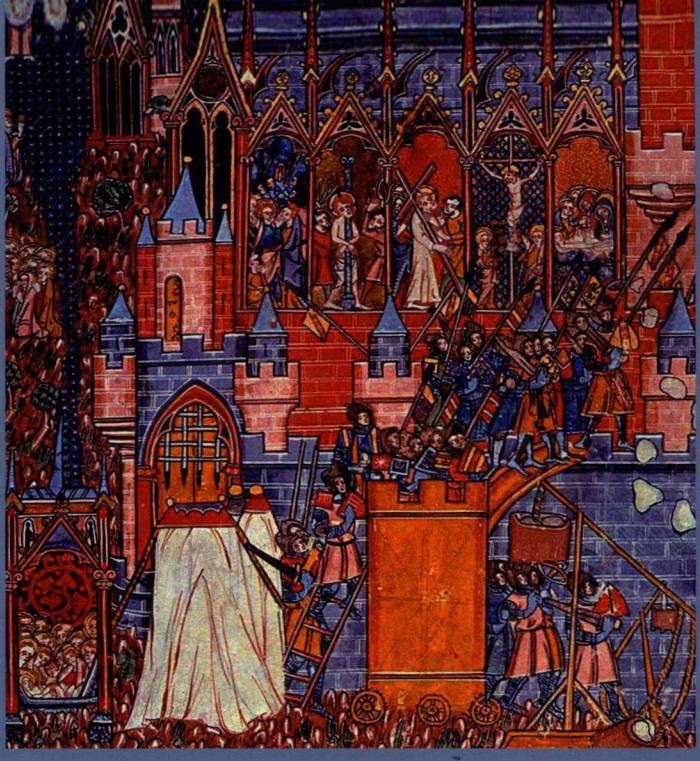

SANCTUARY AND CRIME IN THE MIDDLE AGES 400–1500

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Abbreviations

ACO	*Acta Conciliorum Oecumenicorum*
A Gu	*Alfred's Treaty with Guthrum* (ed. *Liebermann*)
Alf	*Laws of Alfred*
As [I–VI]	*Laws of Æthelstan* (ed. *Liebermann*)
Atr [I–X]	Laws of *Æthelred* (ed. *Liebermann*)
BL	British Library
CCSL	*Corpus Christianorum Series Latina*
CIC	*Corpus Iuris Canonici* (ed. Friedman)
CJ	*Codex Justininanus*
CL	*Corpus Legum ab Imperatoribus Romanis ante Iustinianum Latarum*
Cn [I–II]	*Laws of Cnut* (ed. *Liebermann*)
CSEL	*Corpus Scriptorum Ecclesiasticorum Latinorum*
C. Th.	*Codex Thedosianus* (Theodosian Code)
D	*Decretum* (ed. Friedman)
Dig.	*Digest of Justinian*
ECf	*Laws of Edward the Confessor*
Edg. [I–IV]	*Laws of Edgar* (ed. *Liebermann*)
Edm. [I–III]	*Laws of Edmund* (ed. *Liebermann*)
E Gu	*Edward's Treaty with Guthrum*
E. Th.	*Edictum Theodorici*
Gesetze	*Die Gesetze der Angelsachsen* (ed. *Liebermann*)
Hist. Eccl.	*Historica Ecclesiastica*

IRME	*Ius Romana Medii Aevi*
JECS	*Journal of Early Christian Studies*
JUST	*Rolls of the Itinerant Justices*
Leis Wl	*Leis Willelme* (ed. Liebermann)
LHP	*Leges Henrici Primi* (ed. Downer)
MGH	*Monumenta Germaniae Historica*
NA	National Archives (Great Britain)
Nov.	*Novellae*
PG	*Patrologia Graeca*
PL	*Patrologia Latina*
RDC	*Revue du Droit Canonique*
RHD	*Revue Historique du Droit Français et Etranger*
Robbins	Robbins Civil and Religious Law Collection, Berkeley, California
Wl Lond	*William I, Writ for London* (ed. Liebermann)
X	*Liber Extra* (ed. Emile Friedman)
ZDR	*Zeitschrift für Deutsches Recht und Deutsche Rechtwissenschaft*
ZSS GA	*Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Germanische Abteilung*
ZSS KA	*Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Kanonistische Abteilung*
ZSS RA	*Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Romanistische Abteilung*

Prologue

In its medieval form, sanctuary law granted a wrongdoer who fled to a church protection from forcible removal as well as immunity from corporal or capital punishment. The fugitive might be required to pay a fine, forfeit his goods, perform penance, or go into exile, but almost without exception his body and his life were to be preserved. Laws carving out sanctuary protections appear in every major medieval legal tradition. Fourth-century Roman law recognized sanctuary, ensuring that it was part of the legislative traditions that medieval Europe received from Rome. Ecclesiastical canons reiterated it, backing sanctuary with the Church's spiritual authority. In the early Middle Ages, a host of royal legislative commands repeated it, mooring sanctuary to images of pious and benevolent kings. In later medieval England, sanctuary traditions were incorporated into the routine administration of royal law, providing a resolution to all sorts of felonies until Tudor reforms all but abolished the privilege. In many cities on the European continent, sanctuary remained a central feature of feuding, exile, and dispute-resolving processes until the sixteenth century.

In the sixteenth century, the thousand-year-old legal practice came under increasing political and juridical attack. Roman lawyers, scouring the classic Roman law texts, argued that sanctuary rights belonged to the prerogative of secular sovereigns and could be restricted in the interest of the "*res publica*." Even the papacy participated in the restriction of sanctuary rights, promulgating in 1591 a bull that lengthened the list of crimes that no longer qualified for sanctuary and conceded a role for laymen in forcibly extracting

fugitives from churches. The role of canon lawyers in the death of sanctuary is complex, and began in thirteenth-century attempts to reconcile ecclesiastical privileges like sanctuary with an emergent conception of deterrence-oriented criminal law. These thirteenth-century canon law doctrines had a lasting impact and were even conspicuously cited by Henry VIII in his move against sanctuary during his divorce with Rome in the 1530s. But the attack on sanctuary was not limited to Protestant lands. François I of France, for example, issued legislation that abolished sanctuary in 1539. Sanctuary's early modern abolition was closely tied to the emergence of juridical discourses that stressed the necessity of uninterrupted territorial sovereignty and deterrence-oriented understandings of punishment. Sanctuary, which had once been an important expression of medieval sovereignty and which had been integrated into the administration of criminal law in medieval common law and Roman-canonical jurisdictions, was recast as a nuisance that responsible lawmakers must be careful to restrict or abolish altogether.

I began this study attempting to understand how every major European legal tradition could recognize some form of protection for criminals who fled to a church. Why was allowing respite to a criminal who fled to a church considered an appropriate response to wrongdoing? How could such a legal practice flourish in European legal traditions for more than a millennium? And given that sanctuary survived for so long, why was it suddenly abolished throughout Europe in the sixteenth and seventeenth centuries? When did the sanctuary protections that had been transmitted from the late Roman Empire into every major medieval European legal tradition begin to seem inappropriate, even dangerous, so that a once-honored legal practice came under vociferous attack from secular and ecclesiastical quarters? To answer such questions, this study seeks to reconcile the history of sanctuary law with the general history of medieval criminal law and to relate the abolition of sanctuary to the emergence of a new understanding of criminal law and punishment at the dawn of the early modern era.

My initial investigations yielded two surprises. First, no general book-length study of medieval sanctuary law had been produced in English for nearly a century. The bulk of scholarship on medieval sanctuary, having been produced on the continent, has tended to treat the Roman-canonical tradition to the exclusion of the English common law tradition. Concomitantly, despite some fine article-length treatments of sanctuary law within the English legal tradition, there has been no sustained attempt to situate English sanctuary

law within the broader picture of medieval Europe. Second, the sizeable literature on sanctuary law produced by historians has led to remarkably uniform conclusions. According to the standard accounts, protecting criminals who sought refuge in churches was an unhappy necessity for peoples without strong centralized governments, whose kings and churchmen could not sufficiently suppress private violence or regulate public vengeance. In this literature, sanctuary is considered a crutch; healthy legal regimes do not need it. It struck me early in my investigations that the people who actually lived under a regime that honored sanctuary laws probably did not, however else they may have understood sanctuary protections, regard those laws as evidence of an inadequate legal order or as mere placeholders serving until modern legal reforms could set things aright. Because the history of sanctuary has not yet been integrated with the history of criminal law, sanctuary has generally been treated as antithetical to criminal law practices in medieval Europe. Yet, sanctuary thrived for more than a millennium not because of its utility in an age of barbarity but because it accorded with medieval conceptions of pious sovereignty and ecclesiastical intercession and dovetailed with a range of medieval penal practices that were understood to be legitimate in their own right.

All research on the history of medieval sanctuary law must start with Pierre Timbal's monumental *Le droit d'asile*, published in 1939. Timbal's book begins by describing sanctuary practices in ancient Egypt and ends nearly five hundred pages later by cataloguing sanctuaries for criminals that still existed in Malabar, Tahiti, and, according to Timbal, in America in the "région du Missouri." In between, Timbal executed a breathtakingly rich account of sanctuary law from the Roman Empire through the abolition of sanctuary in sixteenth-century Europe, although for the most part he left Anglo-Saxon and English common law sources to the side. My own interpretation of medieval sanctuary law differs from Timbal's, but his achievement deserves more recognition than it has received among Anglophone scholars.

That almost seventy years had passed since the appearance of the last comprehensive monograph on medieval sanctuary, and almost one hundred years since the last such book appeared in English, gave me little pause, at least in the beginning. As my research deepened, the vast "untilled soil" I thought I had found proved to be as much a liability as an opportunity to contribute to the field of medieval legal history. It also helps explain the ambitious chronological scope of this study. Under any circumstances it would have

been necessary to examine sanctuary law within the Theodosian Code because a great deal of early medieval legislation must be understood against the backdrop of late imperial Roman law and its transmission into Western Europe, but I found that the history of sanctuary law in the late Roman Empire had not been treated very thoroughly in English-language scholarship. As a consequence, I had to examine closely both the context of that imperial sanctuary legislation and its incorporation into the Theodosian Code (AD 438), which was such an important model for legislation in early medieval Europe.

While very few extant sources delineate how sanctuary law was practiced in medieval Europe before the thirteenth century, nearly every medieval legislative source—ecclesiastical or secular—announces some form of protection for criminals who took sanctuary. That some medieval legislative texts are preoccupied with sanctuary is not altogether surprising, given the indisputable role of ecclesiastics in drafting even so-called secular legislation in the early Middle Ages. Still, this calls for explanation. Although it may have been self-evident that Christian houses of worship should be free from violence and bloodshed, why would churchmen have been so eager to place themselves between feuding enemies or to thwart royal justice? And why would kings heed the message contained within the early medieval *Leges* that good kingship was bound up with respect for sanctuary law? In other words, what did sanctuary mean in the medieval world?

The available sources create certain unavoidable imbalances in research of this scope. The English plea rolls, which provide a largely continuous view of the administration of criminal law in England from the end of the twelfth century, offer a unique glimpse into the place of sanctuary in everyday administration of criminal law in England and show that the common law of sanctuary was distinctive in a number of ways, including the almost unlimited access to sanctuary for all types of felons and the administrative linkage of sanctuary with exile practices. On the other hand, while late medieval canon law sources reveal little about the administration of sanctuary in Roman-canonical jurisdictions, they do reveal an emergent tension between sanctuary and canon law conceptions of punishment. In regard to sanctuary practices outside late medieval England, Timbal did unearth some sources showing the disposition of sanctuary cases in fourteenth- and fifteenth-century royal French law, but the most detailed and quotidian view of medieval sanctuary is found in the records of the early English common law. There are reasons to suspect that the late-medieval English experience with sanctuary was not al-

together different from that on the contemporary Continent, though English sanctuary practice was likely the most administratively disciplined in Europe. Still, considerable gaps in the record make it difficult to draw firm conclusions. In medieval Italy, both civilian jurists and canonists agreed that some form of sanctuary should protect at least some criminals, but evidence of sanctuary's actual administration is scarce. Surviving papal sources allow us only glimpses of sanctuary in practice on the European continent in the fourteenth century and thereafter. Fourteenth-century papal registers, for instance, show an expectation that sanctuary be respected in places as distant as Majorca and Bratislava. Yet the papal curia was unlikely to create a record in instances where the sanctuary privilege was respected, and thus the sources sometimes offer more evidence about exceptional cases than they do about the routine administration of sanctuary laws within canon law. Because of the abundant sources, the latter portion of this study is tilted toward the English common law. Where comparative evidence is available, it has been incorporated so that the picture might be somewhat rounded out to the extent possible, but the most detailed picture of how sanctuary law was successfully integrated into late medieval governance is provided by common law sources, and this book reflects that fact.

This book represents the accumulation of more debts than I can ever repay. The greatest of my intellectual debts are owed to my teachers at the University of California, Berkeley. I count myself fortunate to call Philippe Nonet my teacher, and I join a long line of his students when I acknowledge his generosity and grace as a teacher and friend. Laurent Mayali deserves special thanks for his patient guidance and support as I first began to work with medieval Roman and canon law sources. The late Tom Barnes shared his wealth of knowledge concerning English archives and the history of English law. David Lieberman has been an unfailing source of moral support over the years and taught me to think like a legal historian. Marianne Constable provided valuable insights throughout the life of this book, and her own work served always as a model to me for what a legal history project could be. I accumulated earlier debts at Cumberland School of Law in my home state of Alabama, where Professors Trisha Olson, Tom Berg, Andy Klein, David Smolin, and R. George Wright encouraged me to pursue a life in legal scholarship rather than one in law practice.

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Introduction

Although every medieval legal tradition offered criminals who fled to a church respite from corporal and capital punishment, in the sixteenth century kings, parliaments, and popes reached the common conclusion that the privileges that protected sanctuary seekers presented a major obstacle to good order, and the thousand-year-old legal practice was abolished or drastically restricted throughout Europe. With remarkable unanimity, scholars since the eighteenth century have looked approvingly upon the abolition of a practice that, according to their critique, had allowed respite to the guilty and unnecessarily infringed upon the proper reach of sovereign jurisdiction.[1] On account of sanctuary, "the strong, the swift, the premeditating murderer cheated the gallows."[2] Moreover, in the opinion of one eighteenth-century scholar, sanctuary law was "pregnant with an infinite deal of evil and mischief" because "the very act of persons betaking themselves to sanctuary always implied the commission, and even the confession, of their respective crimes."[3] In short, sanctuary was an "error . . . costly to the civilized community, in that wrongdoing was protected."[4] From its infancy, the science of criminology has agreed. The eighteenth-century penal reformer Cesare Beccaria concluded that "places of asylum invite to crime more than punishments influence against it."[5] By the early modern period, not only had