Clifford Ando / Jörg Rüpke (Eds.)

Religion and Law in Classical and Christian Rome

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Religion and Law in Classical and Christian Rome

assisted by Sarah Blake
and Mihaela Holban

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Introduction
Religion and law in classical and Christian Rome

The contributors to this volume were invited to reflect upon the relationship between religion and law in the Roman world, from varied perspectives, from the late Republic to the final codification of Roman law in Justinian's Constantinople.

Law is a particularly fruitful means by which to investigate the relationship between religion and state, for reasons both historical and theoretical. On the one hand, law is the mechanism by which the Roman state and its European successors have regulated religion, in the twin actions of constraining religious institutions to particular social spaces and of releasing control over such spaces to those orders. And on the other, classical Roman law and Roman Christianity form two of the bases through which relations between religion and the state have been forged, and those relations have been debated in politics and theory, down through the years.

We chose to embrace a period stretching from the late Republic to the late empire not simply because we wished explicitly to acknowledge that our knowledge of even classical Roman law often derives from sources written or compiled after the empire's conversion to Christianity. Rather, we wished also to confront the tendency among scholars of Roman law to bracket religion – to imagine the law as having divorced itself from religious authority in the archaic period, only to remarry an oriental bride in the age of anxiety – as well as the corresponding inclination of historians of civil law in Europe to forget the pagan classical roots of its notionally – Christian late-antique and medieval codifications. This collection aims likewise to complicate the study of religion at Rome, to break down a tendency to study its relations with the law along one or the other or both of two paths, namely by collecting and analyzing the evidence for formal state actions, or by aligning a reconstructed Roman ‹sacred law› with Mosaic codes of ritual and moral purity. There is more to this history than persecution and piety.

In this field as so often elsewhere, the seeking in Rome after origins, after paradigms and antecedents influential upon later ages, founders upon three interrelated conditions: first, our textual evidence generally reaches back no further than the second century before this era and often no further than the first – to a time, in other words, when Rome had long since become one of the largest and most complexly ordered societies in the world; second, that same evidence almost always reveals Rome in a state of flux, its intellectual life as dynamic, and hence reveals itself to be the product already of many centuries' evolution and not, therefore, of some simple transition from archaic to classical, or oral to literate, for example; and third, the Romans themselves naturalized the dynamism and instability of their world by advocating adherence to an enormous cultural conservatism.

As an illustration of these difficulties as they pertain to this project, consider the following distinction between public and private law, crafted by the jurist Domitius Ulpianus, whose political career reached its peak in the third decade of the third century of this era. Born at Tyre, Ulpian wrote the majority of his works in the aftermath of Caracalla's extension of Roman citizenship to all free residents of the empire.

> *Huius studii duae sunt positiones, publicum et privatum. publicum ius est, quod ad statum rei Romanae spectat, privatum, quod ad singulorum utilitatem: sunt enim quaedam publice utilia, quaedam privatim. publicum ius in sacris, in sacerdotibus, in magistratibus constitit. privatum ius tripertitum est: collectum etenim est ex naturalibus praeceptis aut gentium aut civilibus.*
>
> There are two aspects to this subject, public and private. Public law is that which regards the condition of the Roman state; private, that which regards the well-being of individuals. For some matters are of public and others of private interest. Public law consists in *sacra,* priests, and magistrates. Private law has three parts: for it derives from natural precepts, from those of the nations, and those of the state.[1]

Sacra are things belonging to, or actions performed for, the gods; and what was ‹public› pertained to the *populus,* the people, a community joined by consensual commitment to a particular normative order: a body of citizens.[2] Hence, at first glance Ulpian seems to presuppose that persons' civic and religious identities will overlap, indeed, that they will be coextensive. But even were such a brief reading useful, the import of such a presupposition would have been quite different in Rome of the early third century (or of the late Republic) than it will have been in the sixth century, when this definition of public law was excerpted from Ulpian's *Institutes* into Justinian's *Digest* and paraphrased in his *Institutes,* and it will have been different again in the fifteenth and sixteenth centuries, when it achieved a new currency in debates on law and religion in confessionalized Europe.

But our difficulties are more substantial than those raised by the mere elision of historical change by some frankly improbable lexical continuity. For it turns out that *ius publicum* was not a technical term within Roman law in the age of Cicero, that his was rather an era in which an enormous amount of ambitious theorizing regarding law and religion was being done; and Chapter 8 sketches some of the most important tenets of that project and inquires into its reception among high and late imperial lawyers and theologians. What is more, the Romans felt a profound reluctance to codify for themselves exactly those things that Ulpian denominated *ius publicum,* namely, the law that consisted in ‹*sacra,* priesthoods, and magistracies.› Indeed, our best evidence for Roman thought on this issue in the late Republic and early empire derives from municipal constitutions drafted at Rome for colonies and municipalities elsewhere; and while Chapter 2 takes up just this problem, it must be confessed that neither substantially-preserved charter retains the clauses that will have enumerated the priesthoods of its community.

For now, receiving our impetus from Ulpian, we might ask how the distinction within law between public and private held within religious life. Indeed, how did the Romans conceive religion itself, such that its public and private forms were so easily balkanized? And what space did a Roman law that embraced sacred things and priests as well as magistrates grant to individuals in which to practice their own cults, and how did it conceive of those whose actions it deemed unacceptable? Where religion itself is concerned, Chapter 3 explores the role of law in drawing a boundary between religion and one of its many others, namely, magic. This classificatory scheme, its language and the coercive apparatus that developed around it, had a long life in the high and late empire, and Chapters 6 and 7 explore some aspects of that history. For the present, let us turn to conceptions within Roman law of the public and private spheres and of the place of religion within them.

We should first observe that Romans distinguished what was public not simply from what was private, but also from what was foreign. That is to say, ‹the public› anchored two quite distinct polarities, but their individual logics turn out to have a great deal to say about

1 Ulpian *Institutiones* bk. 1 fr. 1908 Lenel = *Dig.* 1.1.1.2 (trans. after D. N. MacCormick).
2 Cicero *Rep.* 1.39.1 and 3.45, together with Dyck 2004, 184–185 on *Leg.* 1.42.

each other. For what was ‹public› as a matter of law were the things of the people, and a people was above all a community of citizens. So, for example, the second-century lexicographer Festus, who drew heavily on the work of the Augustan polymath Verrius Flaccus, described *publica sacra,* public rites, as ‹those performed at public expense on behalf of the people, on behalf of (the inhabitants) of mountains, villages, and consecrated meeting houses, and (groups centered around) sanctuaries.› Private rites, by contrast, were ‹those performed on behalf of individuals, families, and clans.›[3] Peregrine, or alien rites, form a curious third category, consisting not of the set of all rites performed by all non-citizens, but rather of ‹those which were performed either for gods called forth to Rome from besieged cities, or for the sake of certain cults sought in peacetime.›[4] No doubt the Romans had a way of describing rites performed by foreigners in foreign lands, whether by individuals for their own sake or for the sake of their communities. But this category clearly embraces only those rites performed publicly at Rome but which remained, for whatever reason, ideologically and legally alien. The extraordinary expansiveness of Rome's particular conception of *civitas* and *res publica,* and its liberal admission to citizenship, naturally resulted in a likewise striking conception of ‹Roman religion›: not the religion of the territory of the city, but of the city's citizens.[5] But in the final analysis this conceptualization remained incoherent, as we shall see.

If we approach the ‹public› a second time, this time by way of the private, we encounter a similar structural difficulty, whereby ‹the public› is defined by opposition to some other, but the conceptualization of that other is purely circular. Consider the second law offered by Cicero in the draft constitution contained in his work *On the Laws,* which urges as follows:

> *Separatim nemo habessit deos, neve novos neve advenus, nisi publice adscitos. Privatim colunto quos rite a patribus ⟨cultos acceperint.⟩*
>
> Let no one have gods separately, either new or foreign, unless they have been recognized publicly. Let them worship in private those whose worship has been duly handed down by their ancestors.[6]

Latent in these clauses are potential ruptures at several levels. First, Cicero does not explain the difference between ‹having a god separately *(separatim)*› and ‹having a god privately *(privatim),*› but it is clear that he recognized the potential for individual (as opposed to private) action to affect state cult. It is precisely that possibility that he seeks to foreclose. At the same time, the public recognition of a deity might seem to hold out the possibility of obligating or affecting individuals in their private practices, and so raises the question how the commitment of individual citizens to civic cult was conceived. What is more, the city of Rome regularly acquired new citizens and resident aliens, and immigrants of either legal status tended to travel with their gods. What happened when that which was duly handed down was foreign or new?

To return for a moment to Festus' definition of ‹public rites,› we observe that he situates them in particular locations: ‹on behalf of mountains, villages, consecrated meeting houses, and sanctuaries.› His interest in place recalls the diction of Valerius Maximus, as imperfectly preserved by a later epitomator, in describing the expulsion of the Jews from Rome in 139 BCE. According to the text as we have it, the praetor Cornelius Hispalus expelled the Jews beyond the borders of the city and removed ‹their private altars from

3 Festus s. v. *publica sacra* (284L).
4 Festus s. v. *peregrina sacra* (268L); cf. Cancik and Rüpke 2003.
5 Cancik and Cancik-Lindemaier 1994.
6 Cicero *Leg.* 2.19: *Separatim nemo habessit deos, neve novos neve advenus, nisi publice adscitos. Privatim colunto quos rite a patribus ⟨cultos acceperint⟩.*

public spaces.›[7] This care with regard to the legal-religious status of land accords closely with a judgment rendered by the pontifical college regarding the placement by private individuals of some tombs on land discovered later to have been consecrated to the goddess Honor. According to Cicero, who preserves the anecdote, ‹the pontifical college decided that a public place could not be placed under the constraint of private religious observances,›[8] and so the bodies were exhumed. At the same time, it merits attention that though all these texts stress the removal of private rites from public spaces, they devote no theoretical work to the understanding of privately-installed cults, and that inattention proves a further source of instability in Roman understandings of religion and law.

The distinction between public and private in the realm of religion thus integrates distinctions of several kinds, between spaces owned by the community and those owned by individuals; between the power of magistrates and that of private individuals; between gods formally summoned and received by magistrates, as opposed to those brought to Rome by individuals; and between cult acts undertaken for the good of the citizen body and those undertaken for the good of an individual or some collectivity other than ‹the people.›[9] This understanding of the boundaries of public and private should permit a more careful description of the forms and limitations of religious tolerance at Rome. For while tolerance may be preached by anyone, in complex states it is practised by governments; and though it exists as an abstract quality in modern theory, in practice its justifications and limitations are contingent and contextually specific. And so we suggest, whatever the roots of religious tolerance at Rome, tolerance itself was not the necessary product of its polytheism. Rather, tolerance extended to those private observances that did not infringe upon public cult – cult acts undertaken by magistrates, performed in public spaces, directed to the gods of the community, and expressive of a shared zeal for the common good.

The rough distinction we have drawn between public and private in Roman law and religion finds support in legislation after Cicero on the sacralization of space. Always at issue in that body of literature as it is preserved is the power of private individuals to sacralize or, more precisely, to tinge with religion a plot of land by burying a corpse in it, and the need to distinguish the religious effects of such action from the consecration of spaces undertaken by magistrates. In sum, private individuals can render their own property *religiosus*; magistrates render things *sacer,* sacred. In the words of the jurist Marcian, *sacrae res sunt hae, quae publice consecratae sunt, non private*; ‹sacred things are those that have been consecrated publicly, not privately.› ‹If a person privately makes something sacred for himself, it is not sacred, but profane.›[10] Likewise, the taboo associated with the dead notwithstanding, individuals cannot render another person's property *religiosus* by burying a corpse on it; as they need the owner's permission for the burial, so that permission is a precondition for the religious scruple to adhere and the sacralization to take place.[11] What seems to clinch the argument is the logic of the judgment of Pomponius,

7 Valerius Maximus 1.3.3, in the epitome of Nepotianus: *Iudeos quoque, qui Romanis tradere sacra sua conati erant, idem Hispalus urbe exterminavit arasque privatas e publicis locis abiecit.* Compare Livy 25.1.6–12, describing events in Rome in 212 BCE. His report opens with the announcement that the longer the war went on, ‹the more *religio,* and in large measure foreign *religio,* attacked the state›, and he goes on to describe the failure of an intial attempt by the aediles to remove *sacrificuli,* petty sacrificers and their equipment from the forum. In the end, the Senate took action and forbade anyone from ‹sacrificing according to a new or foreign rite in a public or consecrated space› *(neu quis in publico sacrove loco novo aut externo ritu sacrificaret)*.

8 *Leg.* 2.58: *statuit enim collegium locum publicum non potuisse privata religione obligari.*

9 Recall in this context the language of Ulpian (reference in note 1): *publicum ius est, quod ad statum rei Romanae spectat, privatum, quod ad singulorum utilitatem.*

10 Marcian *Institutiones* bk. 3 = *Dig.* 1.8.6.2–3. See also Ulpian *Ad edictum* bk. 68 = *Dig.* 1.8.9.

11 *Dig.* 1.8.6.4; *Dig.* 10.3.6.6; *Dig.* 11.7.2.1–2, 7–8.

followed by Paul, that *ex consensu tamen omnium, utilius est dicere religiosum posse fieri,* ‹when everyone is in agreement, however, it is more conducive to well-being to say that a place can become *religiosus*.›[12] The passage may have been excerpted from a debate over the ability of individuals to sacralize land possessed by one party but owned by another, if the burial takes place without the permission of the owner. But the invocation of *consensus omnium* invites us to speculate about the extension of this debate to the possibility of rendering public land *religiosus.* The conclusion is that an individual cannot make it so, but the public can. Among its many accomplishments, Chapter 1 provides a framework within which to understand the development of this distinction within religious practice, as also its articulation through notions of public law.

Given the place of law in Roman social theory, and of jurisprudence in Roman education, it was inevitable that lawyers should become theologians, and that polemicists both within and between religious communities should have recourse to law. Chapters 3, 4 and 5 consider different moments in that history, examining in turn the use of legal argumentation in Christian polemics, legal social theory as a foundation for persecution under the Tetrarchy, and law as an index of cultural difference in the *Comparison of Mosaic and Roman law.*

But the most remarkable exploration of the conceptual apparatus explored here – and certainly the most extended exploitation of its language – comes to us not from a lawyer, of whatever religion, but from Augustine, and so we return to a central concern of this project, namely, the passage of classical language and social theory from the world of Roman law to that of Christian late antiquity. The text to which we refer is the answer to the seventy-ninth of Augustine's *Eighty-three different questions,* ‹Why did the magicians of the Pharaoh perform some miracles, as Moses the servant of God did?›

Augustine responds, naturally enough, by distinguishing between the actions of Moses and the magi, in such a way that the miracles of the former can be categorized as good and those of the latter as deceitful. But the language and arguments he uses are not Biblical, nor even Christian, but Roman and legal.

Thus the holy servants of God, he wrote, are sometimes allowed ‹to command the lowest powers, in order to perform certain visible miracles.› This happens in accordance with what is *utile,* what is conducive to well-being – a standard for assessing actions thoroughly implicated in classical law (see Chapter 8, page 139). What is more, the servants of God have that gift *secundum publicam et quodammodo imperialem legem, hoc est summi dei potestatem,* ‹in accordance with public and, as it were, imperial law, which is the power of the highest god.›[13]

Magicians, on the other hand, do not actually command the lowest powers, as saints do. Rather, the powers themselves are granted the opportunity to deceive magicians and those who place their trust in them – but their ability to perform miracles exists *privato iure,* by private right.[14] Augustine develops this metaphor at remarkable length:

> When, therefore, magicians do such things as sometimes the saints do, their actions indeed appear to be the same, but they are done both for a different end and under a different law, *sed et diverso fine et diverso iure.* For magicians act seeking their own glory; but the saints seek the glory of God. Again, magicians act through certain things granted to the [lowest] powers in their domain, as if in some private contractual or social relationship, *quasi privata commercia vel beneficia*; but the saints act in public governance, *publica administratione,* at the command of him to whom all creation is subject ... Wherefore it is one thing for magicians to perform miracles, another for good

12 *Dig.* 11.7.3.
13 Augustine *De diversis quaestionibus* 79.1.
14 Augustine *De diversis quaestionibus* 79.1.

> Christians, and still another for bad Christians to do so: magicians act through private contracts, *per privatos contractus,* good Christians through public justice, *per publicam iustitiam,* and bad Christians through the tokens of public justice, *per signa publicae iustitiae.*[15]

Where metaphor operates through analogical construal and so works within law to construct homologies, the seeming violence of this transposition, from the world of law to that of religion and back again, operates in pursuit of difference. For Augustine adopts the language of classical law, which once had served to marginalize and criminalize Christianity itself, in order to make a homomorphic distinction, in which, it might seem, only the roles have changed. Are we once again in the position described above, in which lexical continuities across the centuries prevent us from discovering in the language of law the means to distinguish the Christian empire and its concerns from pagan Rome?

Not quite. For the opening statement of Augustine's answer to the seventy-ninth question runs as follows:

> *Omnis anima partim privati cuiusdam sui potestatem gerit, partim universitatis legibus sicut publicis coercetur et regitur. Quia ergo unaquaeque res visibilis in hoc mundo habet potestatem angelicam sibi praepositam, sicut aliquot locis divina scriptura testatur, de ea re cui praeposita est aliter quasi privato iure agit, aliter tamquam publice agere cogitur.*
>
> Every soul wields a power that is its own, unto itself; at the same time, every soul is constrained and ruled by laws of the universe – as it were, public laws. Since, therefore, every single visible thing in this world has an angelic power placed in supervision of it, as numerous passages of divine scripture testify, regarding that thing over which it has supervision, the angelic acts sometimes *quasi privato iure,* as if by private or individual right; at other times, it is compelled to act in another way *tamquam publice,* as it were, in public.[16]

Augustine's use of classical language is thus self-consciously metaphorical, and the gap between his usage and Cicero's may be measured along at least two axes. For Augustine, at least – and he was a theologian, and not a legislator – the public is not a state that requires governance at all, and the private is located not in acts of cult or social actions per se, but in the soul. From the vantage point of Christian or post-Christian modernity, those conclusions might seem obvious; it is one of the aims of this collection to reveal their radicalism.

We are now far from the beginnings of this history, even insofar as they are accessible to us. But let us turn back one more time, to approach the nexus of law and religion from still another perspective. Early Roman penal law took the possibility of successful human employment of divine powers for granted, and acknowledged the possibility of transfering crops by enchanting them (see Chapters 3, p. 55, and 4). At the same time, lawmakers were at pains to avoid themselves interfering with the gods' prerogatives, and sanctioning state actions that did likewise. The quota for the election of priest – precluding, not replacing cooptation – therefore remained deliberatedly just below a numerical majority: only 17 out of 35 tribes were allowed to vote, while the selection of the tribes that would vote was left to the lot. Similarly, land could be consecrated to the gods, but depropriation required the god's assent. Terminus, as we know, was not willing to give it.

Republican law, then, erected boundaries around religion even as it recognized its centrality. Human institutions were recognized for what they were, and limits were established that respected the agency of the gods. Postclassical law, in contrast, tried to mobilize religion as a source of legitimation, for the ruler as for the lawgiver. But from this developed a new dynamic: if religion could support different, competing claims to power, then political differences could be projected onto competing religions. Power could be then

15 Augustine *De diversis quaestionibus* 79.4.
16 Augustine *De diversis quaestionibus* 79.1.

brought to bear, by marginalizing or criminalizing other religions. It was not the end of polytheism, but the novel construction of a plurality of politically exploitable and necessary religions that marked the end of classical tolerance.

In conclusion, we hope that this volume will provoke thought in at least two directions:

First, the incorporation of religion within the law intensified the governmentality of the ancient world. This was true in different ways at Rome and in the provinces of the empire. For the latter might have lain forever outside the consciousness of Roman priests, uninterested as they were in cults on provincial soil, had not the universalism of Roman law brought provincial religion within the scope of their concerns. In both arenas, this process required and produced a continual (re)definition of what lay within the competencies of the state. This embraced negotiations over the boundaries between public and private, sacred and secular, and human and divine. It is our hope that precise historical studies might denaturalize, without in any way dematerializing, the concepts and debates that were produced by, and attendant upon, this history.

Second, we come to know Roman law at a time when it had already been laicized, and what we witness in the classical period is the recursive inscription of religion both within the law and as a form of law. Viewing late Republican literature in this way permits us to see both the archaism and legalism of religious language in a different light; it also helps to historicize what one might call, with deliberate anachronism, the peculiar proto-establishmentarian tendencies of Roman constitutional law and, mutatis mutandis, the constitutionalism of Roman priesthoods and priestly practices. Moving across time, the history of religion and *ius publicum* appears not simply as a sequence of encounters between Roman law and different religions, but as the engagement of theorists and practitioners of government with different theories and metaphysics of the social.

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Chapter 1
Oral tradition and written tradition in the formation of sacred law in Rome

by

John Scheid, Collège de France, Paris

With a cultural background like ours, which relies essentially on the model of a revealed religious tradition, transmitted by a Book, it is difficult to understand the oral nature of Roman religious tradition. A second difference increases this first difficulty of understanding: the ritualistic character of Roman religion, which enhances its oral character. The consequence of these features is a certain contempt and neglect by modern scholarship of what actually formed the core of Roman religion: ritualism.

The controversy about ritual reaches back to Roman times. It started with Christian discussions about the rituals of the Jews and pagans.[1] Closer to us, the debate took radical forms during the Reformation and then acquired the main lines that still obtain today.[2] I do not want to go into particulars; here is sufficient to observe that this debate has affected the history of religion as well as theology. The history of ancient religions developed under the influence of both this debate and a negative prejudice against ritual.[3] Since the 19th century at least, philosophers and historians have opposed interior spirituality to external practice, religion of the heart to religion of reason. According to them, ceremonial and regulation cannot be mistaken for natural religion and the spontaneous impulse of the soul towards the infinite. Or rather, this fundamental prejudice against ritual was transposed in history: according to this inclination of the occidental mind, the original impulse towards the divine was supposed to have been confiscated once by the priests, and reduced to a dry and dreary system of rituals. The original revelation then split, and its ruins covered the whole earth. Consequently it is the task of philosophers, theologians and historians to reconstruct the history of this degeneration, and of the dialectical process towards the reunification of heart and reason in the new religion. Despite all their differences, the scholars who adopted this approach agreed about the authors of the decay of religion, from India to Israel, from the first Christians to the papists: the guilt belonged to priests. And the main tool of this appropriation of piety, the vehicle of their delusive authority, were their books. All the power to the priests, all the power to their books.

1 See, e. g., Tertullian *De praescr. heret.* 40.
2 On the history of criticisms of ritual, see Smith 1990: 1–35, Bremmer 1998, and Ando 2003: 101–105.
3 See for this problem J. Scheid and F. Schmidt 1994: 1 ff.