GLOSSES ON LATE- MEDIAEVAL STATE IMAGERY

by

Ernst H. Kantorowicz

Introductory remarks by REG:

As decreed in his testament, reproduced elsewhere in this website, Eka ruled that his unpublished articles, which existed in various states of preparedness, were not to be published. Rather than being destroyed, however, they were bequeathed to Michael Cherniavsky and me, to be utilized in our own work if we deemed them relevant. Michael died in 1975, and in 1981 I deposited Eka's unpublished work in the Leo Baeck Institute in New York City–all but a few items of it, one of which was the article on "Glosses" I am making public here.

In preparing this digital edition of an unpublished (and not quite fully documented) article by Eka, I have allowed myself to believe that it escapes the forbidden domain of "publication" by being made public only in digital form on my personal website. Furthermore, I have no problem justifying this action as being relevant to my own work, for the style and content of the article is consonant with my longtime study of the role of jurisprudents in the political history of medieval and Renaissance times.

In addition to three drafts of the article meant for publication, there were three drafts of it in lecture form, much abbreviated. A *terminus a quo* for the long form is provided by the date of publication of sources that it quotes: the later 1950s. That establishes an intellectual linkage of this "Glosses" article with Eka's 1957 article "Zu den Rechtsgrundlagen der Kaisersage,"[1] since each of them deals with the famous image of Emperor Frederick II on the bridge-gate of Capua. Likewise, bits and pieces of "Glosses" were utilized in the 1960 article "Kingship under the Impact of Scientific Jurisprudence."[2] Besides the drafts of the two versions there survive two quite thick files of material relevant to "State Portraits" (his favorite title for this work) which includes dated correspondence revealing that drafts of the lecture predate drafts of the article.

The lecture was given twice. The first occasion was the annual meeting of the College Art Association, held in Pittsburgh in January 1956. It begins in a fashion I found quite odd, at first sight:

"Homer" meant one thing to Heinrich Schliemann, and meant

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[1] *Deutsches Archiv,* XIII (1957), 115-50; reprinted in the collection of Eka's articles entitled *Götter in Uniform* (Stuttgart, 1998), 203-234.

[2] In *Twelfth-Century Europe and the Foundations of Modern Society*, edd. M. Clagett, G. Post, and R. Reynolds (Madison, Wisconsin, 1961), 89-111. German translation in *Götter in Uniform* (previous note), 180-202.

> another thing to Babe Ruth or Joe di Maggio [sic]. And "Gloss" means one thing to the artist, and another thing to the student of medieval law.

He goes on to explain that he will be dealing only with legal glosses, "marginal comments made by mediaeval commentators, chiefly of Roman law," which have importance for "the reappearance of the state-portrait in late-mediaeval and early-modern times," and not with (as he quotes the *Oxford English Dictionary* entry for "gloss") the "superficial lustre" or "layer of glowing matter" with which paintings may be coated.

Eka was totally ignorant of baseball (as is testified by his properly Italianate spelling of Dimaggio's name), and I can well imagine how startled he must have been the first time he saw "Homer" in an American newspaper headline. It was not like him to set the stage for a serious lecture by belaboring the different meanings of a common English word, but it turns out that he was prodded into doing just that. The "State Portrait" folder contains Eka's correspondence with Harry Bober (chair of the session in which Eka was to speak), who reports that the Chairman of the Program Committee (the Director of the Fogg Art Museum at Harvard) had had this to say: "It does occur to me that the title of Kantorowicz's paper looks a little ridiculous. Would he be willing to change it?" Bober, distancing himself personally from this remark, replied that Eka had told him "that the title tells exactly what he wants to convey."

It is very doubtful that the glossy beginning was kept for the second presentation of the lecture, at the Warburg Institute in June of 1958,[3] for the audience there would truly have been baffled by the evocation of Yankee homer-hitters. I do believe, however, that it was consequent to this lecture that Eka was asked to prepare an article on the subject, which the Warburg Institute would publish; for, on two occasions in the drafts of the article (namely, in notes 3 & 5) sources he quotes are said to have appeared "in this journal", which it is not difficult to identify as being the *Journal of the Warburg and Courtauld Institutes*.

Mention must be made of a novel way of beginning the article that was abandoned. It is entitled "Legal Glosses on the State Portrait in the Later Middle Ages", which, besides showing Eka belatedly accepting the earlier objection to unqualified "Glosses", sets down two problems that had to be resolved before dealing with display of the image of the Prince in courts of law:

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[3] This date I deduce from the June dates of two postcards in the "State Portraits" folder, one sent by an old friend, Tom Boase at Oxford (addressed to Eka at Wadham College, where he was staying with Bowra), and the other from Joe Trapp, librarian (and later Director) of the Warburg Institute; both of these simply state examples of state portraits that their authors think might interest Eka–afterthoughts, it would appear, on a lecture he had given.

"(1) in whose name justice was rendered, and (2) the idea of the omnipresence of the Prince."[4] Those "vocal" elements, so to speak, had been treated briefly near the conclusion end of the lecture,[5] where they served as supplements to the visual imagery of the ruler; Eka had decided (it would seem) that they should not only be given fuller treatment but also be made antecedent to the artistic elements. He outdid himself, however. After a dozen pages, the theme of verbal evocation of the prince in courts of law had been developed far beyond what would have been a reasonable digression in a paper devoted to artistic representation of the ruler. He probably decided to compose a separate article on that subject later on.[6] Worth noting, however, is the fact that Eka inserted notes in the text, in parentheses, as he went along, wherefor these abandoned pages comprise a fair portion of a scholarly article, which could be the most important element in the three folders in the Leo Baeck Institute archive entitled "State Portaits."

That term, "State Portraits", is not found at the head of the article being reproduced here. Instead, it reads "State Imagery," and that resolves two problems of nomenclature that had beset this work. One was the ambiguity of the word "glosses": when linked with "State Portraits," it was possible that the matter at hand was the surface finish on a certain kind of paintings; but "glosses" has no plausible relationship to "state imagery". In the 'abandoned draft' we just examined, Eka had felt it necessary to say "Legal Glosses" as long as the words "State Portraits" were there, but "Glosses" alone was fine if the subject matter was "State *Imagery*".

The other reason–the necessary reason (as I see it)–to drop the word "Portaits" from the title is that the reader who expected to learn about the medieval antecedents of *pictures* of rulers, such as are still displayed in courts and public buildings today, would be sorely disappointed. Much more important at the outset, in the 12th and 13th centuries, were statuary representation of the ruler, such as the image of Frederick II on the bridge-gate of Capua. Indeed, Eka never carried the story into the Renaissance, or even outside of Italy in the Middle Ages. He did do so in the lectures, where the story climaxes in early-modern examples of French and English royal portraits displayed behind the judge presiding in court. The two pages of the lecture where this occurs (connected, conveniently, with the ubiquity issue discussed above) have been added to the final page of the text of the article being reproduced here. They lack footnotes, of course, but most likely all the documentation one would want will be found in the folders of "State Portrait"

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[4] Page I (of pages I-V), of the second, shorter draft (on pink paper) of this odd beginning of the article; the first draft (on yellow paper) is almost three times as long, and has the odd page numbering of A to L.

[5] See the text of the article below, at the bottom of page 13.

[6] Some evidence of this is found in my notes of an interview with Joe Strayer in 1978; see Chapter 5 of *Reminiscences*, elsewhere on this website.

notes now in Eka's archive in the Leo Baeck Institute in New York City.

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The final draft of the text of Eka's "Glosses" article is marked in 93 places as locations for notes, but the final draft of the those notes is complete only up through number 65. I found the sources for footnotes 83 and 84 (two passages from Lucas de Penna) in the two folders of 'State Portraits' material, but otherwise I have simply identified, in a few words, what author or subject is the subject of a given note. If and when any of these notes is made complete after this digital edition is activated on my website, notice of that deed (and the name of the provider, if not by me) will be posted in the *Addenda et Corrigenda* located at the end of the text. These alterations will be dated, so that earlier readers of this text can see what changes in it have since been made. Too, a multitude of typographical errors were generated by the Optical Character Recognition program used to digitize the 50-year-old drafts of Eka's work. Not all of them will have been corrected before this file is made active on the website, and notice of such errors will be welcome; send email to **info@regiesey.com**.

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About the reappearance of a more or less official state imagery in late-mediaeval and early-modern times we are not too well informed. Whereas the student of classics is in a position to acquire without great difficulty a rather sound and full knowledge of the political, legal, and cultual implications of the ruler images within the Hellenistic-Roman world, including Byzantium;[7] and whereas the students of mediaeval history have taken great strides at evaluating the representations and princes in contemporary miniatures and other works of art,[8] the same cannot be said with regard to the more modern ages: the historians of that period have hardly started to integrate the, so to say, "archaeological" material into their studies in order to secure a more profound understanding of political, constitutional, and religious history.[9] The brunt of exploring the various aspects of the more modern state imagery, therefore, had to be carried by the art historian who, very legitimately, studied in the first place problems of style and general artistic development. It would be ungrateful, however, and also wholly unjustified to maintain that the students of art history did their best to link the new state portraiture to the new "concepts of governmental authority or royal majesty" significant of the budding or fully blooming

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[7] See, in addition to K. Scott, "The Significance of Statues in Precious Metals in Emperor Worship, " *Transactions and Proceedings of the American Philological Association*, LXII (1931), 101-123, and Helmut Kruse, *Studien zur offiziellen Geltung des Kaiserbildes in römischen Reich* (Paderborn, 1934), the numerous studies of Andreas Alföldi, Richard Delbrück, H.P. L'Orange and others; for Byzantine: André Grabar, *L'empereur dans l'art byzantin* (Paris, 1936); E. Kitzinger, "The Cuit of Images in the Age before Iconoclasm," *Dumbarton Oaks Papers*, VIII (1954), 83-150; also Kenneth M. Setton, *Christian Attitude Towards the Emperor in the Fourth Centurv* (New York, 194l), Ch. III ("Imperial Images"), 196ff, and Gerhart B. Ladner, "The Concept of the Image in the Greek Fathers and the Byzantine Iconoclastic Controversy," *Dumbarton Oaks Papers,* VIIl (1953), 1-34, for the age of transition.

[8] It would be sufficient to mention here the name of Percy Ernst 5chramm, *Die deutschen Kaiser und Könige in Bildern ihrer Zeit* (Leipzig, 1928), and his volumes (with collaborators) on *Herrschaftszeichen und Staatssymbolik* (Schriften der Monumenta Germaniae Historica, XIII:1-3; Stuttgart, 1954ff); see, moreover, also the numerous studies by Josef Deér ("Das Kaiserbild im Kreuz," *Schweizer Beiträge zur allgemeinen Geschichte*, III [1955], 48-112; "Ein Doppelbildnis Karls des Grossen," *Wandlungen christlicher Kunst im mittelalter* [Forschungen zur Kunst- geschichte und christlichen Archäologie, II, 1953], 103-156); and G. B. Ladner, *I ritratti dei papi nell' antichità e nel medio evo* (Vatican City, 1941).

[9] The study of Frances A. Yates, "Elizabeth as Astraea," in this journal [i.e.„*Journal of the Warburge and Courtauld Institutes*], X (1947), 27-82, has shown how rewarding studies in early modern political iconography can be.

absolute monarchies;[10] and if their remarks were based mainly on somewhat casual observations and couched in somewhat vague and general terms which lacked precision, this deficiency reflects unfavorably on the professional historian who has failed to prepare the ground and to consider works of art as sources for his political and constitutional studies. The marriage of history and archeology, characteristic of classical and mediaeval studies, has not yet been visualized by the student of the more recent periods.[11]

To cut through the haze of generalities and generalizations, however, is not totally impossible. That, in the later Middle Ages and early Renaissance, the representative ruler image stepped, as it were, out of the concealment of the vellums, visible only to the few and often to the ruler alone, and that it appeared again in the open, in the squares of cities, in assembly halls and court rooms, where it became visible to everyone, implied among indeeed very many other things also a legal problem: the Prince apparently represented a power that in the eyes of the law was potentially omnipresent.

It is true, our legal sources–the glosses, commentaries, and opinions (*consilia*) of the mediaeval interpreters of Roman and, to a lesser degree, of canon law– do not answer every question we might wish to pose, nor do they solve the whole problem. But at least they open up an avenue towards a sounder understanding of the conditions which favored, by the end of the Middle Ages, the re-emergence of a representative state imagery. It appears, to say the least, worth the effort to focus our attention on the legal aspects of the problem, which indeed exist, and point out the interrelations between the reappearance of state-official art and the so-called revival of Roman Law. Moreover, the question will have to be raised, even though as yet not satisfactorily answered, whether the stimuli emanating from the works of jurisprudents have released any traceable effects, and also whether the later display of the Prince's image in court rooms and assembly halls, which remained customary *mutatis mutandis* until this day, was not perhaps the ultimate outcome of certain legal ideas and implications of which the mediaeval jurists grew conscious when they began to expound systematically the law books of Justinian in a scientific fashion.

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It has often been remarked that the signifcant feature of the works of the glossators, from

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[10] Marianna Jenkins, *The State Portrait: Its Origin and Evolution* (Art Bulletin Monographs, III, 1947), certainly did her best to find a link between state portraiture and general history (see, for the quotation, p.2). See also Harald Keller, "Die Entstehung des Bildnisses am Ende des Hochmittelalters," *Römisches Jahrbuch für Kunstgeschichte*, III (1-39), 305ff.

[11] See the excellent discussion of the problem by Arnaldo Momigliano, "Ancient History and the Antiquarian, in this *Journal* [i.e., *Journal of the Warburg and Courtauld Institutes*], XIII (1950), 385-315.

the twelfth century onwards, was not as much a revival of Roman Law–which, especially in Italy, had never been completely obsolete–as it was a revival of professional and scientific jurisprudence.[12] When, at the height of the Struggle of Investiture, the applicability of Roman law to the then-raging controversies became manifest, the burden of exploiting individual laws and finally of reinterpreting the whole Roman Corpus fell to the trained jurists, rare though they were prior to the twelfth century and the rise of Bologna.[13] Justinian's codification of Roman law was a scientific, if hastily performed, work of accomplished scholars, and its mediaeval reinterpretation in th Middle Ages likewise was to become likewise the domain of the scholar, without leaving any chance to the jurisprudential layman. The method developed by the mediaeval jurists was in fact sired by their classical and post-classical predecessors. It consisted not only of collecting legal parallels from Roman law itself, and often from canon law and the works of other jurisprudents, but also of supporting their arguments by relevant non-legal material extracted from philosophy and poetry, literature and historical, biblical, patristic, and theological sources.[14] It was this scientific approach of the mediaeval jurists to their texts, and their effort to make sense despite contradictions, which eventually gave birth to our philologico-historical method. What resulted from this scientific activity was, especially in Italy, a juristic or legal culture which conveyed a peculiar tinge to all learning in the thirteenth and early fourteenth centuries. It was not by chance that in Bologna's heyday jurisprudence not only eclipsed, but

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[12] See the balanced judgment of Woldemar Engelmann, *Die Wiedergeburt der Rechtskultur in Italien durch die wissenschaftliche Lehre* (Leipzïg, 1938), Ch. I, pp. 15ff.

[13] On this point, see Walter Ullmann, *TheGrowth of Papal Government in the Middle Ages* (New York, n.y. [1955]), 368, who rightly refers to Karl Jordan, “Der Kaisergedanke in Ravenna zur Zeit Heinrichs IV.," *Deutsches Archiv,* II (1938), 85-128 (see the summary, pp.127f).

[14] *D*.I,8,6,5 quotes Vergil, *Aeneis*, III,303f. The *Glos. ord.,* influenced probably by Azo, remarks: “sed falsus testis est...et est argumentum quod auctoritates poetarum sunt in causis alleandae...”; see Genzmer, *op. cit.* 396, n.189, for Azo’s restrictions of poetical testimonies. Others were more lenient. Albericus de Rosate, *Commentarii* (Venice, 1585), vol. 63^{v} on that law, n.2, declares that poets and philosophers should be referred to "deficientibus legibus, sed non necessario, nisi rationem necessariam assignent." He is even more positive when commenting on *D*.1,5,12, n.2, fol. 48^{v}, where the law quotes Hippocrates, for he asserts that one quotes also *proverbia antiquorum* and *divinae antoritates* (see also below, n.10). For the biblical authorities, see, e.g., Andreas of Isernia, *In usus feudorum commentaria,* prael., n.46 (Naples, 1571), fol,8: "Item attendendum, quod in hoc Opusculo producuntur plerunque authoritates sacrae Scripturae: nam illae allegantur in causis, sicut leges scriptae..." In a rather interesting discussion he declares that every reasonable word from any source may be alleged: “Nam rationabile dictum debet movere, sicut lex: quia lex est omne, quod ratione consistit.” Therefore St.Paul (1 Cor. l5:33) could quote Menander Comicus. On the whole, however, Andreas of Isernia considered those quotations an embellishment rather than a necessity: "Quando alii authores extranei dant testimonium legi scriptae, fit inde lex pulchrior, non validior, quia lex per se sine eo valida est." It is apparently for fear of more, or of too much, Divine Right that later an English pamphleteer of the revolutionary period declares: " 'Tis from the Statute-Book, not the Bible, that we must judg of the Power our Kings are invested withal, and also of our own Obligations, and the measures of our Subjection ; cf. Charles H. McIlwain, *The High Court of Parliament and its Supremacv* (New Haven, 1910), 99.

also fertilized all other branches of knowledge, that practically all the early humanists had some training in law, and that the new scholarly jurisprudence exercised its influence also on the *humaniora*.

Law, by its very nature, has to consider; in one way or another, almost every range of human life, and no law that we know of was more completely a whole., a "universe" all by itself, than Justinian's body of Roman law. Of this universality of the law the mediaeval jurists were not only fully aware but also proud: "The legal science," wrote Albericus de Rosate, a younger contemporary of Dante, whom he quotes repeatedly, "is commendable because it is more universal than other branches of knowledge. For the other sciences deal with something particular; the legal science, however, deals as it were with all branches of knowledge and above all the liberal arts."[15]

Albericus demonstrated with great eloquence in what respect jurisprudence was linked to every knowledge pertaining *ad humanam salute.* He did not conceal his satisfaction when emphasizing that the law referred also to poets; when claiming that music too was within the compass of legal science, because the Aedilician Edict regulated the activities poets were referred to by law; or when claiming that even music was within the compass of jurists because the Aedilician Edict regulated the activities of comedians and choruses just as it ordained concerning physicians and medicine.[16] It was in that respect also momentous that the mediaeval jurists applied that legal universe of the Justinian law books freely to the conditions of their own time. Moreover, by their method of interrelating the legal problems with almost every bit of classical material accessible to them, they brought classical literature, if in selection, into practical circulation by extracting from it juristic principles and applying those principles to various contingencies of daily ïife. *Seneca iurista optimus* had a function, a practical function, very different from the moral philosopher who served as a source of general education or of edification.[17] Hence, through the work of the glossators many a feature of classical thought and

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[15] Albericus de Rosate, on *D*.39,l, rubr.,n.l8, fol.2^{v}; "Ex his etiam commendabilis est haec legalis scientia, quia universalior est aliis scientiis. Aliae enim scientiae de aliquo particulari tractant; haec autem de omnibus scientiis, et maxime liberalibus, tractat." Actually, Albericus develops in his prologues, like so many other jurists before him, a full philosophy of law and legal science. It would be rewarding to analyze the philosophical prologues of the works of the jurists in general, and not only that of an individual author. See, for an essay on Baldus, W. Ullmann, "Baldus' Conception on Law," *Law Quarterly Review*, LVIII (1942).

[16] For Albericus on poetry, see above, n.8; also on *D*.39,l, rubr.,n.20, fol.3: "Allegat haec scientia poetas, ut Homerum [with reference to *D*.18,1,1]... et Oratium [with reference to *Glos.ord.* v. *non continebuntur*, on *D*.32,52]. For music, Albericus (*loc.cit*.,n.20) quotes *D*.21,1,34, and 21,l, lff.

[17] Andreas of Isernia, on *Feud.* 2,56 (*Quae sunt regalia*), n.78, fol.305^{v}: "Seneca fuit iurista optimus." I may treat the subject separately; see, however, for Seneca's influence in a quasi "absolutist" sense, Antonio Marongiu, "Note federiciane," *Studi Medievali,* XVIll (1952), 297ff, also in *Atti del Convegno Internazionale di*

of Antiquity at large became generally valid again, comparable perhaps to a re-activated currency, to the *solidi veterum principum* which, according to a decree in Justinian's Code, were to be respected and have full validity throughout the empire.[18]

That attitude held good for the jurists of the 13th and 14th centuries to a greater extent than for the sixteenth-century savants of the historical school of jurisprudence: Alciati, Cujas, Gothofredus. Those great scholars had at their disposal practically al1 the classical text material now known to us; but what they lacked owing to their historical relativism was the unbiased approach and unsophisticated candor of their earlier colleagues who transferred and applied the classical knowledge almost directly and with very little qualification to their own surroundings– as often as not with a noble disregard of the obvious errors they made when, for example, identifying the ancient Roman *sacerdotes* and *pontifices* with the contemporary priests and bishops of the Catholic Church.[19] For all that, however, they were able to detect the fundamental legal principles of Roman law with admirable clarity, and it mattered little that often they detected by some misunderstanding even new principles which made sense only in their own orbit of social stratification–as, for example, the firm belief that every Doctor of Law was a *nobleman, a miles*, and every professor who had read law for twenty years ranked with a count.[20]

Studi Federiciani (Palermo, 1952), 42f.

[18] *C*.11,11,1.

[19] The basis is Ulpian's remark in *D*,1,1,1, when he compared jurisprudents with priests of justice, The mediaeval jurists interpreted that quasi-priesthood of their profession in the sense of Christian priests: like priests of the Church *sacra ministrant et conficiunt*, like priests of the Church they handle *sacramenta* ["oaths" in the case of the jurists], and they act like priests *in danda poenitentia*; see Accursius' *Glos. ord*., on *D*.1,1,1, v. *Sacerdotes.* Durandus, *Rationale divinorum officiorum,* II,8,6 (Lyon, l565), fol.55^{v}, quite obviously refers to glossators of his time, when he explains the Prince's character of *rex et sacerdos* along the lines of Ulpian's comparison: "Quidam etiam dicunt... quod [imperator] fit presbyter, iuxta illud [i.e. Ulpiani]: 'Cuius merito quis nos sacerdotes appellat'." And he adds: "Imperator etiam pontifex dictus est," because in ancient Rome the emperor had this rank (cf. *Decretum*, D.XXI,c,1; ed.Friedberg, I,68). Against this equivocation the Renaissance jurists of the historical school objected; see, e.g., Guillaume Budé, *Annotationes im Pandectarum libros*, on *D*.l,l,l (Lyon, 1551), 29f: "Accursius peracute sane (ut solet plerumque) sacerdotes hoc in loco absolute intelligit..., ut ipse inquit, poenitentiam dantes." He is, however, less willing to recognize the merits of Accursius when he continues: "Similis est ignorantia Accursii vel saeculi potius Accursiani, quae hac aetate ridicula est... Ubi pontificum Ulpianus miminet de collegio pontificum loquens, a quo ius pontificium apud antiquos dictum, quod Accursius ad nostros pontifices retulit."

[20] The basis for that new *militia legum* (*militia litterata* or *doctoralis*), ranking with the *militia armata* of the gentry and the *militia coelestis* of the clergy, is found in *C*.2,6,7; 2,7,4; 2,7,14; also 12,30,1, and 12,l5. The doctrine concerning the *militia legum*, developing ever since Placentinus and Azo (cf. Fitting, 543) and "equiparating" the soidiers pay (*peculium castrense*) with the pay of the civil service and of scholars, is neatly summarized by Baldus, on *C*.2,7,14 (Venice, 1586), fol. 132: "Advocati [including *iurisperiti* etc.] militibus aequiparantur, quia per eos tanquam per milites vita et patrimonia hominum defenduntur... Nota, quod advocati ita militant in legibus, sicut milites in armis..." And his brother Angelus de Ubaldis, on *C*,2,7,14 (Venice, 1579: fol.16) adds yet another note, when he writes: "ipsi [advocati] militant, ipsi dicuntur pugnare pro patria sicut milites armatae militiae." See, for *pugnare pro patria* (Distichs of Cato), Gaines Post, "Two Notes on Nationalism in the Middle Ages," *Traditio*, IX (1953), 281-296. The equation of professors and counts on the basis of *C*.12,15 is mentioned

At any rate it will always be most surprising to observe how much classical material had been reasonably and usefully digested in the *Glossa ordinaria* composed by Accursius in the 1230s, and utilized in the works of scholars such as Durandus, Cino da Pistoia, Andreas of Isernia, and Lucas de Penna, It should be emphasized that, as a result also of the work of the glossators, the Thirteenth Century began, and later centuries on a broadened basis continued, to live in an atmosphere of an applied–juristically applied–Antiquity which differed from the belletristic reading of classical authors. For the applied Antiquity of the jurists was backed by the authority of the law behind it, and was officially enforced by the individual governments not because it was "antique" but because it was, or was credited to be, the valid law.

In that respect jurisprudence fell in with other branches of knowledge as well, and it fell in with the visual arts which at, or about, the same time began to apply and utilize antique models in a new fashion. The thirteenth century (if we disregard Aristotle) had hardly more classical material in store than the preceding centuries. What characterizes the great change in that period is the practical application of "applied Antiquity," and to this change the jurists have contributed, to say the least, their very considerable share.

Art, though certainly a factor of life, was a factor of law only incidentally. In Albericus de Rosate's essay-gloss about the liberal and other arts which were of concern to jurisprudence –the arts of painting, sculpture, and architecture–do not figure at all. When jurists talked about "art," they meant in the first place their own art as defined in the opening clause of the Digest: *Ius est ars boni et aequi*, "law is the art of the good and the equitable."[21] This was the meaning of "art" also when, independently of Aristotle's *Physics* and even before that work was generally known, they used a catchword which became so very meaningful and ambiguous to Renaissance artists: *Ars naturam imitatur.*[22] The jurists, of course, did not think of the visual arts, of artistic naturalism or aesthetics. They found the slogan in the Digests and Institutes where it had a perfectly concrete meaning in the law of adoption: You cannot adopt an older

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already by Andreas of Barletta (who wrote after 1257), *Commentaria super tribus postremis libris Codicis* (Venice, 1601), p. 272: "quod doctor perveniat ad comitis dignitatem, debent in eo octo precipue concurrere... Nono, quod docuerit per viginti annos." See further Bartolus, on *C*., prooem. *De novo Codice*, nn. 10-11 (Lyon, 1555), fol. 3, who explains "quod doctoratus est dignitas... Fateor tamen quod non est illustris...; sed si legisset per viginti annos: tunc esset Comes sacri palatii vel saltem clarissimus." Bartolus himself was *illustris*; see Angelus de Ubaldis on *C*.9,8,5,n.4 (v. *virorum illustrium*), fol.258: "Nota quod omnes consiliarii consistorii principis intelliguntur illustres. Et ideo, quia Carolus [IV] princeps in suum consiliarium Bartolum assumpsit et *eidem arma donavit,* fecit illustrem." See, for the problem in general, H. Fitting, *Das Castrense peculium in seiner geschichtlichen Entwicklung und heutigen gemeinrechtlichen Geltung* (Halle, 1871).

[21] *D*. 1,1,1, rubr.

[22] Aristotle, *Physics*, II,2,194a21.

person, because the legal art, in its law of adoption, *naturam imitatur*, and it would be a monstrosity and a phenomenon incompatible with nature were the adopting father to be younger than the adopted son.[23]

Art, however, in the sense of the visual arts, came like music or medicine into the purview of legal studies for other reasons: objects of art were often objects of legislation and therewith also of judicial decisions. A man donates a statue to his city. To whom, asks the law–and asks, for example, Odofredus writing in the first half of the thirteenth century– does the statue belong? To every individual citizen? To the body politic of the city? Can the donor take it back again? Can he sell it? Can he pawn it?[24] Or, take the laws on usufruct, the right to use and enjoy the returns of a thing the substance of which does not belong to you. [25] Strange things could form the substance of usufruct–coins, for example, because they could be used as gems or, attached to a necklace, might be worn by the usufructor without belonging to him.[26] In that connection, one law discusses also statues and images.

> Statues and images may yield usufruct, because they too
> have some utility when placed in a well-designed spot.[27]

To this passage the *Glossa ordinaria* remarked:

> But what returns can there be received from these statues?
> I answer that every one has to pay a penny that he may see
> the statue, as is the case with the lion which is in Florence.[28]

What the glossator, Accursius, refers to is hardly a thirteenth~century precursor of Donatello's

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[23] Aristotle, *Physics*, II,2,194a21.

[24] See *D*.41,1.41 and 42,5,29 (= 42,6,14 in mediaeval editions). Odofredus only elaborates on the *Glos. ord.* when he says (on *D*.41,1,41, nn.1-2 [Lyon, 1552], fol. 47^{v}): "Aliquis ad ornamentum huius civitatis sua propria pecunia posuit statuas, id est, statuae non fiunt singulorum civium, sed totius civitatis: unde aliqui non possunt auferre eas, nec etiam ille qui possit: unde sunt universitatis." Also, on *D*.42,5,29,n.1, fol.90^{v}: "Statua in honorem debitoris posita non venit in venditione honorem eius." Or, on *D*.44.4.14.n.1, fol.l06: "Statuam in municipio ponens non potest eam repetere." Also *D*.43,24,11,1, with the notes of Gothofredus (they are found in most editions of the *Corpus Iuris Civilis* of the 17th and 18th centuries).

[25] *D*.7,1,1.

[26] Odofredus, on *D*.7,1,28, v. *numismatum*, fol. 250^{v}: "Poteris uti [numismatibus] in gemmis et portare ad pectus vel decorare teipsum," follows *Glos.ord.* on this law, v. *usufructus.*

[27] *D*.7,1,41: "Statuae et imaginis usum fructum posse relinqui magis est, quia et ipsae habent aliquam utilitatem, si quo loco opportuno ponantur."

[28] *Glos.ord.*, on *D*.7,1,41, v. statuae: "Sed quia fructus ex his percipitur? Respondeo quod quilibet daret nummum ut possit videre: ut fit de leone qui est Florentiae."

Marzocco, the insignia of the people's independent power displayed originally at the column of Mars, but the live lion which the city kept in a pit near the Palazzo del Podestà, while collecting an admission fee from the visitor.[29] The suggestion of the Gloss, however, to pay a penny for seeing a statue, is perhaps the earliest evidence of an admission fee imposed for contemplating a work of art.

Building and zoning regulations of Roman law actually began to weigh heavily with the municipal authorities in the thirteenth century, that is, at a time when Western Europe in general entered into its formative period. Two titles in Justinian's Code were relevant for building problems, *De aedificiis privatis* and *De operibus publicis*.[30] It has been pointed out recently to what extent these and other laws of late Antiquity have determined the legislation concerning city-zoning of the Italian cities.[31] For example, the decree of the Emperor Zeno (d.1491), prescribing a straight line for the frontage of buildings in public streets and containing other regulations as well, was included, by the second half of the thirteenth century, in the statute books of practically all Italian cities, and exercised, through communal by-laws, a permanent influence also in the transalpine countries.[32] The enforcement of Zeno's law, which conveniently summarized earlier prescriptions, avowedly changed th elooks of the irregularly built mediaeval cities, at least in Italy, and helped to shape and form their geometrical squares such as we know them today.[33] This, we may say, was a clear case of "applied Antiquity."

Roman law, in the discussion of the Law of Things, proceeded from the assumption that *res sacrae* and *res publicae* were on equal footing. They were juxtaposed because things

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[29] That Accursius had a live lion im mind was certainly the opinion of Angelus de Ubaldis, on *D*.7,1,41, fol.177^{v}: "In eadem glossa ibi, de *Leone*: Ex hoc patet quod datum [donarium] cani vel animali alicuius, non obstante quod ipsum animal non sit capax, tamen pertinet ad dominum, sicut pertinet ad fructuarium aniimalis, ubi in eo est usufructus constitutus." For the live lions kept in Florence, see Robert Davidsohn, *Geschichte von Florenz*, IV:3 (Berlin, 1927), 266f. The Florentines even seem to have bred lions; for, on August 16, 1355, Czenko of Lipa, Marshal of the Kingdom of Bohemla, repeats his request to the Florentines to send him two lion cubs; cf. Theodor E. Mommsen, *Italienische Analekten zur Reichsgeschichte des 14. Jahrhunderts* [Schriften der Mon.Germ.Hist., XI; Stuttgart, 1952), 192, No.466. Besides, the lion as an insignia of the popular movement in Florence (Marzocco) does not seem to have existed at the time when Accursius wrote.

[30] *C*. 8,10 and 11. For the following, see the excellent book of Wolfgang Braunfels, *Mittelalterliche Stadtbaukunst in der Toskana* (Berlin, 1953), who most suceessfully has utilized the vast material of Italian municipal legislation and law in general for assessing the development of city-zoning in Tuscany and in Northern Italy in general.

[31] Braunfels, *op.cit.*, 87ff.

[32] *C*.8,10,12. This compendious constitution represents a collection of city-planning laws dating back to considerably earlier times. Justinian found it practical to refer to this law quite frequently; see, e.g., *C*.8,10,13, or *Novellae*, 63 and 165.

[33] Braufels, *op.cit.*, 111 and 114.

belonging to the temples and things belonging to the public sphere–we would say, to the "state"–were both defined as *res nullius*, things belonging "to none"–that is, to no individual person.[34] To the student of political theory it is well known how important it was that in the course of the thirteenth century a *ius publicum* was consciously recovered, a public law which, if necessary, prevailed over private rights, including those of the king as a private person.[35] The recovery of a "public" sphere affected the arts indirectly. From Roman law there derived the notion of *publicum decus*, "public beautification," referring to columns, statues, precious materials and, in general, works of art serving for the dignified appearance of a city.[36] Those things did not figure among the *res sacrae* of the Church, but among the *res publicae* of the state or the city; they were "profane", since they were merely part of the *ornatus civitatis* and had nothing to do with religious equipment. Before the law, however, *res publicae* and *res sacrae* were on one level and both were equally protected by the government. In that respect, there was no difference between buildings on the Piazza del Duomo and those on the Piazza della signoria; for, as the jurists would define the principles, "Church and Fisc, divine law and public law walk together on equal terms–paribus passibus ambulant.[37] Under those conditions the notion of "profane art" began to emerge, an *ars profana* which was "public" and therefore no less sacred than the *ars sacra* of ecclesiastical origin and destination.

In order to preserve the dignified appearance of a city, Roman Law prescribed that "no

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[34] Basic is *D*.l,8,l, rubr. : "quod autem divini iuris est, id nullius in bonis est... quae publicae sunt, nullius in bonis esse creduntur, ipsius enim universitatis esse creduntur." Also *Inst*., 2,1, where the parallelism does not appear quite as clearly as in *Nov.* 7,2,1: "utique cum nec multo
differant ab alterutro sacerdotium et imperium, et *res sacrae* a communibus et *publicis*." Cf. *C*.1,2,23,rubr., or *C*.7.38,2 ("iuris rei publicae vel iuris templorum"). Roman law, of course, distinguished between *res communes* (air, water etc.) and *res publicae* belonging to the *universitas,* the body politic. *D*.50,16, 15, warns, it is true, not to mistake things pertaining to any city for things public: "Bona civitatis abusive 'publica' dicta sunt: sola enim es publica sunt, quae populi Romani sunt." It goes without saying, however, that in the Italian cities, which were quasi sovereign *(civitas sibi princeps*), things communal were also legally things public; see, e.g., Albericus de Rosate on *D*. 1,8,1,§*Hoc autem,* fol.62: "et tunc comprehendit non solum Romam, sed alias civitates."

[35] For the problem, see the brief sketch by Gaines Post, "The Theory of Public Law and the State in the Thirteenth Century," *Seminar*, VI (1948), 42-59; also Peter N. Riesenberg, *Inalienability of Sovereignty in Medieval Political Thought* (New York, 1956), and, for a few remarks, Kantorowicz, "Mysteries of State," *Harvard Theological Review*, XLVIII (1955), 83ff. In a broader sense, of course, the whole recovery of the notion *patria* belongs to "public law"; see Post, "Two Notes on Nationalism in the Middle Ages," *Traditio*, IX (1953), 281ff.

[36] *D*.42,5,29: "ornandi municipii causa"; *D*.43,9,2: "ornamenta rei publicae"; *C*.8,10,6: "publicum decus"; *C*.8,11,13: "in usu vel ornatu civitatis"; *C*.8,10,2, forbids the demolition of buildings, lest "publicus deformetur adspectus." Cf. Braunfels, l76ff, also 87f.

[37] Bartolus, on *C*.11,62(61),4,n.1 (Lyon, l546), fol.50^{v}: "...ecclesia et fiscus paribus passibus ambulent" (reference to *C*.1,2,23; see above, n.28); but the expression was used before by Jacques de Révigny (ca.1270-1280), quoted by Post, "Two Notes," 313,n.81.

person was permitted to move or remove columns or statues of any material within the same province or from one province to another,"[38] This law together with others applied also to private buildings, and it implied at the same time an effort to put a stop the custom of using existing buildings as quarries.[39] The statues mentioned in that law were apparently private or decorative works of art; they were most certainly not imperial statues, because these were protected by other means and no one would have dared to move anyhow.

We have to recall how rigid the laws were not only against violation or defacement of imperial statues, but also against any acts betraying or suggesting a lack of respect, and therefore punishable under the *lex Julia maiestatis* or other laws as well.[40] It was a lack of respect equaling lese majesty if a governor inscribed his own name on a public work after its completion without mentioning that of the emperor;[41] and every acclamation of a local dignitary had to be preceded by that of the imperial name.[42] By analogy the images were treated in like manner. Justinian decreed that no statue of bronze or other material should ever be set up to the Ostrogothic king alone without being sided by an imperial image which always had to stand on the right.[43] It was likewise high treason if a man placed his statue higher than that of the emperor, a charge leveled under Tiberius against one Granius Marcellus, who was accused also of having removed the head of Augustus from a statue only to have it replaced by a head of Tiberius.[44] Legal cases of that kind are known in not oo modest a number, and they have been enumerated repeatedly ever since the times of Gothofredus.[45] There was the case of Lucius Ennius who was accused of having

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[38] *C*.8,10,7.

[39] *C*.8.10.2; 8,11,13.

[40] *D*.48.4; *C*.9.8.

[41] *C*.8,11(12),10.

[42] Procopius, *Bellum Gothicum,* I,6,4. This ceremonial apparently was observed in the l0th century when Dalmatian bishops promised to acclaim the name of the Doge of Venice after those of the Byzantine emperors; see Kantorowicz, *Laudes regiae* (Berkeley and Los Angeles, 1946), 148, n.4; cf. 44ff.

[43] Procopius, *ibid*., I,6,5. Cf. Deér, "Das Kaiserbild im Kreuz" (above, n. 2), 101f.

[44] Tacitus, *Annales*, I,74. See, for a discussion of the trial, Erich Koestermann, "Die Majestätsprozess unter Tiberius," *Historia*, IV (1955), 83ff.

[45] Mommsen, *Römisches Strafrecht* (Leipzig,1899), 585,n.l; Gothofredus, on *D*.48.4.7.4; Floyd Seyward Lear, *Treason and Related Offenses in Roman and Germanic Law* (The Rice Institute Pamphlet, XLII:2; Houston, Texas, 1955), 26f and 121,n.92.

converted a silver effigy of Tiberius "to promiscuous use," though he was finally acquitted;[46] of the case of a person beating a slave and changing clothes near a status of Augustus;[47] of a woman who was executed for undressing near an image of Domitian;[48] of a man relieving his bladder near the place where statues and effigies of emperors were located;[49] of persons who carried an amulet coin bearing the emperor's features into a brothel or public convenience;[50] and of the thoughtful slave, mentioned in Seneca's *De beneficiis,* who quickly drew off from his master's finger a ring bearing the engraved portrait of Tiberius when his master grabbed for the *matella*, the chamber-pot.[51]

Quite evidently, imperial legislation had to consider problems related to imperial statues and images. Under the title rubric *De spectaculis*, a law in the Code ordered that in porticoes or other places in municipalities where imperial images were customarily displayed– that is, in legal language, "consecrated"–no malpropre pictures representing actors, charioteers, or disreputable persons were allowed to be shown, though advertising posters of that kind were not forbidden in other places, at the entrance of the circus or in front of the stage of a theater.[52] Another title of the Code is inscribed *De statuis et imaginibus*.[53] Here the legislating emperors advised the provincial governors how the imperial statues or images were to be exhibited, as was usual, on festal days: the governor himself had to be present; the statues should not be adored; and the governor's presence should grace the day, the locality and the memory of the emperors, who, after all, were resent in their images and should live, says the Theodosian Code, in the hearts and minds of those attending.[54] The laws dealt further with penalties for putting up statues of governors without the emperor's permission, and they prohibited the collection of money for

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[46] Tacitus, *Annales*, III,70; cf. Koestermann, *op. cit.*, 105.

[47] Suetonius, *Tiberius*, 58.

[48] Cassius Dio, *Hist.*, LXVII, 12,2.

[49] Scriptores Hist. Aug., *Caracalla,* V,7.

[50] Suetonius, *Tiberius*, 58.

[51] Seneca, *De beneficiis*, III,26,1-2.

[52] *C.*11, 41, 4.

[53] *C.*1,24,2.

[54] *Cod. Theod.*, 15,4,1.

erecting statues to governors or any other person, so as to preclude abuses and oppression.[55] And, needless to say, the *lex Iulia maiestatis* made it high treason to mutilate or even tamper with imperial statues, whereas it was not considered a crime to repair them, to hurt them by some misfortune, or even destroy them if they were not yet consecrated, that is, dedicated for official use.[56]

An important aspect of the problem of imperial images is mentioned under the title *De his qui ad statuas confugiunt*, that is, on those who flee for sanctuary to the statues of the emperors.[57] The law, issued in 386, is found already in the Theodosian Code and it was referred to quite often in the Digest.[58] The intention of that law was limited though: it only meant to stop certain abuses of the right of asylum granted by the imperial images. Its importance, however, should be sought chiefly in the imperial right of asylum itself which, by the fourth century, had been extended also to the churches and which later glossators tried te extend also to the priest carrying the Corpus Christi.[59] We visualize a budding competition between the images of the emperor and the holy images of Christ and the saints, a competition which became a prominent factor during the iconoclastic controversy in Byzantium, especially when, in the course of the sixth century, the

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[55] *C.*l,2r,3-4, concerning collections. For the senatorial or imperial permission to put up statues, see *D.*43,9,2, with the remarks of Gothofredus; cf. Mommsen, *Römisches Staatsrecht,* I^3,452,n.1. The permission, which he decorated with his own image, was given ipso facto to any private person who built or repaired some *opus publicum*. The permission of the magistracies was needed anyhow insofar as the statue was erected on public ground; cf. *D.*35,1,l4, and also Mommsen, *op. cit.*, 449.

[56] *D.*48,4,5-7; *C.*9,8, does net deal with images.

[57] *C.*1,25.

[58] *Cod. Theod.*, 9,44,l; *D.*1,6,2; 1,12,1,1; 21,1,17,12; 21,1,19,1; 47,10,38; 47,11,5; 48,19,28,7.

[59] *D.*47,10,38: "'ne quis imaginem imperatoris in invidiam alterius portaret" (that if, dodging the right of asylum by showing, e.g., a coin displaying the emperor's image); Accursius, on that law, thinks of some little statue of the emperor carried by a person: "Portabam quandam statuam principis, ...quia timebam Titium, qui me volebat occidere." For the right of asylum, see now L. Wenger, "Asylrecht," *Reallexikon für Antike und Christentum,* I,836ff, esp. 840ff. Imperial legislation concerning the right of asylum of all churches does not, however, antedate the 5th century; see also Mommsen, *Strafrecht*, 458ff. For the extension of the right of asylum, see, e.g., Angelus de Ubaldis, on *D.*1,6,2,n.3, fol.16, the *Additio*: "Adde quod sicut is qui confugit ad statuam principis, est tutus, quia ibi capi non potest... Adde quod idem est in es qui confugit ad sacerdotem deferentem corpus Christi, ut inde capi non possit..." This argument is found also in Ludovicus Romanus, *Singularia,* 339 (*Singularia omnium clarissimorum Doctorum*, ed. Gabriel Sarayna [Lyon, 1560], p.97), who refers to an event in Urbino where the malefactor was captured although he embraced a priest carrying the *Corpus Christi,* because the *Glos.ord.* on *Decretum*, C.XIII,q.2.c.30, v. *in patibulis,* declares: "Ecclesia et non corpus Christi protegit malefactorem." The reason was that, otherwise, a person who had taken communion could claim that he could not be captured–an argument, by the way, which was not too different from that of the Roman jurist denying protection to a fugitive on the grounds that he was carrying a coin or an amulet displaying the emperor's image. Other canonists, however, did not share that opinion (Hostiensis, Guido de Baysio, and others) "quia si hoc ecclesiae concessum est propter Christum, a fortiori concedi debet sacerdoti propter Christum" (according to Felinus Sandeus, a l5th-century decretalist and auditor of the Rota).

images of Christ began to dislodge the imperial images from their former place of honor.[60]

The imperial statues and images, if anything, belonged to the *res publicae*; they were certainly not among the *res privatae*. This argument referred also to other statues erected by imperial permission in public places: it would have been an act of contempt of the emperor himself to mutilate or remove what had imperial approval. This would bave been true also with regard to purely ornamental statues and columns placed on the public squares of the cities to which the law refers quite frequently–an ornamentation, by the way. which was not at all customary in mediaeval cities.[61] Finally, there should be mentioned the laws *De falsa moneta*; for to falsify money *vultu principum signata* and displaying the *aeternales vultus* of the emperors who guaranteed the right weight of the coins, was likewise a sacrilege–not to mention the fact that the coin-image of Caesar was, as it were, hallowed by the Gospels.[62]

If we add to all these laws the numerous references to funerary monuments, we realize that in fact a quite substantial amount of legislation about statues and images was embedded in Justinian's law-books. At any rate, it was enough to make the mediaeval jurists conscious of the legal importance of imagery and to make them, as it were, image-conscious in general and in a fashion which formerly existed only with regard to holy images. Ruler image, after all, had for centuries been confined to miniatures in manuscripts and certainly did not serve the *decus publicum*, public embellishment. Hence, the only parallel known to the jurists was ecclesiastical imagery–the pictures of Christ, the Virgin and the saints. Now, however, there was recovered by the new scientific jurisprudence, though at first only intellectually, a whole new orbit of secular art; for the jurists were compelled to recognize that in their authoritative texts the images of Christian emperors were deemed hardly less sacred and hardly less powerfully charged with

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[60] See above, n.1, the studies of Grabar, Kitzinger, Ladner. See also William H. Worrell, *The Coptic Manuscripts in the Freer Collection* (University of Michigan Studies, Human. Ser., X [New York, 1923]), 375f, for a sermon in which the indwelling forces of an imperial image are claimed also, and with greater justification from the preacher's point of view, for an image of the Virgin; see, for the date (probably 9th or 10th century), Kitzinger, *op.cit.*, 101, n.59.

[61] Braunfels, 116ff.

[62] *C.*9,2r,2; *Cod.Theod.* 9,21,3,9. Tampering with the imperial picture made falsification *eo ipso* a crime of majesty, a connection which Cujas, *Observationes et emendationes*, XIX,25 (*Opera* [Prato, 1836], I,864f), stresses by referring to the *lex Julia* on statues and images (*D.*48,4,6). Cf. Pauli, *Sententiae*, 5,25,1 (*Fontes iuris Romani Antejustinian*i, edd. Riccobono *et alii* [Florence, 1940], 410): "qui...vultuve principum signatam monetam praeter adulterinam reprobaverit." Cf. *Cod.Theod.*, 9,22, and Cassiodorus, *Variae*. VII, according to whom Theodoric the Great wrote: "monetae debet integritas quaeri, ubi et vultus noster imprimitur. Quidnam erit tutum, si in nostra peccetur effigie? Sit mundum, quod ad formam nostrae serenitatis addicitur." *Glos. ord*., on *C*.11,11,3, v. *aeternales vultus*: "id est principis, cuius est ibi imago.., quia imperium semper durat." The *Glos. ord*. on *C*.11,11,rubr., alludes to the evangelical *Cuius est image etc.*. and Bartolus, on *C*,11,11,rubr.,n.3, fol.37v, refers to it.

invisible *virtutes* than the sacred images themselves.[63]

It should not be forgotten, however, that not only Roman law but also canon law dealt with images. In the *Decretum Gratiani* (ca. 1130) we find the two famous chapters taken from Gregory the Great, the first being a warning against the violation of images and any form of iconoclasm, since the picture served for the education of the illiterate; and the other a warning against any form of exaggerated worship of images and against mistaking them for "gods."[64] Those excerpts were later repeated in a decretal of Gregory X, published during the second Council of Lyon (1272) and incorporated in the *Liber Sextus* of Boniface VIII, in which once more the extravagant adoration of pictures was forbidden.[65] The decrees of Trent finally rejected the assumption that the Deity or even divine virtues were dwelling in the images which had their peculiar value only in a commemorative and educational sense.[66] In order to interpret those laws of the Church, however, the glossators referred to the laws about statues in Digest and Code,[67] or drew the obvious conclusion that offending the majesty of God was an even greater crime than offending the imperial majesty, and that therefore the *lex Julia maiestatis* was valid also with regard to God.[68] On the other hand, the civilians referred to the canonistic texts so that also in this respect "divine law and public law walked *pari passu*."

A source of puzzlement was the word "consecrated" in connection with works of profane art, that is, the *statuae et imagines consecratae* which were mentioned so often in the law-books of Justinian.[69] While an anointing of tbe holy images was completely foreign to the Roman rite proper, it was nevertheless practiced in the West sporadically outside of Rome, for example in Arles and in some English churches; but a blessing of the images at the time of their dedication was, of course, quite common, and the Pontifical of Durandus (late thirteenth century), which

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[63] Among the Western Fathers of the Church, St.Ambrose was not at all averse to the imperial images (cf. Setton, *Christian Attitude*, 205), and the jurists referred to his remarks quite frequently.

[64] *De consecratione*, D.3,cc.27-28; E.Friedberg, *Corpus Iuris Canonici* (Graz, 1955), I, 1360.

[65] Cf. *Lib. Sext.*, 1, 16,2, ed. Friedberg, II, 986.

[66] Cf. H. Jedin, "Entstehrung und Tragweite des Trienter Dekrets über die Bilderverehrung", *Theologische Quartalschrift,* CXVI (1935), 423ff.

[67] See. e.g., Joannes Andreae's *Glos.ord.* on *Lib. Sext.*, 1,16,2, v. *in terram*, quoting *C.*1,8, and v. *ultrix*, quoting *C.*l,25 and *D.*48,19,28,7.

[68] *Glos.ord.*, on X 5,26,2, v. *blasphemiam*.

[69] [Blank]

eventually became almost authoritative during the later Middle Ages, contained quite a number of elaborate benedictions for the dedication of images of the Holy Virgin and the saints.[70] Nothing seems more natural than the procedure of the civilians who tried to understand and interpret the word *consecratae* in the sense of ecclesiastical consecration. Andreas of Barletta, writing some time after 1257, apparently thought of holy and perhaps of processional images rather than of profane ones when, glossing on *De spectaculis*, he explained that no pantomimic jesters "who made a laughing-stock of their body" were to be admitted to, or base pictures to be displayed in, a place "where images are consecrated or introduced with great solemnity." For, said he, no unworthy persons should have a stay in a worthy place, just as the tombs of apostles and martyrs should not serve as burial places for others.[71] Albericus of Rosate, when glossing on *De statuis,* offered a long discussion about the etiquette to be observed when holy images in churches were greeted.[72] Angelus de Ubaldis, when discussing the usufruct of statues, thinks in the first place of images of the Holy Virgin or any other saint placed in a private location, which worked miracles, "as I have seen it repeatedly in my city (Perugia)," and to which many gifts were made; but that usufruct does not belong to the private owner, but to God, since the gifts were made in contemplation of the immortal God.[73] To be sure, when talking about usufruct in connection with statues or images, Angelus de Ubaldis discusses also the signboard of a pharmacist's shop which may yield usufruct by attracting customers; however, the first thing that occurred to him was a holy image.

Likewise, Lucas de Penna, writing in the middle of the fourteenth century, interpreted the coin images of imperial *solidi* by referring to the famous words of Gregory the Great, saying that *ob reverentiam* of those represented images should be venerated, since they were quasi the books of the illiterate.[74] On the other hand, Andreas of Isernia (d.1316) interpreted the law according to which intercourse with the *augusta* or any princess of the imperial house was a crime of lese majesty by a simple reference to the images: if the defilement of a consecrated statue representing

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[70] Anointings of pictures were anything but common in the West; cf. Philipp Hofmeister, *Die heiligen Öle in der morgen- und abendländischen Kirche* (Würzburg, 1948),» 213f. See, for the benedictions of images, M.Andrieu, *Le Pontifical romain au moyen-âge* (Vatican City, 1938ff), II,15,17,80,204, and, for the Durandus *Pontifical*, III,525ff.

[71] [Andreas of Barletta]

[72] [Albericus of Rosate]

[73] [Angelus de Ubaldis]

[74] [Lucas de Penna]

the Prince was punishable on account of *laesa maiestas,* how much more so the defilement of a consecrated human being, the queen, who, at her marriage, was "consecrated"' and blessed to be one body with the king. Also, Andreas of Isernia would ask whether it was heresy to break the images of Christ and the saints, and he would answer that it was not necessarily heresy, but that it was certainly a crime punishable under the *lex Julia*, since the holy images were consecrated no less than the images mentioned by the lex Julia.[75] We may think of a thirteenth-century miniature depicting the Laocoon: because Laocoon was said to be a priest of Poseidon, he and his two sons were shown in priestly garbs of the Roman Church, and with tonsures.[76]

The arguments were running in a circle. The tendency, however, towards explaining imperial images through ecclesiastical images, and vice versa, is very obvious in connection with the right of asylum granted by the imperial images. In the early thirteenth century, Azo of Bologna, who exercised an almost permanent influence on the interpreters of Roman law, compared the asylum of statues with the asylum granted "by the supreme king's statue or image, that is, the Church of Almighty God" (*per summi regis statuam vel imaginem, id est omnipotentis Dei ecclesiam*).[77] In a similar sense the glossators interpreted the right of asylum of statues actually quite correctly, since the Church asylum was indeed next of kin to, perhaps even derived from, that of the imperial statues. What matters here is that the jurists customarily "equiparated" ths images of saints and the images of princes, reduced both to one denominator, and treated them as equals. That is, they merged, as was their custom anyway, the sacred with the secular, thereby raising the secular to the rank of the sacred.

One of the first things the glossators would try to explain was the difference between imperial statues and imperial images, and for that purpose they referred practically always to the definition of Azo, who declared that "in a statue nothing exists that would not represent a man's effigy, whereas in an image, being merely a painting, there may be many parts which do not represent the limbs of a man."[78] Azo, of course, and the other jurists of that age would hardly have had an opportunity to see any imperial statues. On the basis of Justinian's law-books, however, they would argue that *if* an emperor put up his own statue, collections should not be made to raise the money for that purpose, or that *if* a person wished te erect a statue, he needed

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[75] [Andreas of Isernia]

[76] [Laocoon scene]

[77] [Azo]

[78] [Azo]

the emperor's permission.7[79] Azo, of course, did not say or even imply that princes around 1200 were doing those things. But the potential "If" of the law~books and the glossators–"*If* " an emperor put up his image"–may have had the effect of a stimulus inviting a prince to do so. And certainly there was *one* prince on whom the juristic stimuli were not wasted: the Emperor Frederick II.

The productions of the artistic movement at the court of Frederick II–the triumphal gate of Capua, the sculptures in or near the palaces, the picture in the palace hall of Naples, the design of the augustales–reflect the stimuli emanating from the new scientific jurisprudence and may be called a first re-translation of Roman law influences into reality.[80] This re-translation of law into practice was not restricted to art. Frederick's law-book, the *Liber augustalis*, was being was teeming with Roman law; so was the exuberant language written by his clerks.[81] If Frederick II publicly celebrated his *dies natalis*, his natural birthday–a most unusual celebration during the Middle Ages, when only the birthdays of Christ, the Virgin and John the Baptist were honored–this was done not for reasons of sentimentality: Frederick merely followed Roman law, which classed the emperor's birthday among the *feriae publicae* on which the law courts were not in session.[82] Innovations such as these would hardly have startled the jurists, who, after all, inspired them. Startling, however, were the famous sculptures of the Capuan gate, which attracted the attention of many a visitor in the thirteenth and fourteenth centuries and thereafter, and they challenged also the wits of a famous jurist.

Lucas de Penna commented on *De spectaculis*, the law ordaining that in porticoes and other places where imperial statues were customarily displayed or "consecrated", pictures of lewd persons should not be shown.[83] He assumed rather significantly that the law meant locations where not only the consecrated statues of the emperors were placed, but where the emperor might frequently show himself in person.[84] For, argued the jurist, a picture or image is placed *pro simulatione vel fictione*, "in that it represents the figure of truth of a certain thing," as one would

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[79] [Azo]

[80] [Capua gate]

[81] [Liber augustalis]

[82] [Frederick II birthday.]

[83] [Lucas de Penna]

[84] [Lucas de Penna]

say that the delegate [judge or officer] is the image of the delegating power."[85] In other words, the statues of the Emperor stand vicariously for his person. He then defined the difference between statues and images by referring to Azo,[86] and pointed out that also according to canon law it was a crime of lese majesty to violate statues or break the image of the Crucified and the icons of saints.[87] Further, he defined the word *porticus* of Justinian's Code as a site where there is, so to say, a *porta*, a gate, or something having the aspect of a gate.[88] With that definition in mind, he finally essayed to interpret the word *consecrare*: "That is, to set up the consecrated statues or place them in a *porta*, a gateway, as in the gateway of the city of Capua, where the statue of the Emperor Frederick has been put up, truly Caesar in human cunning and crafts, and in some respects Augustus had he not been an enemy and rebel of the Church."[89] Though Lucas de Penna finds the verse inscription of the gate insipid, he quotes them nevertheless and gives even a vague description of other figures of the gate, before drawing the conclusion:

> On the basis of such works [as the Capuan gate] royal statues may be called "consecrated"; or else, should kings be deficient in justice, they might be called "execrated" rather than "consecrated".[90]

The jurist may have been mistaken in assuming that the concept of "consecrated" statues of emperor must refer to times when Roman princes still were idolaters, since according to Catholic faith imperial images were not consecrated, although everything connected with the emperor was called "sacred", and emperors, like priests, were anointed–that is, "consecrated".[91] He grasped, however, that the display of the emperor's image in the portico, in the *porta* of Capua, was in harmony with C.11,41,4: *in publicis porticibus..., quibus nostrae solent imagines consecrari*, and

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[85] [Lucas de Penna]

[86] [Lucas de Penna]

[87] [Lucas de Penna]

[88] [Lucas de Penna]

[89] "Consecrari, id est, consecratas apponio, vel in orta collocari, ut in porta civitatis Capuae, ubi apposita statua Frederici Imperatoris vere in humanis vertutiis aut astutiis Caesaris et in [quibusdam Augusti; nisi quia hostis et rebellis ecclesie."; Lucas de Penna on *C*.11,40,4, p.446.

[90] "Ex his operibus possunt dici regales statuae consecrari; alias cessante in regibus iustitia, dicendi sunt potius execrari quam consecrari."; *ibid*.

[91] [Lucas de Penna]

we may wonder if his suggestion was intended to make some specific point. The Capuan gate had no antecedents during the Middle Ages; its design was not repeated until two centuries later when Alfonso's gate of Castel Nuovo, in Naples, was avowedly inspired, as the original design shows, by the imperial gateway in neighboring Capua; and the purpose of the imperial gate is not at all obvious.[92] Perhaps we should recall the fact that one of the most famous porticoes of Italy, the Loggia dei Lanzi in Florence, met in the 1350s with the resistance of the Florentine *popolo* for a reason disclosed by Matteo Villani: "that a loggia befitted a tyrant and not a people" (*che loggia si convenia a tiranno e non a popolo*)[93] The antithesis of "tyranny" and "free community" in this connection is not self-evident, but it may become meaningful through Luca de Penna's combination of the *publici porticus* of the law and the Capuan gate, whose sculptures were felt to have a menacing character, *ad metum transeuntium*, as a thirteenth-century author put it.[94]

However that may be, Frederick II's *porta Capua* was the first, and perhaps even a unique, expression of the unalloyed Spirit of Jurisprudence which, by that time, was strong enough to influence artistic enterprise and was as yet not burdened and buried by that heavy overlay of other intellectual currents which became effective a century later. The juristic purity of the monument may account also for the straight-forwardness of the bridge-gate itself showing, as it did, the marble statue of the emperor enthroned, the big female head which cannot easily be interpreted except as a representation of the *Iustitia Caesaris,* and the two philosopher busts which Lucas de Penna first designated as imperial "judges."[95] Straightforward was also the purpose of the monument: Emperor, Justice, and Judges protect, as the verse inscriptions proclaim, the entrance into the kingdom and its *concordia*, promising security to those of good will and punishment to all transgressors of the law. They protect–let it be noted–a bridge which traditionally would be protected by a "bridge saint", by some "consecrated" images of Christ or a local saint.[96] The very fact that the emperor put up his own "consecrated" image in the bridge-portico on the frontier of the realm indicates whence the wind was blowing; and if is significant, too, that the Guelphic visitor around 1300 re-translated the completely profane imagery of the

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[92] [Lucas de Penna]

[93] [Matteo Villani]

[94] ["13th-century author"]

[95] [Lucas de Penna]

[96] ["bridge-saint"]

Capuan gate into Christian terms, maintaining that the emperor's image signified Christ, while the gate itself signified man's entrance into the kingdom of heaven.[97]

Of "equiparation" in the jurists' sense of the word there is plenty, and it is moving both hither and thither. The copying of Antiquity was secondary and incidental only. It certainly was lacking any romantic features; for what counted was the advice and suggestions of the law-books and the law interpreters. The law was "antique"; hence in the case of the law Antiquity penetrated into daily life. That may hold true also for the thirteenth-century heads, allegedly of Frederick II, which in recent years have been mushrooming from Italian soil.9[98] Though none of them represents Frederick II, these sculptures may still have served as a *decus publicum* in the sense of the jurists, as a public embellishment so often discussed in the laws, even if we know nothing about the place in which they might have been erected. Finally, to the judicial sphere there belonged also the picture in the palace of Naples showing Frederick II enthroned as the *justus judex*; to his side, though a step lower, his logothetes Petrus de Vinea; and in the foreground the parties–a forerunner, as far as can be judged from the scanty description, of the later imagery of "Examples of Justice" which became popular in the later Middle Ages.[99]

[Footnote numbers in the text end here, but the undocumented lecture version continues this way:]

However that may be, the development of a monumental art which was profane, and at least at one prominent point–at Capua–took over the functions of ecclesiastical imagery, should not be severed from Roman Law and the glosses of the jurists, who customarily equiparated holy images and secular images, or transferred, as it were, the *virtutes* dwelling in holy images to those of the secular rulers. In a way, this merging of the two orbits of imagery; ecclesiastical and profane, renewed some of the problems of early pre-iconoclastic Byzantium where competition between imperial images and images of Christ and the saints led to the great movement against ecclesiastical art. It is true, of course, that the bitterness of the eighth-century struggles about the images was rarely reached in modern times; but we do prick up our ears when we read the arguments with which, in Elizabethan England, the catholic Nicolas Sanders defends the images

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[97] [Capua gate]

[98] [Fred. II heads]

[99] [Fred. II painting]

of Christ, the Virgin Mary, and the saint against the attacks of John Jewel. Why, asked Sanders, if the images of Christ are to be destroyed, are the images of rulers to be respected? "Brake (M. Jewel) if you dare the Image of the Queenes Maiestie or the Armes of the realme.". [Nicolas Sanders, *A Treatise of the Images of Christ, and of his Saints* (Louvain, 1567), 109 r-v.] It is clear that the ruler image has achieved quasi-religious values which can be compared only with those attributed by Roman Law and the glossators to imperial images.

This influence becomes quite manifest in 16th-century France, where, until the French Revolution, the kings alone and exclusively were entitled to be honored by the public display of a statue in a public square. Accordingly, Joys Buysson, a jurist of the French crown, in a speech before the dead Henry IV in 1594 [sic], could remark quite plainly that "the statues of the French kings were *tenues comme sainctes*" and could attribute to them the right of asylum. A new age was dawning in which, as in antiquity, the image of the ruling prince would be displayed again in every assembly hall and court room.

Therefore, and before concluding this scrappy paper, yet another item has to be considered. In antiquity, the images had the function to make the Prince as omnipresent as he claimed to be; for they represented vicariously the absent emperor. The idea of the omnipresence of the imperial or royal power re-appeared in another form in the 13th century when the feudal government was superseded by the new centralized administration through royal officers.

English jurists, ever since the 16th century, discussed the legal ubiquity of the king. "His majesty, in the eye of the law, is always present in all his courts." This maxim, needless to say, had a very long history. The Roman emperors of course claimed omnipresence, and since the Prince could not be everywhere in his person, his presence was vicariously indicated by the images placed in assembly-halls, court-rooms, market places, theaters, etc. The imperial omnipresence reappeared in the 13th century when the new centralized administration through imperial vicars general replaced the old feudal government. Frederick II called his governors and high officers "images of our person" and proclaimed time and time again that he, who could not be present everywhere *personaliter,* was nevertheless everywhere present *potentialiter* through his officers. Around 1300, in the France of Philip the Fair, it became the custom to signify the royal presence by hoisting the king's coat-of-arms wherever the *garda regis*, the royal jurisdiction, was to be manifested. Only in relatively modern times did the monogram flourish of the Prince ("E.R.II") take over some of the functions of the coat-of -arms, though the flourish was artistically used as early as the 15th century.

On the other hand, however, in the later Middle Ages it became customary to decorate the court-rooms and council halls with so-called Justice-Images–allegorical or historical scenes

recalling the working of Justice, or a representation of the crucifixion That the ruling Prince should have been represented was not the general custom; however, in the hall of his palace in Naples, Frederick II had his picture displayed as the supreme judge sitting in court. By the late 16th century, however, we find some indications for replacing historical or religious Justice-imagery by portraits of the ruler. De la Roche Flavin, councillor of both the French king and the Parlement of Paris (the highest law court) and later at Toulouse, describes the chambers of the Supreme Court. In the great Audience Chamber, he says, there is no image of the king, because over the royal throne or over the seat of the Chief Justice is the image of the Crucified "in order to refrain by the commemoration of things holy the all too active spirits." And this, says he, was done after the model of the ancient Roman tribunals where, according to Cicero, the images of Castor and Pollux were displayed. However, the portraits of the kings were displayed in the *Salle des Procureurs*, where the parties met; and the same was true in Aix, Toulouse, and other places. And de la Roche Flavin contemplates in that connection that originally "the introduction and usage of those images was a privilege of the Gods; by and by, however, this privilege slipped (*glissa*) from the imperial images to those of Christ and the Saints, until it returned–with a new aura of holiness–back again to the rulers of the modern monarchies.

It would be a quite impermissible exaggeration to maintain that this whole development was *caused* by the scientific jurisprudence of the glossators of Roman Law. However, the perpetual juxtaposition of images of saints and images (or insignia) of Princes, the idea of the ruler's omnipresence and his ubiquity in the law courts, and the simple fact that the jurists themselves became–and made others become– conscious of the saintliness of ruler images and of the *virtutes* emanating from those images, should not be dismissed too lightly. And therefore, when the art historian tries to trace the development of the modern state portrait he should not forget that in addition to numerous other factors there should be taken into account also the legal "Glosses on the State Portrait."

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Addenda et Corrigenda: