopping firewood in the outskirts of the city. Bernardo claimed that the reason the *ronderos* found him racing toward the Colegio San Martín was because he was running away from the “real” robbers, whom he had encountered minutes before. Bernardo insisted on his innocence, repeatedly telling the *ronderos* that the thieves were running toward the *Compañía de Jesús* with the stolen goods. Dragging Bernardo along with them, the *ronderos* went directly to the *Compañía*, where they arrested Francisco Sevillano and Thomas del Río on the church steps. Francisco Sevillano and Thomas del Río immediately claimed ecclesiastical immunity. Both Thomas and Francisco repeated the incantation “Me llamo Iglesia” during the initial round of interrogation and refused to respond to any of the *alcalde*’s questions.

Francisco was a mulatto from Spain (hence the surname Sevillano), and his owner immediately filed an appeal for intercession on behalf of both prisoners.<sup>74</sup> In the appeal, the owner asked for his slaves to be returned to consecrated ground, where they would be protected by the ecclesiastical immunity to which they were entitled. Despite their appeal, fortified by a restitution order from the highest-ranked ecclesiastical prosecutor, the *alcaldes* refused to release the suspects to church authorities. Instead, they proceeded swiftly to *tormento* (torture) to gather evidence about the warehouse robbery.

We next hear from Bernardo Terranova, as he is being tortured during his interrogation. Unlike Francisco and Thomas, Bernardo could not claim ecclesiastical immunity because he had been apprehended while running toward the Jesuit College. Bernardo gave the investigating magistrate and the *alcaldes* a detailed rendition of the events surrounding the warehouse robbery. He changed his story at least three times throughout the course of his interrogation. The recording of his statement was punctuated with attempts to corroborate facts and assess the feasibility of his (ever-changing) story. When Bernardo’s testimony failed to yield results or was too improbable or confused, torture was legally intensified. Bernardo was left hanging by the ropes as the bailiffs went off in search of the stolen goods that Bernardo claimed were left in the shared rooms of *bozales*, in *chicherías* (breweries for corn-produced beer), and in workshops belonging to complicit Indian tailors and blacksmiths.

If we believe Bernardo, he was implicated through association. Bernardo manufactured master keys that were used to break into the padlocks securing

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74. Thomas was a twenty-six-year-old slave from Cali, Colombia. Transcript (on file with author).

Bosqueto's warehouse, but the true mastermind behind the operation was Pedro Terranova—his kinsman. Bernardo's primary source of income and occupation was the *chichería* that he owned. Pedro used the *chichería* as a meeting place to plot all sorts of criminal activities. Pedro inducted a fair number of newly arrived *bozales* into his gang, which encompassed Spaniards, Iberian and creole mulattoes, *indios ladinos*, and other sundry characters—even a wayward priest. Bernardo appeared oblivious to the full scope of Pedro's activities. For instance, Bernardo presumed that the Spaniard was a priest because of the Spaniard's haircut. He only saw some of the faces of Pedro's gang on the night of the robbery, and he vaguely knew some members of the group as they occasionally congregated in his *chichería*. Although Bernardo was not helpful in identifying the group, we learn aspects of criminal activity through his confused testimony. It would be incorrect to portray the gang's activity as "organized crime." Neither Terranova was exclusively dedicated to criminal activity. The record shows their involvement in other pursuits typical with male enslaved labor patterns of the period: wood chopping, blacksmithing, carpentry, and regional muleteering. Some *bozales* in Pedro's band lived together in small rooms, or shared sleeping quarters within an owner's home (much like Sebastian Matamba and Juan Popo). Owners, then, could have been content not knowing the provenance of their slaves' *jornales* (day wages), as long as they were paid. At times, the *retraídos* smuggled stolen goods into the monasteries and convents, where the cloistered residents were interested clients, with the help of many of the enslaved porters who worked therein.<sup>75</sup>

The case ends with Francisco restituted to the Cathedral eight *years* later. The folio included a death certificate for Thomas, dated January 1686 (six years after the arrest). Bernardo either went into the pool of conscripted public labor, or was garroted since he was not apprehended on hallowed ground. Once again, we have a partial victory. Francisco escaped the garrote, but endured eight years in prison.<sup>76</sup>

#### VI. DOCUMENTING PAIN AND SUFFERING: TORTURE AND THE CRIMINAL CONVICTION

Among legal scholars and political philosophers, few topics inspire as much soul-searching as the use of judicially sanctioned torture in criminal investigation. Torturing criminal suspects in custody for the aim of securing confessions and convictions pushes our inquiries way beyond sterile utilitarianism or triumphal rule-of-law evolutionism. Torturing slaves, "terrorists," and other exemplars of bare life under the pretext of ensuring national security or public safety unmasks

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75. In one protracted case, five witnesses claimed that the enslaved prisoner peddled his stolen headscarves in the Santa Clara Convent and the San Andrés Hospital. AAL *Inmunitades*, Leg. 10, Exp. 2, Año 1656.

76. The length of time that *retraídos* spent in prison is puzzling. Apprehension and imprisonment were no more than pretrial detention holdings. Criminal suspects were ideally supposed to come quickly before a magistrate for sentencing: either to hard labor or to death. LANGBEIN, *supra* note 35, at 28–39. However, if Thomas and Fernando were put to work while in jail, the record is silent in this regard.

the limits of liberal legalism. Indeed, many scholars have argued that the true value of any legal regime is its fair and equitable treatment of politically powerless subjects under exceptional circumstances.<sup>77</sup> Yet, prior to the nineteenth century, torture did not inspire widespread moral condemnation. Rather, it was a “crucial weapon in the arsenal of justice.”<sup>78</sup> Torture was integral to inquisitorial investigation, although it was calibrated and tempered with attempts to elicit noncoerced confessions and other forms of proof. As Irene Silverblatt reminds us, “Local magistrates were exhorted to use torture ‘following law, reason, and good conscience’ . . . . Torture was never . . . a punishment, but was, rather, a last resort to ease confession.”<sup>79</sup> Notwithstanding presentist concerns about torture and its necessity, these cases illuminate how the inquisitorial methods of the Holy Tribunal inflected the ecclesiastical immunity cases. Punishment was increasingly misaligned with guilt. Inquisitorial torture was overwhelmingly a prosecutorial tool. Its investigative rationale leached into all aspects of criminal procedure. Deliberately inflicted pain and torture pervaded technologies of discipline, rule, fact-finding, and faith. Here, we see the heaviest burden of the inquisitorial system borne by enslaved witnesses. Slaves’ condition of servitude and racial subjection made them permanent objects of surveillance and suspicion—even when they cooperated with prosecutors, they were, in a word, *torturable*.<sup>80</sup>

The sequence of events in the Bosqueto investigation allows us to follow the magistrate’s application of the canon law of proof. Overall, the cases followed a similar pattern, and demonstrated full compliance with the rules of criminal procedure set out in the treatises of the period.<sup>81</sup> Suspects were arrested and arraigned by competent authorities, and their statements were taken in the presence of a confessor, a jailer, and a notary. If a prisoner refused to talk voluntarily, he was moved to a different part of the jail, closer to the torture

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77. For a few representative writings on the topic of torture within the vast literature from the fields of public international law and political and moral philosophy, see Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 COLUM. L. REV. 1681 (2005) (reproaching those governments which suspend rule of law and constitutional guarantees in times of war). See generally David Luban, *Liberalism, Torture, and the Ticking Bomb*, 91 VA. L. REV. 1425 (2005) (tracing liberalism’s distinction of torture as maiming, mutilation, and flaying in the ancient world from contemporary forms of psychological torture meant to elicit information). For a historical review of the law of war and the treatment of combatants, see HELEN M. KINSELLA, *THE IMAGE BEFORE THE WEAPON: A CRITICAL HISTORY OF THE DISTINCTION BETWEEN COMBATANT AND CIVILIAN* (2011).

78. Margaret Abruzzo lucidly traces the gradual shift away from deliberately inflicted pain and the exalted Christian ideals of suffering and martyrdom to account for the rise of nineteenth-century humanitarian sensibility, which was predicated on an evolving revulsion to cruel punishment. MARGARET ABRUZZO, *POLEMICAL PAIN: SLAVERY, CRUELTY AND THE RISE OF HUMANITARIANISM 2* (2011).

79. IRENE SILVERBLATT, *MODERN INQUISITIONS: PERU AND THE COLONIAL ORIGINS OF THE CIVILIZED WORLD* 70 (2004).

80. See Malick W. Ghachem, *Prosecuting Torture: The Strategic Ethics of Slavery in Pre-Revolutionary Saint-Domingue (Haiti)*, 29 LAW & HIST. REV. 985, 987 (2011).

81. For adherence to criminal procedure in Quito’s *Audiencia*, see TAMAR HERZOG, *UPHOLDING JUSTICE: SOCIETY, STATE, AND THE PENAL SYSTEM IN QUITO (1650–1750)*, at 43–49 (2004).

chamber. Recalcitrant prisoners spent the night in an antechamber that also fulfilled a dual function as a chapel. Confessions were recorded subsequently, during and after sessions with torture, and then the prisoners' statements were ratified on the following day. Ratification was tantamount to a confirmation or refutation of the confession that was read back to the prisoner in the presence of jail personnel and secular officials, most often a court official, a councilman, and a notary. Tortured confessions were never exclusively admissible, because they often yielded contradictory or even undesired results. Ratification, then, ensured the truth—or at least substantiated the veracity and reliability of the confession. Ratification coincided with the *alcalde*'s daily visit to the jail during an active investigation. In theory, prisoners could refute the confession, but they would be tortured again. It is unlikely that they would have opted for refutation, as did suspects in the more infamous Inquisition proceedings.<sup>82</sup> If available, witnesses were summoned to identify suspects, and groups of black and mulatto men within the jail were presented in *ruedas* (lineups). If witnesses were enslaved, they could also be subject to torture to verify the truth of their statements. This was unevenly applied to enslaved witnesses—in some cases, slaves issued their statements in response to interrogatories and left the jail without further investigation. In Juan Popo's death, his kinsman Antonio Popo was not subjected to the *mancuera*,<sup>83</sup> but Jacinta Membrillera (doña Tomasa's slave) was stripped at the waist, tied up, and tortured after identifying Sebastian Matamba in the lineup. Given that there was nothing amiss or contradictory in Jacinta Membrillera's testimony, her status as an itinerant street vendor rendered her presumptively untrustworthy and dishonorable.

The church's appeals followed a similar rhythm, set in motion by the patterns of incursion, arrest, and arraignment enumerated earlier. Upon notification of the arrest, the ecclesiastical procurator responded with vigorous protest regarding the secular incursion into ecclesiastical jurisdiction and the encroachment onto consecrated ground. Prosecutors like Villagómez appealed to their superior—the most high-ranking official of the Lima Archbishopric—to inveigh against the royal criminal court's actions through *innovación* (substituting authority with another's). The Archbishop's legal adviser unanimously supported the prosecutors, demanding that the prisoners be returned to the church from which they were taken or restituted to other consecrated ground within twenty-four hours, free from any visual signs of physical torture. Typically, the royal

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82. See, for example, SILVERBLATT, *supra* note 79, at 31 (describing the notorious cases of Manuel Bautista Pérez and doña Mencía de Luna, who were accused of Judaism in the *complicidad grande* (great conspiracy) of 1635–1639).

83. The *mancuera* was a method of torture used in Lima's prison and the Inquisition jails during this time. See Henry Charles Lea, *History of the Inquisition of Spain: Volume 3*, BOOK 6: PRACTICE CHAPTER 7: TORTURE, <http://libro.uca.edu/lea3/6lea7.htm> (last visited Apr. 16, 2013). Prisoners would hang by their arms with tightly wound ropes, and the person tightening the ropes, called the *verdugo*, would administer the torture on various parts of the arms until the ropes cut into the flesh and reached the bones. (author's notes). *Verdugos* were often other enslaved men working for the jail, or freed mulattoes and *zambos*. (author's notes).



magistrates ignored this order. The *alcalde*'s response was issued after an average of two or three rounds of exchange of paperwork, accelerated by ecclesiastical threats of excommunication and *censores* (publicly posted sanctions). Depending on how seriously the magistrates took the threat of excommunication, the *alcaldes* would respond en masse, defending the exercise of jurisdiction by the secular court. In the case of murder, the *alcaldes* would claim (correctly, in the strict legal sense) that *premeditated* murder was ineligible for ecclesiastical immunity.<sup>84</sup> Technically, they still had to prove that the murder was premeditated, which they could not establish with full proof.<sup>85</sup> At this stage of mutual intransigence, the cases went for a second review to the highest ecclesiastical court in Guamanga, where the archbishop invariably issued another order of restitution. Often, this process took an inordinately long time. Papers were prepared and personally served on the parties, motions were filed, and statements and opinions were diligently noted. *Chasquis* (messengers or couriers of official correspondence into the Andean Mountains) were located to carry the documents from Lima to Guamanga, and made the trek when sufficient paperwork had been accumulated to justify the expense and effort. As the process dragged on, royal magistrates expedited their investigation, calibrating their methods in light of the delays imposed by the requirement that the appeal be sent to Guamanga. Ecclesiastical prosecutors expected that their secular counterparts would ignore the initial motion, and filed a preemptive motion for appeal to Guamanga together with their second or third complaint. Hence the lengthy periods encompassed by these cases. In the procedural sense, the cases were typical of legal patterns common to colonial Iberian litigation: breach, complaint, denunciation, intransigence, delay, and (sometimes) remedy.

The testimonies of the three enslaved suspects extracted during torture sessions were incoherent and inconclusive and never led to the recovery of don Diego's stolen property. Each witness capitulated and blamed the other as the ropes of the *mancuera* ate into their flesh. Thomas succumbed quickly. During the second round of the *mancuera*, Thomas blamed both Bernardo and Francisco for involving him in the crime scheme, thereby maintaining his innocence—or, at the very least, minimizing his role in the events. Francisco endured the pain the longest, insisting no less than sixteen times that he was telling the truth. Suspended and hanging by the ropes of the *mancuera*, Francisco implored, “No hay más de lo que digo señor, Jesús María y Josef, no hay más de lo que le digo.

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84. But in the Bosqueto robbery, for instance, there was no allegation of murder, and theft was a felony for which *retráidos* could legitimately claim ecclesiastical immunity. See DE HEVIA BOLAÑOS, *supra* note 3, at 213.

85. According to canon law, a prisoner could not be executed without full proof. LANGBEIN, *supra* note 35, at 47. Witness testimony and circumstantial evidence only amounted to half proof; confession was needed for full proof. See DE HEVIA BOLAÑOS, *supra* note 3, at 227; LANGBEIN, *supra* note 35, at 47.

No puedo levantar testimonio a nadie, no hay más de lo que le digo. Dios mío de mi alma, no hay más de lo que digo.”<sup>86</sup>

As scholars of the Inquisition records have observed, inquisitors were scrupulous about recording the sounds of pain in an effort to demonstrate the careful administration of torture methods, for they expected that their superiors would review their reports. Calibrated pain was a portal to the truth. In the ecclesiastical immunity cases, we have a similar corpus of records that shows how investigators relied on torture, even if the confessions they yielded only led to more confusion among desperate or traitorous informants. The bailiffs, priests, and *alcaldes* present during the torture sessions solemnly informed the prisoner that “if in the course of the session, a leg or arm were to break, or if another limb came loose, it would not be the fault of the magistrate, but the prisoner’s own fault, because their sole intention was to learn the truth.”<sup>87</sup> Even when prisoners were brought back nearly dead to their cells, we see no record of a written remonstrance to the *verdugo* for going too far. Silverblatt’s observations noted earlier are equally relevant to the bailiffs, *verdugos*, and notaries in the crown jail—men of considerably lower social standing than those employed in the Holy Tribunal. Though they lacked the formal legal training of the Inquisitors, criminal magistrates were “great record keepers—wedded to pen and paper.”<sup>88</sup> Their mundane recordings of agony (rendered to us unceremoniously as “paperwork”) merits further reflection on the bureaucratic functions of criminal adjudication.

Why were these sessions recorded? Historians are well aware that primary sources exist because they served a specific function or purpose. Police records exist principally to document the diligent administration of criminal procedure. Through rational and careful investigation, evidence is assessed and measured, and guilt or innocence is proven. They may later inform racialized narratives of criminality, but their immediate purpose is to document surveillance and detention of criminal suspects, set out internal disciplinary measures, and establish daily operational controls and institutional practices that can withstand external scrutiny. This may read like an unduly functionalist view of bureaucratic procedure, especially in light of the sophisticated renditions of the biopolitics of surveillance inspired by Michel Foucault.<sup>89</sup> Alejandro Cañeque has also described the seventeenth-century vicerealty of New Spain with elegant formulations of colonial governance and lawmaking equally shrouded in liturgical trappings.

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86. Transcript, “Tormento de Francisco de Sevillano” (on file with *UC Irvine Law Review*).

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Estando puesto en las ligaduras de la mancuera, y estando en ella se le aperció la verdad en orden al hurto que hicieron . . . que si por no decirla algún brazo o pierna se le quebrase o se le soltase, o recibiese otro u cualquier detrimento, no ha de ser por cuenta de dichos señores sino por la suya porque el intento de dichos señores es aclarar la verdad.

*Id.*

88. SILVERBLATT, *supra* note 79, at 59.

89. See generally MICHEL FOUCAULT, DISCIPLINE AND PUNISH (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1977). See, e.g., Ian Hacking, *How Should We Do the History of Statistics?*, in THE FOUCAULT EFFECT: STUDIES IN GOVERNMENTALITY 181, 183 (Graham Burchell et al. eds., 1991).

Reams of documents and royal correspondence linked Spain to the *Real Audiencia* and the *Santo Oficio*. But the documents detailing Jacinta Membrillera's torture were meant for the *Cabildo*.<sup>90</sup> The elected councilmen used these proceedings to draft legislation to deal with the perceived dangers of the black and mulatto male underclass, along with renegade Spaniards unmoored from metropolitan disciplinary structure.<sup>91</sup> Granted, this was legislation formulated in consultation with the Viceroy, the *Audiencia*, and the subsequent approval of the Council of the Indies,<sup>92</sup> but municipal lawmaking was quintessentially local. Decisions about curfew hours, appropriate numbers of lashes, and methods of public execution were deliberated in response to locally perceived exigencies. Although the edicts and decrees were issued with the imprimatur of the crown (sealed with the royal proclamation, *Yo, el Rey*), they did not filter down (or cross the ocean) as unilateral directives. Thus, when the crown issued advisory opinions of the rights of criminals to asylum, we gain a unique vantage point into the jurisdictional frictions and turf wars among ecclesiastical prosecutors, bishops, learned canonists, and judges, vis-à-vis elected officials. On the civil side, key players included bailiffs, *ronderos*, *ministros de vara*, and other members of local ad hoc constabulary forces—soldiers of the Palace guard, those inducted into the prestigious cavalry orders of Santiago, Calatrava, and the Santa Hermandad. To be clear: everyone trafficked in the racial grammar of black criminality and vice. Everyone believed that black and mulatto men posed a danger to the republic (except, ironically, their owners).<sup>93</sup> Church and crown, however, differed sharply over jurisprudential prerogatives.

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90. JOHN PRESTON MOORE, *THE CABILDO IN PERU UNDER THE HAPSBURGS: A STUDY IN THE ORIGINS AND POWERS OF THE TOWN COUNCIL IN THE VICEROYALTY OF PERU, 1530–1700*, at 115 (1954); FRANK MOYA PONS, *LIMA: EL CABILDO Y LA VIDA LOCAL EN EL SIGLO XVI (1534–1553)*, at 35–40 (1985).

91. See REALES ORDENANZAS SOBRE LOS NEGROS QUE HAY EN LA CIUDAD DE LOS REYES, *supra* note 5, at 384–388.

92. BOWSER, *supra* note 5, at 149–50.

93. The only “defenders” of the potential redemption of slaves were their owners (who often joined in these lawsuits). Thomas del Río's owner was the one who defended Thomas and Francisco's right to immunity when they were apprehended for the Bosqueto robbery. Transcript (on file with author). Sermons and administrative documents of the period reserved the possibility of redemption from evil exclusively for indigenous neophytes. See, for example, the sermons of the infamous “extirpator of idolatry,” Francisco de Avila, *Sermon for the Fourth Sunday of Advent*, in *THE SERMONS OF FRANCISCO DE AVILA: TRANSLATION, ANNOTATION AND COMMENTARY* 28, 28–40 (Joshua Monten ed., Rachel O'Toole trans., Duke-Univ. of N.C. Program in Latin Am. Studies, Working Paper No. 29, 1999); Karen Sivertsen, *The Devil and the Andeans*, in *THE SERMONS OF FRANCISCO DE AVILA: TRANSLATION, ANNOTATION AND COMMENTARY*, *supra*, at 106, 106–09. For a study of the extirpators, see Kenneth Mills, *Bad Christians in Colonial Peru*, 5 *COLONIAL LATIN AM. REV.* 183 (1996). An instrumental reading of the petitions lodged by owners asserting their slaves' right to ecclesiastical immunity is linked to the economic deprivation of their slaves' labor and the imminent loss of property—either through death or exile—that resulted from the magistrate's custody. See Arrelucea Barrantes, *supra* note 36, at 140.

## VII. STRAINING THE QUALITY OF MERCY

Upon touching land the viceroy went ahead, uncovered . . . .  
 Everyone welcomed and cheered him, and with handkerchiefs in  
 hand gave the acclamatory cry [Long live the viceroy]. . . .

. . . .

Upon disembarking, His Excellency went straight to the  
 Cathedral of Callao and heard Mass . . . .

As soon as he had gone to the palace, the archbishop of this  
 city, Don Pedro de Villagómez, paid him a visit, and the Viceroy  
 came out as far as the stairs to receive him. Upon kissing the  
 hand of the archbishop he humbled himself greatly; by very little  
 more he would have touched his knee to the ground, and he  
 took his hands and kissed him many times. . . .

. . . .

Thursday, the 24th of the month, His Excellency went to  
 visit the archbishop at his house.

Friday, the 25th of the month, he went to the *audiencia* of the  
*oidores* [high court judges] and sat with them wearing a black  
 taffeta cap on his head; the *oidores* all had their heads uncovered.

Saturday, the 26th of the month, he went to the cathedral  
 with all the *audiencia* and those of the *cabildo*.<sup>94</sup>

Having given a sense of the actors in these cases, this section focuses on what was at stake in the proceedings. I locate the jurisdictional conflicts around ecclesiastical immunity in ongoing tensions between church and crown, and the delicate balance of power maintained by the sixteen viceroys assigned to Peru by the Spanish crown in the seventeenth century.<sup>95</sup> The lengthy excerpt above, chronicling the protocol observed during the viceroy's arrival and first week of official duties, illustrates how much deference was paid to the archbishop.<sup>96</sup> Simultaneously, the viceroy affirmed his authority over the secular power structure of the *Audiencia* and the *Cabildo*.

Sanctuary's uneasy coexistence with the secular administration of criminal justice was deeply rooted in local political contexts and changing ideas about

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94. CHRONICLE OF COLONIAL LIMA, *supra* note 39, at 118–19, 122 (describing the arrival and first official visits of the Viceroy, Count of Lemos in 1667).

95. Seventeenth-century kings included Phillip III (1598–1621), succeeded by Phillip IV (1621–1665), and Charles II (1665–1700). WILLIAM D. PHILLIPS, JR. & CARLA RAHN PHILLIPS, A CONCISE HISTORY OF SPAIN 307 (2010). Phillip III appointed three viceroys. Phillip IV appointed six viceroys. Charles II appointed five viceroys. *The Viceroyalty of Peru*, PERU ROUTES, [http://peruroutes.com/peru\\_ing\\_viceroyalty.html](http://peruroutes.com/peru_ing_viceroyalty.html) (last visited Feb. 28, 2014).

96. Mugaburu was not a “professional” historian, and his diary was not written with the intent that one day, social historians would comb through it hungry for clues about local events. But it is precisely Mugaburu's appreciative description of the ostentatious baroque protocol that makes his account so invaluable to trace the fault lines between church and crown. Not surprisingly for a military official, Mugaburu was a staunch regalist and a devout Catholic. See *Introduction* to CHRONICLE OF COLONIAL LIMA, *supra* note 39, at 3, 8–11.

crime, criminality, justice, and mercy that defy easy generalizations. Thus, to make sense of the larger political questions, I map the procedural terrain of the cases onto local offices, conciliar appointments, and civic activities of Lima's eligible *vecinos* (residents of the city with voting privileges) in affairs of public safety.<sup>97</sup> My objective in this mapping exercise is to examine the issue of ecclesiastical immunity in two somewhat contradictory ways. What body was ultimately responsible for punishment or criminal adjudication? Or, conversely, what body was legitimately poised to dispense justice and mercy?<sup>98</sup> Were punishment and penitence two sides of the same coin? This necessarily deals with the vexed question of the potential interchangeability of the political and spiritual body: realms over which church and crown have battled for centuries. The kings' role as dispensers of mercy lent legitimacy to their monarchical functions, which was fortified by their spiritual mandate.<sup>99</sup> Fugitive slaves' appeal to the church for protection against the crown's appointees thus created a political conundrum. On one hand, it reinforced a paternalistic role for the church over slaves and *naturales* (Indians), with which the crown was comfortable. On the other hand, it challenged their own pretensions to benevolence and their patronage over their colonial subjects. And it spawned untenable ambiguities over the ultimate arbiters of discipline and control. Who was in charge?

Each viceroy's political agenda was necessarily tied to the crown's fiscal, diplomatic, and military exigencies in Europe, and the imperative of maintaining

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97. The men of the *Cabildo* exercised virtually the same functions of local government, public health, and safety as they would have exercised as elected town councilmen on the peninsula. See MOYA PONS, *supra* note 90, at 8. Lima's *Cabildo* oversaw the execution of public works; set prices for bread, meat, and wine; and guarded vigilantly against price inflation for imported goods. *Id.* at 20–21, 25–27, 29–30. For a biographical history of Lima's vicerealty and councilmen, see GUILLERMO LOHMANN VILLENA, LOS REGIDORES PERPETUOS DEL CABILDO DE LIMA (1535–1821): CRÓNICA Y ESTUDIO DE UN GRUPO DE GESTIÓN 16–18 (1983).

98. Consider, for example, a royal proclamation that conferred the privilege of absolution on *retraídos* in various religious establishments in 1682: “Auto publicado por su excelencia para que todos los delinquentes se presenten bajo la real palabra para que sean absueltos de sus faltas.” (Royal order reproduced in AAL, *Inmunidades*, Leg. 15. Exp. 6, Año 1682). This is one instance of royal clemency in the records, responding, no doubt, to political exigencies. Another case documents the plight of one indigenous *retraído* (*indio natural deste reyno*), Luis Rojas. See AAL, *Inmunidades*, Leg. 15, Exp. 2, Año 1682. Rojas claimed that he acted in good faith and reliance on a royal promise of absolution in return for military service in Panama to combat piracy. Rojas was immediately returned to the magistrate's custody when he got back to Lima for his earlier crime (he had murdered his wife ten years before). *Id.* Rojas sought refuge in the convent of Santo Domingo, and had been there for three years before bringing his complaint. *Id.* Rojas's grievance indicates that the crown's promises of clemency and absolution were not always honored in practice.

99. Slaves' appeal to the benevolence and mercy of the Catholic kings is well documented. For two interesting case studies on how slaves petitioned for their freedom by positioning themselves as *royal* slaves, see MARÍA ELENA DÍAZ, THE VIRGIN, THE KING, AND THE ROYAL SLAVES OF EL COBRE: NEGOTIATING FREEDOM IN COLONIAL CUBA, 1670–1780 (2000), and Renée Soulodre-La France, *Los esclavos de su Magestad: Slave Protest and Politics in Late Colonial New Granada*, in SLAVES, SUBJECTS AND SUBVERSIVES: BLACKS IN COLONIAL LATIN AMERICA, *supra* note 69, at 175.

peace and security in the colony.<sup>100</sup> Although historians have debated the true nature and scope of Hapsburg decline in Europe, the Hapsburgs expanded their overseas holdings (and accrued military debts) exponentially in the sixteenth and seventeenth centuries.<sup>101</sup> As James Muldoon reminds us,

In addition to the Spanish kingdoms and numerous principalities in Europe and the Spanish overseas possessions . . . in 1580 Philip II obtained the Portuguese throne as well. As king of Portugal as well as king of Castile, Philip . . . had claims to exclusive rule over all of the newly discovered lands covered by Alexander VI's bull *Inter caetera*, making him ruler of virtually the entire world.<sup>102</sup>

Although bureaucrats and jurists strove for a centrifugal administrative model of New World governance with clear lines of authority vested exclusively in the viceroy, it was difficult to create and maintain in practice. High-level bureaucrats were obliged to return to Spain after their tour of duty, precisely to prevent the consolidation of power in local hands. Moreover, high-level appointments, with rare exception, were of short duration. In contrast, the church had a more developed network of parishes and bishoprics with on-the-ground personnel that outnumbered those in the viceregal administration. It is virtually impossible to know who won in the battle for local control by relying on administrative documents, because each drafter was careful to portray himself as furthering the crown's interests. In the early part of the century, the canonists had the upper hand, while the *Cabildo's* prestige was harnessed to royal power (which was itself negotiating the terms of its relationship with Rome).<sup>103</sup> Given the growing prestige and wealth of baroque Lima, especially during the second half of the seventeenth century, it is entirely possible that the crown refrained from interference with the ecclesiastical privilege of sanctuary to counterbalance the power of the *Cabildo*.<sup>104</sup> What this meant to subaltern eyes was that the lines

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100. For a detailed daily account of the viceroy Conde de Chinchon's ten-year agenda, see JUAN ANTONIO SUARDO, *DIARIO DE LIMA DE JUAN ANTONIO SUARDO (1629–1634)* (1935).

101. On the Hapsburg decline, see J. H. Elliott, *Self-Perception and Decline in Early Seventeenth-Century Spain*, 74 *PAST & PRESENT* 41 (1977).

102. MULDOON, *EMPIRE AND ORDER*, *supra* note 27, at 118 (discussing Spain's overseas possessions).

103. See MOORE, *supra* note 90, at 115–16; MULDOON, *EMPIRE AND ORDER*, *supra* note 27, at 114. The crown traditionally regarded the religious orders' accumulation of wealth and their immunity from royal direction as a source of tension, but this rivalry escalated much later in the eighteenth century with the expulsion of the Jesuits in 1767. See JEFFREY KLAIBER, S.J., *THE CATHOLIC CHURCH IN PERU, 1821–1985: A SOCIAL HISTORY* 6–7 (1992). If we read Moore's account closely, the crown relied on the *Cabildo* as a royal legislative and fiscal body as it consolidated power in Peru. MOORE, *supra* note 90, at 115–16. However, it was also concerned with restraining the wealth and political autonomy of creole and peninsular Spaniards and *conquistadores* of low birth, who demonstrated such wanton disavowal of metropolitan allegiance. For a description of the *Cabildo's* concentration of local power in the seventeenth century, see PETER FLINDELL KLARÉN, *PERU: SOCIETY AND NATIONHOOD IN THE ANDES* 87–88 (2000). The *Cabildo*, then, became a critical institution in viceregal regulation of privilege, class, masculinity, honor, and status.

104. In addition to the growing population, the city added significant buildings during the

between viceregal and ecclesiastical power were not clear—and they used this jurisdictional blurriness to play one body off against the other.

An interesting case illustrates some of these unresolved tensions. On October 23, 1653, doctor don Pedro de Villagómez, the ecclesiastical prosecutor of Lima's archbishopric, reproduced an advisory opinion from the crown to clarify the jurisdictional competencies of secular and ecclesiastical power.<sup>105</sup> Villagómez relied on an opinion that had been issued in Madrid on April 16, 1619—which appeared to be the only surviving document that Villagómez could find where King Philip III had opined on the matter. Apparently, a criminal magistrate had written to the king, alerting him to the raging problem of delinquency in the city and complaining that criminals were routinely invoking ecclesiastical immunity to escape proper sanction. The king thought it prudent to delimit the jurisdictional lines, which he proceeded to adumbrate in consultation with his learned advisors. But despite the characteristic pomp and splendor of the opinion, the king simply reminded the magistrate that all cases in which fugitives invoked ecclesiastical immunity fell under the church court's jurisdiction, although secular magistrates could hear the case if they thought the subject matter dealt with one of the crimes exempted by Pope Gregory's 1591 bull. The king also opined that the church courts exercised competency until the *tercera sentencia* (third level of review), at which point the appropriate arbiter for the matter was the Council of the Indies. The opinion was signed and sealed by the king (*Yo, el Rey*), and a copy was duly recorded in the synodal records for Lima in 1620. The king's advisory opinion did not extend or abrogate the jurisdiction of either the clergy or the secular court, or authorize hierarchical complexity on the ground. It could have been a politically astute move on the part of those advising an aging King Philip to appease both sides, yet leave the matter to local discretion.

Villagómez prefaced his request by denouncing the increased frequency with which the magistrates of the *Real Audiencia* transgressed against His Majesty's mercy and piety in their zeal for punishment. In this particular case, the magistrates exceeded the bounds of reasonable torture, resulting in the gruesome death of a prisoner, Vicente Biojo, who had been scheduled for release into church custody. Villagómez reminded the *Audiencia* that all appeals in Vicente Biojo's case filed on his behalf demanded that the prisoner should not be tortured and should be returned *sin lesión, afrenta, tortura ni otra pena corporal* (without any

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latter half of the seventeenth century. Though beset by episodic and often devastating earthquakes, Lima's architectural feats included the imposing Cathedral (completed in 1680), the vast complex of San Francisco (1656–1672), the Dominican convent and Church of Santo Domingo (1678–83), and the Church of Desamparados (1671). See KELLY DONAHUE-WALLACE, ART AND ARCHITECTURE OF VICEREGAL LATIN AMERICA, 1521–1821, at 3, 117, 123 (2008); OSORIO, *supra* note 6, at 19–22. After seismic disasters, these religious structures were the first to be rebuilt, for they were foundational to Lima's expressive baroque spirituality. See DONAHUE-WALLACE, *supra*, at 100, 117, 118–19; OSORIO, *supra* note 6, at 22–23.

105. AAL, *Causas de inmunidad eclesiástica*, Leg. 9, Exp. 11, Año 1653.

visible signs of torture or corporal punishment).<sup>106</sup> Instead, Vicente died after being tortured for nearly twenty-four hours,<sup>107</sup> and witnesses in the jail attributed his death to the pending release order that the *alcaldes* had received.

Villagómez reproduced the 1619 royal communication along with his complaint against the criminal magistrates for violating the strict orders issued to the magistrates preventing them from investigating Vicente Biojo's case. But it was not clear why Villagómez did this from a legal point of view—and indeed it was a rare instance in his lengthy and illustrious legal career that he displayed such a confused understanding of the law.<sup>108</sup> We can only presume that he was operating in full comprehension of the law, but took a calculated risk in reminding the royal magistrates that the king had weighed in on the matter of ecclesiastical privilege decades earlier. Biojo's crime was certainly one that was exempted by Gregory's papal bull. He had stabbed and killed Domingo Angola *inside* the cathedral while the men were working there on repairs. Bodily dismemberment or murder on consecrated ground was clearly exempted from ecclesiastical immunity, and so it was surprising that Villagómez would have protested so vociferously to protect Biojo against the secular authorities.<sup>109</sup> Death was swift, resulting from a

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106. This was indeed standard language of the ecclesiastical appeal, raising the presumption that prisoners would not be tortured in church custody.

107. Juan de Ojeda stated the following:

[M]ulato, preso en la real cárcel, estando este testigo en la cárcel ahora ha pasado el veinte y tres del corriente, como a las nueve y media de la noche, estando este testigo fuera del calabozo de donde estaba el dicho Vicente Biojo . . . supo cómo habían llevado al susodicho a dar tormento, y cuando lo llevaron, iba bueno y sano y anoche que era veinte y cuatro del mes corriente, como a las diez de la noche, poco más o menos vio que trajeron al dicho calabozo cargado al dicho Vicente Biojo . . . atormentado de dos brazos, tirado de las caderas, y el capitán don Francisco de la Cueva, alcalde ordinario desta ciudad había dado tormenta, y dijo a algunos que estaba pendiente la inmunidad de la yglesia que pretende el susodicho.

AAL, *Causas de inmunidad eclesiástica*, Leg. 9, Exp. 11, Año 1653.

The *verdugo* in Vicente's case testified under oath that he was instructed by the *alcalde* to administer seven turns of the *mancuerda*, eight stretches in the rack, and three bouts of water immersion:

[M]andado del dicho alcalde siete bueltas de mancuera y ocho ende potro y tres jarillos de agua y después de acabado lo susodicho por mandado del dicho alcalde lo bajaron enbuelto en una fressada en onbros de tres o quatro personas a la cárcel desta çidad donde lo entraron lo qual dijo ser la berdad so cargo del juramento que tiene fecho . . .

*Id.*

108. I have focused principally on Villagómez in other writing because of his lengthy tenure at the Archbishopric court, as well as his impeccable credentials and reputation in the archbishopric and with the viceroys under whom he served. See KENNETH MILLS, *IDOLATRY AND ITS ENEMIES: COLONIAL ANDEAN RELIGION AND EXTIRPATION, 1640–1750*, at 139 (1997). His uncle, also named Pedro de Villagómez, was appointed Archbishop of Lima for three decades (1641–71). *Id.* The uncle, Archbishop Villagómez, is mentioned in Mugaburu's rendition of the arrival of the Viceroy, Conde de Lemos. *CHRONICLE OF COLONIAL LIMA*, *supra* note 39, at 119. Both Villagómez men claimed distant kinship with the revered and sanctified Archbishop Alfonso de Mogrovejo. See MILLS, *supra*, at 138. More broadly, we can get a sense of the law "in action" as opposed to the law on the books by focusing on particular judges' rulings over time. Judges look to the extant law, but they also issue rulings with a keen sense of the "messy complexities" of life, the local nuances and context, and customary law.

109. See DE HEVIA BOLAÑOS, *supra* note 3, at 213 ("Exceptuase también de la dicha regla, el que mata, ó hiere en la Iglesia, ó Cementerio, ó en ella comete otros delitos semejantes, ó mas



knife fight between the two men, and there were numerous witnesses that corroborated the same series of events. After the stabbing, Biojo ran toward the Church of San Marcelo, where he tied himself to the cross to evade arrest. Despite the unanimity of the witness testimonies, Villagómez ruled that there was no evidence that the fight was unprovoked.<sup>110</sup> In this vein, presumably, Villagómez ruled out premeditation, but he could not have ignored the locus of the crime. Although Villagómez may have been swayed by the image of Biojo tied to the cross, many fugitives invoked similar Christ-like gestures when confronted with invading bailiffs and aldermen (alerting us to how quickly *bozales* had assimilated Catholic visual cues of penance). The case is most interesting for the testimony of the witnesses, who were all *bozales*, and the prescient insistence of Vicente's owner that he should be restituted to the church for fear of his life. Villagómez's stance indicates his rigid defense of ecclesiastical privilege, no matter how extreme the crime. His stance may have been calculated given the severity of the case—Biojo had died at the hands of the royal executioner, in violation of a pending order of restitution, and the victim of the crime was another slave, not a Spaniard. In other words, the political risk diminished with internecine crime; I suspect the magistrates would have responded with righteous indignation about black savagery if the victim had been a Spaniard. In sum, I construe this case as emblematic of how on-the-ground wrangling between prosecutor and magistrate reflected the jurisdictional tensions between church and viceregal governance. The appeal to Spain was an attempt to remind the magistrate where the lines were drawn, and that the *tercera sentencia* rested with the Council of the Indies. Though it may be overstated that the lines of authority were clear between king and the lower courts, farther away from the locus of princely power, lesser sovereigns jealously guarded—indeed, fiercely defended—their respective jurisdictional terrains.<sup>111</sup>

What is clear is the vigor with which the church defended its privilege—and, by extension, defended fugitive slaves. Nowhere was the defense of sanctuary tethered to an emancipatory discourse of *libertad* (liberty).<sup>112</sup> Not many witnesses

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graves . . . con esperanza de valerse de su inmunidad . . . . Y siempre se presume en caso de duda, tener esta esperanza, salvo si allí sucedió accidentalmente la obra, sin tener derivación de atras . . . .”).

110. Continuing in the distinction between cold-blooded murder and crimes of passion, the *Curia* allowed a wide degree of latitude for impetuous crimes, or those that resulted from unmitigated anger and intemperate passion that clouded the killer's judgment, especially if death occurred quickly following a fight or brawl. *Id.* at 215 (“[S]alvo si fuese en intervalo tan breve de la ofensa, ó riña, en que no se pueda mitigar el dolor impetuoso, colera de ella y animo lleno de ira, que ciega la razón, y no se puede temperar, por carecer de entendimiento . . .”).

111. On jurisdiction as *ex ante* to legality, see generally BRADIN CORMACK, *A POWER TO DO JUSTICE: JURISDICTION, ENGLISH LITERATURE, AND THE RISE OF COMMON LAW, 1509–1625*, at 2–4 (2007). For particular focus on jurisdictional hierarchies in medieval jurisprudence legitimating princely power, see generally Jesús Vallejo, *Power Hierarchies in Medieval Juridical Thought: An Essay in Reinterpretation*, 19 *IUS COMMUNE* 1 (1992).

112. Frank Proctor has examined a similar conundrum to understand how Mexican slaves argued for “liberty” in the absence of the Enlightenment discourse of “freedom.” FRANK T. PROCTOR III, “DAMNED NOTIONS OF LIBERTY”: SLAVERY, CULTURE, AND POWER IN COLONIAL MEXICO, 1640–1769, at 152–85 (2010); *see also* Owensby, *supra* note 40, at 40.

(particularly the victims of crime) seemed to uphold the church's sanguine view of the necessity of the privilege. If those in the enslaved community shared the church's view, their words were not recorded. Once again, we are reminded of archival silences, since we reasonably presume that sanctuary existed because people believed in the virtues of mercy and agreed on the necessity of cooling-off periods. Intercession, as a form of sovereign intervention, would have been understandable to subaltern subjects within the slave and free communities. Moreover, the consecrated nature of holy ground, the impregnability of the religious enclosure, and its associated practices of protection and mercy would have resonated with the devout expressions of popular Catholicism: inseparable from the processions, shrines, patronal fiestas, confraternities, charitable hospitals, and religious houses of beneficence which provided social safety nets to many during this period.<sup>113</sup> Perhaps not surprisingly, those who viewed ecclesiastical immunity with the most support were the fugitives and prisoners themselves. What we glean from their statements (and actions) is the vital protection that they believed the church potentially offered them.

The sources reveal the unstable status of *retraídos* in plebeian and enslaved communities. Many of the enslaved *retraídos* were young men newly arrived in Lima, either from West African slave markets or other parts of the Iberian empire. *Retraídos* moved fluidly in and out of spaces of criminality, vice, and imprisonment, which sometimes incorporated the hallowed grounds of the church itself.<sup>114</sup> *Bozgal retraídos* were at the lowest rungs of enslaved and plebeian society, doing work that even in enslaved and urban poor communities was denigrated and undesirable. Was this *lumpen* status related to their ethnic and social status as *bozcales*? Whether this correlates to their *bozgal* status can be inferred from other types of litigation, but we assume that the chances for their social mobility were tethered to crime. Put another way, the opportunities for their survival depended on their incorporation into criminal networks. I have suggested here that the proximity of the African experience is not irrelevant in their search for protection, but substantiating that proposition requires further careful research into Central West African Catholicism and sanctuary patterns established by the Capuchin fathers.

Most of our historical inquiries about slaves and courts are inspired by the inherent contradictions and unresolved ambivalence raised by the universal package deal of slavery and freedom, and our unease about the law's place within the regimes of slavery. I have tried to think through the terms of these antinomies by examining the issue of competing sovereignties.<sup>115</sup> My study here has looked

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113. Although with reference to sixteenth-century Spain, William Christian richly describes the visual impact of religious spaces in the popular imagination and religious devotion. WILLIAM A. CHRISTIAN, JR., *LOCAL RELIGION IN SIXTEENTH-CENTURY SPAIN* 70–105 (1981).

114. According to Antonio Popo, when he went to San Ildefonso to visit another of his relatives hiding there, Sebastian Matamba approached him, asking, “[V]os: sois de panadería, ven acá, quitame estos grillos.” Transcript (on file with author). Matamba identified Antonio Popo as someone who was familiar with the prison restraints of the bakeries—and escaping from them.

115. Other scholars have approached the dialectic of law and slavery by looking at free soil

more deeply at slavery's intersection with ecclesiastical protection and jurisdictional hierarchies, and how slaves situated themselves within those spheres. But ultimately, the haunting question remains unanswered: would Antonio Popo, Sebastian Matamba's kinsman, later release him from his chains?

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and its relationship with abolition. See MIRANDA FRANCES SPIELER, *EMPIRE AND UNDERWORLD: CAPTIVITY IN FRENCH GULANA* 72–75 (2012); Sue Peabody & Keila Grinberg, *Free Soil: The Generation and Circulation of an Atlantic Legal Principle*, 32 *SLAVERY & ABOLITION* 331 (2011). For an analysis of freedom suits in the United States that invoke freedom based on travel and free soil besides the well-studied *Dred Scott*, see EDLIE L. WONG, *NEITHER FUGITIVE NOR FREE: ATLANTIC SLAVERY, FREEDOM SUITS, AND THE LEGAL CULTURE OF TRAVEL* (2009). I follow Hünefeldt's thesis that Peru had no abolitionist movement because slaves overwhelmingly achieved emancipation through self-purchase. CHRISTINE HÜNEFELDT, *PAYING THE PRICE OF FREEDOM: FAMILY AND LABOR AMONG LIMA'S SLAVES, 1800–1854*, at 3, 5 (1994). Zephyr Frank has also argued convincingly that the absence of a robust Brazilian abolitionist sentiment in the nineteenth century, as abolitionism raged in North America, was due to the commitment of former slaves in the petite bourgeoisie to the prospect of owning slaves themselves. ZEPHYR L. FRANK, *DUTRA'S WORLD: WEALTH AND FAMILY IN NINETEENTH-CENTURY RIO DE JANEIRO* 3 (2004). Frank's study of Antonio José Dutra, a prosperous, slaveholding freed slave, sheds comparative light on the vexed question of slavery's tense relationship with freedom. *Id.* at xi–xii. According to Frank, although “some freed slaves became abolitionists, many others accommodated themselves to the institution of slavery and sought to purchase slaves of their own.” *Id.* at 3.