DE GRUYTER

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JUSTIFYING TRANSGRESSION

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ISBN 978-3-11-121590-7
e-ISBN (PDF) 978-3-11-121801-4
e-ISBN (EPUB) 978-3-11-121862-5
DOI https://doi.org/10.1515/9783111218014

Library of Congress Control Number: 2023942326

Bibliographic information published by the Deutsche Nationalbibliothek
The Deutsche Nationalbibliothek lists this publication in the Deutsche Nationalbibliografie; detailed bibliographic data are available on the internet at http://dnb.dnb.de.

Cover image: Left: *Death Plays the Fiddle* or *Memento Mori* by Frans Francken the Younger, early seventeenth century (detail). CC-BY-SA 4.0: Historisches Museum Frankfurt (Pr340), photo: Horst Ziegenfusz. Right: *Prince Khurram (the Future Emperor Shah Jahan) and His Son Dara Shukoh Toying with Gems* by Nanha, c. 1620 (detail). The Metropolitan Museum of Art, Purchase, Rogers Fund and The Kevorkian Foundation Gift, 1955 (55.121.10.36).
Printing and binding: CPI books GmbH, Leck

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Acknowledgements

Because this book delves into many fields and subfields, I have had to rely on the advice of many specialists. Traversing different nodes of the academic world I struck up acquaintances and friendships with scholars from a global range of backgrounds. I could not have written this book without them. Luckily, I have kept an academic diary containing all their helpful comments, which I can now draw on to express my gratitude.

After the seed for this book was sown in 2006 (see the Coda), I was able to bounce my ideas about the set-up off Job Weststrate with whom I first explored the proscriptions to investigate, as well as Sheldon Pollock, Ghulam Nadri, André Wink, Shailendra Bhandare, Daniel Friedrich, Sebastiaan Tijsterman, Scott Kugle, Anjana Singh, Richard Eaton, Roy Fischel, Nicholas Abbott, and of course Lennart Bes, Sebastiaan Derks and the late Aditya Behl. The art historians Pauline Lunsingh Scheurleer, Jan Piet Filedt Kok, and Ebba Koch have kept thinking along and providing visual sources over the years. Thibaut d'Hubert and Paul Wormser were always very open to broad comparisons. Stéphane Jettot and Marie Hoellemare were always full of confidence in this project.

In 2010–11 I began researching in all seriousness at Yale University. I am grateful to the South Asian Studies Council of the MacMillan Center for granting me a postdoc in which I was able to work most of the time on this project, to K. Sivaramakrishnan for the opportunity, and to Kasturi Gupta for making Yale a welcoming place. I met many inspiring people who advanced my thinking. First of all, my fellow fellows Mrinalini Rajagopalan and Ian Desai. Then there were the members of a short-lived but thought-provoking early modern Persian reading group: Assef Ashraf, Hadi Jorati, Dena Motevalian. They all gave me much to think about over many exchanges. Indrani Chatterjee and Sumit Guha were and are always brimming with suggestions. Many others gave me new ideas on occasions like the brain-picking lunches that are such a great feature of American academic life: Ashwini Vasanthakumar, Georg Fischer, Kishwar Rizvi, Sylvia Houghteling, Mira Debs, Brais Outes-Leon, Holly Shaffer, Sunil Sharma.

In 2011–12 I held a fellowship at the Legal Cultures platform/Forum for Transregional Studies of the Berlin universities hosted by the Wissenschaftskolleg. I am grateful to Manan Ahmed, Susanne Baer, Alexandra Kemmerer, Christoph Möllers, and Thea Schwarz for helping to create the atmosphere of exchange, and to Upik Djalins for giving me the idea to apply. My fellow fellows Julie Billaud, Mark Somos and Esra Akcan pointed me in new directions. Others in the orbit of the Forum for Transregional Studies also gave me useful feedback, in particular Michael Allan, Ahmed Fekry Ibrahim and Fatemeh Masjedi. During that year I also met the Ber-

lin-based intellectuals Joseph Pearson, James Helgeson, and Avi Lifschitz, who helped me think through some of the theory and publishing quandaries and pointed out important literature. I had some more "brain-picking" lunches with Khaled El-Rouayheb, Alberto Saviello, Miloš Vec, Sebastian Conrad, Julia Eckert.

In 2012 Thomas Ertl and Uroš Zver saw enough potential in my project to hire me for a three-year postdoc in the framework of the "Handling Diversity in Pre-Modern India and Europe in Comparison (13th-18th Centuries CE)" project at the University of Vienna Institute for Economic and Social History (Wiso), sponsored by the Vienna Science and Technology Fund (WWTF). Of my colleagues at the Wiso and the rest of the university, I would like to thank for their insights and help: Hülya Çelik, Manya Rathore, Robin Köhler, Rolf Bauer, Franz Eder, Susanne Hehenberger, Erich Landsteiner, Peter Eigner, Peter Rauscher. The *jour fixe* of the research cluster The Jewish Holy Roman Empire, organised by Stephan Wendehorst, was a source of inspiration. Others who shared their insights in this period were Florian Herzog, Marco Ricci, Barbara Karl, Tilmann Kulke, Jyotirmaya Sharma, Najaf Haider, Marjolein 't Hart.

Also in Vienna, the legality reading group with Eirik Hovden and Paolo Sartori was short-lived (they all have to be) but very inspiring. Paolo also drew my attention to important sources and cautioned against reading too much legal consciousness into them. In general, I benefitted enormously from the presence in Vienna of the Institute for Iranian Studies with its welcoming atmosphere. I received particularly useful feedback from Ulfatbek Abdurasulov, Bert Fragner, Christine Nölle-Karimi, Stephan Popp, and Velizar Sadovski. At the Instititute I also met Zahir Bhalloo, Rudi Matthee, Allen Frank, Tawfiq Da'adli. All of whom clarified many finer points.

The WWTF funding enabled us to bring together international scholars in a series of gatherings, two of which I co-organised. The first was the 2014 conference "Law Addressing Diversity: Pre-Modern Europe and India in Comparison (12th to 17th Centuries)." I learned much from everyone at this conference. Particularly pertinent were the pointers I got from Corinne Lefèvre, Sanjog Rupakheti, Farhat Hasan, Mia Korpiola, Jovan Pešalj, Ali Anooshahr, and Karl Härter. Blain Auer advised about Delhi sultanate legal sources. In 2016 we held the workshop "Sexual Diversity in Visual Culture: A Comparison between the Persianate, Indic and Latinate Spheres c. 1000–1800." The exchanges during this gathering gave me much inspiration. Sussan Babaie, Robert Mills, and Naman Ahuja all gave me material to work on. Also during this period, I discovered and gave a talk at the exemplary Oxford Legalism project, where I received useful feedback from Hannah Skoda and Fernanda Pirie.

During the final period of writing, I taught at Leiden University and worked as an archivist at the KNMP. Colleagues, friends, and students from various depart-

ments at Leiden University I would like to thank are: Petra Sijpesteijn, Egbert Koops, Salvador Santino Regilme, Sara Mirahmadi, Alicia Schrikker, Hendrik Niemeijer, Gabrielle van den Berg. Other friends and colleagues I was able to test my ideas on in the final phase were: Pooyan Tamimi Arab, Annelien de Dijn, Karen Bauer, Afzar Moin. At the "Transactions and Documentation in the Persianate World" workshop in Exeter, I gained insights from Nandini Chatterjee, Sajjad Rizvi, and Fahad Bishara. A number of specialists I was able to query at conferences and over email about specific issues: Christiane Gruber, Frits Scholten, Shazad Bashir, Hilbert Lootsma, Kathleen Smith, Gregory Minissale, John Seyller.

Very important and dear are the friends and colleagues willing to comment on (sections of) the manuscript. Jos Gommans, who has supported me throughout my scholarly path, provided detailed comments on the cases, organisation, and gaps in the whole manuscript. Thomas Ertl, with his enthusiasm and flair for comparison, also commented on the whole and provided grounding in medieval and early modern European history. Prashant Keshavmurthy read chapter 4 and the Coda, aided in the interpretation of many crucial lines of Persian poetry and provided countless suggestions about sources and philosophical angles. Nadia Latif helped think through the Coda. Wilfred the Bruijn gave me some ideas to make the Introduction more accessible. Alan Strathern helped think through the organisation of the book early on and gave feedback on the Preface and Introduction. Stefan Kras and Folkert Bolkestein also gave useful feedback on the whole from an outside perspective. Louis Sicking commented on Chapter 4 and encouraged me to finalise the manuscript, as did my unique flatmate Matthijs Lok, who also gave feedback on two chapters and direction to my deliberations over the title and illustrations. George Michell provided insights early on, finally convinced me to drop my original title of choice (*The Ethics of Exception*), and corrected a part of Chapter 1.

Needless to say: the colleagues and friends I thank above may not endorse the arguments I am making. The responsibility for any factual errors or omissions is entirely mine as well.

In Torsten Wollina I found an editor who is well acquainted with the conversations this book partakes in. He found knowledgeable peer reviewers, one with a European legal history background and the other with a background in the early modern Persian world. I would like to thank the peer reviewers very much for their elaborate comments. Meanwhile Antonia Pohl of De Gruyter provided help with making the manuscript ready for press. I am grateful to the owner of figure 2 for giving permission to reproduce it through an intermediary.

Finally, I would like to thank my support team: Louise, Paul, Ruud, and Tieke. (The memory of) my mother Helen has been my foundation throughout the writing process.

Amsterdam, June 2023

Preface

This study originated in a fascination with how people deal with inconvenient rules. We all know that people often do not stick to all sorts of rules, be they laws, social norms, organisational regulations, and what have you. But *how* do they square their going around or against the rules with being and remaining members of their communities? I think this "how" is and has been more crucial to social and intellectual life than is generally acknowledged by historians. Some historians regard statements about the crimes/sins that this book looks at, namely sodomy, idolatry, and usury, as irrelevant to life practice. They argue that people were going to do these forbidden things anyway, and we might as well study social, artistic and economic developments without keeping these proscriptions in mind.[1] This book demonstrates that at least some people put a lot of effort into justifying what others saw as transgression. They invested considerable energy in worrying, debating, and writing about what might appear to be sodomy, idolatry, or usury, and made many subtle formal changes to the way they practiced.

Moreover, it turns out that over the long period from 1200 to 1700 people had to come up with ever more sophisticated justifications for not sticking to the rules. This evolution of strategies tied in with other intellectual currents. It tied in with ideas about justice and the place of law in life, and the relation between the two – which people at the time debated and legal scholars still debate. Many people over the period clearly thought that the dominant interpretation of the law did not serve their idea of justice, even though their expectation was that law should deliver justice.

We can take the investigation a level deeper even. By looking at what people said or wrote to justify their not sticking to the rules we are also able to say something about their consciousness. To what extent were people conscious of transgressing any of the divine rules that we are looking at? If we look closely at the sources, we see that it was quite impossible for people to ignore inconvenient rules. This study questions people's ability to remain "ambivalent" about the rules of divine law. Saying one thing and doing another was not always a solution in the face of potential accusations of crime and sin. There were enough contemporaries willing to point out that stated intentions did not mesh with real intentions. The solution was justifying one's practice in the light of the ideals that the guardians of doctrine upheld. In short: justification was necessary to fill the gap that consciousness created, and therefore the study of past justifications sheds light on past consciousness.

1 See the introductions to chapters 1, 2, and 3 for examples of this dismissiveness.

 https://doi.org/10.1515/9783111218014-002

When one reads a bit into the poetry of the Persian world in the period before the seventeenth century one is easily struck by a partly defiant and partly flexible attitude to the rules people were supposed to live by. Modern scholars have started to see this flexibility in the Persian world, or the Muslim world of the time more generally, as either the outcome of different cultural strands existing side by side or inherent in Islam. Rudi Matthee sketches the situation in Iran before the eighteenth century as one in which different traditions came together: the ancient Iranian tradition, the nomadic traditions of the Turkish and Mongol conquerors and the Islamic tradition. The first two traditions he sees as entailing a preference for ostentatious feasting which included wine-drinking and intercourse with young boys, and the latter as entailing a concern with sharia in general and ritual purity in particular. He sees the Islamic strand as increasingly important, but also notes that this never got the upper hand over the "live and let live attitude that characterized Iran's traditional society." Shahab Ahmed argues against Matthee and others that we should see this tolerance as the outcome, not of different strands, but of the ambivalence inherent in the one, capacious, strand that Islam is.[2]

For Latin Europe in the late medieval and early modern era, however, the emphasis in the scholarship of recent decades has not been on flexibility and tolerance. One can say that Western European culture of the era was also made up of different strands: the heritage of Roman antiquity with its Bacchic aspect, the Germanic customs, as well as Christian teachings. Yet scholars have been emphasising the aspects of fear, persecution and purity that showed their face in many times and places and were often associated with the latter strand only. Scholars sometimes even see the European culture of this era as already being on track to the concentration and extermination camps of the Third Reich, the ultimate effort at purifying the nation. To be precise: scholars have attributed different dates to the beginnings of this repressive, persecutive and purity-obsessed aspect of European history. While the highly influential Michel Foucault and Zygmunt Bauman have associated it with the advent of modernity around the eighteenth century, others, for instance Peter Burschel, see it as starting with the early modern period, that is, around 1500.[3] Still others place the beginnings around the start of the period this book covers. Jean Delumeau, John Boswell, and Robert Moore situate it in the early 1300s, between 1150 and 1350, and in the 1160s respectively. Therefore, whenever in the past three decades scholars have focused on tolerance in medieval and early modern Europe, it has tended to be on the limits of this tolerance.[4]

2 Matthee, *Pursuit*, 19, 37—43, 48—50, 61—7, 73, 76, 303; Ahmed, *What Is Islam*, 381—2 and passim.
3 Walker, "Framing," 13; Burschel, *Die Erfindung.*
4 E. g. Kaplan, *Divided by Faith* and Kooi, *Calvinists and Catholics.*

Moreover, Moore was able to write in the foreword to the 2007 re-publication of his *The Formation of a Persecuting Society* that its main thesis "has been widely – many may think, too widely – accepted."[5]

All these scholars are arguing against an older – but also still continuing – current in the historiography that sees the Muslim world as a place where individual conscience was stifled by divine law, even while Western Europe was slowly being disenchanted and on its way to the eighteenth-century Enlightenment. Although the opposite of the views presented in the last two paragraphs, this strand in the historiography has also reified the difference between the two world regions. The world historian Toby Huff for instance emphasises the contrast between the influences of the first-century apostle Paul on the Western Christian tradition and of the theologian-jurist Muhammad Ghazali, active around 1100, on the Islamic tradition. In this view Paul opened the way for conscience to become the supreme arbiter in the interpretation of divine law, and the sixteenth-century Reformation completed that work. In the Muslim world meanwhile, Ghazali closed the gates to the application of reason in interpreting divine law.[6] While few scholars still hold this view, and many hold the opposite view as we just saw, it survives in today's public debate on the strict and formalist adherence to the rules of Islam by fundamentalists.

Surely there were differences of degree between the Persian part of the Muslim world and the Latin part of the Christian world, but if we look at relative levels of tolerance of diverse behaviours and ways of life as the outcomes of struggles over justifications for those behaviours and ways of life, we get a more nuanced picture. In other words, the lens of justification that this study looks through evens out many of the contrasts that have been emphasised. It turns out that tolerance was never a given in either the Persian world or the Latin world, and many of the same strategies for justification came up in both. For instance, talking about "Platonic" love when suspicions of sodomy arose, emphasising the precise placement of images when the issue of idolatry came up, or dressing a usurious loan up as a sale. The lens of justification allows us to perceive more sharply how and why the separation of private and public spheres was invented more than once in communities that lived under the laws of the Judeo-Christo-Islamic tradition, which appears ever more clearly as a single tradition.[7] This lens also lets us look in reverse at a question that has occupied historians of gender and sexuality:

5 Delumeau, *Le péché et la peur*, 7; Boswell, *Christianity*, 269—302; Moore, *Formation*, vii, ix, 156, 173.

6 Huff, *Rise*, 107—16.

7 Compare and contrast Bulliet, *Islamo-Christian Civilization*, 9—16 and passim.

whether there was such a thing as homosexual orientation before Western modernity.

There were many similarities between the two worlds in the "how" of transgression. This has much to do with the shared heritage of Islam and Christianity, and perhaps to some extent with continued exchanges, but probably also with the universal traits of humanity. At the same time, we should not neglect the differences between the two worlds in the level of acceptance of specific justifications and justifications in general. However, this study finds that the acceptance varied more across time than between the two worlds. The willingness of the theologians and jurists in charge of divine law to accept narrow definitions as well as circumventions also varied more by topic than by the region. With respect to the proscription of usury the guardians of divine law bent over backwards to make life easier, but not with respect to sodomy.

By applying the lens of justification, this study ends up perceiving mainly parallels. Communities in both the Persian and Latin worlds experienced a permanent division into strict and flexible subgroups, with sometimes the strict in the ascendant and sometimes the flexible. When flexible voices predominated, there was relatively much space for justifications. When the strict had their way, there was less room for justifications. Both worlds also saw another division of minds. This was between those taking a formal or literal approach to the law and those looking at the spirit of the law, the consequences of actions, or the intention of actors. The debates over substance and form of the law often became a matter of identity and had a physical dimension in clashes over the issue of idolatry. The need to interpret divine law was as old as the formulation of it, but the different approaches underwent many developments in the period between 1200 and 1700. The results of the continuous development of these approaches are still with us today.

Finally, this book ties in with the current philosophical debate on whether there is or should be a "right to justification." In other words: whether humans should have the right to justify their own actions and should have the rules they are to abide by justified to them. The philosophical debate on this proposition, first brought forward by Rainer Forst, can benefit from a grounding in historical research and a comparative framework. This will allow us to gain more insight into what people have actually done with whatever space they have had for justification. The comparative historical approach can also uncover the processes by which ways of justification became/become more sophisticated over time.

Introduction

> The wealth of virtue, wisdom and gifts
> That the clever Persian, alienated from Christ's law
> Finds in Muhammad's Teachings, however crudely buried
> Sa'di has long ago put into poetry.
> *"N," 1688*[1]

To get at the why and how of justifying transgression, this book investigates a matrix of two regions and three proscriptions thought to be based on divine law, and that in a particular timeframe. The following sections will try to explain as briefly as possible why it is a good idea to focus on these regions in this period, how they can be compared with respect to divine law, what divine law was, why it is a good idea to look at justifications with respect to these three particular proscriptions, and how classifying the range of justifications has helped the comparison along.

What Were the Persian and Latin Worlds?

Precisely because, as noted in the Preface, much has been made of the contrast between the Muslim and Christian worlds, it is interesting to compare the two. The Persian-using part of the Muslim world is a good starting point because, as mentioned, its literature is so startlingly full of transgression or near-transgression. The Latin-using part of the Christian world is always the implicit reference point in Western discourses on the rest of the world, as Dipesh Chakrabarti warns.[2] Indeed, studies produced in the Western academic environment on any aspect of the Persian world or wider Muslim world invariably make the comparison at some point. So, if we are going to make the comparison anyway, we may as well make it explicitly and thoroughly.

The comparison comes with many caveats, however, as any historical comparison must. This study refers to the two regions as "worlds," because they had more cultural coherence than any random land area. At the same time, I do not want to reify them as civilisational units. Both were nested within larger cultural wholes. They were respectively parts of the Muslim and Christian worlds, which were both in turn nested within the whole of the culture of Abrahamic monotheism (the

1 Recommendation of the first Dutch translation of Sa'di's *Bustan*, in H[avart], *Persiaanschen Boogaard*, n.p.

2 Chakrabarty, *Provincializing Europe.*

 https://doi.org/10.1515/9783111218014-003

Judeo-Christo-Islamic tradition) and situated within the still larger whole of the interconnected Europe-Africa-Asia landmass. Moreover, the Persian world partly overlapped with another cultural sphere, the world of Sanskrit learning and Indic religions. What then lent the two worlds in question the relative coherence they can be said to have had and how can we define them?

The different parts of the Persian world shared the use of Persian as the language of princely courts and administration, poetry and certain forms of learning (including history and statecraft). It also shared with the rest of the Muslim world the use of Arabic for the purpose of the study of theology and sharia. To be sure, there were also non-Muslim officials and literati who used Persian in this region. The Latin world cohered, in the first half of our period at least, around the use of the Latin rite in its churches. In that era Latin was also the language of administration and of all forms of learning. In the course of our period the vernaculars demanded an ever-increasing space, yet Latin remained an important language for the learned community throughout. Although the roles of Latin and Persian in the two regions were different, both languages entailed particular cultural knowledge.[3]

While the concept of the Latin world or "Latin Christendom" is well-established in world history, there is something of a debate about how to define the Persian world. Some scholars advocate a wide definition as the area where Persian was the language of exchange, while others employ a narrower definition as the area where it was the language of exchange as well as administration. The term "Persianate world" is also used to emphasise the aspect of cultural exchange in Persian. Both the wide and narrow definitions have their merits, but I am going with the narrow definition to keep this study within a feasible scope. Even by the narrow definition the Persian world encompassed a larger landmass and population than the Latin world.[4] In the following paragraphs I will highlight a very small selection of developments in these two regions in order to paint their boundaries and give the briefest of impressions of developments that form the background to the following chapters, as well as to delineate the timeframe from 1200 to 1700.

Around 1200 both the Latin and Persian worlds were expanding, to the extent that they became contiguous. Latin Christians were engaged in maintaining the crusader states in the eastern Mediterranean, while they also captured Constanti-

3 Compare Sheldon Pollock, *Language of the Gods*, and Eaton, *India in the Persianate Age*, 10—8.
4 For a history of the term "Persianate" and an overview of the definition debate see Green, "Introduction." The reason I have opted for "Persian world" is threefold: it suggests the narrower definition; it is less cumbersome and unfamiliar to non-specialists; and for the Latin or Latinate world, the term "Latin" is much more commonly used as an adjective. I use "Persianate" only when necessary.

nople from the Greek Christians. Another crusade was taking shape in the Baltic region, which was to bring that into the Latin sphere as well. The Catholic Church, with which Latin came, had in the previous two centuries extended its sway in Hungary and Poland, and was missionising among nomadic peoples still further east.[5] In the period before 1200 Turkish conquerors, who, in the process of passing through Transoxiana and Khurasan (now Uzbekistan and north-western Iran and north-eastern Afghanistan) had become Islamised and Persianised, carried the use of Persian to Syria, Anatolia and India. Persian was the language of administration of the Seljuqs of Rum, who were separated from the Latin Empire of Constantinople only by a strip of remaining Byzantine state. It was also an important language for the Seljuq states that bordered on the Latin crusader states. One Persian book of advice to the Seljuq ruling elite that will be cited a few times in these pages was written in Syria. At the eastern end of this world, the Delhi sultanate, founded by Turks from Afghanistan in 1192, also used Persian as its language of the court and administration. Offshoots of this sultanate were to give that language a certain prominence also in the Deccan region (Central India) over the next centuries.[6]

A number of important developments in the sphere of divine law took place around the beginning of our period. During the previous three centuries, the economic, cultural and intellectual heart of the Persian world – and indeed much of the Muslim world as a whole – had lain in Transoxiana and Khurasan.[7] Right around the start of our period, scholars in this region belonging to the Hanafi school of law produced important works of jurisprudence. Burhan al-Din Marghinani and Qazi Khan topically arranged centuries of rulings by theologian-jurists, along with some hadiths or Traditions about the life of Muhammad and his Companions. While preserving the contradictions between the authorities, they made sure to indicate what the preferred or correct opinion was. Their works set standards followed by Hanafi jurists beyond the end of our period and marked the beginning of the rise to dominance of the Hanafi school in the Persian world over the next few centuries. In the Latin world a milestone in the development of Church or canon law was the compilation known as Gratian's *Decretum.* In the mid-twelfth century the person known as Gratian brought together a thousand years of rulings on many issues by Church Fathers, Roman emperors, Church prelates, etcetera. Just as the Persian world jurists he put all the often-contradictory rulings side by side, but attempted to harmonise them with his own dictum. Gratian's work electrified the study of canon law and Roman law, giving rise to an amalgam of

5 For an overview of the state of the Latin world around 1200 see Jackson, *Mongols,* 8—30.

6 See the introduction by Julie Meisami in *Sea of Precious Virtues,* vii—xix; Eaton, *India in the Persianate Age,* 13—8.

7 Tor, "The Importance of Khurasan and Transoxiana," 3—4.

the two called the *ius commune.* Amid the flurry of legal activity, the Third Lateran Church Council of 1179 enacted canons on sodomy and usury which set the stage for further legislation by church councils over the next century and a half. Also, churchmen with some or much legal training rose to the papacy. One of them, Innocent III, designated idolatry a crime rather than only a sin.[8]

Moreover, the start of our period saw some important developments in the organisation of faith that were to have their effect on the reception of divine law. Over the twelfth century a transition took place in Khurasan and Transoxiana toward a distinctively Persian Sufism. From this heartland transition emerged a number of *tariqa*s ("ways" or orders) that became prominent during the remainder of our period in different regions of the Persian world. In particular we should mention the rise to prominence of the Naqshbandis in Central and South Asia, the Chishtis in South Asia and the Maulawis (or Mevlevis) in Anatolia.[9] As we will see in the Chapters, the founding fathers and followers of these *tariqa*s often felt it necessary to take a stance on certain issues relating to sharia. In the Latin world around the start of our period a number of mobile religious orders were founded that looked to Rome for guidance more than the older monastic orders. The twelfth century saw the foundation of a number of military orders including the Knights Templar. More important for this study was, however, the emergence in the early thirteenth century of the mendicant orders, the Franciscans and Dominicans, whose members were known as friars.[10] These orders were to play a large role in preaching against sodomy and usury, but also finally in the coming to terms with usury.

The geo-political constellation around and between the Persian and Latin worlds changed continuously. Over the course of the thirteenth century the Mongol conquests disrupted their processes of expansion, even while the Mongols in Iran and Central Asia also came to adopt Persian as the language of administration and forged new connections with Europe. In Anatolia the Seljuqs were replaced by other Turkish dynasties, of which the Ottomans came to dominate. From the beginning of the sixteenth century, if not earlier, the Ottoman empire took a path separate from the (narrowly defined) Persian world. Around that time, Ottoman Turkish increasingly became the language of administration and literature. Moreover, Hanafi sharia jurisprudence developed quite separately in the Ottoman empire. While the great Central Asian jurists active around the beginning of our period continued to be authoritative in the core of the Ottoman empire known as Rum

8 See Chapters 1—3 and Brundage, *Medieval Origins*, 75—6, 103—5, 125; Kuttner, *Kanonistische Schuldlehre*, vi; Pennington, "Innocent III."

9 Spencer Trimingham, *Sufi Orders*, 51—66.

10 Jackson, *Mongols*, 9—10.

as well as in India, Hanafi jurists in those two respective regions did not cite jurists from the other region, so that we can in fact speak of the development of separate sub-traditions of the Hanafi school in those regions over our period.[11] For these reasons, I am leaving the Ottoman empire mostly out of the investigation, even though Persian remained a language of exchange there.

Yet new connections were forged between the two regions by the European overseas mercantile and imperial activities from the end of the fifteenth century. While at times this study makes use of the observations by individual European travellers and merchants about the Persian world, the European overseas establishments are not included in its investigation of the Latin world. This is done simply to restrict the research to a feasible scope. The chapter on sodomy, however, devotes one paragraph to the possibility that this limitation might distort the comparison.

Another important development in the first part of the sixteenth century was the splitting into two halves of both these worlds on the basis of religious adherence. As the post-nomadic empires (the Ottomans, Safavids, and Mughals) established themselves, a chessboard pattern became apparent. The dynasties of Central Asia remained Sunni. To their south, the Safavid dynasty in Iran was staunchly Twelver Shi'i, which eventually entailed the Shi'ification of the majority in Iran. The Mughals in India were Sunni, ruling over a Hindu majority. To their south again, some of the sultans in the also Hindu majority Deccan declared themselves Twelver Shi'i, and this move also brought a measure of Shi'i folklore to the lower strata of society.[12] Both Sunnis and Shi'is continued to be found in all these realms, however, for instance Shi'i Iranian courtiers in the Mughal empire and Sunni Turks in the Safavid state. In the Latin world the onset of the Reformation entailed choices for those in leading positions, pitting one prince against another in the wars of religion. The most southern lands remained entirely Catholic, while the leading Protestant states were eventually concentrated in the northern half of the Latin world. In many of the northern and central realms Catholics and Protestants were to live together and accommodate each other in the towns.[13]

The eighteenth century was one of rapidly (faster than before) increasing complexity in both these worlds, and to continue after 1700 would require a whole separate book. The Persian world saw the crumbling of the Mughal and Safavid empires in India and Iran respectively and the rise of regional states and short-

11 NB as will be seen in Chapter 1 the Indian *Alamgirian Rulings* did cite a few jurists from the Arabic regions of the Ottoman empire but not from its core lands. For the formation of the *Rumi Hanafi* branch see Burak, *Second Formation of Islamic Law*, chapter 2.

12 Wink, "Islamic society"; Kruijtzer, *Xenophobia*, 86, 90—2.

13 See Kaplan, *Divided by Faith*.

lived empires in their stead, as well as European encroachment. Meanwhile, Persian lost ground as a language of administration, for instance because the increasingly powerful Marathas in India rejected it as such. Muslims in India bemoaned the breakdown of the moral city in Urdu poetry.[14] In Europe, Latin, which had lost the position of administrative language already, now also lost ground as a language of learning, with fewer scholars using it than in previous centuries. But more importantly the eighteenth century saw the Enlightenment, which mainstreamed a toned-down version of the most radical ideas of the sixteenth- and early seventeenth-century libertines (see Chapter 1) and entailed a fresh look at the authority of Church and scripture. To put the effects of these eighteenth-century processes on the position of divine law in a comparative perspective I leave to another study.

A Shared Heritage

How can we compare what people expected from divine law in these two worlds, and what is the ground for the comparison?[15] In more technical terms, what is the third element of the comparison besides 1) differences, and 2) similarities? What did the moral-legal systems share? Ultimately the basis for the comparison is my definition of divine law as *all the rules that people attributed directly or indirectly to God, including both revealed commandments and rules derived by reason from examples in authoritative texts or from God's plan for the world.* The reason I have been able to use such a specific definition, with references to revelation, one God, and authoritative texts, is, however, the fact that the Persian and Latin worlds shared sources and a history of exchanges relating to these very features. The shared heritage of Christian and Islamic divine law stretches even to specific pre- and proscriptions, including the ones we are looking at in this study. One can clearly demonstrate the common origin of these three Christian and Islamic proscriptions in Jewish law. In order to understand this heritage better, I will briefly sketch how both Christian and Muslim scholars tried to come to terms with the Jewish legal heritage.

Through colonialism and present-day politics, we have been socialised to believe that the Judeo-Christian tradition is one thing and Islam a completely different thing, but scholars are increasingly regarding Judaism, Christianity and Islam

14 See Chapter 1 and Naved, "Erotic Conceit," 157—61, 227; Kruijtzer, *Xenophobia*, 276—8.

15 This study builds on a growing body of comparative legal history and anthropology. For an overview of some of the methodological problems signaled there, see Ertl and Kruijtzer, "Introduction." In focusing more on what people expected from law than on what law did, this study follows several others, especially: Pirie, *Anthropology* and Dresch and Skoda eds., *Legalism.*

as one "Abrahamic" monotheism. The latter perspective was to an extent also present in the period under discussion. First of all, each successive layer of this monotheism had from the start recognised the contribution of the founding fathers of the preceding layers of the tradition. The New Testament recognised the important role of Moses and the Quran recognised both Moses and Jesus as prophets (along with many others from the Jewish and Christian tradition). The Quran further spoke of the *millat Ibrahim*, the way or law of Abraham. In the Persian world, Abraham continued to be seen as the first monotheist destroyer of idols.[16] The proximity of Christians and Jews (and the so-called "Sabeans") to Muslims was also clearly laid down in scripture in the term *ahl al-kitab*, people of the book. In the Persian world in our period this term was applied in a broad sense. It was not a question whether Jews and Christians were close enough to the Muslim community to deserve protection, but whether people of other religious traditions (Indic, Zoroastrian) could also be included under that term. Secondly, we can point to continued parallel developments in the three religious traditions through the Middle Ages. As John Tolan points out for instance, in both medieval Latin and Arabic usage notions of "religion" and "law" overlapped in crucial and similar ways.[17] And many of these parallels were carried over into the period with which this book is concerned.

Looking at the centuries in which sharia came into being, a number of things stand out about its relation to the commandments of the Torah that I think we can bring forward without arousing too much controversy. First of all it seems to have been assumed in the early days that at least Jews should stick to the commandments of the Torah. We can see this in a number of instances where the Quran or Traditions about Muhammad pointed out that the Jews were not sticking to the commandments, for example with regard to the proscription of usury, or with regard to the penalty of stoning for adultery.[18] Secondly, some passages in the Quran seem to restate commandments from the Torah, as the Iranian scholar Ahmad Sa'labi already recognised with regard to the Ten Commandments in his early eleventh-century collection of tales of the prophets.[19] Thirdly, as the historian S.D. Goitein noted many decades ago in an argument that was more recently cited with approval by the legal historian Wael Hallaq, it seems to have been only about five years before his death that Muhammad delineated a separate, competing legal path for Muslims. At that point he made clear that Jews should judge according to

16 See e. g. Prashant Keshavmurthy, "Translating Rāma," 11.

17 Tolan, "Lex alterius," 2.

18 Quran 4: 161; Burton, *Sources*, 129—58, 166—8.

19 Goitein, "Birth-Hour," 28; Sa'labi, *Lives of the Prophets*, 337—8. See also Libson, "Jewish and Islamic Law."

the Torah, Christians according to the Gospel as the confirmation of the Torah, and Muslims according to the newly revealed book, as the confirmation and criterion of the previous two books. Thus the three groups had each been given a legal path and method (*shir'atan wa minhajan*) and were to race each other towards the good, and only in the afterlife would it be revealed what the right position on disputed matters would be.[20] Finally, as the Quran took much of the Torah and Gospel for granted, the first generations after Muhammad seem to have often looked to Jewish and Christian legal thought in order to determine the criteria of and punishments for certain divine proscriptions. Over the centuries after those first generations, however, an increasing number of jurists chose to emphasise the distance between the Jewish and Christian sharias on the one hand and the Islamic sharia on the other.[21]

In Islamic legal treatises the treatment of the relation to the Jewish and Christian traditions came to be subsumed under the more general theory of abrogation. In the early centuries of Islam the idea developed that of all the statements and acts by the prophets, the latest ones were the ones to be followed. In this view, Jesus had abrogated some of the Old Testament pre- and proscriptions, Muhammad had abrogated some more of the Jewish ones as well as some Christian ones, and acts and statements by Muhammad might abrogate previous acts and statements by himself.[22] In the eleventh century the Iranian scholar of the Hanafi school Muhammad Sarakhsi noted that "the law that preceded us is our law as long as it has not been abrogated."[23] The general idea of subsumption and abrogation of the Jewish and Christian traditions continued to be relevant till the end of our period. It was for instance expressed in the belief of some scholars belonging to the Hanafi school that Jesus would follow their school upon his return on earth. A Shi'i version of this idea was recorded by a French traveller to Iran.[24]

In Christianity the debate over which Old Testamentic commandments were to be considered abrogated also continued over many centuries, with a crucial contribution by Gratian, who was of the opinion that none of the Old Testament commandments were to be considered abrogated but some were to be interpreted spiritually rather than literally.[25] During the Reformation the role of works in salvation became a central question and this revived the abrogation debate. Luther

20 Goitein, "Birth Hour"; Hallaq, *Sharī'a*, 31; Quran 5: 42—51.

21 Kugle, *Homosexuality*, 62, 141—3; Libson, "Jewish and Islamic Law." See also Brinner's notes on the concept of *isra'iliyat* or "Israelitisms" in his introduction to Sa'labi, *Lives of the Prophets*.

22 Burton, *Sources*, 165—83; Compare Hallaq, *Sharī'a*, 96—7.

23 Libson, "Jewish and Islamic Law."

24 Ter Haar, *Volgeling*, 59; Chardin, *Voyages*, 2: 217—8.

25 Tolan, "Lex alterius," 14—5.

quarrelled with the people he called antinomians, who in his view went too far in considering the law of the Old Testament abrogated. Luther himself tried to walk a middle road between the implications of divine grace and divine law as we will see in Chapter 3. Calvin was more inclined to grace but nevertheless favoured an equitable application of divine law.

For Muslims the relation of Islam to the Jewish and Christian traditions was perhaps more evident than it was to Latin Christians, but the relation became increasingly clear to Western Europeans in the centuries after the first Latin translation of the Quran appeared in the mid-twelfth century. About a century later, the Dominican friar Thomas Aquinas concluded upon reading the Quran that Muhammad had purposely replaced the original texts of the Old and New Testaments with his own "fabulous narration." Aquinas therefore chose to class Muslims with pagans rather than with heretics, because even though they might have shared some traditions, they did not recognise the Old or New Testaments as authoritative in themselves.[26] Some fifty years later, however, Dante Alighieri positioned the Prophet Muhammad and his son in law Ali among the schismatics in his poetic description of hell.[27] The latter view, of Muslims as schismatics or heretics, i. e. as people holding views coming from the same stem as what was deemed the correct theological outlook, rather than as pagans, seems to have gained increasing currency among those Latin Christians who gave any thought to the relation of Islam to Christianity, despite a certain tendency within the confines of canon law to conflate all non-Christians for the purpose of the application of specific injunctions.[28] By the seventeenth century the Protestant thinker Johannes Hoornbeeck, in his discussion of conversion, clearly separated Christians, Jews and Muslims on the one hand from "Gentiles" on the other, since, he argued, Jews had the Old Testament and the Muslims recognised both that and the New Testament to an extent.[29] Moreover, starting with the twelfth century translation, the Quran often came to be designated as *lex*, law, just as the Old Testament was generally designated as such. While the Old Testament was simply *lex*, the Law, the Quran was the *lex* of the Muslims.[30] This way of referring to the Quran made comparison possible for Christian scholars over our period.

26 Heimerl, "Mahumetistae," 53, 62, 64—5.

27 De Ventura, "Dante and Islam."

28 Bechmann, "Tradierte Topoi," 197. Stantchev, "'Apply to Muslims'."

29 Hoornbeek, *De conversione Indorum et Gentilium*, 14. See also Gommans and Loots, "Arguing with the Heathens," 55, 57.

30 For examples from, respectively, the works of Aquinas, Ricoldus de Monte Crucis, and sixteenth-century editions of the latter, see Heimerl, "Mahumetistae," 62, Bauer, "Stille Post," 109 and Bergner, "Oporinus' Alcoran," 182.

Divine Law as Law

How did the God-given rules function in the two worlds? Should we even consider them as law?

To begin addressing the latter question we would need to define law, a task that has defied generations of legal philosophers and anthropologists. Besides that, we have a problem of translation, since "law" is an English term that comes with the particular history of that term in the English-speaking world and we are here concerned with sources in many other languages. To situate law broadly, we might look to the useful tree structure that the legal philosopher Ronald Dworkin proposes. In this tree structure, law branches off from politics, which in turn branches off from morality. What sets law off from morality, in his view, is that it should be "enforceable on demand in an adjudicative political institution such as a court." In our period divine law was in fact sometimes enforceable on demand, but enforcement was often also left to the afterlife.[31] While it is important to have an idea of how contemporaries saw the roles of God and the community in enforcement, it is not necessary for the purpose of studying justification to make a distinction between divine morality and divine law. Indeed, it is quite impossible to separate the two for the period under investigation.

For one thing, people in both these worlds perceived a continuum between enforcement of the God-given rules on earth and in the afterlife. Texts on sharia and canon law did not stop at what could be enforced on earth. This can be well illustrated with the matter of Chapter 3, the proscription of usury. As we will see there, the late seventeenth-century Indian compilation of legal opinions, the *Alamgirian Rulings* (*Fatawa-yi 'Alamgiri*) devoted an entire chapter to "discouraged sales and irregular gains." The "irregular" referred to this-worldly implications of the transactions under discussion, namely that they should be rectified. If the transactions were to come before a judge, he should strip away the irregular elements and recognise only the elements that were sound, which meant that any usurious gains should be removed. There would, however, be no this-worldly punishment for either party, but both or either of the parties ran the risk of consequences in the afterlife, which is what the "discouraged" signified.[32] In the context of the five main legal categories of sharia, viz. the forbidden (*haram*), the discouraged (*makruh*), the neutral (*mubah*), the recommended (*mandub*), and the permitted (*halal*), Hal-

31 Dworkin, *Justice*, 400—9; Ertl and Kruijtzer, "Introduction," 4—8.

32 Shaikh Nizam et al., *Fatawa*, (Arabic) 3: 268—77, (Urdu) 4: 479—88, (Baillie, *Law of Sale*) 300—12. Compare Dusuki, Mahbubi and Husain, "Hanafi's Approach" and Gerber, *Islamic Law and Culture*, 129—30.

laq argues against the view of some other modern scholars that sharia acts as "law" only when the first and the last of these categories are involved.[33] Even thoughts that only God could perceive, could be categorised on this scale. Or, in another example of the entanglement of divine and worldly justice, a judge could lock a sodomite up until he would repent, which would spare him further punishment in the afterlife.[34]

A similar continuum was perceived in the Latin world, along with a gradation of sins (although somewhat less worked out than in the Persian world). There was the same sense that if punishment in the here and now might be insufficient, there would be no escaping divine justice. As we will see in Chapter 3, at the start of our period, European canon law noted the consequences in the afterlife for certain kinds of sales that only God could perceive the flaws in, and such "mental usury" was much discussed by the late scholastics into the sixteenth century. However, just as in the Persian world, jurists increasingly distinguished what could be enforced by a court and what was to be left up to the heavenly judgement. In conjunction with the emergence of a class of legal professionals, the start of our period saw intense efforts to determine the relation between the categories of crime and sin. A consensus emerged that all crimes were sins but not all sins were crimes punishable in this world. Although there was an increasing specialisation of jurists (in the sense of people writing about law in a systematic way) as distinct from theologians, their fields long remained entangled. While jurists did not cite what contemporary theologians wrote about compensation for sins through penance, they were clearly aware of it.[35] How this worked we can see in an early fourteenth-century Anglo-Norman legal textbook. This *Mirror of Justices* (*Le mireur a justices*) graded crimes by their implications for the afterlife, but at the same time laid down concrete punishments to be exacted by secular administrators.[36]

If we see the function of rules as the enabling of cooperation within communities, it only matters whether the enforcing agent be perceived to be located on earth or above it in so far as a transcendent judge may be perceived to be more efficient and just.[37] In other words, people would perceive the justice delivered

33 Hallaq, *Sharīʿa*, 84—5 (I am translating *makruh* as discouraged rather than disapproved, following e. g. Gleave, *Inevitable Doubt*, 108—9). Lists of the five categories could vary somewhat, see e. g. the list in the *Sea of Precious Virtues*, which has no "neutral" but does have "*sunna.*" Meisami trans., *Sea*, 254.

34 For the two latter examples see Chapter 1.

35 Compare Brundage, *Medieval Origins*, 3, 75—6, 105, 217, 231; Kuttner, *Kanonistische Schuldlehre*, 2—27, 40, 59—60; Mäkinen and Pihlajamäki, "Individualization," 531—2, 536.

36 Horn, *Mirror of Justices.*

37 Compare Greene, *Moral Tribes*, 55—6.

on earth as a botched version of what was to come in the afterlife – as we will see in a number of examples. However, the necessity to justify oneself in some way remained. Moreover, in practice, justifications directed to the afterlife judge ended up being delivered to members of the community. The fact that some of the guardians of doctrine insisted that one could not fool God in the same way that one could fool the community, testifies to the fact that people tried precisely that. From the idea that there was a continuum between enforcement in this world and the next, it was not a huge step to the idea that divine law and human law are both inventions to safeguard the continuation of the community. This step was taken in Europe in the last century of the period under investigation. As we shall see in Chapter 1, Italian and French homosexually inclined libertines of the early seventeenth century saw divine law and human law both as human inventions, while they embraced the laws of nature as a force in itself.

Communities in both worlds sustained a group of men who saw it as their task to remind people of the divine rules and to interpret and define those rules, and whose authority to do so was widely recognised, though at times contested, as we will see in the chapters. Who were these men that I shall sometimes refer to as the guardians of divine law? Among Sunnis in the Persian world, and the Muslim world more generally, it was the class of alims, or "the knowledgeable," who claimed all authority in matters concerning sharia, since any authority that the caliphs once exercised in this matter had long vanished.[38] Sharia was among the standard subjects in which all alims were trained. As we shall see, however, some Sunni Muslim rulers also tried to have a say in matters regarding divine law, and in that way put themselves forward as guardians. Among Twelver Shi'is the alims were seen as the placeholders of the hidden twelfth Imam as far as the authority to interpret went. However, as Chapter 1 will elaborate, over the last century of our period, there was a growing divergence between the two main interpretative schools in Twelver Shi'ism over the extent to which the alims had interpretative authority. In Pre-Reformation and Catholic Europe it was quite clearly the churchmen, be they priests, monks, bishops etc., and in final instance church councils presided over by the pope as well as the pope himself, that held the authority to define and formulate. Some of these men were especially trained in canon law, or canon and Roman law (as "doctors of both laws"). In Post-Reformation Europe new Church organisations were quickly established, and all manner of ministers put themselves forward as theologians with something to say on divine law. The great reformers themselves played a dual role, arguing against the old guardians but quickly becoming guardians in their own right. Some Protestant rulers

38 Crone, *Roman, Provincial and Islamic Law,* 15—6.

also tried to have a say in matters of divine law, making moves not unlike some Sunni rulers as we shall especially see in Chapter 3.

The developments of the relation between the Church and the state and between the alims and the state in the respective regions have been the subject of a great number of studies and it is not possible to recapitulate the nuances and variations in the space available here. With regard to the alims, some have emphasised their independence and ability to stand up to rulers and mitigate what an older generation of scholars saw as the despotism of Muslim rulers. This more recent trend in scholarship has emphasised the need of Muslim rulers to co-opt the consent of this section of the elite. Other scholars have emphasised the extent to which the alims depended on the state for official positions and finances, especially in the second half of our period.[39] Much has been made of the fact that the Church – and later, Churches – in Europe were institutions, which fact guaranteed a measure of independence, and how this contrasted with the situation of the alims, who formed a self-selecting body (through a system of "permissions" to practice as such) but not an institution. Most recently the old argument that the two domains remained inseparable in the Muslim world was revived by Shahab Ahmed.[40] I agree with Ahmed that it is difficult to separate the religious from the secular for the period with which we are concerned, but would argue that this goes for both the regions that we are concerned with and not just for the Persian-Muslim region, although there were differences of degree.

Firstly, not too much should be made of the opposition between the ordinances issued by secular rulers and administrators on the one hand and sharia and canon law on the other. As we will see in the sections on definition and enforcement in the chapters, rulers and administrators at various levels often issued orders that incorporated and specified divine law.

In the Persian world some rulers seem to have seen it as *wajib*, obligatory, to enforce divine law by backing it up with ordinances. Modern scholars generally use the term *qanun* to distinguish the body of royal or imperial ordinances, but those often explicitly presented themselves as sharia compliant.[41] In the chapters we will encounter such ordinances from throughout the region and period. The

39 Compare Matthee, *Pursuit*, 10, 95—6; Gerber, *State, Society, and Law*, 106; Anooshahr, "Muslims among Non-Muslims"; Lefèvre, "Beyond Diversity," 121.

40 Ahmed, *What Is Islam*. For an influential older articulation of this argument see Huff, *Rise*, 91—148.

41 For the (best-researched) Ottoman case see Gerber, *State, Society and Law*, 62 and passim, and Burak, *Second Formation of Islamic Law*, 19 and passim. For a brief comparison with the Mughal empire, see Heyd, *Studies*, 317—8. See also Ahmed, *What Is Islam*, 459—60.

complex relation between sharia and the *a'in* or regulations instituted by the Mughal emperor Akbar will be discussed in Chapter 3.

Similarly in the Latin world, as we will also see in the chapters, many of the God-given rules were not only enshrined in canon law but laid down in statutory laws and ordinances throughout the region over this period and thus made more easily enforceable on earth. Precisely at the start of our period Innocent III or his staff launched the maxim that "it is in the interest of public utility that crimes do not remain unpunished."[42] This allowed the Church to put pressure on secular bodies to enforce its canons. As we will see in Chapter 3 the Church put strong pressure on secular governments to enforce the proscription of usury, most explicitly around 1300, and the ordinances enacted by governing bodies regarding interest long continued to pay lip-service to divine law, though sometimes in an oblique way. The pressure by the Church to prosecute transgressions of divine law may also have worked itself out in city magistrates deciding to prosecute transgressions of divine law themselves precisely to get out from under the claims of jurisdiction of ecclesiastical courts.[43] Sometimes divine law was also enforced by secular administrators simply as customary law, without recourse to any written ordinances. This may have been the case for a few instances relating to sodomy in German regions before the ordinances of Charles V were enacted in 1532.[44] And even a few decades later, in Calvinist Scotland, which had no statute on sodomy, secular administrators were able to convict two men on the ground that their acts were "in contrare to the laws of God, and all other human laws."[45]

Secondly, the jurisdictions of secular courts and the courts officially reserved for divine law often overlapped. In both worlds we do see a rudimentary division of labour concerning the nature of the crimes/sins and the types of punishment they entailed, but we also see many cases that did not fit this division.

In the Persian world the courts of qazis, who belonged to the alims and in theory dispensed sharia justice (although they sometimes explicitly drew on *'urf* or custom) saw many kinds of cases, but so did the various kinds of state officers and rulers themselves who dealt with cases on the basis of custom or ordinances (but might also draw on sharia as far as that was not already laid down in ordinances). Sodomy seems to have typically been assigned to qazis, but we will encounter a fictionalised story of a king deciding the fate of a sodomite on the basis of sharia and the Mongol ruler Ghazan punishing sodomites in accordance

42 Pennington, "Innocent III"; Mäkinen and Pihlajamäki, "Individualization," 531.
43 This much is suggested for the case of late Medieval Fribourg by Patrick Gyger, *L'épée*, 28—34.
44 Puff, *Sodomy*, 27—30.
45 Hume, *Commentaries on the Law of Scotland,* 2: 335—6. See also Crompton, *Homosexuality*, 384 and compare Beam, "Consistories," 67—8.

with both sharia and *yasa*, the customary law attributed to Chinggis Khan. In the Mughal empire by the end of our period there seems to have been an attempt at a formal division between the sort of matters that were to come before a qazi and those that were to be handled by imperial officers, but any accused would also have to show a certain willingness to submit to sharia to qualify for a qazi trial.

In Europe canon law was applicable to lay persons as well as the clergy until well into the period under consideration, and the limitation of canon law to clergy is of later date. Whether ecclesiastical courts or secular courts were responsible again often depended on the nature of the matter. Yet in some matters, for instance usury, canonists were willing to allow prosecution before secular courts on the basis of the definitions laid down by the canonists. Sometimes jurisdiction depended on both the nature of the matter and the nature of the person, as was the case with usury in England. There, the Church and the king seem to have come to the arrangement that living suspected usurers fell to the ecclesiastical courts and dead suspected usurers to their feudal overlords or the king (who could sequester their property if found guilty).[46] Sodomy was, at least in the first half of our period, considered a crime/sin that could be tried by both types of court. With the Reformation in parts of northern Europe the courts anchored in the hierarchy of the Catholic Church disappeared, but they were replaced by various other institutions like the Calvinist consistory chambers consisting of one or more ministers and elders that could discipline their own congregation members. Their jurisdiction encompassed many of the matters that had previously come under the ecclesiastical courts, including sexual transgressions but not sodomy.[47]

Thirdly, the differences between the two worlds in the means and methods of enforcement should not be overstated. In both worlds it mostly came down to secular governing bodies to bring the unwilling to any sort of court, and the severest punishments were always executed by the secular administration. In this respect the Church in the Latin world relied as much on secular power as the alims in the Persian world. Sharia jurists did explicitly leave the duty of "commanding the praiseworthy and banning the proscribed" up to individuals who were not part of the state hierarchy, and we will see how they elaborated this for cases of attempted sodomy in Chapter 1. But in Europe too, people took the enforcement of divine law into their own hands on occasion. An example are the mobs that sought to enforce the command against idolatry in the mid-sixteenth century.

46 Helmholz, "Usury," 365.

47 Parker and Starr-LeBeau eds., *Judging Faith*, 5, 43, 68 (contributions by Margo Todd, Sara Beam, and the editors).

Why These Three Proscriptions?

Why focus on the proscriptions of sodomy, idolatry, and usury? First of all, they are all attested in the Torah (or at least people in the period under consideration thought they were) and elaborated by Christian and Muslim theologians and jurists over our period, as the sections on definition and enforcement in the chapters will show at some length. But why not focus on murder and theft, laid down in the Ten Commandments, and also represented in all Christian and Islamic iterations of divine law? While specialists of divine law also spent much energy on delineating exactly when the killing of humans was justified and they could also think of justifications for stealing, on the whole, these two proscriptions are still regarded as standing in both the Western and Muslim worlds today. Yet in the period between 1200 and 1700 reasoning on the basis of the consequences of acts (consequentialism) as opposed to evaluating acts on the basis of their inherent goodness or badness (deontology) was already eating away at the taboos on anal or same-sex sexuality, image-making and interest-taking, as Chapter 4 will argue at length. And consequentialism has become, in the words of Julian Baggini, "the implicit ethic of our time."[48]

It was precisely because people in this period sought to understand why these three activities were proscribed, and the answer was not evident, that they came to be lumped together. In the Christian imagination of this period, these three vices were closely associated with each other, since they were all seen as involving carnality, and "the flesh" was again associated with many evils by theologians. Moreover, from the mid-thirteenth century, when Thomas Aquinas was active, there was a growing concern with natural justice, and numerous theologians and jurists came to see these sins as against that. The associations were summed up by the commentator on canon law Panormitanus, active in the first half of the fifteenth century: "whenever humans sin against nature, whether in sexual intercourse, worshipping idols, or any other unnatural act, the church may always exercise its jurisdiction…For by such sins God Himself is offended, since He is the author of nature. This is why Jean Lemoine felt…that the church could prosecute usurers and not thieves or robbers, because usurers violate nature by making money grow

48 Baggini, *Without God*, 117. I do not intend to reify consequentialism as a doctrine in itself in such a way as Quentin Skinner detects and criticises in the work of many historians of ideas. Instead, I see it as one among a limited variety of ways in which rules can be interpreted that can take many forms depending on the ultimate values to which it is attached (such as: the common good, individual well-being, aggregate well-being, abstaining from harm etc.). I elaborate this point in Chapter 4. See Skinner, *Visions*, 1: 57—89. Compare Dworkin, *Justice*, 18, 260, 273, 281, 285—7, 293—5.

which would not increase naturally."[49] By the end of our period, however, usury was no longer regarded in this way, but sodomy still was.

Similarly, in the Persian world, Sufis, in particular the *zahid*s or self-proclaimed ascetics and guardians of divine law amongst them, advocated the taming of the *nafs* or lower soul as the source of lust. Self-proclaimed profligates, on the contrary, ridiculed this attitude and associated idolatry with sexual transgression in the figure of the forbidden beloved who was often male and worshipped like an idol. An example of such a playful interlinking, which also draws in the proscription of usury, takes place in a poetic description of Agra, one of the Mughal capital cities, written by the Iranian migrant and poet laureate of the empire Abu Talib Kalim Kashani in the second quarter of the seventeenth century:

> When will the money-changer idol [*but-i sarraf*], with a hundred coquetries,
> Look again at the cash of our hearts.
> Before his face, a customer's pile of gold
> Cannot measure up.
> What can a lover's gold do for this haughty one?
> What trick [*hila*] can work on this skilled one?

The genre, as Sunil Sharma argues, is *shahrashub*, a description of the beautiful boys (or sometimes girls) in a city, who are always merciless on the men smitten with them. This particular boy is tempting like an idol and approaching him requires recourse to a legal stratagem or *hila*, just as the practice of usury did – and usury was often practiced precisely by *sarraf*s. The three forbidden things are here subtly hinted at and linked together, creating a mildly seedy atmosphere of illegal lust.[50]

Consciousness

As Charles Taylor points out in his essay "To Follow a Rule…," it is easy for a social scientist to fall into the trap of attributing consciousness. What looks to the social scientist like an articulated rule because everyone is doing something a certain way, may not be so. With reference to the theories of Pierre Bourdieu, Taylor argues that much comes down to habitus: the way that things are done that is not necessarily articulated.[51] Attributing consciousness where there may not have

49 Quoted in Boswell, *Christianity*, 331. Translation as there.

50 Sharma, "The City of Beauties," 75—6. Translation as there, brackets added.

51 NB Taylor does not use the term "consciousness" but rather "articulation" or "representation." Taylor, "To Follow a Rule…," 37—43.

been any is obviously something that we want to avoid here. But the historical situations we will be looking at are different: the rules we are investigating *were* articulated and upheld by the guardians of doctrine, as the sections about definition in each chapter show. What remains to be investigated is the extent to which the general public were conscious of these rules and what individual actors understood by them.

What makes such questions so hard to answer is that writings of the period too often consciously or unconsciously assumed the rules along with the whole context that we are no longer familiar with. Fortunately, there are cases where a source articulates the relation of a particular rule to a particular act. Such cases in which an agent was seen to be conscious of the tension between the law and her/his practices are crucial for this study. We need to look more closely at efforts to make transgressions acceptable as the moment in which people were forced to confront the divergence between their aims and the aims that their environment imposed on them. It is at this point that Sally Engle Merry's concept of "legal consciousness" assumes its importance.[52] The term denotes how non-jurists envisage law in general or certain injunctions in particular. With this concept our investigation turns to how ideas landed on the street, becoming a history of ideas in practice.

At the same time I want to deemphasise the contrast between the theory of the rule and its practice, since, as we will see in many examples, the rule was transformed in each instance in which it was enacted or stated.[53] What I am interested in here is not the gap between the rules as they are found in the authoritative texts and what people were doing, but in the consciousness of the actors that there was a gap between a certain definition of the rule and what they were doing. This is where justification comes in. Over the past decades Rainer Forst has written important work about justification, asking what it is, where we find it, and why we need it. He sees justification as part of practice but also as transcending practice. The transcending takes place when generally practiced norms are reflected upon anew, and in the process the norms get changed.[54] Here we are mainly interested in those creative moments when individuals engaged with norms.

This study will situate those moments at which individuals tried to justify themselves as much as possible in what we know of the biography of those individuals and their general social context. For instance, the chapter on sodomy situates any justifications for what seemed to approach sodomy in what we hear

52 Merry, *Getting Justice*.
53 Compare Taylor, "To Follow a Rule...," 40—1.
54 Forst, *Normativität*, 40—1, 46—7, 52, 100—1.

about the involvement of the justifiers in male-male relationships. The modern scholar Claude Summers remarks about one such justifier, the late sixteenth-century poet Richard Barnfield, that a crucial misunderstanding of his biography contributed to obscuring the significance of his main work as a statement against the proscription of sodomy.[55] The chapter on idolatry focuses partly on justifications by the very makers of works of art that ran the risk of being seen as idolatrous, in other words: on the people for whom art was part of their daily life. In the chapter on usury we will see how the personal networks and responsibilities of rulers and theologians played a great role in the extent to which they were prepared to justify usury. In that chapter especially we will see the extent to which the guardians were entangled with certain interest groups.

In order to facilitate the comparison, I have classified the ways in which transgressions were justified into four categories. As Bourdieu has pointed out in a brief passage, it makes a great difference to human societies with what intention someone breaks the rules.[56] The following discussion is partly inspired by that passage and partly by what I have found among all the material presented in the next chapters. In distinguishing the four categories much depends on the point of view of the observer. While my classification is a toolbox for a modern analysis, it builds on contemporary observations and vocabulary. How was the transgression presented? How was the intention of the transgressor represented? Did the observer and the observed agree that it was a transgression? The four-fold classification I propose is based on two criteria: whether or not a perceived breach was presented as abidance, and whether or not the perceived transgressor explicitly opposed his view to the views espoused by certain self-proclaimed or official guardians of the moral-legal system that the rule belonged to. The first criterion, the presentation of the transgression in confrontations with the rule, is quite straightforward and creates the two possibilities of a performance of abidance or no performance of abidance. The second criterion concerns the relation between the transgressor and the guardians of the system and recognises how closely our moral standards and reasoning are tied to our identities. It is about contestations over the ownership of value systems, or in the words of Joshua Greene, our being "moral tribes." I am presenting the four modes or categories here briefly since the chapters are loosely organised along the lines of these four modes of transgression.

"Stridency" openly transgresses both the rule and the system, or sometimes merely claims to break the rule in order to oppose the system. In the period

55 Summers, "Foreword."

56 Bourdieu, *Outline*, 40—1.

1200–1700 his kind of transgression could be part of a lifestyle that came to be called *rindi* ("profligacy") in the Persian world, and *libertinage* in the Latin world, as Chapter 1 will elaborate. Another relevant term is "antinomian," coined by Luther to describe those who entirely rejected the role of the law of the Old Testament in salvation, but often used by scholars to describe *rind*s and Sufis of a similar persuasion in the Persian world.

"Compensation" is the breaking of a rule without any attempt to present the breach as abidance, while still paying respect to the moral-legal system (and sometimes literally paying). As we shall see, even when the transgression was manifest or plain for all to see, there were still strategies available to make it acceptable to the community. An interesting list of ways a transgressor might compensate is given in the advice text *The Sea of Precious Virtues* (*Bahr al-Fawa'id*) written around 1160 for the Seljuqs in Syria. The text presents a conversation between Moses and God about admitting Israelites to Paradise. God suggested that people might compensate for wronging other people by contenting Him in four ways: "remorse in the heart, seeking forgiveness on the tongue, tears in the eyes, and many acts of obedience."[57] Pierre Bourdieu speaks of the well-meaning rule-breaker. More recently, experimental psychologists have shown that a transgressor who appears to be embarrassed is liked better than one who does not appear embarrassed, because embarrassment seems to signal a genuine desire to behave differently in the future.[58]

"Circumvention" is a special kind of transgression in that it is constituted in the mind of the transgressor and in the perceptions of his thinking. Circumventors pay respect to both the rule and the system but go ahead nonetheless. They may or may not share the interpretation that others around them give to the rule, but their (perceived) intention is to break the rule as others see it and yet they present the breach as both abidance by the rule and abidance by the system of which the rule is a part. In other words: there is a divergence between form and intention, between the form of adherence and the intention of not adhering. Circumvention does not contest the definition of the rule, but it can work to alter the general understanding of the rule. In that way circumvention could work to redefine the rule eventually. Modern scholars have asked whether we should take a broader view of for instance the definitions of usury and consider various loopholes and legal tricks as "incorporated into doctrine."[59] One has to investigate very closely the stated intention of the legal specialists who created these provisions as well as the

57 Meisami trans., *Sea*, 108—9. Translation as there.

58 Bourdieu, *Outline*, 40—1; Greene, *Moral Tribes*, 46.

59 Horii, "Reconsideration," 313 and passim; Todeschini, "Usury"; Munro, "Usury, Calvinism and Credit."

statements about the suspected intentions of those who made use of these provisions. Simply asking the question whether these provisions *were* loopholes, as the economic historian John Munro does (and answers negatively), is to ignore the dimension of intention which was so important to contemporaries.

"Exception" is both transgression and abidance. It takes the rule to a higher level of abstraction by relating it to certain principles. The exception presents itself as abidance by the rule, yet it undermines the system. The exception-maker opposes his view of the essence and applicability of the rule to current authoritative views, and in that way transgresses the system but not the rule. In exception-making the boundary-keeper and transgressor coincide. The boundary-keeper consciously becomes the boundary-determiner that every self-perceived boundary-keeper in our analysis always is anyway, since every enactment of the rule redefines it. In other words: the exception-maker contests the definition of the rule and in that way exception-making is a stage in the redefinition of the rule. As with the formalist loopholes, modern scholars debate whether the application of ethical principles to certain sharia and canon law rules should be considered internal to the juridical discourses they are studying or external to them.[60] Let's say that when an argument for exception becomes accepted by the guardians of the system it becomes part of the definition of the rule. Here, however, we are interested in the moments when the exception was (still) contested.

These four broad modes of transgression represent shades rather than bounded categories. The distinction between circumvention and stridency for instance is difficult to maintain as far as the homo-erotic poetry of both the Latin and Persian worlds is concerned. The skilful use of ambiguous language by the wordsmiths of both worlds often made both a norm-compliant and norm-deviant reading possible. Chapter 1 will elaborate how circumvention and stridency were interwoven by these poets. Another example is the phenomenon of *hila*s, or jurist-approved tricks in the Persian world. I will discuss where we might place this phenomenon on the scale of transgression and abidance in the chapter on usury. The categorisation is not a goal in itself but merely intended to make the comparison as explicit as possible.

60 For recent interventions in these respective debates see Katz, *Wives and Work*, 22, 208—11 and passim, and Todeschini, "Usury," 124 and passim. See also Chapter 3.

Organisation of the Book

It is easy to miss the justifications in the sources. We need to read widely and closely. Many secondary sources only refer to justifications obliquely. This is because many historians see the rules of divine law as irrelevant to premodern life, as already noted in the Preface. Also, while reading the primary sources we want to take care not to attribute consciousness where there is none, as just discussed. Moreover, transgressive voices were often silenced in the primary sources, so we need to read in a particular way, "against the grain." Chapters 1 and 4 will develop this point further. So the first task of this book is to locate any potential justificatory strategies.

The body of the first three chapters is therefore made up of many mini-excavations of particular cases. I have had to make a selection from the vast amount of secondary literature on the sexual, economic, and art history of the period as well as from the potentially relevant primary sources. While the potentially relevant secondary sources and published primary sources for the Latin world are overwhelming in number, they are often too sparse for the Persian world. For the latter I have even had to go to some manuscript sources. In the face of these challenges, it has been impossible to cover all corners of the two worlds. These first three chapters are not intended to present exhaustive histories of everything people saw as sodomy, idolatry, or usury. Instead, the goal has been to find as many different ways of justification as possible. I have tried to represent the full range of justificatory strategies in both worlds. Also, I have made an effort to cover the whole period with respect to this range, so as to be able to show developments in the ways of justifying transgression.

These first three chapters start the comparison from the Persian world perspective, and then move on to the Latin world. This order takes seriously the advice of Chakrabarty to "provincialise" Europe by not using European history as the measure of all other history. During the writing process, however, my investigation has been a back and forth between Persian and Latin worlds. Once I had found a particular strategy in one world, I set out to find it in the other, partly through secondary sources and partly through promising primary sources of all genres. Taking types of strategies as a starting point rather than types of sources has made it possible to put side by side startlingly similar viewpoints coming from people with very different backgrounds. Surprisingly, it was only rarely that I found a particular strategy in one world but not in the other. Yet this posed another challenge. As always, showing that something is not there is far more difficult than showing that it is there.

These chapters on sodomy, idolatry, and usury present the four broad categories outlined above in the following order: circumvention, exception, compensa-

tion, stridency. The reason for this order is that it is necessary to first understand how circumvention of each of the proscriptions worked, because circumvention engaged with the form of the rule. Next, we can understand the engagements with the substance of the rule that exceptions represented. Only when we understand how people treated the form and substance of the rules in question can we understand how and why compensation was made possible or not. Strident transgression, finally, often built on the other strategies.

The chapters on sodomy, idolatry and usury also each contain sections devoted to "a short history of definition and enforcement." These introductory sections provide a simplification that is a necessary starting point to the following case by case discussions of the continual redefinition and shifts in enforcement. To be sure, I do not see enforcement as separate from definition. While all instances of definition were not instances of enforcement (a point that is much belaboured in the literature that emphasises the distinction between theory and practice), all instances of enforcement were instances of definition. Quite obviously, every time people sought to enforce a rule, they also made it clear what their idea of that rule was.

Each of the first three chapters also draws particular attention to one of the major themes of this study. The sodomy chapter presents a first exploration of the workings of legal consciousness. The idolatry chapter investigates how spatial boundaries were used to demarcate the possibilities for transgression, especially how private spaces were created away from the gaze of the guardians of divine law. The usury chapter looks especially into the complicity of law-makers in the process of transgression.

The fourth chapter brings out the parallels between the regions along with some divergences. It seeks to distinguish long-term and short-term trends in the two worlds, especially in the faring of tolerance, formalism and consequentialism. This chapter also compares the relative acceptance of justifications for sodomy, idolatry and usury within the respective regions, and tries to explain the differences in the level of acceptance for the three proscribed practices. Finally, the chapter returns to the question of consciousness.

The Coda, at the end, discusses my stake in the investigation and relates the findings to present-day issues. It briefly engages with the ideas of some modern scholars, including Hannah Arendt and David Graeber, about the role of rules and authority in twentieth- and twenty-first-century life. Despite the changes in the place of law and authority since the period this book looks at, some of the voices from that era still resonate with us and can be building blocks for an ethics for today.

1 Justifying Sodomy

"he estimated that, maybe, from mediocre poet he could become grand legislator"
Jean-Louis Guez de Balzac about Théophile de Viau, 1623[1]

Introduction

In both the Christian and Islamic traditions, the name of the crime/sin under consideration here derives from the story, first mentioned in the Torah, of Lot or Lut, who is considered a patriarch in Christianity and a prophet in Islam. The stories as found in the Old Testament and the Quran have lent themselves to multiple interpretations as to what the sin was that God punished the tribes- or townsmen of Lot for, but by the beginning of our period the dominant interpretation in both traditions was that divine proscription of male-to-male intercourse was the key to the story.[2] On the basis of this view, sharia jurists, probably a few generations after Muhammad, developed the term *liwat* or *liwata* for the proscribed act from the root letters of the name *Lut*.[3] Somewhat later but also before our period, Christian theologians developed the term *sodomia* from the name of the town that Lot resided in according to the Bible.[4] In parallel, *luti*, "belonging to the tribe of Lot," and *sodomita*, "belonging to Sodom," became the terms for the perpetrators of the proscribed act. These two relatively late concepts continued to develop alongside two concepts that *are* mentioned in the Quran and the Vulgate Bible respectively, namely *fahisha*, "abomination" and *contra naturam*, "against nature."[5] Moreover, around the beginning of our period, two vernacular counterparts to *sodomia* arose that might just then denote both heresy and sexual transgression: *bougerie* in French, which yielded the English "buggery," and *ketzerei* in German.[6] Somewhat similarly, before our period, some Shi'i jurists started to call one particular form of male-male intercourse *kufr* or unbelief, but this application of that term seems to have gone out of use by the end of our period, just as the German *ketzerei* (but not the English buggery).

1 Quoted in Godard, "D'*Alitophile*," 552.

2 For an elaborate treatment of past as well as possible interpretations of the story in a Christian and Islamic framework respectively see Boswell, *Christianity*, 91—8, and Kugle, *Homosexuality*, 49—63.

3 Kugle, *Homosexuality*, 50, 64, 81, 88, 138, 140, 281 n.33.

4 Norton, "The 'Sodomite' and the 'Lesbian'."

5 See Kugle, *Homosexuality*, 63—5; Boswell, *Christianity*, 110—3.

6 Puff, *Sodomy*, 12—4; Mills, *Seeing Sodomy*, 71, 127.

 https://doi.org/10.1515/9783111218014-004

A question that all studies touching on sodomy and *liwat* grapple with is what the relation of these concepts is to the modern concept of homosexuality. My short answer is that though over time and space and between individuals the definitions of sodomy and *liwat* and their derivatives and cognates shifted considerably, a steady factor was a link to conceptions of same-sex, and particularly male-to-male, intercourse and inclination. In this chapter I have followed the legal definitions of sodomy and *liwat* where they took me, but the bulk of the justifications I found indeed concerned male-to-male eroticism and sex acts, rather than the other issues to which the definitions extended at times. This chapter is emphatically not a comparative history of all aspects of male-to-male love and intercourse in the Persian and Latin worlds, as I want to concentrate on the kind of cases that demonstrate a level of legal consciousness, as outlined in the Introduction.

To be sure, there were norms other than legal norms that played a role in whatever level of social tolerance there happened to be for male-to-male intimacy and/or intercourse in certain periods and places within the Judeo-Christo-Islamic world. Particularly important were norms of masculinity, honour and hierarchy. Many (but certainly not all) of the male-male relationships took the shape of affairs with an age gap between a senior "active" partner and a junior "passive" partner. Much has been written about why this was the case, and numerous studies conclude that concepts of masculinity rendered such affairs more or even completely acceptable, because the masculinity of the mature man was not infringed by his being the "active" partner. Nor was the masculinity of the "boy" – as long as he was not in a position to object within the patriarchal structure of society or participated only for advantages other than sexual gratification.[7] While it is necessary here to point out this structuring of many homosexual relationships in our period, as well as the perception of this structure as a pattern by contemporaries, this aspect was, as we shall see, only relevant to jurists and judges in so far as it affected the capacity of the hierarchically inferior person to exercise freewill.

Even in times and places where the construction of male-male relationships as hierarchical may have contributed to social acceptance because in that way the initiators of such relationships did not contest patriarchy, legal norms remained to be dealt with. In fact it was often in places where contemporaries registered the highest tolerance for man to boy intimacy that there was also intense legal activity. I am thinking here of Renaissance Europe, and northern Italy in particular, and the Persian world in general throughout our period. Renaissance Florence was known

7 See Andrews and Kalpaklı, *Age of Beloveds*; El-Rouayheb, *Before Homosexuality*; Chatterjee, "Alienation"; Fisher, "Peaches and Figs," 161; Penrose, "Colliding Cultures."

throughout Europe as a place that tolerated sodomy, even while the city government produced statute after statute proscribing sodomy.

Scholars have attempted to resolve this paradox by suggesting that people were in some way able to ignore the proscription, either on the individual or societal level. Arguments about ignoring the proscription on an individual level have been put forward for both Europe and the Muslim world. An oft cited study is that by Alan Bray, who argues that in Renaissance England "the individual could simply avoid making the connection; he could keep at two opposite poles the social pressures bearing down on him and his own discordant sexual behaviour, and avoid recognising it for what it was."[8] In their groundbreaking comparative study of erotics in the Ottoman empire and Europe over the long sixteenth century, Walter Andrews and Mehmet Kalpaklı put forward that Bray's point equally applies to Ottoman society in the same period. The question remains how this avoidance of connecting the putative poles of behaviour and proscription would work.

In his equally groundbreaking and much cited *Before Homosexuality in the Arab-Islamic World, 1500–1800*, Khaled El-Rouayheb has proposed that the ignoring took place on a societal level.[9] The introduction to the book suggests that many of its points may be valid for Turkey and Persia in the same period, and it has also been cited with respect to Muslims in South Asia. The book constructs three spaces or "cultural strands" for the perception of what the modern observer might want to call homosexuality but contemporaries did not, it is argued, perceive as a single phenomenon: a space where intercourse between a boy and an older penetrator was regularly consummated with impunity; a literary space where the beauty of boys could be appreciated by men; and a legal space where the act of anal intercourse between males was proscribed along with everything that might be construed as a slippery slope leading towards it. To be sure, El-Rouayheb nuances the completeness of any such separation of spheres, writing that "ordinary believers seem to have been able to acknowledge the religious authority of the jurists while at the same time resisting a wholesale adoption of their austere outlook and way of life."[10] I think that the "resisting" of the "austere outlook" was a complex affair that by its very dynamics drew the legal sphere deep into social life, and vice versa.

This debate ties in with another debate in the study of past same-sex intercourse that centres on the questions of whether any or all premodern people

8 Andrews and Kalpaklı, *Age of Beloveds*, 301—2.

9 El-Rouayheb, *Before Homosexuality*.

10 El-Rouayheb, *Before Homosexuality*, 150.

had sexual orientations, and if so, whether there were people who had a concept of such orientations. It is customary to start a discussion on these questions with a reference to the work of Michel Foucault, who is often cited for his view that before the mid-nineteenth century same-sex sexuality could only be conceived of as an act or a series of dissociated acts without, as the critic of this view Kenneth Borris puts it, "any cumulative personal significance or implied sexual identity."[11] The Foucault-inspired view is still widely propounded in scholarly debates, for both Europe and the Muslim world.[12] A few years ago, when I gave a talk about this subject, a scholar from the audience, coming from that broad view, suggested that my search for strategies was pointless: "what if there were no strategies?" Clearly in a view of premodernity where there were no people with a sexual preference, and sex acts were just things that happened between bodies and not in minds, there would be no room for strategies. I hope this chapter will show that, to the contrary, there was much conscious strategising. Chapter 4 returns to the question of orientation.

In any case, the more evidence becomes available – and it has been almost forty years since Foucault published his views – the less tenable his "acts paradigm" seems. As Bruce Smith points out in his study of homosexual desire in Shakespeare's England, Foucault chose to focus on three kinds of discourses he distinguished: juridico-political, moral, and medical. He largely ignored literary evidence: the fictional, poetic, imaginative. Yet, as Smith remarks, "we miss this imaginative dimension to sexual experience if all we attend to is moral discourse, legal discourse, and medical discourse with their narrow interest in sex as a physical act."[13] Other modern observers steeped in literary sources, such as the Italian historian Giovanni Dall'Orto, also reject the Foucault-inspired narrowness of vision. A careful examination of the evidence from medieval European visual culture by Robert Mills similarly dissolves some of the salience of the acts paradigm while reaching even further back in time.[14] Going a step beyond Smith, also in the course of investigating literature in Elizabethan England, Borris argues that rather than seeking some definite point of departure, such as mid-nineteenth or late seventeenth-century Europe, we should take into account that "capacities for attaining awareness of personal sex difference may well have varied greatly according to

11 Borris provides a useful short summary of the debate which too often focuses on what Foucault supposedly intended, rather than on what can be found in the sources. Borris, "'Ile hang a bag'," 236—44.

12 The studies most often cited for Europe in this respect are those by Bray on England and Michael Rocke on Renaissance Florence. For the Muslim world El-Rouayheb's study is always cited.

13 Smith, *Homosexual Desire*, 14—5.

14 Mills, *Seeing Sodomy*, 243—97.

class, education, familial circumstances, contacts, and size of local population."[15] Such a sensitivity to historical developments like urbanisation, economic growth or decline, and the circulation of people and texts, opens up the way for global comparison.

A Short History of Definition and Enforcement in the Persian World

The definition and implications of the "deed of the people of Lot" or *liwat* had already been subject to debate among sharia jurists for centuries before our period.[16] In the debates over the crime/sin some nine passages from the Quran and up to two dozen Traditions about Muhammad and his Companions were cited by Sunnis, while the most authoritative Shi'i collections recognised at least two relevant Traditions about Muhammad and three Reports about the Imams.[17] To give one example from just before the beginning of our period: the stern Sunni advice text *The Sea of Precious Virtues* listed seven places from the Quran and eight Traditions about Muhammad and his Companions in its condemnation of sodomy.[18] However, verses from the Quran could be perceived as abrogated and around the Traditions a whole body of scholarship had developed that sought to separate the reliable from the less reliable or forged. There was debate between the major schools of law and to a lesser extent also within the schools about many aspects of *liwat*. Below I will try to briefly sketch the divergence of opinion within the Central and South Asian branch of the Hanafi school, which followed in the footsteps of the eight-century scholar Abu Hanifa. Still more briefly I will try to outline how the Twelver Shi'i or Ja'fari school diverged from that.

Among Sunni jurists, a consensus seems to have been reached before our period that *liwat* was male-to-male anal penetration. However, different emphases could be laid in this definition. Emphasising the "anal" entailed associating male-to-female anal penetration with *liwat*, and emphasising the all-male aspect of the definition sometimes entailed associating other male-to-male sexual or erot-

15 Borris, "'Ile Hang a Bag'," 237, 243—4.

16 For a useful overview of the early debates see Kugle, *Homosexuality*, 33—186. For an overview of the debates as they crystallised in the Arabic-speaking parts of the Ottoman realm in the early modern period see El-Rouayheb, *Before Homosexuality*, 118—28.

17 For modern discussions of some of the relevant quranic passages and Traditions see Kugle, *Homosexuality*, 33—127 and El-Rouayheb, *Before Homosexuality*, 124—6. For the authoritative Shi'i collections see www.hadith.net under "sodomy."

18 Meisami trans., *Sea*, 103—5.

ic acts with *liwat.*[19] Jurists of the Central and South Asian branch of the Hanafi school of law seem to have leant towards emphasis on the "anal."

Well before our period, jurists of all schools had discussed the relation of *liwat* to *zina* (fornication and adultery). This was important because *zina* was one of the crimes that carried a divinely ordained punishment or *hadd*, namely death by stoning. On the eve of our period, Marghinani's *The Guidance* (*al-Hidaya*) defined *zina* as follows: "penetration by a man of a woman in the front side without ownership [of such access] and without the *shubha* [justified yet erroneous belief] of ownership [of such access]." By limiting the definition of *zina* to frontal or vaginal intercourse, the early Hanafi jurists whom Marghinani was following had excluded all anal intercourse from the category of *zina.*[20] Over what the penalty for *liwat* was to be then, there was disagreement. There were both Hanafi jurists advocating some form of death penalty and those advocating milder punishment, and these opinions were often cited side by side.

Marghinani endorsed the opinion of Abu Hanifa that the "act of the people of Lot" was not subject to *hadd* punishment, but also gave an overview of the debate. Abu Hanifa had pointed to the difference of opinion (*ikhtilaf*) over the punishment between the Companions of Muhammad. The punishments they had prescribed, ranged from putting the sodomite to the fire, collapsing a wall on him, or throwing him headlong from a high place followed by raining stones on him. This unclarity had been the ground for Abu Hanifa to conclude that no *hadd* had been established. Besides the opinion of Abu Hanifa, Marghinani also cited two opinions he rejected. The first was by Shafi'i, the eponymous founder of the second most important school of law in the Persian world. He argued that the death penalty applied regardless of the status (married, slave, etc.) of the involved because according to a Tradition Muhammad had said "kill both the doer and the done [i.e. penetrator and penetrated]" or "stone both the upper and the lower." Marghinani further cited the opinion of Abu Hanifa's two main disciples. Against Abu Hanifa's formalist argument that there was no *hadd* because there was no agreement on what form any *hadd* punishment should take, the disciples argued that the "act of the people of Lot" was linked to *zina* in substance (*ma'ni*), and therefore *hadd* did apply.[21]

Towards the end of our period the *Alamgirian Rulings*, compiled by jurists under the auspices of the Mughal emperor Aurangzeb Alamgir, also presented

19 El-Rouayheb, *Before Homosexuality*, 131.

20 Marghinani, *Hidaya*, (Arabic) 2, 344—6, (trans. Nyazee) 2: 211—5. Translation substantially modified from Nyazee's translation. Compare Azam, *Sexual Violation*, 173—5.

21 Marghinani, *Hidaya*, (Arabic) 2: 346—7. Nyazee's translation, 2: 214—5, omits and adds from/to this passage. See also Hamilton's translation, 185.

the opinions of Abu Hanifa and the disciples side by side, but attempted to reconcile them. The work discussed anal penetration of boys and women together but reserved the term *liwat* for the former. Unmarried men should be submitted to both *ta'zir*, that is, variable chastisement to a maximum of thirty-nine lashes, and imprisonment until they would repent. Married men should be subject to *hadd* punishment, but again not if the anal penetration was committed with one's own male slave (*'abd*), female slave, or wife. This would be on the authority of "many" jurists, i. e. the ones from the Central and South Asian branch of the Hanafi school that the *Alamgirian Rulings* usually cited. It also added on the authority of the fifteenth-century Egyptian Hanafi jurist Ibn al-Humam that if a male had made a habit of *liwata* he should be killed regardless of whether he was married or not.[22] The relatively strong emphasis on the death penalty for *liwat* in the *Alamgirian Rulings* came after the scholar of Traditions Abd al-Haqq of Delhi had called for severe punishment in the early part of the seventeenth century,[23] which perhaps explains the recourse to the opinion of a stern jurist from outside the Persian sphere.

In the Latin world there was, as we will see, a lively interest in the question why God had forbidden sodomy (or not), and the answer was arrived at by looking at what was "natural." For Sunnis the way to asking the "why" question was beset by hurdles left over from the backlash against the rationalist philosophers in the Caliphate in the second half of the ninth century. Those philosophers had been trying to match and supplement divine law as it could be established through the study of statements in the Quran and Traditions with eternal principles of good and evil. But over our period some theologian-jurists created a renewed space for a "positivist soft naturalism," as Anver Emon puts it.[24] With respect to sodomy we find little evidence of legal reasoning on the basis of nature or universal principles. The only example I found was from the theologian-jurist Fakhr al-Din Razi of the Shafi'i school, active in Iran and Afghanistan at the beginning of our period. He argued that the act of the people of Lot was evil (*qabih*) for six reasons. Apart from it being bestial, shameful and pathogenic, the main reasons had to do with the necessity of perpetuating mankind and with Razi's concept of nature (*tabi'at*). In Razi's view, God had made intercourse pleasurable in order to trick people into procreating and therefore he needed to proscribe the way to obtain that pleasure without the possibility of procreation. Also, "masculinity is presumed to act, and femininity is presumed to be passive, so if the male becomes passive and the fem-

22 Shaikh Nizam et al., *Fatawa,* (Arabic) 2: 213, (Urdu) 3: 256.

23 Vanita and Kidwai eds., *Same-Sex Love*, 111.

24 Emon, "Natural Law and Natural Rights"; Compare Hallaq, *Sharī'a,* 57—8, 120, 503; Shihadeh, *The Teleological Ethics.*

inine active, this is contrary to the requirement of nature, and contrary to divine wisdom." It followed that the passive party, if a male, would feel his nature infringed and want to kill the active party, and it was obligatory to encourage the passive party to do that (we will return to legal but extrajudicial killing below). If the act occurred between a man and a woman, nature was evidently not inverted in Razi's view, since for that he merely prescribed the obligation to guide the man back to intimacy, desire and the achievement of the greater goods (*al-masalih al-kabira*).[25]

Related to the question of whether there was a divinely ordained punishment for *liwat* on earth was the question of whether it was a major sin (*kabira*). Such a sin would be punished with hellfire in the afterlife if it was not repented. It could not be offset by deeds to one's credit such as prayer, fasting, profuse almsgiving, pilgrimage or generally making an effort to obey the law.[26] On this too there was some room for divergence of opinion, also because there was no agreement on how many major sins there were. Around 1160, the *Sea of Precious Virtues*, which aimed at holding a balance between the Shafi'i and Hanafi schools, squarely classed sodomy with the major sins and cited a number of Traditions relating to the punishment, more severe than that for fornication, awaiting sodomites in hell.[27] The Sufi and Shafi'i alim Ali Hamadani, active in Central Asia and Kashmir two centuries later, in his book of advice for Muslim kings also classed *liwata* with the major sins, if one counted their number as seventeen.[28] The prominent Indian Hanafi jurist Muhammad ibn Tahir Patani, in his 1551 work about Traditions that he considered fabricated, however, rejected two Traditions according to which Muhammad had said that those engaging in male-to-male intercourse would burn in hell, as well as another one in which he said that *luti*s would be raised on judgement day in the form of monkeys and pigs. Yet, less than half a century later the alim Abd al-Qadir Badauni, who opposed what he saw as the heterodoxy of the Mughal ruling class of his day, clearly associated the pursuers of beardless-boys with hell.[29]

In any case it appears that many in the Persian world thought repentance necessary. The section on compensation further discusses repentance (*tauba*). Here I merely want to note that the opinion expressed in the *Alamgirian Rulings* that

25 Razi, *Tafsir*, 14: 175—7; Compare Omar, "Semantics to Normative Law," 237. On Razi's use of the *maslaha* (pl. *masalih*) concept see Emon, *Islamic Natural Law,* 34, 146—50, 156.

26 Kugle *Homosexuality,* 86, 289 n.36; El-Rouayheb, *Before Homosexuality*, 118, 138—9; Meisami trans., *Sea*, 100—8.

27 Meisami trans., *Sea*, 103—4, 332 n.26.

28 Hamadani, *Zakhirat,* 51—2.

29 Kugle, *Homosexuality*, 85—8; Ishaq, *India's Contribution*, 124—7; For Badauni's views see below.

an unmarried man found guilty of *liwat* should be confined till he would repent, represents an interesting intermingling of this-worldly and next-worldly justice. By forcing the person to do *tauba* (which would have entailed both being repentant and vowing to abstain from the act in the future), the judge would be saving the person from punishment in the afterlife.

The role of voluntariness or intention seems to have been important in the definition of *liwat* by Central and South Asian Hanafis in our period.[30] The two main disciples of Abu Hanifa had given intention a central place in the definition of *zina:* "the gratification of lust in a location that is penetrated in a complete way in the face of complete prohibition as to the intention [*qasd*] of spilling semen." The disciples had argued that this linked the substance of the "act of the people of Lot" to *zina.* As we saw, Marghinani disagreed, adducing two arguments of his own about the substance of *zina* and coming up with a vagina-specific definition. He did, however, maintain an emphasis on intention also for the "act of the people of Lot." In his view, one of the differences in substance between that and *zina* was that: "the initiative [*da'iya*] is from one of the two sides while the initiative in *zina* is from both sides."[31] This accords with the formulation of the crime in the *Alamgirian Rulings*, which was also only concerned with the active male. In principle thus, for Persian world jurists of our period, the *luti* was a man who intended to penetrate and achieved that aim, and the penetrated male was not supposed to be prosecuted.

However, writers of advice literature in the period 1250–1350 also saw men inclined to being penetrated as punishable, either in this world or the next. Later on in this chapter, we will see how the famous writers Sa'di and Rumi treated the *mukhannas* or man inclined to being penetrated. While Rumi only mildly condemned, Sa'di was merciless. The way the moralist/jurist and historian Barani presented the lives of two slaves who were the beloveds of two successive sultans of Delhi is also a case in point. The first slave was a eunuch whom Barani portrayed as co-initiator of the intercourse he had with the sultan. Barani called him a *mabun*, i.e. a catamite or a person inclined to passive homosexual intercourse, and called his *mabuniyat*, i.e. his inclination to be anally penetrated, a moral defect (*naqs*). The second slave, a boy, not a eunuch, detested being penetrated by the sultan and was constantly plotting to kill the sultan and managed to do so in the end. Barani used all manner of invective for him as well as the term *maf'ul*,

30 For the disagreement on this point among Arab jurists of the different schools see El-Rouayheb, *Before Homosexuality*, 136—7.

31 Marghinani, *Hidaya*, (Arabic) 2: 346—7.

"the done," but not *mabun* or *luti*.[32] Thus even slaves could be perceived as having the choice to at least direct their intention.

Moreover, giving occasion to *liwat* was also problematised. The enormously influential Shafi'i jurist and thinker Muhammad Ghazali who was active a century before our period contemplated whether the sale of a young male slave was legal if one had an intimation that the buyer would use the slave for illegal purposes. The twelfth-century Hanafi-Shafi'i *Sea of Precious Virtues*, which heavily relied on the work of Ghazali, saw such a sale as unlawful. By the end of our period the *Alamgirian Rulings* discussed Ghazali's scenario in a chapter on discouraged sales, that is, sales that are not strictly forbidden in the sense that they can be prosecuted in a law court but nevertheless are likely to carry consequences in the afterlife. There it is stated that: "the sale of a beardless youth [*al-ghulam al-amrad*] to one of whom one knows he disobeys God is discouraged."[33] In the same line of thought, catamites and their facilitators were often the target of ordinances to put a stop to sodomy, as will be seen below.

There is no space here to discuss the variety of the opinions of Twelver Shi'i jurists as elaborately as those of the Hanafis, but their debates seem to have revolved around some of the same issues. Yet while the Hanafi jurists emphasised the "anal" aspect of *liwat*, the Twelver Shi'i jurists seem to have emphasised the all-male or same-sex aspect more. This had two important consequences. First of all, Shi'i jurists at the beginning of our period seem to have seen anal penetration of an appropriate woman (married to or slave of the penetrator) as not completely forbidden. This kind of intercourse is one of the points of contention in Abd al-Jalil Qazwini's refutation of an anti-Shi'i tract, called the *Book of Refutation* (*Kitab al-Naqz*). His Sunni opponent alleged that Shi'is deemed *liwata* with a permitted woman neutral. Qazwini was forced to admit that Shi'i jurists were divided on this issue and classified such intercourse somewhere between permissible and discouraged, though not as neutral. Yet Qazwini rejected his opponent's use of the term *liwata* for anal intercourse with permitted women.[34] The other consequence of the Shi'i emphasis on the same-sex dimension was that non-penetrative male-male intercourse was seen as approaching penetrative intercourse in gravity, and also deserving of heavy punishment. In fact, foundational jurists of the tenth century referred to penetrative male-male intercourse as *kufr* or unbelief and reserved the term *liwat* for interfemoral (between the thighs) male-male inter-

32 Barani, *Tarikh*, 337, 368, 375, 381—409; Vanita and Kidwai eds., *Same-Sex Love*, 131—5.

33 Meisami trans., *Sea*, xii—v, 140; Shaikh Nizam et al., *Fatawa*, (Arabic) 3: 270, (Baillie, *Law of Sale*) 305. The reference there is to Ghazali's *Khulasa* or *Synopsis*.

34 Qazwini, *Naqz*, 613—6.

course. But by the seventeenth century, when the originally Lebanese jurist Muhammad al-Hurr Amili was active in Iran, *liwat* clearly connoted penetrative male-male intercourse, just as it did with the Hanafis.[35]

Turning to issues of enforcement, it needs to be mentioned that prosecution of sexual crimes on the basis of sharia was generally very complex. Especially for *zina,* strict requirements had been put in place by generations of jurists. It seems to have been commonly agreed that four witnesses, who met a number of requirements and who had witnessed the deed without anything obstructing their view of the body parts involved were necessary. Whether prosecution for *liwat* required the same strict procedure depended on one's view of the relation between *zina* and *liwat.* For some of Hanafi jurists who held that *liwat* was to be punished by *ta'zir* the requirement seems to have been for two witnesses.[36] Moreover, in general, rulers were not to pry into the forbidden acts of their subjects beyond the doorstep of the house, which meant that forbidden acts committed there remained to be dealt with by God. The next chapter will elaborate this important distinction between public and private spaces.

The potential for prosecution was occasionally enhanced by ordinances, especially in Iran in the last two centuries of our period, but there is less evidence of government-backed enforcement than in Latin Europe. Also, I found only one instance, in an early twelfth-century satirical poem, of the idea that God would punish whole communities with calamities if there were sodomites among them.[37] This idea was often a stimulus for enforcement in Europe. However, just as in Europe there were considerable regional differences as well as shifts over time. Here I will briefly present some of the fragmentary evidence that can be found for what level of government enforcement there was.

Interesting ideas touching on legal consciousness in different layers of the population float around in Qazwini's *Book of Refutation.* On the eve of our period, Qazwini aimed to refute the accusations levelled against his creed by an anonymous recent convert to Sunnism from Shi'ism,[38] and in the course of his refutation cited this anonymous opponent at length. At one point the tract that Qazwini sought to refute is quoted as alleging that Shi'is practiced *zina* and *liwata* publicly in plain daylight (*naharan-jaharan*) in bazars and alcohol-taverns. This would at first sight seem to support the idea that the legal sphere was separate from daily life. However, the same quoted text goes on to note that the Shi'is "would make

35 Rowson, "Homosexuality II: Islamic Law"; El-Rouayheb, *Before Homosexuality,* 121—2, 127, 129; Long, "'They Want Us Exterminated'," 6.

36 Hallaq, *Sharī'a*, 312—5;

37 See Sprachman, *Licensed Fool*, 86—7.

38 For a discussion of both authors see Gleave, *Scripturalist Islam*, 16—21.

a judge sit down so that he keeps on mitigating [sentences for] drinking alcohol and *zina* and *liwata.*" This again would indicate a high level of consciousness of how sharia worked with regard to these proscriptions on the part of the lay populace, besides a certain level of enforcement.[39]

Ghazan Khan, a Mongol ruler of Iran who converted to Islam in 1295 was praised by his minister and chronicler Rashid al-Din, himself a convert to Islam from Judaism, for his enforcement of the proscription. As per the latter, Ghazan issued ordinances in the Mongol form of the *yarligh* to forbid "sodomy, transgression, and immorality [*liwat wa fisq wa fujur*]" and "ordered that several people who were settled [*mu'aiyan*] in this sin [*gunah*] be given the public punishment [*siyasat*] required by both sharia and *yasaq.*"[40] Hanafi jurists considered the administration by the government of *siyasa* punishment a matter of course for habitual offenders of all sorts, and it was often understood to be the death penalty, but not necessarily so by this time.[41] The *yasaq* or *yasa* was the unwritten code attributed to Chinggis Khan.

Another heir to both the *yasa* and sharia traditions, the Turco-Mongol conqueror Timur was also said to have enforced to proscription in two rather diverse sources. In the early fifteenth century, John of Sultaniya, the Dominican monk and archbishop of Sultaniya in Azerbaijan who acted as Timur's envoy to Western Europe, emphasised that the latter was a good Muslim who prayed five times a day and was chaste and bent on severely punishing Muslims who practised "the sin of sodomy." This remark certainly speaks to our comparison between the Latin and the Persian worlds since the envoy was evidently trying to present Timur as understandable and laudable to a European audience.[42] But Timur was also remembered and/or celebrated as a ruler who strictly enforced the proscription by a Muslim author in the Volga basin in the early nineteenth century.[43]

Male prostitution and its facilitation were the specific target of legislation in Safavid Iran. In the first decade and a half of his long reign starting in 1524, Shah Tahmasp issued some strict ordinances in the form of royal *farmans*. In one such ordinance, inscribed on a marble slab at the Safavid dynastic shrine in Ardabil, Shah Tahmasp forbade anyone to go against "any command from among the commands of sharia [*amri az umur-i shari'a*]." The text proceeds to a

39 Qazwini, *Naqz*, 97—8.

40 Rashid al-Din, *Jami' al-Tawarikh*, 2: 1188.

41 Johansen, *Contingency*, 401—6.

42 The Latin translation of the French text added that Timur berated Christians for their practice of sodomy. [John of Sultaniya], "Mémoire sur Tamerlan," 462; Casali, "John of Sultāniyya."

43 Kemper, *Sufis und Gelehrte*, 336—44.

number of examples of forbidden acts such as shaving the beard, playing backgammon, and "the service of the beardless boys [*amrad*] in the bathhouses."[44] It is unclear if the ordinance pertained only to Ardabil or also to the rest of the realm. It was probably during a visit to the pilgrimage destination of Mashad that Tahmasp publicly repented his sins such as wine-drinking and decided to purge that city of "all blameworthy activities that cause good government to founder." To this effect he issued a number of *farman*s for Mashad and the remainder of Iran which included a ban of prostitution by both women and boys, and set the death penalty for not obeying the ban. Regarding street entertainers he ordered that they should not have boys over twelve with them and that beardless youths and women should not be present at their performances. A century later, in the sixteen-thirties and 'forties, two successive prime ministers again issued ordinances banning both female and male prostitution.[45]

Evidence for the enforcement of the ordinances on male prostitution or the proscription of sodomy in general in Iran is scant, however. Persian chronicles claim that Shah Tahmasp did enforce aspects of the ordinances related to his repentance with severe punishment and that the *muhtasib* (sharia compliance inspector) and *darugha* (policeman) were feared at this time. In that period there was also a high-profile case that ended in the burning of an office-holder who had conducted an affair with a young man who happened to be a servant of the Shah. A century later in another high-profile affair a provincial administrator was castrated upon being accused of sodomising a boy by the boy's parents. In the second half of the seventeenth century the French Huguenot merchant and traveller Jean Chardin reported that the latest ban on boy prostitution had been seen to be enforced by impaling pimps of boys. He also observed more generally that while some Muslim denominations, especially that espoused by the Turks (i. e. Hanafis), held "the sin against nature" to be permitted, and used that permission to a great extent, the Persians (i. e. Shi'is) condemned it and their magistrates sometimes punished it. A French Carmelite missionary to Isfahan in the 1670s observed that sodomy was punished by caning the foot soles.[46]

Evidence for any prosecution in South Asia is even more scant, but there are a number of indications that it was occasionaly punished, and increasingly so from the middle of the sixteenth century onwards. The authorised chronicle of the reign of the Mughal emperor Akbar contains some four episodes in which the young em-

44 The date of the *farman* is either 1526 or 1536. The text can be found in Torabi-Tabataba'i, *Asar Bastani-i Azerbaijan*, 2: 142—5 and Ja'fariyan, *Din wa Siyasat*, 439—40. A discussion and (different) translation is in Rizvi, *Safavid Dynastic Shrine*, 95—8, 203—4.

45 Matthee, *Pursuit*, 74—6; Floor, *Social History*, 329—30.

46 Matthee, *Pursuit*, 77—9; Floor, *Social History*, 329—31; Chardin, *Voyages*, 2: 216—21.

peror chastised office-holders for improper relations with boys. These events seem to have taken place before Akbar distanced himself from the more orthodox among the alims in 1579. In the chronicle, written well after that date, Akbar's intervention is not cast in terms of sharia but as the emperor frowning on *khaba'is* or impurities deriving from Transoxiana that distorted the good judgment of the officers. It is nevertheless possible that the measures were presented as enforcement of sharia at a time when the emperor had not yet openly distanced himself from orthodox interpretations of sharia.[47] It seems that the emperor and his confidant Abu'l-Fazl in the later phase rephrased certain shariatic proscriptions in new terms. This will be discussed more elaborately with reference to the proscription of usury.

It appears from various sources that at the end of our period, during the long reign of Mughal emperor Aurangzeb, sodomy was expected to be dealt with by either qazis or by imperial administrators. Aurangzeb was keen to cast himself as an upholder of sharia. He sponsored the compilation of the *Alamgirian Rulings* and in 1679 recreated the institution of the *muhtasib*, which had lapsed since the days the Delhi sultanate.[48] Newsletters from the court show that already in 1667 Aurangzeb sent officers to inquire as to why a particular officer was engaging in drinking and sodomy, at the request of the mother of that young officer.[49] A 1672 ordinance to the imperial officers in the province of Gujarat that laid down which offenses were to be punished in what way by imperial officers and which offenses were to come under the purview of a qazi, stipulated that catamites (*ighlamiyan*) and sodomites (*lutiyan*), along with a string of other offenders against sharia who had nevertheless "in deference returned to it," were to be dealt with in accordance with the order of a qazi. This suggests not only that such offenders might come before a qazi court, but also that they might prefer a qazi's verdict to the sort of punishment that the imperial officers might mete out.[50] At the very least, it suggests that those (with a reputation for) engaging in male-to-male sex acts were at that time supposed to come under the purview of the administrators of law and that Aurangzeb's ban on sodomy was not confined to the imperial entourage.[51]

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47 Compare O'Hanlon, "Kingdom," 917—22; for a different view see Chatterjee, "Alienation," 66—7.

48 Malik, *Islam in South Asia*, 194—6.

49 Sangar, *Crime*, 187.

50 *Farman* dated 29 Safar 15 *Julus* in Khan, *Mirat-i Ahmadi*, 1: 277—83 (especially point 28).

51 By contrast, Katherine Butler Brown argues that Aurangzeb's ban of instrumental music, which the emperor at some point in his life seems to have considered to be unanimously regarded as *haram* by Hanafi jurists, was confined to the imperial entourage. Brown, "Did Aurangzeb Ban Music?," 101 and passim.

That Aurangzeb's reign was viewed as a high watermark in the enforcement also of the proscription of sodomy we can see in the work of the satirist Ja'far Zatalli, who survived Aurangzeb into the second decade of the eighteenth century. Zatalli's Urdu and Persian poem entitled *Debate of the Cock and the Cunt* (*Munazara-yi Kir-o-Kus*), thematised the fear of a particular qazi named Nazir. While the cock and the cunt are disputing their superiority, the cunt brings forward that the cock would be nowhere without her and that having recourse to an arse (*kun*) instead is not an option because penetrating an arse would be disgusting and painstaking, and if the cock were to persevere despite these (graphically described) disadvantages the cunt would report that to qazi Nazir:

> At this point the poor cock fell silent,
> Since qazi Nazir is a roaring lion.
> ...
> Afraid of the name of that virtuous man,
> Of necessity he made peace with the private part cunt.

And that is the end of the debate. It is possible that we are to read the dread of qazi Nazir satirically as well as the victory of the cunt, and that Zatalli implied that Nazir was actually a rather feeble qazi. Nevertheless, the concepts of fear, the judge, and anal intercourse are connected in this poem.[52] Moreover, in a lengthy Urdu poem entitled *Gand-maravva Nama*, or the *Book of Arse-fuckery*, Zatalli lampooned the reign of Aurangzeb's immediate successor Bahadur Shah as a free-for-all:

> The qazi's order, the *muhtasib* have lapsed,
> Put your heart in it and play arse-fuckery.
> From your preceptor and father and teacher,
> Hide and play arse-fuckery.[53]

The text thus suggests that while the state was no longer after the *luti* in the post-Aurangzeb era, the upholding of sharia was once more left to patriarchal structures.

And that is precisely what has been overlooked in the secondary literature: the approval for, and legality of, the extrajudicial killing of the active party after or before the act. It is in this light that we must see Barani's description of the death of the sultan at the hands of his beloved slave-boy turned high-ranking officer. Barani graphically described how the boy took the initiative to have himself penetrated

52 Zatalli, *Zatalnama*, 178—180.

53 Naved, "Erotic Conceit," 155—61 (translation slightly modified).

one last time in order to stop the sultan from escaping his coup plot, and then kept hold of the sultan's private parts while a co-conspirator shot the sultan and proceeded to lop off the parts, apparently his just desert in Barani's view.[54] Also in India, but later, in the seventeenth century, the French traveller and gem merchant Jean-Baptiste Tavernier came across reports of an incident involving a young servant of a Mughal infantry commander at Patna. Tavernier used it to make the point that "the crime of sodomy does not go unpunished among the Muslims." The commander wanted to have his way with the boy, but the latter had been warding off his attempts and had even complained to the governor, saying that if the commander tried again, he would not fail to kill him. Finally, however, the commander did get his way when the two were in a country house. Sometime later again, while they were out hunting, the boy took his revenge and killed the commander, rode to town shouting along the way that he had killed his master on account of sodomy, and presented himself to the governor. The governor had him imprisoned but released him again after six months, despite the efforts of the kin of the commander to have him executed, because "he feared the people who believed that the young boy had acted rightly."[55]

The frame of reference for the people who believed the boy had acted rightly would have been the concept of "commanding the praiseworthy and banning the proscribed" which can be traced to the Quran. We already saw that by the beginning of our period the Shafi'i theologian-jurist Razi was of the opinion that it was every man's duty to support the "done" in killing the "doer." Around the same time, the *Sea of Precious Virtues* noted that Abu Hanifa and Shafi'i agreed that lethal force was allowed in commanding the praiseworthy if all else had been tried. The text gives a number of examples of such cases. The first among these is, "if a master is seen committing sodomy with his slave he should be prevented; if he does not heed, so that he is killed, no talion is required." In other words: the death penalty did not apply to such killings. It is noteworthy that this discussion of killing in the name of commanding the praiseworthy immediately follows a discussion of killing in self-defence and that these two topics are united in one section. For the author they apparently both constituted exceptions to the proscription of killing. The rationale for the exception of killing a sinner in the course of commanding the praiseworthy is given by the author as: "since he does not respect the Law, the Law does consequently not respect him."[56]

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54 Barani, *Tarikh*, 407—8.

55 Tavernier, *Les Six Voyages*, 2: 76—7. For a different take on this passage (based on the incomplete English translation of it by Ball), see Chatterjee, "Alienation," 68.

56 Cook, *Forbidding Wrong in Islam*; Meisami trans., *Sea*, 131—3. Translation as there.

As we see in this example from the *Sea of Precious Virtues*, time was a crucial factor: some jurists reserved punishment after an act for the state, but in cases where one saw a wrong in preparation, under certain conditions the individual was to take action to prevent it.[57] The *Alamgirian Rulings* noted on the authority of two sixteenth-century jurists from the Arabic regions of the Ottoman empire as well as a much older but relatively obscure collection of Traditions that it was permitted to kill a person who with oppressive force would commit a major sin (*al-mukabir bi'l-zilm*) as well as those aiding him, and that the killer would be rewarded (in the afterlife). The *Alamgirian Rulings* also related a response to a legal question by the jurist Abu Ja'far Hinduwani, who was active in Central Asia before our period and nicknamed the minor Abu Hanifa. The question was whether a man was allowed to kill a man that he caught with his wife. The answer was that if the husband knew that expostulation and beating would suffice to forestall future acts of *zina* it was not permitted to kill the second man, but if he knew that only killing the second man would forestall future *zina*, then killing was permitted, and if the wife were consenting to the *zina* she should be killed too.[58]

Once more we see here the importance of intention in the legal thought of the era. Everything in Hinduwani's *fatwa* depends on intention: the intention of the fornicator to persist or desist in the future, the estimation of that intention by the husband, and whether the husband's intention in killing is to prevent future *zina.* The obvious difficulties in establishing the intention of sodomy gave rise to much ambiguous play in poetry, which we will come to shortly. But for all its playfulness we must not lose sight of the facts that the poets appear to have been highly conscious of the legal limits and of the possibility of the pre-emptive strike, and that there were real cases of prospective sodomites being struck down for their intention.

Among the documented casualties of such pre-emptive strikes were poets but also a violin player, military men, and administrators. I will mention them in chronological order. In mid-sixteenth century Iran there was the mysterious death by "falling off a roof" of the poet Hayrati, who was originally from Marv in northern Khurasan and known for his boy love. Some forty years after his death the censorious North-Indian Sunni alim and chronicler Badauni associated him with hellfire for having left the path of sharia along with his homeland Transoxiana and having

57 Cook, *Forbidding Wrong in Islam*, 24—5, 34 and passim.

58 Shaikh Nizam et al., *Fatawa,* (Arabic) 2: 247, (Urdu) 3: 285. The two (Arabic) jurists that the text refers to seem to be Zain al-Din Ibn Nujaym and his pupil Muhammad Tumurtashi. For their views see El-Rouayheb, *Before Homosexuality*, 130—3. For Hinduwani see Burak, *Second Formation of Islamic Law*, 76 n.23.

joined "the beardless-boy-believers [*kuhna mu'minan*] of the Iraq." [59] His death brings to mind the environment of sixteenth- and seventeenth-century Ottoman poets, of whom at least three seem to have died at the hands of the boys they were chasing.[60] In this period in Iran we find the cases of Buraq Khan and the violin player Malik Qasim Kamancha, who were both stabbed by boys they were approaching in the night. It was also recorded that when Shah Abbas I was told by one of his *ghulam*s that a kinsman of the Shah was in love with him and had offered him money to give in to his desires, Abbas gave the boy a sword and told him to cut the man's head off.[61] The most elaborate example is once more provided by Tavernier. The event occurred when he passed through Burhanpur in North-India. The governor of the town who was a nephew of the emperor kept a beautiful young page who was of a good family. Once the governor was fondling the boy and making moves to have intercourse with him. The boy went to his brother who was a respected dervish (Sufi espousing poverty) who gave him a knife and told him next time to pretend to be giving in and then to strike. And so it happened. The boy left the palace before the killing was detected and his brother organised a rally at which many turned up to demand that the governor's body be fed to the dogs rather than buried among Muslims. That demand was not met, but the emperor Shah Jahan did give the page a small district in Bengal to administer and draw an income from.[62]

Circumvention in the Persian World

Under this heading come three broad strategies that stretched the interstices of existing definitions to their formal limits. These are: confounding the gender of the beloved; claiming chastity or partial chastity; and making use of the institution of slavery.

Mystical experience in the Persian world often took the shape of gazing at a beautiful beloved who was either identified with or seen as a manifestation of the divine; the beloved was to be a *shahid* or witness of God's eternal beauty. A very substantial part of Persian poetic output over our period takes this form, but the adoration of beautiful *shahid* boys also found expression in real life. Cru-

59 Note by the editor in Sam Mirza, *Tuhfa-yi Sami,* (Patna ed.) 43 n.1; Rypka, *History of Iranian Literature*, 298—9; Badauni, *Muntakhab*, 2: 272.

60 Andrews and Kalpaklı, *Age of Beloveds*, 251—4, 266.

61 Floor, *Social History*, 325—7.

62 Tavernier, *Les Six Voyages*, 2: 32—3. NB the English translation by Ball omits a large part of this story.

cial to these mystical pursuits was the claim that the love for the beloved remained chaste.[63] This claim found support in a Tradition that seems to have circulated widely even though it was deemed inauthentic by a number of jurists. According to this Tradition Muhammad said: "He who loves and is chaste and then dies, dies a *shahid*," or "he who loves and is chaste and conceals his secret and then dies, dies a *shahid*." Thus both the gazer and the gazed-upon could be a *shahid*, which in the context of dying is usually translated as martyr rather than witness.[64] There remained endless controversy over how gazing at boys was to be experienced since it approached the proscriptions of both sodomy and idolatry. At the beginning of our period the Iranian Sufi Ruzbihan Baqli noted how the tension created by sharia heightened the experience of the chaste gazer, "the journey of the lovers is nothing but Reality, and the collyrium of their eyes is only the dust of the street of sharia."[65]

The environment in which such gazing was experienced was often the all-male environment of the majlis, a poetic/festive gathering, or the Sufi hospice, yet the gender of the beloved was frequently disguised. Much of Persian and Ottoman poetry (which had been strongly influenced by Persian poetry) is "androgynous," and it is difficult to tell whether the beloved who is addressed by the love-sick poet is male or female, also because the Persian language does not reveal gender (except in some words with Arabic roots). Andrews and Kalpaklı argue that this androgynous poetry was the translation or manifestation of a general blindness among adult men to the gender of their potential intimate partners. This would have been especially true in the period of the rise of absolutist court culture in the long sixteenth century.[66] We do, however, need to take into account that this kind of ambiguity of the gender of the beloved had been a feature of Persian poetry centuries before. More pertinently, we must not overlook the possibility that there were many who were not indifferent to the gender of the beloved, but who employed ambiguity as a strategy to deflect criticism of impropriety. This could have worked two ways: heterosexual intercourse outside of marriage was after all also legally problematic. But since in the case of a female beloved there was at least the potentiality that the love-sick poet was intending to marry the

63 For two brief overviews see Vanita and Kidwai eds., *Same-Sex Love*, 115—7 and Schimmel, "Eros," 130—41.

64 Schimmel, "Eros," 133. For the controversy over this tradition among Arab jurists of the period see El-Rouayheb, *Before Homosexuality*, 87—8, 95, 139—42. Translation modified from there.

65 Cited in Schimmel, "Eros," 133. Translation as there.

66 Andrews and Kalpaklı, *Age of Beloveds*, 21, 261, and passim.

woman in question,[67] the greater benefit/advantage of such a strategy would have been on the side of those inclined to boys.

As the literary scholar Mahdi Tourage notes, one of the most widely read Persian poets of the thirteenth century, Rumi, rejected the androgynous model, but his relation with the male loves of his life remains a matter of endless speculation. Rumi's great love was the mature Shams-i Tabriz, who in his diwan of poetry appeared as Yusuf, the biblical Joseph who in the Islamicate tradition is a paragon of male beauty and attractiveness. The affair seems to have created a stir in the circle around Rumi. The modern scholar of Sufism Annemarie Schimmel, who devoted much of her work to Rumi, was adamant that there was a physical dimension to the relationship between Rumi and Shams which can be pointed out in the diwan. After Shams was murdered or disappeared, Rumi had two more male loves, of increasingly young age, but not of the beardless kind.[68]

In a passage in his other great work, the *Masnawi*, Rumi seems to poke fun at the model of beardless boy-love. It presents the story of two brothers, one beardless (*amrad*) and ugly, the other beautiful but with four hairs on his chin (*kusa*). They come to stay in a house for bachelors and the beardless boy finds it necessary to put up a wall of twenty bricks behind his behind, but still a *luti* stealthily starts to remove that in the middle of the night. They start arguing and the boy explains that he is not safe anywhere from men or women wanting to get into his pants, and that even in a Sufi convent, men who are of good repute (*namusi*) steal glances while rubbing their penis. The boy reaches the conclusion that three or four hairs on the chin are better than thirty bricks behind the arse, and Rumi transforms that conclusion into an analogy about how the light of knowledge of the divine is better than mere performance of prescribed rituals.[69]

The passage points to Rumi's consciousness of the legal and colloquial markers of *liwat.* In it, Rumi put forward a number of elements that distinguished the *luti:* he was focussed on the anus and did not care about consent, which meshed with many legal definitions, and he was vile and after the immature, as per the colloquial stereotype. In the *Masnawi* there are two more passages in which Rumi seems to make fun of or condemn the desire for anal intercourse by the *luti*

67 Ghazali saw the option of marriage as one point on which lust for females and males diverged and should be treated differently. Floor, *Social History,* 307—8. Jami considered the sorrows of family life to be "the punishment for the execution of legally permitted lusts." Cited in Schimmel, "Eros," 127.

68 Tourage, *Rūmī*, 166—8; Schimmel, *As through a Veil,* 84—93; Wafer, "Vision and Passion," 125—7; The "adamance" I noticed at an oral presentation by Schimmel around the year 2000.

69 Rumi, *Mathnawi*, book VI: verses 3843—4.

and the *mukhannas* (effeminate man inclined to being penetrated by males).[70] He also remarked in more than one place that the common association of Sufis with stealing upon boys or *liwata* more generally was unfortunate since the real Sufi sought purity.[71] Clearly Rumi conceived of his own love for Shams, Salah al-Din and Husam al-Din as different from such desire for anal intercourse and stealing upon boys: either they were entirely spiritual (as many modern commentators against whom Schimmel was arguing like to believe) or they were physical to an extent but without anal intercourse. In various places Rumi suggested that he slept naked with a beloved, or had his garments torn in a beloved's presence.[72] But that does not mean that the line was crossed. In his diwan, Rumi suggested it was an effort for him not to cross certain lines when faced with his beloved:

> Yesterday your intoxicated dream image came with a cup in his hand.
> I said: "I don't drink wine!" He said: "Don't do it then [but] it is a pity!"
> I said: "I am afraid that if I drink, shame will fly out of my head,
> And I may put my hand on your curls, and then you'll again recede from me."[73]

This notion of abstention from transgression in the face of temptation was, however, under constant suspicion. Rumi himself noted that the common folk thought that Sufism meant nothing but wearing patched garments and sodomy.[74] Rumi's contemporary Sa'di of Shiraz put forward a scenario where a man would manage to restrain his raging lust despite having a moon-faced beauty within reach (in a closed apartment, his friends asleep, and the guardian of the beauty not objecting). According to the story, an alim gave the following opinion on this scenario: "even if he remains in safety from the moon-faced ones, he will not remain so from the evil speakers."[75] In other words no-one was going to believe a story of abstinence (*parhizgari*) in such a scenario.

In his *Gulistan* or *Rose-garden*, Sa'di has a chapter devoted to "love and youth," in which he has a number of stories about love affairs between men and between men and boys. Most of these are very light and positive in tone. Some of these sto-

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70 See Shamisa, *Shahidbazi*, 125. For discussions of the term *mukhannas* in Arabic and Persian see Kugle, *Homosexuality*, 91—7; El-Rouayheb, *Before Homosexuality*, 16—22; Sprachman, *Licenced Fool*, 151 n.15; Mahdi Tourage suggests that for Rumi the *mukhannas* was not only an effeminate man but also, or primarily, an intersex person. Tourage, *Rūmī*, 164—6.

71 Rumi, *Mathnawi*, book V: verses 363—4; Shamisa, *Shahidbazi*, 123; Wafer, "Vision and Passion," 126.

72 Schimmel, "Eros," 137.

73 Cited in Schimmel, *As through a Veil*, 99. Translation as there.

74 Rumi, *Mathnawi*, book V: verses 363—4.

75 Sa'di, *Kulliyat*, 94—5 (*Gulistan*, Chapter 5 story 12).

ries are presented as autobiographical. He even described a promise to "one of my friends," after a night spent in a garden, as the occasion for writing the *Rose-garden.* The description of the garden, has the subtlest of hints at intimacy, with its entangled trees and glass-like droplets scattered on the ground. In the morning his friend had gathered flowers in the hem of his robe, but he scattered them while hanging on to the hem of Sa'di's robe when the latter promised a more lasting *Rose-garden.* This is all mildly suggestive, but like Rumi, Sa'di clearly drew a line at anal penetration, as we will see further on. How did people read Sa'di's description of his night in the garden then? We have a clue in the depiction of this story probably made by the (Hindu) Mughal court painter Govardhan four centuries later (fig. 1). As Mika Natif argues, this depiction is full of sexual symbolism. Much attention goes to the groin areas of both men. Standing to the right, Sa'di draws attention to his own with his left hand, while his friend grasps Sa'di's robe close to that area, meanwhile pouring the flowers from his own groin area suggesting ejaculation. The longing gaze of the friend completes the picture.[76]

Despite Sa'di's warning Sufis continued to develop the notion of purified intention in defending practices that were frowned upon by those of a stern bent. These practices included the whole complex of listening to musical recitation (*sama'*) and the gazing at and ecstatic dancing with boys that this often entailed. According to one of his disciples, Burhan al-Din Gharib, a fourteenth-century Indian Sufi of the Chishti order, graded the purity of the participant's intention on the scale of lawfulness that sharia provides: it was permitted when one longed only for God during the participation; it was neutral when one longed mostly for God and only a little for a this-worldly person; it was discouraged when the longing was more for such a person than for God. Finally, the longing was forbidden when it was only for a person, but not if that person was "a permitted [woman] or a slave girl [*kanizak*] that one owns oneself," in which case it was neutral. Gharib's four-fold classification of the ways of listening/gazing/dancing therefore basically applied to cases that involved objects of desire with whom intercourse was, as he put it, "shariatically forbidden." Evidently, he perceived a slippery slope from the various practices around *sama'* to sodomy and fornication. The participant in *sama'* himself should keep track in his mind of the classification of what he was doing, since "this is a secret between God and the *sama'* participant."[77]

A rather elaborate rebuttal of common suspicions was offered by the Sufi poet-thinker Jami, who was active in late fifteenth-century Herat. This rebuttal

76 Compare Natif, "Generative Garden"; Sa'di, *Kulliyat*, 21 (*Gulistan*, Introduction).

77 Kashani, "Shama'il-i Anqiya wa Dala'il-i Atqiya," folios 195v—6. Compare Ernst, *Eternal Garden*, 148—9.

Fig. 1: *Sa'di in the Rose-garden*, attributed to Govardhan, ca. 1630—45. This illustration, made four hundred years after Sa'di wrote, gives an impression of how his stories of male bonding were read. While the text only provides the mildest hints at physical interaction between Sa'di and his friend, Govardhan loads the illustration with sexual symbolism. National Museum of Asian Art, Smithsonian Institution, Freer Collection, Gift of the Art and History Trust in honor of Ezzat-Malek Soudavar, F1998.5.6.

once more tried to define the limits of chastity. Jami's discussion of the issue came in his biography of Awhad al-Din Kirmani who lived two and a half centuries earlier, dying when Rumi was about thirty years of age. Kirmani was a practitioner of *shahid-bazi*, or playing with *shahid*s, affirming that one can only find the transcendental (*ma'ni*) in its worldly image (*surat*). He used to dance with beardless boys during *sama'* and when he "would be heating up," he would tear the shirts off them and place his chest on theirs. Nevertheless, Jami claimed that he never crossed the line, despite suspicion and disapproval from all quarters. Shams-i Tabriz supposedly castigated him for not adoring the divine more directly. In the environment of Rumi it was said that Kirmani might be a *shahid-baz* (witness player), but was also a *pak-baz* (pure player), to which Rumi supposedly responded "I wish he had done [it] and gotten [it] over with." Jami went on to note that it was argued that *'arif*s (gnostics/mystics/Sufis) had a more refined gaze than the non-*'arif*s, who should take care not to gaze at the beauties so that they would not step in the pitfall of confusion. Jami concluded that great men like Kirmani, Ahmad Ghazali (brother of the more famous Muhammad) and Fakhr al-Din Iraqi indeed had this refined gaze, but also implied that their beloved boys did not and the latter were smart enough to refuse the great men's advances, which not only worked to keep the beloveds themselves from the lowest pits of hell but also stopped the great men from committing great sins (*kubra'*). The great men might not have had any intention to sin, but still might have accidentally slipped in their elevated state of mind, if people with their feet on the ground would not have stopped them. A case in point was the incident with the gorgeous son/boy of the caliph who was ready to kill Kirmani if "he so much as made a move towards this sin." In the end, however, the boy became Kirmani's disciple when the latter, heated up during *sama'*, declared his readiness to die at the hands of his "dearly beloved."[78]

The phenomenon of the pre-emptive strike was, as we saw, recorded in chronicles and travelogues, but also a literary trope, which shows that there was a consciousness of it among the intended audience of the literature using this trope. Explicitly or implicitly, we find the trope all through poetry, especially that written in a mystical vein where the beloved was not supposed to be "easy," as it was also not easy to attain a glimpse of the divine. The beloved boys and young men, often Turkish slave soldiers or the like, were dangerous – with eyebrows like arrows.[79] One rather innocuous example is found in a story by Jami. In brief: a fourteen-year-old boy stands on the roof of his house dealing with his many admirers. An old man

78 Jami, *Nafahat*, 588—91.

79 See Anonymous, "Homosexuality iii: In Persian Literature." For a Freudian interpretation of the trope see Wafer, "Vision and Passion," 108—9.

approaches and declares his love, but the boy tells him to look at someone more beautiful. As the old man does so, the boy knocks him off the roof. The story is meant to underscore the point that love only exists in unity.[80] Poetic death at the hands of a beloved signified annihilation into the divine, the goal of some Sufi practice. Jami's story of Kirmani and the son of the caliph served to put into context a quatrain by Kirmani that revolves around this trope. The quatrain makes the murderous boy the instrument of faith by calling him a *ghazi* (warrior of the faith).[81]

Jami's narration of the interaction between Kirmani and the caliph's son along with his thought about the role of intention and prevention ties in with other cases where observers sought to reconcile contrasting views of the intention of a man in his relation to a boy. In these cases, a suspected intention of sodomy was both punished by death and posthumously extenuated.

We can find a few such cases where the man who got killed was in final instance exonerated or vindicated. In 1609 a Safavid nobleman called Husain-Quli Beg Qajar was stabbed in his sleep by a youth who was one of his servants, because the latter feared his master's intentions. But in that case the boy was executed.[82] We can also point to the case of Ali Adil Shah I of the Deccan sultanate of Bijapur, who died in 1579 at the hands of a *khwaja-sara* (eunuch or intersex person). The basics of the story are that Ali had demanded this beautiful young eunuch as part of a peace deal with his neighbour the sultan of Bidar, and when he was finally alone with the eunuch, he was hoping to have intercourse with him, but the eunuch stabbed him to death. Different narrations of the story vindicate different sides, however. The Mughal emperor Akbar's spokesperson Abu'l-Fazl, a contemporary, vindicated the eunuch by stating that the sultan had been "continually staining the skirt of chastity" even before he "stretched out the arm of improper desire" for the eunuch, while the latter was a "jewel of the felicity of a pure nature," who "from pure-skirtedness [*pak-damani*] and a love of good repute [*namus-dusti*], did not yield his body," because he had had the foresight to take a dagger with him.[83] In keeping with the style of Akbar's ordinances, Abul-Fazl did not motivate this verdict in terms of sharia but in "rational" terms, namely, the preservation of purity and reputation, yet it was clearly in line with certain interpretations of sharia. Also typical for Akbar's court is the use of neologisms to reformulate and redefine such sharia-derived principles in terms of equity

80 For this story and a sixteenth-century Safavid illustration of it see Simpson and Farhad, *Sultan Ibrahim Mirza's Haft Awrang*, 157—9.

81 Jami, *Nafahat*, 590.

82 Compare and contrast Floor, *Social History*, 326.

83 Abu'l-Fazl, *Akbar Namah*, 3: 298.

(see Chapter 3). In narrating these events half a century later, an anonymous chronicle written from the courtly perspective of another one of the Deccan sultanates, however, seems to condemn the eunuch more for the killing than it does the sultan for his lust. The text speaks of "the martyrdom of Ali Adil Shah through the justice-less [*bi-dad*] dagger of the perfidious eunuch." It seems that Ali Adil Shah could be proclaimed a martyr of love because his love was as yet unconsummated, even though the intent of fulfilling his "desire for unity" is not denied.[84]

Another such creation of a martyr of love we find in the same Deccan region a century later. In one of the traditions recorded of the Naqshbandi Sufi preceptor Baba Palangposh, by his disciple's disciple Shah Mahmud, he is seen to act as a judge to deliver a masterstroke verdict around the year 1689.[85] One of the preceptor's disciples took a fancy to a good-looking youth in the town by the Sufi hospice and constantly passed by the lane where the youth lived and cried out "*Haqq Allah! Jan Allah*" – that is, praise for the youth and God. Both the suitor and the boy are named, creating the strong suggestion that this was a real incident. The youth's peers taunted him with the attentions of the suitor, saying "your lover has come," and those taunts "weighed heavily on the mind of the boy." One day when he came out, the Sufi was waiting for him and the taunters were also out. The youth said some harsh words to the Sufi but got no response and then stabbed him in the belly. The Sufi died and the youth and his uncles fled while the peers of the Sufi called for *qisas*, or legal retaliation, and the governor of the town put the house under surveillance. Baba Palangposh, however, stepped in, removed the police guard from the house and invited the youth and his uncles back and "with the greatest kindness…placed his hands on the head of the boy" and then organised the funeral of the Sufi in such a way that the youth and his uncles were seen wailing in front of the procession. In the end the Sufi is pronounced a "martyr of love" and the youth becomes his devotee and visits his grave weekly to recite the opening verse of the Quran and weep. The youth is saved from revenge by his canonisation as the instrument in the making of a martyr of love, at the moment where the love was still chaste. Again chastity is implicitly invoked as a strategy, in this case to create a martyr. But there is enormous tension around this chastity. It seems that the narrative also implicitly defends the right of the youth to defend himself from what he suspected the lover was after, thereby legalising the preemption of an illegal act, that is, the feared penetrative intercourse. It is important,

84 "Tarikh-i Sultan Muhammad Qutb Shah," pages 221—2. I thank Roy Fischel for pointing this passage out and providing a photograph of the text.

85 Shah Mahmud, *Sufis and Soldiers*, 80—1.

however, that the infatuated Sufi had made the affair a public affair through his ostentatious stalking. We should also note that this Deccan branch of the Naqshbandi Sufi order prided itself in its upholding of the sharia, or in any case Baba Palangposh's successor took it upon himself to uphold it and was feared by the "wicked men" in town.[86] Further context is that some members of the order were apparently quite fond of "dancing boys" and that this regularly provoked the ire of Baba Palangposh's successor, who is also said to have cured a disciple from his attraction to a particular dancing boy.[87]

Two of the cases just outlined involved a slave, and the role of the institution of slavery is important for our line of inquiry. The historian Indrani Chatterjee has argued that the ubiquity of slaves (as personal retainers, business representatives, military men, etc.) in South Asia in this period warrants reading slavery back into the history of sexual relations in the subcontinent.[88] And indeed we should give a place to the suggestions we find with some stern authors that men acquired male slaves for sexual intimacy, not just in South Asia, but in the whole of the Persianate world. At closer inspection we get the impression that sexual relations between a man and his male slave were not merely in accord with norms of hierarchy as Chatterjee argues, but were in fact deemed by many to be in line with sharia norms.

The mid-fourteenth-century chronicle of the Delhi sultanate by Barani mentions a market for boy slaves. The context is important. During his reign around the turn of the fourteenth century, Sultan Ala al-Din Khilji had issued many rather strict ordinances (*zawabit*) and injunctions (*hukumat*). Most concerned issues not directly covered by sharia, such as price and monetary regulation, but some, like his ban on alcohol, appear to have been measures to regulate the enforcement of sharia. After his death in 1316, his second successor Qutb al-Din revoked many of the ordinances and injunctions and replaced them with *mu'amalat*, by which Barani here seems to mean ways of interpersonal conduct and transacting. The ease-loving, indulgent and unequal *mu'amalat* of the sultan set the tone, and uprightness and honesty disappeared from the *mu'amalat* of the people. The ban on alcohol was not revoked, yet no longer enforced. Meanwhile the new sultan engaged in the indulgence or "worship" of his lust (*hawa-parasti*), by repeated "defloration" (*tamas*) of his beloved slave boy (*ghulam bacha*) whom he raised to a high office. Barani described the acts between them in general terms as "the act of slave-boy-

86 Shah Mahmud, *Sufis and Soldiers*, 103. Nile Green suggests that this branch of the order may have been oblivious to the renewed emphasis on sharia advocated by the Naqshbandi Sufi Ahmad Sirhindi in North India around 1600. Green, *Indian Sufism*, 18.

87 Shah Mahmud, *Sufis and Soldiers*, 122, 139, 145.

88 Chatterjee, "Alienation."

ing and shamelessness [*kar-i ghulam-bachagi wa bi-sharmi*]." Seeing the laxity of the sultan, his people started to follow suit. "Thoughts of fear and dread of do that – don't do this and say that – don't say this and wear this – don't wear that, eat that – don't eat this, sell this way – don't sell that way, be this way – don't be that way were released, and the people remembered enjoyment and ease, and sensuality and pleasure, and *shahid*s and wine, and male slaves and boys [*ghulam wa pesar*]." As this went on for a while, people started to break their vows of repentance. "The *shahid*s became scarce and fresh young boys [*bachagan*] came to be found and well-formed singing boys appeared all over town and the price of beardless slaves [*ghulam-i amrad*] and handsome eunuchs [and intersex persons] and beautiful female slaves reached five hundred and one thousand and two thousand tankas." It is interesting that Barani put these three categories of physically attractive slaves side by side and suggested that the market rate went up for all of them (although if we are to read the rates respectively, those for beardless boys and eunuchs remained lower than that for girls).[89]

While jurists agreed that intercourse by a man with his female slave was permitted, the status of intercourse with male slaves was either contested or left open by them in our period. Their vagueness was such that in his defence of Shi'ism, the twelfth-century scholar Qazwini mocked the founding fathers of the four Sunni schools for, on the one hand, forbidding intercourse with non-slave boys and, on the other, allowing intercourse with slave boys.[90] But as we saw, there was merely a growing consensus among Hanafi jurists that punishment for such cases should be less.[91] Ghazali's objection to the selling of beardless boys to those who "disobey God" was also picked up again and again. From the way Barani described the Delhi slave market, it looks like he shared Ghazali's view.

Yet although no authoritative jurist in the Persian world seems to have been saying so, there appear to have been men who deemed intercourse with slaves of all genders permitted. Barani's contemporary, the Iranian poet Ubayd Zakani, commented in his satirical *Ethics of the Aristocrats* (*Akhlaq al-Ashraf*): "Take advantage of the money and the bodies of slaves, so that you may be regarded as a perfectly law-abiding man"[92] Those who were of that view could, and apparently did, point to a formula regarding forbidden intercourse that occurs twice in Quran (23:6 and 70:30): "except from their wives or those their right hands possess." The

89 Barani, *Tarikh*, 381—4, 386—7, 400, 407. The period of their lives during which boy slaves were valuable was much shorter than that of female slaves as Barani's contemporary Ubayd Zakani satirically pointed out. See Floor, *Social History*, 292 n.35

90 Shamisa, *Shahidbazi*, 116.

91 See above and Omar, "Semantics to Normative Law," 252 n.101.

92 Floor, *Social History*, 315.

latter is the most common quranic term for people with slave status. In his discussion of the act of the people of Lot, Fakhr al-Din Razi referred to a debate he had with a person who was "weak in religion [*din*]" and who argued that these quranic passages "stipulate the lawfulness [*hall*] of penetration of a slave [*mamluk*] irrespective of the slave being male or female."[93]

Thus the institution of slavery provided a window of opportunity for those who were tired of "do this, don't do that" (to paraphrase Barani) or "disobeyed God" (as Ghazali put it). In evaluating positive statements about intimate relations between males in the Persian world we should always ascertain whether there was also a relation of ownership or not. The anonymous article on homosexuality in Persian literature in the *Encyclopaedia Iranica* suggests that the *Qabus-Nama* or *Book of Kawus*, written by a prince of the Caspian Sea region as advice to his son in the late eleventh century, "approves of male homosexuality" because it advises the employment of both women and *ghulams* for enjoying sexual relations.[94] However, *ghulams* would be better translated as slave-boys here than as boys (as the article does),[95] especially if we take into account that elsewhere the text advises that when being hosted one should not even look at the patron's cupbearer in order to avoid suspicion.[96] One was, apparently, only to look at one's *own* cupbearers. Similarly, we may point out that the second most celebrated intimate relationship between mature men in the Persian world, that between Mahmud and Ayaz, concerned a sultan and his slave.[97]

Exception in the Persian World

We find a number of cases where people contested the applicability of the proscription on account of the circumstances. Some found grounds in the general nature of the times, while others allegedly found them in the necessities of particular situations.

93 Omar, "Semantics to Normative Law," 251—2; Razi, *Tafsir*, 14: 177.

94 Anonymous, "Homosexuality iii: In Persian Literature."

95 Chatterjee also points out the implications of our choice in translating the term *ghulam*. "Alienation," 64. I have translated it as "boy" or "youth" from Arabic texts and as "slave" or "slave boy" from Persian texts.

96 See Floor, *Social History*, 307.

97 See Kugle, "Sultan Mahmud's Makeover." The most celebrated would be that between Rumi and Shams.

An example of the former is found in the description of late seventeenth-century Muslim life in the Deccan sultanate of Golconda by the former Dutch East-India Company employee Daniel Havart:

> When one asks them why they do not punish that vile sin, which is so strictly and severely forbidden, in public to set an example for others, they profess not to be qualified or pious enough, because there is no Imam, that is, apostle or successor from the offspring of Muhammad, in their midst; but it is indeed because all are scabby and the big are contaminated as well as the small.[98]

There are two important dimensions to this passage. First, it contains a heterology (statement about the other by the other) that explains the reason given by Muslims in Golconda for considering themselves excepted from the proscription. Second, it contains Havart's own view on the relation of that claim to practice. As to the former: what to do during the occultation of the twelfth Imam (who completely disappeared in 941), had been a major issue in Shi'i legal thought for a long time. In Havart's heterology we seem to see a popular expression of a strain of that thought (although it must be noted that Havart's frequent interlocutors included at least one alim).[99]

From the end of the sixteenth century a fundamental controversy had arisen among Twelver Shi'is over the interpretation of the sources of sharia. The two opposing movements came to be called Akhbari and Usuli. A major point of disagreement between the Akhbaris and the Usulis was the role of the alims for the present, as long as the twelfth Imam remained hidden. According to Usulis the alims were entitled to arrive at legal rulings through *ijtihad*, which is exerting oneself in interpretation according to a set methodology (the *usul*) of the Quran as well as the Traditions about Muhammad and Reports (*akhbar*) about the twelve Shi'i Imams. According to Akhbaris, the alims did not have that right and both alims and laypersons were to stick to what had been definitively stated or explained by the twelve Imams in the Reports.[100]

One thing that the Imams appeared to have said, according to at least three Reports, was that if something was not explicitly forbidden it was permitted/clean/unrestricted. But on this issue too there was disagreement between the movements. Muhammad Amin Astarabadi, the key figure in the early phase of the Akhbari movement, maintained that there was no matter in life on which there was no ruling, so that there was no "original" state of permission as Usulis

98 H[avart], *Persiaansche secretaris*, 59—61.

99 See Kruijtzer, "Daniel Havart."

100 Compare Hallaq, *Sharī'a*, 116—24.

claimed. Later in the seventeenth century, however, some Akhbaris seem to have started to accommodate the principle that one might at least act as if something was not forbidden if its proscription was not evident enough. The influential Akhbari scholar and poet Muhsin Faiz Kashani wrote that in such a case one might say "it is permitted for one not to adopt [a particular ruling] because it is not proven for us," or "we are searching for [the answer to a question] such that it might become clear [to us]." So, while Akhbari thought considered everyone qualified to receive the teachings of the Reports and freed laypersons from the obligation of seeking and following the interpretations of the alims, by the same token it also considered everyone entitled to doubt.[101]

The Akhbari Abdallah Samahiji, a native of Bahrain who would go on to become the overseer of religious affairs for the Safavid state in its final years, argued that no one should formulate a ruling on any issue that the Reports were silent about. Here is how he presented this point in an overview of the differences between the two movements written in 1712, just over twenty years after Havart published the above statement:

> The *mujtahids* [Usulis] permit *ijtihad* in legal judgements in the event it is impossible to know the statement of the Infallible [occulted twelfth Imam]. The Akhbaris do not make such a distinction but require recourse to Him absolutely [through the *akhbar* that are definitive in text and definitive in evidence]. If His statement can be established [the Akhbaris] will propound it; if not they keep silent and make no decision. Thus they are in agreement with Their [one of the Imams'] statement… "Whenever you know, speak; but if you do not know, then this", and He stretched out His hand to His chest.[102]

In other words, one had to be absolutely certain of what the Imam would say if he were present, or otherwise remain quiet. While Akhbarism may be characterised as conservative (numerous Akhbaris for instance opposed the new habit of smoking),[103] at the same time it could be remarkably tolerant by its suspension of judgment in the absence of adequate proof texts.

Samahiji's statement seems very close to what Havart recorded his informants as saying on the point of sodomy. The claim "not to be qualified or pious enough, because there is no Imam…in their midst," betrays a certain influence of Akhbari

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101 Compare Gleave, *Scripturalist Islam*, 284—9. Quotations as translated there. See also Gleave, *Inevitable Doubt*, 15—23.

102 This is the first part of point 17 of Samahiji's exposition, edited and translated in Newman, "The Nature of the Akhbārī/Uṣūlī Dispute in Late Ṣafawid Iran. Part 1," 44. I have edited the translation given there somewhat, including, among other things, an interpolation from Samahiji's point 16. See also Hallaq, *Sharīʿa*, 122.

103 Gleave, *Scripturalist Islam*, 154. Matthee, *Pursuit*, 136.

thought in Golconda. While it appears that proponents of both movements sought to enlist the ruling dynasty of Golconda for their cause by dedicating works to the sultans, more research is needed to establish how exactly the controversy played out in Golconda.[104]

Coming to the arguments from necessity, we can start with a story by Sa'di addressing the relation between necessity and sodomy, or more precisely what the limits of interaction with a *mukhannas* were in circumstances of need. The case was as follows: some dervishes were caught in the middle of an episode of drought and hunger in the region of Alexandria (probably the Alexandria in Transoxiana) but there was a *mukhannas* who was very rich and was bestowing silver and gold on the needy and laying out tables for travellers. The dervishes were for sheer want inclined to accept the invitation (*da'wat*) of the *mukhannas* but asked Sa'di for a consult (*mushawarat*) on this issue. Before presenting his verdict Sa'di presents a general assessment of the *mukhannas* in verse:

> Were a Tatar to kill that *mukhannas*/
> there'd be no reason to kill the Tatar for it.
> How long, after all, can he go on like the bridge of Baghdad/
> with water beneath and a man on/in the back/behind.[105]

Sa'di here apparently sees the *mukhannas* as an initiator of *liwat* through his drawing men to his *pusht* (back/behind) and therefore as deserving of the kind of chastisement reserved for preventive action. His verdict on the question of the hungry dervishes he also puts in verse:

> A lion does not eat something half-eaten by a dog/
> although he may face hardship in his lair.
> Apply the body to wretchedness and hunger/
> and do not stretch the hand to lowness.

So why did Sa'di object? Paul Sprachman suggests that the initial description of the *mukhannas* implies that he would have wanted the dervishes to penetrate him in

104 Around 1620 the Akhbari Astarabadi wrote an advice treatise in Persian for Sultan Muhammad, and in 1642 the Usuli Nur al-Din Musawi Amili dedicated a treatise refuting another work of Astarabadi to Muhammad's successor Abdallah. Gleave, *Scripturalist Islam*, 35—6; Rizvi, "Shi'ite Religious Literature in the Deccan," 24. Rizvi says that Amili succeeded in enlisting the sultanate for the Usuli cause, but does not cite any evidence for that claim.

105 Sa'di, *Kulliyat*, 72 (*Gulistan*, Chapter 3 story 12). Compare Sprachman, *Licensed Fool*, 6, 151 n.14 and 17. My translation is partly based on that by Sprachman. The edition he uses has *bar pusht* (on the back) rather than *dar pusht* (in the back).

exchange for hospitality. This is plausible. It depends on what Sa'di referred to by *siflat* or lowness. Was it merely accepting something from a person who was like a dog? Or was it committing the sin of sodomy oneself? The word *siflat* has the same root as the word *asfal,* used for the "lower" or "passive" party in the Tradition "stone both the upper and the lower" (cited by Shafi'i and rejected by Marghinani, as we saw). So Sa'di's dictum "do not stretch out the hand to *siflat*" could be interpreted as "do not penetrate the *asfal.*" Sa'di did explicate that he refrained from describing what was going on directly for the sake of politeness. In any case, necessity was no ground for recourse to this lowness in the eyes of Sa'di, who was here acting clearly as a jurisconsult.[106]

The idea that sodomites might appeal to the concept of necessity was also ridiculed. In the fourteenth century, in his satirical *Ethics of the Aristocrats*, Zakani narrated the story of Qutb al-Din Shirazi, a scientist and teacher who allegedly committed sodomy with students in his school. Once someone came into to the room where this was going on, and Shirazi said: "Are you blind? Don't you see that this place is so small that people have to pile on top of each other?'."[107] This satirised appeal to necessity to explain a suspicious situation is not as farfetched as it may seem. A century earlier, the Shi'i polymath, ethicist and jurist Nasir al-Din Tusi in all seriousness drew attention to the need for a judge to investigate whether a situation that might attract the suspicion of *liwat*, such as sharing a bed, was actually due to necessity.[108]

Mockery of the sodomite's appeal to necessity continued beyond the end of our period, as we find it again in the dictionary of idioms and idiomatic expressions compiled by Anand Ram Mukhlis in India in the mid-eighteenth century. It is in the entry on the expression "the qazi is also of the *ahl-i bakhia.*" The *ahl-i bakhia* were those who "quilt," or cover up shameful secrets, and therefore make good drinking companions. As an example, the dictionary provides a story about a man from Tabriz who is taken into custody on the charge of *liwatat* and brought before a qazi. The qazi asks the Tabrizi why he did what he did. The Tabrizi answers: "I am of a cold constitution and I could not by myself make my arse warm in order to thrive; I did it by way of medicine." The qazi laughs and the Tabrizi says to his friend "I swear to you: the qazi is also of the *ahl-i bakhia.*"[109] The context is that the "medicine" argument had been used to defend the drinking of wine in a more serious manner. In the early seventeenth century, Shah Abbas of Iran asked a physician who was also a qazi to compose a treatise for him on

106 Sa'di, *Kulliyat*, 72 (*Gulistan,* Chapter 3 story 12); Sprachman, *Licensed Fool*, 5—6.
107 Cited in Floor, *Social History*, 311.
108 Long, "'They Want Us Exterminated'," 6.
109 Mukhlis, *Mirat al-Istilah*, 2: 574—5.

the benefits and etiquette of wine-drinking. The author started out by noting that there was a debate among jurists whether drinking wine was permitted in cases of illness, but went on to rely on the opinion of the important Shi'i jurist Baha al-Din Amili, who was also living in Isfahan at the time, that drinking was lawful when life was at stake, and used that license to talk freely about wine consumption in the remainder of the book.[110]

As we shall see in Chapter 3, necessity was often deemed a basis for making exceptions with regard to the proscription of usury. From the satirical stories above we get the impression that sodomites attempted appeals to necessity as well, but that such appeals were taken half seriously at most.

Compensation in the Persian World

The two main strategies to be discussed under this heading are repentance and claiming that others were getting away with the same and similar sins. The role for repentance might seem to be provided in Quran 4:16 "And the two [males] who commit it among you, dishonour them both. But if they repent and correct themselves, leave them alone. Indeed, Allah is ever Accepting of repentance and Merciful." Yet the role of this particular verse in the juridical thought of the Central-South Asian branch of the Hanafi school needs to be further investigated. El-Rouayheb points out that many non-Hanafi jurists considered this verse abrogated by subsequent prescriptions of punishment on earth, and the influential sixteenth-century Ottoman Hanafi jurist Ebu Suud Efendi considered it to apply to heterosexual fornication.[111] Within the Twelver Shi'i school, Tusi made an important contribution to the debate early in our period. He adduced a Report about Ali pardoning a weeping repentant man despite his having confessed to *liwat* four times.[112]

The debate about the applicability of repentance in cases of *liwat* seems to be reflected in one of Sa'di's didactic stories, in which the main protagonist first seeks recourse to the strategy of repentance and when that fails, successfully takes recourse to the others-are-getting-away-with-it approach. This story centres on a qazi in the city of Hamadan who is infatuated with a farrier-boy (son of a person who shoes horses or an apprentice in that profession). The infatuation becomes a public scandal after the boy scolds the qazi and pelts him with stones. When the qazi is in court one day his junior colleagues suggest that he should stop pursuing

110 Matthee, *Pursuit*, 51.
111 Compare El-Rouayheb, *Before Homosexuality*, 122, 184 n.52.
112 Long, "'They Want Us Exterminated'," 7 n.15.

the boy. This situation turns into a sort of court case and the qazi submits to their argument that he should not pollute the office of qazi with such an abominable sin/crime (*gunahi shani*ʿ). Nevertheless, he persists in his pursuit, spending a lot of money, and manages to get a night alone with the boy "with the wine in his head and the boy[113] in his embrace." A friend comes to warn him that news has gotten out but he stays in his house with the boy until dawn when the king arrives to verify the news with his own eyes. He finds the qazi sleeping off his inebriation, with the boy sitting by his side surrounded by spilled wine and broken cups (hints to the night's physical activity). The king wakes up the qazi and tells him that the sun is up. The qazi asks him from what direction the sun has risen and the king answers in surprise that it has risen from the east as usual. The qazi replies: "Praise be to Allah! The door of repentance is yet open because according to Tradition the gate of repentance will not be locked against worshippers till the sun rises in its setting place." But the king answers that it is no use to repent as he must now face capital punishment. The conversation continues for a while but the king keeps insisting that he must have the qazi thrown headlong from the castle to set an example, otherwise it would be a contortion of reason and against sharia (*mahal-i ʿaql-ast wa khilaf-i sharʿ*). To this, the qazi quips that he is not the only one to have committed this crime and suggests that the king throw another man from the castle so that *he* may take an example. The king laughs and pardons the crime, saying, in verse, to those who desired the qazi to be executed:

> Everyone of you who are bearers of your own faults
> Ought not to blame others for their defects.[114]

The qazi of Hamadan thus employs a double strategy, or rather two successive strategies: first he sets his hope on the option of repentance, but when that does not work in this world, he moves to the strategy of "who is without sin?"

Perhaps Saʿdi intended the happy end as an alternative to the tragic end of the real-life figure know as Ayn al-Quzzat (the Wellspring of Qazis) whose pen name was "the Qazi of Hamadan," who some hundred and thirty years before had been executed for his controversial Sufi views.[115] Ayn al-Quzzat stood in the tradition of homoerotic love mysticism. Sufi circles in the centuries after his death remembered him as having been a *shahid* of his teacher Ahmad Ghazali, the brother of the more famous and much sterner Muhammad Ghazali. People like Shams-i

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113 *Shabab*, some manuscripts have *shahid*. It is not entirely clear if this is the same boy.
114 Saʿdi, *Kulliyat*, 99—102 (*Gulistan*, Chapter 5 story 20). One manuscript has: *khilaf-i naql*, "against precedent," instead of "against sharia." Translation of the last verse as per Rehatsek.
115 Böwering, "ʿAyn-al-Qożāt Hamadānī."

Tabriz (writing a few decades before Sa'di in Anatolia) and the Chishti Sufi Nizam al-Din Auliya (speaking a few decades after Sa'di in India) claimed that Ahmad Ghazali's affairs with his *shahid*s had been chaste. Nizam al-Din claimed that Ahmad Ghazali had been deliberately courting the blame of the common people (a practice tied up with a certain form of Sufi esotericism) by giving the appearance of having physical relations with boys, but the father of one of these boys had spied on his son with Ahmad and found that mere chaste instruction was going on.[116] Sa'di, however, gave a different twist to these apparently widely circulating stories. First of all, the qazi of Hamadan becomes a lover himself rather than the *shahid* of Ahmad, and second, his love is not found to be chaste when it is spied upon. In line with his story about the man in an apartment with a boy with no-one watching (recounted above in the section on circumvention), Sa'di again seems to be saying: who is going to believe the chastity line? Instead, Sa'di offers the who-is-without-sin approach.

Sa'di's story itself also had a long afterlife. It was apparently popular enough in circles around the Mughal court in the mid-seventeenth century to be illustrated a number of times. The most explicit is a miniature attributed to the painter Payag (fig. 2).[117] Here, the boy is depicted sleeping bare-chested beside the qazi, who is wearing a partly translucent garment and has one arm around the boy while he is being woken up by the king. The informer is standing over the couple pointing at the qazi and holding a sheet in his hand while addressing the king. The removed sheet may reference the quite widely acknowledged sharia requirement that acts of fornication must be witnessed without a sheet for any testimony to be valid. This is another indication of the awareness of the legal implications of such acts. Another illustration of this same scene, signed by Lalchand, more modestly shows the boy sitting fully dressed and awake beside the qazi at the moment the king arrives (fig. 3). The only suggestion of sexual activity is in the tumble of bottles and cups beside them.[118] This painting was part of a series of six illustrations to Sa'di's *Rose-garden* apparently commissioned by Jahanara Begam, the daughter of Emperor Shah Jahan.[119] A third depiction, this one with an attribution to the painter Govardhan inscribed on it, is similar to the depiction by Payag, except that the bed scene is much more chaste with the boy fully clothed sleeping in a sitting position at a little distance from the qazi.[120] Obviously, the story was con-

116 Kugle, "Sufi Attitudes," 37—8.

117 See Dye, "Artists," 117, 122 and "Payag," 133—4.

118 Natif, "Generative Garden," 49—51.

119 See Soudavar, *Art of the Persian Courts*, 332—8.

120 In the collection of the Sainsbury Centre and described in Skelton, "South Asia."

Fig. 2: *The Qazi of Hamadan with the Farrier-Boy Caught by the King*, attributed to Payag, mid-seventeenth century. The king is able to view the situation without the cover of the sheet, which the man behind the bed is holding in his hand. Private collection.

sidered risqué and the level of explicitness in its visual depiction carefully attuned by the painters to the taste of their patrons.

We find another story of repentance in a late sixteenth-century chronicle of the history of Iran under the Safavids. This story is presented as a historical occurrence rather than (merely) an edifying tale. The chronicle recounts the fate of an oppressive tax collector of Herat, whose oppression came to an end one morning in 1535 when "he was doing the activity with slave-boys [*ba ghulam mashghuli mi namud*]" in a bathhouse. A mob was out for him and observed through the roof windows of the bathhouse that he was being rubbed down by a beardless boy (*pisar-i amrad*) and consequently threw stones through the windows which wounded him on the head, upon which he offered repentance for his past deeds, i. e. his oppression as well as his acts in the bathhouse. The quranic phrase "And you had disobeyed [Him] before and were of the corrupters?" (10:91) was heard and he was forgiven by the people high and low. The chronicler, Ahmad Qomi, who was also a qazi at some point in his life, clearly sympathised with the mob and noted how the stone-throwing had restored the tax collector to aware-

Fig. 3: *The Qazi of Hamadan with the Farrier-Boy Caught by the King* by Lalchand, mid-seventeenth century. What happened is suggested by the jumbled cups and bottles. National Museum of Asian Art, Smithsonian Institution, Freer Collection, Gift of the Art and History Trust in honor of Ezzat-Malek Soudavar, F1998.5.74.

ness of hell and torture in the afterlife. Furthermore, according to Qomi, two or three radiant old men, undoubtedly of the "hidden elders" (the entourage of the

hidden twelfth Imam), were seen in the town during the occurrences and spoke in favour of the stone-throwing.[121] This is important because, as we saw, the absence of an Imam might be brought as an argument not to prosecute transgressors, or so it was a century later in Akhbari-influenced Golconda.

Stridency in the Persian World

Any celebration of a transgression of the proscription of sodomy in the Persian world should be seen in the context of a certain measure of celebration of antinomianism in general. As was noted in the Introduction the term antinomianism was coined by Martin Luther to wield against fellow reformers who went too far in diminishing the role of adherence to divine law in salvation. A similar term, also originally pejorative, was the term *ibahiya* derived from the legal term *ibaha* for things that are not explicitly proscribed or regulated by sharia and therefore permitted. In the centuries before our period some Sufis applied this term to those who went too far in their esoteric leanings and thought that they themselves had transcended the law, or that the law was in general of no importance for salvation. Also already before our period the opponents of *ibahiya* associated it with sexual transgression.[122] In our period, antinomianism received a great boost from the work of the fourteenth-century poet Hafiz, who described himself as a *rind*, that is, a person positioning himself on the fringe of the community, far from the theologian-jurists, enjoying life along with a superior insight in the intentions with which God had presented sharia to the world.[123] *Rindi* (the condition of being a *rind*) was foremost a posture in life and in the philosophy of life. Hafiz' *rindi* took the form of celebrating the transgression of certain proscriptions as defined by the theologian-jurists and exposing the hypocrisy of the latter. A related posture is that of the *lawand*, which we may translate by the seventeenth-century European term libertine (see below). The *lawand* went a step further towards debauchery and did not appear to fear God at all. In his biographical dictionary of poets written in the mid-sixteenth century, Sam Mirza (incidentally the brother of Shah Tahmasp) designated a few poets as *lawand*, or as being lovers of "the art of *la-ubali* [I don't care]."[124]

121 Qomi, *Khulasat al-Tawarikh*, 1: 248—50.
122 Algar, "Ebāḥīya."
123 Compare Ahmed, *What Is Islam*, 32—7.
124 Sam Mirza, *Tuhfa-yi Sami,* (Tehran ed.) 267, 283; Matthee, *Pursuit*, 46.

Throughout our period there was a strong association between antinomianism and male-male love and intercourse, and both of these were often linked again to poets. On the eve of the period we find an anti-Shi'i diatribe listing a number of prominent Shi'is in various categories, one of which was, "men of letters and poetry who have always been famous for heresy, *fisq* and *fujur* [transgression and immorality], and *liwata* and *ubna* [sodomy and desire for being anally penetrated]."[125] And right after the period, the dictionary of Persian idioms by Mukhlis included an expression that linked the concept of *lawand* with boy-love: "the *lawand* is at the foot of the peach-tree" – the fuzz on the skin of peaches having a centuries-long association with the hair on the chins of pubescent boys.[126]

The transgressions of choice of the antinomian poets were wine-drinking, boy-love and idolatry, often in combination. Playing with the notion of idolatry, arguably the mother of all Judeo-Christo-Islamic proscriptions, they described their beloved boys as *negar* or *naqsh* (painted or drawn pictures) or as *but* or *sanam* (idols). In that way they added insult to the injury of the tastes of their opponents, the alims and the *zahid*s, i. e. those of a stern and ascetic bent. They also combined their broaching (but not necessarily breaching) the proscribed physical act with that of the drinking of wine. In their poetry they recreated the atmosphere of the *majlis*, or poetic-extatic gathering, at which ruby-coloured wine was served by equally ruby-lipped boys.[127]

It is important to note that antinomianism often drew on the kinds of strategies that we have seen under the previous headings. If, for instance, we look at the first three verses of a *ghazal* in which Hafiz addresses the transgressions of drinking wine and illicit love (in this case seemingly for a maiden – though in many of his poems the beloved is clearly male)[128]:

> If the heart draw me to musky wine, it befitteth/
> For, from austerity and hypocrisy, the perfume of goodness cometh not.
> If all the people of the world forbid me love/
> That which the Lord commandeth, I shall do.
> Sever not hope of the bounty of blessing. For the nature of the Merciful/
> Pardoneth sin; and lovers, forgiveth.[129]

125 Quoted in Qazwini, *Naqz*, 184.

126 Mukhlis, *Mirat al-Istilah*, 2: 646. In a personal communication, Shahzad Bashir confirmed my suspicion that there was a homoerotic/sexual innuendo in this expression.

127 For a brief survey see Anonymous, "Homosexuality iii: In Persian Literature"; Schimmel, "Eros," 131

128 Shamisa, *Shahidbazi*, 165—6.

129 Hafiz, *Diwan*, 468—9 (no. 226). Translation as per Clarke.

The first two verses suggest an absolutely strident antinomianism, a rejection of the hypocrisy of those who think they know the law and a claim to know the essence of it better. Yet the third verse concedes that there may be sin involved, even if that will be forgiven in the greater scheme of God's intentions. This verse thus draws the notion of compensation into the scheme of antinomianism. Elsewhere also, Hafiz speaks of how his own vows of repentance had more than once been "untied" by wine and the long curling hair of the beloved.[130]

Hafiz spoke with regret of the impediments of sharia to union with his beloved boys. It was clear to him that his "fourteen-year-old idol" might strike even if he would make a good (*nek*) effort to stay chaste and to only gaze upon that pearl of a boy:

> My heart-ravisher is a *shahid* and kid and in play one day/
> He might kill me abjectly and according to sharia there would be no blame on him.[131]

This is because the boy, who still exuded the perfume of (mother's) milk, did not yet know good (*nek*) from bad (*bad*), by which Hafiz seems to imply the fine distinction between appropriate and inappropriate interaction between a man and a boy, which is left ambiguous. In another poem Hafiz made it seem that he kept searching for that impossible moment where union with a beloved boy was *halal:*

> Though that sweet boy may spill my blood/
> O heart, make him *halal* like mother's milk...
> Why Hafiz, when you were afraid of abandonment/
> Did you not make sweet the days of union with him.[132]

Rather than repenting transgression, Hafiz here regretted not-transgressing.

As Leonard Lewisohn shows, Hafiz fully developed the idea, already present with some of the Shi'i Imams as well as Sufi thinkers, that sinning could be a positive value, because the blame it attracted forced one to be humble before God, whereas sticking to sharia often entailed a self-righteous pride leading to hell. In the thought of Hafiz and others, this meta-view of the role of sharia was, however, reserved for the elect, together with other forms of mystical knowledge.[133]

Precisely because of this concentration on the circle of the elect, poetic celebrations of mysticism and antinomianism were also often tied up with ambiguity:

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130 Wafer, "Vision and Passion," 124.
131 Hafiz, *Diwan*, 584—5 (no. 284).
132 Hafiz, *Diwan*, 544—5 (no. 274).
133 Lewisohn, "Religion of Love."

a kind of now you see it now you don't. There is a continuing debate among scholars about the extent to which the boy-love celebrated in poetry reflected reality.[134] Was the love projected in these poems chaste love? This debate is difficult to bring to a conclusion precisely because much of the poetry under discussion was itself purposely ambiguous. Often a certain measure of flaunting the proscription is couched in protestations of chastity, in an endless play of allusions. We could thus say that the stridency of the antinomians borrows the language of circumvention in its presentation to the outside world: the stridency is there for those who wish to see it, but it can always be denied in the face of those who disapprove. This tension brings out the endless rope-pulling between the flexible and the inflexible.

An interesting case is that of Maulana Ahmad Kafi Kashani as narrated in Sam Mirza's biographical dictionary.[135] He was swept between compensation and strident transgression, or as Sam Mirza put it "he was not continually *farigh* [free from care]." While doing a traineeship with a qazi, he drank day and night, only to perform repentance once every few days and then return to his work. If the qazi would still not give him his stipend he would perform *tauba* again and the qazi would be happy. At some point, however, he stopped drinking and the qazi asked what had happened. He answered that on account of the qazi's stinginess he was now feasting on the repentance-breaking cup-bearer (*saqi-yi tauba-shikan*) instead of on wine. He composed the following couplet:

> If the sharia qazi administers an oath regarding wine-drinking
> I will drink, oh *saqi*, from your hand a different oath.

The word used for oath here, *saugand*, evokes the *saugand-i Sattar* which was said to have been a special oath sworn by gamblers and sodomites, through which they would have invoked God as the *Sattar* or Veiler (of sins).[136] Ahmad Kafi Kashani's suggested transgression of the proscription of sodomy was therefore not entirely strident or "free from care" – just as his transgression of the drinking prohibition had been quite embarrassed. But the story does seem to contain an element, typical of antinomian discourse, of exposing the hypocrisy of the theologian-jurists. It is after all the jurist's avarice that is said to have led to the new sin. Moreover,

134 El-Rouayheb, *Before Homosexuality*, 75—85, 111; Kugle, "Sultan Mahmud's Makeover," 40. Sirus Shamisa in his overview of *shahid-bazi* in Persian literature perpetuates the efforts of period mystics like Jami and Burhan al-Din Gharib to distinguish an unimpeachable variety from the physical variety. *Shahidbazi*, 15—6, 26 and passim.

135 Sam Mirza, *Tuhfa-yi Sami*, (Tehran ed.) 283–4; (Patna ed.) 149.

136 See the dictionaries of Steingass and Dehkhuda s.v. *saugand/saugand-i Sattar*. Dehkhuda cites a couplet by the seventeenth-century poet Mulla Tughra which relates the *saugand-i Sattar* to the habitual gambler.

there is a sort of "are you happy now" satisfactory tone to it all. Finally, the story seems to reference the principle of "the lesser evil" that jurists sometimes invoked to create legal devices (*hila*s) to circumvent proscriptions like that of usury (see Chapter 3). The story also appears to expose the invention of such devices as hypocritical.

The tension between strictness and freewheeling also comes out in the life and quatrains of the poet who went by the name of Sarmad (which means "eternal" or "inebriated"), a Jewish convert to Islam who came to the Mughal empire from Iran in 1631/2. In his port of arrival, Thatta, he fell in love with a Hindu boy named Abhai Chand who became his companion. Sarmad then renounced his wealth, became a naked *faqir* and together with Abhai Chand embraced a monism bordering on agnosticism. He was well-received in some courtly circles, first in Golconda and later with the Mughal prince and free-thinker Dara Shukoh. One author who met Sarmad claimed that his love for Abhai Chand was "pure and chaste," but others doubted this. In 1661–2 he was executed on the orders of Emperor Aurangzeb for reasons that historians still debate, but seem to have included both sharia-related issues such as his agnosticism and antinomianism (as expressed in his nakedness and relationship with a Hindu boy), and the political reason of his belonging to the party of Dara Shukoh who was also brought to death.[137]

Writing some thirty years after Sarmad's execution, Sher Ali Khan Lodi, an Indian scholar of Afghan descent and a supporter of Aurangzeb, made it clear that in his view it was Sarmad's divergence from sharia that cost him his life, and in the course of describing that divergence he made various allusions to Sarmad's relations with boys. First, Sarmad's love for a Hindu boy (*hindu-pisari*) left him bereft of his sense and intellect (*hush u khirad*), and he gave himself over completely to the heart-ravishing boys (*yaghmayan*). However, the coming to the throne of Aurangzeb changed things for Sarmad and people in general in Lodi's view: "from fear of the whip of justice [*'adl*], the mole of the beauties, which is prone to the infidel faith [*khal-i kafir-kesh-i khuban*], got in line for prayer in the prayer-niche of the eyebrow, and from dread of the court delivering the qazi's verdict [*mahkama'i qaza*] the blood-spilling wink of the idols [*butan*] became a hermit in the chamber of the eye."[138] The mole was a trope in Persian homoerotic poetry, something that love-crazed men adored about their beloved boys. The way Lodi cast this trope

137 See the editor's introduction in Sarmad, *Rubaiyat*, i—xxxiv; Kinra, "Infantilizing," 184—91; Katz, "The Identity of a Mystic."

138 Lodi, *Mir'at*, 123—5; The translation builds on but diverges from that of Kinra, "Infantilizing," 190—1. I am translating the word *khuban* as "beauties" on the basis of its use elsewhere in Lodi's *Mir'at* (199), as well as in Jami, *Nafahat*, 591, and even in Ottoman poetry, see Andrews and Kalpaklı, *Age of Beloveds*, 308.

seems to allude to the well-worn link between sodomy and infidelity but also to the *khal-i hindu*, or mole with the colour of a Hindu/Indian that Hafiz famously was prepared to give up everything for. The allusion would thus be to the Hindu boy that Sarmad had a relationship with. Aurangzeb's rule would, however, set such attraction straight, and make all face the prayer niche of the mosque instead. The allusion is then elaborated through the mention of the idol, which was, as we have seen, associated with the beloved boy, who, as we have also seen, might turn violent and become blood-spilling when sodomy was nigh. The suggestion is that Sarmad's lust had drawn him physically to a Hindu boy and consequentially away from Islam. Lodi however, made it clear that there would be no glancing at boy-idols under Aurangzeb from fear of the qazi, an evaluation that is in line with what the poet Zatalli said about the policing of sodomy under that emperor's reign. Lodi went on to note that in final instance it was Sarmad's refusal to clothe himself that justified his dying "by the sword of the command of the illustrious sharia." Lodi seized the occasion to praise in verse Aurangzeb's putting sharia before everything:

> The severity in his compassion is civility,
> Bound like a slave he is to the sovereignty of sharia.[139]

Even while Sarmad was seen by contemporaries as an antagonist of a sharia-minded Aurangzeb, he himself incorporated a certain measure of sharia-abidance in his poetry. In one poem he cast himself as a follower of the antinomian poets Hafiz and Khayyam as far as style was concerned, but at the same time distanced himself from their ideas and lifestyle, especially the excessive wine-drinking of Khayyam. Sarmad's twentieth-century editor Fazl Mahmud Asiri has analysed this slight but significant shift. Khayyam, on the one hand, believed that sins were made to be committed and that their commission was even necessary to attract the mercy of God through subsequent repentance, and sins were therefore nothing to worry about. To Sarmad, on the other hand, sinning was not so central in getting closer to God, and he seems to have seen his sins as a source of exasperation of the heart (*dilkhastagi*). Sin and lust were recurring themes in Sarmad's quatrains. In one he expressed his consciousness of being steeped in sin, using the words *jurm* (sin in the sense of crime or fault), *ma'siyat* (sin in the sense of disobedience) and *guna* (sin in the sense of error or flaw), while expecting God's mercy. In another quatrain he reflected on the ravages of his lust (*hawas*).[140]

139 Lodi, *Mir'at*, 124.

140 Sarmad, *Rubaiyat*, xxviii—xxxii, 1 (no. 1), 33 (no. 230), 30 (no. 204), 40 (no. 275).

It is in this context that we must see the most sexually explicit of Sarmad's quatrains:

> That butcher-boy who begrudges me a favour
> I'd like his heart to be as bright [*saf*] as a mirror.
> If he gave me his hand, I'd grab his foot.
> And if he gave me his bottom [*pusht*], not chest, even better.[141]

While it may be read as part of the genre of mystical symbolism involving the evasive or unattainable beloved, for which the association with cruelty that the butcher-boy brings is a fitting trope,[142] there are a number of possible chaste and lustful readings. Why does the butcher-boy carry a grudge? The answer seems to be in the last line: Sarmad wants to have recourse to his behind. But it is not revealed if Sarmad's recourse to the boy's behind is actually consummated. The last hemistich can also be read as a gesture of leaving the scene. Therefore Asiri translates it chastely as: "But if he leaves, it's better than his showing his (annoyed) face." Then there are the references to cleanliness and mirrors. The mirror was a long-standing mystical metaphor for attaining the divine through self-reflection, but in this case it perhaps also reflects on the sameness of the persons involved. The reference to purity or cleanliness encapsulated in the word *saf* further suggests that Sarmad wants to preserve the boy's purity. But there is a third possible reading of the last hemistich, which backs up the first (sexual) reading. It builds on the alternative meaning of *pusht dadan* as "to support or back," and the implicit idiom *sina dadan* "to show strength," thus: "And if he backed instead of resisting me – even better."[143] In any case, we may conclude that Sarmad was prepared to test the boundaries of chastity in his poetry.

Finally, a note is in order about the spectrum of genres in Persian literature that included *hajv* (satire) and *hazl* (ribaldry or off-colour humour). I have found these genres difficult to work with for the purpose of this chapter, because the extent to which they confirmed or tested the established norms is always open to question. Were their authors testing the boundaries by talking dirty or were they confirming them by exposing those who crossed them? Therefore, I have

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141 Sarmad, *Rubaiyat*, 12 (no. 80). Translation provided by Prashant Keshavmurthy. It seems to be because of its absence from the 1921 edition of Sarmad's diwan that this quatrain is not included among the (five) quatrains translated in Vanita and Kidwai eds., *Same Sex Love*, 157—8. The corpus left by Sarmad is rather unstable, and Asiri has gathered and selected from the 1905 edition as well as anthologies and *tazkiras*. See his introduction to Sarmad, *Rubaiyat*, xxxiii—iv.

142 The influential Egyptian mystic and poet Umar ibn al-Farid (d. 1235) was for instance known to have loved a butcher-boy. El-Rouayheb, *Before Homosexuality*, 97, 102.

143 Personal communication by Prashant Keshavmurthy 7.9.2013.

Fig. 4: *Old Man and Youth*, Iran, mid-seventeenth century. The man at the right makes a gesture with his outstretched hands suggesting intercourse with the youth on the left. The startled onlooker may be a later addition. National Museum of Asian Art, Smithsonian Institution, Freer Collection, Purchase – Charles Lang Freer Endowment, F1953.42.

cited one of the great masters of these genres, Zakani, only in so far as he exposed the self-justifications of sodomites that he seems to have encountered. But there is much more concerning sodomy in his work, which on the whole seems to cast male-male sexuality in a negative light, even though it is discussed in an in-your-face way. And there are a number more of such examples in our period and also after it.[144] The work of Ja'far Zatalli quoted in the section on definition

144 Compare Sprachman, *Licensed Fool.*

and enforcement, for instance, one can hardly count as advocating transgression. His call to "play arse-fuckery" is plainly satirical and, as the literary scholar Shad Naved notes, homosexual intercourse is undeniably depicted in his poem on that theme as "negative albeit fun." Naved sees Zatalli as a precursor to the flourishing in India of the literary genre of *shahr-i ashub* that in its Urdu form bemoans the breakdown of the moral city.[145]

We may even identify a visual counterpart to the literary genre of ribaldry in Iran, as the art historian Sussan Babaie argues. In an article discussing two seventeenth-century murals in public and representational spaces in Isfahan, she draws attention to some homoerotic themes. One of the murals, a depiction of a feast among Europeans that was is the entrance to the bazar, Europeans are depicted as debauching. As part of this scene, one man carries a male companion with drunken half-closed eyes on his back, while a third person points to the rather large buttocks of the companion. In a mural in the audience hall of the Chihil Sutun garden pavilion, which has the reception by Shah Abbas of an Uzbeg ruler as its main theme, we see a man luxuriously stretched out, lying with his de-turbaned head in the hand and lap of another man who is dangling a pear above his mouth. Babaie suggests that this pair are also European. She further notes that the attribution of homosexual behaviour to Europeans in these paintings suggests a certain moralising on the issue, to be seen in the context of textual representations of European claims of sexual abstinence (while away from their wives) or celibacy (by the monks present in Isfahan).[146] Such exposing the hypocrisy of others would certainly fit the template of the ribaldry genre. Another example of the ribaldry genre in Safavid art is a drawing made around the beginning of the seventeenth century (fig. 4). In it we see the face of a man looking shocked or affecting shock (his wide-open eyes are greatly exaggerated), while witnessing a lecherous older man making a gesture suggesting penetrative sex to a boy, who looks askance and seems unfazed. Thus, the image contains all three positions in the game of ribaldry: the player, the object of seduction, and the censor/hypocrite. The art historian Esin Atil suggests that the onlooker must be a later addition,[147] yet the shock that the onlooker displays may merely reflect what the image intended to invoke in the viewer, who is invited to condemn, but still…

Another such visual satire painted on paper, probably at the court of a Safavid district governor in Khurasan, illustrates the romance *Khusrau and Shirin* by one

145 Naved, "Erotic Conceit," 157—61.

146 Babaie, "Frontiers of Visual Taboo," 131—55.

147 The onlooker does indeed look a bit out of place. Atil, *Brush*, 90.

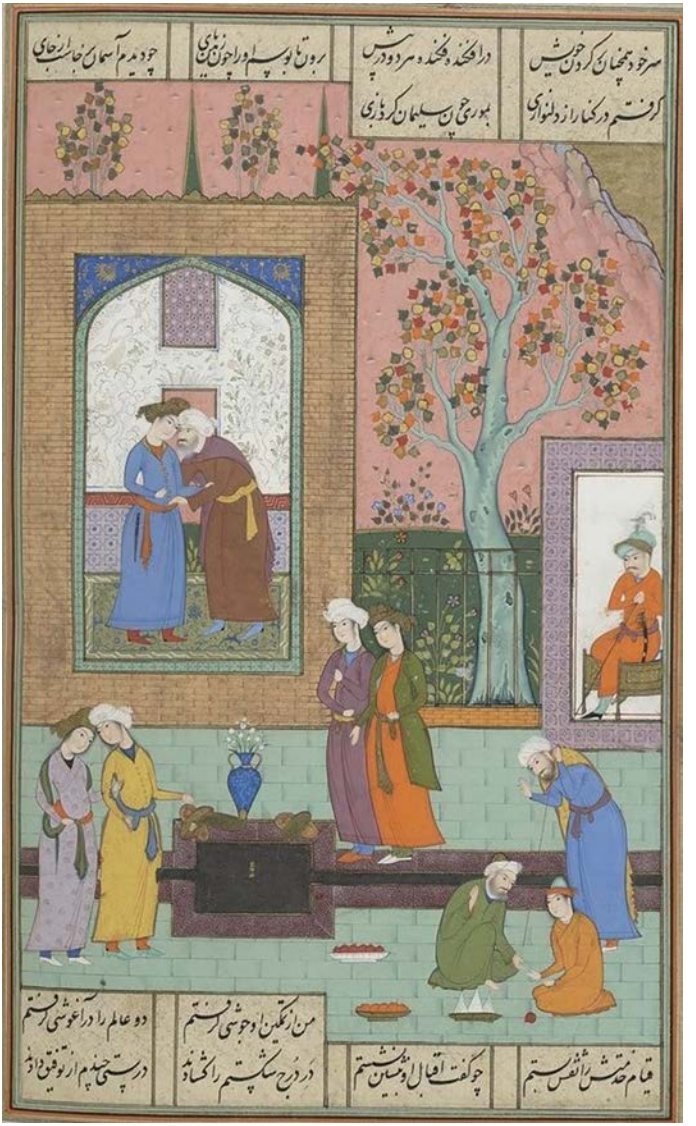

Fig. 5: *The King Has the Feasting Ceased on Account of Nizami.* Illustration to Nizami's *Khamsa*, possibly made in Khurasan, 1619. Nizami (with walking stick) on the right strides into a scene where wine bottles and male-male intimacy are still visible. Bibliothèque nationale de France. Département des Manuscrits. Supplément Persan 1029: fol. 120v.

Fig. 6: Detail of fig. 5. In a garden pavilion a man with a grey beard fumbles with the belt of a youth. The youth is linked to the fox painted on the wall behind, and the old man to the hare. While outwardly it appears that the man has caught the youth, inwardly the youth ensnares the soul of the man in his charms.

of the most celebrated Persian poets, Nizami of Ganja in Azerbaijan (died 1209).[148] Here, we see a slightly bent man with a grey beard with his hand tucked under the belt of a beardless boy as if trying to unfasten it (fig. 6). The two stand in a garden pavilion with a hare and fox painted on the wall behind. The scene is a detail of a larger one in which we also see a couple of beardless boys walking hand in hand, and an older man and a boy next to wine flasks (fig. 5). Nizami walks into this scene, an illustration for a passage where the poet presents himself as entering

148 Nizami, "Khamsa," fol. 120v. For a discussion of this manuscript's images, painter(s), calligrapher and possible patron, see Richard, *Les cinq poèmes de Nezâmî*.

Fig. 7: *Shah Abbas with a Saqi* by Muhammad Qasim, 1627. Shah Abbas clasps the wrist of his young wine-pourer while the latter clasps the neck of the wine-bottle in front of the private parts of the shah. Musée du Louvre MAO494. Photo (C) RMN-Grand Palais / Mathieu Rabeau.

the court of a patron ruler who was just then engaged in a feast reminiscent of paradise (where a number of things not permitted in this world were thought to be permitted, including wine-drinking and perhaps sodomy)[149]. The feast involved wine, music and (mental) caressing, as well as women singers who made (male) listeners tear their own silk shirts. But out of respect for Nizami's asceticism (*zuhd*), the ruler stopped the feasting for one day, dismissing the *saqi*s, or wine-pourers, and minstrels. Nizami was quite exceptional in priding himself in being a *zahid* or purist ascetic, since most poets celebrated licentiousness.[150] The oeuvre

149 Compare El-Rouayheb, *Before Homosexuality*, 128—36.
150 Seyed-Gohrab, *Laylī and Majnūn*, 26, 28—9.

of Nizami in general contains little or no trace of homoeroticism,[151] but the text as it is in this particular manuscript copy made over four centuries later hints at intimacy between the feasting men and the *saqi*s: "having taken the *saqi*s, wine in hand / the emperor drank malevolent wine [and] became drunk."[152] Be it on the basis of this verse or the general fashion of having feasts in the early seventeenth century, the painter decided to include the scene with the man and the boy and his belt.

The choice to illustrate this particular scene at the court of a provincial governor in Iran suggests that Nizami's brand of purism was on the ascent once more around 1620. On the other hand, it was at that time still possible for Shah Abbas to have himself portrayed looking intently at, and clasping the hand of, a *saqi* who is in turn suggestively clasping a flask in front of Abbas' pubic area (fig. 7). A ribald image that once more seems to test the boundaries of *shahid-bazi.*[153] Chapter 4 will discuss the long-term ebb and flow of sharia-mindedness at the royal courts and other power centres.

A Short History of Definition and Enforcement in the Latin World

Over the period under investigation here, sodomy was a concern for theologians and canonists as well as for secular jurists dealing with Roman, customary and statutory law. What sodomy was mattered for the expected verdict by God concerning one's afterlife, for ecclesiastical courts, and also for secular courts, the latter especially after parts of Italy, parts of France, Spain, and England saw a wave of secular statutes, ordinances, and codifications of customary law that addressed sodomy in the second half of thirteenth century.[154] A number of jurists in that early period saw sodomy as a *delictum mixti fori* or a crime that came under the mixed jurisdiction of secular and ecclesiastical courts. Ideally the Church and governments were to work together on its prosecution.[155]

151 Shamisa, *Shahidbazi*, 91—2.

152 In this particular manuscript the *saqi*s (*saqiyan ra*) are clearly the object of the ruler's actions. In other manuscript versions they may be seen as the subject of the first hemistich. As found in the critical edition by Chetagurov the verse might be translated, "his *saqi*s [*saqiyanash*] having taken wine in hand/ the king was drinking malevolent wine [and] became drunk." Nizami, "Khamsa," fol. 120r; Nizami, *Khusrau o Shirin*, 786—8.

153 Painting by Muhammad Qasim, 1627. Musée du Louvre, inv. no. MAO 494.

154 For this wave see Boswell, *Christianity*, 286—93; Crompton, *Homosexuality*, 196—201.

155 Crompton, *Homosexuality*, 199; Puff, *Sodomy*, 40—1; Monter, "Sodomy and Heresy," 42.

Both theologians and secular jurists found the grounds for the proscription of sodomy in the Bible and adduced its passages in condemning and defining the crime, even while they also referenced the legislation of the Roman emperors, both Christian and pre-Christian, and the writings of the Church Fathers, especially Augustine. In a chapter about sodomy that may have influenced canon law, Peter Cantor in the late twelfth century invoked some dozen biblical passages to show that it was a sin. In the mid-sixteenth century the Flemish jurist Joos de Damhouder adduced some eight biblical passages along with the commentaries of Church Fathers, Roman legal texts and classical Roman thinkers for his discussion of the crime in the Roman Law tradition. The seventeenth-century English jurist Edward Coke could point to as many as thirteen biblical passages in his exposition on the sodomy/buggery statute then in force in England. The passages employed for the purpose came from both the Old and New Testaments. Especially crucial became the passage in Paul's first letter to the Romans, where he condemned men and women turning to their own sex "against nature [*contra naturam*]."[156]

There was an ongoing debate over whether sodomy was to be mentioned at all by jurists and theologians in communications with the common people, and whether descriptions of what it was would not give people ideas. It was therefore often referred to in vague terms, as the "silent" or "unspeakable" sin.[157] This may be one part of the explanation for the enormous gap in the level of detail that we see when we compare the official definitions of sodomy to those of usury. Yet while keeping it vague the jurists and theologians using the term seem to have worked with the idea that well-informed people knew what they were talking about anyway.[158] A case in point is the early fourteenth-century Anglo-Norman *Mirror of Justices*, which lists three kinds of crimes against the majesty of God, namely heresy, apostacy and *sodomie* and proceeds to define only the former two.[159]

By the beginning of our period, sodomy had, in theological and legal treatises, mostly come to be defined as intercourse between people of the same sex, and especially between men, even though some other sexual practices were closely associated with it. In his late twelfth-century exposition on sodomy, Peter Cantor, with reference to Paul's letter to the Romans, used the term sodomy exclusively for

156 Crompton, *Homosexuality*, 197—8, 203—4; Boswell, *Christianity*, 277; Damhouderius, *Praxis*, 351—61 (chapter 96); Smith, *Homosexual Desire*, 50. For an overview of the biblical passages deemed relevant see Boswell, *Christianity*, 91—117.

157 Crompton gives a brief overview of the debate and also notes the strategic use of this argument for silence by Frederick the Great of Prussia still in the eighteenth century. *Homosexuality*, 361—2, 512. See also Roelens, "Visible Women," 8—9; Compare Monter, "Sodomy and Heresy," 46—7.

158 Brundage, *Law, Sex*, 399.

159 Horn, *Mirror of Justices*, 15—6.

"males doing evil with males, women with women." In the thirteenth century again, whenever it was defined, "sodomy" can be seen to have applied only to intercourse between people of the same sex. The important theologian Albertus Magnus defined *sodomia* along the same lines as Cantor.[160] Most of the thirteenth-century codifications did not explicate what they meant by sodomites and sodomy, but the *Siete Partidas* (*Seven Parts*) law code drafted around 1260 for the king of Castile, which may, incidentally, in its organisation have been inspired by Muslim jurisprudence, gave the following definition: "sodomy is the sin which men commit by having intercourse with each other, against nature and natural custom."[161] While that definition referred only to men, the code for Orléans in France of approximately the same date did explicitly mention women under its discussion of *sodomites*, but again did not further define the term.[162]

However, also in the early part of our period, sodomy came to be included in a new, wider, category called crimes or sins against nature. In 1179 a canon had been adopted by Third Lateran Church Council that set punishments (deposition and penance for clerics, excommunication for laymen) for "that incontinence which is against nature, on account of which the wrath of God came upon the sons of perdition and consumed five cities with fire."[163] A large role in shaping this category of sins against nature was consequently played by Thomas Aquinas, who continued, following his teacher Albertus Magnus, to define "the sodomitical vice" itself as "copulation with the inappropriate sex, male with male and female with female." For him this was merely one of several ways in which sin against nature could occur, the others being: *mollities* (masturbation), *bestialitas* (bestiality), having intercourse in an inappropriate mode or with an inappropriate instrument, or other "monstrous and bestial ways" of intercourse.[164]

As the category of "sins against nature" gained currency over our period, the term "sodomy" came on occasion to be seen as its equivalent, that is, as a label for the whole category. We can trace this development especially in the secular codes that were promulgated over the long sixteenth century in the Holy Roman Empire, Spain, Portugal (all under the Habsburg dynasty by the end of the century) as well as England. The 1532 German-language code for the Holy Roman Empire brought human-animal, male-male and female-female intercourse under the heading of

160 Boswell, *Christianity*, 277, 316, 376. Translations as there.

161 Boswell, *Christianity*, 289. Translation as there. On the Islamic influence see Marcel Boisard, "Probable Influence of Islam," 435—6.

162 Crompton, *Homosexuality*, 196—202. See also Boone, "State Power," 145.

163 Boswell, *Christianity*, 277—8. Translation as there.

164 Aquinas, *Summa*, pt. 2 of pt. 2, question 154, article 11; Gilbert, "Conceptions of Homosexuality," 62; Boswell, *Christianity*, 316.

"unchastity against nature,"[165] but as the code for the Holy Roman Empire came to be incorporated into statutes for the constituent parts of the empire, the term sodomy was sometimes used for this whole set of crimes.[166] Similarly, the 1533 statute for England spoke of "*buggerie* committed with mankind or beast," without further defining buggery, yet in 1563 this same statute was revived and made permanent under the title "act for the punishment of the vice of *sodomye*."[167] At the end of the century the code enacted by Philip II in Portugal made sure to include "any person, of whatever rank, who in any way commits the sin of sodomy."[168]

An important landmark in this ongoing redefinition of the term sodomy in the legal sphere was the influential treatise published in 1554 by the Catholic Flemish jurist De Damhouder, which was soon translated from Latin into French, Dutch and German (but the relevant section was much less detailed in those languages in view of their more tender audiences)[169]. It was a guidebook to the conduction of criminal prosecution, and it borrowed heavily from the handbook by another Flemish jurist, Philips Wielant, completed around 1515 but only circulating in manuscript. Both saw the term sodomy (*zodomye*/*sodomiticum*) as the equivalent of the term sin against nature. Both also saw it as a crime as well as a sin. There are some differences in the way both jurists elaborated this, but the more learned and influential De Damhouder presented the following in the Latin version. The crime was constituted when someone practiced sexual abuse of three main kinds, which were, in order of ascending gravity: with oneself, with other people, and with an animal. The first was what Paul called *mollicies* and the Romans masturbation. The second main variety could be subdivided in a number of kinds. It could be with the same sex and with the opposite sex. The same sex variety might be a masculine person with a masculine person, sleeping "with a man as with a woman [*cum masculo coitu foemineo*]," as Leviticus 20: 13 put it, or it might be a woman having intercourse with a woman in an unspecified way. The crime as conducted between the sexes could again be constituted in two ways: "not in the appropriate body part or not in the appropriate way." De Damhouder

165 Art. 116: [*Straff der*] *Unkeusch so wider die Natur* [*beschicht*]. The Latin translation has [*poena*] *libidinis contra naturam. Carolina* (German), 61, (Latin) 93.

166 Thus e. g. the 1656 code for Austria explicitly equated "unchastity against nature" and *sodomia* in the title of the relevant article. *Ferdinandea*, 79—81 (art. 73). For the complex regional reception of the 1532 imperial code in this respect see Hehenberger, *Unkeusch*, 48—52; Puff, *Sodomy*, 29—30.

167 *Statutes of the Realm*, 4, pt. 1: 447 and 3: 441 (spelling of quotations modernised).

168 Crompton, *Homosexuality*, 309. Translation as there.

169 For a comparison of the Latin, French, and German translations see Hehenberger, *Unkeusch*, 184—5. Also contrast my summary of the definition below to that by Jonas Roelens on the basis of the Dutch translation, "Visible Women," 14—5, 17—8.

expressly refrained from explaining the latter two possibilities. The third kind, with animals, could be committed by both men and women in ways not specified beyond the terms used in Leviticus 18 (a man should not copulate (*coibis*) with an animal and a woman not succumb to (*succumbet*), or mix with (*miscebitur*) an animal). To conclude De Damhouder listed two crimes that did not come under the definition of sodomy but approximated it: intercourse with "Turks, Saracens or Jews," and intercourse with corpses.[170]

Even while the widening of the definition of the term for the act(s) was going on, the terms for actors, such as *sodomita*, continued to strongly connote a man engaging in intercourse with men or boys.[171] The early fifteenth-century preacher Bernardino of Siena, who demonstrably influenced sodomy legislation in some Italian towns, stated in one of his sermons that there were three forms of sodomy: "either male with female, or male with male, or female with female." Yet overall, in his six odd sermons on the topic, he painted the sodomite as a type of man who worshipped boys and was uninterested in women. The specific connotation also persisted in legal texts that otherwise adopted De Damhouder's wide definition such as the 1656 criminal regulations for Austria. As Susanne Hehenberger points out, this text equated the person engaging in sodomy first of all with a pederast (*knabenschänder*) and only then with persons engaging in other forms of sodomy. And a late sixteenth-century Latin paraphrase cum exegesis of the code of Charles V applied the phrase "imitating the most unmentionable outrages of the Sodomites" only to the kind of male-male intercourse that was punishable, and not the human-animal or female-female intercourse that was also included in the relevant clause.[172]

Further questions of definition, however, inevitably came up in the course of trials and in directions for the prosecution. Was penetration a necessary constituent of the crime? The role of penetration in constituting the crime of sodomy remained contested as we will see in examples from Italy, Portugal and England below. Already in the eleventh century Peter Damian and Pope Leo IX debated the role of "the complete act against nature," or anal penetration, in defining the sin committed by *sodomita*s (here only men) for the purpose of canon law.[173] The protocol of a 1493 secular trial of a pastry baker in Fribourg in Switzerland distinguished between his acts "from the front," by rubbing his member against the belly of a male counterpart, and "from behind," which constituted

170 Wielant, *Corte instructie*, 222 (chapter 96); Damhouderius, *Praxis*, 351—61 (chapter 96).
171 Norton, "The 'Sodomite' and the 'Lesbian'." See also Crompton, *Homosexuality*, 175.
172 Hehenberger, *Unkeusch*, 52; Remus, *Nemesis Karulina*, 107 (*caput* 116).
173 Crompton, *Homosexuality*, 175—7 (translation as there); Boswell, *Christianity*, 210—3, 365—6.

"proper sodomy [*propre sodomitique*]" and seems to have clinched the death sentence.[174] Even for cases of female-female intercourse penetration with implements was often deemed a necessary constituent of the full crime, certainly by the later part of our period. The influential Spanish jurist Antonio Gómez for instance, in a legal commentary published a year after De Damhouder's treatise, argued that the most severe punishment was to be applied in cases of female-female intercourse only if a material instrument had been used, and a few years later the headquarters of Spanish Inquisition decided not to prosecute some accused women because without artificial phallus their lascivious behaviour did not constitute sodomy.[175]

To conclude this section a few paragraphs are in order on the ways, instruments and extent of enforcement. There was great variation in both the intensity and way of prosecution throughout the different regions of Europe and through time, but it is clear that the beginning of our period saw much change in this respect. The wave of secular statutes, ordinances, and codifications of customary law that swept Italy, France, Spain, and England set very severe punishments for sodomy, mostly death by burning or otherwise. In Germany it was simply assumed that the punishment of burning prescribed in the code put together under the Late Roman emperor Justinian was still in force. In Scandinavia punishments prescribed around the beginning of our period were milder. There is debate about the extent to which the laws were enforced in the first part of our period, because there are few documented sentences, which does not necessarily mean that there were few prosecutions. In any case the accusation of sodomy played a large role in Philip IV of France's campaign against the Knights Templar in the beginning of the fourteenth century.[176] During the second half of our period, Italy, Spain, and Portugal each saw many thousands of denunciations and trials, France and the Southern Netherlands each in the hundreds, the northern Netherlands and Austria each a few dozen, and England only a few – although sodomy also played an important role in Henry VIII's campaign against the monasteries – and Scandinavia saw hardly any. Regarding the ways of enforcement Florence is a particularly interesting case because, as Crompton notes, the sodomy laws were so embattled there that they were on average changed more than once a decade over the period of the Renaissance. The changes concerned such things as punishment for first and second offense and death penalty versus fining. The thousands of cases brought be-

174 Trial protocol of Jehan Ruaulx 11.6.1493, in Gyger, *L'épée*, 308—9. Compare Puff, *Sodomy*, 29
175 Crompton, *Homosexuality*, 299. Monter, *Frontiers*, 281—2. See also the remark by De Brantôme below, in the section on circumvention.
176 Crompton, *Homosexuality*, 131—6, 192—204; Boswell, *Christianity*, 293—5, 321, 328—9; Puff, *Sodomy*, 27—8.

fore the special tribunal of the "Officials of the Night" in Florence are also among the best researched by modern historians.[177]

The wrath of God – in the form of natural disasters and plagues on lands harbouring sodomites – was also perceived as a means of enforcement on earth. This idea seems to have been quite widely held among both Catholics and Protestants until after our period. Peter Cantor in his treatise from the second half of the twelfth century noted that the sin of sodomy had destroyed five cities, and this notion was subsequently (or in any case around the same time) inscribed in the acts of the Third Lateran Church Council. Numerous secular ordinances also mentioned this aspect. Thus, the enforcement by both secular and ecclesiastical administrations was often justified with reference to the danger that God's enforcement would be less discriminate. Still at the end of our period a preacher at the court of Louis the XIV tried to convince the latter to enforce the law more strongly on this ground.[178]

The reality of the prospect of punishment in the afterlife also played a large role. When, at the beginning of our period, Pope Gregory IX sent out some Dominicans to root out unnatural vice in Germany, he suggested no this-worldly punishment, but instead that the Dominicans should bring the sinners back to the right path, keeping in mind that such sinners might well suffer "some unimaginable type of pain worse than that given to all the other damned souls." An interesting observation on the relation between punishment in this life and in the hereafter is found among the rumours noted by the Puritan Symonds D'Ewes in his diary in the first half of the seventeenth century. After a school usher had been acquitted of the charge of having "buggered" a schoolboy, the father, a knight, was about to slay the usher with his rapier when those present intervened "saying that, though he had escaped the justice of man, he could not the judgement of God."[179]

There were thus some differences with the Persian world regarding definition and enforcement. We have far more data on prosecution for the Latin world, and probably there also *was* more prosecution by the authorities. On the other hand, jurists in the Persian world allowed for the pre-emptive strike by individuals, whereas in the Latin world intervention in the case of attempted sodomy was also left to the authorities. In the Latin world the definition came to be stretched

177 Crompton, *Homosexuality*, 251—61, 311, 321, 326—7, 362—6; Roelens, "Visible Women"; Noordam, *Riskante relaties*, 24—5, 56, 85; Hehenberger, *Unkeusch*, 164.

178 Boswell, *Christianity*, 277, 289; Crompton, *Homosexuality*, 175, 249, 252, 260—1, 347, 385—6; Vanhemelryck, *De criminaliteit van de ammanie van Brussel*, 159; Puff, *Sodomy*, 27; Brundage, *Law, Sex*, 398—9, 472; Boone, "State Power," 140.

179 Boswell, *Christianity*, 294—5; Smith, *Homosexual Desire*, 176—7.

much further than in the Persian world, especially over the course of the sixteenth century. Yet the core of the definition, if we can put it that way, was and remained the same in both worlds: male-male penetration. In the next sections we will follow the definition of sodomy where it takes us, since the story of definition is also part of the story of justification.

Circumvention in the Latin World

There seem to have been two main modes of presenting intimacy between same-sex partners as non-sodomitical. The first was engaging or claiming to engage only in non-penetrative sexual activity and the second was engaging or claiming to engage in forms of intimacy that did not involve sexual organs. Sometimes these two strategies were employed in combination.

The importance of anal penetration in some definitions of sodomy has already been mentioned, and we have evidence that practitioners of male-to-male intercourse were acutely aware of this. Medieval visual culture perhaps contributed to such an awareness with its negative depictions of sodomy focussed on the anus.[180] One mode of circumvention of the proscription of sodomy was practicing or claiming to practice interfemoral (between the thighs) rather than anal copulation. Frequent mentions of this appear in trial records from fourteenth- and fifteenth-century Italy as well as from fifteenth- and sixteenth-century Germany and Switzerland.[181]

A particularly interesting case on which we have a lot of material comes from Portugal in the later part of our period. The Portuguese Inquisition only proceeded against *sodomia perfeita* or *sodomia completa*, i. e. cases involving both penetration and emission of semen.[182] We can see that men inclined to men were keenly aware of the possibilities this created in a series of letters written by Francisco Correa Netto, sacristan of the cathedral of Silves in southern Portugal, in the Lenten season of 1664. The letters were addressed to Manuel Viegas, a guitarist and maker of musical instruments, who turned them over to the town vicar who sent them on the Inquisition. The letters have been translated and analysed by the anthropologist Luiz Mott. The first of the letters contained a simple proposal:

> Senhor Manoel Viegas:
> If men sleep with me, it is not to find a pussy. They place the cock between my legs, and they

180 See Mills, *Seeing Sodomy*, 247, 270—97.
181 Dall'Orto, "Socratic Love," 35; compare Puff, *Sodomy*, 29.
182 Mott, "Portuguese Pleasure," 85, 92 and "Love's Labors," 93, 99.

> have their way. I do not achieve it. If Your Grace would wish the same, dispose of me, I am at your service, to whom I swear unto death, to offer what is needed, and the losses are mine. Francisco Correa Netto

The offer came with two or three safeguards against prosecution: first, it was for interfemoral intercourse, second, the letter seems to promise sworn discretion, and third, with his remark "I do not achieve it [*Eu, nao me vem nada*]," Correa suggested that he would satisfy his partner without coming himself. As Mott points out, a number of cases in the Inquisition records revolve around what he calls "pseudo-hermaphrodites" who tied their parts up with tape and cloth and whose partners could claim that they thought they had a vagina rather than a penis, and Correa's remark seems to hint at such an escape route as well. From the subsequent letters it appears that the two did kiss and caress, but Viegas refused to go further despite having an erection. The vicar who forwarded the letters to the Inquisition noted in his accompanying letter that, "We have long had a clandestine sodomite in this city who by God's will is now discovered," and a number of townsmen were prepared to swear on the Gospel that Correa was an infamous sodomite, but Correa was not prosecuted. [183]

The distinction between penetrative and non-penetrative sexual pleasuring was also made by Pierre de Bourdeille-de Brantôme in the memoirs he wrote around the turn of the seventeenth century, but with relation to woman-to-woman intercourse. While he had little sympathy for *abominables*, i. e. practitioners of sodomy, whom he divided into *bougre*s and *bardache*s, i. e. active and passive, and about whom he noted that, "God awaits them and in the end we will see what must become of them," he wrote sympathetically about women who pleasured each other by rubbing (*friquarelle*) or what is now called scissoring (*geminos committere connos*). According to De Brantôme some men said that these practices were harmless, as opposed to the use of "instruments fashioned like a …., but which people like to call *g*….[*aude mihi*]," i. e. what are nowadays called dildos. Such instruments were a danger to women's health according to Brantôme. He claimed to have spoken to quite a number of ladies engaging in female-to-female intercourse, and presented stories from both women who would not want otherwise and women who engaged in such practices out of convenience. While speaking about the latter category of women he noted that they "hold the opinion that they do not offend God as much and are not as slutty as [women having intercourse] with men; also there would be a great difference between pouring water into a vase and merely sprinkling it around and on the edge." De Brantôme agreed with them on this and, moreover, many of their husbands did too, prefer-

183 Mott, "Love's Labors." Translations as there.

ring this kind of adultery to that with men. As the poet Martial had put it: in that way the husbands were not *cocu* (cheated through adultery). But then again "that is not the text of the Gospel, but only that of a foolish poet."[184] Divine law is thus continually referenced in De Brantôme's discussion, yet he was willing to accept some redefining of what constituted illegal intercourse.

As the modern historian Giovanni Dall'Orto shows, there was a period of about a century in the history of Renaissance Italy that circumvention of the proscription of sodomy took the shape of protested chastity, just as it did in the Persian world for much of our period. That we are dealing with a mode of circumvention is not a figment of our modern gaze, but borne out by the suspicions of contemporaries as they came to be increasingly voiced in the course of the century starting from Marsilio Ficino's composition of a commentary on Plato's *Symposion* in 1469. Already during the Council of Florence in 1439–40 scholars had discussed the merits of Plato's philosophy of love in general and his views on pederasty in particular at the house of Cosimo de' Medici at the initiative of a Greek cardinal,[185] but the early humanist Ficino may be credited with eloquently putting into words this rediscovery of Socratic or Platonic love[186] under the patronage of Cosimo. Ficino saw this love as developing between ripe men and men who were nearly adults, and carefully separated it from the "the physical union of love" which came out of the "urge of the genital parts," which could be directed to both sexes (although the inclination to same-sex intercourse was, according to him, more frequent in males who were born under a specific planetary constellation). Ficino's conception of this higher form of love was very close to that of many Persianate contemplations of youthful male beauty, which reflects the shared Greek philosophical heritage of our two worlds as well as Ficino's reception of the Iranian thinkers Ibn Sina and Ghazali, whom he saw as "thorough friends of Plato."[187] Here is how Dall'Orto describes this conception:

> Following Plato, Ficino declared that through the beauty of the human body we can admire a reflection of God's own beauty, which is its model, its 'idea.' In Ficino's thought, the human body is seen as a link connecting the tangible world and God: it stands halfway between the two. Moreover, only love can grasp the reality of God, which is the source and idea of any human love, whereas the human mind is limited, and can know only a part of the truth.[188]

184 Brantôme, *Vies des dames gallantes*, 97, 108—11; Crompton, *Homosexuality*, 350—4.

185 Sternweiler, *Lust der Götter*, 89.

186 Ficino seems to use the two as synonyms. Hanegraaff, "Under the Mantle," 182 n.32.

187 See Hasse, "Avicenna's 'Giver of Forms'," 236. On the shared heritage of Neoplatonism see also Gommans, *Verborgen Wereld*, 173—248.

188 Dall'Orto, "'Socratic Love'," passim, quotation from 36.

Among the number of still famous Renaissance thinkers who tried to live or utilise Ficino's ideal were Girolamo Benivieni and Giovanni Pico della Mirandola (a student of Ficino). Their combined epitaph evokes the mystical aspect of Socratic love and acknowledges the dialogue with "Oriental" philosophy: "here lies Giovanni Mirandola, the rest know both the Tagus and the Ganges and maybe even the Antipodes…Girolamo Benivieni, to prevent separate places from disjoining after death the bones of those whose souls were joined by Love while living, provided for this grave."[189]

Much has also been written about the way the famous artist Michelangelo, who was part of Ficino's circle at an early age, expressed his mystical conception of love in his poetry and visual arts. As Crompton remarks, he comes strikingly close to the imagery of Persian mystical poetry in his poems to Tommaso de' Cavalieri, seeing the beauty of this man in his mid-twenties as both a veil and a mirror of God. But from his poetry it also seems that Michelangelo had trouble defining his relation to his beloved boys and young men, as well as with the suspicions that it was not chaste. He made a rather ambiguous drawing for Tommaso of Ganymede's mythical abduction by Jupiter in the form of an eagle, a favourite homoerotic trope in the Renaissance. It depicts Neoplatonic rapture but also suggests intercourse through the way the bodies of eagle and the youth are positioned (fig. 8).[190] Michelangelo's vision of Socratic love thoroughly confused his young authorised biographer Ascanio Condivi: "As for me, I don't know what Plato says about the matter, but I know well that having practiced[191] with him so long and intrinsically, I never heard from his mouth anything but most honest words, having the power to extinguish in young people every disordered and unbridled desire that might cascade in them."[192]

For all this mystification, however, Ficino's conception of Platonic love had been entangled with the concept of sodomy from its inception, and this entangle-

189 Dall'Orto, "'Socratic Love'," 43 (translation as there) and idem, "Giovanni Pico della Mirandola." Reference to the rivers Ganges and Tagus to evoke "Orient" and "Occident" seems to have been something of a trope and is also found in a prophetic inscription allegedly found in Portugal in 1499. See Subrahmanyam, *Tagus to Ganges*, 136—7. Ficino and Pico della Mirandola explicitly acknowledged their debt to millennia of thinkers from what was then conceived of as the Orient. See Matar, *Islam in Britain*, 87—8.

190 Crompton, *Homosexuality*, 269—78. Crompton cites some art historians who point to the sexual dimension of the drawing. On the rise and demise of Ganymede theme in the visual arts see Sternweiler, *Lust der Götter*, 149—57, 258—73, 286—9, 301—2.

191 Michelangelo's beloved Tommaso also spoke of his "practice" with him. See Crompton, *Homosexuality*, 274.

192 Condivi, *Vita di Michelagnolo*, 46v; Dall'Orto, "'Socratic Love'," 53 (translation substantially modified).

Fig. 8: Copy of *The Abduction of Ganymede* made by Michelangelo for Tommaso de' Cavalieri in 1532. The original is lost, this copy is attributed to Giulio Clovio, sixteenth century. The positioning of the bodies of the eagle Jupiter and the youth Ganymede is more suggestive of carnality than of the Platonic ideal. Royal Collection Trust no. 913036 / © His Majesty King Charles III 2023.

ment proved the undoing of Platonic love. As the modern scholar of Western esotericism Wouter Hanegraaff argues, there were probably two direct causes for Ficino's writing his *Commentarium:* the suppression of the Roman Academy by the pope in 1468 and Ficino's struggle with the physical aspects of his crush on Giovanni Cavalcanti. Among the charges levelled at the leader of the Roman Academy, Pomponio Leto, was that of sodomy – on the grounds of his praising the beauty of two boys in Latin writings. In his written defence Leto appealed at length to the example of Socrates. As to Ficino's effort to come to terms with his physical attraction to Cavalcanti, we may tease that out of his writings. Ficino seems to have consciously connected his writing to his sexual desire. As Hanegraaff notes: "he even foreshadows modern perspectives on sexual sublimation by stating that it is in fact 'that continuous ardour of concupiscence' which 'impels some to the study of letters, others to music, or painting, others to virtue of conduct, or the religious life, others to honors, some to making money, many to the pleasures of the stomach and of Venus, and others to other things.'" Ficino was attempting to

extricate two things that he himself was aware were tied up, and we can no longer assume that he was simply naïve. As Hanegraaff argues, in extricating the physical and the Platonic Ficino was not aiming to subjugate desire but to transform it into a creative force.[193] Michelangelo, who was keenly aware that his desires were sinful,[194] also may have leant to this view, although as we saw in Condivi's remark above, some of his efforts also went into containing cascading carnal desires. Whether as a creative force or as something to be contained, however, carnal lust had a role to play in Platonic love. This primal entanglement between the concepts of sodomy and Platonic love proved the undoing of the latter in the end.

Over the course of Michelangelo's lifetime, the ideas about Socratic love and its practice were punctured time and again. One of Michelangelo's own letters indicates that it was well known that he hosted boys in his bed, and Condivi found it necessary to defend that site from "certain carnal men, and those who cannot understand the Love of Beauty if not as lascivious and dishonest." Those men thought and spoke ill of Michelangelo, "as if Alcibiades, a most well-formed young man being most chastely loved by Socrates, did not stand up from his side when he lay down with him; he used to say that he got up no different than from the side of his father." Those ill-speakers understood Michelangelo's claims about *amor di belezza* or love of beauty as dishonest, that is, as a strategy. At first sight Condivi's refutation is a flat-out denial of this position, but why did he use the superlatives *formosissimo* – most well-formed – and *castissimamente* – most chastely? That seems to imply that the greater the physical beauty of one's bed partner was, the greater the struggle to remain chaste would be, and the existence of such a struggle again would suggest a link between carnal lust and Platonic love – a partial admission therefore of the position of the "carnal men."[195]

The scepticism was pervasive and steadily growing already in the first half of the sixteenth century. Baldassare Castiglione had one of the characters of his famous *The Courtier* (*Il Cortegiano*) make such a sceptical remark. The context is a discussion about the relative capacity for chastity of men and women. The character praises the continence of two particular women and says he has witnessed it himself and is therefore much surer of it than his counterparts can be that Alcibiades rose from Socrates' bed "as pure as sons get up from their fathers' beds." The character goes on to note that: "A very strange place and time were in fact the bed and the night to admire that pure beauty, that Socrates is said to have

193 Hanegraaff, "Under the Mantle," 191—4; Dall'Orto, "'Socratic Love'," 44—5.
194 Crompton, *Homosexuality*, 277.
195 Dall'Orto, "'Socratic Love'," 52—3; Crompton, *Homosexuality*, 270; Condivi, *Vita di Michelagnolo*, 46r.

loved without any indecent desire, especially loving more the beauty of the soul than the bodily one, but in boys and not in old men, although the latter are wiser."[196] Somewhat later, in 1538, a fourteen-year old student, the later well-known humanist Carlo Sigonio, wrote in a letter that for all his adult male correspondent might claim, the *pedanti* ("school teachers") were all sodomites, and, "Socrates was very wise, but even he sinned as a mortal man… and if by chance somebody wanted to rise to defend him, I shall say that not only is he vicious himself, but also willing to cover up other people's vices, and to defend them by means of a shameless impudence."[197]

An interesting case is the poetry of Benedetto Varchi (1503–65). He too couched all his love poetry for boys in the language of Socratic love, but on occasion he went a little bit further and stretched ambiguity to its fullest. What after all was chaste loving if one could not ask for a chaste kiss? Here is how one of the numerous contemporary critics of his poetic approach responded to it: "Concerning the sonnets of Varchi I already wrote you in my last letter; and since I saw them I have become even more convinced that, although he calls 'holy' and 'chaste' the fact of loving corporeal beauty that he celebrates in that boy, they are more wanton and filthy than chaste and honest; moreover, his dealing with eyes, forefront, cheeks, lips and neck in my opinion has nothing holy, nor has his 'big kiss' anything chaste no matter what the Platonists say. Then his lying alone in the grass, wishing to die not to be deprived of beauty from the passing time, is definitely ugly. To tell it in a few words, I should be ashamed if those sonnets were read under my name." Sonnets were written ridiculing Varchi and his Platonic ideals: "His arms open and his trousers down: this is how / your Bembo is waiting for you in the Elysian fields." Varchi's attachment to his sixteen-year-old pupil Giulio della Stufa became something of a laughingstock in town and the boy's uncle and father became concerned, trying to limit the face time and correspondence between the two. Giulio wrote to Varchi about the poems they exchanged: "the correction that Your Lordship made to my sonnet where it said 'the holy love,' that you corrected into 'the holy ardour,' caused Messer Agnolo [the father], when he heard it, to burst out: 'This is nonsense! What a love is this?! What an ardour?'" Such scepticism also filtered through to the humanist Tulia d'Aragona, a rare woman to write on Platonic love. In her treatise on love in the form of a dialogue with Varchi she has him defend himself thus: "I do not deny that Socrates and Plato openly loved young men, and that they took pride in it, but I add that

196 Dall'Orto, "'Socratic Love'," 46; Castiglione, *Il Cortegiano or the Courtier*, 296—308.
197 Dall'Orto, "'Socratic Love'," 46.

they did not love them for the reason that the vulgar herd thinks, and that also you seem to think."[198]

Another famous person who stretched the ambiguity that the concept of Platonic love afforded to its limits was James Stuart, who became king of Scotland in 1567 (as James VI) and of England in 1603 (as James I) and held both crowns until his death in 1625. He had a succession of male beloveds, at first older than him and later younger. Yet certainly later in his life the erudite king seems to have presented them as Platonic loves, while publicly condemning sodomy. John Hacket, who was chaplain to the king in the last years before the latter's death, chose to perpetuate the Platonic vision. He retrospectively wrote about James' last great love, the much younger George Villiers, who rose to become Duke of Buckingham, that he was "our English Alcibiades for beauty, civility, bounty, and for fortitude."[199] Yet another observer noted that the public were swept back and forth between belief and disbelief in the claim to Platonic love: "Nor was his love, or whatever else posterity will please to call it…carried on with a discretion sufficient to cover a less scandalous behaviour; for the king's kissing them after so lascivious a mode in public, and upon the theatre, as it were, of the world, prompted many to imagine some things done in the tiring house that exceed my expressions no less than they do my experience, and therefore left them upon waves of conjecture, which hath in my hearing tossed them from one side to another." While the affair between Buckingham and the king was still going on, Sir Symonds D'Ewes, Puritan and trained jurist with an interest in parliamentary history, recorded a conversation with a friend in his diary about how widespread sodomy was in London and that a horrible punishment from God was to be expected. This especially because they had "probable cause to fear" that the king also partook of this sin, and God was the only one who could chastise a prince.[200]

At the same time, we can also point to some recognitions of the proscription of sodomy by James, which, taken together, impart the impression that he had a very specific understanding of the term. In a treatise on kingship, written for the education of his son and first published in 1599, he listed sodomy along with witchcraft, murder, incest, poisoning, and counterfeiting of currency as "horrible crimes which ye are bound in conscience never to forgive."[201] His next use of the term sodomy in writing came a decade later. While commenting on a draft for the proclamation of the general pardon of convicts of 1610, James sought to clarify what this draft said about three exclusions from the pardon. One of these was sodomy,

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198 Dall'Orto, "'Socratic Love'," 54—9 and "Varchi, Benedetto"; Crompton, *Homosexuality*, 276—7.
199 Cited in Bergeron, "Writing King James's Sexuality," 350. Rendering as there.
200 Crompton, *Homosexuality*, 385—6. Rendering of the quotations as there.
201 Crompton, *Homosexuality*, 386; Smith, *Homosexual Desire*, 14.

the others were piracy and deer poaching. His comment on the sodomy section aimed to ensure that "no more colour [leeway, pretext][202] may be left to the judges to work upon their wits in that point." Therefore sodomy was to be excluded from the pardon *nominatim*, which may be translated as "expressly" or "under that specific term." My supposition is that the draft used vague wording such as "the silent sin," or "the abominable vice," and this was to be replaced by the word "sodomy."

In practice, James' insistence on precision in the proclamation might have led to more people going free,[203] since at this time the definition of sodomy for purposes of indictment came to be largely limited to cases involving anal penetration and non-consent. Only two years before there had been a conviction of a man who by "force and arms" leaped upon and "carnally knew" a sixteen-year-old boy. This case was adduced as exemplary by the enormously influential jurist Edward Coke in a collection of precedents which he published in 1614, that is, while he was serving as chief justice on the Court of King's Bench. Coke also happened to be the only English jurist of the period who explicitly defined buggery, although this definition was published ten years after his death and nineteen after James'. He noted that emission of semen was not sufficient to constitute buggery, for in order for that to occur there had to be carnal knowledge, which was "*penetratio*, that is, *res in re* [the thing in the thing]."[204] In any case we can say that rather specific ideas about what constituted sodomy circulated in James' vicinity and that his intervention in the draft text of the pardon points to such a legalistic and specific interpretation of the statute on his part.

Coke was, certainly for a period, in close correspondence with James and whatever the vicissitudes of their working relationship were (between efforts at ingratiation and open clashes), we may wonder if it was a coincidence that precisely during and shortly after James' reign such an effort was made to define this crime. One indication that it was not, is another piece of gossip that D'Ewes noted in his diary in 1622. It was thought that James had intervened through Henry Montagu, who had succeeded Coke as chief justice, to forestall a conviction at the London Guild Hall in a case, already briefly mentioned, where a school

202 This sense becomes clear from other instances of James' or his government's use of this term. E. g. in James making explicit the "effect" of a diplomatic letter in 1603, because some words in it might otherwise "give some colour for a messenger to enlarge his speech." Or in a 1609 law against pheasant poaching etc. we find that this was sometimes done "under the colour of hawking," and that tenants and freeholders went beyond what gaming rights they had "by colour of" those limited rights. Letter to Thomas Parry in "Cecil Papers: November 1603," in Giuseppi ed., *Calendar*, 15: 277—303; *Statutes of the Realm*, 4 pt. 2: 1167—8.

203 Contrast the interpretations of Crompton, *Homosexuality*, 386 and Sharpe, *Remapping*, 171.

204 Smith, *Homosexual Desire*, 49—51.

usher had "buggered" the young son of a knight. D'Ewes does not mention the grounds that the Guild Hall bench finally gave for the acquittal, but is clear that he as a Puritan thought them flimsy and so did others who were present at the trial, as they convinced each other that God would punish the man after all.[205]

While James and Coke seem to have defined sodomy very narrowly, within six years of James' death a less narrow definition of sodomy was applied in the trial of the earl of Castlehaven. Castlehaven was alleged to have committed sodomy with two male servants and to have enticed them to sleep with his wife. Castlehaven tried to defend himself against the charge of sodomy by claiming that he had not anally penetrated the two servants. Yet while the servants confirmed his claim that he had only had interfemoral intercourse with them, in this case the emission of semen was enough for a conviction. Castlehaven was beheaded and the servants hanged, despite the promised immunity for their testimony. This case shows that the period of James' reign marked a particular phase in the definition of sodomy in England and that the narrow definition that applied in the courts then should not be seen as having applied throughout the period from Henry the VIII till the Civil War. We might even see the case as a backlash against James' policy in this matter. The attorney general in the Castlehaven trial remarked in public what D'Ewes had noted secretly, that letting the crime go unpunished might attract God's wrath to the land and that King Charles had expressed his desire that "his throne and people" be cleansed from such guilt.[206]

Some modern authors, beginning with Jeremy Bentham, have singled James out as a hypocrite for condemning sodomy in his writing and seeming to practise it all the same. Smith points to the different contexts in which James condemned sodomy and celebrated his affection for Buckingham, a published book on the one hand and a private letter on the other. Such a discrepancy might have gone some way towards reconciling the public (swayed from one conception of the king's affairs to the other as it was) but would leave James a hypocrite in his own conscience, which as we saw he took seriously. James was very much aware of the people's scrutiny of his "smallest actions and gestures," and seems to have sought to keep his "private conscience and public fame" in line, as he noted on the topic of the problems involved in sending an ambassador to the pope. He was also keen to demonstrate that "both our theorique and practique agree well together," in defending himself against the accusation of meddling in the religious affairs of another state. Such statements show that James put quite a bit of thought into the relation between his conscience, his actions, and public perception. He had several

205 Compare Smith, *Homosexual Desire*, 176—7.

206 Compare and contrast Smith, *Homosexual Desire*, 49—53; Crompton, *Homosexuality*, 391—2.

strategies at his disposal to save himself in his own eyes as well as that of the public with respect to his patently visible inclination to men. From James' correspondence with Buckingham it is quite clear that the relationship had seen some physical consummation, but not necessarily anal penetration. Whatever passed between the two might have remained outside James' definition of sodomy.[207]

Moreover, Renaissance discourse offered James a trump card that situated male intimacy in the authority of the Bible. In 1617 James summoned the Privy Councillors to the palace and – reported the Spanish ambassador who was very close to James – stated that they should keep the interests of Buckingham well in mind, since "they should be quite clear that he loved the Earl of Buckingham more than any other man, and more than all those who were present. They should not think of this as a defect in him, for Jesus had done just what he was doing. There could therefore be nothing reprehensible about it, and just as Christ had his John, so he, James, had his George."[208] James did not go as far as stating that the relation between Jesus and John the Apostle had been sexual, as some of his libertine contemporaries did. This radical proposition will be discussed below in the section on stridency. The fact that more homosexually inclined men aired this idea, however, makes it likely that James did not come up with it independently, even though he was intimately familiar with the Bible and he could have drawn his own conclusions from John 13: 23 as rendered in the translation he commissioned: "Now there was leaning on Jesus' bosom one of his disciples, whom Jesus loved."

Finally, since so much space was devoted to the role of the institution of slavery in circumventing the proscription of *liwat* above, a few words are in order on whether there was a similar phenomenon in the European overseas territories. To be sure, in those territories and settlements (which I am leaving out of the general scope of the book to avoid overstretch) slavery was legal as opposed to within the metropolitan lands. The short answer seems to be that male owner to male slave intercourse could not be perceived as justified on an analogy with male owner to female slave intercourse because the latter was also seen to be proscribed even if frequently practiced. In the Dutch settlements in Asia, for instance, slavery was covered by Roman law, but intercourse with female slaves was explicitly forbidden in ordinances which invoked divine law. Female slave concubines were however often presented as housekeepers, a phenomenon that was seen as circumvention

207 Crompton, *Homosexuality*, 385—7; Sharpe, *Remapping*, 157—8, 171; Smith, *Homosexual Desire*, 14; Letter to Thomas Parry in "Cecil Papers: November 1603," in Giuseppi ed., *Calendar*, 15: 277—303; James I, *Workes*, 379.

208 Lockyer, *Buckingham*, 42—3. Translation as there.

already at the time.[209] Where we do hear of intercourse between free men and male slaves, there is no indication that this was perceived as less of a crime than intercourse between free males.[210]

Exception in the Latin World

There were a number of ways people tried to make exceptions. Different people took into account intention, the consequences from the perspective of charity towards one's neighbour, the consequences for procreation, individual inclination as sanctioned by nature, married status as a legitimiser of intercourse, and (in one case) religious difference.

Intention as a criterion for judging acts gained currency in confessional literature and legal treatises from the early twelfth century on, and from there it slowly but steadily crept into actual trials. Intention as a criterion remained contested, however, not least because already during the twelfth-century legal revolution canonists recognised that earthly judges had only the exterior signs of guilt to go by. Nevertheless, confessions did play an increasing role in trials from the start of our period.[211] We can see the emphasis on intention in various aspects of the treatment of the crime of sodomy. For instance, we find equal punishment for attempt and act upheld in an ordinance issued by Ferdinand and Isabella in Spain in the late fifteenth century, and again half a century later by a Protestant Geneva jurist. This implies that intention was a main criterion. At that time also, De Damhouder cast the net wide: emission of semen was not necessary and the freewill (*voluntas*) or attempt to act alone sufficed for full punishment.[212] We can see the role of intention also in the distinction between "voluntary pollution" (masturbation) and "nocturnal pollution" (wet dream etc.), which gave rise to the expression "sod.[omy]…*per voluntariam pollucionem* [through voluntary pollution]," which is found

209 Wamelen, *Family Life onder de VOC*, 368—71, 381.

210 E. g. Rossum, *Werkers van de Wereld*, 323 (where the initiator incidentally denied the charge of sodomy by claiming that he was just keeping warm).

211 Mäkinen and Pihlajamäki, "Individualization"; Kamali, "Felonia"; Kuttner, *Kanonistische Schuldlehre*, 20—30, 59—61.

212 Monter, "Sodomy and Heresy," 46; Crompton, *Homosexuality*, 293; Damhouderius, *Praxis*, 356—357 (chapter 96).

as an accusation against monks in Henry the VIII's England, beside accusations of (plain) sodomy with boys.[213]

Earlier on already, we see a tendency to regard only one of the two parties involved as the initiator with the intention to perform the act. Spanish jurists recognised the importance of freewill early in our period. The *Siete Partidas* exempted from punishment males who were forced or under 14, "because those who are forced are not guilty, and minors do not understand how serious a crime they have committed."[214] By the early sixteenth century, in Flanders, Wielant specified that "those who pick up young servants to perform the depraved offence," were to burned at the stake but he did not say what was to happen to the young servants. The 1656 code for Austria explicitly saw "youth or ignorance" as a mitigating circumstance. Around that same time, however, De Damhouder struggled with freewill. Making it the main criterion put him in a difficult position vis-à-vis the biblically prescribed bringing to death of the animals involved in cases of the person-animal intercourse he included in the category of sodomy. He inserted a long digression defending the biblical position in spite of the absence of *voluntas* on the part of the animals. Nevertheless we can see a general trend towards regarding only one party as liable for the most severe punishment. In numerous court cases throughout Europe only the person seen as the initiator, e. g. the older man in a pederastic coupling or the husband sodomising his wife or a master or mistress a servant, received the full punishment.[215]

A case from late fifteenth-century Bruges brings out such an effort to excuse a youth. During phases of repression in Bruges, and elsewhere in Europe, prosecutors seem to have believed that there was a network of sodomites and tried to extract names from the accused. When the bailiff and aldermen had one Joos l'Evesque burned at the stake as a sodomite, others had reason to fear. In his testimony he had named Philipot, the son of one of the secretaries of the archduke. L'Evesque had accused the boy of "indecent touching." A few weeks later the Bruges aldermen and bailiff received a letter from their overlord, the archduke of Burgundy himself. The archduke pardoned the boy in case that was necessary: "We have well heard how pure and innocent of the case as well as a child of good inclination and renown the aforementioned Phelipot is. Nevertheless, if any [accusa-

213 Crompton, *Homosexuality*, 363—4. The distinction seems to go back to Aquinas' lengthy discussion on "nocturnal pollution," although he did not use the phrase "voluntary pollution." Aquinas, *Summa*, pt. 2 of pt. 2, question 154, article 3 ad 1 and article 5.

214 Quoted in Boswell, *Christianity*, 289, translation as there.

215 Wielant, *Corte instructie*, 222 (chapter 96); Damhouderius, *Praxis*, 356—357 (chapter 96); Roelens, "Visible Women," 11—2, 15—6; Puff, *Sodomy*, 29; Crompton, *Homosexuality*, 250; Brundage, *Law, Sex*, 534—5.

tion of an] offense that he might have committed out of childhood or youth, might be found true…" The aldermen had this pardoning letter expressly registered in their proceedings.[216]

Intention was also brought forward along with many other exculpating factors in a 1323 trial testimony. In that year Arnald de Vernhola, a sub-deacon, was tried on different counts by the bishop of Pamiers north of the Pyrenees. The questioning and his recorded testimony are so rich in strategies and potential strategies that it is worth quoting at length:

> Asked if he had stated or believed that because his nature impelled him to satisfy his desires with a man or woman it was not therefore a sin to have relations with men or women, and [whether he believed such relations] were slight or venial sins, he responded that although he thought his nature inclined him toward the sin of sodomy, he had nevertheless always considered it a mortal sin but thought it was the same as simple fornication, and that the wrongful defloration of a virgin, adultery, and incest were all more serious sins than the sin of sodomy (the carnal knowledge of men by men). And he had said this to Guillem Ros…and Guillem Bernardi…with whom he had committed the sin of sodomy. He said to Guillem Ros that the sin of masturbation was equal to the sin of simple fornication or sodomy: they were equal in gravity, he said,…if the sin of masturbation was performed deliberately and intentionally.[217]

The question by the interrogatory committee implies that there were people who justified sexual crimes on the basis of their natures, which would be God-given. And indeed, the Church Council of Vienne had recently condemned such a justification for fornication.[218] De Vernhola's own argument, however, seems to have revolved around a combination of intentionalist and consequentialist reasoning. The suggestion seems to be that sodomy and simple fornication were on a par because they did not harm anyone, while the wrongful defloration of a virgin, adultery and incest all harmed people (either the object of the sex act or their spouse). This is an argument that looks at the consequences of the act rather than at its formal status, and creates an exceptional space of non-harmful sex acts. The second, supporting, strand of his reasoning seems to have been that intention was what made a sin a sin, and by that line of reasoning wilful masturbation was equal to wilful sodomy. As a sub-deacon De Vernhola seems to have used what authority he was thought to have to downgrade the sin of sodomy before his male sex-partners. In the subsequent part of the interrogation he admitted to having absolved people from sins, including from mortal sins. It is not clear whether he also applied that absolution to cases of sodomy (or even to his own sex partners).

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216 Boone, "State Power," 148—52.

217 Boswell, *Christianity*, 401—2. Translation as there, abridged.

218 Newman, *Medieval Crossover*, 163—5.

If we read Thomas Aquinas against the grain – and he made it quite easy to do that because he himself put forward all kinds of objections that he could imagine people bringing to his propositions – we see that De Vernhola's reasoning about the gravity of the sin of sodomy may have been quite common. In his discussion of the sins against nature in the context of the different sorts of *luxuria* (i. e. lustful excess, debauchery), Aquinas presents the following objection: "It would seem that vices against nature are not the greatest sins among the species of *luxuria.* For the more a sin is contrary to charity the graver it is. Now adultery, seduction and rape which are injurious to our neighbour are seemingly more contrary to the love of our neighbour, than the sins against nature, by which no other person is injured. Therefore sins against nature are not the greatest [sins] among the species of *luxuria.*"

Aquinas' reply to this was that "Just as the order of right reason proceeds from man, so the order of nature is from God Himself: wherefore in the sins against nature, whereby the very order of nature is violated, an injury is done to God, the orderer of nature. Hence Augustine says (*Confess.* iii): 'Those foul offenses that are against nature should be everywhere and at all times detested and punished, such as were those of the people of Sodom, which if all peoples commit it, they should all stand guilty of that same crime by divine law, which hath not so made men that they should so indulge themselves. For even that very bond [*societas*] which should be between God and us is violated, when that same nature, of which He is the Author, is polluted by the perversity of lust.'"[219] Thus Aquinas countered the argument that man may arrive at an estimation of the gravity of sins on the basis of a careful weighing of this-worldly relationships, with one about humanity's relation to God. Even if we might wish to see Aquinas' argument as rational in itself, he rated human reason (*ratio*) in this passage below what one could know of God's demands of humans only through authority, in this case that of Augustine.

The strategy of creating analogies between different sex acts could be taken to its logical conclusion: that marriage would legitimise same-sex intercourse. Again, we need to read against the grain to see this idea occurring in the Middle Ages. A generation after Aquinas, the Savoyan theologian-jurist Petrus de Palude felt it necessary to specify that human and divine law agreed that marriage was between a man and a woman. Marriage within the same sex (*in eodem sexu*) was forbidden

219 Aquinas, *Summa,* pt.2 of pt. 2, question 154 article 12 argument 1 and response. Translation substantially modified from that by the English Dominicans. I have rendered both the indefinite singular *vitium/peccatum contra naturam* and the plural *peccata contra naturam* as plurals to convey Aquinas' idea of sins against nature as a category of acts, rather than as one particular act.

precisely because intercourse between females was against natural law and that between males was against natural as well as Mosaic law. Because natural law overruled any laws that princes might make (this is unstated but see Ch. 2), the marriage between the Roman emperor Nero and a man had been no marriage. And therefore, God had created man and woman, not man and man or woman and woman.[220]

The idea of marriage as a legitimator was, however, brought into practice in Rome in 1578 by a group of Portuguese and Spanish men, perhaps as many as twenty-seven or more. According to reports by the Venetian ambassador and Michel de Montaigne, who visited Rome two years later, the men were married to each other in couples on several occasions in a church. Montaigne wrote on the basis of what he heard: "They married one another, male-to-male, at Mass, with the same marriage gospel service, and then went to bed and lived together. The Roman wits [*esperis*] said that because in the other conjunction, of male with female, this circumstance alone makes it legitimate, it had seemed to these sharp folk that this other action would become equally legitimate if they authorised it with ceremonies and mysteries of the Church. Eight or nine Portuguese of this fine sect were burned." These men seem to have redefined the proscription along the lines of the proscription of fornication, whose sole difference with legitimate intercourse was the sacrament of marriage. This analogy was well understood by contemporaries as Montaigne's remarks show, and is also evident in the remark by the Venetian ambassador that they "sullied the sacred name of matrimony." While these men seem to have seen marriage as righting their intercourse, by the same token their opponents saw their intercourse as sullying marriage. The executions effectively put a stop to the practice.[221]

Others in that period seem to have taken up Aquinas' notion that it was the principle of sterility that underlay the unnaturalness of all four kinds of intercourse against nature – as none of them could lead to offspring. Some of the quite numerous justifications of heterosexual sodomy that William Monter has found in the records of the Spanish Inquisition regarding Sicily, were exceptions based on this principle. In 1676 a priest was deprived of his income for admitting that he had said that sodomy between husband and wife was not sinful if the wife was pregnant. Eight years later a doctor of laws was accused of having said that sodomy between husband and wife was licit after childbirth. A Latin teacher was imprisoned for two years in 1608 for defending heterosexual sodomy on the ground that "woman is the garden of man," but at the same time he held that

220 Palude, *Lucubrationum*, 322 (distinction 26 question 1 art. 2); Brundage, *Law, Sex*, 474.

221 Compare Crompton, *Homosexuality*, 286—7. Translations as there with slight modification.

the proscription of sodomy was put in place by "justice," so that women would not be deprived of their marital rights and "to promote procreation."[222] The reasoning of these three educated men seems to have been that as long as an equitable amount of children was being produced there was no harm.

The line of reasoning laid before De Vernhola, but not fully admitted by him, that people should be allowed to follow their inclinations without sanction, also came back with a vengeance in the early seventeenth century. By that time, as will be elaborated below, libertines came to regard nature as a force with a will of her own, which gave a whole new dimension to the concept of natural law that had received such a boost from Aquinas' work. A case in point is the French poet Théophile de Viau, who took some of his inspiration from the Italian thinker Vanini, who again ran all over Western Europe to escape his persecutors and ended at the stake in Toulouse. De Viau on the one hand led a quite openly homosexual lifestyle and was also alleged to have poetically jested that the "carnal company" of boys kept him from catching infections,[223] and on the other seems to have set himself the task of replacing divine law with that of nature, or more precisely of people's individual natures. He wrote for instance that, "I condone each person following his nature / Its Empire is pleasant and its law is not harsh…Never will my judgement find fault with / Him who attaches himself to what he finds aimiable."[224] As the quotation at the top of this chapter demonstrates, this was not appreciated by many and he was effectively silenced by his trial in 1626. Still, a few years later in Venice, Antonio Rocco wrote a defence of intercourse between men and boys in which he argued that nature would be offended if men who were thus inclined would not follow their inclinations. More on him below.

Quite unrelated to these lines of reasoning that in some way built on mainstream Christian theology, was an argument allegedly presented by a Morisco New Christian, or descendant of Muslim converts to Christianity, in the Spanish Crown of Valencia. In an attempt to seduce an Old Christian teenaged boy, he would have said that "when an Old Christian did such a thing with another Old Christian it was sinful, but not when a New Christian [Morisco] did it with an Old Christian."[225] There seems to be a faint echo here of the opinion of certain Arab jurists of the Maliki school that sexual relations with non-Muslim youths were permissible, especially when travelling without a wife.[226] We don't know

222 Monter, *Frontiers*, 174—5. Translation as there.

223 Crompton, *Homosexuality*, 331—5.

224 From De Viau's first satire of 1620. Quoted in Todorov, *Imperfect Garden*, 165, translation as there.

225 Monter, *Frontiers*, 293. Translation as there.

226 Floor, *Social History*, 292; See also Crompton, *Homosexuality*, 172.

how widespread this idea was among Moriscos in Spain, but it does once again demonstrate the multifarious entanglements of the Muslim and Christian worlds.

Compensation in the Latin World

The interconnected paths of repentance, penance, and absolution offered important opportunities to the people regarded as sodomites. This section will first discuss these phenomena and then also present the scanty evidence for "purification," which seems a related phenomenon. The second part of the section is devoted to the "others are getting away with it" approach that we also saw in the Persian world.

In the very beginning of our period, Pope Honorius in a letter to the archbishop of Lund emphatically presented penance as an alternative to trial for the prohibited sexual relations constituted by incest, bestiality and sodomy:

> Since divine mercy is greater than human perverseness and since it is better to count on the generosity of God than to despair because of the magnitude of a particular sin, we order you herewith to reprimand, exhort, and threaten such sinners and then to assign them, with patience and good judgment, a salutary penance, using moderation in its devising, so that neither does undue leniency prompt audacity to sin, nor does unreasonable severity inspire despair.[227]

The fear expressed here that too much leniency would lead to more audacity was also expressed by Bernardino of Siena in a 1427 sermon. In his view sodomites were wont to think, "oh, when I am close to death, I shall confess it and repent."[228]

As we saw in the trial of Arnald de Vernhola, by the early fourteenth century some members of the clergy made it a point to ensure that the public believed that sodomy was a mortal sin, and that was also Bernardino's mission. The distinction between a mortal sin and other sins was crucial because the latter left room for compensation in the form of repentance and spending time in purgatory, while those guilty of non-absolved mortal sins were destined for hell. A mortal sin could also be absolved but often not by ordinary priests (and certainly not by a sub-deacon such as De Vernhola). From the thirteenth century sodomy seems to have become a reserved sin in some parts of Europe, meaning that only the pope and specially delegated bishops could absolve it.[229]

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227 Letter Honorius to Archbishop of Lund, 4.2.1227. Translated in Boswell, *Christianity*, 380.

228 Dall'Orto, "'Socratic Love'," 63 n.7. Translation as there.

229 Boswell, *Christianity*, 293.

The level of the sin of sodomy remained contested, however, even by members of the Church hierarchy. In 1618 a cleric was burned at the stake in Sicily for claiming that "sodomy was only a venial sin" as well as boasting that he had sodomised some boys. Moreover, even the Spanish Inquisition often continued to prescribe penance for voluntary confessions/self-denunciations, in any case in the regions where it was not actively prosecuting sodomy. The Portuguese Inquisition left space for pardoning self-denunciators of sodomy in its guidelines. The anthropologist Luiz Mott gives the example of a friar of the Jeromite order. In 1681, a decade after the last sodomy execution at the hands of the Portuguese Inquisition, he confessed to its Lisbon branch that he had copulated hundreds of times with more than 62 male partners but was merely admonished that he was to avoid repetition.[230]

Other examples of such confessions to the Spanish Inquisition show how people tried to compensate for "the silent sin." An Aragonese sculptor had already made pilgrimages to Santiago de Compostela and Rome before he confessed, in order to purge his conscience, to having committed the *pecado nefando* or unspeakable sin with an animal in 1620. He was severely reprimanded. In the same year a married couple denounced themselves for having committed the sin between them "with the intention of discharging his [the husband's] conscience." They had been "moved by hearing the Edict of Faith." Such edicts listed all possible heresies and encouraged denunciation and self-denunciation. Initially the couple were let off, but the husband was apparently deemed not repentant enough and was arrested months later and convicted to a mix of severe punishments and penance. The former consisted of 100 lashes and three years of banishment and the latter was five years of "unpaid penance at the oars."[231]

From the European frontiers of the Muslim world we also hear of the phenomenon of "purification," which seems related to the Islamic prescriptions about entering a state of purity before prayer by washing more or less thoroughly depending on what acts one had engaged in. Galley slaves reported to the Spanish Inquisition in the sixteenth century that they had seen Muslims washing their hands after male-male intercourse as a way of purifying themselves. From the garrison town of Varaždin, which formed part of the Habsburg line of defence against the Ottoman empire in the Balkans, we get a report of a Christian barrister who in the last decade of the sixteenth century was convicted of "the sodomitical sin." He was forbidden from acting as a barrister before any court in the future and anoth-

230 Monter, *Frontiers*, 175, 284—5; Mott, "Portuguese Pleasure," 85—6.
231 Monter, *Frontiers*, 293—4.

er court case against him was to proceed only once he had "purified" himself. It is not clear what this purification entailed.[232]

Turning to the second set of strategies to be discussed in this section: some of those who stood accused argued that those higher up on the social ladder were doing it with impunity.[233] This argument was brought forward by the protagonist of the Latin comedy *The Debate between Cavichiolus and his Wife*, written in northern Italy in the early fifteenth century. In response to his wife's recriminations about his intercourse with boys rather than with her, Cavichiolus said: "kings fuck boys [*pedicant*], but are not thieves. The gods loved boys: so what if Cavichiolus loves?" The short play also gives an insight into how men inclined to boys might have managed to stay under the radar. While the wife's side of the conversation is all about being sexually satisfied, Cavichiolus side of the conversation is all about managing the fallout in the shape of scandal over his crimes. He needs the cover of a functioning marriage, to avoid the gossip turning into scandal. The compromise they reach is that they will stay together and she gets to share his boys (not at the same time). This will ensure that there will be gossip but not the scandal that a separation would entail. For all its wit and irony the play may well reflect real situations of the time in which sodomites sought not to upset the system. We might say that there are two strategies being presented in this play: staying under the cover of marriage and claiming that everyone is doing it anyway. Neither of these upset the system. Nevertheless, the prospect of punishment in the afterlife continues to dangle over Cavichiolus, or as the wife puts it: "carry on with your crimes, until the law-enforcing flame makes ash of your penis, together with your wicked body." It is difficult to say what the position of the play's author was on all this; he might have intended the play as a funny observation on the sodomite of his days, a bit of talking dirty while roasting contemporary mores, or he might have intended to extremely carefully valorise Cavichiolus' refusal to give up intercourse with his "golden boys." Neil Cartlidge's description of the text as both provocative and evasive seems apposite, however.[234]

A double strategy very similar to that presented by the fictional Cavichiolus is that presented by the famous Florentine goldsmith and sculptor Benvenuto Cellini in his autobiography. Cellini made much of his sexual affairs with women and his love for and live-in relationships with beautiful boys, but stopped short of mentioning intercourse with the latter and also briefly referenced the Neoplatonic distinction between dirty and disinterested love for boys. Yet he was convicted of

232 Monter, *Frontiers*, 293; Budak, "Sexualität und Rechtsbruch," 312.

233 Dall'Orto, "'Socratic Love'," 35, 62 n.6.

234 Cartlidge, "Homosexuality and Marriage." Translation of the second quotation as there.

sodomy in 1523 (a fine) and 1557 (prison commuted to house arrest). The first conviction, or Cellini's general lifestyle, did not escape the notice of a rival sculptor, who during a dispute about their respective artistic skills in front of the duke of Florence, called him out, saying: "shut up you *soddomitaccio* [nasty sodomite]." Upon this insult the duke narrowed his eyes severely at Cellini's rival and the others pursed their lips and frowned at him as well. Clearly this was an unwarranted escalation of the dispute and Cellini mentioned himself being furious, but nevertheless quickly finding a remedy (*remedio*), which seems to have been to turn the situation into a jest. Cellini claimed to have said that: "Oh madman, you are crossing the line. But God grant that I would know how to perform such a noble art: after all we read that Jove used it with Ganymede in paradise, and here on earth it is the usage of the greatest emperors and the greatest kings of the world. I'm a lowly, humble little man, who neither can nor knows how to concern himself with such a marvellous thing." This cleared the air and the duke and his entourage broke out in laughter. The implication of Cellini's jest seems to be that he as a non-elite person should also be allowed to get away with sodomy, but societal hierarchy being what it was he would have to maintain his cover, just as Cavichiolus did. Thus Cellini both defended and dissimulated in the public arena that the court of the duke was.[235]

The "gods and kings" argument was also put forward by the poet Théophile de Viau in the beginning of the seventeenth century. In a poetic plea to an aristocratic lover to be his (passive) sexual partner, he lists classical examples such Apollo and Caesar but also contemporary French noblemen who were *foutu* (fucked), "and this learned king of England / did he not fuck *Boukinquan* [Buckingham]?". However, as Louis Crompton remarks, mentioning contemporaries by name in such a list was something of a break with the tradition of listing homoerotic couples, and De Viau belongs more to the libertines discussed in the next section than the slightly more careful men discussed in this section.[236]

Stridency in the Latin World

The second half of the thirteenth to the beginning of the sixteenth century were a low tide in poetic expressions favouring the kinds of intercourse defined as sodomitic.[237] In sixteenth- and early seventeenth-century literature and visual arts, we

235 Cellini, *Vita*, 2: 520. Compare Dall'Orto, "Rocco," 227; Andrews and Kalpaklı, *Age of Beloveds*, 121—5, 268—9.

236 Crompton, *Homosexuality*, 331—5. Translation slightly modified from there.

237 Crompton, *Homosexuality*, 204—12.

do, however, find a new stridency that transcended the careful approach of Ficino and the author of *Cavichiolus and his Wife*. As the Latin world became more like the Persian world in this respect, the number of strident pronouncements multiplied while the claims of chastity became ever more obviously ambiguous. As I argue in the section on stridency in the Persian world, the language of stridency often draws on that of circumvention through the medium of ambiguity.

If there was a transgressive voice in literary texts of this early part of our period, it was often hidden under a pile of allegories that could also be read as non-transgressive; a sort of now you see it now you don't. The difficulty of interpreting allegory has, for instance, sparked a continuing debate among literary scholars on the widely read thirteenth-century erotic allegory, the *Romance of the Rose* (*Roman de la Rose*), and especially the second part written by Jean de Meung in which the rosebud gets to be plucked and inseminated. Some scholars have suggested that the text opens itself to deconstruction since the author explicitly distances himself from the pronouncements by the characters within it, which include terrifying condemnations of men having sex with men (referred to allegorically and as followers of Orpheus) and many a negative statement about the ways of women. The literary scholar Simon Gaunt has argued that we may consider Jean de Meung a "queer writer" because first of all a homoerotic seam may be detected in the story and secondly the apparent homophobia and misogyny are parodic. More recently, however, Noah Guynn has argued that we should *not* see the use of multiple voices in the poem expressing different opinions as a liberating strategy and that the *Romance* sets the reader up for a crisis of convictions in order "to legitimate coercive, violent forms of discipline."[238]

Multiple voices were also used in the more sexually explicit tradition of poetic mock debates comparing (from a male perspective) the merits of physical intimacy with boys versus that with women or anal versus vaginal intercourse. A few such poems had been produced in classical Rome and in the twelfth through the early thirteenth century (perhaps under Arabic influence) some more. In the mock debates that appeared around the beginning of our period heterosexual vaginal intercourse tended to win, although Boswell suggests that the sympathies of the writer were often hidden between perfunctory remarks and apparent victories should be viewed cautiously.[239] After that the genre disappeared from the Latin world for a long period, with as only exception *Cavichiolus* in the early fifteenth century – and it is a matter of debate whether that should be counted as part of the

238 Guynn, *Allegory*, 137—74; De Lorris and De Meun, *The Romance of the Rose*, 323—4 (verses 19629—86).

239 Boswell, *Christianity*, 255—66; Cartlidge, "Homosexuality and Marriage," 26—34.

genre. Italian poetry of the sixteenth century, however, took the genre to new heights starting with Francesco Berni. In 1522 he wrote a burlesque poem entitled *Capitolo delle pesche* (*Chapter of the Peaches*), which praises "peaches," i. e. boys' bottoms. This poem invited a response entitled the *Capitolo de fichi*, praising "figs" or vaginas and the two were published side by side in a number of collections of burlesque poetry.[240]

The play of allusions and ambiguities that these disputes revolved around was taken to a further height by the painter and poet Bronzino in the middle of the century, as the art historian Will Fisher shows. Bronzino wrote a poem *First Chapter in Praise of the Galleys* (*Capitolo primo in lode della galea*), in which he celebrated the physical proximity of tanned and shaven men, and observed that in the galley "boiled and roasted meats are hardly ever mixed," i. e. vaginal (wet) and anal (dry) intercourse do not coincide there. He also made two allegorical paintings that juxtapose Venus' naked front and Cupid's naked back. Perhaps the most explicit of the two is one that art historians call *Venus and Cupid and a Satyr* (fig. 9). A very masculine Satyr, with his tongue sticking out and one hand ready to strike, glances across Cupid's prominent behind in the middle of the painting and Venus' front further along. Both Venus and Cupid hold a metaphoric arrow in their hand and to top it off Bronzino added a phallic golden quiver hanging off Cupid's back in the direction of his buttocks. The question is whether Bronzino in this and the other painting was aiming to present the bottom and the vagina as equally pleasurable in a "bisexual eroticism," for which Fisher makes the case, or whether he was presenting the two as equal options in order to justify the more censured option. The celebration of exclusive homoeroticism in the galley poem seems to point to the latter.[241]

Another highly ambiguous burlesque poem entitled *Chapter of the Oven* (*Il capitolo del forno*) caused some scandal. It was written by the humanist Giovanni della Casa and published in a collection of his Italian poems in Venice in 1538, when the author was thirty-five and just embarking on a career in the Church. The recurring metaphor of bread in the oven must be read as an allusion to anal penetration, just as the roasted meat of Bronzino. In a 1549 pamphlet an Italian refugee in the Swiss Confederation who had an axe to grind with the Catholic Church and Della Casa in particular, the former bishop Pietro Paolo Vergerio, published a pamphlet against Della Casa who was by then an archbishop. He concluded that there was no bigger *ribaldo* than Della Casa and that in his verses he had "spoken up to celebrate… the praises of sodomy (which is a notorious matter in all

240 Fisher, "Peaches and Figs," 156—60.

241 Compare Fisher, "Peaches and Figs."

Fig. 9: *Venus and Cupid and a Satyr* by Bronzino, 1553 – 5. Two options are aligned for the satyr, Cupid's behind and Venus' front. Galleria Colonna.

of Italy), and two times in a few lines… said that it is a craft and a divine art."[242] After this pamphlet, the *Chapter of the Oven* came to be thought of and condemned north of the Alps as a treatise with the title *In Praise of Sodomy* (*De laude sodomiae*) and since it had been written by someone who was by then a bishop, it became a topos in the Protestant campaign against the depravity of the Catholic Church. It also seems to have been assumed in this continued discussion that the work was about male-male sodomy. Della Casa answered with a remarkably candid poem in Latin (the elevated language to which the discussion of the poem had been lifted) in which he admitted – undoubtedly with a nod to Augustine's *Confessions* – his youthful sin in writing the poem, yet claimed to be older and wiser now. The poem takes the shape of a defence before the German humanists and called all of Italy to witness that the author was still in esteem there. Della Casa noted that even though his verses were perhaps not the most chaste, and even though he had praised "the oven" in them, he had clearly praised females and not males "as you can in fact see from the poem itself." Della Casa added that his detractor had "asserted for maximal slander" the notion that the poem praised males (which in fact was not explicit in Vergerio's text, though perhaps suggested through the reference to Italy's notoriety in sodomy – which did concern male homosexual-

242 Vergerio, *Il catalogo… da M. Giovan della Casa*, k6r—v.

ity – and a remark about a "conventicle of friars" that Della Casa might want to form with other obscene authors).[243] Thus we see a Della Casa who was highly conscious of the line he had crossed when young. This younger Della Casa clearly fits our category of the strident transgressor. The older Della Casa, however, fits better into the category of the compensating transgressor. He shows himself to be penitent and resorts to a strategy that we have seen often went with penitence: downgrading his sin from mortal to venial. While the text calls (the praising of) male-male intercourse the maximal transgression, it suggests that (the praising of) male-female anal intercourse was only a youthful sin. Despite this effort at containing the scandal, some observers thought that it had cost him a promotion to the rank of cardinal.[244]

In the sixteenth and early seventeenth centuries we also find a certain libertinism, in both its common parlance sense of unrestrained sexual behaviour and its intellectual history sense of "freethinking." It was less of a school than for instance the Neoplatonism that had taken off over half a century earlier, and more of a "philosophical posture," as Paolo Fasoli has put it.[245] Apart from a philosophical stance, however, it also seems to have been a way of life for those who espoused that stance. The libertines were only at the extreme end of the wider trend of sixteenth-century humanism, which was all about daring to act, think and speak, and that too in unison. As Michel de Montaigne put it in his famous *Essais:* "I have ordered myself to dare to say all that I dare to do, and I dislike even thoughts that are unpublishable."[246]

The term libertine itself has a complex history. It was first used by Calvin to apply to the religiously heterodox, but an important stage in its development was the application by the Jesuit François Garasse to the circle of Théophile de Viau, whose poem on the sexual habits of gods and nobles we have already encountered. To be sure, the use by both Calvin and Garasse was pejorative and members of De Viau's circle themselves seem to have preferred the label "friends of truth."[247] Through its application to De Viau in the 1620s, which stuck, the term libertine came to signify not just a heterodox person, but in particular a debauching freethinker.

Sometime between 1525 and 1527, Antonio Vignali of Siena wrote *La Cazzaria*, which means something like "cockery," but is perhaps best translated as *The Book of the Prick.* The book takes the form of a dialogue in which an older man educates

243 Casa, *Latina monimenta*, 33—4. Vergerio, *Il catalogo… da M. Giovan della Casa*, k6v—7r.
244 Compare and contrast Puff, *Sodomy*, 158—65. See also Dall'Orto, "Giovanni della Casa."
245 Fasoli, "Body Language," 27—8; Dall'Orto, "'Nature'," 84—5.
246 Toulmin, *Cosmopolis*, 39—42. Translation of Montaigne as there.
247 Godard, "D'*Alitophile.*"

a younger one on sexual as well as political matters, trying to seduce him by convincing him of the superiority of *bugerare* over *fotere*, or buggering over fucking, after which the two end up in bed drinking wine. The book seems to have been intended for circulation among a small circle of initiates only, and the printed edition pretends to have been based on a manuscript stolen from the main character's study. The author was a founding member of the circle called the *Accademia degli Intronati*, or The Academy of the Stunned, and the work displays much disdain for the less educated. The main character also reflects on the wit one needs to find the "hidden ways and means" to engage in such activities as fucking outside of wedlock and buggering, which only the educated have:

> You will find all maliciousness and dirty tricks where scholars are, and you cannot imagine all the sharp and subtle lies they tell about things they want to do. Beyond that, in spirit and certainty of heart they are all – or for the most part – valorous and great. They know what is good and what is bad, which things are disgraceful and which show a generous spirit, and they would be incapable of doing anything that was not virtuous and noble.

While the educated need to strategise because of the law and common morality, their virtue-based ethics guide them to what is right in the end.[248]

Thus, we can see the production of this work as a kind of contained flaunting, or a flaunting for the right audience only. The members of the academy were well aware of the danger that they would be in, were their ideas and acts to reach the wrong ears. In a play written by one or more members of the Academy around the same time, one of the characters in the course of a dispute calls another a *sodomito*, adding that "if I wanted, I could have him burned, and yet he insists on breaking my ass." Through its print editions *The Book of the Prick* took on a life of its own, however, although its circulation was necessarily secretive and it was officially banned in the course of the Counter-Reformation.[249]

Later in the sixteenth century a certain general scepticism of the received teachings of organised Christianity came, in parts of the Latin world, to be combined with a specific rejection of those teachings on sodomy.[250] This scepticism was already present to an extent in *The Book of the Prick*, where the main character substitutes, as it were, his own authoritative scripture for Christian Scripture by his claim to be writing a book with the Latin title *Lumen Pudendorum*, or *Light of the Prudes*, which was to be subdivided into three books: On the Genealogy and

248 See Moulton's introduction to Vignali, *La Cazzaria*, 1—70; Buranello, "Hidden Ways and Means," 65—6 (translated quotation as there) and passim.

249 Moulton's introduction to Vignali, *La Cazzaria*, 1—70; Buranello, "Hidden Ways and Means," 62.

250 Dall'Orto, "'Nature'," 100 n.17. On the general scepticism see e. g. Schwartz, *All Can Be Saved.*

Baptism of the Cock, On the Nativity and Works of the Cunt, and On the Life and Passion of the Asshole.[251] But we find more explicit expressions of such criticism a bit later, for instance in the case of the Franciscan friar Francesco Calcagno. At the age of twenty-two Calcagno was tried by the Inquistion in 1550 in Brescia in northern Italy on a number of counts revolving around apostasy and sodomy. The first point he was accused of was that he had said that Christ was a carnal man who had intercourse with the apostle John. The fourth point was that he worshipped any beautiful boy (*putto*) more than God, and that too carnally, the fifth that he had solicited people to provide him with males (*maschi*) for intercourse, etcetera. One of the witnesses, Lauro di Glisenti, largely confirmed these accusations: "He said many times that there is neither God, nor soul; and that after the body is dead, the soul dies too, and that the man who is called Christ was a carnal man, and that St John was his *cinedo* [i. e. his penetrated/passive/effeminate partner] and kept him beside at table, and loved him so much for this reason." This witness claimed to have tried to convince Calcagno to change his mind about sodomy, saying: "Don't you see that the Holy Scriptures condemn, and consider this vice of sodomy an abomination in a very clear way." To which Calcagno replied, "You are a fool if you believe the Holy Scriptures: what difference is there between them and the *Metamorphoses* by Ovid? Indeed Ovid is more truthful than the Bible." He allegedly added that those who wrote the Bible "were devilish people, and did so to keep the people in fear and to rule the world in their own way, and he often told me a verse by Lucretius: '*Primus in orbe deos fecit timor* [Fear first made gods in the world, or: It was foremost fear that brought gods into the world]'."

This quotation, not found in the extant work of the ancient Epicurian thinker Lucretius although it seems to mesh with some of his ideas, but actually in that of two other pre-Christian Roman authors, was quite well-known at the time and also adduced by not-so-libertine theologians to illustrate various points.[252] Just over a decade before the trial, the reformer Calvin used the quotation to illustrate a point about those who do not serve God with "integrity of heart" and transgress his law, "preferring to indulge their fleshly intemperance" only to try and placate him with "frivolous trifles and worthless little observances."[253] Although Calvin and Calcagno were coming at this quotation from quite different angles, the context in which they placed it, namely carnal pleasure, is the same. Also, they both identified the fear of divine wrath as the main obstacle to transgressing divine law

251 Buranello, "Hidden Ways and Means," 70.

252 Riaux, "'Primus in orbe'."

253 Calvin, *Institutes*, 1: 50—1. This passage appeared in the second Latin edition of 1539, so it is even possible that Calcagno read it.

for many people. Only for Calcagno these people were fools (at least according to the testimony) and for Calvin they were hypocrites. Still, the positions of the libertine Calcagno and the stern reformer Calvin were surprisingly close on this issue.

In his own testimony Calcagno denied most of the charges or turned them around at Lauro di Glisenti. About the first charge he said that "one time Mr. Lauro di Glisenti da Vestone said that he didn't believe in anything, only what you can see with your eyes, and I said to him 'well then you can believe or say anything you want about Christ no matter how bad, like he kept Saint John as his boy [*bardassa*]'." He did admit that he had said "that a nice ass was paradise and God," but only because he had read those words in *The Book of the Prick* which Di Glisenti had lent him. It appears that the two had been part of a libertine circle steeped in classical and modern literature, which found its end in the execution of Calcagno after the trial.[254]

The same link between scepticism and sodomy was made in two denunciations of the English poet and playwright Christopher Marlowe some forty years later. Marlowe's influence on his contemporary Shakespeare is well known and his work has attracted a great amount of scholarship, some of which has focused on the homoerotic passages in it. Bruce Smith goes so far as to say that his work, for all its ambiguity, displays a "specifically homosexual subjectivity."[255] Yet Elizabethan England was full of informers (see also Chapter 3) and shortly before Marlowe was mysteriously killed at the age of twenty-nine in 1593 one Richard Baines submitted damning accusations against him. These were partly corroborated by a posthumous information by Marlowe's former friend and fellow poet-playwright Thomas Kyd, who was himself under investigation and had just been released from incarceration with torture. According to Baines, Marlowe had said: "That the first beginning of religion was only to keep men in awe." This is clearly an English rendering of the same "Lucretian" saying that Calcagno was alleged to have endorsed. There is also a close correspondence with other things Marlowe would have said according to Baines, especially "that St John the Evangelist was bedfellow to Christ and leaned always in his bosom; that he used him as the sinners of Sodoma," and "that all they that love not tobacco and boys were fools." Kyd's note is slightly more circumlocutory in alleging that Marlowe "would report Saint John to be our saviour Christ's Alexis…that is that Christ did love him with an

254 A transcript of the trial has been published by Dall'Orto in "'Adora più presto un bel putto'." The translations here are largely based on those in Dall'Orto, "Rocco," 230—1, and "'Nature'," 86.
255 Smith, *Homosexual Desire*, 23

extraordinary love." Kyd underlined the outrageousness of the suggestion by claiming to report it "with reverence and trembling."[256]

There was also a strong rejection of the authority of the Bible and the state in what Marlowe supposedly said. According to Baines he would have said that Paul was the only apostle of Jesus who had some wit, "but he was a timorous fellow in bidding men to be subject to magistrates against his conscience." According to Kyd, Marlowe had called Paul a "juggler," i. e. a deceiver, and would generally jest at and contest the content of Bible. No less than three points in the accusation by Baines concern the authority of Moses. Moses would have been a "juggler" (as well) who had awed the unrefined Jews with the arts he had learned from the Egyptians, implanting an "everlasting superstition in the hearts of the people." Again this is quite similar to what Calcagno was supposed to have said about the authors of the Bible.

Also, just as with Calcagno and Di Glisenti we get the impression that Marlowe and Kyd were part of a libertine circle. The playwright and pamphleteer Robert Greene also seems to have been part of it. On his deathbed, he had drawn up a confession which was published right after his death. This was less than a year before the cycle of denunciations began. Marlowe was not mentioned by name but it is clear that he was the person that Greene called on to turn aside his "diabolical atheism." Greene had once shared this person's views and said with him "there is no God," but had now repented and urged that person to do the same. Still another informer also cast Marlowe as an advocate for atheism within a small circle.[257] While trying desperately to distance himself from this circle in his notes to the Privy Council, Kyd still revealed something of the sense of "us against the orthodox establishment" that must have prevailed in it. He wrote that the person who denounced him must have been "some outcast Ismael" who was acting out of lewdness but pretending to do so out of "duty or religion."

The combined contestation of the proscription of sodomy and the authority of the Church to interpret scripture was, however, more widespread than the small libertine circles we have seen so far. Giovanni Dall'Orto points to more sightings of the idea that the relationship between Christ and John was sexual among homosexually inclined men in this period, and suggests that that cannot have been a coincidence. One twenty-four-year-old, on trial in Lisbon for sodomy, was alleged to have said that "Christ was very attached to St John because they used to sleep together." Contesting the authority of the Bible, the young man was also supposed to

256 Freeman, *Thomas Kyd*, 31—2; Baines, "Accusations" (I modernised the spelling); Kyd's letters to John Puckering of the Privy Council in Freeman, *Thomas Kyd*, 181—3 (I modernised the spelling).
257 Nicholl, *The Reckoning*, 44—5.

have said that "If Saint Paul spent so much time talking about *molicies* [masturbation] it's because he must have had some experience in the area."[258] Also in Sicily in 1586 a merchant was fined for expressing the cognate idea that "St. Peter, before he was ordained, made unnatural love to his wife."[259]

An idea of how widespread the rejection of the Church's teaching on both heterosexual and homosexual sodomy was at the time, at least in one region of Italy, we can also gain from the confrontation between the Spanish Inquisition and Sicilians. I have already cited a number of arguments for excepting certain instances of heterosexual sodomy, and a priest who claimed that it was only a venial sin. But there were also a number of men, both educated and less educated, who were accused of claiming that sodomy was no sin at all as well as of practicing it. In the late sixteenth century a tanner allegedly said to his wife during intercourse that anal sex was not sinful "even if it is done on the high altar at Rome." In 1607 a lackey from Lombardy was to have quoted a "doctor" when he told some Spaniards that homosexual sodomy "could not be sinful, because nature permitted it." A nobleman from Catania claimed that "if a boy is asked to commit sodomy and refuses, he commits a mortal sin." A Franciscan friar claimed on the basis of scripture that sodomy was not sinful and "fornicating with boys was something holy and just." While these pronouncements show that, in Sicily, such ideas were not limited to small circles of literati, we must remember that all these men were convicted. The punishments for these pronouncements ranged from imprisonment to whipping.[260]

From the archives of the Inquisition in Portugal we learn that there too, a number of people spoke out against the sinfulness of sodomy, including several members of the Church hierarchy, even after what Luiz Mott sees as the heyday of homosexual subculture in Portugal, the period of 1610 – 44. In the 1650s, Father Gregorio Martins Ferreira, dean of the Oporto cathedral was accused of "making a doctrine of sodomy, defending it as forbidden [only] because men inclined to it and because it hindered the multiplication of the species," and, "he spoke without shame, making a satirical song with the names of the most famous sodomites, and singing it to the accompaniment of his guitar." Ferreira thus stitched together a number of arguments that we have encountered earlier: the listing of homosexual role-models, and the argument that as long as procreation was safeguarded there was no harm. From the Portuguese Inquisition files, we get the impression once more that there was a sense of belonging to a small libertine circle among

258 Dall'Orto, "'Nature'," 86—7, 101 n.20. Translation slightly modified from there.
259 Monter, *Frontiers*, 166, 174.
260 Monter, *Frontiers*, 174—5; Crompton, *Homosexuality*, 299—300.

insiders, who referred to outsiders as "ugly." There is a report of a striking conversation in the file on the house of Manuel Figueiredo, who was a servant of His Majesty's Chamber as well as to the Governor of Hormuz in the Persian Gulf. Figueiredo, himself in his early twenties, opened up this house to beautiful boys, some of them cross-dressing, as well as to men inclined to them. A man once brought a beautiful boy and the host remarked "there you bring a beautiful maid," to which the man responded, "she is ugly: she is not of our jurisdiction."[261]

Moreover, we have evidence that was not the direct result of trials and investigations. The collection of poetry entitled *The Affectionate Shepheard* published anonymously by Richard Barnfield in England in 1594 confronted the idea that physical interaction between a man and a beautiful boy was sinful. And the most outspoken defence of anal intercourse between a man and a boy we find in *The Boy Alcibiades at School* (*L'Alcibiade fanciullo a scola*) written in Venice around 1630 by Antonio Rocco and printed anonymously around 1651 in an immediately suppressed edition.

The first and main poem in *The Affectionate Shepheard* is a love lament by a shepherd who pines for a boy. The names of the protagonists, Daphnis and Ganymede, suggest that there are classical tropes at play, but the author certainly steps outside those tropes. Quite a bit of sexual imagery is used in the poem, much of it suggesting the desire for fellatio, but some also the desire for anal penetration between the shepherd and the boy, and that too mutually. The text seems to suggest that on the first day the shepherd-lover had been successful in penetrating the boy but after that he was spurned. In the first stanza the first-person voice of the poem announces that on the first night,

> Cursing the time, the place, the sense, the sin;
> I came, I saw, I viewd, I slipped in.

It is left open what the poet is slipped in, but the suggestion of anal intercourse is clearly there, and it is connected to the notion of sin. In the second stanza then the shepherd proclaims:

> If it be a sinne to love a lovely lad,
> Oh then sinne I, for whom my soule is sad.

Having been mentioned four times in the first twelve lines, the word sin does not recur in the remainder of the poem. Kenneth Borris convincingly argues that the poem is structured to steadily replace this acknowledgment of the proscription

261 Mott, "Portuguese Pleasure," 91—4.

with positive perspectives and in that way comes to function as a defence. A large role in this defence is played by the beauty of the boy – his loveliness is contrasted with the notion of sin from the start – as well as by the purity of the life that the two live as shepherds in the countryside. The descriptions of Ganymede's breast as sacred and his beauty as divine mesh with Neoplatonic discourse on the relation between physical beauty and love. Just as the Neoplatonists that we encountered above, Barnfield described the shepherd's love and thoughts as pure. The shepherd aims to love the boy into old age (which undercuts one of the arguments we have seen brought against Platonic love) and asks him to be "my Boy, or else my Bride." The latter of course would entail consummation.[262]

As so many of the advocates of a bit of flexibility with respect to Old Testamentic proscriptions, Barnfield also indirectly drew attention to the principle of charity. The main character extolls the way of life of the shepherd as an ethical model: "He is a Gentleman, because his nature / is kinde and affable to everie Creature." The mention of Philemon, who together with his wife Baucis showed hospitality to two gods in disguise in Ovid's *Metamorphoses* and was consequently spared the divine wrath that struck their inhospitable neighbours, may have been meant to replace readings of the story of the reception of the angels in Sodom as being about sexual abuse with a reading of that story as being about hospitality and charity. That is, God would have struck Sodom not because of its sexual transgression but because of its breaching the norms of hospitality. Looking ahead to when the boy will grow older, having spurned the shepherd's love, the latter gives him all manner of advice to live a life of virtue and kindness. The future grown-up is even to embrace his wife and "live not in lecherie."[263]

How did these poems mesh with Barnfield's biography? Pointing to the dedication of *The Affectionate Shepheard* to Lady Penelope Rich, which extolls her charms, a number of scholars have suggested that it is another example of the putatively orientation-less eroticism of the era.[264] Yet as we saw, Barnfield seemed to consider sleeping with males while being married to a woman "living in lechery." Moreover, while before the thorough investigation of his life published by Andrew Worrall in 2001 literary scholars were keen to point out that Barnfield, after his youthful publications (*The Affectionate Shepheard* was published when he was twenty), went on to live a settled life with wife and children. Now it appears

262 Norton, "Pastoral Homoeroticism"; Borris, "'Ile Hang a Bag'"; Barnfield, *Affectionate Shepherd*, 8.

263 Compare Borris "'Ile hang a bag'," 210—1, 220; Barnfield, *Affectionate Shepherd*, 23—31.

264 E. g. Andrews and Kalpaklı, *Age of Beloveds*, 128—9 and 366 n.31.

that in fact he was disinherited by his father and it is unclear if he married at all.[265]

In a second, more guarded, volume of poetry that appeared a year later, Barnfield continued in a vein very similar to Persianate antinomian poetry. He expressed a strong relativism regarding debates among philosophical schools about what greatest good should be:

> My chiefest good, my chief felicity,
> Is to be gazing on my loves faire eie.[266]

Once more we get the impression that all this was meant for a small circle of discerning people. In a commendatory poem in the same volume one "T.T." observed that its sonnets distilled "delights…Nere yet discoverd to the country swaines."[267]

Now we turn to the Italian confrontational literary work that needs to be discussed at some length, *The Boy Alcibiades at School.* This prose work presents a dialogue between a professor of rhetoric named Filotimo and a boy named Alcibiade, in which the professor tries with all his sophistry to persuade the boy to have anal intercourse with him.[268] In his plea the professor offers a number of arguments against the proscription of the proposed intercourse as well as reasons why that would be preferable to other forms of sex and otherwise beneficial for the boy. In the end the plea is successful and the professor proceeds to lick and penetrate the boy's behind while the latter describes the pleasure he derives from this in cosmic terms. The story is set in an ancient Athens where the laws proscribe "the practice… between males," as opposed to "the laws of more civilised nations: the Persians, the Medes, the Indians and the more worthy of our Greeks." The terms sodomy, sodomite and Bible are not mentioned, nor are the names of Moses and Aquinas, yet these are all hinted at in a roundabout way.[269]

Against the discourse on the unnaturalness of non-procreative intercourse which had come to underpin the proscription in the eyes of canonists, the professor proffers a number of arguments. First that anal intercourse between men and boys is thought to be *contro natura* in the sense of "against nature," only because of a confusion over the meaning of the words *contro*, which can mean both against and opposite, and *natura*, which also meant (in North Italian slang) vagina, so that

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265 Summers, "Foreword" and Worral, "Biographical Introduction."

266 Quoted in Norton, "Pastoral Homoeroticism," 125.

267 Borris, "'Ile Hang a Bag'," 224—5; Summers, "Foreword," 11.

268 Rocco, *L'Alcibiade*. The following discussion leans heavily on two articles: Dall'Orto, "'Nature'," and Fasoli, "Body Language." The translations rely partly on those given in the first article, and also on the French translation of 1866 (available on Wikisource).

269 Rocco, *L'Alcibiade*, 43—98, quotation 64. Compare Fasoli, "Body Language," 33.

the phrase must be understood as simply signifying the use of the anus which in women happens to be opposite the vagina. And – by the way – the vagina is not called *natura* because the desire for it is the more natural, but because it is the natural birth channel. Furthermore, "those acts to which nature inclines one are natural, and she has seen to their end and their effects. So if it is your natural inclination (*natural inclinazione*) to look at beautiful boys, how can you be against nature?" In fact, it would be an offense to nature to not follow her inventions. Noting that there are enough men around who are more inclined to women than boys (because of the foresight of nature, their being raised in an environment that is prejudiced against boy-love, and because love tends to grow once the object of it has been established) to ensure sufficient procreation, he reaches the conclusion that: "The inclinations are… given by nature and by God, whosoever follows these does not stray from his own principles, nor acts against their institutor."[270]

A number of the professor's arguments revolve around the concept of justice which he contrasts to state reason. He finds notions that all acts of lovemaking should be for procreation, "follies far removed from true sense [*vero sentimento*] and from justice." This statement resembles one made around the same time by Galileo Galilei (whose scientific ideas Rocco incidentally opposed) that a bare, naked, or literal reading of the Bible led to follies and that the correct way to read it was by adhering to its *vero sentimento.*[271] The statement also references the all-important concept of justice. The professor returns to this point: just because certain peoples, including the Athenians, have proscribed it does not mean that it is not good *in itself.* "They tailor their laws to their own interests; they don't submit their interests to justice. [These laws] are made to placate women, to satisfy them that they won't fall into neglect and abandon… They have made the relevant ordinances really according to the interests of the state and of politics, rather than according to the dictates of reason, the inclinations of nature. As a matter of fact, the greater part of human and even religious laws [*umane leggi e le religione*] are based on this accursed state reason [*ragione di stato*], so that even those that are reprehensible are held by the ignorant masses to be venerable and sacrosanct." Humans should instead abide by the laws of nature that are inborn in every man and can be divided into two main classes, "one concerning the honouring of God, the other the benevolence and equity towards the neighbour." The professor proceeds to demonstrate that first of all male-male intercourse does not harm one's neighbour if the neighbour in fact feels that he has benefited and is happy (which is also why the boy's description of

270 Rocco, *L'Alcibiade*, 56—60, 66; Dall'Orto, "'Nature'," 89—90, 94—5.

271 Rocco, *L'Alcibiade*, 59; Dall'Orto, "'Nature'," 90; Carroll, "Galileo," 680.

his pleasure at the end is important), and then to argue that God is not a tyrant who gave people free will while at the same time forbidding them to enjoy it.[272] This whole passage echoes Aquinas, and does only partly, if strongly, contradict him. Aquinas and Rocco's professor are in agreement that male-male intercourse does not offend one's neighbour, but while Aquinas introduced his concept of sins against God into this context, Rocco's professor casts doubt on the possibility of sinning against God simply by having pleasure.

Rocco's professor also makes a point about the story of Sodom and Gomorra and divine law in general, without mentioning either explicitly, that recalls what Calcagno and Marlowe were alleged to have professed. The professor sets out on a proto-anthropological exploration of different peoples and how they fashion their gods and their laws, leaving the student to admit that the listed laws appear foolish and unreasonable. Nevertheless, notes the professor, such laws are "canonised by usage, stabilised by fear, and authenticated by their reality." Moreover, legislators have made what was motivated by their caprice look like the will of God, because God is everywhere revered and feared. He then moves on to a thinly veiled retelling of the story of Moses and his people wondering in the desert, and proceeds, again indirectly, to deconstruct the link between the proscription and the story of Sodom and Gomorra. This deconstruction consists of three main elements: the proscription was only necessary at a particular point in time, the story is made up, and the link between the story and the proscription is tenuous anyway.[273]

Two main questions have come up in modern analyses of this text. First, to what extent Rocco intended his text to be taken as a satire and parody, and second, to what extent Rocco might have been attempting to legitimate his own lifestyle.

As to the first question: one might read the text as a satirical parody of the Platonic dialogue and of the kind of stories that a sodomite might come up with. The arguments in the text tumble over one another and some, such as the explanation of *contro natura*, are patently silly, and as Paolo Fasoli points out, Rocco may have had an intellectual interest in lampooning Plato's approach on account of his education at the university of Padua, where a number of extreme ideas (both libertine and reactionary) flourished that meshed more with the Aristotelian tradition than the Platonic tradition. Moreover, when the person who was probably responsible for getting the manuscript printed sent a copy of the booklet to a friend in 1651 he referred to it in the accompanying letter as a *libretto da Carne-*

272 Rocco, *L'Alcibiade*, 63, 70—1; Dall'Orto, "'Nature'," 90—3; Fasoli, "Body Language," 32—4.
273 Rocco, *L'Alcibiade*, 62—9. Compare Dall'Orto, "'Nature'," 91—2 and 103 note 37.

vale, a carnival booklet. But this again may have been intended as a measure to pre-empt any accusations: a way to, when necessary, point out that the whole thing was just a joke. The preface to the edition, which warned against "schoolmasters of Sodom," and the sonnets that came before and after the text in the publication may also have been intended as such cushioning.[274]

Also, if we place the text in the context of Rocco's life as we can catch a glimpse of it in scattered non-literary sources, we will quickly see that his sympathy is much more likely to have been with the Athenian professor's arguments than with those presented in the preface. Rocco was a Capuchin father teaching philosophy at a convent in Venice. He moved in the cautiously libertine circle of Venice that went by the name of the Academia degli Incogniti.[275] In the archives of the Venetian Inquisition no fewer than five accusations against him are preserved from the period 1635–52. None of these denunciations were pursued, however, and Rocco appears to have enjoyed protection from one or more Venetian patricians. The denunciations centre on his irreverence for Catholic doctrine in general and his advocacy of sexual liberty specifically. He supposedly said "many things against Catholic faith and religion" and that "the one who behaves honestly will be saved, and will be saved in accordance with nature's law also the infidels." The last of the denunciations noted that he was a promulgator of antireligious doctrines, although this advocacy "cannot make that much of an impression, since everyone knows he doesn't say Mass and lives like an atheist." In the mid-sixteen-thirties, at a session of the Academia degli Incogniti, he proffered a scandalous interpretation of Paul's writings about the temptations of the flesh, which he was, however, forced to retract on the spot. A young man who moved in Rocco's circle over a decade later confessed on his sickbed that, "mister Rocco used to ask us how long it had been since we'd had carnal relations, either naturally or against nature [*ò naturalmente ò contra natura*], and sometimes we would tell him yes, and he would say 'good job!' because that tool was made by nature so that we could use it as we pleased."[276] Some of these statements match quite closely with the arguments of the Athenian professor in *The Boy Alcibiades at School*. The parodic form of that work we may then see as a concession to orthodoxy. As was the case with the ribalds and antinomians in the Persian

274 Various anonymous authors in Rocco, *L'Alcibiade*, 41—2, 99—100; Fasoli, "Body Language," 31, 37—8; For Loredano's involvement see Dall'Orto, "Rocco," 224; Coci, "Nota al Testo" in Rocco, *L'Alcibiade*, 103—7.

275 Fasoli, "Body Language," 31.

276 Dall' Orto, "'Nature'," 88—9; Dall'Orto, "Rocco," 225; Spini, *Ricerca dei libertini*, 163—4, 166—8.

world, libertines often found it necessary to concede something to mainstream legal-moral notions in construing their arguments.[277]

Together with the judiciary records discussed above, the works of Barnfield and Rocco show how widespread small circles of sodomy-friendly libertines had become in this period. Where the mainstream Reformation contested the authority of the Church, these libertines contested the imposture of organised religion, and where the Reformation de-emphasised the role of divine law in salvation, they reduced scripture further to a few principles such as love and charity. They became the antinomians that Luther had already warned against.

Rocco, however, wrote exactly at the point that some modern historians indicate as the time when the mainstream of European thought turned from broad humanism to narrow and conservative rationalism. Pointing out that Montaigne's writing is much more explicit about his own sex life than that of the line of thinkers that started with Descartes, the intellectual historian Stephen Toulmin argues that the latter thinkers not only narrowed rationality to what we now call cognition but also turned towards respectability. Toulmin sees the years around 1630 as the turning point at which this conservative reaction gained the upper hand. In his *Homosexuality and Civilisation*, Louis Crompton identifies the trial of Théophile de Viau (instigated by the Jesuits but carried out by the Parliament of Paris) in 1626 as the event that "effectively ended the age of open libertinism."[278]

The turning point was also noticed by the contemporary Claude-Barthélemy Morisot, a Dijon-based jurist and author of two romans à clef, one of which can be read as an apology for Théophile de Viau. He put some thought into the relation between authors and their writings as well as into the ways to read texts describing homosexual relations. In a 1630 letter he remarked that there was a new breed of embellishers (*mangonibus*) who castrated the books of the brightest minds because they could not read them without getting sexually excited. He advocated that at least "it should be permitted to read what it is not permitted to say or do. It is not necessary for verses to be chaste; it suffices that the poet be chaste [*pudicus*]." Thus, while criticising the castrators, Morisot in effect also became part of this very turn towards orthodoxy by reverting to the claim of chastity. In his roman à clef defending De Viau and his circle against the attacks by the Jesuits, Morisot presented two ways of teaching students the homoerotic texts and stories of classical antiquity such as the *Satyricon* and the myths of divine love-affairs. There was the way of the Jesuits which aimed to pervert the students and turn them into pas-

277 Compare Dall'Orto, "'Nature'," 84.

278 Toulmin, *Cosmopolis*, 23, 39—42; Crompton, *Homosexuality*, 334.

sive sexual partners. The way the roman à clef itself embodied was to lead the reader through the practice of the liberal arts to consider no subject forbidden.[279]

To be sure, libertine ideas did survive the Counter-Reformation backlash even after around 1630, but much of the stridency in advocating them was gone. People continued to discuss them in small circles but were unwilling to publicise them. The French court under Louis XIV was full of such well-meaning rule breakers. The French nobility at the time was said by insiders to be practically atheist, yet its members did not aim to spread their disdain for religious pre- and proscriptions among the wider population. One member of De Viau's circle, the aristocrat Denis Sanguin de Saint-Pavin went on to become honorary chaplain to Louis XIV, even while being dubbed the king of Sodom and secretly writing libertine poetry inviting his select readers to follow nature rather than morality. A certain strand of libertine thought already present with De Viau and Rocco, namely that there was a layer of superior minds floating above the sheepish masses, was perfectly suited to the aristocratic habitus. The attitude of homosexually inclined aristocrats at the court was well described by the German princess Elisabeth Charlotte, who married Louis XIV's brother and listened patiently her husband's stories about his homosexual affairs as well as the stories his lovers had to tell, and claimed to have become an expert on the topic:

> Those who have that taste and who believe in Holy Scripture suppose that it was only a sin as long as there were few men in the world and what they practiced could hurt the human race…But now that the world is completely populated they consider it a simple divertissement. They hide it as much as they can in order not to scandalise the common people, but they speak openly of it among people of quality. They consider it a delicate refinement [*gentillesse*] and do not fail to say that since Sodom and Gomorrah God our Lord has no longer punished anyone for this reason.

Thus, Rocco's ideas about the imposture of religion returned at the late seventeenth-century French court in a slightly toned-down and very much guarded airing. Gone was also the emphasis on truth-seeking and truth-speaking that for De Viau and Rocco to an extent connected the inner and outer worlds, left was only the inner world of personal refinement and the elite circle.[280]

Because of the special status that the visual arts and its creators had acquired over the Renaissance, we can trace the arc of the development of libertinism perhaps even more clearly in the visual arts scene, as made up of artists, patrons, and

279 Compare Godard, "D'*Alitophile*," 546.

280 Compare Abirached and Adam, "Libertins"; Crompton, *Homosexuality*, 335, 341—5 (translated quotation as there); Godard, "D'*Alitophile*," 551.

art-works. Illustrative of this status is the claim by Benvenuto Cellini that even the pope once said that because of his unique art he was above the law (with respect to murder).[281] But while he did openly acknowledge killing a man, he did not, as we have seen, openly acknowledge committing sodomy. On the other hand, the painter Giovanni Antonio Bazzi from Siena proudly wore the sobriquet *Il Sodoma*, the sodomite. In his biography of Renaissance painters Vasari noted: "His manner of life was licentious and dishonourable, and he always had boys and beardless youths about him of whom he was inordinately fond, this earned him the name of Sodoma; but instead of feeling shame he gloried in it, writing stanzas and verses on it and singing them to the accompaniment of the lute." When Sodoma was in Florence in 1515 and his horse won the race there, however, "the boys who used to call out the name of the victor after the trumpet had sounded asked him what they should cry, and when he replied 'Sodoma, Sodoma,' they repeated the name. But when some reverend men heard their shouts they began to say, 'What ribaldry is this? Why is such a name shouted in our city?' So before long poor Sodoma, his horse, and a Baboon he had with him were stoned by the boys and the mob." Despite his courting controversy in this way, Pope Leo X made him a Cavalier of Christ on account of his artistic achievements, and from then on Bazzi signed himself "Antonio Sodoma, Knight of Siena."[282]

But over the period from the mid-fifteenth till the late sixteenth century, most artworks we can call homoerotic, including those by Bazzi and Cellini, remained within the fold of the concept of Platonic love. Around the turn of the seventeenth century, however, some artists started to make the viewer complicit in their invitations to transgress. The Italian painter Caravaggio's naked youths with their inviting lips have been described by one art historian as "sexual come-ons."[283] Interesting instances are also two paintings by French painters working in Rome: Simon Vouet's of a handsome young man in women's dress holding a scrotum-shaped pair of small pears with the hand at the end of his bare left arm and making a thumb-between-fingers gesture with the right hand (fig. 10), and Nicolas Régnier's of a boyish bare-chested faun with a bowl of apples (metaphor for buttocks) making the same gesture at the viewer. The gestures are reminiscent of the one made by the old man in fig. 4, but here the subjects are making it at the viewer. The three positions of the Safavid painting are here conflated into two: the seducer in the painting, the object of seduction (us) and the hypocrite (also us). The Vouet paint-

281 Andrews and Kalpaklı, *Age of Beloveds*, 256.

282 Crompton, *Homosexuality*, 245.

283 Compare Sternweiler, *Lust der Götter*, 14, 24, 86—91, 291 and passim; Röske, "Blicke," 132—3.

ing may well have been commissioned by Cardinal Francesco Maria del Monte who patronised both Vouet and Caravaggio.[284] Del Monte appears to have commissioned more daring works than some of his homoerotically inclined colleague-friends like Odoardo Farnese who continued to commission works in the Platonic vein.[285] Theodorus van der Ameijden, a contemporary Netherlandish doctor of Roman and canon law who also moved in Rome's art-loving circles, wrote about Del Monte: "He loved the company of youths, I do not think out of evil instincts but from natural friendliness…[and at first] he gave no cause for censure, wisely keeping everything private. After Urban's election [in 1623]…he dedicated himself openly to his tendencies."[286]

That final period of Del Monte's life, however, at the same time marked the highpoint and end of the libertine era. The turnaround that we noticed in the literary scene can also be traced in the visual arts scene: not only did northern Protestant artists start to frown upon the sexualised male nudity of the libertine era in Italy, Catholic collectors and artists also created a bit more distance to erotic subjects. The German Calvinist painter and art critic Joachim Sandart claimed to have taken the initiative in hanging a curtain in front of Caravaggio's frontally nude and inviting *Victorious Cupid* while he was, in the early sixteen thirties, in Rome organising and documenting the collection of Cardinal Giustiniani to which the painting had moved after the death of Cardinal Del Monte. Ostensibly Sandart suggested the curtain so that the painting would not outshine the other works, but art historians have been inclined to think that it had more to do with his censorious attitude towards sexuality and sodomy in particular, which can be traced in his edited volume about the Giustiniani collection and his much later book of painters' biographies.[287]

While the homoerotic/sexual works of Caravaggio and Vouet make the viewer complicit, the work of the most daring Catholic painters of the mid-seventeenth century takes a step back. The homoerotic is merely observed, to be judged or not, as in the work of Michael Sweerts, a Flemish painter who worked in Rome for a while.[288] He is very interested in illicit intercourse, for instance in his painting of bathing and cruising men where the sexual component is quite explicit in the two naked men in the background, one rubbing the other's back (fig. 11).

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284 Compare Lemoine, "Sous les auspices," 28—34 and Jacquot, "Jeune homme aux figures." Both identify the fruits in Vouet's painting as figs, not pears.

285 Sternweiler, *Lust der Götter*, 291.

286 For good measure: there are also remarks that early in life Del Monte had affairs with females. Hibbard, *Caravaggio*, 30 (translation as there); Crompton, *Homosexuality*, 288.

287 Compare Sternweiler, *Lust der Götter*, 286—9, 301—2.

288 Röske, "Blicke," 132—3.

Fig. 10: *Young Man in Women's Dress* by Simon Vouet, 1620 – 30. The young man holds some scrotum-shaped fruits and makes a gesture suggestive of intercourse. Musée des Beaux-Arts de Caen.

The illicitness is suggested by the bushes and the falling darkness and the stealthy glance from under a hat at the prominent shining white bottom at the centre of the painting. In another painting of naked wrestlers with prominent behinds, a completely clad man flees the scene towards the viewer with open mouth and hands in

the air – is he supposed to reflect the horror that the viewer would be supposed to experience at the sight of so much transgressiveness?[289]

Fig. 11: *Bathing Men in the Evening Light* by Michael Sweerts, c. 1655. The viewer becomes a voyeur to this scene of nakedness and men rubbing each other (in the background). Landesmuseum, Hannover.

Conclusion

The similarities between the ways of thinking about the rules on sodomy are striking. The ways overlapped in form but also often in content. People circumvented the proscription by zooming in on the narrowest possible definition of sodomy, which in both our worlds happened to be male-male anal penetration. For this both our worlds had access to the Platonic heritage that allowed for the construction of a higher form of love. In both worlds males stretched this chaste love to its limits. In the Latin world through all sorts of non-penetrative practices in bed, and in the Persian world through ecstatic dancing, chest to chest, with no shirt on. Also

289 Compare Fred. A, "Michael Sweerts Le match de lute."

in both worlds, outsiders aired their suspicion that Platonic or mystical love was only a cover, and that boundaries were crossed nevertheless. Confounding the gender of the beloved was also practiced to some extent in both worlds. A difference between the two worlds was the use that men in the Persian world made of the institution of slavery. In making exceptions to the rules on sodomy the Persian world looked more at the nature of the times, while individuals in the Latin world looked more at charity and nature. Those who were embarrassed by their behaviour could, and did, in both worlds point to others who were doing it with impunity. Also in both worlds people debated and negotiated over whether the sin was too large for God to pardon or there was space for repentance and penance. Finally, both worlds saw strident advocates for male-male intercourse, though those advocates did not arise at the same time. What do these patterns of thought and their recurrence mean? Chapter 4 will explore a number of the emerging patterns in combination with what emerges from the other chapters. Here I just want to look at the legal consciousness to which they point.

The cases and their patterns upend the theory that divine law was and remained confined to a separate sphere. For each case I have brought evidence of a certain awareness of the proscription of sodomy. Having systematically put all these ways and means together, we can say with some confidence that there were a substantial number of people whose lives were affected by the proscription of sodomy to the extent that they needed recourse to a way out of its scope, and that in both worlds. Even when those people did not mention any of the terms related to sodomy explicitly in their justifications, they were engaging elements of the definition of sodomy that were current in their time and place.

In neither world were poets blithely writing their love poetry without being aware of the restrictions of divine law. Indeed, it appears that some poets and thinkers who were inclined to the same sex sought to close themselves off from the scrutiny of the guardians of divine law and "the vulgar herd" by establishing circles for the elect where the homoerotic was celebrated along with a host of other heterodox ideas. The alternative sphere they sought to set up consisted of a whole complex of cultural elements and attitudes. In the Persian world it encompassed the strand of Sufism that emphasised love and mystical experience over the rules of divine law. It appealed to the love and mercy of God, and the suspension of judgement. The opponent of the alternative sphere was defined as the *zahid* and the hypocrite. In the Latin world it consisted in an appeal to pre-Christian classical models and ideas over Judeo-Christian ones: Socrates, Plato, Ganymede, the power

of nature.[290] In the Latin sphere the opponents were those who clung to the authority of Moses and Paul. But this alternative sphere did not simply exist side by side with that created by the legalists, purists and preachers of divine law. It had to constantly fended for, its proponents had to constantly engage with the arguments of the other side.

The elect individuals we can classify along a spectrum from more to less beholden to the law. On one side were those who presented themselves as fully law-abiding, claiming to enjoy only the most chaste mystical experience of the homoerotic. Here we find Jami and Ficino. On the other extreme we find the *rinds*, *lawands,* and libertines. But as we have seen, even their rejection of common morality was not complete; it partook of the kinds of strategies that I classed under circumvention, exception and embarrassed transgression. Writing about the late eighteenth-century libertine author Marquis de Sade, Roland Barthes notes that: "Libertine morality consists not in destroying but in diverting; it diverts the object, the word, the organ from its endoxal usage; however, for this theft to occur, for the libertine system to prevaricate at the expense of common morality, the meaning must persist"[291] In other words, even libertines in many ways recognised some commonly agreed or endoxal legal boundaries. Or to put it still otherwise, the heterodox and the orthodox often sought confrontation, but both sides recognised that they were on the same playing-field. As Muhammad Fadel remarks in a review of Shahab Ahmed's *What Is Islam?*, the antinomian philosopher-mystics of the post-Mongol Persian world would not have been able to establish their vision as a viable alternative if they had not recognised "that the orthodoxy of the theologians and the jurists was a universal, albeit inferior, truth to that which they possessed and professed."[292]

In the alternative sphere we also find many people somewhere in between the law-abiders and the law-breakers, in between Jami and Hafiz, in between Ficino and De Viau or Rocco. Their testing of the boundaries of chastity shows that the claim to chastity was often a strategy to circumvent the forbidden. Their weapon was ambiguity, through which they could at the same time affirm the boundaries and deny them. Among the cases of this chapter we can point for instance to Sarmad and Varchi, as well as Barnfield. And where would the poetry of the period be without the transgressive element? The proscriptions enabled the ambiguities that make the poetry so much fun.[293]

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290 Andrews and Kalpaklı make this comparison for the Ottoman empire and Western Europe in *Age of Beloveds*, 302.

291 Barthes, *Sade/ Fourrier/ Loyola*, 124; Fasoli, "Body Language," 32.

292 Fadel, "The Priority of the Political."

293 Compare Fasoli, "Body Language," 38—9.

Beside these elite engagements with the proscriptions of *liwat* and sodomy, we have examples of such engagements even in the everyday practice of sodomy by people who did not have access to the circles of the elect. The ideas of both the guardians of doctrine and their opponents seem to have circulated widely, although most of what we get to see of the views of the non-elite comes from censorious sources like Barani and the Inquisition.

2 Justifying Idolatry

Bring wine and to Hafiz' hand give first/
On condition that word does not go from the circle of friends to the door.
Hafiz[1]

Introduction

The proscription of idolatry was of one of the core characteristics, if not the core tenet, shared by Judaism, Christianity and Islam. As Moshe Halbertal and Avishai Margalit put it, "the very identity of the monotheists depends on the negation of idolatry."[2] The shared heritage of Christians and Muslims, and with that their common identity as non-idolaters, was to an extent recognised in our period. To Muslims, Christians and Jews were by their quranic definition as Peoples of the Book separated from the *mushrik*s (literally those who associate other gods with God). For a sixteenth-century painter like Dust Muhammad it was obvious that a justification of his art should encompass the Old-Testamentic Daniel as well as a Christian Roman emperor, as we shall see below. Nevertheless, certain beliefs and practices of Christians continued to evoke suspicion, especially the way they displayed and employed images and their belief in the Trinity, which seemed to associate partners with God.[3] By the end of our period, Catholics in particular came to seen as fallen brethren in this respect. From the Christian perspective, identification with Muslims was less self-evident, but some Christian thinkers were also willing to extend the identity of non-idolaters to Muslims. As we may recall from the Introduction, some theorists (including Aquinas) saw Muslims as pagans while others saw them as heretics, and the latter perspective was gradually gaining ground. With respect to the concrete issue of idolatry this was also the case. In the beginning of our period, there was, on the one hand, the scholar William Durand who was of the opinion that Muslims stuck too strictly to the biblical proscription of images and, on the other hand, a popular discourse in which Muslims were seen as idolaters par excellence. Terms derived from the name "Mohammed" were sometimes used in European vernaculars to designate idols (In English: *mawmet* or *mamette*).[4] Yet in the early fifteenth century, John of Sultaniya, the Italian-born envoy of Timur, made the point that the main thing that set Muslims apart

1 Hafiz, *Diwan*, 454 (no. 219). Translation modified from that by Clarke.
2 Cited by Cummins, "Golden Calf in America," 82.
3 Compare Minissale, *Images of Thought*, 211—4.
4 Camille, *Gothic Idol*, 129—64; Kamerick, *Popular Piety*, 45, 65, 194. For Durand, see below.

 https://doi.org/10.1515/9783111218014-005

from gentiles or pagans was their great abhorrence of idolatry.[5] From the late sixteenth century, Calvinists recognised Islam as belonging to the three religions that abjured idolatry, and some Catholics and moderate Calvinists came to present Muslims as the ultimate iconoclasts, as we will see in a number of examples below.[6]

Since not being seen as an idol-worshipper was so crucial, the limits of idol-worship had to be constantly redrawn. Sometimes they were drawn very widely. Because the proscription of *idolatria* or idolatry was central to Christianity it was often linked to whatever people wanted to condemn, as "the real idolatry."[7] Luther for instance took an Old Testament passage addressing the crafting of likenesses of God in gilded metal or wood (Isaiah 40: 18–20) as a starting point to critique self-righteous people, especially papists and other proponents of free will and good works, who set up their own figments and opinions "like internal statues."[8] Similarly, some Muslims levelled the accusation of *shirk* ("association," i. e. idolatry) or more specifically idol-worship *('ibadat al-wasan* in Arabic and *but-parasti* in Persian), against all kinds of self-described Muslims they considered heretics, in particular the Muslims who believed in "the Unity of Existence."[9] In a discussion of women who were out of bounds for marriage to Muslims on account of their practicing *shirk*, the *Alamgirian Rulings* brought forward two main groups: Zoroastrian women and female idol-worshippers (*wasaniyat*). To define the latter, the text cited the wide definition by the fifteenth-century Egyptian Hanafi jurist Ibn al-Humam, whom we already encountered in the last chapter as rather stern. He wrote that "included with the female worshippers of idols [*'abdat al-wasan*] are the female worshippers of the sun and the stars and of images which they hold in reverence, and [those of the] *mu'attila* [better known as the *mu'tazila* or rationalist school of theology], and *zanadiqa* [heretical beliefs bordering on atheism] and *batiniya* [esotericism, belief in the Unity of Existence] and *ibahiya* [antinomianism] and all schools by belief in which one is deemed a *kafir*."[10]

The most damning terms in the two worlds, *idolatria* and *shirk,* did not overlap exactly, but as we just saw, both could be very broadly employed at times. Moreover, both concepts were tied to their physical manifestation: the material idol. Both concepts were also tied to memories of the formative moments of monotheism: in particular the worshipping of the Golden Calf by the Israelites at the pre-

5 Excerpt from the text in Kern, "Der 'Libellus de notitia orbis'," 96.

6 Vanhaelen, *Wake*, 41—3; Hoornbeek, *De conversione Indorum et Gentilium*, 14. See also Gommans and Loots, "Arguing with the Heathens," 55, 57.

7 Compare Cole and Zorach, "Introduction," 1—4.

8 Melion, "'Nor my praise to graven images'," 226—30. Translation as there.

9 See e. g. Keshavmurthy, "Translating Rāma," 15—6.

10 Shaikh Nizam et al., *Fatawa*, (Arabic) 1: 396, (Urdu) 2: 144, (Baillie, *Digest*) 40.

cise moment that Moses received the Law, and the smashing of the stones worshipped by the *mushrikis* at Mecca by Muhammad. Just as Luther's discussion of idolatry starts from a discussion of a biblical passage on idols made by craftsmen, the definition of *shirk* in the *Alamgirian Rulings* starts from the concrete and physical, and then progresses to all sorts of more abstract beliefs, not the other way around. Thus, we can say that concepts of the physical idol kept haunting all discussions of idolatry and *shirk*, however abstract.

This chapter will focus as much as possible on material idols in the form of drawn, painted, sculpted, or built images. This means leaving out not only many immaterial phenomena some saw as *shirk*/idolatry, from the saintly voices heard by Joan of Arc to the intercession of Sufi *pirs*, but also the debates on other material manifestations, from the practices at Sufi tombs in the Persian world to the rituals involving saintly relics and the Eucharistic host in the Latin world. I hope this focus will make it easier to see similarities and differences in the patterns of thought employed in the two worlds.

The question which drawn, painted, sculpted, or built images constituted idols was important in both our worlds. Both worlds employed two parallel sets of terms for the objects in question, a condemning set and a neutral set. Among the damning terms, the Latin world used *idolum*, which in combination with *latria* or worship yielded *idolatria*. The Romance languages and English mostly used derivative forms of *idolum*, but the Germanic languages also knew other terms that denoted both the physical idol and the false god, *abgot* or *afgod*, or as Luther preferred: *götze*. Equivalents in the Persian world were the Arabic words *wasan* and *sanam* and the Persian word *but* (which derives from "Buddha" – of whom the early Muslims encountered many statues in the eastern regions). The terms that could be more neutrally employed in the Latin world were *imago, image* etc. and the Germanic *bild, beeld* etc. The not necessarily damning terms in the Persian world were *surat* (image) or *timsal* (likeness).

To be sure, the definition of idols by Muslims in the Persian world was on the whole wider than that set by Christians in the Latin world (even by most Protestants). Yet even though the boundaries of idolatry were drawn differently in the Latin and Persian worlds, I believe that we can fruitfully compare the strategies around those boundaries. Moreover, the case of idolatry provides an interesting counterpoint to that of sodomy, for which, as we have seen, the relation was inverse since it was generally more widely defined in the Latin world compared to the Persian world. This is one of the reasons why juxtaposing the way people dealt with these two proscriptions is useful.

For the Persian world, or even the Muslim world in general, modern scholars have posed the question in terms of whether there was a complete proscription of images. While some twentieth-century scholars have argued that there was such a

Bilderverbot (the debate was started in German), more recently numerous art historians have dismissed that idea as an Orientalist fiction.[11] The older scholarship tends to focus on what appears as compliance with such a proscription, namely the great efflorescence of non-figural ornamentation in the Muslim world from Andalusia to Bengal. The newer studies, on the other hand, tend to focus on what appear to be indications of the irrelevance of any possible proscription, namely the numerous instances of figural representation, in particular in the Persian world.[12] Among the more recent arguments is that by Jamal Elias. He argues that it was and is through a process of "multi-think" that Muslims were and are able to simultaneously condemn and engage in the use of images (in particular what Elias calls "religious images").[13] This argument recalls the arguments about the irrelevance of the legal field to sexual practice that the previous chapter argued against. As Finbarr Flood suggests, it might be good to look *between* compliance with and seeming irrelevance of any proscription of images to the "middle ground of compromise and negotiation."[14]

For the Latin world too, the "separate spheres" and related arguments have played a large role in the debate. Famous thinkers of the modern era like Georg Hegel, Max Weber, and Roland Barthes have contemplated the paradox of the Netherlands in the seventeenth century, in which Calvinism with its relatively strict interpretation of the biblical commandment on images was the state religion, but the visual arts flourished in new ways. Weber attributes the flourishing of the arts to the failure of the Calvinist Church to impose its will on a pleasure-seeking society – saying in effect what some also argues with regard to the proscriptions of sodomy and usury, that divine law was relegated to a sphere separate from the practice of people who were not its appointed guardians.[15] More recently, Caroline Bynum has argued that the medieval Latin world saw a paradox arising from an ambivalence towards sacred images and other material objects. This paradox would have grown in strength over the period 1300 to 1500 and continued into the sixteenth century. Latin Christians would have simultaneously embraced and rejected the role of images and other objects in worship. The more they were rejected, the more they were embraced. Again, I think it is necessary to look at the stories through which people connected their embracing of sacred images to their awareness that they ought to reject them.[16]

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11 Shahab Ahmed cites some examples of the latter. *What is Islam*, 50—1 n.128.

12 E. g. Gruber, *Praiseworthy One*, 29—30 and passim; Houghteling, *Art of the Cloth.*

13 Elias, *Aisha's Cushion*, 13, 287.

14 Flood, "Lost Histories of a Licit Figural Art."

15 Vanhaelen, *Wake*, 11—5.

16 Bynum, *Christian Materiality*, 268—72 and passim.

This chapter combines the analysis of artworks as much as possible with written sources, but in some cases we only have the artworks themselves. How do we determine the measure of legal consciousness of the people involved in making an artwork with only the artwork itself as evidence? Looking at what was depicted and what was not goes some way towards such a determination. I will be taking a leaf out of Ebba Koch's work on the Taj Mahal, where, in the section on "the Built Tomb Controversy," she reconstructs a consciousness among the Mughal emperors of the legal obstacles to tomb building on the basis of the morphology of the tombs. Especially useful for such a reconstruction are what may be called reflexive paintings. These paintings reflect on image-making and image-breaking through the presence of images, image-makers, broken images, image-breakers, or indications of their own two-dimensionality within their frames. The art historians Gregory Minissale and Angela Vanhaelen have devoted some attention to such images for the Persian and Latin world respectively in recent years. But their views have come in for criticism from art historians who caution that we should be more careful in trying to read works of art.[17] The question is basically how much we should attribute to accident. A question that both authors bring up for instance in whether certain flaws in perspective were due to lack of skill or a statement about the nature of the image. I lean to the more daring interpretations, which attribute more agency and consciousness to the makers of images.

A Short History of Definition and Enforcement in the Persian World

Well before our period jurists of the four Sunni schools and the Ja'fari school had started to make all sorts of distinctions concerning the juridical status of images. The most basic distinctions were those between idol and image and between images of animate and inanimate subjects. Further distinctions were made between images without and with shadow (i. e. statues), between those hanging and those lying, between small and large images, between the sorts of spaces they were found in, etc. The finest distinctions were made by jurists of the two schools most relevant to the Persian world, the Hanafis and the Ja'faris. The least willing to make distinctions were members of the Hanbali school. Its founder, Ibn Hanbal, defined *surat* as an image of an animate being and encouraged all Muslims to re-

17 Koch, *The Complete Taj Mahal*, 85—8; Minissale, *Images of Thought*, 204—58; Vanhaelen, *Wake*, 15 and passim. For the criticism of Vanhaelen's book see: Lootsma, "Review," and Schwartz and Middelkoop, "Naar de kerk met Emanuel de Witte," 68—9.

move or "decapitate" *surat*s in all spaces where they had any business. On the whole, Hanbali views were not so relevant in the Persian world, but in this case the school's view was promoted by the enormously influential Shafi'i theologian-jurist Ghazali. He professed his agreement with Ibn Hanbal's stance, although, as we will see further on, he too ended up making important distinctions.[18]

In contemporary discussions it was not so much the Quran, but rather the Traditions and Reports that were brought to bear on the issue of idols and images. They number a few dozen in the authoritative Sunni collections (not taking into account the minor variations and different lines of transmission) and fewer in the Shi'i collections. Some of these Traditions and Reports were very strict and damning regarding images and image-makers, others less so.[19] Because of the way some of the Traditions were framed the possibility of idolatry was not seen as the only problem with images in the Persian world. This is a minor contrast with the Latin world where scruples regarding images seem to always have been directly related to the concept of idolatry. In the Persian world, the risk of trying to imitate God's creative power was also perceived to be a reason behind a potential proscription of the *making* of images. This has to do with certain interpretations of the relevant Traditions – as we shall see below in two examples of lines of reasoning that turned these interpretations on their head. Yet in juridical works of the period and region under investigation, the emphasis was more on the problem of idolatry tied to the *use* of images.[20] We can see this clearly in the argumentation of both Hanafis and Ja'faris throughout our period, as well as in that of Ghazali.

The concern with idolatry is evident in all writing of Hanafi jurists on images. Abu Hanifa's disciple Shaybani already adopted what his student Jawzajani called a "solution of toleration." The discussion with his teacher that Jawzajani recorded revolved around figurative images in prayer situations. Figurative images on the walls and carpet around the praying person, or even on his clothes, were discouraged but did not invalidate prayer as long as they were not in the direction of prayer. In the latter case, however, the images were to be "decapitated" for the prayer to be valid. This view was further developed closer to our period by the Iranian jurist Sarakhsi. He went into every possible situation concerning *timsal zi arwah*, literally "likenesses with souls," that is, images of living beings. What, for instance, if the head of the praying person precisely touched such a figure on the carpet? He

18 Compare Touati, "Le regime," 18—30. Contrast Gruber, *Praiseworthy One*, 201.

19 For an overview see Heger "The Status," 34—51 and Elias, *Aisha's Cushion*, 9—13.

20 Heger also notes a strong preoccupation of jurists with idolatry. "The Status," 73—4. Yet in some modern discussions the ground of the imitation of creation is emphasised. Thus e. g. Wensinck and Fahd, "Ṣūra" and Elias, *Aisha's Cushion*, 286—7.

concluded that the discouragement did not apply to the image itself so much as to "what could signify the glorification of the image and the imitation of a person devoting adoration to it." Having an image precisely in the place where one's head reached in prayer did indeed produce the "signification of veneration" that invalidated the prayer. Sarakhsi also developed a general rule: since an idolater would not be content to worship a small idol, only images that could be seen from further away were discouraged. Small images were not discouraged (as long as they were not in the direction of prayer). The same concern with idolatry continued in the school till the end of our period. At its start Marghinani followed Sarakhshi very closely. Speaking of situations of prayer but also more generally, he specified that small images, images of things that do not have life, and images of which the head was erased were not discouraged. This, again, because such images were not worshipped. And as we saw, the *Alamgirian Rulings* deemed the worship of "images [*suwar*] which they hold in reverence" a species of the worship of idols (*wasan*).[21]

The Ja'fari school leaned heavily on the Reports about the fifth Imam, which display the same concern with idolatry. Some of these show a measure of unconcern with images that were not in the direction of prayer. Others, however, show him invalidating prayer in a room where there were images, no matter what their position relative to the praying person. These Reports were presented side by side in some collections. Nomi Heger, however, draws our attention to a subtle shift in the Ja'fari compilations of legal opinions. While before the sixteenth century the issue of images was mainly discussed in the section on prayer, from then on there was also an important discussion in the book on commerce. This entailed new questions about makers and sellers of images. The new discussions tended to bring forward the Traditions concerning the imitation of creation for which artists would be punished in the afterlife. At the same time, these discussions shifted the responsibility from the patrons of artworks to their makers. We see this especially with the influential jurist Ali Karaki, who was active at the court of Shah Tahmasp until his death in 1533. He argued that the sale of "instruments of entertainment like the lute, instruments of gambling like chess sets and objects of worship like idols [*sanam*]" in an unbroken state was not permitted unless one was certain that the buyer was so pious that he would break such objects after buying them. Consequently he went on to ask whether "artisan-made images [*suwar al-ma'mulat*]"[22] were of the same class. Acknowledging that some jurists did think so, he

21 Touati,"Le regime," 27—9; Marghinani, *Hidaya,* (trans. Nyazee) 1: 156—7.

22 I am translating *ma'mulat* as "artisan-made," because *'amal* was generally used for the work of artisans as well as of the people we would now call artists. It seems that Karaki added this adjec-

maintained that their sale was not forbidden because the proscription of their making did not extend to their sale – unless again the buyer would use the image as an idol.[23] Karaki's discussion also makes explicit the issue of intention in the use of images, which seems implicit in many of the discussions over images that we will come to below.[24]

At certain points in time, however, such very specific considerations regarding intention and the placement of images came to be disregarded in favour of a harder line. Such a thing happened during a ban on images promulgated by Sultan Firuz Shah Tughluq of Delhi in the third quarter of the fourteenth century. While he adhered to the Hanafi school, he seems to have followed Ghazali quite closely in this ban. He followed both Ghazali's rejection of zoomorphic and anthropomorphic household items[25] and his concern with de division between private and public spaces. The latter will be discussed in the section on exception. The former aspect I will discuss here because it is an important moment of enforcement and because it throws light on what many people other than Firuz Shah considered allowed and what the crucial concepts were. According to both his own statement about his achievements and the chronicle of his reign by Shams Siraj Afif, Firuz banned all *surat*s as well as *timsal*s at the court. Both stated explicitly that *surat*s were against sharia, and Firuz added that people should instead make "what is not repugnant to sharia [*makhtur-i shar' nist*] and permissible [*ja'iz*] and neutral [*mubah*]." *Surat*s that were on all sorts of items ranging from the robes of courtiers to weapons, tableware, and banners as well as on walls had to be removed.[26]

Just as Ibn Hanbal and other early jurists, Firuz Shah seems to have defined *surat*s as images of living beings. The sultan commanded that in his private apartments "instead of making *surat*s [*suratgari*] they should draw paintings [*naqsh*] with all sorts of orchards agreeable to connoisseurs."[27] Firuz Shah's contemporary Hamadani also made explicit that *surat* was the problematic subcategory of *naqsh*. He allowed any *naqsh* of "trees and whatever is inanimate [*ghair-haiwan*]" on doorways of bathhouses but disallowed any *naqsh* that was a *surat* of "people, an-

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tive to distinguish from mental or literary images. Abu Rayhan Biruni also used it in his discussion of Indian idols (Friedmann, "Islamic Thought," 82).

23 Karaki, *Jami' al-Maqasid*, 4: 16. Interestingly, in a discussion of the same subject (whether objects with non-permissible purposes could be sold without breaking them) the *Alamgirian Rulings* only mentioned musical instruments, game boards "and the like." I am not sure what to conclude from this. Shaikh Nizam et al., *Fatawa,* (Urdu) 4: 368—9.

24 Touati, "Le régime," 24—7; Heger, "The Status," 67—71.

25 Touati, "Le régime," 22.

26 Firuz Shah Tughluq, *Futuhat*, 11. Afif, *Tarikh*, 373—4.

27 Afif, *Tarikh*, 373—4.

gels, jinns, or animals."[28] We find the same fine distinction later in our period, for instance in a sixteenth-century album preface by the Safavid painter Dust Muhammad. With regard to *naqsh* he simply noted that according to the Shi'i Reports it was Muhammad's son in law Ali himself who was the first to practice this to decorate a Quran. Thus, reasoning somewhat like a jurist (an actual one would have gone through the opinions of the authorities of his legal school before bringing up a Report) the painter Dust Muhammad could easily demonstrate that *naqsh* was so impeccable that it could be used even on the Quran. His defence of *taswir* (the making of a *surat*), on the contrary, was necessarily much more elaborate as we shall see later.[29]

Not part of any formal definitions, but an important association of idolatry, was that with lascivious or libertine behaviour. As we saw in the last chapter, Sufis liked to play with the idea of image-worship while speaking of illicit beloveds. This may seem confined to the realm of the imagination, but there is an instance where the link was seen to have become real, and this episode is evidence of the strength of the association. Among his measures to curb the use of images among Muslims as well as idol-worship by the Hindus, Firuz Shah Tughluq listed a crackdown on "a sect of heretics and antinomians [*ta'ifa-yi mulhidan wa ibahatiyan*]" led by some Shi'i preceptors who had been holding gatherings of men and women with alcohol and food where they encouraged participants to perform prostration to an image (*surat*) and have illicit vaginal intercourse (*zina*).[30]

In Iran, an important moment of enforcement was the conversion of Ghazan Khan in 1295. While the majority of the population was already Muslim by the start of our period, the first Mongol rulers themselves constituted a non-Muslim element at the top of hierarchy. But the conversion of Ghazan Khan brought elite and commoners more in line in this respect. On the eve of embracing Islam he had, according to Rashid al-Din, concluded that bowing to idols was not in accordance with reason (*'aql*). He proceeded to give orders that all idols (*asnam*), idol-houses (*but-khanaha*), fire temples, and other places of worship "whose existence in the land of Islam was shariatically [*shar'an*] not permissible [*ja'iz nist*]" be destroyed. These orders did not go uncontested as we will see below.[31]

In South Asia meanwhile, Muslim conquerors and rulers continued to work with a majority Hindu population. How to briefly summarise the extremely contentious debate on temple destruction and desecration in the region? This para-

28 Hamadani, *Zakhirat*, 400.
29 Dust Muhammad, "Preface," 11. See also Heger, "The Status," 64, 264, 273.
30 Firuz Shah Tughluq, *Futuhat*, 6–7.
31 Rashid al-Din, *Jami' al-Tawarikh*, 2: 1107, 1201.

graph outlines the questions which keep coming up in this debate and are relevant to the issue of enforcement of the proscription of idolatry. Were many temples destroyed or few? On the one hand, there are the claims made in the chronicles eulogising certain rulers in this respect,[32] on the other there is the evidence that many temples kept functioning. Were the Muslim rulers and commanders who destroyed temples motivated by a desire to implement sharia or by (other) political motives? Richard Eaton has argued in an oft cited article that, first of all, temple destructions in India by Muslim conquerors and rulers were far fewer than some historians and Hindu nationalist politicians claim, and, second, that when temples were desecrated by removal of the main god-statue or otherwise, this was done mainly for political reasons, despite the claims by those in command of such actions that they were doing so to comply with sharia. Eaton concludes this on the basis of evidence that almost exclusively politically significant temples were targeted, i. e. temples to which Hindu powerholders and their dynasties were personally connected.[33] Yet we should not discount sharia consciousness in this matter. Firstly, the proscription of idolatry was not only invoked when convenient. We will see this for instance in a passage where the Mughal emperor Babur appears to be explaining why he was not destroying more temples than he was. Secondly, as we will see in many examples, Muslims in South Asia used sharia-infused language to justify the continued functioning of temples.

Circumvention in the Persian World

The three major ways to render images (more) acceptable without contesting the proscription of idolatry revolved around the way the observer regarded them, the way they depicted things and beings, and their affinity to calligraphy.

A very large amount of evidence from literary sources shows that the distinction between *maʿni* (meaning, transcendental reality, "idea" in the Neoplatonic sense) and *surat* (both form and image), was a major concern in early modern Persianate thought. A more general way to phrase this opposition, which was particularly cultivated by Sufis, was as the distinction between the internal (*batin*) and the external (*zahir*). We have already encountered this distinction in the discussion of *shahid* beloveds in the previous chapter, and it was part and parcel of a Neoplatonic conception of the Unity of Existence, the controversial idea gaining influence from the beginning of our period that one divine essence manifests itself in every-

32 There were many such claims. See Wink, *Al-Hind,* 3: 160—1 n.241.

33 Eaton, "Temple Desecration."

thing. From its (re)conception in the Arab world at the turn of the thirteenth century, the idea bore within itself the capacity to justify the use of idols, even the Golden Calf. As we saw, by the end of our period the *Alamgirian Rulings* classified its adherents themselves as idolaters. To be sure, the preference for the internal over the external and meaning over form was more widely shared than only among the espousers of the Unity of Existence. It was, however, often tied to another distinction, that between the esoteric elect and the common man.[34]

In the beginning of our period, the poet-jurist Sa'di, whom we have already encountered as an advocate of the pre-emptive strike against the sodomite, touched on the distinction in the course of the story of his visit to the important temple at Somnath in western India. At first he criticised the goings on there and the powerlessness of idols. But sensing a growing hostility he changed his tone to politeness. He facetiously asked "what transcendental reality [*ma'ni*] is there in the form [*surat*] of this idol [*sanam*]?" His inquiries were appreciated by the Brahmins of the temple, who invited him to stay and see how the idol raised his hand to God in the morning. By pretending to be an infidel and participating in the "great sin" of idol-worship, he was able to find out that the moving arm of the idol was operated by a rope pulled by a Brahmin priest. The story ended in Sa'di killing one of the Brahmins, which he justified as both self-defence and a pre-emptive strike to stop the perpetuation of idol-worship by this *mufsid* or evil-doer. It seems that Sa'di was aware that one might bring up the argument that there was a divine reference point behind the idol, but he did not want to concede it.[35]

The role of images in worship was indeed part of an ongoing conversation between Hindus and Muslims in India. Some learned Hindus of various denominations apparently sought to justify the use of images as unimportant externalities in the worship of an abstract divinity, and did find some Muslim interlocutors who were more sympathetic than Sa'di, or in any case more explicit in their recognition that the idols were not the substance of Hindu worship. Already in the early eleventh century, the Iranian scholar Abu Rayhan Biruni, who accompanied one of the Afghan conquerors of north-western India, argued that idols (*asnam*) were for the benefit of the Indian common folk with limited gnostic insight, and the elites who had such insight merely catered to their needs.[36] Around the turn of the fourteenth century the Delhi-based poet and writer of advice literature Amir Khusrau was also in one place willing to concede that when Brahmins worshipped the sun, stones, or animals they saw these not as similar to God but as part

34 Compare Minissale, *Images of Thought*, 221—4, 238—41; Franke, "Emperors," 126; Ahmed, *What Is Islam*, 26—31, 46—57 and passim.

35 Sa'di, *Kulliyat*, 286—9 (*Bustan*, Chapter 8, last story).

36 Biruni, *India*, 1: 112—3; Friedmann, "Islamic Thought," 81—2.

of his creation. In the course of this ongoing conversation, in the fifteenth and sixteenth centuries, influential Hindu reformers like Kabir and Guru Nanak drew the conclusion that if images were irrelevant to worship they should be dispensed with altogether. The majority of Hindus, however, continued to use sacred images, and we continue to find justifications for a Muslim audience. Akbar's minister Abu'l-Fazl asserted that all Hindus believed in the unity of God and that their homages to images of stone were only "aids to fix the mind and keep the thoughts from wandering."[37]

One seventeenth-century response in this genre is particularly striking. We have a stylised record of a series of conversations between Prince Dara Shukoh, a Sufi slated to inherit the Mughal throne, and Lal Das, a Hindu sage with some followers. In one of his unorthodox works on metaphysics and different religious practices, Dara described Lal Das as "amongst the perfect gnostics," that is, one who shared his belief in the Unity of Existence. The conversation may have taken place at an early point in the development of Dara's ideas on Hindu beliefs. Taking a divine law starting point Dara asked: "What is idol worship [*but-parasti*] in the Hindu world [*Hind*], and who ordered it?" Lal Das answered:

> This aspect has been established for strengthening the heart. A person who is aware of the transcendental reality [*ma'ni*] in the image [*surat*] is excused from this aspect. Just like unmarried girls play with dolls and the latter show them housekeeping. When they themselves have become housekeepers, they give that practice up. It is the same thing with the practice of idol worship; as long as one is not aware of the essence [*batin*] in the image, one is attached to the image. Whenever one attains awareness of the essence, one will hasten away from the image.

In that way Lal Das rejected the use of images by those who had progressed in gnosis but defended it for the non-elect.[38]

The distinction between *ma'ni* and *surat* played a role not only with respect to declared idols, but also with respect to the potential idols that paintings were, and that too throughout our period. Rumi already spoke of the *ma'ni* and the form with reference to painting.[39] In sixteenth-century Iran, Sadiqi Beg Afshar made much of the distinction in his treatise on painting entitled *The Law of Images* (*Qanun al-Suwar*), seeing himself as a meaning-searcher from the face of images (*ma'ni-talab az ru-yi surat*). At the same time at the Mughal court, Akbar was styled "Em-

37 Compare Friedmann, "Islamic Thought," 82—3 and Hayat, "The Conversation," 48, 70, 74, 98, 193.
38 Hayat, "The Conversation," 33—44, 61—2, 71—2, 130, 143, 194. Translation substantially modified. In the secondary literature this statement is often erroneously attributed to Dara himself. E. g. Friedmann, "Islamic Thought," 84.
39 Heger, "The Status," 300.

peror of *surat* and *ma'ni*" while he and his spokesperson Abu'l-Fazl demonstrated that making or looking at images led one to contemplate meaning more acutely. Akbar's son Jahangir was particularly proud of his ability to see the meaning behind the form. In a miniature painting made for him by the Hindu painter Bichitr we see the emperor paying attention only to a Sufi shaikh, while the Ottoman sultan, a European monarch and a Hindu (probably the painter) hang on (fig. 12). The Hindu holds up a miniature painting of himself bowing deeply, perhaps in gratitude for the two horses and elephant seen behind the bowing figure. Two verses inscribed on the painting proclaim that even though in appearance (*dar surat*) kings stand before Jahangir, in reality (*dar ma'ni*) he fixes his gaze on dervishes. The verses also proclaim him to be "Emperor of meaning and form by the grace of God." The little painting within the painting is evidently part of the irrelevant externalities, and just tolerated in the corner.[40]

We even have a painting of Jahangir contemplating a golden idol through his superior vision.[41] The painting in question is difficult to date but ties in with sixteenth- and early seventeenth-century illustrations of the passage in Sa'di's *The Orchard* (*Bustan*) where the author described his visit to the temple at Somnath in Gujarat, already mentioned. The story ended in violence as we saw, but later illustrations of it show Sa'di standing aloof and quietly contemplating the goings-on around the idol, as if distinguishing *ma'ni* from *surat.* One manuscript of *The Orchard* produced in Bukhara with such an illustration (fig. 13) was in possession of Jahangir, and he had this particular illustration partly reworked by one of his court painters.[42] Another illustration made for Jahangir shows Sa'di equally contemplative, but also shows that this was not the only possible response: a number of Hindus venerate the statue with folded hands, a Zoroastrian seems to turn his gaze away from it to the fire in front and two Muslims turn away from it, throwing their hands up in the air in what seems to be an ecstatic Sufi dance (as an alternative way of contemplating the divine).[43] These paintings are reflexive, showing in an image how one should treat images, namely by seeing through them to

40 Compare Porter, "'Theory of The Two *Qalams*'," 112—3; Minissale, *Images of Thought*, 247; Franke, "Emperors." Translation modified from the latter.

41 Minissale, *Images of Thought*, 247. Victoria and Albert Museum inv. no. IM.116–1921. The painting is possibly a copy of around 1800 after an original produced at the court of Jahangir (see museum website).

42 Compare Minissale, *Images of Thought*, 48 n.52; Welch, *India*, 210—1. Another example is Brooklyn Museum, Frank L. Babbott Fund, inventory no. 35.1028 (see museum website).

43 Sa'di and the other two Muslims are distinguished by the right-sided closure of their dress. Reproduced in Soudavar, *Art of the Persian Courts*, 351.

Fig. 12: *Jahangir on the Hourglass Throne* by Bichitr, c. 1615–8. Jahangir prefers a book of wisdom offered by a Sufi shaikh to the Ottoman sultan, the king of England, and a Hindu holding a painting (below left). National Museum of Asian Art, Smithsonian Institution, Freer Collection, Purchase – Charles Lang Freer Endowment, F1942.15a.

the ultimate reality. They show that images are only idols for those who cannot see through them. The idolatry inhered in the observer, not the image.

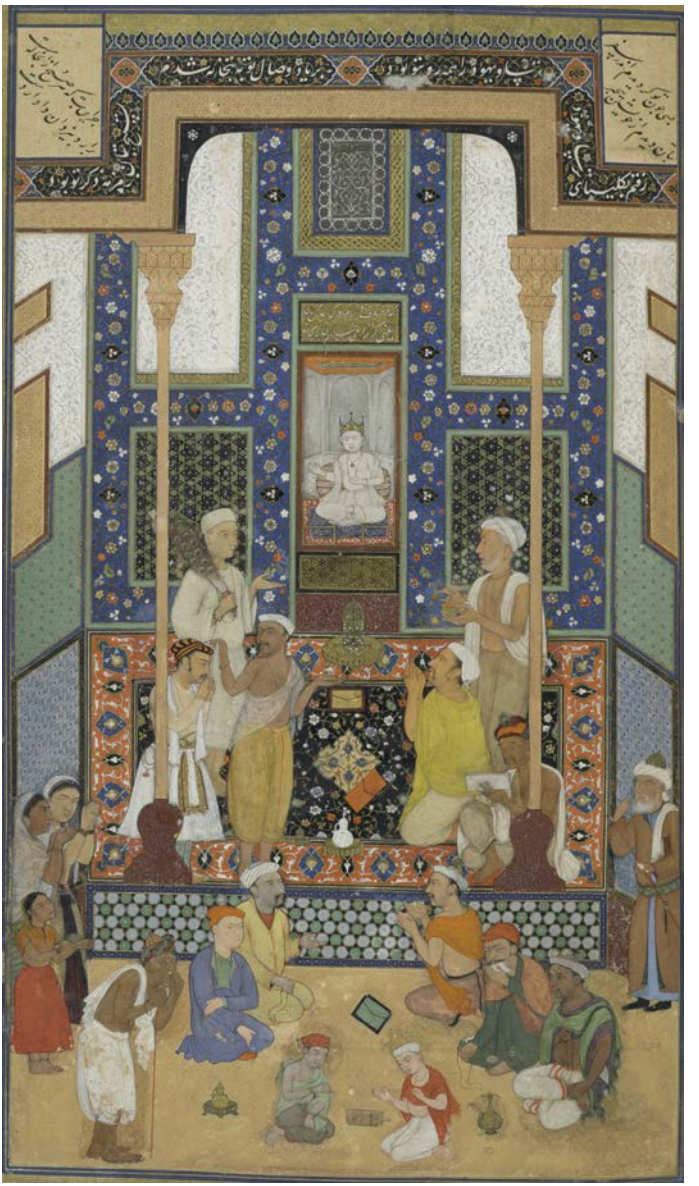

Fig. 13: *Sa'di at the Temple of Somnath,* attributed to Shaikhzada in Bukhara first half of the sixteenth century, with overpainting attributed to the Mughal painter Bishndas, early seventeenth century. Sa'di stands aside to the right in amazement, which is indicated by the finger to his lip (just as the student in fig. 15), while people pay homage to the white idol. Harvard Art Museums/Arthur M. Sackler Museum, Gift of Philip Hofer in memory of Frances L. Hofer, Photo © President and Fellows of Harvard College, 1979.20.119.

In his *Images of Thought*, art historian Gregory Minissale argues that in Persianate miniature painting naturalism was avoided because paintings were to be images of the mind rather than of external reality and signs rather than idols. Instead of the perspective and moulding that was increasingly developed in the period in Western Europe, painters in the Persian world applied an anti-illusionism. This is particularly visible in "the insistence on flattening surfaces" that Minissale notes, for instance in the treatment of textiles, of which the patterns are often depicted as if they were hanging vertically in front of the viewer.[44] And, importantly, shadows were also absent from most paintings – with the notable exception of the candle or fire-lit scenes of Payag and Lalchand (fig. 3).[45] Particularly relevant to our discussion here is the question whether this anti-illusionism noted by Minissale was consciously applied in order to direct the mind towards the internal rather than the exterior.

Ebba Koch has shown that Mughal painters consciously employed naturalistic and non-naturalistic styles together to create pictorial hierarchies that matched and underlined the hierarchy of the imperial court of Shah Jahan, who reigned in the second quarter of the seventeenth century. While as a whole the touches of naturalism within a flattened scheme served to underline the reality of imperial power, the least naturalistic rendering in these paintings of court scenes is reserved for the hierarchical peak, the emperor and/or his highest officers and princes. What is lower in, or outside, the hierarchy is painted more naturalistically. Thus, the more respected people in the painting partake of the ideal world and the less respected beings are based in the plane of murky externality. This does not only apply to Shah Jahani painting but also, as Nadia Ali and Yves Porter note, to earlier paintings from Iran where humans tend to be depicted as flat and almost transparent, while demons have heavy bodies with apparent muscles, hair, and genitalia. Minissale provides some further evidence to show that it was not due to lack of skill that Persian world painters were careful with illusionism.[46]

While the painters who combined naturalism and anti-naturalism in one painting clearly put some thought into what they were going to flatten and what not, for painters whose works were unnaturalistic throughout the impulse to flatten may have been part of the habitus of painting, as Minissale observes. Yet whether it was always conscious or sometimes habitus, the question remains to what extent we can attribute the flattening impulse to the juridical insistence

44 Minissale, *Images of Thought*, 1—40, 221—37.

45 See Koch, *Mughal Art*, 144.

46 Koch, *Mughal Art*, 130—62; Porter, "'Theory of The Two *Qalams*'," 113 and 117—8 n.43; Minissale, *Images of Thought*, 35—6.

on images without shadow. It is difficult to tie the flattening directly to statements by contemporary jurists, but we know that jurists did think about such things at an early date. At least, so it seems from a Report that a ninth-century Ja'fari scholar attributed to the fifth Imam. This Report has the Imam rejecting images on prayer rugs unless they only "look with one eye." In other words, he made a distinction between frontal and in-profile representations of living beings.[47]

A remarkable instance of nonrealism is the depiction of veils over the faces of Muhammad, Ali, and the sons of the latter in paintings made at the Shi'i courts from the early sixteenth century onwards. The practice seems to have started at the court of Shah Tahmasp. As we saw, Tahmasp honoured and supported the jurist Karaki, who was very concerned with intention in the use of images. Christiane Gruber has studied these Shi'i images of Muhammad and Ali and argues that we should see the addition of the veil not as a turn to an image-adverse pietism but as part of a package of innovations which served to put Ali almost on a par with Muhammad in visual representations. Apart from the veil, Safavid artists also started to apply to both figures of a flaming aureole and a type of headgear that the Safavid rulers wore themselves. However, Gruber also acknowledges a possible role for sharia consciousness, noting that "premodern jurists…encouraged artists to adopt nonrealistic devices to avoid the representation of facial features."[48] Moreover, Gruber argues that the strategies chosen to visually represent Muhammad "disclose a general arc of evolution from about 1200 CE to today." Whereas in the early part of our period Muhammad was regularly depicted with face in illustrations to stories about his life, in the later part his depictions were more and more replaced by pictorial allegories and faceless representations. The introduction of the face-veil was an important point on this arc. After its introduction in the Safavid Shi'i environment it also came to be adopted by artists working for Sunni patrons.[49]

The concern with meaning and form is also implicit in the strategy that we find in the sixteenth and seventeenth century of explicitly juxtaposing calligraphy and painting as arts of the *qalam* (which can mean both a pen and a brush). The first explicit iteration of this so-called theory of the two *qalam*s is in the poet and historian Abdi Beg Shirazi's *A'in-i Iskandari* (Rules of Alexander), where he refers to the tip of the *qalam* as the key of art and simultaneously notes that God created

47 Minissale, *Images of Thought*, 158—61; Touati, "Le régime," 26.

48 This is possible, but the passage that Gruber references (Touati, "Le régime," 21) speaks merely of the Hanbali scholar Ibn Qudama, who suggested that the use of images of animate beings was only *halal* if their heads were represented separate from their bodies. Gruber, *Praiseworthy One*, 201.

49 Gruber, *Praiseworthy One*, 17, 20, 30, 201—8 and passim.

two kinds of *qalam*, that made of plants (the reed pen) and that made from animals (the hair brush). According to the art historian David Roxburgh, two mid-sixteenth-century authors seized on this idea precisely in order to justify image-making by assimilating it to the completely unobjectionable art of calligraphy. Roxburgh also suggests that it was for this reason that the painter and calligrapher Dust Muhammad discussed calligraphy and painting side by side in his preface to an album containing samples of both.[50] Still closer to the practice of painting is what appears to be a restatement of the equation in a Mughal painting of the beginning of the seventeenth century (fig. 14). On a colophon page at the end of a manuscript, the painter Daulat painted a portrait of himself in the act of portraying the calligrapher of the work Abd al-Rahim sitting next to him, also at work. Abd al-Rahim held the title *Anbarin Qalam*, The Ambergris Pen (ambergris was a costly ingredient for perfume), and was known for his rhythmically proportioned and precise *nastaliq*, or sloping script. In this colophon, he has managed to position the word *qalam*, or pen, precisely in the middle of the page, right below his own name and the title of the deceased emperor Akbar. This testifies to his conscious assertion of his art. The painter Daulat also seems to be making a statement about his art. By positioning himself as a painter close to, but slightly lower than, the calligrapher, he seems to be asserting that the art of painting is almost on a par with the latter's very respectable art. A number of illustrated books are strewn around the pair as examples of the fruits of their collaboration.[51]

Exception in the Persian World

Beside the concern with the external and the internal, the form and the meaning, of images there was also a parallel concern with placement of images inside and outside the private sphere. This concern with placement was implicit in the strategy of juxtaposing calligraphy and painting already encountered. Although there was much calligraphy on architecture and also some mural painting in certain periods, the place par excellence where these two arts found each other was the book, which tended to be read and admired in private settings.[52] We may note that the late sixteenth-century *The Law of Images* treatise only dealt with book painting in its guarded defense of painting.[53] Yet a dichotomy of private and public spheres with regard to the use of images of animate beings can be traced to well

50 Porter, "'Theory of The Two *Qalams*'," 110—1, 113; Roxburgh, *Prefacing the Image*, 199.
51 Compare Minissale, *Images of Thought*, 88—9, 206—7.
52 See Houghteling, *Art of Cloth*, 99.
53 Compare Porter, "'Theory of the Two *Qalams*'," 112—4.

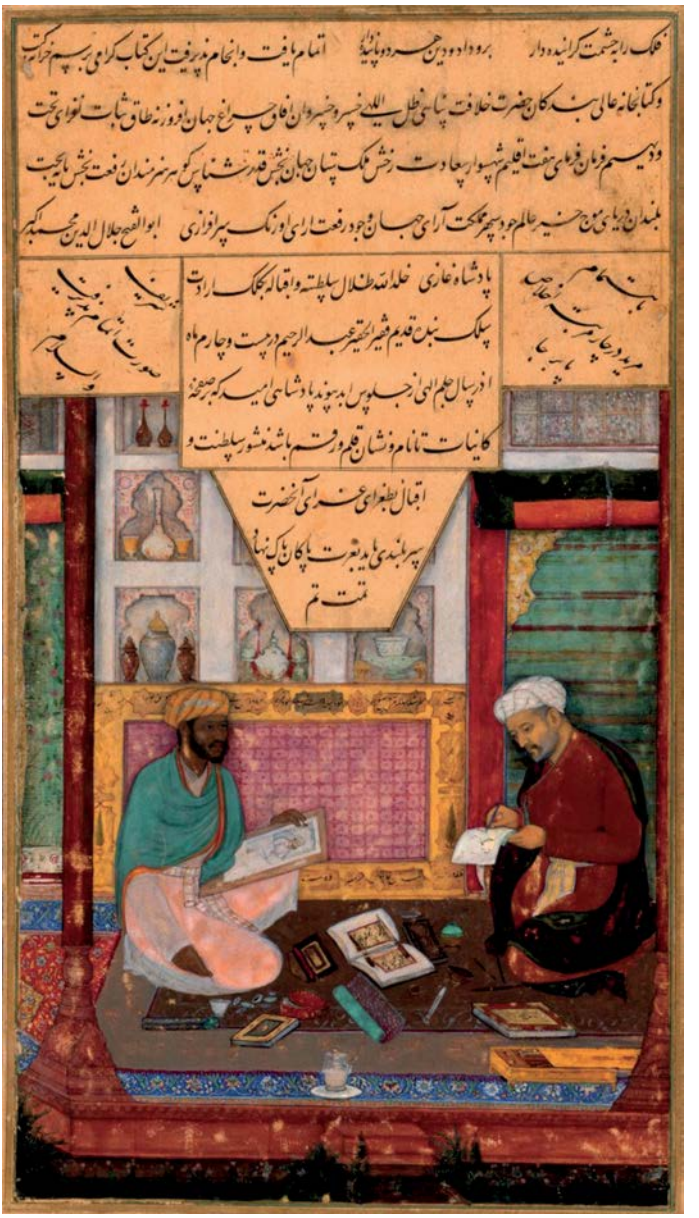

Fig. 14: *The Calligrapher and the Painter at Work* by Daulat, shortly after 1605. Illustration at the end of the *Khamsa* of Nizami. Daulat places himself to the left, almost on a par with, though slightly lower than, the calligrapher Abd al-Rahim with his "perfumed pen." He is drawing a portrait of the calligrapher. © The British Library Board, Ms. Or. 12208, fol. 325v.

before our period, even as far back as the Umayyad Caliphate, as Priscilla Soucek notes.[54]

It was also already before our period that the private space came to be quite generally considered to be inviolable from the point of view of the duty of "commanding the praiseworthy and banning the proscribed," which could be delegated to a *muhtasib* or left up to every individual. An early account of the practical implications is in Rashid al-Din's account of his emperor Ghazan Khan's efforts to back up a number of shariatic proscriptions with his own ordinances. He also wanted to restrict the use of *sharab* or alcohol but realised that a complete ban was not feasible and instead opted to lay down a punishment for drunkenness in cities and marketplaces. In addition, he ordered that no-one was to go into people's houses for an investigation so that oppressors would not conduct misguided actions and there would be no harassment.[55] In the fourteenth century, Hamadani counselled both rulers and guardians of divine law against prying across the doorstep of the house. He defined very precisely "the limits of concealment": the forbidden act (*munkar*) was to take place in one's own house and no sounds of debauchery (*fisq*) were to be heard outside. In such a situation it was not allowed to inquire into any forbidden goings-on. The poetry of Hamdani's contemporary Hafiz also contains many references to keeping sins concealed in gatherings of friends within closed doors, as evidenced by the quotation at the top of this chapter. There was an expression in Persian that neatly summarised the principle: "what business for the *muhtasib* inside the house?" This expression was recorded by Anand Ram Mukhlis in his dictionary of Persian idioms in the mid-eighteenth century, but probably has a longer history.[56]

An instance of this limitation specifically related to images we can see in the work of Muhammad Ghazali, whom Hamadani followed quite closely. Ghazali considered it an individual's duty to command the right and forbid the wrong. While discussing wrongs that were commonly met with, Ghazali mentioned the type of image (*sura*) that one found at the entrances of or inside bath-houses. It was an individual's duty to deface these images, and if they were too high to reach, one should move on to another bath-house. Images of trees and the like were not a problem for Ghazali. Among the wrongs that one could encounter while being received in someone's house for an entertainment was confrontation with hanging curtains with images on them. Since the act of hosting opened up the private

54 Soucek, "Taṣwīr, 1."

55 Rashid al-Din, *Jami' al-Tawarikh*, 2: 1338—9.

56 Matthee, *Pursuit*, 72, 95—6, 296—7; Hamadani, *Zakhirat*, 385—7 (translation as per Farooq, "Mir Sayyid Ali Hamadani's *Dhakiratul Muluk*," 306—7); Mukhlis, *Mirat al-Istilah*, 2: 667.

sphere of the host, making it in a sense a public space, the guest would be obligated to take action against the wrongs that he found there or leave.[57] Thus Ghazali was willing to make a minor exception concerning the enforcement of the proscription of *surat*s (but not concerning the proscription in itself), namely that in the private space they should be left alone as long as the private space remained private. There is an important difference in emphasis between the rather strict Ghazali and Hamadani on the one hand and Hafiz on the other: while the former saw so-called *majlis* gatherings at a house as open to sharia enforcement by invitees,[58] the latter preferred to see them as closed. It all depended, of course, on inviting the right people.

In his discussion of the measures that Firuz Shah Tughluq took to have *surat*s removed from the court, the chronicler Afif also mentioned the *musauwar* (adjective of *surat*) murals in the private palace of the sultans (*mahal-i khalwat-gah-i salatin*): "and this is the ordinance [*a'in*] of the keepers of the crown [i. e. Firuz's predecessors] on this: that precisely in the space of their relaxation [*maqam-i aramgah*] they justified the drawing of *musauwar* scenes, so that the sultans at the time of retirement would lay eyes on those *taswir* [pictures, from the same root as *surat*]. Sultan Firuz Shah in order to remove the terror of the Lord God gave an order [*farman*] that no *taswir* should be made in these spaces of public works [*karkhanaha*], because this is against sharia." Thus, while Firuz Shah's predecessors had made an exception for their private space as far as wall-painting was concerned, Firuz removed that exception. Interestingly, in the course of the remark the spaces concerned change from spaces for retirement and relaxation to spaces of work, or from private spaces to public spaces. Just as in Ghazali's discussion the private sphere was transformed into a public sphere by bringing a guest in, here the private sphere was transformed into a public one by bringing the fear of God in.[59]

Still, in this early period, people seem to have thought that more should be possible in a palatial setting than in a place of worship. When, in Iran, the recently converted Ghazan Khan destroyed a temple built by his father Arghun, the ladies and nobles of the court petitioned him that the images (*surat*) of himself which his father had put on the walls were now exposed to the snow and rain and that to give his father rest and a good name they might be allowed to restore the place. When Ghazan would have nothing of it, the petitioners suggested that they give the place the exterior form (*hai'at*) of a palace. Ghazan still would have none of

57 Cook, *Commanding Right*, 444 (including note 108).
58 Hamadani gives a simplified version of Ghazali's argument. Hamadani, *Zakhirat*, 401—2.
59 Afif, *Tarikh*, 373—4.

it, saying that "Even if my intention were to build a palace and images were made in it, because it has been a temple and a site of idol-worshippers it is not possible. If a palace must be constructed, let them build it elsewhere." Ghazan thus conceded the petitioners' point that images might be part of a palace but found that once a temple meant always a temple. According to Rashid al-Din there were many legal disputes (*qazaya*) over similar issues, but unfortunately for us he thought that expounding all of them would take too long.[60]

In the Safavid and Mughal era, garden pavilions seem to have occupied some sort of special position with regard to painting on walls. As numerous examples testify,[61] painting in the secluded and private space of these pavilions seems to have been less problematic than the use of images in more public parts of palaces. It is perhaps no coincidence that an anonymous Mughal miniature which reflects on the art of painting, in particular the art of mural-making, does so in a garden setting (fig. 15). In the painting, which has been dated on stylistic grounds to around 1610, we see a pavilion in which a painter is at work painting a human figure on a wall, with brush in hand and bowls of paint at his feet.[62] Below him, at a little fountain, is his assistant washing similar bowls, gazing intently at a man in a yellow robe walking in the garden. The man can be identified by the (loose) style of his robe and the (round) style of his turban as a religious scholar. The younger man walking by his side, also carrying a book, seems to be his pupil and expresses surprise or attention by putting his finger to his lip. The older scholar is looking at and gesturing towards the painter and his creation. It seems that he is discussing the relation of painting to the knowledge and ethics laid down in books such as the one he is holding up. In that way he condones the activity of the painter.[63] The painting draws attention to the acceptability of the art and at the same time indicates the spatial limits of acceptability. The work the scholar and his student discuss in the painting is in a private garden, and the painting of that scene itself was most likely kept between the covers of an album.

There was a certain development at the Mughal court, however. Already before his accession to the Mughal throne in 1628, Shah Jahan (then Prince Khurram) was known as a stricter adherent of sharia than his father Jahangir. The latter was flexible to the point that European observers believed he was hardly a Muslim at all.[64] Shah Jahan's attitude to sharia in general and images in particular seems to have fallen somewhere between the very lenient to experimental attitude of his

60 Rashid al-Din, *Jami' al-Tawarikh*, 2: 1202.
61 See Morgenstern, "Mural Painting."
62 Stronge, *Painting for the Mughal Emperor*, 106.
63 Compare Minissale, *Images of Thought*, 209—10.
64 Beach, Koch and Thackston, *King of the World*, 59.

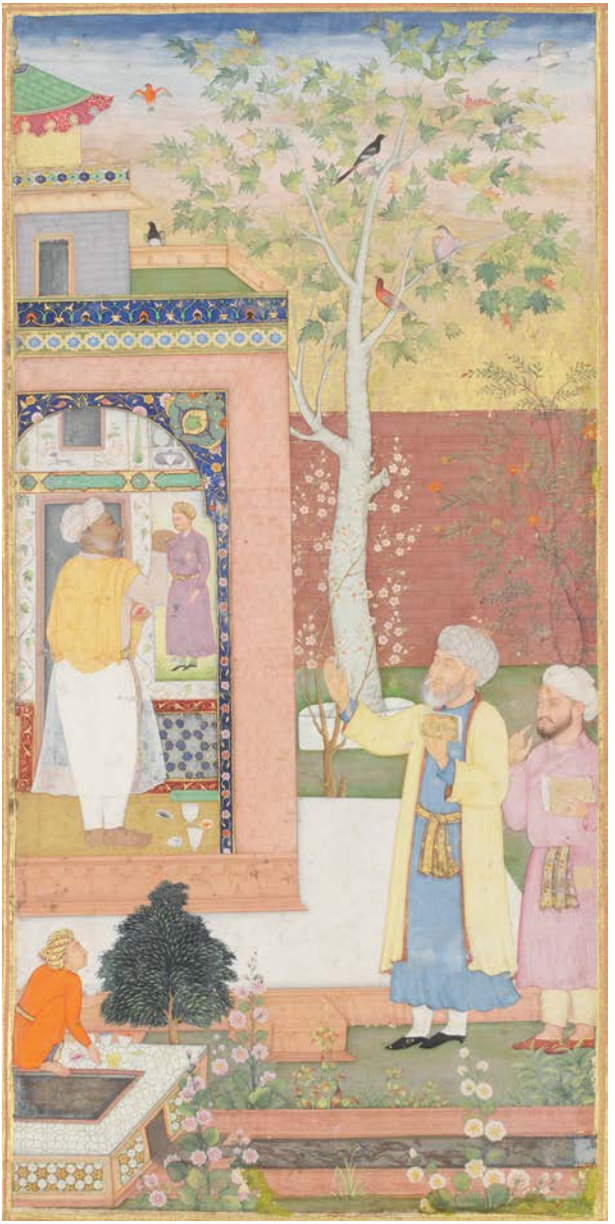

Fig. 15: *An Artist Decorates a Pavilion in a Garden*, Mughal, c. 1610. A painter paints a human figure on the wall of a garden pavilion while a religious scholar and his student (far right) discuss his work. The painter's assistant is busy with bowls of paint below. © Victoria and Albert Museum, London, IS.48:56/A-1956.

father and grandfather and the strictness of his succeeding son. He did continue the lavish patronage of miniature painting that his father and grandfather had engaged in. He even had allegorical images of animals and persons displayed around his throne. But he imposed restrictions on Hindu temples and Catholic churches early in his reign (see below) and we can detect a slight and perhaps increasing hesitancy in his dealing with images even in the private sphere. We already saw how careful most of his court painters were with naturalism. Another indication is that the authorised chronicle of the first ten years of his reign by Muhammad Amin Qazwini devoted a few sentences to his daily meetings with painters and other artists, but the revised authorised chronicle of the same as well as the subsequent period written by Abd al-Hamid Lahori did not mention the presence of any painters at these meetings, even though the new version was in parts more elaborate.[65]

A painting from Shah Jahan's princely days, around 1620, in which the artist Nanha depicted him with his son toying with gems, is a case in point (fig. 16). I would like to draw attention to the bolster pillow against which the prince is leaning: it has a human figures on it. This kind of figurative textile was produced in Iran for about a century, between circa 1550 and 1650, and a number of examples survive, including some in the form of robes.[66] But here the fabric is used for a cushion, and that brings to mind a number of Traditions found in some of the most respected Sunni collections that discuss precisely the topic of images on household textiles. There were many different versions of and contradictions between the Traditions concerning images on textiles,[67] but one distinction the jurists drew from them was that between images on cushions and images on curtains. Here is how Marghinani's authoritative *The Guidance* summed the matter up in its discussion of prayer situations: "If the form is on a pillow lying on the floor or on a floor mat, it is not considered discouraged as these are trampled and walked on, as distinguished from a pillow in an upright position, or if the form is on the *sutra* [barrier object in front of the praying person] as that would amount to its veneration."[68] The distinction between vertical and lying items with images was sufficiently received by the fourteenth century to be entered into Hamadani's mirror for princes, which we know continued to circulate at the Mughal court. He simply noted that in spaces where one received guests images of animate beings (*surat-i haiwanat* or *saur-i haiwani*) on curtains were for-

65 Koch, *Mughal Art*, 131—2.

66 See Lassikova, "Hushang the Dragon-slayer" and below.

67 Elias, *Aisha's Cushion*, 9 and 193 n.12.

68 Marghinani, *Hidaya,* (trans. Nyazee) 157. Translation modified.

Fig. 16: *Prince Khurram and Dara Shukoh Toying with Gems* by Nanha, c. 1620. The future Emperor Shah Jahan studies gems with his son while leaning against a bolster pillow decorated with human figures. Metropolitan Museum, no. 55.121.10.36.

bidden but there was no harm in images on cushions, flooring, or carpets.[69] Therefore it does seem to me and some art historians[70] that there is something going on this painting with regard to the use of images and that the prince and his painter

69 E. g. Hamadani, *Zakhirat*, 401.

70 Personal communication from Sylvia Houghteling, 14.04.2011.

are in some way exploring the boundaries of the permissible. The painting is reflexive, as it reflects on image-making, and either the painter or the prince is making a statement about the orthodoxy of the prince with this cushion. The painting should be seen in the context of debates at the Mughal court about painting, more on which in the section on stridency.

Around the same time, Dutch East India Company employee Wollebrant Geleynssen de Jongh took note of the concern for placement and found it comparable to the concerns that Protestants had. Based on his experience of staying in the Gujarat province of the Mughal empire, he wrote that the Muslims there disliked the Protestant religion less than the Catholic, because the Catholics had statues in their churches. "The Muslims," he noted, "do not like to honour or serve statues/images [*beelden*], [and] have no statues at all in their temples, houses or places they honour, whether made of wood, stone or other materials." Geleynssen thus emphasised that Muslims made a distinction between positionings that demanded respect and positionings that did not. The comparison with the approach of Protestants in his home country is implied in this part of the statement, but in an ironic aside he made it explicit: Muslims did like silver or gold statues because they could convert them into cash, jewels, or bracelets, and they shared this perspective with Protestants.[71]

Geleynssen's self-reflexive appraisal of Muslim concerns about images is reflected back in a remark by Khafi Khan. He was active as a Mughal administrator around the end of our period and chronicled both his own and the preceding era. While speaking about Shah Jahan's victory over the Portuguese at Hooghly in 1632, he described their house of worship (*ma'bad khana*) there, and compared it to both the idol-houses of the Hindus (*but-khana-yi Hunud*) and the churches (*kalisa*) of the English. To Hindu temples it compared favourably because externally it appeared perfectly clean with its burning candles. To English churches it compared negatively because the Portuguese had "in their irregular belief [*i'tiqad-i fasid*]" made gaudy images of wood, wax, and paint of Jesus, Mary, and others, "while in the churches of the English, who are also Christians, there are no images by way of idols [*surat ba-tariq-i asnam*]." The crucial difference was not that the English did not have images, but that they did not use images as idols in their places of worship. The note by Khafi Khan on the different kinds of churches was based partly on the narrative of Shah Jahan's victory over the Portuguese as it had been recorded by contemporary chroniclers and partly on his own experience. He claimed to have often gone into Hooghly, where many European nations had

71 Geleynssen, *Remonstrantie*, 59—60.

set up trading posts, and to have conversed with "their alims."[72] Chroniclers of Shah Jahan's reign also recorded that the statues of the Portuguese Hooghly church were brought to the capital Agra where Shah Jahan had many of them thrown into the river.[73]

A further contemporary source took up the distinction between public and private spaces with regard to Portuguese Christian worship. Three years after the capture of Hooghly, Shah Jahan issued an order to the Portuguese padres at Agra to tear down the church (*kilisiya*) they had been allowed to build there by Akbar. They were allowed to reuse its materials for the construction of a mansion (*hawili*) and were allowed to continue their services to the Christian community regarding life rituals and worship in the house (*khana*) of the padres. Thus Catholic worship was diverted from the public to the private space in the imperial capital.[74]

Exceptions were not only made with regard to space but also with regard to time. For the first Mughal emperor Babur, for instance, the destruction of idols was a pious wish for the future. This comes out in the 1527 order (*farman*), written up for him in elegant language by his clerk Shaikh Zain, in which he announced his renunciation of wine as well as the rescinding of a tax on Muslims. The text presented the *jihad* against infidels and the inner, greater, war against sensuality as a stepped process, which explained why Babur was renouncing wine only then – at the age of 44. It also noted that the renunciation of wine had "remained under a veil in the chamber of deeds pledged to appear in due season." After the order, Babur wrote in his memoirs, his servants smashed the wine-flasks and cups along with other gold and silverware: "they dashed them to pieces, as, God willing! Soon will be dashed the gods of the idolaters – and they distributed the fragments among the poor and needy."[75] Babur as well as his successors needed the support of Hindus to sustain the empire. A moratorium on the enforcement of the inconvenient proscription of idolatry was necessary.[76]

Another temporal distinction was that between newly begun and old temples, creating as it were an exception for the old temples and their rituals. Among the "victories" that Sultan Firuz Shah Tughluq listed in the third quarter of the fourteenth century was his order to destroy the "new idol-houses [*but-khanaha-yi jadid*]" in Delhi. He noted that "in the sharia of Muhammad…the producing of

72 Khafi Khan, *Muntakhab*, 1: 469—70.
73 Beach, Koch and Thackston, *King of the World*, 180.
74 *Farman* 13 Rajab 1045 / 23.12.1635 in Felix, "Farmans, Parwanas and Sanads," 25—6.
75 Babur, *Babur-Nama*, 553—6.
76 Carl Ernst also points to the inconsistencies in Babur's efforts in this respect. Ernst, "Admiring," 115—6.

idol-houses is not proper [*rawa*]."[77] Around the same time, Hamadani, who acted as an advisor to the sultan of Kashmir at some point in his travelling life, laid down a list of twenty conditions that such rulers were to impose on *zimmi*s, or protected non-Muslims. The first two of those conditions were that, "they are to build no new *dair* (monastery/temple) or *buq'a* (convent) or *but-khana* (idol house)," and that, "they are not to renew any old buildings of that kind that have fallen into ruin [or: have been ruined]."[78]

The mirror for princes in which Hamadani laid down this advice was quite influential for centuries — a *qazi al-quzzat* or chief judge serving under Emperor Aurangzeb centuries later had a copy in his library —[79] and the distinction between old and new temples continued to be made. Some hundred years after Firuz Shah and Hamadani were active, there is supposed to have been an exchange between the heir to the Delhi sultanate and some alims regarding the status of well-established temples and rituals. The prince had heard about the tank at Thanesar, in fact an important pilgrimage site, and that Hindus (*hinduan*) gathered and performed ritual ablutions (*ghushl*) there, and inquired what the shariatic injunction on this matter was. The alims responded that "it is not permissible [*ja'iz nist*] to lay waste old idol-houses [*but-khanaha-yi qadim*], and [as to] the performance of ablutions in a well that has been customary from old, the forbidding [*nahy*] of it is not up to you."[80] Now it should be mentioned that the audience for the chronicle that reported this story a century after it was supposed to have taken place was the Mughal emperor Akbar, who was very tolerant towards most Hindu practices, and that the author found that the zeal in Islam (*ta'assub-i Islam*) of the prince in question crossed the line. Yet the distinction was again reified in 1632 when Akbar's grandson Shah Jahan ordered the razing of all *but-khana*s or idol-houses that had been begun to be built recently, specifically during the reign of his father. The original order was in particular concerned with the pilgrim city of Benares (Varanasi), but extended to the whole empire. In his authorised chronicle, Lahori claimed that this order was indeed enforced in the province around Benares.[81] In 1659 Emperor Aurangzeb continued the exception for old temples in Benares, again phrasing it as valid for the whole empire. His order made it clear that old temples and their priests should be protected (so that they might pray for the empire), but that new temples should not be constructed. The order claimed that this was in accordance with sharia and "the

77 Firuz Shah Tughluq, *Futuhat*, 9.
78 Hamadani, *Zakhirat*, 285.
79 Farooq, "Mir Sayyid Ali Hamadani's *Dhakiratul Muluk*," 24.
80 Nizam al-Din Ahmad, *Tabaqat-i Akbari*, 1: 335—6.
81 Lahori, *Badshah Nama*, 1: 451—2; Sharma, *Religious Policy*, 111.

exalted faith," i. e. Islam. Also remarkable is that the text designates old temples as *dair*, which is a rather neutral term for a monastery, convent or temple, while the new ones are designated *but-kada*, which is a much more explicit term meaning "idol-temple." As we will see in the next section, a sort of upgrade from idol-house to church or monastery was necessary to make toleration possible within a sharia framework, in a stepped process.[82]

There were, however, some Muslims who appreciated idols as artworks. In an oft-repeated narrative that we can trace back to Hegel and Weber,[83] the appreciation of sculpture and painting as "art" rather than as objects of veneration or simply decoration is seen as a development that followed in the footsteps of the Reformation in Europe and arrived in the Muslim world much later. Yet at the time this process was taking place in Europe (see below), we also find the appreciation Rafi al-Din Shirazi accorded to sculpture that others regarded as idolatrous. Written in 1612 at the court of Bijapur under the broad-minded Ibrahim Adil Shah II, his chronicle included an elaborate description of the disused cave temples at Ellora. Shirazi regarded the caves as a thousands of years old monument to royal power rather than a temple complex, although he noted that the patron of the caves had also built many *but-khana*s or idol-houses. How exactly the Ellora temples came to be construed as secular monuments is an open question. Did local guides package the story as such in order to attract Muslim customers? It appears in any case that there were many casual Muslim visitors, although some of the sculptures would have been easily recognisable as deities from their attributes and poses. Even Shirazi's text itself is ambiguous on this point. At the very end of the section it suggests a contrast between idol temples with "adored idols of unbelief," and the buildings at Ellora "on which the welfare of the time and the kingdom depended." Yet at the same time it assimilates the two again as "this kind of idol temple and art." In any case, what Shirazi appreciated was that it was all made with "such subtlety and workmanship that a hair of a single brush could not have rendered it," and he regretted that the level of skill of ancient times had been lost. Even more remarkable is that Shirazi also admired the workmanship of actual "idol temples" and criticised his former master, the preceding sultan, for destroying as many as he did, wishing that God might forgive him for it "with the light of his compassion." Clearly, Shirazi was arguing here for taking the idol out of its context of unbelief and putting it into a new context of "art" and "workmanship."[84]

82 Compare Eaton, "Temple Desecration," 263, 279 n. 50 and 51.

83 Vanhaelen, *Wake*, 11—5.

84 Compare Ernst, "Admiring." Translations as there.

Compensation in the Persian World

In his memoirs cum history of Central Asia, Haydar Dughlat, a powerbroker of noble birth from Central Asia whose life spanned the first half of the sixteenth century, provided a few biographies of painters active around Herat, where there had been a great efflorescence of the arts in the previous century, and placed himself in their line by describing one of them as his master. He must have been a remarkable figure in his own right in being able to combine his military and administrative work with active engagement in many arts from bow-making to poetry to penmanship and painting, as his cousin, the Mughal Babur, remarked. Noteworthy is what Haydar Dughlat wrote about a painter who was active in Iran three centuries earlier, Khwaja Abd al-Hayy: "It is the belief of these artists [of Haydar's day] that he was a saint, and in the end he repented, and wherever he could lay his hands upon any of his own works he washed them off or burnt them."[85] Haydar Dughlat made no further statement on how he regarded this repentance, being a painter himself, but it is striking that other artists of Abd al-Hayy's day regarded him as a saint. Babur suggested in his memoires that Haydar himself also at some point became somewhat more sharia-minded. Around 1527 Babur noted, "people say that he now lives repentant [*ta'ib*] and has found the right way [*tariqa*]."[86] That would have been well before Haydar wrote the memoirs in which we find the mostly laudatory biographies of painters, so his repentance would not have gone as far as that of Khwaja Abd al-Hayy. Nevertheless, he did note the saintly status to which his repentant precursor in the field of painting had been elevated.

Apart from the question how Haydar Dughlat appreciated Abd al-Hayy's repentance, there is the question of whether we should consider that as compensation or simply compliance. After all, Abd al-Hayy ceased painting completely, it was not that he was painting, repenting, painting, repenting and so on, in the way that the drinker and sodomite Ahmad Kafi Kashani mocked in the previous chapter. There is little or no indication that the latter kind of penance was common among painters. We do hear of one prominent Iranian Shi'i painter at the court of Akbar being engaged in supererogatory fasts and prayers, but there is no mention that these acts were meant to compensate for sinful behaviour (and if so, what sinful behaviour).[87]

Was there also such a thing as monetary compensation for idolatry in the Persian world? Or more concretely: were Hindus in India ever required to pay in

85 [Haydar Dughlat], "Mīrzā Muḥammad Ḥaydar." Translation as there with brackets added.
86 Babur, *Babur-Nama*, 22. Translation modified.
87 Heger, "The Status," 146; Badauni, *Muntakhab*, 3: 139.

order to perpetuate what some Muslims saw as idolatry? First of all, there were the special taxes that non-Muslims (with exceptions) were required to pay in India under some of its Muslim rulers over our period. The payment of these taxes called *jizya* — and in the early period sometimes also *kharaj* — was tied to the status of protected person or *zimmi*. Right at the beginning of our period, the Hanafi jurist Fakhr-i Mudabbir, who served the first few Delhi sultans, stated that those of the people of Persia (i. e. non-Arabs) who were liable for the *jizya* were Christians, Jews, Sabeans, Zoroastrians, and idol-worshippers (*but-parast*).[88] In Hanafi jurisprudence, the levying of *jizya* was thus formally disconnected from the issue of idolatry, but a certain tension remained. The tension around the categorisation of Buddhist and Hindu temples can be seen in an exchange that took place at the court of Sultan Muhammad bin Tughluq according to the Arab traveller Ibn Battuta, who spent time there working as a qazi in the second quarter of the fourteenth century. As per the account, the emperor of China had sent an embassy to Delhi with rich gifts and the request to be allowed to rebuild a house of idols (*bait al-asnam*) at a particular mountain to which Chinese people used to make pilgrimage, but which had been destroyed by the army of Islam in India (*jaish al-Islam bi'l-Hind*). The sultan wrote back that "it is not permissible [*la yajuz*] in the law of Islam [*millat al-Islam*] to grant this request, nor is it neutral [*yabah*] to build a church [*kanisa*] in the land of the Muslims, except for those who pay the *jizya*. If you agree to pay it, we authorise you to build it. Peace be upon those who follow the true guidance."[89] So in order for this shariatic formulation to work, the prospective building that Ibn Battuta saw as an idol-house had to be reconceived as a church. And there was authoritative precedent for the equation of church and idol-temple: according to the ninth-century Arab historian Ahmad Balazuri the two had already been equated by the first Arab conqueror of Sind as a ground for his levying *kharaj* there from the idol-worshippers.[90] In the first part of our period at least, the upgrade from forbidden idol-house to neutral church was thus linked to the payment of special taxes in sharia-conscious discourse. It all hinged, however, on visibility. Sultan Firuz Shah for instance found that paying the *jizya* did entitle Hindus (*hunud*) to the status of *zimmi*, but that they should not practice idol-worship (*but-parasti*) with "such audacity" as some of them did. He insisted on calling all new temples idol-houses – in contrast to his predecessor Muhammad bin Tughluq who had been willing to label even a new temple as

88 Auer, "Regulating Diversity."
89 Battuta, *Rihla* (Defrémery and Sanguinetti text), 4: 1—2.
90 Friedmann, "The Temple of Multan," 181.

church.[91] The various ways of justifying the continuance of Hindu practice to a sharia-minded audience interlinked, but there was no consistency in their invocation.

Moreover, there were other taxes on non-Muslims that were quite directly linked to idolatry, charged from pilgrims and visitors to important temples and holy sites. The historian Sri Ram Sharma speculates that these charges were a compromise that might have originated in the earliest phase of Muslim rule in India and enabled the toleration of public expressions of Hindu devotion such as the many fairs and periodic gatherings at temples and holy places. In any case it seems that such a pilgrimage tax was levied under most of the Delhi sultans and the early Mughals, until it was abolished by Akbar in 1563. A tax on pilgrims to two sites on the Ganges appears to have been instituted once more by Shah Jahan, but the emperor abolished it after an appeal by Kavindracharya Saraswati, a Brahmin scholar in the Sanskrit tradition. We do not know what arguments Kavindracharya brought forward.[92] Shah Jahan's son Aurangzeb from early in his reign levied tolls from visitors to temples and people going to bathe in the Ganges and other holy waters such as the tank at Thanesar, which was, as we saw, directly associated with idol worship by the alims but excepted from closure because of its antiquity. It seems that in some cases the levies were paid as a lumpsum by the priests of the receiving site, but in others it was levied from visiting individuals.[93] At some point later in his reign, Aurangzeb appears to have decided to abolish taxes on certain pilgrimage sites again, as these taxes were then found to be without ground in sharia. To be sure, this was not because of some new reasoning with regard to idolatrous sites, but simply because no authoritative precedent could be found for such taxes, and some other taxes that had nothing to do with idolatry were abolished at the same time for the same reason.[94]

Around the same time in Iran, an attempt to save an idol through monetary compensation failed. It concerned the Hindu community of mainly merchants and lenders in the Safavid capital Isfahan. A student of the influential theologian-jurist and Shi'i hardliner Muhammad Baqir Majlisi wrote that at some

91 Firuz Shah Tughluq, *Futuhat*, 6, 9—10. While speaking of the right of the Hindus to pay *jizya*, Firuz used the term *hunud*, but in condemning their practices in specific places he also used *mushrikan*.

92 Truschke, "Contested History," 421—2, 425.

93 Sharma, *Religious Policy*, 2—3, 10, 13, 15, 51, 110—1, 181; Aurangzeb, Dutch translation of a decree issued by Ja'far Khan on behalf of Aurangzeb concerning toll, tax and revenue rates in Gujarat and Hindustan, 1 Shawwal 1075 / 15 April 1665 in Giessen University Library Hs 609, n.f.; Bernier, *Travels*, 302—3; Manucci, *Storia do Mogor*, 2: 82.

94 Azizuddin Husain, *Structure*, 80—2.

point news reached his teacher that unbelievers from India were in concealment worshipping an idol (*buti*) there. Majlisi gave license (*dastur*), either to officials or vigilantes, to destroy the idol. The Indian idolaters consequently offered a large sum of money to the shah for permission to take the idol to India intact. Shah Sulayman refused, however. This was in 1687, or 1098 of the Hijri era, the same year that Sulayman gave Majlisi the position of Shaikh al-Islam to oversee and further the administration of sharia. The year came to be known to contemporaries as "the year of breaking idols," probably not only on account of this one event but also because Majlisi stepped up the enforcement of many kinds of proscriptions. Significantly, Majlisi did not respect the boundary between private and public spaces in his sharia enforcement campaigns. The one idol in Isfahan was being worshipped in concealment (*panhani*), that is, in a private space. And during Majlisi's great anti-alcohol campaign a few years later, state officials would apparently even enter the homes of Christians (in Armenia) to smash jars containing wine. In that case a petition and a large sum of money were sufficient for the shah to exempt the Christians of Armenia from the decree.[95]

Stridency in the Persian World

Stridency we find from the early sixteenth century through the mid-seventeenth, and a little beyond that. When strident pronouncements were first made in Iran, the golden age of Mughal painting was yet to commence.

To start we have some poetic statements on particular paintings which, to paraphrase Shahab Ahmed, celebrated painting with reference to the very same proof texts that some jurists took as the criteria for their proscription. In his foreword to an album of miniature paintings brought together by the famous painter Bihzad in Iran around the turn of the sixteenth century, his contemporary, the historian Khwandamir wrote:

> By his mastery the hair of his brush
> Has given life-soul to inanimate form [*surat*].

As Ahmed points out, such a statement could not be made or understood without awareness on the part of the author and his audience of the Traditions directed against attempts to imitate God's creative power by making images. The verse seems to turn on its head a Tradition found in various versions in two of the

95 Dawani, "Muqaddama," 60—1; Matthee, *Pursuit*, 56, 92—3.

Sunni canonical collections of Traditions. The gist was that whoever made an image would on the day of resurrection be commanded to breathe soul into his creation, fail, and be severely punished in the afterlife.[96]

In his preface to an album of paintings and calligraphy put together for a Safavid prince in 1544, the painter Dust Muhammad tied his defence of painting up with the identity of his Shi'i community and the tradition in which it stood. Apart from his juxtaposing calligraphy and painting, and the argument that God himself is a drawer of beautiful forms in the world like that of the biblical and quranic Joseph, he also contrasted good and evil painters in a short history of painting. On the evil side was in particular Mani, who duped his followers with his great painting skills. On the good side were Adam, who requested images (*surat*) of the prophets among his offspring from God, the quranic figure Zu'l-Qarnain (often identified with Alexander the Great), who carried those images to the prophet Daniel, who copied them, and the Byzantine emperor, who kept the copied images in a chest and showed them to some of the Companions of the prophet Muhammad shortly after the death of the latter. This story about the approving use of images by people from the Jewish, Greek, Christian, and finally Islamic traditions was explicitly brought by Dust Muhammad to allay the feelings of shame or confusion (*khijalat*) that plagued the masters of image-making (*arbab-i taswir*) in the face of the external appearance (*zahir*) of sharia. He concluded: "thus, moreover, image-making would not be without noble lineage and the mind [*khatir*] of the image-maker [*musauwir*] should not be scratched by the thorn of despair."[97]

In effect, Dust Muhammad's preface relegates those who follow the law by its external appearance to the category of people that the author does not himself, or expect his audience to, identify with. Nomi Heger argues that there was a long-term trend towards flexibility and that by the time of Dust Muhammad "no sense of taboo had remained." Heger does not see the preface as "serious attempt to assuage feelings of guilt among painters and patrons" or a coming to terms with painting as an "explicit act of transgression," but instead regards its defensive elements as tropes. But, as Heger also argues, we should distinguish between the consciences of the makers of images on the one hand and those of their enjoyers on the other, as Karaki did at the Safavid court only half a century earlier.[98] Dust Muhammad invited his audience of art patrons to solidarity with him, the painter. This solidarity could be celebrated in the *majlis* circle that kept dissenters out. We

96 Ahmed, *What Is Islam*, 56—7. The relevant Traditions can be found in the collections of Tirmizi (one narration, number 1751 on www.sunnah.com) and Nasa'i (five narrations plus one with the corollary, numbers 5358—63 on www.sunnah.com).

97 Dust Muhammad, "Preface," 4—5, 11—2. See also Roxburgh, *Prefacing the Image*, 170—4.

98 Heger, "The Status," 40, 68—71, 266, 268. On trends, see Ch. 4.

might see the defence as in line with some of the defences of the enjoyment of beautiful boys encountered in the previous chapter: something for the elect. In fact, the preface implicitly ties itself in with the genre of boy-poetry in its description of the beautiful forms that God draws in the world. These are boys with down on their cheeks, as beautiful as the canonically gorgeous Joseph. The stridency that Heger does detect in the claim that painters imitate God (which was the central issue in some of the relevant damning Traditions), ties in precisely with the antinomian strands in boy-poetry. As was the case with the strident Persian authors discussed in the previous chapter, Dust Muhammad draws on less strident strategies, namely circumvention (the calligraphy argument) and precedent (the travails of the chest with images of the prophets). Just as the beautiful boys were called *shahid*s or witnesses, the chest with images was called the *sanduq al-shahada* or chest of witnessing.[99]

In the Mughal empire the tone was set in the second half of the sixteenth century by the emperor Akbar (who was accused by his detractors of being into rationalism or *'aqliyat*). According to his spokesperson Abu'l-Fazl the emperor opposed himself explicitly to the *taqlidpishagan-i taswir-dushman,* which we can translate as "the painting-hating amateurs of slavishly following [sharia]." The emperor opened their eyes to the transcendent truth (*haqiqat*) by pointing out that painters arrived quicker at knowledge of God than others, precisely because they would grasp the miracle of giving life through their own inability to ensoul their works. Again, this seems to turn on its head the Tradition about the failure of image-makers to give life to their creations on the day of resurrection. It is not unlikely that Akbar had heard a version of this Tradition in the course of the debates he apparently had with "the number who display their disapprobation for this art."[100]

In a painting dated 1617 – this one uncommonly large and on canvas – Akbar's successor Jahangir is holding a globe which is illuminated by his own halo. It has a number of verses inscribed around the edge, composed, they state, extempore by the emperor himself. They contain an endless play on *surat* and *ma'ni*, while praising the emperor's abilities and the quality of the painting. The corollary is:

> Whoever sees his *surat* becomes a *surat*-worshipper
> Be it a dervish, teaching the *ma'ni,* or be it a king.

At first glance this verse seems to justify worshipping the image of the emperor, and the verse itself seems in need of a justification. That would likely be found

99 Dust Muhammad, "Preface," 4—5, 11—2.

100 Abu'l-Fazl, *A'in-i Akbari*, 1: 117 (Book First: *a'in* 34).

at a meta-meta-level, where the verse would be only one of the numerous stages on the path to realising the ultimate *ma'ni*. Centuries of discourse about *surat* and *ma'ni* ensured a certain ambiguity for this strident/playful statement.[101]

Akbar's great-grandson Dara Shukoh over the course of his writings became increasingly strident in his embracing of the idol as a tool on the way to awareness of the One. Setting out as a self-declared Hanafi he became an antinomian, rejecting pride in his sharia. As we saw in Chapter 1, antinomian poets loved to throw about references to forbidden things like wine, idols and *shahid* boys precisely to show how irrelevant such externalities were, and this often tied in with the idea that such things were portals to the divine essence. The trope of the idol was already used extensively by the most influential *rind* Hafiz in fourteenth-century Fars, but it must have felt more immediate to the poets who employed it in South Asia. Moreover, with Dara it became a proxy for his admiration for certain strands in Hindu metaphysics and it assumed political significance because he was the heir apparent. In verse:

> Were Muslims to know the significance of the idol
> They would have realised that real faith is in idol worship.

In a letter to one of his Sufi correspondents he went so far as to call himself an idol-worshipper (*but-parast*) and temple-sitter (*dair-nishin*). The extent to which Dara's heterodox views contributed to his execution on the orders of his brother Aurangzeb in 1659 will remain a subject for debate among historians forever.[102]

The tradition of superior vision in the Neoplatonic vein was also continued by Akbar's great-great granddaughter Zeb al-Nisa, in contradistinction to her father Aurangzeb's legalistic view on old and new temples. In her diwan of poetry she spoke of temples and "heart-stealing" idols as sites for seeking divine love, and like Dara described herself as a *but-parast*. She also cast herself as one seeking the stain of transgression (*malamat*) in the tradition of the legendary Majnun (and some of the *rind*s we encountered in Chapter 1). In what is perhaps an allusion to sculpted images of the god Krishna as a child, she had "stone children" bring this *malamat* to the palm of her hand.[103] For reasons that are not entirely clear, Zeb al-Nisa was confined to a fortress outside Delhi by her father for the last twenty years of her life.

It so happens that the arc we can detect in the centrality of such statements at the Mughal court (from the emperors themselves in the era of Akbar and Jahangir,

101 Franke, "Emperors," 123—7. Translation modified.
102 Hayat, "The Conversation," 10—11, 29, 33—44, 48.
103 Zeb al-Nisa, *Diwan*, 7, 22, 24, 35, 39, 53.

to the most senior prince under Shah Jahan, to a locked-up princess under Aurangzeb), coincides with the arc we can detect in the wearing of figurative textiles at that court. This prompts the question: was wearing such a textile a strident statement?

We know that the wearing of figurative textiles constituted an issue for Hanafi jurists, as they started discussing it well before our period. The issue features, once again, among the discussions of situations that might invalidate prayer. Co-founder of the school Shaybani did not think the wearing such a garment invalidated prayer, but he discouraged its association with the shariatic duty of prayer. By the start of our period Marghinani followed this view on praying in a garment with images, explaining that that was "similar to the case of a person carrying an idol." We may also recall that Firuz Shah's ban on the display of images at the court (whether in prayer situations or not) had explicitly included such garments. That was all hundreds of years prior to the zenith of the Mughals but we should also consider the canonical status that Marghinani's *The Guidance* continued to have in the Mughal realm until the compilation of the *Alamgirian Rulings* (which still leaned heavily on it).[104]

In the mid-sixteenth century, however, robes started to be made out of figurative materials in Iran, and this fashion, along with the silk textiles themselves, started to make its way to Mughal India. We have evidence in the form of preserved garments and miniature paintings that indicate that some people wore them at the Mughal court for a while. Jahangir was depicted wearing a green vest embroidered or painted with gold European-style winged putto-heads at a fictive meeting with his Safavid counterpart.[105] One still preserved robe with images is probably also connected to Jahangir (in his princely days). It is likely that he sent it to the father of one of his wives, a Hindu raja and imperial officer. The Iranian fabric used for this robe has alternate rows of attractive young male and female faces, interspersed with lines of poetry that form a strident couplet. It reads:

> It is as if this image [*surat*] has come to life from head to foot [as a robe of honour]
> It has become the gatekeeper of [legendary great king] Khusrau of Iran.

The textile was thus strident about images being brought to life in the same way the couplet of Khwandamir and the pronouncements of Akbar cited above were. This stridency on the part of the makers or commissioners of the textile cannot

104 Touati, "Le régime," 27—8; Nyazee's introduction and the text in Marghinani, *Hidaya,* (trans. Nyazee) xxiii, 157. Translation as there.

105 Koch, *Mughal Art*, 27—8. The painting by Abu'l-Hasan, *Emperor Jahangir and Shah Abbas*, c. 1618, Freer Gallery of Art inv. no. F1945.9 can be found on the museum website.

have escaped Jahangir who wrote many a line in a similar vein, even if in giving the robe to his father-in-law he may have sent a subtle message about the latter's absence from military campaigns.[106]

Even still in the very early days of Shah Jahan's reign we can detect the presence of robes with images at the court. A painting by Bichitr of some of the ceremonies surrounding Shah Jahan's accession in 1628 shows a prominent Muslim courtier wearing a robe with human figures. The material is quite similar in colour and composition to the textile on the bolster pillow behind the future emperor in figure 16. However, after around 1630 such textiles appear to have no longer been worn at the Mughal court and around the mid-century they also disappeared from the Safavid courts. In a recent thorough investigation of Mughal figurative textiles Sylvia Houghteling argues that their presence or absence at the courts of the post-nomadic empires was determined by political considerations and fashion.[107] This argument implies that decisions about wearing or not wearing them were made without or independent from any consciousness of the jurists' sharia. But the verse on the robe given by Jahangir does betray such a consciousness. What is more, the disappearance of figurative textiles from the Mughal court coincided with the moves by Shah Jahan against other expressions of what some considered idolatry: Catholic statues and newly built Hindu temples.

A Short History of Definition and Enforcement in the Latin World

The ground of contestation in the Latin world were numerous passages in the Old as well as the New Testament about idols and images. The principal among these was the formula found in Exodus 20:4 and Deuteronomy 5:8 that Augustine and, subsequently, Catholics and Lutherans regarded as part of the first commandment and Jews, Calvinists, and the Church of England as a commandment on its own, namely the second.[108] This is highly significant, because subsuming or not subsuming the proscription of making *sculptile* and *similitudinem* (as per the *Vulgate*), or "any graven image" and "any likeness" (as per the Protestant *King James Bible*) under the proscription of having other gods besides God, in itself gave a certain direction to the possibilities for interpretation of that proscription. Yet the pro-

106 Compare and contrast Houghteling, *Art of Cloth*, 71, 85—6, 96, 101—2, 230 n.78. Translation modified.

107 Houghteling, *Art of Cloth*, 82—3, 94—6; Lassikova, "Hushang the Dragon-slayer," 29.

108 See Aston, *England's Iconoclasts*, 240—1, 424—31.

scription was incontestably fundamental, and half a century before the beginning of our period Gratian's compilation of canons considered it part of natural law, which overruled any laws that princes might make. When "the servant of idols" Nebuchadnezzar in biblical times legalised the *adoratio* or worship of images, that had been against natural law.[109]

In his standard-setting work on liturgy, the French canonist William Durand, who moved in papal circles in the second half of the thirteenth century, carefully laid out the layers of canons that had accrued around the biblical proof passages. First, he made it clear that of all the many commandments in the Old Testament, only the "moral" ones were still completely in force. The "mystical" commandments were not abrogated but valid in modified form. It seems that he considered the commandment concerning images part of the latter category, since he presented it as something that only Muslims still followed to the letter. It is worth quoting the passage in full as it also gives a short definition of idolatry:

> Pagans truly worship images, or icons, and idols; which Saracens do not, who neither will possess nor look on images, motivated by this word: 'Thou shalt not make to thyself a graven thing, nor the likeness of any thing that is in heaven above, or in the earth beneath, nor of those things that are in the waters under the earth' (Exodus 20) and on other authorities, which they follow strictly, upbraiding us very much over this. But we do not worship them, nor call them Gods, nor put any hope of salvation in them: for that would be to idolatrise. Yet we venerate them for the memory and remembrance of things done long ago.

The tone was set for the centuries to come. The Roman Church was and would remain on the defensive. Durand presents a crucial distinction here between worship (*adoratio*) and veneration (*veneratio*). Worship was what the pagans gave to their images and idols and veneration was what Chistians were supposed to show to their images. He goes on to more biblical passages and how the, also more strict, Greek Church arrived at its position, to conclude that the *moderate* use of pictures was not reprehensible. Although, still according to Durand, the Church Council of Agde in the year 506 had adopted a canon against placing pictures in churches and depicting what was to be revered and worshipped on the walls, a century later Pope Gregory I had said that it was not allowed to destroy pictures just because they should not be worshipped and that they could still play a role in the church since they move the mind more than texts.[110]

From before the start of our period, it was evident to all jurists and thinkers that *adoratio* was the issue, but how to distinguish *adoratio* from (other forms of)

109 Gratianus, *Decretum*, Part 1: Distinctio 9 canon 1.

110 Durand, *Rationale*, 6 (prohemium § 7—9), 34—6 (book 1 c. 3 § 1—4).

veneratio? Right at the start of the period Pope Innocent III introduced into the image debate two terms that further refined the scale from *adoratio* to (lower forms of) *veneratio.* These were the terms *latria* and *dulia* which were already used by the Church Fathers and which he considered two species of *adoratio. Dulia* was due to holy and sanctified created entities, including angels, people and sacraments. *Latria* was due to God only. The terms *latria* and *dulia* assumed special importance with regard to the question of what was due to images of Christ.[111]

A second element often brought forward in distinguishing the legitimate and the illegitimate use of images was the idea that the honour paid to images was destined for what they "imaged" or "figured." Yet already in 1230 the bishop of Paris voiced concerns that the "simple folk" were not upholding such a distinction between the image and the imaged and were praying to the images themselves. And then there were some theologian-jurists, including Durand (in a different passage) and Aquinas, who actually advocated the worship of images of Christ in themselves (but not because of themselves), which will be discussed under the heading of circumvention. [112]

The existing unease over images came to a head in the late fourteenth century with the objections against, and in some cases the destruction of, sacred images by Hussite and Lollard movements in Central Europe and England respectively.[113] The *Twelve Conclusions of the Lollards* directed to the 1395 Parliament in London and aiming at the reform of the English Church, signalled four practices as *ydolatrie* or approaching it: the celebration of the mystery of the host, pilgrimage, prayer and offerings to images, and giving *latria* worship to crucifixes.[114] Starting around the same time, the so-called Observant Reforms introduced by various agents within the Catholic Church did include a renewed stress on texts instead of objects and entailed such acts as the taking away of jewels previously hung on statues of saints.[115] Nevertheless, in the case of the Lollards, the Church also saw it as its task to enforce the opposite of reticence in the use of images. In the same year that the *Twelve Conclusions* came out, Thomas Arundel, who held both secular and ecclesiastical powers, forced some Lollards to pronounce that they *would* worship images with prayer and offerings in order to worship the saints they represented.[116]

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111 Innocent III, *Opera*, 4: 436—8; Compare Endrödi, "The Chancellor's," 150 n.39.
112 Freedberg, *Power*, 393; Innocent III, *Opera*, 4: 437; Camille, *Gothic Idol*, 203—8.
113 Bynum, *Christian Materiality*, 48, 108—9, 240, 257.
114 Kamerick, *Popular Piety*, 26—7. See also below.
115 Bynum, "Are Things 'Indifferent'," 104—5. See also below.
116 Camille, *Gothic Idol*, 219—20.

Only a few years after Luther came out with his ninety-five theses in Wittenberg in 1517, the rejection of sacred images became a key topic in Reformation thought. In the same town, the theologian and doctor of both laws Andreas Bodenstein von Karlstadt published a short treatise against the way images were being used in churches and elsewhere, which in turn led Luther to preach against his approach, and a pamphlet war ensued between Luther, Karlstadt and others.[117] In his first, hastily written, treatise Karlstadt argued that Christ had come to fulfil the Law of the Old Testament, not to break it, and that he did not abolish even the tiniest letter of it, so the commandment on images was as valid as ever. Rhetorically, he asked those "enemies of the Law" who were also "image kissers" why they would not tolerate adultery, theft, or murder in churches, if the Old Law had indeed been abrogated.[118]

The positions of the most influential reformers varied. Over the span of his prolific writings, Luther was to develop a complex position on images. He chose to see the Old Testamentic proscription of images as part of the ceremonial laws abrogated by the New Testament. At the same time, he seems to have included images in the canon law category of *adiaphora* or indifferent things which, in his view, included everything that was neither commanded nor prohibited by Scripture. The word he used was *frei* or free. The use of images, whether in churches or not, was "free" and "at everyone's discretion," as long as there was no worship of the images themselves. The most important subsequent reformers, however, were closer to Karlstadt on the matter. The Swiss reformer Huldrych Zwingli considered the Old Testamentic proscription still binding because it would not be possible to forestall *adoratio* of images in churches. In his view people's natural inclination to false worship would end up turning all church images into idols (except those in stained glass windows), so they were to be removed from there. He was more flexible on images outside churches, where biblical themes and even Jesus could be represented as long as the images were regarded as historical representations only, and not given reverence of any sort. Calvin also upheld the proscription and even, as we saw, returned it to its status of separate commandment.[119] He too made a distinction between churches and private homes. But even for the latter, he deemed it unlawful to make any visible figure as a representation of God and even more unlawful to worship such an image. He argued that humans should stick to representing things visible to their eyes. A further distinction that he made

117 Eire, "Iconoclasm"; Krentz, "Auf den Spuren."

118 Carolstatt, *Abtuhung*, 25—6.

119 Hofmann, "Geburt der Moderne," 32—5; Christensen, "Art"; Aston, *England's Iconoclasts*, 257—8; Verkamp, "Adiaphoristic Freedom"; Garside, *Zwingli and the Arts*, 171—2.

was between narrative images and images simply representing corporeal forms. The former were useful for instruction in his view, but the latter could only serve as amusement. Calvin's evaluation is reminiscent of that long formalised in sharia, namely between the neutral (in this case: narrative painting), the discouraged (other painting) and the forbidden (images of God).[120]

The Protestant objections to the use of images in worship, particularly in churches, led to some major waves of iconoclasm. The first wave spread from Wittenberg through central Germany, to Switzerland and the Alsace, as well as around the Baltic Sea, and to England. The second important wave, inspired by Calvinism, came to Scotland in 1559 and spread north from southern France in subsequent years, reaching a peak in the Netherlands in 1566, and later swept through parts of Germany again, continuing through to Poland-Lithuania in the early seventeenth century. England experienced four waves between the late 1530s under Henry VIII and the 1640s under the Puritans, that time along with Ireland.[121]

Right from the start in Wittenberg, the questions of who got to decide which images were to go and who got to carry out their removal or destruction, were central concerns. Sometimes individuals acting as mobs conducted the iconoclasms, but often the city magistrates would enact ordinances against images in churches and oversee their removal, to be sold or stored somewhere in civic buildings rather than churches. Often mobs and magistrates vied for the initiative. The respective roles of the Wittenberg magistracy and individuals in removing the images from churches were thematised in the pamphlet war of the 1520s. In this debate with Luther and others, Karlstadt progressed from commending the decision of the magistracy for the removal of images from churches to calling on individual Christians to act against idols when the governing bodies did not take action.[122] And indeed in many places throughout Reformation Europe, even well after ordinances, injunctions, or laws for removal had been enacted, it was sometimes mobs that sought to enforce the commandment, for instance when, in the words of a contemporary, "a mass of foolish people" gathered to obstruct the placement of a figurative framework around a newly erected memorial in a church in the Netherlands.[123] Individual actors could always point to the commandment and other biblical precedents as a ground, and the question whether the commandment superseded human law remained unsettled beyond the end of our period. Below we

120 Compare Vanhaelen, *Wake*, 34—5.

121 Eire, "Iconoclasm"; Michalski, "Ausbreitung"; Christin, "Frankreich und die Niederlande"; Aston, *England's Iconoclasts*, 220—342.

122 Eire, "Iconoclasm"; Krentz, "Auf den Spuren"; Carolstatt, *Abtuhung*, 1.

123 Scholten, *Sumptuous Memories*, 10.

will see the example of a private individual daring iconoclasm even in a royal chapel.

England was somewhat exceptional in that injunctions and laws against idolatry were introduced at the central level instead of the local or regional, although there too mobs of private individuals played a large role on occasion. Henry VIII enjoined the clergy to "take down and delay" any "feigned images…abused with pilgrimages or offerings of anything made thereunto," to forestall "that most detestable sin of idolatry." Also, no candles were "to be set afore any image or picture," and only the lights illuminating the church as well as those "before the sacrament of the altar" and those around the Easter sepulchre were allowed to remain. Under Henry's successors many more ordinances and statutes addressing idolatry were enacted, the most drastic in the third year of Edward VI, but throughout, the state attempted to retain the initiative, sending agents to enforce the law and/or correct what mobs had been doing. One of the injunctions of Edward VI for instance specified that only the clergy were to "take down, or cause to be taken down and destroy" the "abused" images "and none other private persons."[124]

The response from the Catholic Church came quite late in the final session of the Council of Trent in 1563, which issued a statement defending the sacred use of images and condemning those who accused the Church of idolatry. It did introduce some minor restrictions. For one thing, all lasciviousness was to be avoided in images in churches, specifically that "images shall not be painted or adorned with a provocative bodily attractiveness (*procaci venustate*)." Lasciviousness and fornication had been tied up with idolatry in canon legal thought already before Gratian,[125] but it is noteworthy that of all aspects of the image question at this juncture, the council seized that one to legislate on. The famous first instance of enforcement of this decree was the painting of loincloths over what was now deemed excessive nudity in Michelangelo's *Last Judgement* in a chapel at the Vatican. Also, the council ordained "that no one is permitted to put or cause to be put in any place or church, even [a church that is] in any manner exempt, any unusual image unless it had been approved by the bishop." Here the Church was clearly speaking as lawgiver. We will see an example of this restriction on innovations in representing the sacred below.[126]

In short, the limits of idolatry were drawn very differently over time and space in the Latin world, but, throughout, there were people justifying their posi-

124 Aston, *England's Iconoclasts*, 220—342.

125 Gratianus, *Decretum*, Part 2: Causa 28 questio 1 canon 105, Causa 132 questio 4 canon 12 and questio 7 canon 15; Aston, *England's Iconoclasts*, 468—9.

126 Compare Freedberg, *Power*, 369, 399; Christensen, "Art," 77—8; *Concilium Tridentinum*, sessio XXV.

tion in relation to the limits obtaining at their place and time. The most pressing need to do so was felt in places and periods of high agitation over the issue, and most cases below hail from those situations.

Circumvention in the Latin World

Here and there, the second part of the first commandment was simply omitted. Some medieval Bible paraphrases in the vernacular languages left it out, as did some English and French compendia with material from the Bible. Or the two parts of the commandment were fused into one. A visual representation of such a fusion is in a volume of diagrams of necessary knowledge made in Picardie in the late thirteenth century. The diagram about the Ten Commandments shows a horned Moses holding the stone tablets as well as small medallions representing from left to right: the plagues that hit the people because of their non-compliance to the respective commandments, the commandments themselves, and the abuses they were meant to forestall. The abuse of making idols is represented by an idol in the form of a martial woman with a shield and banner or axe. The first commandment is here simply "believe in one God," and the whole is glossed as "against idolatry." The art historian Michael Camille ventures that if the diagram had included the Vulgate text of the whole commandment, it would be at odds with itself.[127]

Yet the thirteenth-century Scholastic thinkers as well as the canonists were clear-eyed about the text of the second part of the first commandment. Durand let the Muslims throw it before him, as we saw, right at the start of his discussion of the use of images, and Aquinas also had an opponent cite it at the beginning of an exposé on the proper adoration of Christ and his image. Still theologians and jurists found many reasons why the use of images in churches was not about *adoratio* and why the *adoratio* of the Christians was not the same as that of the pagans.

In the twelfth and thirteenth centuries there was quite a bit of activity among theologians and canonists in developing general formulas to justify the use of images in churches. This time saw a clear development, and scholars are still debating what the influence on this was of the work of John of Damascus, one of the Fathers of the Eastern Orthodox Church, which was introduced to the Latin world in the mid-twelfth century and seemed exciting to the Scholastics. In the first half of the twelfth century, a work on liturgy listed the following three reasons for painting in a church: "first because it is literature for the laity, second that the

127 Camille, *Gothic Idol*, 31—3.

church may be adorned with such beauty, third that it may bring to memory the life of the forebears." At the turn of the thirteenth century, however, Innocent III gave a reason that had more to do with the observer's affections. While warning against the *crimen* of idolatry, he argued that one should not put one's hope for salvation in images of Christ, but should use them to stir up the memory of devotion that one holds in one's heart together with God. By the 1270s Aquinas listed three reasons which recognised both the cognitive and affective impact of images:

> First, for the instruction of the unlettered, who might learn from them as if from books; second, so that the mystery of the Incarnation and the examples of saints might remain more firmly in our memory by being daily represented to our eyes; and third, to excite the emotions which are more effectively aroused by things seen than by things heard.[128]

All of the general reasons formulated in that era steered clear of *adoratio* of any image, but it turned out to be difficult to maintain that boundary in the face of images of Christ. Here also there was a development. In his discussion of the use of images in veneration and worship, or more specifically *dulia* and *latria*, Innocent III sermonised that "we must venerate the image of Christ with worship [*adoratione venerari*]." Yet since he, like others, made a distinction between the image and the imaged, he was able to say that "more truly … we worship God while facing the image, than the image while facing God." In this presentation, once again, worship *of* the image was avoided. As far as worship involved images, it was to be only before or facing (*coram*) the image.[129]

In the later part of the thirteenth century, however, Durand and Aquinas went as step further. Clearly building on the sermon of Innocent III, Durand equated *latria* with *adoratio* and *dulia* with *veneratio*, and advocated the highest level of honour for images of Christ. Whereas Innocent still spoke of worshipping God before his image, Durand concluded that because *latria* was due to God in both his divine and human form, it was also due to his image. Aquinas reached the same conclusion through a more elaborate argument. Following Aristotle and John of Damascus on how a sculpted or painted image is not just a thing but also an image (in the broader sense) of its prototype, and that whatever honour was given to the image passed to that prototype, he argued that the same level of reverence was due to an image as to its prototype. Therefore, the image of God as he appeared in human form should be worshipped with the worship of *latria* (*adoratione latriae adoranda*). He specified that the image of Christ was to be worshipped because of (*prop-*

128 Endrödi, "The Chancellor's"; Ladner, *Images and Ideas*, 29—32; Innocent III, *Opera*, 4: 436—8; Freedberg, *Power*, 162—4, 399.
129 Innocent III, *Opera*, 4: 436—8.

ter) the entity of which it was the image (Christ) and not because of the image itself, since the apostle Paul had condemned the gentiles precisely for worshipping images in themselves (*adorabant ipsas imagines*). In this vision, the only thing that was left separating Christian worship from idol worship was the "because of," or in other words: the intention.[130]

One of the *Twelve Conclusions* of the Lollards was directed precisely against the offering of *latria* to rood crosses, i. e. the large crucifixes with Christ Triumphant centrally placed in the church, which they saw as idolatrous. Instead, people should offer alms to people who were the real image of God, having been created in his image according to the Bible. The *Conclusions* make it clear that this point was directed specifically against the argumentation of Aquinas by casting doubt on his sainthood (he had been sanctified in the meantime). However, Aquinas' fellow Dominican friar Roger Dymmok of London straightaway mounted a defence against the *Twelve Conclusions*, which he intended for a lay audience and dedicated to the king even though he wrote it in Latin (citing the *Conclusions* in their original English). In this text he doubled down on giving *latria* to images of Christ. Offering honour to images of stone and wood had two advantages over offering it to the living image of God in the form of man as the Lollards advocated. First, *latria* would pass straight through the dead material of the image to what was imaged, whereas in humans it would get stuck, and second, dead images could not develop pride, whereas *latria* offered to a man would lead that man to pride, and, besides, the adorer to idolatry.[131]

Yet there came a point at which the ever-further refinement of Scholastic arguments for the adoration of images of Christ became untenable. By the sixteenth century Karlstadt ridiculed the "papist" argument about images and their prototypes in general as a loophole (*schluffwinckell*/*schluffloch*) and as painting white what was black. The specific requirement of *latria* for images of Christ was not reiterated by the Council of Trent, which chose a more careful formulation again. It was only by (*per*) and in the face of (*coram*) their respective images that one was to worship Christ and venerate the saints.[132]

The two most high-profile attempts to enforce the new regulations laid down by the Council of Trent, however, also ended in circumvention. In its new strictures on carnality, the voices that had been arguing that Michelangelo's Sistine Chapel *Last Judgement* contained too much nudity found support. A committee of cardinals appointed by the pope to work out the immediate implications of the decrees

130 Innocent III, *Opera*, 4: 436—8; Durand, *Rationale*, 432—3 (book 4 c. 39 § 2—3); Aquinas, *Summa*, pt. 3 question 25 article 3. Contrast Endrödi, "The Chancellor's", 144.

131 *The Twelve Conclusions of the Lollards*; Kamerick, *Popular Piety*, 26—32.

132 Carolstatt, *Abtuhung*, 6—7, 22; *Concilium Tridentinum*, sessio XXV.

of the council in Rome, decreed that: "The pictures in the Apostolic Chapel are to be covered, as [is to be done] in other churches if they display anything obscene or obviously false, according to decree 2 in Session 9 [25] under Pius." The responsible as well as the painter carrying out the order for the *Last Judgement* appear to have opted for the minimum. Only the two most offensive figures were repainted and only genitals were covered up with painted cloths, leaving enough nudity for some popes of the following centuries to take umbrage.[133] A decade later Paolo Veronese was interrogated by the Inquisition in Venice over his recently completed wall-covering painting of the Last Supper. The focus of the questioning was on certain inventions: the presence of a dog, a buffoon with a parrot, soldiers in German dress with halberds, one of the apostles picking his teeth with a fork. Although Veronese tried to defend the right of artists to invent and he even pointed to Michelangelo's *Last Judgement* as an example, under pressure from the sharp questioning he finally said that he was not defending his work. He was sentenced to "correct and amend" the painting at his own expense. The matter was put to rest by Veronese adding an inscription referring to the Gospel of Luke's description of a meal Jesus had at the house of Levi at which sinners were explicitly present. This was sufficient to change the subject from *Last Supper* to *Feast at the House of Levi.* It is not clear who took this decision. A remark in the verdict that the correction should be suitable to the subject matter of the Last Supper was crossed out.[134]

Over the same period, the English monarchs, particularly Henry VIII and Elizabeth I, found refuge in ambiguity. Both seem to have been torn between would-be iconoclasts, image-reformers and image-defenders, and seem to have personally leant to the latter. The distinction Henry's injunction made between abused and non-abused images proved a source for many interpretations, and, as historian Margaret Aston shows, could be and indeed was "twisted to different ends". She also points out that the ruling was vague on the point of what should be done with the abused images, for what was "take down and delay"? After a more radical and unambiguous law enacted in the third year of Edward VI, and its rescission under the Catholic Mary, Elizabeth indirectly restored Henry's law through a clause in the 1559 *Act of Uniformity.* The clause read: "such ornaments of the church and of the ministers thereof shall be retained and be in use as was in this Church of England by authority of parliament in the second year of the reign of King Edward the Sixth." This clause was also of a studied ambiguity in itself. It seemed to entail a return to Henry's injunction along with two sharper

133 O'Malley, "Trent," 36—8; Lukehart, "Counter-Reform," 167—8.

134 Grasman, "On Closer Inspection"; "Paolo Veronese in front of the Inquisition."

royal injunctions grafted unto it by Edward VI, but not to the parliamentary act of the third year of Edward. In any case, it meant retaining the distinction between abused and non-abused images, which had proven to give so many openings for interpretation, and which the law of the third year of Edward had sought to abolish. It also meant a return to the situation of Edward's first two years in which his councillors complained that there was much contention in the realm over "whether this image or that image hath been offered unto, kissed, censed, or otherwise abused," and the reformer Hugh Latimer sermonised against the "blanchers" who whitewashed the status quo. As Latimer saw it, those blanchers obfuscated the need for further action by whispering in the king's ear, "it is but a little abuse…and it may be easily amended…The people will not bear sudden alterations; an insurrection may be made after sudden mutation." In short, radical reformers tried to shake the English monarchs out of their hiding behind ambiguity, but only met with brief success during the later years of Edward VI.[135]

Elizabeth showed her intention to give the narrowest possible interpretation to Edward's injunctions by retaining two lights and a crucifix on the altar in her own chapel. The two lights were precisely the maximum allowed for the altar by the Edwardian injunctions, but the cross required a narrow interpretation of "abuse." From a correction likely attributable to her in the text of *Certain Sermons or Homilies Appointed to Be Read in Churches*, it appears that she supported the position that images were "of themselves indifferent," and the reason not to have them in temples was only the "fear and occasion of worshipping them." For this interpretation in general and her crucifix and candles in particular, Elizabeth faced enormous opposition. Churchmen sermonised to her face about the crucifix and candles, and three times individuals smashed them from the altar. Twice the culprit was the same "youth," who referred to New Testament precedent. The first time he was declared insane, which, as Aston suggests, was convenient to Elizabeth because she would not have to address the substance of the issue at hand. The second time the youth was condemned to prison, however. Opposition to the candles and cross in the royal chapel was also voiced in a mock disputation, which was, as we saw in the last chapter, a favourite literary medium to express views that might not be to the taste of the authorities in both the Latin and Persian worlds. In *A Pleasant Dialogue between a Souldier of Barwicke and an English Chaplaine*, the soldier argues against the chaplain that the "policy" the queen espoused through the retention of the cross and candles was sophistry and a monstrous quibble. Yet, Elizabeth retained the set-up on the chapel altar throughout her reign. When a dean delivered a sermon before the court in 1565 and started

135 Aston, *England's Iconoclasts*, 227—9, 261—5, 278—80, 301—5.

to speak about images while alluding to the cross in the royal chapel, Elizabeth is reported to have said "Do not talk about that," and when he continued, "Leave that, it has nothing to do with your subject, and the matter is now threadbare."[136]

Exception in the Latin World

There were three major avenues for making exceptions for image use. There was the argument of the need of the times. Then there was the argument that images should be appreciated for their artistic merit – already encountered in the Persian world. Also as in the Persian world, many arguments about the distinction between idolatry and legitimate uses of images revolved around the how and where images were presented.

In the England of the time of the Lollards we find two arguments that revolved around concepts of necessity and the nature of the times. The first was that the commandment against graven images had only been necessary for the Jews with their tendency to idolatry (somewhat like the Muslims, the Jews were at times regarded as idolaters and at others as iconoclasts). This line of argument is found in the English-language anonymous *Pore Caitif*, which sought to explain a number of matters related to doctrine and faith to a wide audience. This argument appears to have become somewhat common throughout Europe and continued to be found with Catholic defenders of the use of sacred images into the seventeenth century.[137] The other, more unusual, argument, presented by the Augustinian canon Walter Hilton in Latin, looked not at the feebleness of the Jews but at the weakness and ignorance of "the simple and lay people" of his days. He argued that in the early Church there were few faithful and they did not "need to be drawn to devotion through the exterior signs of images or other corporeal signs" because the memory of Christ was still glowing freshly in their hearts and grace of the Holy Spirit visited them in abundance. Likewise at the end of time, the faithful would see God face to face and all signs would be abolished. But in his own middle era, after the Church had been almost swamped with the "imperfect, carnal, and ignorant," the Church, seeing the general weakness of human nature "disposed to the vanity of this visible life," ordained the use of corporeal signs "through which the obstinate are humbled and the idle are exercised,

136 Aston, *England's Iconoclasts*, 256, 306—37, 334—5

137 Kamerick, *Popular Piety*, 51, 191, 211 n.19. On the perceptions of Jews see Camille, *Gothic Idol*, 165—94. A seventeenth-century example was the treatise of Ottonelli and Da Cortona discussed below.

taught and instructed, and the feeble are led to internal and spiritual knowledge and love of God." Both texts agreed that images were for the feeble-minded, but disagreed on who those were.[138]

An early fifteenth-century example of concern over the presentation of images we find in the *Rule for the Management of Family Care* by Cardinal Giovanni Dominici. He recommended having images of saints and biblical scenes that would appeal to and edify children around the house, but:

> I warn you, if you have paintings in your house for this purpose, beware of frames of gold and silver, lest they [your children] become more idolatrous than faithful, since, if they see more candles lit and more hats removed and more kneeling to figures that are gilded and adorned with precious stones than to the old smoky ones, they will only learn to revere gold and jewels, and not the figures, or rather the truths represented by those figures.[139]

The risk of idolatry was thus present but could be easily averted by eschewing precious materials, which had of course been the hallmark of the ultimate idol, the Golden Calf. We can read this as an exception for images of simple materials.

As I noted in the Persian part of this chapter, there is an oft-repeated argument that the appreciation of sculpture and painting as art rather than as objects of veneration or simply decoration is a development that followed in the footsteps of the Reformation. Indeed, it seems that aesthetic appreciation was the major avenue to create space for images of all sorts in the wake of the Reformation, and this came to be more and more clearly articulated.[140] But as we saw, this development was not limited to Europe at the time. Moreover, what Camille calls the anesthetising effect of the aesthetic predated the Reformation by many centuries. Already in the twelfth century learned travellers were walking around Rome appreciating pagan sculpture and even buying some, though not without some witty controversy. One wit at the court of the English king Stephen both chided and provided a mock justification for the king's brother, who was one of these travellers and happened to be a bishop. He would have bought his pagan statues to prevent the Romans from relapsing into pagan worship since they were evidently prone to avarice, which already made them idol-worshippers in spirit.[141] The aesthetic exception was apparently possible but not fully accepted yet by the mid-twelfth century. The example I selected from the many possible examples of the second half of our period, is of an artist in a city at the frontline of the Counter-Reformation.

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138 Kamerick, *Popular Piety*, 34—7, 51.

139 Freedberg, *Power*, 4—5, 11—2.

140 Vanhaelen, *Wake*, 11—5; Cole and Zorach, "Introduction," 3; Wirth, "Soll man Bilder anbeten," 35.

141 Camille, *Gothic Idol*, 77—87, 339—42.

In the first half of the seventeenth century, some artists in Europe were still reeling from the iconoclasms of the sixteenth century, as several paintings by the Flemish painter Frans Francken the Younger show. They reflect how numerous images from churches landed on the market in the period of the iconoclasms and managed to survive as "art" in private collections. In one painting we see an art collection offering a safe haven to classical sculpture, including an image of the god Poseidon, and a painting by Peter Candid of the Holy Family amidst some innocuous landscapes, while donkey-headed iconoclasts rage outside the room. The old-fashioned dress of the three scholars and art lovers seems intended to transport the scene back to 1566, the year of the great iconoclasm in the Netherlands, including the painter's own Antwerp, which by his time had been returned to Catholicism.[142] The link with the events of 1566 is even more clear in another painting by Francken contrasting art appreciation with iconoclastic donkeys (Francken has at least six paintings featuring these creatures). That painting features a wall hung with various natural and artistic rarities, including shells, an Indonesian dagger, a still life, and, prominently, also a drawing of the Holy Family (fig. 17). To the right again is a window to the outside world where iconoclastic donkeys rage in front of a church that is being stormed and torched. The presence of the church makes the context of the religious controversies of the age even more explicit than the other paintings featuring iconoclastic donkeys by Francken.[143]

The sheltering of images as art in private homes was not a figment of Francken's imagination. In the wake of the mid-sixteenth-century iconoclasms in the north of Europe, fine spatial divisions and considerations about placement of images, and in particular statues, came to play a large role in judgements about what was permissible or not. Distinctions were made between inside and outside churches, and different places within churches, and increasingly also between private and public spaces.

With respect to the proscription of idolatry, the privacy of the home assumed importance early in the Reformation. Even in Zurich in 1524, when Zwingli personally advised the city council, individuals were allowed to retrieve images they had donated to churches and keep them in their homes. They had only one week to do so. The Strasbourg magistracy recognised the right of donors in a similar way. Immediately, however, there was also opposition to the distinction between homes and churches. In a disputation at Zurich, Ludwig Hätzer argued against Zwingli that "secret images" were proscribed by scripture as well as those in churches

142 The painting was in the Munich Staatsgemäldesammlungen, inv. no. 1988, but sold at auction by Dorotheum 18.04.2012.

143 This painting now in the royal collection at Buckingham. Härting, *Frans Francken*, 83—90, 369—72; Christin, "Frankreich und die Niederlande," 66.

Fig. 17: *The Cabinet of a Collector* by Frans Francken the Younger, 1617. A drawing of the Holy Family hangs casually among other art works and rarities and in that way becomes "art," while iconoclasts with donkey heads rage outside to the right, destroying musical instruments, books and art works. Royal Collection Trust no. 405781 / © His Majesty King Charles III 2023.

and should be removed as well.[144] In the northern Netherlands, at the height of the iconoclasms there, we find the case of a failure to rescue an image by taking it out of the church in the *Book of Painters* (*Schilder-boeck*) by the painter Carel van Mander. The Lady of Sonneveldt offered 100 pounds for this crucifixion altarpiece by Pieter Aertsen, and this was apparently accepted by the authorities of the village or its church. Yet while people were taking the painting out of the church to deliver it, "frenzied" farmers hacked it to pieces with axes. Van Mander obliquely suggested that Aertsen himself used the "art" argument during the iconoclasm in which he had to see many of his own works destroyed. At his own peril he "would often use big words with such people hostile to art [*const vyandighe*]."[145]

The most radical governments meanwhile adopted ordinances and laws that acknowledged the boundary of the home but sought to override it. The Geneva council in 1537 ordained that "those who have idols at home break them up forthwith." A decade later, in England, the injunctions of Edward VI stipulated that the

144 Aston, *England's Iconoclasts*, 257—9; Garside, *Zwingli and the Arts*, 156—7.
145 Van Mander, *Schilder-boeck*, fol. 244v.

clergy were to remove without a trace "all shrines, covering of shrines, all tables, candlesticks, trindles or rolls of wax, pictures, paintings, and all other monuments of feigned miracles, pilgrimages, idolatry, and superstition" from their churches and their houses (i. e. the clergy's housing). Also, the clergy were to "exhort all their parishioners to do the like within their several houses." In other words, the keeping at home of objects of idolatry was not forbidden but discouraged. The subsequent parliamentary law enacted in the third year of Edward, the *Acte for the abolishing and puttinge awaye of diverse Bookes and Images*, made it clear that any "images of stone tymbre alleblaster or earthe graven carved or paynted, which heretofore have bene taken out of anye Churche or Chappell, or yet stande in anye Churche or Chapell," were to be destroyed or defaced. The act was directed at any person or corporation having such images in their custody, and they were to be fined for non-compliance, or even imprisoned on the third offense. This law thus distinguished between church images and non-church images, and also – in its wording – between inside and outside churches, but it did explicitly apply to both images that were still in churches and images that had already been brought out of churches to other places, including, it must be supposed, the home.[146]

In the Dutch Republic, the debate over whether the freedom of conscience enshrined in its foundational articles of union of 1579 should also entail freedom of practice gradually crystalised around a boundary between private and public spaces. Ordinances against divergent religious practice were in particular directed against what Protestant hardliners regarded as idolatry and invoked its Dutch equivalent *afgoderye* to proscribe various things. Catholics could therefore complain that Jews and Muslims had more liberties in Holland than they did. However, Catholic worship flourished in increasingly elaborate house churches, i. e. churches that looked like a house from the outside but were fully-fledged churches on the inside. One such house church in the north of Holland was described by its detractors as "stuffed" with images for "false religion." However, the ordinances themselves did not recognise the boundary of the house. In 1581, the first ordinance for the suppression of "popish exercises [*pauselijcke exercitien*]" in Holland, which was later repeated and sharpened and also copied in other provinces, explicitly applied to the performance of such exercises in both "secret and public," and it made the owners of the houses in which they took place liable for a fine. The exception for the nominally private space of the house church was the outcome of continual negotiation between local authorities and the practicing Catholics. Christine Kooi has analysed this process of negotiation that gave rise to a mea-

146 Aston, *England's Iconoclasts*, 256—8; *Statutes of the Realm*, 4 pt. 1: 110—1.

sure of toleration, though interspersed with episodes of enforcement of the ordinances, which remained in place.[147]

Apart from church space and private space, there was also public space. This increasingly came to be seen as secular. The difference that being in a church and in a civic space made is exemplified by the travails of the monumental painting of the Last Judgement by Lucas van Leyden. The painting had been commissioned for St Peter's Church in Leiden in 1526 and it had hung there till the time of the iconoclasm, which in Leiden entailed many removals of images from churches besides actual destructions. After a few years in a storage the painting was transferred to the burgomasters' room in the town hall, but this transition seems to have required that the image of God the Father in the painting was painted over with an aureole with the word YHWH in Hebrew. Once in the town hall, however, the painting seems to have taken on a new role as a work of art, and in fact came to exemplify civic pride in the artistic achievements of Leiden. When Emperor Rudolf II sought to acquire it at the beginning of the seventeenth century, the renowned artists Hendrick Goltzius and Carel van Mander stepped in to stop the sale, even though it had the support of the Prince of Orange.[148] For this painting to take on its new role two steps were thus required: removal of the part of its imagery that was deemed entirely proscribed by the sterner Protestants, and, most importantly, removal from a place where its imagery could be venerated.

The one freestanding statue in public space that was erected in the Republic in this period did attract criticism, but the Church quickly backed out and left the matter to politics. Already in the sixteenth century a statue of Erasmus had been erected in his birthplace Rotterdam. This was destroyed in 1572 not by Protestant iconoclasts but by Catholics loyal to the Spanish who saw Erasmus as a heretic. A new statue of stone was soon made to replace it. The great controversy came when the city council commissioned a bronze statue from the premier Dutch sculptor of the age, Hendrick de Keyser. The controversy should mainly be seen in the light of the struggle between the stricter and less strict Calvinists for power in Rotterdam and the Republic more generally, but the strict faction was able to employ the accusation of idolatry. In 1621 the church council sent a delegation to the city council to object against the statue saying that Erasmus' thinking was too much in line with that of the flexible faction, which had just been ousted, and that the statue of him could not be "conducive to the honouring of God, since one had seen that a certain person knelt before the said statue."[149] The next year a

147 Israel, *Dutch Republic*, 372—9; Wiltens ed., *Kerkelyk Plakaat-boek*, 516—7, 519, 544—5, 748; Kooi, *Calvinists and Catholics*, 63—129, 215.

148 Hermesdorf et al., "Examination and Restoration," 325—7 and 413.

149 This must concern either the old stone statue or the wax model for the new one.

petition in support of the church council and its opposition to the statue gathered three hundred signatures. The petitioners proclaimed that they would abstain from the Lord's Supper until what they called the *afgodt,* or idol, had been removed. The city council did not take any action, however, while the Church Synod concluded that "the erection of such statues was a neutral [*middelmaetige*] matter and had a political use, and that they should therefore not meddle in it." The Church thus chose to leave public space to the secular governing bodies in this matter.[150]

An interesting case regarding the different placements within churches is the defence of one of his works brought forward by De Keyser himself, who was at least nominally Protestant. In 1613 news reached the consistory of the Protestant community that he was working on a sculpture of St John the Evangelist "for those of 's-Hertogenbosch, to be used there in the church for idolatry [*afgoderij*]." The city of 's-Hertogenbosch in the central Netherlands was at that time still in Spanish, and thus Catholic, hands, and the damage that had been done to the trappings of the church during the iconoclasm there was being repaired. A new structure with a loft screening the choir from the rest of the nave of the church had been commissioned to replace the old damaged one, and De Keyser had apparently been asked by his colleague there to make a statue of no less than the church's patron saint for it. When a minister was sent to admonish him to desist from this work, De Keyser argued that with his statue "no idolatry would be committed, but that it would stand under the loft [*docsael*] beside the portal." In other words, the statue would not be in a position where devotional images were usually placed, such as behind the altar, in side-chapels, or atop such lofts. The altercation suggests that De Keyser himself thought this was sufficient ground for his work not to be considered idolatrous. Nevertheless, he promised "in order to avoid irritation" that he would lay down the work. But we know that the work did end up in the position he described on the choir screen, which is now in the Victoria and Albert Museum, because the statue of St John there can be attributed with quite a bit of certainty to De Keyser on stylistic grounds. So either the statue was almost finished and De Keyser gave it to someone else to finish, or De Keyser did finish it himself after all.[151]

The question also came up whether exceptions should be made for stained glass windows and/or funerary monuments in churches. In Zurich an exception was made for images in stained glass windows early on, since, as Zwingli put it,

150 Becker, *Hendrick de Keyser.* Quotations from 66—7.

151 Kannegieter, "St. Jansbeeld"; Neurdenburg, "Hendrick de Keyser"; Scholten, *Sumptuous Memories*, 10—1; Vanhaelen, *Wake*, 111.

they were "for the sake of ornament" and "nobody worships in such a place." And in the Dutch Republic, stained glass windows were the first avenue through which figurative art re-entered Protestant churches. Yet in the injunctions given by Edward VI in England, "glass-windows" were explicitly included in the list of objects from which all traces of idolatry were to be obliterated.[152] With respect to funerary monuments an exception was made in both England and the Dutch Republic, but the grounds adduced for this exception were slightly different, although in both cases these grounds were ultimately tied to the unlikeliness of worship. This slight difference is worth exploring.

In England, the *Acte for the abolishing and puttinge awaye of diverse Bookes and Images* excepted images on tombs, specifying that this applied "onelye for a Monument of any Kinge Prince Nobleman or other dead pson, whiche hath not bene commonly reputed and taken for a Saincte." This left some room for interpretation. There was wrangling over specific tombs, and it seems to have been especially the anti-image side that took advantage of the space for interpretation to remove as many funerary monuments as possible. After Mary set the legal clock back to the much more circumscribed injunction of Henry VIII and Elizabeth set it to just before the *Acte for the abolishing and puttinge awaye*, there was a bit of a legal vacuum on the issue of tombs, of which individual iconoclasts seem to have taken advantage once more. One and a half years into her reign, Elizabeth issued a proclamation of her own to rein in those people in. As in the case of the youth who was declared insane for targeting the cross and candles in the royal chapel, the proclamation did not concede any theological or divine legal point to the tomb-defacers, calling them instead "partly ignorant, partly malicious, or covetous." They supposedly gave a bad name to the government agents and clergy whose job it had been "only to deface monuments of idolatry and false feigned images in churches and abbeys." Monuments that were "only to show a memory to posterity of the persons there buried" and "not for any religious honour" were to be left in place or even repaired. Offenders were to be punished with the obligation to carry out the repairs, or if they could not, they were to do penance. The injunction appears to have been applied retrospectively from the beginning of Elizabeth's reign, and if any offenders had died the executors of their estate were responsible for the repairs.[153]

In the Dutch Republic a further distinction between different areas within churches played a role in the placement of new funerary monuments with figurative sculpture, which became very grand in the seventeenth century. A case in

152 Tümpel, "Reformation," 318; Aston, *England's Iconoclasts*, 256—7.

153 *Statutes of the Realm*, 4 pt. 1: 110—1; Aston, *England's Iconoclasts*, 269—71, 314—6.

point is De Keyser's monument for William of Orange – freestanding allegorical figures and all – set in the choir section of a church, right where the altar used to be in Catholic days (something that did not escape the notice of contemporaries). The distinction between choir and non-choir parts of the church was, however, irrelevant to Dutch Calvinists. The spatial distinction that mattered with regard to figurative sculpture was that between the strolling church (*wandelkerk*) and the preaching church (*preekkerk*). The preaching church was an area, mostly somewhere in the middle of the church, set off by benches around a pulpit. The strolling church was the remainder of the church which functioned as a public area for socialising and sheltering from Dutch weather, since church buildings as a whole were administered by the town council, not the church council. The distinction predated the Reformation but took on a new significance after it. The sometimes sumptuous figurative monuments for heroes of the fatherland and local notaries were created in the strolling areas.[154] By contrast, for the preaching section of the Amsterdam New Church, its church council had great trouble accepting as a gift from the city council a pulpit carved with numerous figures by Albert Vinckenbrinck – even though the sculptor seems to have adhered to a Zwingli-inspired Calvinism himself and the way the figurative scenes are presented is markedly different from the way they would have been in a Catholic context.[155]

Although the concerns about the placement of images were most pronounced in northern Europe, in southern Europe too, a concern with public and private space became tied up with debates about images. The focus of this concern was somewhat different from that in northern Europe. It came about during the second quarter of the seventeenth century, when tolerance entered something of an ice age. As we saw in Chapter 1, this was the time that any viewing of Caravaggio's *Victorious Cupid* was rendered private by hanging a curtain in front of the painting. The need to shield artworks with nudity in such ways was made explicit in a treatise on the use and abuse of images published by the canonist Giandomenico Ottonelli and the painter Pietro da Cortona under anagrams of their names in Florence in 1652. The authors were well aware of the issue of idolatry, but they managed to sweep much of that aside with the argument, already encountered, that its proscription had only been necessary for the idolatry-inclined Jews. In fact, in the analysis of Yvon Le Gall, the four-hundred-page treatise seems bent on maximising the boundaries of what was allowed through perplexing casuistry. For these two authors, the sinfulness of nudity in painting and sculpture lay not so much in its being idolatrous as in its giving rise to forbidden sexual acts, even though

154 Scholten, *Sumptuous Memories*, 13—4; Vanhaelen, *Wake*, 68—126.
155 Eisma, "Vinckenbrinck"; Scholten, *Sumptuous Memories*, 11.

they were aware that the Council of Trent's decree on images connected the two. This left them with the issue of obscene images, which they found to be present in many houses of the Italian elite, including the ecclesiastical elite. They deemed it a deadly sin to display such works in the public parts of the house and touched on the option of destroying them but quickly moved to four alternatives: relegating the work to a private part of the house, covering the paintings c.q. dressing the statues, hiding the offending parts as had been done with Michelangelo's *Last Judgement*, or removing the obscene parts. Their preferred option was clearly the first and in that way the authors' thinking about space and placement was quite in line with that in northern Europe.[156]

Compensation in the Latin World

As was noted in the last section, Catholic worship designated as idolatry was tolerated in the Dutch Republic within certain spaces that were not publicly visible. This toleration came at a price, however. For the sheriffs and city councils to not see Catholic practice the payment of "recognition money" was generally required. In this way the Catholics were required to compensate for their transgressive behaviour. A 1636 pamphlet inveighing against the perceived idolatry of the Catholics, literally stated that the "accursed greed" of law enforcement agents made it possible for Catholics to "purchase the committing of their idolatries" in this way.[157] This is a form of compensation we have not encountered in the last chapter, but as we will see in the next, it played a large role in the practice of usury by certain groups in Europe. We also saw it in the Persian world with respect to idolatry in the form of the pilgrimage tax that was levied from Hindu pilgrims at times.

I found just one example of a person showing contrition for past idolatry. Very early on in the Reformation, in 1522, the case of Mrs Göldli in Lucerne, Switzerland, was brought to Zwingli by letter for advice. Göldli had at some point in the past fallen ill and donated a statue of St Apollinaris to a beguine church in Lucerne, as a way of aiding her recovery, While recovering, however, she had become troubled by her conscience because she had made an idol and trusted in its healing powers. She took the statue from the church and burned it. After the beguines protested, the council of Lucerne fined Göldli and ordered her to replace the statue. She paid the fine willingly but refused to have a new statue made. Zwingli's fellow reformist correspondent wrote, "she sees that her conscience is weighted down in

156 Le Gall, "Le *Traité*," 74, 76—7, 85—7, 91 and passim.

157 Kooi, *Calvinists and Catholics*, 76, 90—1, 105. Translation as there.

two ways; for there will have been the ancient scruple, and a new one is added if she will obey men against God." Zwingli wrote a speech for Göldli to deliver to the council in which she should wax on her contrition about her previous hypocrisy and worldly pride, as well as feminine instability, which had made her donate the statue in the first place. She was to end the speech by saying "I am not concerned about the expenditure of money; I have, however, an abhorrence of what is dangerous to the soul. And so that this will be the more evident, I am prepared to pay to the Beguines as much money as the image cost, and to leave it entirely to them as to how the money is to be used." It is pertinent here that Zwingli thought it would help her case if she both elaborately described her contrition and made it "evident" in the form of money. In this way Zwingli made the money serve three purposes: it would make Göldli's contrition tangibly "evident," it would satisfy her obligations to the secular authorities, and it would transfer the responsibility before God to the beguines, because Göldli would leave its expenditure entirely up to them. Zwingli's secondary advice was that if this compromise between divine law and secular authority would not satisfy the Lucerne council, Göldli was to obey God rather than man and be prepared to die for it. We do not know if she got to deliver this speech in any form or what the outcome was.[158]

The Lucerne council, however, initially at least, seems to have followed an opposite line of reasoning, making Göldli compensate not for her idolatry, but for her destruction of a sacred image. As we saw in the last section, in England, Elizabethan regulations applied much the same reasoning. People were supposed to compensate for their defacement of images by repairing them or even doing penance.

I have not come across any examples of painters or sculptors who at some point in life showed contrition for making idolatrous works. In the mid-seventeenth century Ottonelli and Da Cortona in their collaborative treatise pointed to the remorse of sixteenth-century painters like Bronzino and Michelangelo would have felt in later life for the amount of nudity they had painted. Yet, as we saw, for these two authors, the sinfulness of nudity in painting lay not so much in its being idolatrous as in its giving rise to forbidden sexual acts.[159] In the Netherlands we do find a small number of painters and sculptors who participated in the iconoclasm of 1566 (besides a number of artists vehemently defending their own and other artworks during the iconoclasm). In Ghent the sculptor of garden statues Jan Cooman was hanged for his participation, in Middelburg a sculptor named Hans participated. In 's-Hertogenbosch where, as we saw, the choir screen and other trappings of the main church were badly damaged during the iconoclasm, the per-

158 Garside, *Zwingli and the Arts*, 98—101.
159 Le Gall, "Le *Traité,*" 85 and passim.

son leading the Calvinist drive had been Lodewyck Jansz. van Valckenborgh, a painter of still lifes and history pieces.[160] But as was noted, there is no sign of contrition for any of their own works among these painters in the sources. This difference with the Persian world – for which I did find one and a half example in this respect – can perhaps be explained by the fact that there, the emphasis in prescriptive texts that treated idolatry and images was not only on the display, veneration, and worship of images, but also on their making.

Stridency in the Latin World

Stridency took off from two premises: that the proscription of graven images was directed only at images of false gods, and that the Bible and traditions about the life of Christ themselves furnished examples of legitimate imagery. Expressions of the former idea we find from the start of the period in the way pagan idols were represented (or not), and it continued to be expressed by Catholics in the Netherlands against their Protestant compatriots till the end of our period.[161] Recourse to authoritative examples of image-use assumed importance especially in the face of Hussites and Lollards around the turn of the fifteenth century and again around the time of the Council of Trent.

Defenders of sacred images deemed the distinction between pagan idols and Christian images obvious, as we can see in images where the two are juxtaposed or confronted. Camille shows how the raised position on columns and pedestals which was a hallmark of Roman idols in the Gothic imagination, came to be applied to images of Christ and the saints in a triumphal gesture. An interesting example is an illustration in a *Bible moralisée* produced in Paris around 1235 (fig. 18). It illustrates Acts 17:23 where Paul pointed out to the Athenians that among their idols they also had an (empty) altar to the unknown god, and suggested that this was the God he was preaching about. The illustrators painted four pedestals/altars: three with idols they left blank except for their outlines and one with a crucified Jesus. In that way they replaced the reality of the Athenians in which only the three idols were visible and the fourth altar was empty with Paul's reality as they saw it. In that reality material idols were disallowed while a crucifix was canonical and could as such appear on the altar to the unknown god.[162]

160 Personal communication from Hilbert Lootsma 01.11.2017 on the basis of his forthcoming PhD thesis.

161 Groenewegen, *Oefeningen*, 655.

162 Camille, *Gothic Idol*, 19—22, 73—128, 197—203. See also Kamerick, *Popular Piety*, 62.

Fig. 18: *Paul preaching to the Athenians.* Illustration of a *Bible Moralisée* by a Paris workshop, around 1235. A crucifix appears on the altar left empty for the unknown god by the Athenians. The illustrators indicated only the contours of the idols on the other three altars. © The British Library Board, Ms. Harley 1527, fol. 77r.

In the Room of Constantine in the Vatican palace we find a ceiling painting by Tommaso Laureti (fig. 19). It depicts an antique hall, empty except for a pedestal with a shattered statue of a Roman god at its feet and a crucifix with the body of Christ on top. The painting seems to provide an answer to the question of what is and what isn't and idol. It was created in 1585, some twenty years after the Council of Trent had come out with its statement on images, and also the time that Pope Sixtus V was restructuring the centre of Rome, creating vistas and moving around ancient obelisks and pillars, while also demolishing some antique structures, which led one cardinal to complain that Sixtus was "quite bent on the destruction of Rome's antiquities." But in fact, Sixtus seems to have been more bent on exorcising and Christianising Rome's ancient monuments, and thereby saving them. In the same year the painting was commissioned, Sixtus initiated projects to have an obelisk relocated to the newly created square in front of Saint Peter's Basilica, with a cross placed atop, and statues of the saints Peter and Paul placed atop the columns of Trajan and Marcus Aurelius. These projects were completed within the three following years, after exorcism ceremonies had been performed on the monuments. Sixtus had Laureti depict this series of cross-topped obelisks and saint-crowned columns in the register below the ceiling.

Fig. 19: *Triumph of Christianity over Paganism* by Tommaso Laureti, 1585. Ceiling fresco in the Hall of Constantine at the Vatican. A crucifix replaces a shattered idol. Photo: Jean-Pol Grandmont. https://commons.wikimedia.org/wiki/File:0_Triomphe_du_christianisme_-_Sala_di_Costantino_-_Vatican.JPG.

Together these images made a strong statement about the triumph of Christian worship over Roman idolatry.[163]

Tied up with this idea of the obviousness of the distinction between idols and venerable images was the perception that particular images justified themselves by their effectiveness or by their responses to injuries to themselves. As Mrs Göldli believed at first and countless others with her, images might play a role in curing the sick and working other miracles. What is more, the stories of statues bleeding under attack by Lollards and Hussites are numerous, and Lollard propagandists found it necessary to stress that statues did not cry or weep while being destroyed. A chronicle written over centuries by the nuns of Wienhausen in Germany speaks of sightings of ghosts and demons after the Observant Reform arrived at their monastery in 1469 and a reformist abbess took the jewels away from the statues

163 Cole, "Perpetual Exorcism."

of saints. During the sixteenth century, again, stories abounded of statues under attack weeping, showing themselves to be indestructible or striking back against iconoclasts.[164] However, "the power of images" or their "agency" is a vast topic to which I cannot do justice here beyond noting that the perception of their power was sometimes tied in with the defence of sacred images (with pagan images it was the other way around, which is why the exorcism of the image-laden columns and obelisks of Rome was necessary). The problem was that according to the orthodox view images in themselves were not supposed to have power, so the effectiveness or self-defence of images could never be a sufficient justification.[165]

Authoritative precedents for the sacred use of images were, however, found in places in the Old and New Testaments as well as some traditions about Jesus. Roger Dymmok, one of whose arguments against the *Twelve Conclusions of the Lollards* we already encountered, started his defence of images by pointing to three non-biblical episodes from the life of Christ: the imprint he left of his face on a cloth to send to King Abgar, the imprint he left on a sweat-cloth offered by Veronica, and Luke painting images of Jesus and of Mary. These premises allowed Dymmok to declare that images of Christ and the saints were "usefully and validly introduced." He further pointed to examples from before God had become flesh and therefore become representable. The Old Testament furnished the sculpted cherubs on the Ark of the Covenant, and the brass serpent set up by Moses in the desert upon God's command. These examples further proved for Dymmok that God did not forbid all images in his commandment.[166]

During the Counter-Reformation Moses' brazen serpent and its healing powers became an anchoring point for image defenders, even while reformists held up the equally biblical later destruction of the same serpent by King Hezekiah as an example to the rulers of their day.[167] Already before the Council of Trent came out with its statement on images, one of the clerics who were to shape that statement, Ambrogio Catarino, published a short treatise defending the use of images in which the passages about the brazen serpent played a key role. He argued that the healing powers of the brazen serpent were not attributable to the sign (*signo*) but to the signified (*signato*), because it made the mind fly from the sign to its prototype. According to Catarino, the destruction of the serpent by Hezekiah came about because Hezekiah concluded that by his time it had

164 Bynum, *Christian Materiality*, 108—9, 240, 257 and "Are Things 'Indifferent'," 104—5; Michalski, *Reformation and the Visual Arts*, 88—9.

165 Compare Camille, *Gothic Idol*, 208 and Bynum, *Christian Materiality*, 50, 280—4 and passim.

166 Kamerick, *Popular Piety*, 28—9.

167 E. g. Aston, *England's Iconoclasts*, 222, 246, 275—7, 294—5, 335, 426, 429.

come to be worshipped as if it had some divine power in itself (*in se*). In the erection of the obelisk with its gilded bronze cross in front of St Peter's Basilica we see a practical application of the escape clause that the Bible was seen to provide in the story of the brazen serpent. To mark the occasion, an engraving by Natale Bonifacio de Sebenico was published together with a poem by Guglielmo Blanchi. The poem compares the cross to the brazen serpent and enjoins Romans to raise their faces in the air and entreat the cross for their health and salvation. Pope Sixtus ordered indulgences of fifteen years to be granted to all pilgrims who came to the cross to pray for their health and salvation and who had confessed their sins.[168]

Around the same time, the Jesuits who were invited to the court of the Mughal emperor Akbar seized on these biblical precedents. As we saw in the first part of the chapter, Akbar defended the making of images. He was keen to have the Christian images the Jesuits brought along explained to him. In an account of these interactions, the Portuguese Jesuit Monserrate devoted some space to explaining how the Jesuits defended the Catholic position, in the full realisation that "the Musalmans hate idolatry." The Jesuit showing the images to Akbar took the opportunity to point out the angels on the Ark, noting that their divinely sanctioned presence indicated that God had not proscribed statues of saints but only the making and worship of images of false gods. "Religious men, inspired by the divine will, explain by the right interpretation passages of Scripture which appear to conflict. These men declare that the words 'graven image' and 'idol' denote only the images of demons and false gods; and God, the Creator of the universe, forbids both in Law and Gospel the worship of such images." For that reason, it was wrong to accuse Christians of idolatry for their reverence to sacred images. As Ebba Koch argues, these arguments were not lost on Akbar and his successor Jahangir.[169]

Some defenders of the Catholic position did not shy away from recourse to the authority of extra-scriptural tradition. Dymmok, as we saw, made use of traditions from non-biblical sources such as the *Legenda Aurea*, citing places in the New Testament that point to the importance of teaching by word and the lacunae of the Bible itself.[170] Although he aimed his Latin tract at a lay public, it does share features with the legal treatise genre and therefore it is all the more remarkable that he gave such a prominent place to extra-scriptural traditions as proof. This was quite uncommon in the Latin world. In sixteenth-century England also, some explicitly espoused the position that the traditions of the Church were the inventions

168 Cole, "Perpetual Exorcism."

169 Koch, *Mughal Art*, 8—12. Translation of Monserrate's Latin *Commentary* as cited there, capitalisation modified.

170 Kamerick, *Popular Piety*, 29, 206 n.57.

of the Holy Spirit. Thomas More, for instance, combined this argument with the ones that the intent of the commandment against graven images was only to banish pagan idols and that it had been necessary because of the Jewish inclination to idolatry. As he put it in a mock poetic debate, the Holy Spirit would never allow the Church "so hole & so long in so damnable ydolatry / as this were / if it wer supersticyon / & not a part of very fayth & true deuout relygyon."[171] Such papalists made up the most strident wing of the Church. Just as the strident transgressors of the sodomy proscription pointed to their divinely created natures, so too did these defenders of the Catholic Church's position on images point to the divine force behind its traditions.

Fig. 20: *The Sacrilege of Cambron.* Flemish, early seventeenth century. The "Jew" Guillaume, wearing a Muslim turban, assails a framed painting of the Adoration of the Magi. With his spear he appears to threaten the life of the Virgin in the painting. Douai, Musée de la Chartreuse, inv. no. 1598.

171 Verkamp, "Adiaphoristic Freedom," 62—3; Kamerick, *Popular Piety*, 191—2.

Fig. 21: *View of the Choir of St John's at Utrecht* by Emanuel de Witte, c. 1654. A mural of two saints with gilded aureoles makes an appearance (left) over a set of cleaning tools in an otherwise white-washed church. Fondation Custodia, Collection Frits Lugt, Paris, coll. no. 3551.

As we have been seeing throughout the chapter, the use of images was closely tied up with identity in the Judeo-Christo-Islamic world. Catholics came to identify iconoclasts with Protestants, heretics, donkeys, Muslims, Jews, and murderers. An early seventeenth-century Flemish painting took up the stridency of the Council of Trent (fig. 20). It seems to equate iconoclasm with murder while valorising the veneration of a living/painted Virgin Mary. Its size (109x140 cm) suggests that it was made for a church and to be venerated. It shows a framed painting of the adoration of the Virgin Mary and Child by the three Magi on the left, while from the right enters a man in a classical martial outfit with a turban to attack the painting. Another person tries to kill the iconoclast with an axe, while a third man restrains him. It is an episode in the legend surrounding the torturing to death of a converted Jew named Guillaume in 1322. Guillaume had converted to Christianity and served the count of Hainaut as a sergeant of his court. He was accused, however,

of the act we see in the painting. In this depiction, Guillaume seems to be threatening both the painting and the living Virgin with the tip of his spear on her jugular vein. We do not yet see the bleeding that ensued according to the legend. By equating the image of the Virgin and its veneration with the living Virgin and her adoration, the painter is emphasising precisely what Protestants abhorred about the veneration of images. This depiction was made at a time of a heightened sense of alarm about iconoclasm and the turban Guillaume wears is no accident. The inscription on a somewhat earlier engraving, after which the depiction is clearly modelled, points to the similarity between the bleeding of an image attacked by a Muslim (*Saracenum*) at Damascus and the bleeding of the painting attacked by the Jew Guillaume. The point the Flemish painter makes here is strident in its affirmation of the life of sacred images as well as in its damnation of the iconoclast Other.[172]

Painters in the Northern Netherlands who were keen defend their art, seem to have struggled with such identifications and tried to rise above the Catholic-Protestant binary. This section will discuss three such painters. Pieter Saenredam of Haarlem over his long career in the middle of the seventeenth century made many paintings of quite empty Protestant church interiors. In an early work of his we see a group of people lost in the empty space that St Bavo's Church in Haarlem had become after the iconoclasm of the 1560s (which in Haarlem was quite orderly). He is portraying the church not as a site of worship but as a historical site where a group of visitors are watching the traces history has left on the building once filled with statues and paintings, gazing up and around and drawing each other's attention to what they are seeing. Saenredam was in this period more of a local history buff than a Protestant, and he only became a full member of the Dutch Reformed Church at the age of fifty-four. The later work of Saenredam, too, contains many empty Protestant church interiors, and it was probably on the basis of such later works that the modern French thinker Roland Barthes reached the conclusion that "never has nothingness been so confident." Yet as Celeste Brusati argues, even Saenredam's later work seems to be less about erasing history and everything else in a sugar-coated celebration of iconoclasm, than about "an abiding commitment to the survival of art and its commemorative power."[173]

Angela Vanhaelen further argues that the work of Saenredam and other Dutch church interior painters in fact investigated the boundaries of possibility for the visual arts after iconoclasm and underlined "iconoclasm's always incomplete im-

172 Compare Martens, "Iconoclasmes."
173 Brusati, "Reforming Idols."

position of forgetfulness."[174] She points to some early and mid-career paintings by Saenredam in which images surreptitiously reappear amid the surrounding emptiness. In one painting a group of two men and a boy in Turkish dress examine the near-emptiness of the Buurkerk in Utrecht. The walls are only painted with a figure of Moses peering over his tablets with the Ten Commandments, which was the acknowledged shared heritage of Christianity and Islam, and in the foreground a graffiti-style picture of four men on a horse, with Saenredam's signature under it in the same style. The painting seems a subtle discourse on the limits of the proscription of images laid down in the Mosaic commandments.[175] Taken together, the clues in the painting might suggest that Muslims and radical Protestants went too far in their interpretation of the second commandment. More explicitly we find this argument some fifty years later with the Dutch Protestant minister Henricus Groenewegen who argued that the "Turks" misread the intent of the lawgiver by deeming the making of images of humans in a lifelike way proscribed altogether, rather than merely the depiction of God in such a way and the veneration of such images.[176]

Even more striking are the paintings by Saenredam and Emanuel de Witte, who flourished slightly later, in which paintings and statues of the pre-Reformation kind reappear in otherwise empty church interiors. One painting by Saenredam features a black funerary statue of a bishop in the middle of the whitewashed interior of St Bavo's Church in Haarlem, in another people pray to a crucifix in what Saenredam knew to be an empty niche in St Anthony's Chapel in the Church of St John at Utrecht.[177] In a painting of the same church by De Witte a mural of two saints with prominent gilded aureoles appears beside an empty niche and above a pile of cleaning tools (fig. 21).[178] It is possible that Saenredam and De Witte served Catholic patrons with these paintings, but they do not represent fully Catholic church interiors, which Saenredam was able to draw in 's-Hertogenbosch in the newly conquered southern part of the Dutch Republic and which De Witte also painted after his imagination. It seems, rather, that these paintings reflect

174 Vanhaelen, *Wake*, 10—1.

175 Vanhaelen, *Wake*, 10—1, 22—43.

176 Groenewegen, *Oefeningen*, 651.

177 Vanhaelen, *Wake*, 46—50; Brusati, "Reforming Idols," 49—51.

178 "View of the choir of St John's church in Utrecht from the nave," Fondation Custodia inv. no. 3551. See Wuestman ed., *Emanuel de Witte*, 153 (cat. no. VII).

on history and the limits of the visual arts in the light of widely varying interpretations of the second commandment.[179]

Most cryptic is De Witte's 1660 rendering of the Old Church in Amsterdam with the original image of Christ on the cloth held up to his face by Veronica appearing on a black funerary plaque appearing prominently in the centre of the painting. The popularity of this "true" image of Jesus culminated in the seventeenth century amid the Counter-Reformation, and its existence was seen to support the case for the making and use of images, just as the existence of the authentic images of the prophets in the chest of witnessing did for Dust Muhammad.[180] But De Witte placed his signature on the plaque under the image of the cloth with the face of Christ. The image is impossible in many ways: the church had been cleansed of such images, such images would not appear on funerary plaques in the place where the epitaph would be, and to inscribe one's name under it desecrated what would be a sacred image in a Catholic context. As Vanhaelen remarks, the act of placing the signature in such a way repeats the acts of iconoclasm that had gone before. It seems to be for this reason that a later owner had the signature painted over, and it came to light again only when the painting was cleaned in the mid-twentieth century. This image would have appealed to neither devout Catholics nor to devout Protestants, rather it insists on questioning and a sceptical attitude.[181]

From external evidence, too, it appears that both painters were sceptical of the authority of Protestant hardliners. As we saw Saenredam kept his distance from the official Church until the age of fifty-four and De Witte seems to have been sceptical of religious authority in quite a rowdy way. A biographical note written within thirty years of his death claimed that De Witte "often caused disputes and wrangles at gatherings, especially when the talk was of biblical matter, not eschewing obstructing that kind of [Bible-based] argumentation, and casting doubt on the grounds [of it], saying that at the age of fifteen his eyes had already been peeled." Moreover, although he was raised a Protestant, the children he had with his successive female partners were baptised in different denominations; initially a few Protestant, later a few Catholic.[182]

Such artistic scepticism of the Protestant hardline, combined with a reflection on the Judeo-Christo-Islamic tradition, we find elaborated in the 1678 treatise on

179 Vanhaelen, *Wake*, 44—66; Saenredam, watercolour *The choir screen of St John's Cathedral, 's-Hertogenbosch*, 1632, British Museum inv. no. 1883,0714.102, see the museum website; Wuestman ed., *Emanuel de Witte*, 154—5 (cat. nos. XVI, XXI).

180 Freedberg, *Power*, 205—12, 403.

181 Vanhaelen, *Wake*, 44—66.

182 Schwartz and Middelkoop, "Naar de kerk," 69; Van der Veen, "Emanuel de Witte."

painting by the painter Samuel van Hoogstraeten, who was a student of Rembrandt. Lamenting the precarious position of his art in the Dutch Republic, which he designated as "our Christian [i. e. Protestant] realm," he saw world history as an alteration of periods of flourishing and enforced neglect of painting and sculpture. He remarked that he was not sure whether the ancient Jews had the art of painting but that their abhorrence of sculpted images of deities was "in strict accordance with the law [*recht na de wet*]," and he likened them in this respect to the Germanic tribes of antiquity and the early Romans. In a curious passage he condemned the second Roman king Numa Pompilius' proscription of divine effigies as well as the claim of a direct personal link with the gods that he was able make because of that absence. Hoogstraeten then likened the practices of this Roman king to those the prophet Muhammad: "This trick of seducing the [common] people without images, the Arabic Muhammad has put into practice with no less success than any of his predecessors." Hoogstraeten also noted that the advocates of images perceived an evil role for Jewish and Muslim individuals in instigating and carrying out the iconoclasms in the Christian Eastern Roman empire in the eight century.[183] Thus he redrew the by then established lines somewhat, seeing Jews and Muslims as outside the circle of people he identified with, while aiming, it seems, to lump them with the part of the Protestant community that still frowned upon images in adhering to an overly strict reading of the Old Testament.

Conclusion

In both our worlds thinkers were very much concerned with the Platonic distinction between the image and what it represented. The question was how much credit one was to give to commoners for their ability to make this distinction. Those who were willing to give credit to people's capacities for making the distinction did not think it necessary to restrict the use of images very much spatially. Among these thinkers we find the surprising combination of Aquinas, who was otherwise very intolerant, and Jahangir, who was tolerant in many other respects as well. Other thinkers, however, drew the conclusion that images were not to be too easily accessible. At this point the Platonic distinction intersected with ideas about space. Placing could ensure that mages were unlikely to be worshipped, the uneducated had no access to certain ones, or access was restricted to those who were doomed anyway.

183 Hoogstraeten, *Inleyding*, 244—57; Brusati, "Reforming Idols," 49.

Tolerance for certain uses of images was in both worlds restricted to particular spaces and locations within those spaces. Also in both worlds these spatial restrictions revolved around a division between spaces for the community and spaces for the family (and by extension friends), or, for short, public and private spaces. To be sure, I am not speaking here of the post-Enlightenment public sphere as it has been theorised by Jürgen Habermas and theorists following in his footsteps, i. e. as a virtual community in which debate about societal matters takes place. Whatever the merits or demerits of that use of the phrase, I am talking here of a broader sense that life possessed both public and private attributes. Early modern, or, more generally, premodern, concepts of public and private rested on a distinction between inside the household and outside the household which was very much linked to ideas about what should be visible and what should be invisible.[184] There is much evidence that this distinction was made in both worlds throughout our period.

The way the public-private distinction played out in space came to be quite similar in (parts of) both worlds. The house was in general considered coterminous with the household, the ultimate marker of the private. We need think only of the Persian expression "what business for the *muhtasib* inside the house," or of the Catholics in the Dutch Republic simply refusing entry into their houses to law officers who wanted to check for evidence of collective Catholic worship.[185] There were, however, more and less public spaces in houses. Houses tended to have rooms for receiving and rooms only for the members of the household.[186] As we saw, Ghazali deemed a party with guests at a house a public occasion which gave rise to the duty to enforce sharia. We also saw that the predecessors of Firuz Shah Tughluq had deemed the private (*khalwat*) sections of their palace suitable for the painting of animate beings, but apparently not the sections for receiving the public.

The kinds of images that were frowned upon by the advocates of a strict enforcement of the divine proscriptions regarding images, still thrived in private spaces. The way that paintings on paper were kept in books and albums in the Persian world was in that sense linked to the relegation of Hindu imagery to Hindu spaces in a part of that world, and these ways of dealing with the presence of images were again similar to the way Catholic images were restricted to home-like situations in Zurich, Strasbourg, England, and the Dutch Republic. In both worlds we also saw remarkably similar instances of the two-step process of redefinition

184 Compare Kooi, *Calvinists and Catholics*, 95—6.
185 Kooi, *Calvinists and Catholics*, 119—22.
186 See e. g. Kooi, *Calvinists and Catholics*, 96.

and compensation. In India Hindu temples could be conceived of as churches through the payment of the *jizya* and in the Dutch Republic Catholic house churches would be seen as private houses upon payment of recognition money.

In this chapter we witnessed once more the clash between the strict and the flexible. We saw two well-publicised failures to move sacred images to a safe space in exchange for monetary compensation. The attempts of the Lady of Sonneveldt in Holland and the Hindu merchants of Isfahan had a similar outcome: they were blocked by hardliners. Against such hardliners, people in both worlds increasingly developed an appreciation of "art." This appreciation was anchored in a certain intransigence of artists, from the designers of figurative textiles in Iran to the painters of church interiors in the Dutch Republic. The defences written by Dust Muhammad and Samuel van Hoogstraeten were part of this development. Chapter 4 returns to the historical arc in the dynamic between the strict and the flexible.

3 Justifying Usury

Last night the jurist of the school was intoxicated and issued a *fatwa*
That wine is forbidden but better than taking possession of charitable trusts.
Hafiz[1]

Introduction

The Hebrew Bible had much to say about *neshekh,* or what we would now call interest, and about *tarbit,* or increase. While *neshekh* came to be translated by the Latin word *usura* in the Vulgate, the Quran built on the concept of increase through the term *riba* that shares the root of the Hebrew *tarbit/ribit.* However defined, *riba* and *usura* were by the start of our period generally seen as negative and damnable, as were related terms. In the Persian world the term *riba* was used in Islamic legal discourse in our period, but there were also more or less equivalent half and fully Persian neologisms in use, such as *ribakhwuri* (*riba*-eating) and *saudafizay* (gain-increasing). In continental northern Europe the Germanic term *wucher* (*wůcher, woekerie*, etc.) came to be seen around the beginning of our period as the equivalent of the Latin *usura*, but in English the Germanic *ocker* was replaced by the Romance *usury*, which carried all the technical connotations of canon law and learned discourse. While this chapter will attempt not to lose sight of the complexities of the trajectories of these concepts in the Latin and Persian worlds, we may start by pointing out the remarkable similarities in the discourses about *usura* and *riba* around the beginning of our period.

Two ethical-didactic poems by poets who were active around the same time in the early part of our period and both went on to achieve great fame provide some striking parallels. These are the *Khamsa* by Amir Khusrau of Delhi (completed 1299) and the *Divina Commedia* by Dante of Florence (written between 1308 and 1321). While the jurists of the day were construing *usura* and *riba* in all kinds of complicated ways, the implied definition in both these texts was simply lending at interest. The poems depict the usurer as on the way to hell and already in hell respectively, and both see him as not merely a sinner, but among the worst sinners, and try to explain why that was the case. Both also evince the idea that usury was a trade in time and that therefore it involved idle waiting rather than honest work, ideas that may have been somewhat common in both worlds.[2]

1 Hafiz, *Diwan*, 106—7 (no. 45).

2 For an analysis of this logic in European thought see: Le Goff, *La Bourse*, 35—49.

 https://doi.org/10.1515/9783111218014-006

Dante, who was ferocious in his condemnation of many forms of avarice,[3] invoked a work of Aristotle to say that art (human productivity) is the imitation of nature, and referred to the injunction in Genesis that man must earn his living "by the sweat of his brow" (3:19). He concluded that the usurer disdains both art and divinely instituted nature because he "puts his hope in something else," that is, he sits and waits till time delivers. In hell the former usurers are forced to use their once idle hands to ward off hot winds and hot sand. Amir Khusrau, in the witty treatise-like part of his *Khamsa* that is most explicitly concerned with ethics, depicted a rich (Muslim) usurer as speeding towards death month by month, while waiting for his returns to come in at the end of each. Of the different manifestations of avarice that Khusrau summed up, he described usury as the worst. He also made it clear that usurers should, like others who did not abide by sharia, fear for their afterlives. Rhetorically he asked, "are you not afraid that there is an end to you?" and "what will you answer on the day of reckoning?"[4]

The parallels between these two near contemporary poems lie in the vehemence of the condemnation, the conviction that hell is awaiting the usurer, and the sense they give of what the spirit of the proscription would be in the view of their authors. These two poetic images, however, each only represented one strand in the thinking about and defining of the problem of usury as we shall see in the discussions of the doctrinary stances, as well as in the many ways to render transgression acceptable. One way, incidentally, in which Khusrau's discussion differs from that of Dante is that it presents his verdict on a number of such ways that usurers employed. Chapter 4 will return to that aspect of Khusrau's discussion, after all the possible ways around the proscription have been reviewed in this chapter.

As is the case for the proscriptions of sodomy and images, there is a lively debate among modern historians about the effectiveness of the proscriptions of usury and *riba.* There are three basic positions that scholars have taken regarding periods and places within and around our two worlds. The positions are not necessarily mutually exclusive, and especially the third is found in combination with either of the first two, but I have arranged the secondary literature in this way to provide a preliminary overview.

The first position is that it was effective. This position has for instance recently been espoused by Graeber for the medieval Middle East and Central Asia, where with the coming of Islam the mercantile classes supposedly abandoned usury for risk-sharing partnerships. In this way, still according to Graeber, they built a gen-

3 Dante, *Divina Commedia,* Inferno: cantos 11 and 17. Goldthwaite, *Economy*, 585.

4 Amir Khusrau, *Matla' al-Anwar*, 261—5.

uinely free market based on trust rather than violence, and this was reflected in the thought of the Iranian thinkers Ghazali and Tusi, whose thought was taken up by Adam Smith in eighteenth-century Scotland. It must be noted that the studies that Graeber relies on in reaching this conclusion mostly cover the period before the one we are concerned with here, so that the evidence presented in this chapter cannot not directly contradict or confirm it. Rudi Matthee also suggests that the proscription was quite effective in seventeenth-century Iran. When historians suggest that the proscription of usury was to an extent effective in Europe it is mostly for the early part of our period and the century before.[5]

The second position is that the proscription was generally ineffective. To many economic historians of both regions it seems that theory and practice operated on different planes, and that the theory of the doctrines of usury and *riba* were quite irrelevant to economic activity in practice. The economic historian John Munro characterises this line of thought, which he opposes, with a quotation from Charles Kindleberger, according to whom, usury "belongs less to economic history than to the history of ideas".[6] For the Latin world this is nowadays very much the mainstream view among economic historians. For the Muslim world the idea that there was a disjunction between the theory of sharia and everyday practice in general has long been widely accepted among historians, but it is now hotly contested among researchers of sharia in history.[7] For South Asia, and for usury specifically, this point has been made by Tapan Raychaudhuri, who, in the context of lending by the Mughal state (which will be discussed at length below), remarks on "the total absence of any religious scruples even in the reign of Aurangzeb, despite the very clear injunctions in Islam prohibiting usury."[8]

A third position, to which I subscribe on the basis of the many cases presented in the body of this chapter, is that the proscription was effective in so far that those wanting to engage in credit relations were forced to invest considerable energy in circumventing, creating exceptions, and compensating in the face of the proscription of usury. As the economic historian Richard Goldthwaite writes in the context of fourteenth-century Florence: "bankers – and others – had no difficulty in circumventing the usury restriction, but at what cost?"[9] A number of economic and legal historians, most notably Raymond de Roover, Goldthwaite, and Munro

5 Graeber, *Debt*, 275—6, 282, 303; Matthee, "Merchants." For an overview of the debate on the effectiveness in Europe see Tan, "Empty Shell."

6 Munro, "Origins," 506.

7 See Gerber, *State, Society, and Law*, 1—2 and passim.

8 Raychaudhuri, "Inland Trade," 347.

9 Goldthwaite, *Economy*, 411.

for Europe, Irfan Habib for India and Janet Abu-Lughod,[10] Haim Gerber, and Timur Kuran[11] for the region in between, have profitably explored the connections between the usury/*riba* doctrines and economic practice, as I also intend to do here.

Remarkably, David Graeber also espouses this third position for the case of Europe. In his view, Europe after the start of its "commercial revolution" in the twelfth century represented a complete contrast to the (earlier) medieval Muslim world. He argues that, in contrast to the respectable trust-based markets of the Muslim world, in Europe commerce was disdained and tied up with violence. Whereas in the Muslim world legal loopholes were hardly used to circumvent the proscription of usury, in medieval Europe they were on a considerable scale. Moreover, the laws on this point did "move in two directions simultaneously." While I have my doubts about the image Graeber presents of the early Muslim world, I quite agree with his description of the Latin world after 1100 and will elaborate the dialectic that pulled the law in two directions in the next chapter.[12]

Among the espousers of position three, there is a further debate worth mentioning here. This is the controversy between historians who see a certain society-wide coming to terms with the proscription as initiated by the guardians of divine law (Satoe Horii, Giacomo Todeschini) and those who see it as initiated by economic agents (Joseph Schacht, De Roover), which would have implications for whether one might construe this coming to terms as *written into*, and therefore part of, divine law or as a series of loopholes puncturing *through* divine law. Wherever the initiative lay, the extent to which the guardians of divine law were willing to accommodate market parties on the topic of usury assumes importance in a comparison with their stances on sodomy.

Related to the debate about the efficacy of the proscriptions of usury and *riba* is another about the role for non-Christians and non-Muslims in the financial sector in both regions. Those historians who see the Christian and Islamic proscriptions as partly effective also tend to see a greater role for such groups, and this is also what lends the debate over the efficacy of the proscriptions its acrimony, because the historical relations between Jews and Christians in Europe and be-

10 For the Middle East around 1300 Abu-Lughod points to some constructions used for disguising interest but also harks back to the argument discussed in the last paragraph with the phrase "discrepancies between law and practice." Abu-Lughod, *Before European Hegemony*, 218—24.

11 For the Middle East (at times including Iran but with a strong focus on the Ottoman empire), Kuran argues – against what he sees as simplistic claims that the prohibition of *riba* caused economic stagnation – that the prohibition was to an extent compartmentalised in the sphere of theory and to another circumvented, but that it also did have a very minor practical impact. *Long Divergence*, 143—56, 292.

12 Graeber, *Debt*, 289—91, 445 n.70, 448 n.130.

tween Muslims and non-Muslims in Iran and especially India are sensitive topics. The proportion and importance of Jewish involvement in the credit market in different parts of Europe, in particular, has been the subject of much acrimonious debate in the light of the sinister uses of the developing stereotypes of Jews as usurers and, later, as capitalist exploiters. Some of the vast literature on the economic and social position of Jews in Europe and on anti-Semitism emphasises the dialectic over this period of the forces pushing Jews into the lending trade through their exclusion from guilds, professions, and land-ownership and the pressure of worldly rulers who stood to gain from levies on the Jews on the one hand, and the increasing hatred against the Jews on the other.[13] Yet, another part of this literature stresses the point that the Christian discourses about Jews, in which greed played a role besides murderousness, carnality, literalism, mendacity etc., were self-perpetuating and set in a context of anxieties and tensions among Christians, and had little to do with the economic role of real Jews.[14] For South Asia, Irfan Habib has drawn attention to the role of Hindu and Jain moneylenders in the face of the Islamic proscription, and with respect to Safavid Iran Rudi Matthee has done the same for the role of Jews and Indians.[15] Yet it is clear that many Christians and Muslims also engaged in the activity of lending at interest, and it is with them that we are mostly concerned here. The non-Christian and non-Muslim lenders only concern us insofar as Christians and Muslims sought to regulate and justify their lending roles within nominally Christian and Muslim polities.

A Short History of Definition and Enforcement in the Persian World

Riba had been discussed in four passages in the Quran, one of which (4: 161) explicitly referred to the older Jewish proscription as unjustly unheeded.[16] Besides that, up to eighty relevant Traditions about Muhammad and his Companions were to be

13 For variations of this narrative see Neumann, *Geschichte*, 292—347 (in particular 329); Attali, *Juifs*, 230—369; Kerridge, *Usury*, 20—1; Graeber, *Debt*, 287—90.

14 For a recent and forceful statement of this position see Nirenberg, *Anti-Judaism*, 1—12, 246—99. Todeschini cites some literature that criticises the view that Jews everywhere in Europe specialised in lending from the High Middle Ages. "Usury," 121.

15 Habib, "Usury," 407; Matthee, "Merchants." For the role of Indian merchants in lending in seventeenth-century Iran see also Dale, *Indian Merchants*, 70—4.

16 The other passages are 2: 275—9; 3: 130; 30: 39. See Nomani, "Interpretative Debate."

found in the most authoritative Sunni collections,[17] and two Traditions about Muhammad and at least twelve Reports about the Imams in authoritative Shi'i collections.[18] Two of the quranic verses spoke of *riba* as something that is "eaten," which seems to have given rise to the Persian *riba-khwur* "*riba*-eater" for the person and *riba-khwuri* for the practice (although it must be noted that the suffix *khwur* is used in Persian for the practitioners of many more things). The Quran, however, did not itself clearly define *riba*, nor did the Shi'i Traditions and Reports. Some of the Sunni Traditions did provide more of a handle. Nevertheless, one Tradition attributed to the Companion of Muhammad, and later caliph, Umar had it that, "there are three things I wished that the Prophet (may peace be upon him) would not leave us until he explained them fully to our satisfaction: [the inheritance share of] the grandfather, [the execution of the estate of] one who leaves no descendants or ascendants as heirs, and the details of usury."[19]

In juridical treatises and collections of rulings, the question of *riba* came, before our period, to be subsumed under the heading of sales or market transactions (*buyu'*). Marghinani, in his *The Guidance*, saw *riba* as an illegal excess accruing to one of the parties in a contract. Such an excess could be constituted either by an inequality of the quantities involved in an exchange of goods, or by a time-lag in the exchange. Necessary conditions were, according to Marghinani, that the goods exchanged were of the same kind and/or were both to be measured either by weight or volume. Which goods were to be measured by weight or volume was determined by what Muhammad had established in this regard: wheat, barley, dates, and salt for instance were to be measured by volume and gold and silver by weight. If both conditions (same species or same legal mode of measuring by volume or weight) were present neither an inequality of quantity or a suspension of payment was legal. If only one of these conditions was present, an inequality of quantity might be introduced but not a time lapse. Thus the concern with time lapse was paramount, and Marghinani cited a Tradition about Muhammad in which he encouraged transactions "from hand to hand," i. e. on the spot. Marghinani's very formal and precise definition left ample scope for transactions not to be considered *riba.*

17 That is what a search for "usury" on sunnah.com yields; there is some overlap between a number of these.

18 A search on www.hadith.net yields ten Traditions and Reports, to which I added the four Reports cited by Faiz Kashani that are discussed below and which the modern editors of his work have also traced to authoritative collections.

19 www.hadithcollection.com: Abu Dawud, book 20, drinks. Translation as there with some additions in brackets.

Amid the long formalist exposition on all possible scenarios, Marghinani also briefly delved into the fraught question of why *riba* was forbidden. He noted that (according to Shaybani) the *'illa* or operative cause of the proscription was the safeguarding of integrity and honour. At a still deeper level, the *maslaha*s or general goods served by the proscription were the preservation of person and property. At the end of the discussion, Marghinani noted that the proscription did not apply to transactions between a Muslims and an enemy (*harbi*) in the *dar al-harb*, or land of the enemies of Islam. It did, however, apply to transactions between a Muslim and a protected non-Muslim (*musta'min*), because the property of the protected person was to be safeguarded.[20]

As the Hanafi tradition was cumulative, with a strong emphasis on what the three founding fathers of the school had said,[21] the way *riba* was defined in a dedicated section in the chapter on permissible (*mujauwaz*) and impermissible (*la-mujauwaz*) sales in the book on sales in the *Alamgirian Rulings* did not significantly diverge from Marghinani, although some points were refined with reference to juridical scholarship of the intervening centuries. Just as *The Guidance*, the *Alamgirian Rulings* discussed *riba* transactions in the *dar al-harb*, citing some opinions on transactions between a Muslim and an enemy, a Muslim and a recent convert to Islam, or between two recent converts to Islam. There is no discussion in this section, however, of transactions between Muslims and non-Muslims in the *dar al-Islam*, which would have applied to the realm of the Mughal emperor at whose behest the compilation was created.[22]

The *Alamgirian Rulings* did, however, add one important emphasis right at the start, namely that *riba* could only arise in an exchange of property (*mal*) for property, that is to say: there had to be a transfer of ownership. The general treatment of loans was relegated to a separate chapter on *qarz*, i. e. loans in which the thing lent is used up and an equivalent returned – as was generally the case with loans of money (in which the lent coins were replaced by different coins). There it was emphasised that *qarz* loans were not supposed to involve a transfer of ownership.[23]

However, the separation of the issue of *riba* from the discussion of lending that the *Alamgirian Rulings* seems to have sought had to remain incomplete. In the section on *riba* there is only one indication that it was often understood as linked to

20 Marghinani, *Hidaya*, (Arabic) 3:60—6, (trans. Hamilton) 289—93.

21 See Hallaq, *Sharī'a*, 214.

22 Shaikh Nizam et al., *Fatawa*, (Arabic) 3: 160—6, (Urdu) 4: 370—6, (Baillie, *Law of Sale*) 163—73.

23 Shaikh Nizam et al., *Fatawa*, (Arabic) 3: 160, 260—1, (Urdu) 4: 370, 471, (Baillie, *Law of Sale*) 163, 289—90.

lending. This is a remark that there is no *riba* between a master and his slave but that the master should not plunge his slave into more than moderate debt (or a debt that was higher than the slave's worth).[24] But the chapter on *qarz* turns up many implicit references if read against the grain. First of all, the chapter had remained part of the book on sales, despite the declaration that *qarz* did not involve a transfer of ownership. Further, the compilers refer to a remark by Shaybani, one of the two main disciples of Abu Hanifa, that the latter had classified all *qarz* lending at interest (*nafʿat*) as discouraged. This remark is followed by a discussion of the limits of this statement, and whether it only applied to cases where the gain (*manfaʿat*) was an express stipulation of the loan. The paragraph concludes that a present might be accepted from a borrower if it was clear that the present was given out of friendship or in order to cement the relationship. Repayment by the debtor in things better than those lent was also lawful, but need not be accepted by the creditor (the discussion taking the perspective that the lender had to watch out for the sake of his own afterlife). A very small excess in the return of between one-sixth or half a dirham per 100 dirhams (depending on the authority) was also allowed. The term *riba* is remarkably absent from this whole discussion, but the objections and counterobjections of the authorities cited in it are quite impossible to explain without reference to the concept.[25]

In this way, the concept of *riba* also entered into Hanafi discussions of more complex economic transactions than sales and loans. A case in point are the discussions of the important instrument of *muzaraba*, or profit-sharing investment. By the start of the period the majority of the legal schools had come to consider this as a form of partnership, and *ipso facto* permissible, but the Hanafi school did not regard it as such and its jurists resorted to more complex justifications.[26] Marghinani sought the ground for the permissibility of this instrument in the principle of convenience, since it was a win-win situation when a man with property and no business sense and a man with a good sense for business and no property joined forces.[27]

Among Shiʿi jurists of the thirteenth and fourteenth centuries, the definition seems to have developed along similar lines, but in the later part of our period, when both Usulis and Akhbaris came to reject Traditions about Muhammad that were not sanctioned by the Imams, the situation seems to have become more complex, even though the great jurists of the thirteenth and fourteenth century contin-

24 The latter is the interpretation of the Urdu translators. Shaikh Nizam et al., *Fatawa*, (Urdu) 4: 376.

25 Shaikh Nizam et al., *Fatawa*, (Arabic) 3: 262—3, (Urdu) 4: 473—4, (Baillie, *Law of Sale*) 291—2.

26 Hallaq, *Sharīʿa*, 254.

27 Marghinani, *Hidaya*, (trans. Hamilton) 579.

ued to be cited.[28] The seventeenth-century Akhbari Faiz Kashani, for instance, left delay out of his definition as a constituting factor of *riba*, so that only increase was left. The conditions of same kind and same way of measuring quantity he did seem to recognise, however, adding that there was a debate among Shi'i jurists whether things that were counted piece by piece (as opposed to weighed or measured by volume) were also subject to the proscription. In typical Akhbari fashion he suggested caution in such cases. In the end, his definition encompassed an increase paid in money over an amount of money as much as the Hanafi definitions. As we will see in the section on circumvention, what we now call lending at interest remained a primary connotation of the term *riba* also for Faiz.[29]

Moreover, outside the "juridical field,"[30] the concept of *riba* seems to have continued to denote interest exclusively, regardless of the efforts by some jurists to relegate *riba* to the realm of sales. As we have seen, *riba* clearly denoted interest in Amir Khusrau's literary presentation of ethics. Also much later, by the mid-seventeenth century, a Persian dictionary written at the Shi'i court of Golconda by an Iranian author plainly stated that *riba* was how "in Arabic they call gain [*sud*] and interest [*naf'*] from money." This latter perspective might be inflected to the definitions of Shi'i jurists, but may also reflect a much more broadly shared understanding, as a dictionary should.[31]

Our picture of the extent to which governing bodies in the Persian world sought to enforce the proscription is more episodic than that for Europe. At the start of the period we see Nizami, whose *zuhd* or strictness was respected by contemporary rulers as we saw, addressing himself indirectly to such a ruler on the topic. In a story in his *Khamsa* he had a wise minister say: "Don't practice usury [*riba*], listen to the advice [telling] what the hare did to the usurer-lion [*sher-i ribakhwur*]!" Thus Nizami commended the monarchs of his day to not practice usury themselves (but not to enforce the proscription among their subjects).[32] A century later Amir Khusrau, who moved in the ambit of the Delhi sultans, condemned the practice more vehemently and at greater length, which suggests that there was a greater concern about the issue in Delhi around the turn of the fourteenth century than there was in Azerbaijan a century earlier. But he seems to have called for self-restraint in the face of afterlife enforcement rather than enforcement by rulers.

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28 Compare Nomani, "Interpretative Debate."

29 Kashani, *Mahajjat*, (Arabic text) 3: 159—61, (Persian translation) 142—3.

30 Bourdieu, "Force of Law."

31 I have not been able to ascertain the denomination of the author, but his middle name Husain suggests that he was likely Shi'i. Tabrizi, *Burhan-i Qati'* s.v. *riba*.

32 Van Ruymbeke, "Khusraw learns," 153, 157—8.

In 1299, the same year Khusrau completed his *Khamsa*, Iran saw a dramatic episode of enforcement. The newly converted Mongol ruler Ghazan Khan issued another of his *yarligh* ordinances to "strengthen the sharia of the Prophet and lead the people from the labyrinth of error to the straight path of guidance," this one to ban lending money for gain (*zar ba sud dadan*). In his lengthy description of the reasons for the measure and its effects, Rashid al-Din used the term *riba* simply to denote what we now know as interest. According to Rashid al-Din, Ghazan saw it as obligatory to enforce the shariatic proscription. He was also convinced of the need to ban this sort of lending in view of the iniquities it caused by itself as well as by enabling corruption among officials. Rashid al-Din suggested that after an initial period of objections and non-compliance (see below) the practice did diminish in the realm. [33]

In later centuries in Iran, pious wishes can be detected at the Safavid court, but it is unclear to what extent they were enforced. Under Shah Abbas I, one of the quranic verses – "O you who have believed, do not consume usury, doubled and multiplied" (3:130) – was deemed relevant enough to include in the decorative programme of an extension to the Safavid dynastic shrine. This quranic verse is inscribed on the main doorframe above which a foundational inscription in the name of Shah Abbas I declares the programme for his reign, which included restraining excess (*al-taghiyan*). If we recall from Chapter 1 the injunction against boys serving men in the baths that Shah Tahmasp had inscribed at the shrine, it seems that a pattern was set in which the Safavids saw this shrine as a stage to proclaim their adherence to sharia.[34] French merchant-travellers of the second half of the seventeenth century suggested that Shah Abbas had not been letting Indian merchants settle in his realm partly because of their practicing usury. There is, however, no direct confirmation of this suggestion in sources contemporary to Shah Abbas. It does seem that the great influx of Indian merchants into Iran only started after his death.[35]

There is, by contrast, some evidence that lenders in Iran as well as India had the full support of the government in enforcing their contracts. Both a European travelogue and a treatise by a Shi'i scholar who was critical of the society of his day report that officials in seventeenth-century Iran backed the financial claims by Indians lending at interest.[36] Also in the Delhi sultanate and Mughal India cred-

33 Rashid al-Din, *Jami' al-Tawarikh*, 2: 1325—36.

34 Compare Rizvi, *Safavid Dynastic Shrine*, 208—9 and passim.

35 Tavernier, *Les Six Voyages*, 1: 527; Chardin, *Voyages*, 6: 164; Matthee, "Merchants" and *Politics of Trade*.

36 Tavernier, *Les Six Voyages*, 1: 528; Ja'fariyan, *Din wa Siyasat*, 353.

itors seem to have had the full backing of the state to enforce their loans, although it is not clear if that also went for any *riba* they might have charged.[37]

It was precisely because creditors often needed recourse to the courts that their contracts had to be enforceable. In order to establish the this-worldly effectiveness of contracts jurists had developed a whole set of terms parallel to the five main normative terms (forbidden, discouraged, neutral, recommended, permitted). These determinations of validity included on the enforceable side: *sahih* (valid or sound) and *ja'iz* or *mujauwaz* (permissible). On the non-enforceable side were *batil* (invalid or void), *fasid* (irregular), and *ja'iz nist* or *la-mujauwaz* (impermissible).[38] Whereas discussions of sodomy were largely in terms of *halal* and *haram*, in discussions of idolatry and the use of images we saw the use of the term *ja'iz* come up a few times. In the present chapter we will see the full array of legal vocabulary on display.

It was not only with respect to the terms relating to enforceability that Hanafi jurists treated commercial exchanges differently from other domains regulated by sharia. Already by the start of our period, Hanafi jurists and lay people seem to have considered *mu'amalat*, "transactions" or "reciprocal acts," a domain to which individuals were allowed to apply more reasoning on the basis of ethical principles than to other domains. There are some examples of this below. A related distinction was that between a domain governed by "the rights of God" and a domain governed by the rights of individual people. Jurists who worked with the latter distinction seem to have subsumed the interpersonal transactions under the "rights of individuals."[39] Reference to such rights of individuals further enhanced the options for case-by-case judgement, as well will see in one case.

Circumvention in the Persian World

A division of minds seems to have taken place during the formative period of the legal schools about whether motive could invalidate a sales contract. The question was whether a sale or a series of sales that were externally sound should be considered legal even if the intention was to use these sales contracts to evade the proscription of usury. While for the majority of the schools intent was the guiding principle in evaluating contracts, the Hanafi school came to differ in that it did

37 For the Delhi sultanate see the discussion of Muhammad bin Tughluq below. For Mughal India see Raychaudhuri, "Inland Trade," 347 and Geleynssen, *Remonstrantie*, 52.

38 Compare Katz, *Wives and Work*, 18.

39 Compare Johansen, *Contingency*, 34, 60, 424.

not see the supremacy of intent as universal. The legal historian Hallaq sketches a scale on which the Hanbali school attached the greatest importance to intention in contracts, followed by the Malikis and the Shafi'is and finally the Hanafis, who attached the least importance but certainly not none, for which reason Hallaq calls them "quasi-formalist."[40]

In conjunction with their stronger emphasis on form the Hanafis allowed certain "ways" around established proscriptions known as *hila* (literally: device or stratagem, or in ordinary Persian usage: trick) or *makhraj* (exit) that members of other schools explicitly condemned. It is necessary to say something in general about the Hanafi "ways" here because, whether or not they were explicitly designated as *hila* or *makhraj*, they seem to have played a role in the credit market of our period. In fact, such a large part of *hila*s were concerned with economic transactions in general that the scholar of Islamic law Joseph Schacht has suggested that they were first invented by "practitioners of commerce" rather than jurists.[41]

*Hila*s were a subject of controversy already at the time, and their prevalence (or not) is still the subject of controversy among researchers of Islamic law. This is reflected in the amount of attention scholars give the subject. While Schacht, writing in the mid-twentieth century and now sometimes seen as a typical Orientalist, devotes much attention to the phenomenon of *hila*s, the revisionist Hallaq does not even mention it in his more recent *Sharī'a: Theory, Practice, Transformations* which represents sharia as a flexible grassroots system.[42] The scholar of Islamic law Satoe Horii offers a new perspective and a kinder view than some of the Western scholars of the older generation. He suggests that, while one of the disciples of Abu Hanifa, Abu Yusuf, had allowed for a measure of opportunism in the use of *hila*s, the other disciple of Abu Hanifa, Muhammad Shaybani, allowed *hila*s only in so far as they created escapes for those facing oppression from too strict an interpretation of sharia. Shaybani's view came to predominate in the Hanafi school, so that by the start of our period *hila*s functioned as a way to avoid evil consequences and promote the greater good. The "formalism" in the Hanafi approach to *hila*s was therefore, in Horii's view, backed-up by a deeper sense of the purpose of the law among the majority of Hanafis.[43] As such, *hila*s fall somewhere in between circumvention and exception in our four-fold scheme. More precisely, I would say a *hila* constitutes a circumvention with some features of an exception.

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40 Hallaq, *Sharī'a*, 240—1; Horii, "Reconsideration," 346—7; Khan, "Mohammedan Laws," 234—6.
41 Horii, "Reconsideration," 314—5.
42 Hallaq does discuss the (moderately negative) view of one fourteenth-century Andalusian Maliki jurist on *hila* in his earlier *History of Islamic Legal Theories*, 173, 185–7.
43 Horii, "Reconsideration," 313, 357.

Indeed, as we will see in some examples below, Hanafis often brought "necessity" as an argument, but rather than allow manifest transgression in cases of need, they insisted on staying within the law through *hila*s. Here is how the fourteenth-century Syrian Hanbali jurist Ibn Qayyim al-Jawziyya represented Hanafi reasoning:

> … Similarly, a person may be under dire necessity, and he may not find somebody to lend to him without interest: the legal tricks to circumvent the law of usury will be a way out from the hardship. If he does not take the way out he and his family will be lost. God cannot have intended such a law: and His shari'at which applies to all men cannot intend to create such a hardship. Thus there are here only three alternatives, of which one must be adopted: the person either shall ruin [lose] himself and his family, or take a loan on usury openly, or do the legal trick to evade the law of usury.[44]

The latter was what the Hanafis preferred.

Yet over and above such consequentialist reasoning regarding good outcomes in cases of need, a further ground for the justification of *hila*s was found in the aspiration[45] by their users to conform. It seems as if many Hanafi jurists distinguished two levels of intention: the intention to do something forbidden by sharia, and the aspirational intention to recognise sharia. Both disciples of Abu Hanifa made statements regarding this intention to recognise sharia in the use of *hila*s, and these statements continued to be cited in our period. Shaybani repeatedly spoke of people who sought to "escape from what is forbidden and to enter what is permitted,"[46] and Abu Yusuf said about a certain *hila* for *riba* that it "is allowable and deserving of heavenly reward. The parties to the transactions deserve the heavenly reward because of flying from what is prohibited."[47]

Qazi Khan offered a number of *hila*s to present a loan in the form of a sale or series of sales. The simplest was for A to sell B an article for 100 dirhams and to buy it back for 120, which would result in A paying B 100 dirhams and getting a claim against B for 120 dirhams. Another was for B to sell an article on credit to A, who would sell it for less to C who would sell it for the same lower price to B, so that in the end A received the lower amount and owed B the higher amount. In support of the latter *hila*, Qazi Khan cited both Shaybani and Abu Yusuf with his statement about flying from the prohibited.[48]

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44 Quoted in Khan, "Mohammedan Laws," 239. Translation as there.

45 On law as aspiration see Pirie, *Anthropology*, 158—87.

46 Quoted in Horii, "Reconsideration," 318. Translation slightly modified.

47 Khan, "Mohammedan Laws," 242. Translated quotation as there.

48 Khan, "Mohammedan Laws," 242.

We have evidence that giving a loan the form of a sale was not confined to prescriptive texts from Rashid al-Din's description of Ghazan Khan's clampdown on usury in Iran. As his chronicle has it, "some people in whose hearts the lust for *riba* had remained, gave some goods in loan at an inflated price on this *hilat* that 'it is a transaction and a sale [*mu'amalat wa bai'*] and it does not have the form of usury [*surat-i riba*]'." This seems to be a *hila* model in which the borrower/buyer obtained a good from the creditor/seller to sell in the marketplace to have funds available and would pay the seller/creditor a higher price for that good at a later date. However, some of the creditors came to the *diwan* or revenue officer, apparently to seek his aid in obtaining their payment, and the *diwan* was able to ascertain the real conditions. When Ghazan heard of this, he was reportedly enraged by what he called "such tricks and circumventions [*hil wa tazwirat*]."[49]

By the end of our period, the *Alamgirian Rulings* put more stress on the element of necessity in such transactions. It presented the type of transaction outlined in the last paragraph in the following scenario:

> A needy person comes to another person and asks for a loan of 10 dirhems; the lender does not want to give a loan because of the greed of getting more, which he would not get in the case of a loan; thus he says to him: 'I cannot afford lending; but I sell you this garment, if you please, for 12 dirhems, although its price in the market is 10 dirhems, so that you would be able to sell it for 10 dirhems in the market.' The borrower agrees, and the lender sells the garment to him for 12 dirhems; and then the borrower sells it in the market for 10 dirhems, so that the lender gets a 'profit' of 2 dirhems from this 'business,' and the borrower gets a loan of 10.

Noting that there was a difference of opinion among the authors about exactly which constructions in this genre were forbidden, the *Alamgirian Rulings* presented this scenario as an option in the section about discouraged sales, and with that left it up to the involved to decide, while also noting that Abu Yusuf deemed such constructions permissible (*ja'izat*) and their users deserving of the heavenly reward.[50]

Regarding the usufruct of real property given as security (*rahn*) for loans, the *Alamgirian Rulings* was also ambiguous. In two places it presented a construction adding an *'ariyat* (i. e. a loan of a specific item that amounted to the gift of its usufruct) on top of the security. In the section on *qarz* loans, the text cited one authority who deemed this construction discouraged even though it was reported to have been allowed by Shaybani. In its "book of *hila*s," however, the *Alamgirian Rulings*

49 Rashid al-Din, *Jami' al-Tawarikh*, 2: 1335—6.

50 Shaikh Nizam et al., *Fatawa*, (Arabic) 3: 268—9, (Urdu) 4:479, (Baillie, *Law of Sale*) 300—1; Khan, "Mohammedan Laws," 242 (translation of the quotation as there).

presented the same construction as rendering the usufruct lawful (*tab*). It must be noted that in the latter discussion there is no mention of *qarz*, and in theory a security could also be given for other transactions than *qarz* loans.[51]

One *hila* that seems to have been used on some scale was that of the *bai'-i ja'iz* or "revocable sale,"[52] also known as *bai' bi'l-wafa* or *bai' al-wafa*, "sale on trust," or as *bai' al-mu'amalat*, "transaction sale."[53] In all of these, a person in need of cash would sell a piece of real estate to another on the understanding that he would get it back by repaying the paid sum. There seem to have been two main types, one in which the buyer of the real estate/lender of the money would temporarily have the usufruct of the real estate, be it rent from tenants or the harvest, and another type in which the seller/borrower would temporarily lease the real estate back from the purchaser/lender. These constructions were quite controversial even within the Hanafi school. Yet by the end of our period a comprehensive text like the *Alamgirian Rulings* had to accommodate both sides of the debate, even though the compilers clearly leant to the side of opposition in starting their discussion with a stern statement that "the sale that is in customary use among the people of our time as a *hila* for *riba*, by the name of *bai' al-wafa'*, is in truth a *rahn*." Nevertheless, the compilers of that work seem to have regarded the construction as discouraged rather than forbidden.[54]

It is unclear when exactly the device was first invented, but it was mentioned by jurists in Central Asia as early as the late twelfth century. By the middle of the thirteenth century Abu'l-Fath Samarqandi, grandson of Marghinani,[55] noted in his work on procedure in civil cases:

> We have legalized the sale because of the need of the people, especially in our countries; because of the need, the people of Balkh have legalized by making it a custom, 'the loan and the hire of the vineyard,' although, as it is well known,

51 Shaikh Nizam et al., *Fatawa,* (Arabic) 3: 264, 6: 606, (Urdu) 4: 474, 10:351.

52 *Bai'-yi ja'iz* could also be translated as "permissible sale," but I am taking *ja'iz* here as opposed to *lazim*, i. e. non-binding vs. binding (See Hallaq, *Sharī'a*, 245, 247). Thus the *Alamgirian Rulings* noted on the authority of Qazi Khan that *bai' al-ja'iz* was used in the sense of *bai' ghair al-lazim*, i. e. the opposite of binding. Shaikh Nizam et al., *Fatawa*, (Arabic) 3: 269. Fitrat and Sergeev in their glossary to some documents from Samarqand (see below) also translate the term as "inconclusive (conditional, fictitious) sale." *Kaziiskie Dokumenty,* 68.

53 Shaikh Nizam et al., *Fatawa,* (Arabic) 3: 270, (Urdu) 4: 480, (Baillie, *Law of Sale*) 303.

54 Shaikh Nizam et al., *Fatawa*, (Arabic) 3: 269, (Urdu) 4:479, (Baillie, *Law of Sale*) 301. The *makruh* is suggested by the chapter title.

55 See Heffening, "al-Marghīnānī."

> the hire of the vineyard is not allowed. And the people of Bukhara have legalized by making it a custom, 'the long lease of the vineyard,' the lease of the vineyard being prohibited, they could only give the lease by making a sale, viz. the Bai-bil-wafa of the vineyard.[56]

In a volume of legal deeds done at the Samarqand qazi office in the late sixteenth century there are two documents that are explicitly about a *bai'-i ja'iz*. The recorded transactions both involve the same buyer/lender, an alim called Kamal al-Din, and are around half a year apart.[57] Both may be summarised as follows: so and so attested in accordance with sharia that he had made a *bai'-i ja'iz* of such and such property to Kamal al-Din for such and such sum of money, and after the transfer of the property so-and-so leased the said property from Kamal al-Din for such and such amount per day. In both cases the temporarily sold property was an income-generating real property: shops in the first case and a part of a caravanserai in the second.[58] Remarkable is the phrase that connects the two parts of the transaction in the documents: "and after the receipt and relinquishing and the lifting of the shariatic obstacles [*raf'-i mawani'-i shar'iya*], I have taken in lease this aforementioned sold entity." This phrase seems to spell out the intention with which the document was drawn up, suggesting that the whole official relinquishing of the property was done only in order to lift the obstacles that sharia put in the way. That the relinquishing of the property was only temporary is not spelled out, but this is explicit enough in the designation of the transaction as a *bai'-i ja'iz*. We may perhaps attribute the high level of awareness of the requirements of sharia borne out by these documents to the fact that the buyer/lender was an alim, who was also the son of an alim and recognised in the document with the title *Faza'il-Ma'ab* or "Repository of Learning/Virtue."

The same insistence on form we find about a decade later in the manual for drafting correspondence and legal documents compiled in the Mughal empire by a mid-level administrator nicknamed "Namakin," or "The salty one," who hailed from a Shi'i lineage of Khurasan. The model legal documents he provided seem to be based on what he encountered in his practice as administrator in the Hanafi context of the Mughal empire, but he may also have added elements himself. With regard to what he called for short a *wafa*, or, in full, a "shariatic revocable sale-

56 Quoted in Khan, "Mohammedan Laws," 243.

57 Attestations of *bai'-i ja'iz* dated 29.10.997 AH/10.9.1589 CE and 12.4.998 AH/18.2.1590 CE in Fitrat and Sergeev, eds., *Kaziiskie dokumenty*, 14 (docs. 8, 9).

58 NB: the documents claim that the sellers were fully entitled to dispose of their possessions and with that suggest that the properties in question were fully in their possession, but in the second case the land on which the sold entity stood appears to have been leased from a *waqf* or foundation.

cum-partnership by way of trust and confidence [*bai‘ wa shirk-i ja’iz-i shar‘i ‘ala sabil al-wafa wa al-wasiqat*]," he too emphasised that, first, the sale had to be completed by a transfer of possession and occupancy rights, and only then other stipulations in the form of promises could be invoked. It could be promised for instance that the sale would be cancelled on repayment of the advanced sum and that the proceeds (*intifa‘*) of the property would accrue to the buyer while it remained at the disposal of the seller.[59] The model contract that Namakin provided was in line with what Qazi Khan already laid down, namely that the sale and the pledge of cancellation upon repayment should be procedurally separated: first the sale without any condition and then a mutual promise regarding the option of cancellation. Otherwise, it could not be regarded as a sale.[60] Namakin's model contract therefore emphasised in two places that the first part of the transaction was in accordance with sharia. The same is true for other documents made up for transactions that bordered on usury in Namakin's collection. The sample documents regarding *muzaraba* (silent partnership), *‘ariyat* (use of usufruct), *muzara‘at*, and the acceptance of a gift all mention how shariatically sound (*sahih*) or just shariatic the procedure they outline is, just as the documents discussed in the last paragraph do.[61] One would almost say that the more the adjectives *sahih* and *shar‘i* or the combination of them were used the more suspicious the transaction might have seemed. It was apparently important for qazis and *munshi*s (document-makers) to cast suspect transactions into recognised forms. Namakin seized on two well-established forms to justify lending in return for usufruct, namely the sale and the partnership.

Perhaps under Hanafi influence, some Shi‘i jurists in the Safavid realm too came to approve of *hila*s, and increasingly so towards the end of our period. While pointing out that the fourteenth-century "First Martyr" among the Shi‘i scholars had refused to approve the use of a *hila* in an issue concerning *riba*, the jurist Ibrahim Qatifi, who hailed from Arabian side of the Gulf but was involved in the debates that went on in the Safavid capital around 1530,[62] nevertheless approved of one particular *hila* for *riba.* Finally, by the first part of the eighteenth century, the theologian Abd al-Hayy Razawi from Kashan complained that while in earlier times *hila*s had been despised and the *mujtahid*s or practitioners of juridical interpretation had refrained from giving *fatwa*s authorising them, in his days that had become all too common. In fact, he objected, this juristic approval

59 Namakin, "Munshat," (manuscript) fol. 355v. NB this document is not in the edition, for Namakin's background see Zilli's introduction in the edition.

60 Shaikh Nizam et al., *Fatawa*, (Arabic) 3: 268—70, (Urdu) 4: 479—80, (Baillie, *Law of Sale*) 301—3.

61 Namakin, "Munshat," (edition) 342—3, 356, 358.

62 Abisaab, *Converting Persia*, 17

was practiced as publicly as the Friday prayer, and it demonstrated the weakness of the alims of the time.[63]

The Akhbari Faiz Kashani distinguished between neutral *hila*s (*hil al-mubaha*) and forbidden *hila*s (*hil al-mahruma*). Neutral *hila*s were allowed in cases of force majeure (*isqat*), such as the necessity to have recourse to *riba* (here clearly implying lending at interest), in which case one might sell an article even if no sale was intended, as long as the overall objectives were sound. Permanent *hila*s (*hila li-sabt*), i. e. *hila*s not born of necessity, were not allowed in his view.[64] Elsewhere, he also distinguished two levels of intentionality: the primary level of the stated intention (*qasad*) of a contract, which should be sound, and then the overall aims (*ghayat*), of which at least one should be sound. Those who refused to look at the specifics of the situation Faiz branded rationalists (*al-ʻuqala*), i. e. Usulis.[65] He underlined this quasi-formalist point by noting that the Imams had allowed *hila*s, and went on to cite four Reports to that effect. In those Reports different Imams were said to have had no objection to two *hila*s. One was the debtor buying of an item for a higher price than its worth from the lender to postpone the moment of repaying a loan. The other was the voluntary giving of *ribh* or profit/interest for a loan as long as it was not a condition (NB the root of the term *ribh* is not the same as the root of *riba*).[66]

Two European accounts of Shiʻi practices in Iran and the Deccan mention another stratagem that they claim was common and had some sanction from the law courts. The late seventeenth-century French traveller to Iran Chardin noted that Islamic law did allow returns on investment (i. e. *muzaraba*), but not any usury, or for that matter interest (which had come to be distinguished from usury in Europe), but that,

> for interest the parties know how to fraud the law however they want. They go to the judge, and the borrower, holding a sack of money, says that such and such sum is in it, even though the interest agreed between them is missing from it. The judge, without further enquiry, has the contract drawn up; to authenticate the debt it even suffices, without so many precautions [of going to the judge], to recognise before witnesses that one has received so much, although one has received less.[67]

Chardin's Dutch contemporary Havart, in his discussion of legal documents used in Golconda, similarly noted that obligation documents would simply overstate

63 Jaʻfariyan, *Din wa Siyasat*, 352—3.

64 Kashani, *Mafatih al-Sharayi*ʻ, 3: 204—5 (nos. 1228—32).

65 On Faiz Kashani's hostility to *ʻaql* and his polemics against the Usulis see Algar, "Fayż-e Kāšānī."

66 Kashani, *Mahajjat,* (Arabic text) 3: 161, (Persian translation) 143.

67 Chardin, *Voyages*, 4: 161—2.

the amount lent because *interest* was proscribed. He gave the example of the amount of a loan of 100 for five months being stated as 105, which came down to a rate of one percent per month.[68] For Europe, where this strategy of overstating the principal was also used well into the sixteenth century as we will see below, it has been possible to find some evidence for it in the account books of the practitioners themselves, yet for Iran and India such evidence does not seem to be available for our period.[69]

To count up the evidence for circumvention of the proscription in the Persian world, we may divide it in three classes: 1) evidence from prescriptive texts, 2) some relatively direct evidence from and about practice, and 3) some indirect pointers from neighbouring regions. I have discussed the evidence from prescriptive texts at some length precisely because I am not convinced they belong solely to the history of ideas. For one thing, some of these texts refer, directly or indirectly, to the frequent use of *hila*s by economic practitioners. From the second class of evidence we have Rashid al-Din's narration of the altercations at Ghazan's court, the two revocable sale documents from Samarqand and the statements by Chardin and Havart. But we must keep in mind that from the Persian world of our period very few administrative and mercantile records have survived in general.

With regard to the pointers from neighbouring regions, it is tantalising to refer to the evidence from the abundant records of the Anatolian heartland of the Ottoman empire, even though, as noted in the Introduction, the Hanafi school developed in quite a distinct way in that empire. Nevertheless, we may perhaps carefully extrapolate from there in order to suggest something of the scale we should think of when we look at the use of *hila*s in lending at interest as opposed to just going ahead without regard for sharia or coming to terms with sharia in some other way. Timur Kuran presents substantial evidence from the Ottoman heartland of circumvention of the proscription of *riba* through *hila*s. [70] He gives a list of the euphemisms for interest that are frequently found in the seventeenth-century court registers of Istanbul, among which "payment for cloth" was the most common. The reference point for this euphemism are clearly the various *hila*s we have also encountered in our area involving the sale of a market good. Other references to *hila* constructions, or at least to the idea of sharia compliance, were found in the same set of documents as were the expressions *mu'amele-'i*

68 H[avart], *Persiaansche secretaris*, 134—5.
69 Compare Dale, *Indian Merchants*, 73—4.
70 Kuran, *Long Divergence*, 147—53, 324 n.26, 33.

shar'iye "shariatic transaction" and *devr-i shar'i* "shariatic [property] transfer."[71] As was seen above, the Arabic term *mu'amala* was also used in the context of *hila*s for *riba* in South Asia, where the "transaction sale" and the "sale on trust" were seen as synonymous already in the fourteenth century.[72] Further, and more concretely, Kuran calculates that in the same period 21.8 percent of all the cases concerning charitable trusts in Istanbul involved revocable sale cum lease-back contracts (the same *hila* as used in the contracts from Samarqand).

Exception in the Persian World

Arguments about necessity came to play a large role in discussions about usury in both the Persian and Latin worlds. In the Persian world we find rulers on different sides of the argument at different times.

When Ghazan Khan banned usury in 1299, three different arguments from necessity were presented before him according to the chronicle of Rashid al-Din. Some grandees simply objected that the measure would put a stop to all transactions (*mu'amalat*). The supporting argument that transactions were necessary to keep economic life going is missing from Rashid al-Din's narration, but we may assume that it was implied. To this the khan simply responded that his measure was meant only to put a stop to all reproachable (*na-mahmud*) transactions. Some people further argued that "at all times, expenditures in cash must be carried out on account of the treasury and if people do not give loans to the governors of the provinces they [the latter] will fall short on the payment of funds." Ghazan answered his ministers that "here we do not want money from any governor or administrator" and he gave an additional order that anyone who lent money for gain to a revenue officer would forfeit both his principal (*asl*) and the profit (*murabaha*). Also, some brought forward that loans were necessary (*zaruri*) for certain people with needs (*arbab-i hajat*) to arrange matters of grave importance (*muhimmat*). But Ghazan scoffed at the fact that people who supposedly had no money, did have the funds to travel to court to make their case. And since people in his vicinity were coming up with all sorts of arguments concerning the matter, Ghazan said "Do God most high and the Messenger…know the public interests [*masalih*] of the world better or do we? With certainty it must be said: they!… God most

71 Since the first expression was used in the *qanun* of Sulayman (discussed in the conclusion to this chapter), and the latter in a later rendering of that body of ordinances, these phrases seem to have taken on a life of their own, coming close to expressing interest directly as Haim Gerber notes. *State, Society, and Law,* 75.

72 Shaikh Nizam et al., *Fatawa,* (Arabic) 3:270.

high and the Messenger have commanded thus and we will not hear any talk to the contrary, and thus is the ordinance."[73] We are now deep into the territory of consequentialist reasoning. Ghazan's interlocutors argued in effect that good outcomes, namely keeping economic transactions going, a continuous cashflow for the treasury, and the resolution of dire personal situations, should trump sticking to the shariatic injunction for its own sake. Ghazan countered, however, with both a deontological argument "the law is the law" and with a consequentialist argument of his own: "how can you pretend to know what the best outcomes are?" It is a consequentialist argument to end all consequentialist arguments. His reference to the *masalih* (singular: *maslaha*), public interests or general goods, was steeped in centuries of debate about divine law, as was the reference to the necessities and needs that his interlocutors made. Particularly embattled was the question of how a *maslaha* could be determined. It is precisely this centuries-old acrimonious debate that Ghazan touched on. Two of the thinkers we already encountered, Ghazali and Fakhr al-Din Razi, had contributed to this debate. Ghazali had determined three levels of *maslaha:* the highest level was the *zarurat* or necessary interest, the second level was the *hajat* or basic need, and a third was the perfectionist value. The protestations of the courtiers representing urgent loan-seekers seem a faint echo of his reasoning.[74]

A quarter of a century later we find the sultan of Delhi, Muhammad bin Tughluq, on the other side of the debate. A very interesting, if somewhat controversial, source about his rule is the account of the Moroccan traveller Ibn Battuta.[75] He claimed to have served the sultan as a qazi for six years. One of the episodes he reported from that period must have taken place in the early 1340s, after Muhammad bin Tughluq's return to Delhi from a failed attempt to make Deogir in the South his capital, and after disastrous drought and famine had struck much of northern India.[76]

> During the years of the famine, the sultan had given orders to dig wells outside the capital and have grain crops sown in those parts. He provided the cultivators with the seed, as well as with all that was necessary for cultivation in the way of *nafaqa* [monetary support], and required them to cultivate these crops for the *makhzan* [grain-store/treasury].

73 Rashid al-Din, *Jami' al-Tawarikh*, 2: 1334—5.

74 Emon, *Islamic Natural Law*, 34, 134—51, 156; Hallaq, *Sharī'a*, 104, 109.

75 I do not share the scepticism of the scholars arguing that Ibn Battuta never visited any of the places he discussed and think that at least the part on his stay at Delhi is written from his own experience. The episode discussed here cannot have been copied from Barani's chronicle, because there is no equivalent passage there. See, however, Trausch, "Rewriting Baranī."

76 See Conermann, *Beschreibung*, 96—108.

In response to this measure, the jurist Afif al-Din Kasani (or Kashani) said to some people: "This sowing [*zar'*] will not produce what is desirable."[77] Ibn Battuta did not elaborate which aspect of the arrangement the jurist objected to, but there seem to be two things going on that were problematised in legal treatises: share-cropping and lending.

First of all, there was the *nafaqa*, which from other sources seems to have been not so much a subsidy as a loan. That lending was an aspect of the scheme devised by Muhammad bin Tughluq is confirmed in the chronicles of Barani and Afif. Both used the term *sondhar*, which from the context and later usage appears to denote a loan to bring barren land under cultivation, and mentioned the great amounts laid out in this way.[78] It appears that this *sondhar* was given partly in cash and partly precious items.[79] Afif also made it elaborately clear that all the property handed out in this way was recorded as debt in books held by the finance minister. Neither of these two contemporary chroniclers was very positive about the measure. Barani averred that the advances were wasted by middlemen who suddenly showed up out of nowhere with promises to bring large tracts of barren land under cultivation. Afif deemed it very wise that Muhammad's successor Firuz Shah, on the advice of his minister, decided to cancel all the outstanding debts caused by the *sondhar* scheme and other lavishness on the part of the previous sultan and his minister, and to publicly purge the books in which they had been recorded. In connection to this and other reforms Afif lauded the just word of the sultan (*khat-i 'adl*) and his overhauling of "the customs of generations past and the law of the predecessors [*rusum-i guzashtagan wa qanun-i pishiniyan*].[80]

The modern economic historian Irfan Habib further points out that since the recipients of the *sondhar* were, as per Ibn Battuta, required to deliver the resulting agricultural produce to the *makhzan*, meaning either the treasury or the state granary, the loans may have had a usurious element to them which led the jurist to protest.[81] Yet, while it is clear from the accounts of Afif and Barani that *sondhar*

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77 Ibn Battuta, *Rihla* (Al-Tazi text), 3: 187, (Defrémery and Sanguinetti text), 3: 299. Translation substantially modified from that of Gibb, 3: 700. Gibb's translation of *nafaqa* as "money and supplies" seems unwarranted. I would like to thank Eirik Hovden, Lucian Reinfandt, and Blain Auer for going over this puzzling passage with me.

78 Habib, "Usury," 396.

79 In Barani's account the gifts (*in'am*, *talattuf*) of precious items and horses, and the *sondhar* in cash seem related but not necessarily the same, and Afif's account mentions "the *mal* [here: moveable property] given to the people by way of *sondhar*."

80 Afif, *Tarikh*, 90—3; Barani, *Tarikh*, 498—9; Conermann, *Beschreibung*, 97—9.

81 Habib, "Usury," 396 and *Economic History*, 51 n.52.

was largely regarded as a loan giving rise to debt, we know nothing of the stipulations for paying off the debt.

We should therefore also take into account the possibility that in his remark about the *zar'* or sowing as represented by Ibn Battuta, the jurist saw the scheme as *muzar'a* or sharecropping, and was taking aim at one of the many possible technical problems that such contracts might entail, as evidenced by centuries of debate among jurists. Of the authoritative collections of Traditions about Muhammad and his Companions, that by Abu Dawud had the most to say about *muzar'a*, and this was mostly condemnatory.[82] There is some evidence that this particular collection may have circulated in the vicinity of the objecting jurist from Ibn Battuta's narrative.[83] Abu Hanifa himself also did not permit sharecropping, but his two disciples did. Marghinani, however, followed the disciples because compacts for cultivation were convenient to mankind and had become customary everywhere. Nevertheless, Marghinani stipulated all kinds of complex conditions that sharecropping arrangements were to fulfil in order to be valid.[84] It is thus possible that in his objection to the scheme implemented by the sultan, the jurist Kasani had in mind any of these conditions, or even that he was reverting to the position of Abu Dawud and Abu Hanifa. That would make the case somewhat less relevant for this chapter, but then again, objections to *muzar'a* were often attached to the proscription of *riba.* The link is explicit in one Tradition in the collection of Abu Dawud,[85] and implicit in the analogy made by Marghinani between *muzar'a* and *muzaraba*, the legal investment practice that was also just one step removed from *riba.*[86] Moreover, our main interest here is more in the strategies to come to terms with the rules of divine law than in the technicalities of usury in themselves.

82 See Abu Dawud book 23 chapters 31—2, which can be found online on www.sunnah.com; See also Donaldson, *Sharecropping*, 33—6.

83 A copy of the collection of Abu Dawud must have been present in Delhi in the mid-thirteenth collection as the collection is referred to by the historian Minhaj al-Siraj Juzjani. We also know that at least one member of the Kashani family in Delhi, a dynasty of *qazis*, was a scholar of Traditions. It is unclear what the relation of this Muhiyy al-Din bin Jalal al-Din bin Qutb al-Din Kashani was to Afif al-Din Kasani or Kashani but the shared naming pattern (…al-Din) suggests they were of the same lineage, and Muhiyy al-Din died in 1319, that is, only about a decade before the incident under discussion. Ishaq, *India's Contribution*, 62, 76.

84 Marghinani, *Hidaya* (trans. Hamilton), 579—84. Bin Tughluq was, incidentally, well acquainted with *The Guidance.* See Conermann, *Beschreibung*, 49 – 50.

85 Muhammad told one of the parties in a sharecropping arrangement "*arbaytuma* [you have both practiced *riba*]." www. sunnah.com, Abu Dawud book 23 no. 77; Donaldson, *Sharecropping*, 34, 121.

86 Marghinani, *Hidaya* (trans. Hamilton), 579.

The remainder of Ibn Battuta's account does indeed offer such a strategy to come to terms with the demands of divine law. The episode continues as follows: the objection that the jurist had made reached the ears of the sultan and the jurist was called for questioning. The sultan said to him: "What reason do you have to meddle with state affairs [*umur al-mulk*]." The jurist was released and met two colleagues on the street who praised God for his release, to which Kasani replied with a quotation from the story of Noah in the Quran: "Praise be to God, Who has saved us from the people who do wrong [*al-qaum al-zalimin*]," which is what God instructed Noah to say after he would embark on the Ark.[87] Again these words reached the sultan and all three participants in the conversation were executed. If we look closely at the passage, we see that the sultan not only cleared the opposition to his policies through the execution, but also developed a justification for countering the opposition of the alims, namely to declare the matter at hand a state affair.

The apparent incongruence between reason of state and sharia seems to have been accepted as a given at the time,[88] and Ibn Battuta explicitly sketched Muhammad bin Tughluq as a paradoxical character who embodied this incongruence. On the one hand, he painted him as a kind and modest upholder of the sharia who appeared in a qazi's court a number of times to hear verdicts against himself in some petty cases, and who placed the chief justice (*qazi al-quzzat*) on a dais with cushions, similar to his own seat, and had his brother assist the chief justice, especially in cases of nobles who did not pay their creditors their dues. On the other hand, Bin Tughluq was to Ibn Battuta a bloodthirsty tyrant. The story of the execution of Kasani comes in a long list of stories of executions, in many cases with the aiding and abetting of qazis. On the whole, however, it seems that Ibn Battuta did not see Bin Tughluq as a person upsetting sharia as a system.[89]

In an autobiographical statement Bin Tughluq reflected on the relation between reason of state and sharia and on the role of the alims as guardians of sharia. The statement appears to have been meant as a support for his application for recognition by the Abbasid Caliph in Cairo, which he sent out around the same time that he was undertaking the controversial agricultural reforms around

87 Quran 23: 28: "And when thou hast embarked on the Ark – thou and those with thee, – say: 'Praise be to God, Who has saved us from the people who do wrong [*al-qaum al-zalimin*]'."

88 Conermann, *Beschreibung*, 143—4.

89 Ibn Battuta, *Rihla* (Husain translation) 83—93. For an analysis of the subtly different approaches by Battuta to different instances of violence by the sultan see Waines, "Ibn Battuta on Public Violence."

Delhi.[90] In the document he cast himself as the son of a usurper who was not a tyrant but also not sufficiently versed in sharia. About the alims he wrote that "by the maxim 'necessities eliminate prohibitions [*al-zarurat tubih [tubiyhu] al-mahzurat*]' [and] by the cutting of their tongues, the alims of the day were barred from speaking the truth and on account of exceeding greediness they stretched out the hand of depravity from the sleeve of irreligion [*bi-dini*] and in coveting futile offices they were united and became obedient." He meanwhile felt himself to be on the brink of hell, but recognition by the Caliph would resolve that by giving his state a legal base. The tension between his good intentions and his making dirty hands in the world permeates the text and is refracted in his appraisal of the alims: he relies on the alims to collaborate, yet he also reviles them for their co-operation. Implicitly, then, Muhammad bin Tughluq would seem to commend the alims who raised their voices, that is, alims like Kasani.[91] In this text, Muhammad bin Tughluq cast himself as a well-meaning breaker of the rules of sharia. The *hukm* or maxim "necessities eliminate prohibitions," would appear from this text to have been a well-known one with a standard Arabic formulation (the remainder of the text is in Persian) already at the time.[92] The statement seems to ultimately reject the maxim as being merely a tool to shut up the alims (or a tool with which they shut themselves up)[93]. Nevertheless, we can safely say that the argument from necessity and its cognate state reason played a role in assigning sharia its place in mid-fourteenth century Delhi, if not on the basis of this text then on the basis of the Ibn Battuta narrative.

Two and a half centuries later, we can observe the Mughal emperor Akbar and his minister Abu'l-Fazl engaging with the issue of usury in a creative way. Abu'l-Fazl announced a new system of loans to imperial officers. The loans were not called loans but *musa'adat* or "kind assistance," and were meant to help the officers of the empire who held temporary titles to revenue-generating lands, without imperilling their honour. The interest is not stated directly in the text, but only the total amount to be repaid after x amount of years, with a maximum of ten years. If

90 The authenticity of this text is controversial, but I agree with Mahdi Husain that the arguments against its authenticity are not strong and rely on a particular historical image of the period that one need not subscribe to. Husain, *Tughluq Dynasty*, 571—2; Conermann, *Beschreibung*, 47—9; 96—103.

91 Facsimile of the only manuscript of the text reproduced in Husain, *Rise and Fall*, back of the volume. A translation of this document is found in Husain, *Tughluq Dynasty*, 265—276, and reproduced in Conermann, *Beschreibung*, 188—90.

92 Modern commentators trace the roots of this maxim to certain passages that speak of being forced by circumstances to eat forbidden meats etc. in the Quran (2: 173, 5: 3, 6: 119), but I have not seen this link being made in the period. See e.g. Kurzman, *Liberal Islam*, 91.

93 That is what the translation by Husain suggests. Conermann, *Beschreibung*, 189.

an officer repaid after one year he was to pay 106.25 % of the original amount and if he were to redeem the loan after 10 years or later he was to pay 200 %. Irfan Habib has broken down the interest to be paid on the loans from year to year, and it ranged from between 6.10 % in the second year to 10.70 % in the fourth year, which rates were at the low end of the then going market rates in India. The cap of 200 % may have been derived from the ancient Hindu legal text of Manu. This *musa'adat* system seems to actually have been operational and was continued under later Mughals.[94]

In laying down this *a'in* or regulation among many other such ordinances, Abu'l-Fazl inserted a short justification at the end of the text. It announces itself as an objection or strident point (*sigalish*): "and the whole point [of this ruling] is the teaching of good transacting [*nek-mu'amalagi*], otherwise there will be no improvement in the computations with respect to lending and borrowing of our contemporaries. Through this *a'in* those without a sense of equity in gain-increasing [*bi-insafan-i saudafizay*] took the path of kindness and decent arrangement was discovered." Thus, the scheme was ostensibly meant to set an example for market parties. The justification contains some interesting neologisms. The first is *nek-mu'amalagi*, which consists of an Arabic core with a Persian prefix and suffix. The Arabic *mu'amala* had, as we have seen in the last section, come to be used as a designator for lending transactions that delivered interest through *hila*s. The Persian suffix *–gi* turns it into a general process: making such transactions. The Persian *nek*, the opposite of evil in pre-Islamic Persian thought, takes the term out of the context of shariatic form and references abstract eternal good. The second odd phrase is *bi-insafan-i saudafizay*, which takes the Arabic *insaf* or equity and adds a whole array of Persian components to make a string of two neologisms "gain-increasing" and "persons without equitability." The overall suggestion is that it is not so much the *mu'amala* or (disguised) loans at interest and the gain-increasing that are the problem, but bad *mu'amala*. The text suggests that the measure had been implemented some time before it was composed and that the beneficial effects were already visible.[95]

Besides that, the remark at the end of the short passage about the indiscriminate gain-increasers seems to have been aimed at creating a distinction between equitable and inequitable increases, and thereby provided an argument against possible objections from a shariatic point of view. The fact that the argument references equity rather than law meshes with Akbar's announcement from the pulpit in 1579 that God (*khudawand*) drove all but justice (*'adl*) from his thought. Ak-

94 Habib, "Usury," 409—10.

95 Abu'l-Fazl, *A'in-i Akbari*, 1: 196—7 (Book Second, *a'in* 15).

bar's detractor Badauni therefore suggested that Akbar made reason (*'aql*) the basis of faith (*din*) instead of imitation (*naql*). Badauni further perceived Akbar as transgressing the line between what was *shar'i* (in accordance with sharia) and what was *mulki* (of the state), a line that Muhammad bin Tughluq had been careful to uphold. In a *mahzar*, or legal statement, that was drawn up in that same year by several leading alims of the realm at his instigation, Akbar was given the right to choose and impose one legal opinion over others in case there was *ikhtilaf* or disagreement between the *mujtahid*s. He was to make this choice "with a regard for the facilitation of the daily life of the offspring of Adam [i. e. all of humanity] and the matters of the governance of the world." At Akbar's court state reason did not merely shield the field of state activity from divine law, it was allowed to decide what divine law was.[96]

Much more hesitant was the application of state reason by Akbar's great-grandson a century later: at his court it appeared in language that hovered around sharia. In 1702, the financial administrator of the crown lands presented the emperor with the situation that the troops needed to be paid and the arrival of the treasury was delayed. He recommended taking a *qarz-i hasana* or shariatically acceptable – that is, interest-free – loan from the *sahukars* or moneylenders in the imperial camp. The moneylenders (or perhaps we should call them financiers) politely refused, and at the end of the discussion "it was ordered that until the arrival of the treasury the requests for salary represented *huquq*." This order was to imply that the financiers were to have their interest, but its phrasing as well as the argumentation of the financiers deserve some elaboration.[97]

The phrasing of the imperial side of the discussion, as represented by a newsletter-writer posted at the court to report on the common audiences of the emperor,[98] used two shariatic terms: *hasan*, which in the context of sharia means "acceptable,"[99] and *huquq*, which, being the plural of *haqq* (law/truth), was used in Hanafi discussions over the preceding centuries about the position of sharia, and especially its position in the state. We may translate *huquq* as "rights" or "just claims" and Hanafi jurists distinguished the *huquq Allah*, the rights of God and the *huquq al-'ibad*, the rights of individual people which governed just exchanges. The former represented the public interest and were to be prosecuted by the state, the latter

96 Badauni, *Muntakhab*, 2: 211, 268—72; Wink, *Akbar*, 88, 103—4.

97 "Akhbarat-i Darbar-i Mu'alla," 46th regnal year of Aurangzeb, doc. no. 25 (16 Shawwal) verso. Compare and contrast Habib, "Usury," 408—9.

98 These particular newsletters were despatched daily to the court of the raja of Amber. It is unclear what their relation was to the official court diary. See Faruqui, *Princes*, 22 and Mehta, *Advanced Study*, 2: 27—9.

99 Hallaq, *Sharī'a*, 121.

concerned private interests and could be brought to court by individuals or arranged between individuals themselves. As the legal historian Baber Johansen writes, Hanafi jurists saw the rights of God as absolute, but "any government interfering with the *ḥuqūq al-ʿibād* in a way likely to endanger the principle of just exchange could jeopardize its own character as guardian of the absolute." It seems to be this fine line that Aurangzeb hinted at in his brief conclusion. As long as the state could not satisfy the private right of the troops to their salary without taking recourse to usury, that private right was to take precedence over the state's obligation to uphold God's and the public's right to be free from usury. In general Hanafi jurists justified giving preference to the rights of individuals over the rights of God with the maxim that God could not suffer loss or damage.[100]

The financiers used a different language, that of the market. The Indic term *sahukar*s seems to have been used at the time only for non-Muslim, specifically Jain and Hindu, money-lenders and financiers. In the two lines about their contribution to the discussion in the court diary, the word *jawahir* occurs four times. The word *jawahir* literally means jewels but here it seems best translated as capital or as capital sum/principal sum. For one thing they called the kind of loan that the financial administrator had requested a *qarz-i jawahir* rather than a *qarz-i hasana*, by which they seem to have meant "a principal sum-only loan." Here is how the reporter at the imperial court recorded what they said: "if one were to take a 'capital loan' at the [level of the] imperial administration, word would reach the provinces [that are or might be] without capital, and the provincial governors would also take such capital loans from the *sahukar*s and all the *sahu*s would be bereft of capital." Aurangzeb's answer implied that he conceded their pressing request for interest, but he chose to justify his decision in completely different terms, arguing from the need to fulfil the right of the troops, rather than from the need to sustain capital flows.

Compensation in the Persian World

There seems to have been some space for compensating for the sin of *riba* by giving in charity (*sadaqa*). Around the middle of the seventeenth century, the Akhbari Muhsin Faiz Kashani, for instance, saw such room for compensation, if very limited. As briefly noted in Chapter 1, he was quite tolerant of unsuccessful searches for what the sharia ruling was on certain points. He was, however, not tolerant of not searching for the ruling, at least not in the case of usury. Anyone involved in

100 Compare Johansen, *Contingency*, 210—6; Emon, "Ḥuqūq Allāh," 389 and passim.

earning an income, and especially a merchant, was to get himself informed about *riba.* But again, the results of the search might be incomplete and *riba* might be committed accidentally. For that case, Faiz cited a Tradition according to which Ali said that since *riba* creeps into trade more stealthily than an ant creeps onto a rock, merchants should give their possessions to charity to avoid being like the profligates who go to hell. Now the suggestion in this passage is not that merchants might compensate for *riba* that they had knowingly committed, but only for that which they had unknowingly committed.[101]

A concrete way in which one might go about compensating for more manifest interest-taking is found in the collection of sample documents put together by Namakin at the very end of the sixteenth century. He provided an example of how one could have a small steady income from taking interest on capital for oneself while giving most of the proceeds thus gotten away to charity. This could be done by creating a *waqf* (charitable trust), specifically a *waqf-i zar* or cash trust. The construction would work like this: one would make a *waqf* out of a sum of money and this sum would be lent at interest (*ribh*). The proceeds would go to the maintenance and furnishing of a mosque. One third of what was left over would go to the imam of the mosque, and one third to its crier. It is not specified what would happen to the final third of what was left over after the expenses on upkeep, but we may assume that it would be at the disposal of the *mutawalli* or trust custodian, which could be the donor her- or himself. It is unclear on what scale such cash *waqf*s were made in South Asia. It seems that *waqf*s in general were quite rare in South Asia. In the Ottoman empire, however, where all sorts of *waqf*s were created on a very large scale, the cash *waqf* was for a long time highly controversial.[102]

A Short History of Definition and Enforcement in the Latin World

Ultimately the proscription of usury in the Latin world goes back to some nine passages in the Old and New Testaments,[103] but by 1200 the canonists had smoothed out some of the tension between the original passages. When the humanists and

101 Kashani, *Mahajjat*, (Arabic text) 3: 159—61, (Persian translation) 127.

102 Namakin, "Munshat," (manuscript) fol. 364v, (edition) 348; Mandaville, "Usurious Piety."

103 Exodus 22: 25 (Hebrew 24); Leviticus 25: 35—37; Deuteronomy 23: 19—20 (Hebrew 20—21); Ezekiel 18: 7—8, 13 and 17; Psalms 15 (Vulgate 14): 5, and 109 (Vulgate 108): 11; Luke 6: 35. For a brief overview of the five most important passages see: Munro, "Usury, Calvinism and Credit," 156—8.

reformers returned to the Bible around 1500, however, they rediscovered this tension, which it is necessary to point out here in two sentences before we start from the beginning of our period. Of the eight passages in the Old Testament some seemed to condemn only usury or usuries (Latin *usura/usurae*, Hebrew *neshekh*) and others any increase (Latin *amplius/superabondantia* and Hebrew *tarbit*), and some seemed to extend to everyone while others made a more or less explicit exception for lending to aliens (Latin *alienus*, Hebrew *nakri*).[104] The New Testament, finally, offered the crucial: "But love ye your enemies: do good, and lend, hoping for nothing thereby."[105]

The Old Testament exception concerning aliens was by Church Father Ambrose limited to those one had the right to make war on, that is, belligerent heathens. It seems to have been applied to Muslims for a period but was effectively ruled out by Thomas Aquinas and other Scholastics. It did, however, retain some importance in Jewish legal discourse into our period.[106]

A landmark in the definition of usury was Gratian's *Decretum.* In answer to the question what *usura* was, he put side by side four authoritative definitions from early Christianity. Most important was one by Augustine stating that lending should be free of charge and that every excess (be it in money, grain, wine, oil, or anything else) expected in return for money lent out was usury. Notably, Augustine did not use the term *usura* in this passage but spoke of *foenerare*, which was the usual classical Latin verb for what we now call lending at interest.[107]

Gratian also subsumed, in another section, an ordinance promulgated by a fifth-century Christian Roman emperor regarding ecclesiastical real estate that made an exception (*excipitur*) from the laws normally applying to such lands for situations of a pressing need for cash (*si debitum urget*). In such situations it was allowed to pawn the real estate and let the creditor recover the principal as well as four percent in usuries (*in usuras*) from its fruit (*fructus*).[108] Gratian did, however, not include the regulations laid down in the famous corpus of law compiled for the sixth-century Christian emperor Justinian, which allowed interest rates ranging from 12 % for the *foenus nauticum* (loans for maritime enterprise),

104 Calvin for instance discusses these two tensions in his comment on Exodus 22: 25 under his exposition on the eighth commandment in *Calvin's Commentaries*, vol. 5: *Harmony of the Law*, part III. Latin text in *Opera*, 24: 679—83.

105 Luke 6:35.

106 Brundage, "Usury" and Soloveitchik, "Usury, Jewish law"; Menning, *Charity and State*, 17—9; for the range of rabbinical opinions see Attali, *Juifs*, 232—4, 325—6.

107 Gratianus, *Decretum*, part 2: causa 14, questio 3.

108 Gratianus, *Decretum*, part 2: causa 10, questio 2, canon 2. Contrast the discussion of this passage by Todeschini, "Usury," 129—30.

through 8% for business loans to 6% for those not in business and 4% for farmers and distinguished persons.[109] Moreover, jurists of all hues recognised the priority of canon law over Roman law in the matter of usury. Even while Roman law was on the ascendant from the late fifteenth century, some of its defenders found it necessary to note that on the issue of usury canon law remained the point of reference.[110] When the issue of setting legal percentages came up in our period, therefore, these could not be justified with reference to Roman law, although it is quite likely that the legislators involved in the setting of those percentages were aware of what the Justinian corpus had to say on this matter.

Slowly over the first half of our period, however, the guardians of doctrine, the Scholastics concerning themselves with canon law and the mendicant preachers of the fifteenth century, diluted the doctrine with ever more precise definitions of each of the words used in the definitions of usury found in the *Decretum*. One crucial term was for instance the term *mutuum* used in a passage that Gratian quoted from Augustine. This term came to be regarded as referring only to obvious loans, or more specifically: the kind of loans seen by some late twelfth-century glossators on the *Decretum* as involving a temporary yet complete transfer of the ownership of what was lent.[111] This emphasis on the formal appearance of loans was recognised in the phrase "*ex forma*" in the section on usury in the additions to the *Decretum* promulgated by Pope Gregory IX in 1234 known as the *Liber Extra*, and was made even more explicit some years later in a gloss on that phrase by Pope Innocent IV, which noted that the question of usury arose only in so far as one could speak of a loan.[112] This criterion continued to be of great significance into the fifteenth century, when the Franciscan preacher Bernardino of Siena repeatedly mentioned in his Latin sermons that "usury only applies to the *mutuum*."[113]

Moreover, as the historian Giacomo Todeschini points out, the position of the lender in relation to the sacred social body or Christian *respublica* was also, to an extent, written into the definitions of usury by the canon law specialists in the century before the crucial Council of Vienne in 1311–12. A number of canon law specialists made the reputation of a creditor a factor in the definition of usury, leading to the tautological tenet that a usurer was a manifest or notorious usurer, that is:

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109 Jones, "Usury."

110 Neumann, *Geschichte*, 467—74; McLaughlin,"Teaching of the Canonists" [first part], 84— 95.

111 Gratianus, *Decretum*, part 2: causa 14 questio 3. Compare De Roover, *Rise and Decline*, 10 and *San Bernardino*, 28—9 and Munro, "Usury, Calvinism and Credit," 159—6.

112 *Corpus juris canonici*, 2: 1736—7 (Liber Extra: Liber 5 titulus 19 caput 6 "In Civitate"); Innocent IV, *Commentaria*, 517—8 (comment on book 5 titulus 19, caput 6 [5 in the commentary] "In Civitate.")

113 See De Roover, *Rise and Decline*, 10 and *San Bernardino*, 28—9.

someone whom common opinion designated as usurer.[114] The term *manifestus* consequently made its appearance in the sections about usury in the thirteenth-century additions to the corpus of canon law, the *Liber Extra* and the *Liber Sextus.* In addition, canon law started to distinguish between insiders and outsiders with regard to usury. The canons adopted at the Second Council of Lyon in 1274 made it clear that persons of "dignity, [good] condition and status" should not provide accommodation to "foreigners (*alienigenas*) and others not originating from their own lands who are exercising, or willing to exercise, public lending," and "the usurers who are manifest in this way" should be expelled from their lands within three months. Clearly dignity and respectability were associated with the self and usury with the foreign other here, but it is important to note that the passage stopped short of making foreignness a legal criterion for usury in the same way as manifestness, and this left the glossators to ask: what about the indigenes? The answer was that other punishments than expulsion were to be meted out to them in cases of usury.[115] Perhaps partly as a result of such definitions and associations, lenders went to great lengths to remain on the side of decency and good reputation, as we will see below.

Once we leave the era of Scholasticism and we move into the sixteenth century, we can perceive a few attempts by leading authorities to redefine the issue with reference to the spirit of scripture. In 1515, Pope Leo X defined the spirit of usury thus: "our Lord, according to Luke the evangelist, has bound us by a clear command that we ought not to expect any addition to the capital sum when we grant a loan. For, that is the real meaning of usury: when, from its use, a thing which produces nothing is applied to the acquiring of gain and profit without any work, any expense or any risk."[116] Crucial in this definition is the aim of profit and the lack of work or risk, opening up avenues for those without the aim of profit or the reappraisal of the activity of the banker as work. Leo X arrived at this new definition in the context of a new practice of communal pawn banks, which will be discussed in the section on exception. Calvin cut the proscription down to what he saw as its spirit even more radically in his commentary on the book of psalms published in 1557. Returning to some of the relevant passages in the Old Testament, he noted that: "the end for which the law was framed was that men should not cruelly oppress the poor…whence it follows that the gain which he who lends his money upon interest acquires, without doing injury to anyone, is not to be included under

114 Compare Todeschini, "Usury," 124—30.

115 *Corpus juris canonici,* 2: 1733—6 (Liber Extra: liber 5 titulus 19 capita 3 and 5) and 3: 656—8 (Liber Sextus: liber 5, titulus 5 caput 1).

116 Fifth Lateran Council, session 10 (4.5.1515).

the head of unlawful usury." Moreover, Calvin swept aside the centuries of comments and meta-comments by reminding his readers that Christ's principle of equity as expressed in the Gospel of Matthew 7:12 obviated the need for a lengthy discussion of usury.[117] The practical context in which Calvin arrived at his view, will again be discussed in the section on exception. The other major reformers of the sixteenth century also returned to the source paragraphs in the Bible but arrived at definitions that were as strict or stricter than the canonical definitions had been before Pope Leo X. Luther, as we have seen in Chapter 2, steered a delicate course between antinomianism and overemphasis on adherence to the Law of the Old Testament. He defined the proscription very widely once more: "where one lends money and demands or takes therefore more or better, that is usury."[118]

The big story of the era is, however, the creation of a distinction between usury and interest, or in other words, the redefinition of usury as high rates of return on lending. There were two main strands to this story. One started as formalist circumvention and ended up giving us the term interest as well as its equivalents in other Western European languages (*interêt* in French, *interesse* in Italian, *rente* in Dutch, *zins* in German). The other began by thinking about what might be equitable rates that were liable to exception from the proscription. These two strands were very much intertwined, although the secondary literature seems to overlook the extent to which the people setting the rates also often took the cover of formalist strategies. I will tell this story in two parts, namely in the sections on circumvention and exception, yet will continually draw attention to the formalist justifications when they were used alongside arguments from equity as well as necessity. It is important to remember that the development was not straightforward. Even while the new terms were used more and more, and with wider connotations, and the term usury and its equivalents in other languages became more restricted, instances of the application of the term in its older, wide, sense continued well into the seventeenth century.[119]

Now we turn to the means of enforcement. The canons adopted at the Council of Lyon in 1274 that focused on "foreigners," were no dead letter. They were both preceded and followed by a wave of expulsions of outsider groups practicing lending, such as Lombards, Cahorsins, and Jews. In fact, for the Jews, this was the beginning of many executions and expulsions for which the practice of usury was cited as the ground, or at least one of the grounds. Yet the policies of secular gov-

117 Calvin, *Calvin's Commentaries*, vol. 8: *Psalms*, part I, psalm 15.

118 Munro, "Usury, Calvinism and Credit," 164. Translation as there.

119 *Reichs-Abschiede*, 3: 390 (art. 20 § 6); Munro, "Usury, Calvinism and Credit," 172; Maassen, *Krediet*, 149.

ernments towards outsider lenders were riddled with contradictions and subject to constant change, as we will see in the section on exception.[120]

The Council of Vienne held in 1311–12, however, focused on the activities of usurers who were insiders, and turned them into outsiders. The canons adopted there stated that those accused of usury should be forced to show their account books on pain of being excommunicated. Moreover, all secular officials who made or abided by any written or unwritten statutes that enforced any demand of usury by a creditor, were to be considered excommunicated. And, last but not least, those who insisted on stating that usury was not a sin were to be considered heretics.[121]

Now everyone had to pay attention and this strong condemnation had a demonstrable effect in raising awareness of the issue among worldly governments and guilds throughout Europe in the fourteenth century. In the Netherlands, the town council of Arnhem enquired with its overlord as to what exactly constituted usury, and the council of Brussels asked the doctors of the university of Paris if it could endorse lending contracts or not. It was also from the mid-fourteenth century onwards that guilds and civic bodies in Florence began to show a certain determination to restrict usury. Also in the fourteenth century, town governments throughout Western Europe drew up anti-usury ordinances that allowed for usury to be prosecuted in secular courts.[122]

Prosecutions might be initiated by official prosecutors, but also by plaintiffs, and in some places and periods also by informers. In the second half of the fifteenth century (and perhaps already earlier), the Exchange Guild at Florence operated a box in which people could anonymously denounce usurious transactions. In England in the second half of the sixteenth and first part of the seventeenth, the secular courts enforcing the statutes of Henry VIII and Elizabeth relied on informers, who stood to gain by composing with the alleged usurer and for a short period in the 1570s were even awarded more than half of the fine.[123]

While many secular governments in this way endorsed and enforced canon law, it was also often the case that their ordinances condoned certain practices that canon law proscribed. Secular governments often ended up enforcing the obligations incurred by borrowing, despite the strict condemnation by the Council of Vienne. The tension between what secular governments condoned and the canon

120 Dorin, "Canon Law," 130—9; Attali, *Juifs*, 263—7, 271, 342—9, and passim; Neumann, *Geschichte*, 344 and passim; Munro, "Usury, Calvinism and Credit," 169 n.55.

121 *Corpus juris canonici*, 3: 279—83 (Clementinae: liber 5 titulus 5); McLaughlin,"Teaching of the Canonists" [second part], 10—11.

122 Maassen, *Krediet*, 70, 79; Menning, *Charity and State*, 14—5; Tan, "Empty Shell," 188—9.

123 Maassen, *Krediet*, 79, 236; Goldthwaite, *Economy*, 443; Jones, *God*, 93—5.

law ideal remained very much unresolved. During the early years of the Reformation, the reformer Zwingli, saw it thus: "whenever a government tolerates Jews or other usurers,"[124] one would be a thief or robber if one had, with conscious intent (*mit wolbedachtem willen*), taken a loan and subsequently refused to return its principal sum.[125]

Very importantly, Christians were to reckon with enforcement in the afterlife. The criteria applied at heaven's gate promised to be even stricter than those applied on earth. According to the *Liber Extra*, for instance, selling on credit (selling five pounds worth of goods for six pounds to be paid at a later date) did not fall in the category of the usuries, that is, the proscription as it could be enforced on earth, but it was still a sin that could endanger salvation, "since man cannot hide his thoughts from God almighty."[126]

Another means of enforcement, related to the soteriological aspect, was social exclusion. The bankers of the Exchange Guild in Florence excluded pawn bankers from their ranks in the later part of the fourteenth century, because, so it seems, they were the most obvious interest-takers. In the mid-sixteenth century, Charles V excluded those running loan banks under government privilege in the Netherlands from going to church during service in the way that honourable people did, since they were legally excommunicated and allegedly scandalised the other churchgoers by their presence. If they did continue to go to church they would lose their official permission to run their banks and be considered manifest usurers (*openbaere wouckeraers*) and punished accordingly.[127] Calvin also, despite his lenient attitude towards moderate interest, advocated the expulsion from the Church of those who made lending at interest their profession. In 1574 the Calvinist synod for Holland and Zeeland did indeed rule that *lombarden* (which had become a general term for professional lenders at interest) should be banned from the weekly communion or lord's supper, despite the permission of worldly governments for their lending activities. This ban remained in force in the Dutch Republic until the second half of the seventeenth century, when town and provincial governments stepped in to support the bankers who abided by their regulations against church councils that upheld the ban. In Elizabethan England also, there were cases

124 *"all die wyl ein obergheit Juden oder andre wůcher duldet." Wůcher* here seems to be an error for *wůcherer*, as seen further down in the text: *"Es solt aber ghein obergheit so unredlich … sin, das sy Juden oder andre wůcherer…duldete."*

125 Zwingli, "Von göttlicher und menschlicher Gerechtigkeit 30. Juli 1523" in *Sämtliche Werke*, 2: 458— 525, there 458—9 (editor's introduction), 491, 519—20. A very different rendering of this passage is cited in Munro, "Usury, Calvinism and Credit," 165.

126 *Corpus juris canonici*, 2: 1736—7 (Liber Extra: liber 5 titulus 19 caput 6).

127 Lameere and Simont eds., *Recueil*, 5: 215.

of usurers subjected to public apology in church, exclusion from the communion, or excommunication.[128]

Circumvention in the Latin World

From legal texts, juridical treatises, and sermons one gets the impression that the creativity of lenders and borrowers was endless. Some seem far-fetched or hyperbolic; did anyone really go to the length of painting a cow on the wall to then rent it out as Johannes Purgold's early fifteenth-century legal handbook for the German town of Eisenach claimed?[129] The guardians of the proscription felt certain that all kinds of devices were used to cover up what might otherwise be seen as usury. The Council of Vienne was bent on forcing usurers to divulge their books for that very reason.[130] Yet it is more difficult to tell how the lenders themselves regarded these instruments or accounting devices that they implemented.[131] Nevertheless, I think we can use the suspicions of contemporaries as a tool to deconstruct the justifications of perceived transgressors, as I have been doing in the other chapters. Moreover, we do have a few more or less direct statements from lenders themselves that give an idea of the issues that troubled them.

The economic historian De Roover has devoted a great deal of energy to showing that in the later Middle Ages bills of exchange were more often used as disguised instruments of credit than as instruments for their ostensible purpose of transferring money to another place and changing currencies. It was for this reason, as De Roover notes, that banking came to be tied up with exchange in the Middle Ages and remained so to an extent into the eighteenth century. It was no coincidence that the banking guild in Florence was called the *Arte del Cambio* or Guild of Exchange. Because of their recourse to the cover of exchange, the big bankers with their international networks managed to dodge much of the opprobrium that accrued to the pawnbrokers and small-time money lenders. Other complex financial tools developed in late medieval and Renaissance Europe, often first in northern Italy, were also used to circumvent the proscription, but it is difficult to establish to what extent. As Richard Goldthwaite remarks, these tools had become so sophisticated and elaborate that economic historians are often at a loss

128 Maassen, *Krediet*, 146—9; Bouwman, *Gereformeerd Kerkrecht*, 2: 401; Jones, *God*, 113—5.

129 Neumann, *Geschichte*, 450.

130 *Corpus juris canonici*, 3: 282 (Clementinae: liber 5 titulus 5).

131 Massimo Giansante remarks on the impenetrable silence of the sources on the attitude of the banker Romeo Pepoli (d. 1322) to his financial instruments and the question of usury. *Usurario*, 197—8.

when confronted with them. It is often impossible to tell today whether a certain transaction really involved e. g. a transfer of money abroad to a third party, or was only entered into the books to cover up the taking of interest from a local person.[132]

Another device was noting the amount to be repaid as the amount lent in the ledger of the creditor. This device was frequently denounced, and we have some evidence for its actual use. Goldthwaite shows how occasional slips can reveal this to the economic historian. There was also the box for anonymous tips about suspect transactions at the Exchange Guild in Florence. In 1476 someone denounced a loan of 15 florins registered as 18 florins. It was not recorded what action the guild took in this case.[133]

Another way to escape opprobrium was to construe any gains made on a loan as a voluntary gift on the part of the borrower. Just how consciously this construction was employed we see in the 1334 statutes of the Florence guild of the traders in and finishers of foreign textiles. Some guild members also dabbled in banking activities. If guild members received any capital under an agreement (*patto*) that they would give, of their own volition (*arbitrio*), anything above the principal sum, they were to write that additional sum in their books as gift (*dono*). They also had to be prepared to swear this gift had been voluntary.[134] There is of course enormous tension between the idea of an agreement to give and the voluntariness of the giving in this text. This tension was picked up by Antoninus of Florence about a century later. By his time the practice described in these guild statutes had come to be known as the "discretionary deposit." The discretionary deposit allowed the well-to-do to deposit money with a banker or merchant without a formal contract stipulating the interest, but with the expectation that the banker would nevertheless pay something at his discretion – if only to keep himself in business. It was precisely the expectation that constituted the problem for Antoninus, since the verb *expectare* played a role in Augustine's definition.[135] Antoninus even came up with a term for this kind of usury: "mental usury," which was picked up by Spanish Scholastics of the sixteenth century.[136]

From a notebook of the wool merchant Giuliano de' Medici (of a less important branch of that famous family) we get an impression of how discretionary lending worked and how this lender himself came to see it as a transgression

132 De Roover, *Rise and Decline*, 10—4 and *Bernardino*, 33—4; Goldthwaite, *Economy*, 99, 217—21, 586.

133 Goldthwaite, *Economy*, 443.

134 "Statuto dell'Arte di Calimala," in Emiliani-Giudici ed., *Storia*, 3: 171—367, there 246.

135 Compare De Roover, *Bernardino*, 30—2; Stantchev, *Spiritual Rationality*, 113—4.

136 De Roover, *Rise and Decline*, 102. For a useful discussion see D'Emic, *Justice*, 15—6.

by the end of his life. The loans in question were made around the middle of the fifteenth century, i. e. when Antoninus was preaching, but it seems that only on his deathbed at the end of the century Giuliano asked his sons to make restitution of the gain he made from most of them, and they in turn left notes as to how they went about these restitutions. Remarkable is that everything about these loans is called *discrezione* in the notebook: the procedure, the loans in themselves and the incremental gain on them. For all these discretionary loans either security had been given (in the form of municipal bonds or a guarantee by a third party) or Giuliano had ensured that they had been entered into the books of the debtors. Restitutions were made on all but one of the secured loans, but not on the unsecured ones, which seems to suggest that it was the absence of risk that made them usurious in Giuliano's eyes. In this case then, the strategy of calling everything to do with lending *discrezione*, only worked out in the end for a part of the loans, namely the unsecured ones.[137]

Another borderline usurious practice, which was often condemned in England over the fourteenth to sixteenth centuries, was chevisance. In the ordinances over this period usury was always mentioned together with (false) chevisance.[138] There has been some confusion among historians as to what chevisance was and why it was sometimes accompanied by adjectives such as "false" or "corrupt" and at other times seems to have had the connotation of deceit by itself. I would venture that the following was the case. The term chevisance was generally intended by its practitioners to express the limit of what canon law in the section on the usuries in the *Liber Extra* allowed on earth (but not at the gates of heaven), namely the selling of goods worth five pounds for six pounds to be paid at a later date. Since, however, the form of such a canonical sale on credit was often or even mostly employed as a cover for loans with a mark-up, all chevisance came to be seen as deceitful, thus making the adjective "false" redundant. In any case it seems that the ecclesiastical courts in England did not prosecute chevisance, but only usury on the basis of *mutuum* type loans, which indicates that it fell outside the canon law proscription. Moreover, the reason given for the proscription of chevisance in the London ordinances and statements was that it destroyed the honour and soul of the lender, which is precisely what the *Liber Extra* said might be the case for the above-price credit sale. Despite it being technically outside the category of "the usuries," false chevisance, was, nevertheless, closely associated with usury as can be seen in the justification that the mayor and aldermen of London

137 Compare Edler de Roover, "Restitution."

138 Section 9 of the 1571 statute of Elizabeth stated that if it was not confirmed by the next parliament and no other statute "agaynste usurie or corrupt chevysaunce" was made, the statute would lapse. *Statutes of the Realm*, 4: 542—3

gave for starting a spate of prosecutions in 1421. They claimed that there had been a lot of usurious activity in the city and a number of people had contracted bargains of false chevisance. All the false chevisance cases that were consequently brought involved the sale and lower price repurchase of goods that remained at all times with the first seller. In most of these cases the false chevisance was considered proven and the seller/lender convicted, which seems to indicate that these kinds of sales were actually practiced. A case brought in 1435 shows that the play with the form of the credit sale could be taken still a step further: in that case even the goods sold were fictitious.[139]

Thus it seems that in London civil institutions were prepared to go further than the Church in enforcing the ban on usury. This is seen in particular in the case of John Pykering and John Middleton versus John Hyham. As Gwen Seabourne remarks in her analysis of the 1421 usury and chevisance trials, it is very interesting that the records reserved quite some space for the pleading of the plaintiffs, even though they were not on trial themselves. One gets the impression that the plaintiffs did not bring the complaints on their own initiative but were enlisted by the city council in order to be able to pursue their campaign against the lenders. Quite a few pleaded that they had acted out of necessity. The section on exceptions will return to that argument. A few of those implicated in chevisance deals pleaded, however, that they were duped by the seller/lender. Pykering and Middleton pleaded that they had bought, two years previously through a (foreign) broker, some goods for 366 pounds and a bit to be paid in two months, but that the seller Hyham would not let them have the goods so that they could resell them, and they were only able to raise 300 pounds on the basis of it, which was what they needed to pay off a debt to a third party. Hyham answered in his defense that since Pykering and Middleton did not have any buyers "at hand" to sell the goods on to, they had asked him to retain the goods until they could find buyers and, in the meantime, to repay for them the 300-pound loan to the third party. So, despite their disagreement on how the transfer of the goods was stymied, both the plaintiffs and the defendant aimed to represent the transaction as a real sale on credit. Hyham "complained piteously to the mayor and aldermen that he was being gravely and undeservedly scandalised by suit of the plaintiffs." Hyham's version of the story was accepted by the court, and he was found to be not guilty of usury or false chevisance as per the ordinances with respect to the plaintiffs, but still guilty of "un-

139 Compare and contrast Seabourne, "Controlling."

just and illicit trading" with respect to the Commonalty and was dealt with "in accordance with custom."[140]

There were also a number of financial instruments that became more and more clearly defined as being outside the definition of usury. The most important instruments that eventually came to obtain authoritative sanction were the so-called extrinsic titles and annuities.

Extrinsic titles were circumstances not inherent in the loan itself but outside of it that entitled the lender to compensation. The two most important and widely accepted of these titles were *poena detentiori* or penalty for tardy payment and *damnum emergens* which covered damages incurred by the lender in extending the loan. Another one of these titles was *lucrum cessans* or "profit halting," which De Roover likens to the modern concept of opportunity cost.[141] It seems that the financial use of the term *interesse* originated in the application of the set of these extrinsic titles that focused on the interest (in the sense of stake) of the lender, including *lucrum cessans.* The term *interesse* was originally mostly used in conjunction with some term for "damages" which reflected another set of the titles, including *poena detentiori* and *damnum emergens.*[142] It is important to remember that the attraction of these "extrinsic titles" for the Scholastic canonists was precisely that they operated outside of the canonical definitions of usury itself, drawing on words that were not part of the definitions of Augustine and the other authorities cited by Gratian.

Nevertheless, the titles met with strong opposition from some guardians in the beginning or our period. As we saw, the reputation of the lender was written into the definition of usury, and that reputation might be another reason to be suspicious of the application of the extrinsic titles. The important thirteenth-century canon law scholar Raymond de Peñafort pointed out the need for the lender and borrower to have "the right intention [*intentio recta*]" when applying extrinsic titles, in the light of the "danger of usury." He noted that, "if… he who applies such an [extrinsic] penalty, is used to be a usurer, it may be presumed that he applies this penalty to circumvent the usuries [*in fraudem usurarum*]."[143] The *lucrum cessans* principle was initially controversial also for another reason. Aquinas and others rejected it because it implied that money was fruitful rather than sterile, but by

140 Seabourne, "Controlling," 122, 125, 128, 130, 137 n.62, 138 n.67, 139 n.85. Quotations modernised as found there.

141 Compare Munro, "Usury, Calvinism and Credit," 161—2, De Roover, *Bernardino*, 30—2.

142 De Roover, *Bernardino*, 1; compare Neumann, *Geschichte*, 164—5.

143 Peniafort, *Summa*, 329—30. Contrast Todeschini, "Usury," 128.

the fifteenth century this title too came to be accepted by people like the archbishop of Florence, Antoninus.[144]

The instrument of annuities, that is, the purchase of a life-time or perpetual stream of income for a fixed sum, was received more favourably by the guardians from early on, although to this instrument too, there was some opposition among the guardians. The annuity contracts were generally guaranteed by a lien on a piece of real estate, or in the case of urban governments financing themselves in this way, by the future tax revenues or collective wealth of the citizens of the town. This financial instrument was first employed by town governments in northern France in the early thirteenth century and from there spread to the Netherlands, Germany and Catalonia shortly after 1300, and to other parts of Europe much later.[145] The terms used for the annual income springing from such contracts were often the same as those used for rent in the sense of an income from land by a landlord: *rente* in French, *census* in Latin, *zins* (or *czyns* etc.) in German, but through this new usage these terms acquired new significance, which was visible early on in the general preference in the Netherlands and sometime preference in German regions for the French term.[146]

The introduction of this device was soon followed by controversy among theologians over its legitimacy, but already by the middle of the thirteenth century Pope Innocent IV, in his commentary on the *Liber Extra*, approved of buying an income in "grain, wine or something similar" for a fixed sum of money, be it subject to a number of stipulations and recommendations. The term money seems to have been avoided in the description of what could be purchased in order to avoid getting entangled in the debate about the saleability of money. There was room, however, for reading "money" for "something similar," as money was generally included in the category of fungible goods, and money, grain, and wine were also all on a par in the definition of usury by Augustine as we have seen. This careful position statement, however, does not seem to have reached very widely, since in the 1270s there seems to have been some confusion over the official position of the Church in the circles around the theologian Henry of Ghent at the University of Paris, who continued to oppose annuities. Between 1425 and 1455, however, three papal bulls confirmed and formalised the approval of annuities by the Church.

The grounds for the acceptance of the instrument of annuities by an increasing number of guardians of the doctrine of usury seem to have been threefold. First, as Pope Innocent IV emphasised, the contracts for annuities had the form

144 Compare Munro, "Usury, Calvinism and Credit," 161—2, De Roover, *Bernardino*, 30—2.
145 Tracy, "Dual Origins"; Munro, "Usury, Calvinism and Credit," 180—2.
146 For the terms used in German regions, see Neumann, *Geschichte*, 223, 227.

of a sale, and as we have seen, there was increasing consensus that where there was no *mutuum* or loan there was no usury. One might object, however, as Henry of Ghent did, that the person buying life-time annuities might hope to live long enough to recover through the instalments of the annuities the principal sum he had paid and more, which would make it usury, because it was precisely such expectations that made a transaction usury. But Innocent IV had already stressed the importance of the element of chance in such contracts whereby either what was sold or what was purchased might end up being worth more, even if the purchaser of the annuities would be "a usurer in intention." The uncertainty of profit was therefore a second factor in the acceptability of at least the life-time annuities. A third factor making these contracts acceptable was the link to the productive factors of labour and land, through the lien on real estate or the backing of the tax income of a town. Pope Innocent IV stressed that having such a backing made a contract of this kind even better (*forte melius*), i. e. more acceptable, and a tie to real property was made a condition by the bull of Pope Martin V of 1425.[147]

The same bull, directed to three bishops in the Holy Roman Empire, also stipulated the right to redemption by the seller or debtor. This right to redemption for the seller of the annuities had arisen in certain localities in the German regions already in the thirteenth century, not long after the invention of annuities. The right came under fire from canonists in the fourteenth century. The bull emphasised that the real goods involved in the contract were in principle "obligated in perpetuity," before stipulating the right to "free" oneself from the obligation.[148]An equivalent right for the buyer/creditor to give notice does seem to have been informally recognised in northern Germany already in the thirteenth century, but was proscribed by a number of city governments in the fourteenth, and was still in 1577 forbidden by the German diet.[149] Despite the right to redemption making annuity contracts more like loans, the form of these contracts remained very important well into the seventeenth century.

Statements about the uses and abuses of the devices of annuities and *interesse* abound among the reformers of the sixteenth century. Both Luther and Calvin considered *interesse* a euphemism. Luther wrote, "There is a little word that is called in Latin: *interesse.* That grand, precious, delicate little word." Calvin suggested that there had been a long-term process of euphemisation, in which the ancient Hebrews had attempted to cover the odious *neshekh* with the term *tarbit* and the Ro-

147 Innocent IV, *Commentaria,* 517—8 (comment on book 5 titulus 19, caput 6 [5 in the commentary] "In Civitate"); Munro, "Origins," 521—4; Wei, "Predicting," 22—3.

148 *Corpus juris canonici*, 3: 278—80 (Extravagantes: liber 3 capitulum 1). Compare Gilomen, "Rentenkauf," 100—1, 105—79, 195—203; Neumann, *Geschichte*, 234—5, 257.

149 Gilomen, "Rentenkauf," 184—95; Neumann, *Geschichte,* 247—51.

mans *foenus* with *usura*, only to be replaced at the hands of the French, in "a new piece of craftiness," by *interesse.* Luther, moreover, noted that *zinskauf* or annuity contracts often functioned as "a good and trusty protector of damnable greed and usury." [150] In his *Great Sermon on Usury* Luther condemned riskless annuity contracts through a play on the broad and narrow senses of the word *interesse* (and thereby seems to purposely conflate the mechanisms of annuities and *interesse* that had been kept separate by generations of canonists). He added that "I have never seen or heard of a sale of true annuities with redemption (*rechten Zinskauff auf Wiederkauff*)."[151] Calvin was less averse to usury under certain conditions, but thought that it should be called for what it was. In his first attempt at addressing the topic in a letter to a friend (see below), Calvin designated as pointless the whole effort of creating a contract for the sale of annuities in cases where the seller/borrower was well off and "would be content with usury." "What is this other than playing with God in the way of a child, to judge what is done by the names and not by the truth?" Calvin asked rhetorically, and warned the addressee of his advice that "the things [*choses*] and not the words [*parolles*] or ways of speaking are here called into judgement."[152]

Luther further reflected on the relation between loopholes and legal subtlety. In 1540 he noted that the jurists of his day distinguished between true and made-up *interesse* (*verum/fantasticum interesse*) and desired jurists to look carefully at all the angles of disputes that centred around damages and *interesse*, so that these titles would not be used as covers for usury. Yet he realised that even wise jurists could fail, because law as it existed in this world was impure (*unrein*) and unsubtle in the light of Christ's evangel, and necessarily so: "it suffices that it [the law for the world] be crude, base, straightforward law. Subtle and sharp it cannot be, or one will get such loopholes [*Scharten*] that it can't cut through, since it must break down blocks and large chunks."[153]

Exception in the Latin World

Just as in the Persian world considerations of necessity and equity were brought to bear on the proscription of usury. These concepts were continually developed by

150 Quoted in Kerridge, *Usury*, 29—30, 49, 87. Translations as there.
151 Quoted in Kerridge, *Usury*, 40, 145—8. My translation.
152 Calvin, *Opera*, 10: 248. I discuss this letter to De Sachin in more detail below.
153 Excerpt from "An die Pfarrherrn wider den Wucher zu predigen Vermanung," in Kerridge, *Usury*, 149—51, 153—4. My translation.

lenders and borrowers, as well as by theologians and jurists who took their perspectives on board.

An important development that played into the idea of usury as a matter of degree rather than kind was the increasing regulation of maximum rates of annuities by both worldly and ecclesiastical bodies. Secular governments, in regulating the right to redemption, in general stipulated an amount for the buy-back, either the equivalent of the original sum or that sum plus a percentage. Initially the stipulated sums were set as a minimum, apparently to protect the buyers/creditors from inflation, but in the fourteenth century secular governments tried to find a balance between the interests of the purchasers/creditors and of the sellers/debtors and establish a just price for buy-backs, resulting in a mark-up that was both minimum and maximum.[154] As economic historians have shown, this just price reflected the market rates for annuities, be it those in the acceptable part of the spectrum. From prescribing these overall mark-up percentages, it was then only a small step to prescribing annual rates, which in fact also started to take place in the German regions. Already around 1386 the Prussian cities set a maximum of one mark in twelve, i. e. 8.3 % per year. In his 1425 bull, Pope Martin V recommended a rate from 7.14 to 10 %, between which one could navigate "according to the quality of the times". But the setting of annuity rates by governments really took off in the sixteenth century. The 1530 police ordinance for the Holy Roman Empire explicitly set a maximum annual rate of 5 % for *Wiederkaufsgülten* (annuity contracts with a redemption clause), and noted, crucially, that "whatever is given, taken or traded above that, we enorder to be considered and taken as usurious [*wücherlich*] and punished as aforementioned."[155]

In a further development, secular governments started to set the maximum rates for *interesse.* A paragraph concerning interest and usury in a 1540 ordinance issued by Emperor Charles V for the Netherlands after consulting with his council there, was still rooted in Scholastic thought, but nevertheless innovative. First of all, it distinguished between *interest* and *woekerie*, arguing that interest was "the gain that a merchant might reasonably make," which had also been the Scholastic argument for the extrinsic title of *lucrum cessans.* Secondly, it limited the right to receive interest to merchants, noting that all non-merchants giving their money to merchants in order to get annual returns would be considered *openbaere woekers*, that is, manifest usurers, and punished accordingly. The tiny but significant innovation in this paragraph was setting the maximum rate of interest at 12 %

154 Compare Gilomen, "Rentenkauf," 100—1, 105—79, 195—203.

155 *Corpus juris canonici*, 3: 278—80 (Extravagantes: liber 3 capitulum 1); Gilomen, "Rentenkauf," 100, 109—10; Neumann, *Geschichte*, 251—65.

per year, which would be the amount that a merchant might also make otherwise according to the text. It declared that "all contracts and obligations through which one would be enabled to take greater gain than the aforementioned is for usury [*woekerie*]." This partial redefinition was linked to what the paragraph suggested was the spirit of the proscription of usury, namely to avoid that by its superior profits usury would crowd out other trade, which would cause "the loss of souls and enormous endangering of the common wealth [*gemeyne welvaart*]."[156] The rationale that usury might drive out enterprise was also espoused by Luther and later by some prominent English Protestants.[157]

A number of laws adopted in the Holy Roman Empire as well as in England between the 1530s and the end of the century were highly ambiguous, and, I would argue, purposely so. We might say that these ambiguous laws created exceptions for lower rates with the implicitness and formal trappings of circumvention. Just as the *hila*s of the Persian world, they fall somewhere between exception and organised circumvention.

As legal historian Gustaf Schmelzeisen suggests, a close reading of the ordinance against "usurious contracts" enacted by the German diet in 1530 turns up some remarkable ambiguities. While the last paragraph of the ordinance unambiguously allowed a 5% rate for annuities and called any takings above that usurious (as was noted above), the remaining paragraphs seem at first sight to proscribe all kinds of strategic contracts. Yet close inspection of the text of the ordinance reveals a concern with the degree rather than the kind of these contracts. The first hint we get is that divine law is only one of the grounds on which the text condemns the usurious contracts widely practiced at the time. These are "not only indecent but also unchristian and against God and justice." The first concrete practice the text condemns is "that some should be lending a sum of money of say 800 guilders, but have a sales contract state more than 1000 guilders, through which by them is charged [*verzinset*] more than five in a hundred, and more received in the buyback than had been their principal." Now it would seem that two things are being condemned here: receiving anything above the principal on a loan and receiving more than 5% on a loan. The first would exclude the second, so what was it? The next condemned practice is taking "an overproportionate *interesse*" for a "small" delay. Paragraph three mentions "a substantial service charge [*merck-lich dienstgelt*], that they should not be obliged to provide." Should borrowers not be obliged to pay a service charge or a *substantial* service charge? Paragraph five condemns the practice of lending on condition of a sale of goods below the going

156 Lameere and Simont eds., *Recueil*, 4: 235. Contrast Munro, "Usury, Calvinism and Credit," 169.
157 Kerridge, *Usury*, 55—6, 145—8.

price by which the lender may have "a great gain, even double or triple." Again it is ambiguous whether gain is condemned or great gain. Paragraph six condemned letting borrowers pay "at four markets, as they call it" so that they end up paying more than 20%. This paragraph thus assumes the norm of five percent but condemns charging it four times a year instead of one. Yet nowhere in the ordinance was it stated explicitly that 5% per annum was allowed on straight loans as it was for annuity contracts – this was left to read between the lines.[158]

We may attribute this ambiguous outcome to the sharp division that arose in the Holy Roman Empire over this issue of lending and usury amid the stirrings of Humanism and the Reformation. This was to last till well into the seventeenth century. In the diets of the empire, the electors, princes (among whom a third were ecclesiastical administrators), and representatives of cities and other bodies had to reach a consensus and this proved exceedingly difficult, for which reason the issue was on the agenda again and again. In 1600 the diet finally explicitly allowed a 5% *interesse* for late repayments of loans "on the assumption that the creditor from that time [of the expiration of the loan] on, would like to invest his money." If the creditor wanted to claim more on the basis of *lucrum cessans* or *damnum emergens*, he would still have to document his claim before the imperial judiciary. It was a rather small step in explicit legislation after three quarters of a century of debate. The deputies to the 1600 diet even mentioned in the ordinance their memory of the *streit* (dispute) at the subimperial diet of 1586 over the issue of loans.[159]

It seems that Emperor Charles V was on the lenient side of the debate and interpreted the 1530 ordinance accordingly. In a 1544 privilege he allowed, "Jews and Jewesses…to invest and use their cash reserves and rent [*barshafften und zinss*] … for as much as [or] above and somewhat broader and more than is allowed the Christians."[160] Evidently, the premise of this sentence is that something was allowed to the Christians in this respect, but the wording is again extremely vague: no mention of the five percent, no mention of an alternative limit, no use of any terms for lending or loan. The most explicit reference to what we now call interest is the term *zinss*, but this term was highly ambiguous in itself as was discussed above.

A product of the same confusing time was the "Acte against Usurye" enacted by Henry VIII in 1545. The root of all the discussion among modern historians

158 *Reichs-Abschiede*, 2: 341—2. Compare Schmelzeisen, *Polizeiordnungen*, 482.
159 *Reichs-Abschiede*, 3: 494 §139. Compare Blaich, *Wirtschaftspolitik*, 159—65.
160 Karl V, *Judenprivileg*.

about it may again lie in that it was simply intended to be ambiguous.[161] Henry and the parliament were steering away from Rome but still clinging to many of its institutions. Canon law, in any case, continued to play a role in the enforcement of the proscription of usury by Church bodies in England well into the seventeenth century.[162] The more or less direct references to what had been condoned by canonists, namely the extrinsic titles and annuities, might then have been purposely applied as a word-sauce by the authors of the bill in order to avoid the taint of radicalism. Little record survives about the debates that went into the making of the Henrician law, except that it originated in the House of Lords and was passed there with only one bishop and three laymen dissenting, after which it passed through the Commons with no recorded opposition.[163]

Besides strictly proscribing usury as well as all kinds of strategies for circumvention, the law provided for a limit of ten percent gain per year on two kinds of transactions. It was not specified whether this was an upper or (also) a lower limit. The limit was for annuities proceeding from a lien on real estate as well as "for the forbearinge or givinge daye of payment [i. e. for the doing without or allowing late payment]… of and for his or their money or other thinges that shall be due for… wares, merchaundizes or other thinge or thinges." It seems that both these exceptions were framed in such a way that they did not contradict canon law. The provision for annuities stayed within the bounds of the papal bulls regarding annuities and the provision for an increment on credit transactions latched on to the *Liber Extra*, where, as we have seen, it was noted that a premium for selling goods on credit was not formally usury. Moreover, the term "forbearing," which implies the effort involved in doing without, and the phrase "givinge daye of payment" seem to allude to the extrinsic titles of *lucrum cessans* and *poena detentiori* respectively.[164]

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161 The debate is summarised by Munro in "Usury, Calvinism and Credit," 169—71. Munro dismisses the suggestion by Eric Kerridge that the rate concerned *interesse* as defined by the Scholastics, as well as the suggestion by others that the rate was also a minimum, but with no, respectively only a rhetorical, argument.

162 Jones, *God*, 108—15.

163 Jones, *God*, 48.

164 Kerridge, *Usury*, 7—9 discusses the term forbearance at some length and suggests that it referred to postponement of payment, but I think this interpretation is not supported by the two examples of the use of the term around 1600 that he cites (pp. 8, 57), which instead seem to support a translation into modern English as "the effort of doing without" and the interpretation that forbearance was not the same as postponement but something that came with it. How one could give rise to the other can also be seen in the phrase in the 1571 act: "giving of days for forbearing of money by way of loan." I would argue that the present legalese usage of "forbearance" in the sense of postponing the enforcement of a claim arose from its particular use in the statute of

Yet, while technically remaining within the bounds of canon law, the wording of this paragraph may have been kept vague on purpose. Was one to understand money as being included under the "thinge or thinges" involved in the transaction? This is certainly the interpretation of Johannes Uyttenhove, a prominent member of the Netherlandish Protestant community in London. He wrote to Calvin only four years after the proclamation of this act that he was keen to entrust his savings to a merchant for a return as per this law, but was wondering whether the rate of 10 % was equitable, and he would have liked the king to provide a rationale for it.[165]

In 1552 a more radically Protestant government repealed this act and replaced it with another act against usury, which forbade "anny manner of usuries, encreace, lucre, gayne or interest,"[166] but in 1571 Elizabeth I revived the act with the specification that the limit was to be seen as a maximum and some other minor elucidations, as well as additional stipulations regarding punishment. While defending the bill in parliament John Woolley admitted that by the letter of the Bible all usury remained a transgression, but that it was only the excess that did the harm and that in moderation it might be allowed to go unpunished. The act therefore still applied the term usury to all incremental payments, whether below or above the 10 % limit, and invoked some strong wording against all these increments.[167]

Now we turn to the exceptions made for outsider groups based on necessity. Despite the call of the Church to expel foreign lender as laid down by the Second Council of Lyon in 1274, secular governments seem in fact to have often been allowed more scope in exercising lending at interest than indigenes. It seems that men from northern Italy and Piedmont, generally known as "Lombards" or "Cahorsins" came to play a major role as bankers in northern France, Burgundy, the Netherlands, the Rhineland and England from the second quarter of the thirteenth century onwards not only because of their banking skills but also because of their legal status as foreigners, which allowed for the possibility of negotiating

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Henry VIII, because the "or" between "forbearinge" and "givinge daye" in the text started to be seen as copulative rather than disjunctive. In 1587 the Barons of the court of the Exchequer felt it necessary to note explicitly that it should be read disjunctively. See Jones, *God*, 101—2. We may also consider the usage of Francis Bacon (who also had quite a bit to say about usury) in speaking about "forbearing wine" with reference to the effort involved in abstaining from something against human nature. Bacon, *Essays*, 356.

165 Letter Johannes Uyttenhove to Calvin 26.11.1549 in Calvin, *Opera* 460—3, there 462.

166 Munro, "Usury, Calvinism and Credit," 170 n.57.

167 For the acts of 1545 and 1571 see *Statutes of the Realm*, 3: 996—7 and 4: 542—3. The speech Woolley gave on 17.04.1571 as represented in an anonymous diary can be found in Halio, *Casebook*, 124—5.

privileges for settlement. The prince-bishop of Utrecht, a province of the Netherlands where both the Church and secular bodies enacted strict anti-usury measures in the second half of the fourteenth century, declared in 1376 that the usury laws did not apply to Lombards for instance.[168] A similar separate status applied to Jews, who were also often subject to conditions and privileges for settlement. The niche that these relative outsiders filled was often that of pawn banking. While annuities were supposed to have a lien on something productive, pawn banking relied on pawns sitting in the vaults of the lender, unproductively. This was one of the aspects that rendered this kind of banking manifest usury in the eyes of Christian contemporaries, and its practitioners manifest usurers. The difficulty of filling the pawn banking niche was such that from the twelfth century onwards town governments sometimes resorted to actively inviting Jews or Lombards to settle in their towns on the condition that they would practice lending. Before the Second Council of Lyon this was the case for some towns in the Holy Roman Empire, as well as for Poland and the Holy Roman Empire as a whole.[169] And again, amid the ever tighter restrictions on Christian pawn-banking in northern Italy in the fifteenth century some towns invited Jewish money lenders.

From the first part of the fifteenth century a number of North Italian towns took to regulating the lending activities of Jews and explicitly tied this to certain freedoms allowed the Jews. The concept of necessity is a recurrent theme in the justifications city councils brought to bear. In 1437 the city councils of Florence legalised pawn banking by Jews against the payment of a tax while at the same time not renewing the privileges of Christian pawnbrokers, thereby restricting this activity to Jews. Ten years later, in an effort to obtain papal dispensation for this or a new arrangement, the council members employed some elaborate reasoning, drawing not only on the category of necessity but also on that of public utility and the lesser evil. Arguing that not allowing the poor access to credit would lead to major inconvenience, the council members noted that it would be near-necessary (*quasi necessario*) to allow Jewish moneylenders in Florence, even though they did not in any way want to contravene divine law.[170]

The municipal government of Pistoia also made it clear in 1455 that it regarded lending for gain an indispensable service. The council grounded its decision to regulate lending activity and to limit it to one person only simply as follows: "for any place it is necessary [*necessarium sit*] to have and hold one man who lends [*mutuet*] publicly on pawn for the daily contingent necessities of the rich and the

168 Compare Maassen, *Krediet*, 40—86; Dorin, "Canon Law," 132—3.
169 Attali, *Juifs*, 232; Neumann, *Geschichte*, 292—347.
170 Menning, *Charity and State*, 13—6; Brubaker, "Ecclesiastical Courts," 248 n.106.

poor." That the lending would be of the *fenerare* kind and practiced by a Jew appears as self-evident further on in the ordinance.[171]

A qualified take on the argument from necessity is found in a letter by the Dominican preacher Girolamo Savonarola, who was quickly gaining influence in Florence. In response to a question about the position of Jews from the governing body of the town of Lucca, he wrote in 1493 that the Luccans should not invite Jews there to engage in lending for gain, but if they were already there and wanted to practice it, the town government might allow it. Savonarola made an analogy with the sin of *luxuria* (lustful excess, debauchery). One should not acquire a courtesan in order to be spoiled/pampered (*luxurietur*), but can acquire a wife, and allow her to spoil/pamper if she wants to. The latter would be permissible as a lesser evil (*minus malum*).[172]

North of the Alps, the argument from necessity also came to be used in the context of lending by Jews in the sixteenth century. In Geldria in the Netherlands in the mid-sixteenth century the provincial administration was stiffly against any privileges for Lombards and Jews, and in 1545 ordered the cities of Roermond and Venlo to expel their Jews. The city of Roermond pleaded in the same vein as Florence and Pistoia, though with less sophistication, that the Jews had been admitted "for no other utility [*nuetz*] or need [*behueff*] than that of his imperial majesty's poor city."[173]

Emperor Charles V also made use of an argument from necessity when defending the right for Jews to lend at interest. His argument, however, took off from the needs of the Jews, as well as those of society. The reasoning of his 1544 privilege to the Jews was that, since the Jews were taxed higher than the Christians, but could not own any real estate or exercise any urban professions, functions, or crafts among the Christians from which to pay these levies and have a livelihood, they could only live off what they could obtain from investment of their cash reserves. It was then, in order to both have them pay tax and let them have a livelihood that Jews were allowed and to be tolerated [*geduldet*] to charge more than Christians, "and also for their utility and necessity [*und sonst zu ihrem nutzen und notthurfft*]."[174] In response to subsequent efforts by the German diet to extend the proscription of usury to the Jews in 1548, he asked how Jews were to live in the face of their exclusion from all urban professions: were they to take up farm labour? In 1577, then, it was laid down in the ordinances

171 Capecchi and Gai, *Il Monte*, 24—5, 137; Menning, *Charity and State*, 13.

172 Quoted in Rivière, "Juifs florentins," 18 and note 26. My rendering of this passage diverges from that given there.

173 Maassen, *Krediet*, 56, 86—7.

174 Karl V, *Judenprivileg.*

for the empire that Jews were allowed to take 5% in *wucher*, "so that they may have their livelihood." The privilege came with the recommendation to find a *ziemlicher*, or more decent, profession.[175]

The increasing recourse over our period to the categories of necessity, utility, and the lesser evil can also be detected in other domains than that of usury. To be sure, Gratian already inserted the maxim that necessity knows no law into his compilation of canon law on the eve of our period, but it was not immediately accepted by all canonists.[176] Necessity as a ground for secular legislation was admitted by Thomas Aquinas (though only for *maxima necessitate* or extreme need). But it seems that, on the whole, the Scholastics, including Aquinas, rejected necessity as a ground for secular rulers to pass over the proscription of usury. Yet recourse to the category of necessity in relation to the public good became increasingly common in worldly ordinances over the first part of our period, as the detailed study by Johannes Pichler shows for the Holy Roman Empire.[177] Necessity was clearly an idea that was floating around and that could be seized on by those on the lenient side of the usury debate and other debates about the limits of divine law.

The keenness to make use of arguments from necessity can also be seen in the fifteenth-century usury trials in London. At least a third of the records make mention of the necessity or need of the borrowers (who were not the prosecuted parties). In a number of cases in the form of an indirect statement by the borrower, such as: "being urged by necessity and anxiety, [he] chose, as he thought, the lesser evil." Sometimes it was emphasised that the heart of the borrower was sorely afflicted and perplexed by his necessity, and he therefore ended up choosing the better of two evils. There is an echo in these statements of the concern that Gratian and subsequent canonists had with the state of *perplexitas* when one was faced with a choice between two evils.[178] One of the 1421 cases reveals the connections across Latin Europe with respect to finance as well as the discourse on necessity. The record noted in the context of a loan from a vintner who was the defendant many cases to Sigismund, King of the Romans and future Holy Roman Emperor, that the latter was "greatly in need of a loan…for the saving of his honour."[179]

A more radical development in thinking about lending at interest took place in the course of the institutionalisation of pawn banking in northern Italy from the 1460s onwards. There, local governments founded loan banks for the poor, so called mounts of piety, and in the process of doing so set rates for the incremental pay-

175 Blaich, *Wirtschaftspolitik*, 165; *Reichs-Abschiede*, 3: 390 (art. 20 § 6).

176 Kuttner, *Kanonistische Schuldlehre,* 257—65, 292—8; Pennington, "Innocent III."

177 Pichler, *Necessitas*, 17—21, 39—65; McLaughlin,"Teaching of the Canonists" [first part], 84— 95.

178 Kuttner, *Kanonistische Schuldlehre,* 257—69.

179 Compare Seabourne, "Controlling," 128—30, 135 n.29, 141 n.124. Quotation as there.

ments that were to keep these banks going. The first mount of piety was founded in Perugia in 1462. Though Florence founded its mount somewhat late, its history is the best documented. Moreover, it turned into a game-changer.

The foundation of the *monte di pietà* of Florence came about in 1495, not long after the removal from power of the Medicis. In 1473 the town councils had passed a provision to set up a charitable mount in Florence but this did not materialise for various reasons. First, there was the opposition of many Dominicans, who objected that the state should not sponsor usurious lending activity even in the form of a mount of piety, and second, Lorenzo de' Medici seems to have paid lip-service to the mount while working against it behind the screens. The establishment of a mount would, as it had in other towns, entail the expulsion of the Jews from Florence and the historian Carol Menning seeks the reasons for Lorenzo's obstruction in his seeing economic advantages in the presence of the Jews as well as his moving in circles of humanists who appreciated the writings of Jews and even Arabs.[180] The driving force behind the eventual foundation of a mount in 1495 were the Dominican preacher and leader of the new republican government, Savonarola, and the Franciscan monk Marco di Matteo Strozzi, both exhibiting a puritan zeal with anti-Jewish overtones, and both taking the example of the Franciscan friar Marco da Montegallo. During the process of the creation of the mount, Savonarola put it thus (using a banking allegory):

> Florence, according to whether you do more or less good, so will your tribulation be small or great. But know that you must chase out those three sins [sodomy, usury, and luxury?] that I have told you many times. Sodomy, first, which you have redeemed from pawn [i. e. on which point you have delivered], second, usury. You know you have created officials to establish a *Monte di Pietà* to exclude the Jews from your city. This matter must be moved along and, if you see fit, do what these Franciscan fathers say.[181]

Thus Savonarola, as a Dominican himself, removed the opposition of the Dominicans in Florence.[182]

A Council of Eight was to draw up the statutes or by-laws for the mount. Although Strozzi was not part of that council, he seems to have been a strong influence and among the papers he left is a draft for regulations for the mount. While the mount was to avoid the taint of usury, it would be necessary and permissible in his view to expect a small return on loans in the larger framework of charity. To redeem their pledges the borrowers were therefore to pay a fee that was small

180 Menning, *Charity and State*, 29—31.
181 Savonarola, *Prediche*, 2:106. Last two sentences of the translation from Plaisance, *Florence*, 91.
182 Goldthwaite, *Economy*, 470—1.

enough not to burden the borrower but large enough to keep the mount in business.[183] The paragraph on interest-taking in the regulations as they were finally adopted by the Council of Eight in 1496, is remarkable first for the careful avoidance of any concrete term for interest, although the word *interesse* is used in subsequent paragraphs. Second, the paragraph is remarkable in recasting the work of the banker as work: "Because every effort (*fatica*) desires a reward, it is appropriate that he who receives the benefit of the effort contribute something to that effort." The word used, *fatica*, carries the connotation of a physical hardship, as it does for instance in Canto 34 of Dante's *Inferno*, where Dante's guide Vergil is finally exhausted from the effort of the descent into hell. Dante's accusation that the usurer does not make anything by the sweat of his brow is implicitly overturned in this paragraph of the statutes, and the way is cleared to asking 5 to 7.5% per annum. This money was needed in order "to compensate for (*supplire a*) all salaries, rents, and other expenses necessary for the house." In this paragraph the founding Council of Eight thus deployed a three-tiered strategy to justify the proposed business practices: avoiding any specific term for interest, recasting the work of the future staff as labour, and recasting the additional payments on the loans as compensation.[184] Such must also have been the arguments that some "masters and doctors" presented before Pope Leo X twenty years later to make the case for mounts of piety. The Pope pronounced himself in favour and in doing so redefined usury on the basis of what he saw as the spirit of the proscription.[185]

The capital for the new institution was, however, to be raised from interest-free deposits from the well-to-do, who would get rewarded in the afterlife.[186] But this principle too was later compromised, after the Medicis were restored to power once again. In 1533 Alessandro de' Medici made it possible for the mount of piety to give interest on the deposits. It was then, as Richard Goldthwaite notes, that the institution really took off and came to command very large assets and to play an indispensable role in the city's financial traffic. Apart from the successful combination of savings and loans in one house, a key to these developments was certainly also, as Carol Menning notes, the close relationship between the mount and the rulers of the state. Thus we are left with the double irony that an institution that was created to combat usury, became a major force in banking

183 Menning, *Charity and State*, 43—8.

184 "Capitoli del Monte di pieta di Firenze…1496 aprile 15," in Piccolomini ed., *Monte dei Paschi*, 271—82, there *capitoli* 21, 33, 36. Compare Menning, *Charity and State*, 60.

185 See above and Fifth Lateran Council, session 10 (4.5.1515).

186 Extract of the Florentine edition of Montegallo's *Tabula della Salute* published as appendix 34 in Ciardini, *Banchieri*, xci—c; Angiolini, "Marco da Montegallo."

with all the trappings of interest-taking and -giving, and that in the city of Florence famed for the innovations in banking tools by its merchant class, it was finally an institution founded and supported by the state that revolutionised banking.[187]

Another example of a very practical case resulting in a renewed religio-legal stance is the answer that John Calvin gave to a question put to him by his friend Claude de Sachin in 1545 regarding the permissibility of putting money in a bank for gain. This rather informal answer written in French was only published thirty years later, in Latin, well after Calvin had given a more formal view on the topic of usury in his *Commentaries.*[188] Despite its informal nature the response to De Sachin has attracted most of the attention from economic historians, theologians, and internet moralists. And while so much attention goes to the letter of Calvin by itself, none of the modern commentators seem to care about how De Sachin put his question to begin with.[189] Taking his letter into consideration it becomes clear that Calvin was under some pressure to accommodate the worldly concerns of De Sachin and a friend of the latter who was a "sane and pious man…tortured by the said matter." Moreover, Calvin was asked similar questions by other troubled people as well.

De Sachin brought forward the view of some professors of recent times that the statements in the Bible about usury were not to be understood strictly, but in the light of equity and the good, as the law of charity prescribed. Calvin adopted this view more or less wholesale. The doubt raised by De Sachin about the "solemn dictum" of Church Father Ambrose that money does not beget money, was merely elaborated by Calvin, be it with much more scorn. Calvin boiled it all down to two main arguments: that the historical situation in which the Jews of the Old Testament found themselves was completely different from "our situation [*nostre coniunction*]," and that the principle expressed in the one relevant passage in the New Testament was charity. These arguments about the Bible he supported, however, with a third argument from lived experience. He stated that, "certainly it would be nice to desire that the usuries would be chased from all the world…but since that is impossible it is necessary to give in to common utility."

Such a sense of utility was also present in the laws that the republican councils of Calvin's residence Geneva adopted in those years. In 1538 the councils adopt-

187 Goldthwaite, *Economy*, 470—83; Menning, *Charity and State*, 2—3.

188 The addressee is not mentioned in the extant manuscript copy of the letter or in the published translation but it is clear from internal evidence that it was a response to De Sachin's letter. De Sachin's Latin letter is in Calvin, *Opera*, 12: 210—1. Calvin's response can be found ibid., 10: 245—9. The published Latin translation is in Calvin, *Epistolae*, 355—7.

189 Compare Bélier, *Pensée économique*, 456—65; Wykes, "Devaluing"; Munro, "Usury, Calvinism and Credit," 166.

ed the first of a series of ordinances concerned with lending. In rather course language it spoke of a concern for poor borrowers who had borrowed money at *renevoz*, which was apparently a kind of annuity construction whereby the debtor gave the lender an amount of wheat each year, which, the law stated, could become a burden especially in times when wheat was expensive. From then on, the *renevoz* were to amount to no more than five percent (apparently calculated in money, but that was not mentioned). While that ordinance still fitted the older trend of the setting of rates for annuities, in 1543 Calvin chaired a committee investigating lending rates more generally,[190] and upon its recommendation the General Council adopted an ordinance stating that no one was "to lend money on usury or otherwise for having from it more than five percent gain." The plain use of the word *usure* reveals the influence of Calvin. Three years later again, after Calvin's exchange with De Sachin, the Little Council adopted an ordinance regulating ecclesiastical matters in the countryside around the city that had been proposed by Calvin and the other church ministers.[191] The ordinance simply stated in elegant French: "that none shall lend at usury or profit above five percent on pain of confiscation of the principal and being condemned to arbitrary amends as the case demands."[192]

Calvin seems to have struggled with the relation between the rule and the exception. Was divine permission for taking a low percentage in usury the rule or the exception? In his commentary on the eighth commandment, which is somewhat more polished than his letter to De Sachin, he adduced some examples from the practice of his day. He concluded that, "if we were to reach a judgement on the basis of equity [*ex aequitate iudicium*], reason [*ratio*] does not suffer us to admit that all usury is to be condemned without exception [*exceptione*]." But in the same text Calvin also turned the hierarchy of the exception and the rule upside down, making the argument that the proscription of usury only applied in exceptional cases: "usury is not now unlawful, except in so far as it contravenes equity and brotherly union."[193] This inversion was already present in his letter to De Sachin, where he made it clear that his new rule came with exceptions (*exceptions*), "since one has to keep in mind…that when I permit some usuries, I am not making them all licit." This statement shows his awareness that he was in effect making a

190 Wykes, "Devaluing," 41.

191 See footnote 1 to the edition of this ordinance in Calvin, *Opera*, 10: 51—8.

192 Resolution on abiding by the Gospel 21.5.1536, ordinance on *renevoz* 17.1.1538, ordinance on usury 19.2.1544, ordinance for the churches of the countryside 16.5.1547, in Rivoire and Van Berchem, eds., *Sources*, 2: 312—3, 343—4, 466—7, 500—5.

193 Comment on Exodus 22: 25 under exposition of the eighth commandment in *Calvin's Commentaries*, vol. 5: *Harmony of the Law*, part III. Latin text in *Opera*, 24: 679—83.

new rule through his interpretation and reasoning. The seven exceptions to this new rule allowing the taking of usuries were: 1) not from the poor or those in need; 2) not with too strong an intention of making gain; 3) not against natural equity and the rule of Christ "Do unto others etc.;" 4) that the borrower have the prospect of as much or more gain than the lender; 5) that what is right and equitable be not judged by the popular custom concerning what is licit, nor by the inequity of the world, but by the word of God; 6) that the parties take into consideration what is expedient for the public as well as for each other, and that the contract be "commonly useful [*utile en commun*]"; 7) that no more and preferably less than the legal limit set in any particular region be taken.

Calvin thus put much responsibility on the parties to the contract, giving them license to act as judges of what was right in each situation. Under point six he even seems to give license for people to make rules that they would like others to follow. Where Luther argued that usury laws should be course enough not to allow any loopholes, Calvin seems to have advocated simple laws with lots of room for case-by-case evaluation. The difference lay in the amount of individual responsibility. Finally, in his 1556 response to a question from someone outside Geneva about *foenus* lending, Calvin responded that he could say little with certainty about this. He noted that there was a gap between secular law (*ius*) and equity (*equum*). While the laws of his city had in a certain way established what the fruit of money might be, that was not to say that one might take it from the poor or in some other oppressive way. In other words, he considered such laws as he had himself helped to establish merely as a guideline that was to be applied with reference to equity.[194]

The linking of the proscription of usury to notions of equity that is observable in the statement by Pope Leo X of 1515, Luther's position in the 1520s, and Calvin's position somewhat later is already traceable in popular consciousness from the second half of the fifteenth century. The juridical clash between a notion of equity on the part of a borrower and the technical defence by a lender in Danzig (Gdansk) in the Baltic Sea region is a case in point. In a 1515 report, the judicial vicar of the Church in the region of Danzig writes that about seven years prior he had been presented a contract for *csyns* or annuities in which a by then deceased man had promised that he and his heirs would give a woman an annual rent of 6 % over the two hundred marks that she paid him, until such a time that he or his heirs would pay back the principal.[195] The woman had donated the annuities to the Church in order to have messes sung at St John's in Danzig, and the pastors

194 Response to unknown 25.4.1556, published in Latin translation in 1575. Calvin, *Opera*, 10: 264—6.

195 The following paragraphs are based on this report by the Pomerelian judicial vicar Schwichtenberg to the magistrate of Danzig, 1515, published in Neumann, *Geschichte*, 582—4.

of the church and the judicial vicar invited the heirs of the debtor to commit to continued payment by registering in the vicarial records before an ecclesiastical court. They offered that any future payments would go towards redemption of the principal sum so that the commitment would only be "for some time and years." But the heirs refused and wanted to have the instalments already paid over many years deduced from the principal as well, which proposal was rejected by the pastors of St John's. The heirs appealed to the general judicial vicar in Inowroclaw or Lesslow, who judged against the heirs. But the heirs did not give up and appealed to the Holy See in Rome, which, however, upheld the verdict with reference to the papal bulls approving annuities.

A number of modern historians have remarked or argued that such cases often were simply ploys by debtors, seizing on the category of usury as an easy way to rid themselves of their burden at least for the duration of the trial. For sixteenth-century and early seventeenth-century England, the historian Norman Jones argues that most of the cases that he analysed were ploys by debtors to get rid of debts or otherwise ploys by informers to earn their share in the forfeiture. He also notes, however, that there were cases in which the plaintiff did seem to feel wronged to the extent that he wanted to drag the alleged usurer through as much mud as possible.[196] To be sure, already in our period itself there were people who regarded some of the usury suits as a way to get out of legitimate contracts. In the fourteenth century, the doge of Genoa even adopted a decree to deter "frivolous litigation," and the merchant association in Florence found it necessary to stipulate that a debtor could not plead that any credit obligation entered in his books was usury, including what was listed as gift, since he had supposedly written this of his own free will.[197] In any case, all plaints concerning usury can tell us something about the legal consciousness of the litigants, or how their idea of usury meshed or clashed with the definitions laid down in canon law and secular ordinances.

Instead of considering it as a case of "frivolous litigation", we may then also read the report by the Danzig judicial vicar against the grain and try to take the point of view of the litigants in this case seriously. Apart from what the judicial vicar offers us by way of self-justification, he does represent the point of view of the wife and son of the deceased debtor as follows: they had complained in writing that the pastors and the vicar "had taken such *csyns* that it was usury." This statement in combination with their proposal for a retro-extension of the scheme for debt recovery suggests that they appealed not against the annuities as such but

196 Jones, *God*, 93—9, 108.

197 Tan, "Empty Shell," 188—9; Edler de Roover, "Restitution," 785.

against their excessiveness. Their position seems to reflect an idea that "perpetual" in such contracts should be taken to mean until the death of both original parties. Even the judicial vicar and the pastors seem to have been unsure that the contract by itself would guarantee continued payment, since they found it necessary to invite the heirs to commit by registering in the vicarial records and had offered a scheme for redemption.

The notion of usury as a matter of degree rather than kind expressed by the heirs was already articulated in a Danzig city ordinance of the late 1460s stipulating that only one year of arrears in annuity payments might be collected by title holders; all arrears from before the past year were to be considered expired and to collect them would be "rent usury [*rentwucher*]." Moreover, the heirs were not alone in seeing the clergy as offenders against the new view of usury as a matter of degree rather than kind. Luther in his 1520 *Long Sermon on Usury* also attacked the catholic clergy for upholding a 10 % rate on the innumerable annuity titles that the Church held. "If the whole world were taking ten in a hundred, the ecclesiastical institutions should hold themselves to the strictest law and, fearfully, take four or five." Thus, what was perfectly legal as per some papal bulls, appeared as a loophole in the face of "the strictest law" of equity.[198]

We may then perhaps perceive in the Danzig case the tragedy of lay people going to court seeking justice but being presented with formal law, which Sally Engle Merry has described so well for the modern USA.[199] Even the judicial vicar himself may have had a certain unease with the proceedings. We can detect the unease already at the start of the report in his effort to present the original debtor/seller as someone who was not needy in any way, and therefore no victim. On the contrary, he was "keeping well [*wohl gehalten*]," but having already mortgaged his lands to the extent that the city ordinances would not allow him to take any further mortgages on them, "he was still thirsty [for fast cash]," so that he took out the annuity contract in question. After winning the case, the judicial vicar felt it necessary to clear his name by suing the opposing party for the impertinence and defamation done to him and the pastors of St John's through their use of the term *wücherer*. This defamation, he wrote, "I, for the sake of my pastors and their names, have drawn into my conscience [*gemütthe*], and [therefore I] protested that I would not have suffered such [even] for 500 guilders."

198 Compare Neumann, *Geschichte*, 262, 263 n.1, 482.

199 Merry, *Getting Justice.*

Compensation in the Latin World

We may see the mechanism of compensation at work in the payment of an annual fee by the collective of pawn bankers in Florence from 1351 onwards. Elsewhere in Europe also Jews, Lombards, and others often had to pay an annual fee for the privilege of practicing usury. The payments to the emperor and local governments by Jewish communities in the Holy Roman Empire were mostly generalised for a number of what were considered privileges, oftentimes including the right to practice lending at interest, but also other rights such as the exercise of Jewish law and religion.[200]

The mechanism of compensation, however, seems to have been applied mostly to deflect the consequences for the afterlife. While restitution of the interest taken from borrowers had been the only option in the face of hell, the invention of purgatory in the late twelfth century created possibilities for repentance and forgiveness, that is, to transgress and still escape hell. Just as was the case for sodomy, the question became whether usury was a mortal or a venial sin, since the latter left space for purgatory. It is in this connection that the speculation of the Scholastics as to why usury was a sin assumed its importance. In the mid-thirteenth century Thomas Aquinas concluded that usury was a mortal sin because it contravened natural justice, just as he argued for sodomy. His reasoning was that money was consumed in its use and therefore could not be owned and used by different persons at the same time like a house. Another argument brought up by the guardians of the doctrine in the thirteenth century was that usury was a sale of time. This was, as we have seen, picked up by Dante who also considered usury a crime against natural justice, and therefore also sent *Caorsa*, the usurer, to the same rung in hell as *Soddoma.* However, the number of guardians allowing the usurer access to purgatory steadily increased from around 1220 till the start of the Reformation. The fact that the Florentine government in 1346 put a stop to the efforts of an inquisitor who was fining people for merely suggesting that usury was not a mortal sin, is illustrative of this development. Jacques le Goff sees the development as a major factor in the changing attitudes in Europe to what we now call interest.[201]

We can find some indications of how heavily the guilt of transgression weighed on the conscience of Italian merchants and how they operationalised compen-

200 Menning, *Charity and State,* 13—5; Capecchi and Gai, *Il Monte,* 24—5, 137; Maassen, *Krediet*, 79; Neumann 294—7.

201 Compare Le Goff, *La bourse*, 41—4, 80—99; Delumeau, *Le péché et la peur*, 247, 427; Wykes, "Devaluing," 33—8; Dante, *Divina Commedia,* Inferno: canto 11 lines 49—51; De Roover, *Rise and Decline,* 410 n.16.

sation and forgiveness. A highly creative quantitative analysis of notary documents from Genoa seems to suggest that already for the period 1186–1226 (that is, right after the opening up of the option of purgatory in general, but largely before the first guardian of doctrine allowed a usurer in there in 1220) merchants would donate to the Church in proportion to their engagement in lending.[202] More explicitly, in his biographical notes on the important people of his century, Vespasiano da Bisticci noted about the great banker and leader of the Florentine Republic Cosimo de' Medici that he felt "prickings of conscience" in fearing that "certain portions of his fortune… had not been rightfully gained." To alleviate these worries, he received the friendly advice from the pope to build a monastery.[203]

The mechanism of compensation through charitable donations was expressed very explicitly in Florence in the fourteenth and fifteenth centuries. An oft cited example are the accounts that two of the largest exchange/banking firms kept in the name of *Messer Domineddio*, Mr God-Our-Lord, in which they set aside part of their annual profits for distribution to the poor.[204] Another example is the life of the great merchant Francesco Datini. When he made plans to open a bank, his factor reported to him that people were scandalised that he was to lose his reputation by becoming a moneychanger engaging in usurious contracts. The factor had, however, replied that this was not true since "what he has he will leave to the poor." And at his heirless death, Datini did leave most of his wealth to a foundation for the poor that he had himself created.[205] Still in the mid-fifteenth century, Ficino, the humanist who played a large role in Chapter 1, wrote to his former pupil Lorenzo de' Medici, banker-statesman and grandson of Cosimo, that "God himself is for sale. But with what coin can he be bought? … At the price of generous charity to the poor."[206]

The strategy of compensation through forgiveness could also be combined with the strategy of not mentioning or euphemising any gains from lending, so as to create a double shield, both from accusations in this world and at the gates of heaven. Goldthwaite draws our attention to the double books kept around 1300 by the Florentine merchant Gentile di Ugo Sassetti. One ledger in a number of places stated only an amount owed and not the amount lent. Another record, apparently meant only for himself, explicitly mentioned the interest charges (though still euphemised as *merito*) as well as several times that a borrower "has forgiven

202 Galassi, "Passport."
203 Menning, *Charity and State*, 22.
204 Galassi, "Passport," 314; Cipolla, *Before*, 14.
205 Goldthwaite, *Economy*, 413; De Roover, *Business*, 206.
206 Menning, *Charity and State*, 22.

us the *merito.*"[207] While, for the outside world, Sassetti was able to camouflage his transgressions as abidance, he was not able to fool his own conscience.

Absolutely striking is the multi-layered approach laid down in the 1334 statutes of the guild of the traders in and finishers of foreign textiles in Florence. As we saw in the section on circumvention, guild members were to call any incremental payments on borrowed capital "gifts." This strategy concerning borrowing was complemented with a strategy concerning lending for gain. It was an elaborate protocol to obtain forgiveness: "The consuls [of the guild] should ensure, with those friars that seem [suitable] to them, that forgiveness is done, and how the best can be done for the love of everyone with regard to the 'gifts,' 'merits,' 'rewards,' or *interesse.*" The subsequent lines explain that each January the consuls were to appoint two guild members who were to go around asking all those who had paid any so-called gifts, merits, rewards, or *interesse* to any guild member to forgive that guild member. They were even to send out envoys to places in the province of Florence for this purpose. Those debtors or former debtors who were not willing to pardon were to have restitution of "what should be restored to him" (read: the interest they had paid) but would lose their access to the services of the guild. The guild members who were not prepared to return such unforgiven gains would be effectively forced to do so by condemnation and other sanctions. Finally, the consuls were to coordinate with the officials of the *mercanzia*, the court of arbitration of the five prominent guilds, to do an audit to ensure that all members of those guilds would forgive among each other. All this indicates that there was a whole framework in place in 1330s Florence to make interest acceptable "for the love of everyone," and that this framework involved all the most prominent guilds along with their court of arbitration as well as some flexible friars. It is unclear what the role of the flexible friars whom the consuls were to seek out was in this process. It seems likely that they were to complete the two-month process with a collective absolution or indulgence for the guild as a whole, in view of the possible incompleteness of the pardons from the individual borrowers. In any case it is clear that the matter was transformed from one of individual conscience to one of the collective, which is why there were also sanctions against non-compliant guild members.[208]

Judging by the secondary literature, the mechanism of compensation was especially pronounced in Italy's banking revolution, but it also seems to have obtained to some extent elsewhere in Europe at the same time. An example from

207 Goldthwaite, *Economy*, 464. Translation adapted.

208 "Statuto dell'Arte di Calimala," in Emiliani-Giudici ed., *Storia*, 3: 171—367, there 246—7. See also Kaelber, "Max Weber and Usury," 69—70.

The Netherlands, related to Italian-style banking, shows that even indirect gains from usury could come up for such a treatment. Around the middle of the fifteenth century, the lord of Bergen op Zoom admitted Lombards to his domain to practice lending, and charged them a collective annual fee, but he soon started to give the sum he received in this way to the Church and charity. His superintendent noted that his confessor had encouraged him to give the money away so as not to endanger his salvation.[209]

At the end of their lives lenders often made arrangements to shorten their time in purgatory by either making restitutions of usurious gains to individual borrowers, or by leaving large sums to the Church. For our purposes we would need to distinguish between restitutions as a form of abidance by the proscription and pious donations as a form of compensation. But since restitution is what guardians of the doctrine insisted on, donations were often presented as restitution. A lender and/or the executors of his or her testament might claim that the precise borrowers or their heirs could no longer be traced and donate a part of the sum involved to charity or the Church instead. Yet some guardians of doctrine did not consider themselves fooled by the acts of philanthropy on the part of usurers. Antoninus of Florence, for instance, considered this "distributive restitution," one of seven kinds of "deceptive restitution," which in no way diminished the obligation to the individual victims of usury.[210]

For large-scale lenders, full restitution would have been hardly feasible if something was to be left of their fortune, and it seems to be for this reason that already in the first century of our period we see a move away from individual restitutions to – why not use that term – distributive restitutions. The testaments of the Biérenghier family of lenders, land-owners, merchants, and social climbers at Tournai in France are a case in point. In his 1252 testament Gillion Biérenghier left part of his lands to a hospital in lieu of individual restitution to those borrowers he could not remember. Interestingly, he let his wife and children retain the usufruct to those lands. This is reminiscent of the way pious trusts in the Muslim world were often structured, with a part of their yield reserved for the donor-custodian and his or her heirs and descendants. Yet in the Biérenghier case it seems to have concerned the whole usufruct, though only for one more generation. In his 1305 testament his son Jehan earmarked a large sum of his fortune for restitution, with a precise specification of individual sums, but with the details indicated rather roughly, e. g. "to Sandrain, the wife of a fuller," or even more vaguely

209 Maassen, *Krediet*, 79.

210 Compare Nelson, "Usurer," 111—4, 120—1 and passim; Edler de Roover, "Restitution"; Le Goff, *La bourse*, 46—9, 86—8; Delumeau, *Le péché et la peur*, 480; Munro, "Origins," 517—8; Goldthwaite, *Economy*, 419—21; Billen and Kusman, "Jehan Biérenghier."

"and also to I don't know when and don't know the name." The testament did, however, provide for a time window after his death for people to come forward and claim back wrongful charges. What remained of the inheritance after the heirs had received their shares, dues had been paid, and minor charitable donations made, was to go towards a chantry singing masses for his soul as well as that of the people he had lent to. In the end only about a quarter of the sum was actually restituted. We may wonder, as the historians Claire Billen and David Kusman do, whether Jehan's intention was indeed to restitute everything that could be restituted or that the whole exercise was more about showing a credible-enough intention to do so. We should keep in mind that in the region heirs were supposed to consent to testaments, and it would not have been in their interest to have all the usurious gains individually restituted, as there might have been too little left for their share. Distributive restitution, then, worked to the heirs' advantage because in the case of Gillion Biérenghier, they benefited from it for life, and in the case of his son, it was to come into operation only if anything was left after they had had their shares.[211]

Conclusion

The researcher of mentality Jacques Le Goff has presented medieval Europe as a society that was not ready for capitalism but still moving towards it, and that needed to be creative with ways to overcome the "obstacle course" that doctrine presented.[212] I do not necessarily disagree with this view, but have tried here, as I have done in the other chapters, to shift the focus to the level of the individual. If we break the process down to the individual level, we perceive that the influence of the usury doctrine on economic life was considerable and that there was enormous pressure on individuals to be creative. Yet, arguing the case for a substantial influence on the way in which people did business is one thing, arguing that the doctrine actually held back economic development is another. The latter question has been hotly debated, but is less important for our current investigation, and it is quite unfeasible to contribute anything substantial to that debate within the scope of this book.

What speaks for Le Goff's view is that we can identify many micro-engagements by practitioners of lending with the doctrine in the Latin world, as well as some for the Persian world. The fact that practitioners had to devise strategies

211 Billen and Kusman, "Jehan Biérenghier."

212 Le Goff, *La Bourse*, 9—10, 74, 98 and passim.

again and again, and so many different strategies at that, suggests that there was a general current in the direction of more lending in both worlds. Quite clearly under pressure from market parties, the guardians of divine law followed suit. They too allowed more and more and ultimately also modified their definitions.

In the Latin world, jurists and lawgivers slowly but steadily created more space. We find less evidence for compensation strategies in the second half of the period. Although formalist trappings long remained necessary, by the end of our period usury started to be considered a thing of the past. By 1740, a poem inscribed on the façade of the Amsterdam municipal pawn bank, modelled after the Italian mounts of piety, proclaimed: "Thus I help you and me, and show the researchers/ of my secrets, the grave of long forgotten usury."[213]

In the Persian world there was a similar progression of ways of coming to terms with the proscription, but less marked than that in the Latin world. Moreover, similar developments occurred at different points in time in the two worlds. In the first half of our period, certain methods appeared first in the Persian world. In the second half of our period, other methods appeared first in the Latin world. It was probably about half a century before Pope Innocent IV accepted the possibility to dress a loan up as a sale through the instrument of annuities that sharia jurists in the Persian world started to allow a similar construction in the form of the "revocable sale." In fact, the revocable sale was more flexible from the start, because it encompassed the right to redemption, while that element took centuries to gain acceptance in the Latin world. The setting of "equitable" rates by governments started about half a century earlier in Europe, however. It was only by the late sixteenth century that the Mughal state set a maximum rate for equitable interest under Akbar. While people in the Persian and Latin worlds probably arrived independently at many of the same ideas to deal with the usury obstacle, in the case of the setting of rates I suspect an indirect influence.

It is possible to see Akbar's setting of the rates for imperial loans as part of a wave of such interventions by state governments throughout the Judeo-Christo-Islamic world. Starting in the 1530s and 40s in Western Europe, this hypothetical wave might have reached the Ottoman capital by the third quarter of the century and India by the last part of the century. The relevant article in the code of *qanun* compiled for the Ottoman sultan Sulayman the Magnificent was probably drafted at the instigation of the jurist Ebu Suud Efendi, who was the Shaikh al-Islam of the empire from 1545 until his death in 1574, and who was very creative at interweaving *qanun* and sharia.[214] Just as the earliest European state ordinances regulating

213 Poem by Balthasar Huydecoper, 1740.

214 Gerber, *Islamic Law and Culture*, 62—3 and *State, Society, and Law*, 88—92.

rates did, the article carefully stayed just within the limits of divine law as it had been developed by jurists. It stipulated: "and [persons] who make shariatic transactions shall not be allowed more than eleven for ten." This would come to a rate of 10%. Some renditions of the code have "eleven and a half for ten," which would come to 15%. To make the point about the "shariatic transactions" explicit some seventeenth-century copies and rearrangements of the code added "and without making a shariatic transaction [or: transfer] no person shall be allowed to practice *riba.*" In other words: one was to use a *hila.*[215]

By the end of our period, the proscription of usury had not evaporated quite as far in the Persian world as it had in the Latin world. To be sure, the jurists engaged by Aurangzeb in the making of his *Alamgirian Rulings* had by then distinguished between *riba* and *nafʿat. Riba* was forbidden and *nafʿat* discouraged. This distinction is similar to that between usury and interest, but as a discouraged act, the taking of *nafʿat* still had consequences for the afterlife. Jurists also used the term *ribh* to distinguish legitimate interest from *riba.* Namakin used it in the context of cash *waqf*s in India in the late sixteenth century. By the end of our period, Faiz Kashani in Iran used it in the sense of a voluntary gift that was not stipulated in a lending contract. These subtle distinctions escaped the Frenchman Chardin, however, when he commented: "another obstacle to the advancement of trade that is there among the Mohammedans, is that their religion, forbidding usury, does not distinguish between usury and interest."[216] The strategy that he observed in Iran by the end of our period, overstating the amount lent in a contract, was according to our commentators also much used in Europe, but at an earlier time.

Thus, we see many of the same developments in both worlds but at different points in time. Despite such time lags, I find that there are far more similarities than differences in the ways in which the guardians of divine law approached usury in the two worlds. Chapter 4 will return to those similarities.

215 Further variants of this addition emphasise the need for making a "shariatic transaction" even more. Heyd, *Studies*, 84—5 (Ottoman Turkish text), 122—3 (translation). I have substantially modified Heyd's translation with the kind aid of Hülya Çelik.

216 Chardin, *Voyages*, 4: 161.

4 Patterns and Trends

Be not in pursuit of injury and [apart from this] do whatever you desire
For in our sharia, there is no sin beside this.
Hafiz[1]

It should by now be clear that there were many parallel developments in the two worlds, although they did not always occur at the same time. In both worlds there were periods in which rule-breakers and their justifications were allowed more space as well as periods of tighter control. Both worlds saw a certain tug between formalism and anti-formalism. In both worlds people sought to fortify the private sphere. In both worlds the guardians were, overall, more lenient on usury than on sodomy. Both worlds saw a profuse use of ambiguous language and visuals. In both worlds observers accused the people using certain types of justifications of hypocrisy. This chapter seeks to account for and explain the parallel developments as well as the, on closer inspection, not so divergent timelines. There are several possible explanations for the parallels: they might represent universal human responses to certain pressures, or they came with the shared concepts of the Judeo-Christo-Islamic and Platonic heritage, or they were a manifestation of the interconnectedness of the early modern world. Most likely, a combination of all these factors went into the parallel developments. I shall try to take all the possible factors into account, starting with the universal.

Two Camps

Throughout the period in both our worlds, we see a cleavage between the flexible and the strict, while in some periods the strict appear to have had the upper hand and in others the flexible. Through a universalist lens, we see what the political scientist Karen Stenner calls "the authoritarian dynamic" at work. Her work is mostly concerned with the twentieth and twenty-first centuries, but Stenner sees its findings as universal and they do indeed seem applicable here. Stenner defines authoritarianism as a general predisposition to intolerance of difference, be it differing people, ideas, or behaviours. She writes: "the overriding objective of authoritarianism, and thus the *function* of all its manifestations, is always to enhance oneness and sameness; to minimize the diversity of people, beliefs, and behaviours with which one is confronted; and to institute and defend some collective order

1 Hafiz, *Diwan*, 148 (no. 76). The translation modified from Clarke's.

 https://doi.org/10.1515/9783111218014-007

that makes all of this possible." Authoritarianism is thus strongly tied to identity, and authoritarian responses only get triggered by certain circumstances, in particular perceived threats to group unity and integrity from within or without. It is especially the sense that their own group is under some sort of siege that brings the advocates of strictness to their insistence on conformity.[2]

The "defensive arsenal" that authoritarians unpack under such circumstances tends to include, according to Stenner, "demands for legal discrimination against minorities and limits on immigration, restriction of free speech and association, regulation of moral behaviour, and their punitive enforcement."[3] That is of course how one would put it in terms applicable to the modern age, but in the 1200–1700 period we also see the threefold package of increased measures against differing people, unorthodox speech, and transgressive behaviour occurring in a number of places. In his classic analysis of the rising intolerance of homosexual and homoerotic behaviour in the Latin world between 1150 and 1350, John Boswell already suggested that this rise coincided with a general wave of social intolerance. Here is how he notes, "During the decades surrounding the opening of the fourteenth century, the Jews were expelled from England and France; the order of the Templars dissolved on charges of sorcery and deviant sexuality; Edward II of England, the last openly gay medieval monarch, deposed and murdered; lending at interest equated with heresy and those who supported it subjected to the Inquisition; and lepers all over France imprisoned and prosecuted on charges of poisoning wells and being in league with Jews and witches."[4] We can observe such purity drives targeting multiple internal vices while confronting out-groups again and again in both our worlds on smaller and greater scales. Around the turn of the sixteenth century, we see Savonarola in Florence seeking to expel the Jews while also condemning sodomy, luxury, and usury in one and the same sermon, and Mughal emperor Babur linking the greater *jihad* of purifying the soul to the smaller *jihad* of battling infidels and so condemning drinking, luxury, and idols in one statement. We also saw that the later Mughal emperor Aurangzeb sought to bolster what he

2 Stenner, *Authoritarian Dynamic*, passim (quotation 143); Using a somewhat different terminology, the historian and philosopher Karl Popper (not cited by Stenner) already in the 1940s traced the dynamic in the Latin world from the ancient Greeks and Jews onwards. Popper's distinction between "socio-psychological regularities of human behaviour" (which he does not believe in) and "social regularities" (which he does believe in) seems somewhat contrived, however, since he himself emphasises the recurrence of the dynamic between advocates of the open society and those of the closed society along with the anxiety and *tribal* sentiments that play a part in it. Popper, *Open Society*, 1: 67, 84, 169—201, and 2: 21—6.

3 Stenner, *Authoritarian Dynamic*, 269, 288 and passim.

4 Boswell, *Christianity*, 272.

evidently saw as his own community, that of the Sunni Muslims, through a combination of enforcement among Muslims of sharia injunctions like that against sodomy, a stamping out of heresy among Muslims like Sarmad, and the enactment of restrictive measures on non-Muslims such as the levying of the *jiziya* tax and tight enforcement of the policy regarding new temples.[5]

The same went for those on the other side of the divide between the strict and the flexible (or libertarians, as Stenner calls them): flexible ideas tended to come in a package with other tolerant ideas. In both worlds, the ideas of homosexually inclined freethinkers tied in with a much more widely shared religious relativism. In the Persian world, those on the flexible side of the divide between the antinomians and the sharia-minded often also espoused an openness to the possibility that other paths than Islam might lead to salvation. In mystical poetry we can trace such ideas from the Andalusian thinker Ibn Arabi, who lived a century before our period, to for instance Muhammad-Quli Qutb Shah, who ruled Golkonda around 1600 and wrote poems in admiration of both his female and male beloveds while also proclaiming that the distinction between Muslim and pagan rites was only superficial.[6] In the Latin world, the wave of libertine thought in the sixteenth and early seventeenth centuries overlapped with a broadly shared wave of scepticism towards organised religion. The audacious freethinking of one late sixteenth-century Italian miller has been well-described in Carlo Ginzburg's acclaimed micro-history *The Cheese and the Worms*. But we should not forget that he was executed by the Inquisition. Stuart Schwartz points to some people designated as "rustics" and otherwise non-elite, who in the Iberian Peninsula expressed similar sceptical or agnostic ideas, and notes that it is not a coincidence that the term "atheist" was created in the sixteenth century. As can be seen in Inquisition records, these non-elite Iberian Old-Christians (not descendants of converts) expressed the idea that the laws of Muslims and Protestants might be equivalent or even in certain respects superior to the law promoted by the Catholic Church. One shepherd allegedly expressed the idea that "each person should live in the law that he wanted." Similar ideas were discovered by the Spanish Inquisition in the villages of Sicily around the same time. As we saw in Chapter 1, people there also expressed doubts about the Church's teachings on sodomy. Still in the mid-seventeenth century, the broader idea that there were multiple ways to salvation was neatly tied up with ideas about sexual liberty by the French courtier and guarded

5 See Chapters 1 and 2; Kruijtzer, *Xenophobia*, 197—204. Compare Sharma, *Religious Policy*, 127—216; Rathee, "Fractured Memories."

6 Kruijtzer, *Xenophobia*, 8, 87—8.

yet incorrigible libertine Roger de Bussy-Rabutin in his satirical description of debauching at the French royal court.[7]

Naturally, specific situations were always more complex than the libertarian-authoritarian model suggests. There are a number of individuals who turned up in more than one of the previous chapters with somewhat contrasting perspectives – or were remarkable absent from one of the chapters. In the Persian world Sa'di was silent on usury but merciless on the *mukhannas* and strongly condemned idolatry, while Akbar was flexible on usury and images, but rather strict on sodomy. His great-grandson Aurangzeb had to give way on usury, but stayed his ground on the issues of idolatry and sodomy. In the Latin world Aquinas was strict on sodomy and usury but lenient on the use of images. Luther was relatively strict on usury, but flexible on images, while Calvin was the opposite on these two counts. Henry VIII wielded the proscription of sodomy against monks, made a start with eliminating the worship of images, but created a bit of space for interest-payments. It almost seems as if certain guardians and rulers were using the divine proscriptions as bargaining chips that could be traded against each other. Apparently, there were multiple factors to consider for these men in mooting a proscription.

Among the counterweights to the authoritarian outlook was conservatism. The authoritarian package of intolerances should not be confused with conservatism. This is an important point that Stenner makes with regard to the present, and in the period that we have been investigating, too, there were ways of harking back to authority without being intolerant. Akhbarism for instance, although conservative, worked in favour of tolerating sodomy, as we saw in Chapter 1. An additional example of the way Akhbaris might arrive at tolerance or toleration is the extremely vague *fatwa* that one of its main proponents, Muhammad Amin Astarabadi, wrote for Shah Abbas about whether wine was pure or impure, which question assumed importance in the context of the ritual purity required for prayer, or more concretely whether prayer in clothing with a wine stain was valid or not. As Astarabadi noted elsewhere, he was aware that the shah he was providing the *fatwa* for had been drinking from a young age, and in the *fatwa* itself he mentioned that its purpose was "to calm the most noble minds."[8] Thus going over all the authorities that he had access to, Astarabadi's conclusion was that nothing could be said about the matter with certainty. In the *fatwa*, rather than reach a

7 Schwartz, *All Can be Saved*, 74—8 (translated quotation as there); Monter, *Frontiers*, 164—6, 173—4; Dall'Orto, "'Nature'," 85.

8 Gleave, *Scripturalist Islam*, 315—9. Translation as there.

new conclusion, Astarabadi remained flexible precisely by conserving all the different standpoints that had been formulated in the past.

Also in Europe, the desire to conserve the status quo ran counter to the authoritarian dynamic. We saw this especially in the effort Catholic theologians put into defending the use of sacred images. Most remarkable in this respect was Aquinas. With respect to the interpretation of the proof texts on images he was flexible to the point of defending the worship of certain images in what may be his most tortuous argument. Similarly, in the seventeenth century the Jesuit Ottonelli and the painter Da Cortona sought to maximise what was allowed with respect to sacred images, even while carefully upholding the proscriptions of fornication and adultery by narrowing the boundaries for depictions of nudity that might give rise to those sins.

Yet, having noted the caveats for the application of the model, the authoritarian-libertarian divide is not merely a construct that I am applying to the people we encountered in the chapters. Many people at the time were aware of where they were situated on the continuum. Some openly espoused the libertarian identities of *rind*, *lawand*, or libertine, while others prided themselves in being *shar'i* or orthodox. In general, the open courting of blame (*malamat*) that the *rind* and *lawand* practiced in the Persian world was less common in the Latin world. The Latin world knew the principle of the *felix culpa* or fortunate fault, but it was more dangerous to openly apply it to one's own sins.[9] With respect to sodomy, we did see some cases of men embracing their own sins from the late sixteenth century in Chapter 1. Most notable was Richard Barnfield, who proclaimed to prefer being a sinner to abstaining from the love of lads. There were also those who aspired to be at one end of the spectrum but ended up embracing positions from the other end. Barnfield's contemporary James I of England, explicitly claimed to be "orthodox,"[10] yet also espoused the view derived from the libertarian side of the debate that Jesus and John were a paradigm of physical intimacy between men. Such cases only prove the point that people perceived themselves as situated on a spectrum.

Moreover, the link between external threats and drives for internal purity could be expressed explicitly already at the time. In Chapter 1 we saw the belief that tolerating sodomy could bring God's wrath upon communities in the form of natural and other disasters. Such beliefs were shared by the two worlds but in this specific form more prominent in the Latin world. The general idea is well expressed for the Persian world, however, by Ala al-Din Juvayni, himself a

9 See Newman, *Medieval Crossover*, 13—25, 162—5.

10 James I, *Workes*, 371

Muslim and administrator under the Mongols, who gave rise to much anxiety in both worlds over the long thirteenth century. In his history of Chinggis Khan, he has the conqueror speak the following words to the Muslim population of Bukhara: "O People! know that you have committed great sins, and that the great ones among you have committed these sins. If you ask me what proof I have for these words, I say it is because I am the punishment of God. If you had not committed these great sins, God would not have sent a punishment like me upon you."[11]

Some contemporaries already saw their societies as perennially divided into two moral parties, the strict and the flexible. The ideas of some thinkers in the Persian world in particular prefigured Stenner's theory. Hamadani, for instance, in his advice for rulers constantly exhorted them to keep issuing orders for people to stick to sharia and to send out preachers to every corner of the realm to raise awareness of sharia and to leave the aware transgressors no more excuses, but also noted that this might not make the ruler popular in the short run. The ruler "should not hold things against justness [*haqq*] and sharia permissible [*rawa*] in order to please everybody," for "the condition of rulership is such that perennially half the population is not pleased with the ruler, since he cannot please the two disputing sides [*khasm*] with justness [*haqq*]."[12] The term *khasm* used here is also the term used for opponents in a court case, and Hamadani thus creates the image of the whole of society (I think we can use the term here) divided into two sides arguing their case before the ruler. At the end of our period, the stiff biographer of poets, Sher Ali Khan Lodi, described the two camps very explicitly in a discussion about the extent to which one might appreciate wine-poetry. The group that went too far in his view, "having thrown the injunctions of sharia and the rules of Sufi orders [*adab-i tariqat*] far from them," were doomed to confusion and to have no awareness of their own existence, and besides that "where can they hide?" The latter is the obvious theological objection to the idea that the elect in their secluded gatherings might be able to get away with more than the common folk because of their superior insights – God after all saw all. By contrast, those in the other camp were diligent in observing sharia and Sufi order regulations. They only mixed the most careful thoughts of the wine that awaited the faithful in paradise with the precepts of *'ilm* or exoteric knowledge, and earned the appreciation of Lodi.[13]

11 Juvaini, *Genghis Khan*, 105.
12 Hamadani, *Zakhirat*, 255, 283, 403—5.
13 Lodi. *Mir'at*, 201.

Fig. 22: *The Hanging of Ibn Mansur Al-Hallaj.* Illustration to the *Diwan* of Hasan Dehlawi, Mughal, 1602. The image visualises the opposition between the strict and the flexible. Sympathisers of Hallaj mourn and plead while the person in charge (standing below left in white) is unbending, and the two executioners move ahead. Walters Art Museum., acc. no. W.650.22B.

The greater visibility of the two camps in the Persian world may be explained by the relatively greater possibility for open discussion over the direction that faith and divine law should take, but this difference should not be overstated. From the extant sources, of which some were discussed in Chapters 1 and 2, it appears that more people were persecuted for free-thinking in the Latin world than in the Persian world, but that phenomenon was not unfamiliar in the Persian world either. All poets and Sufis knew of the cases of Mansur al-Hallaj and Ayn al-Quzzat

who were executed before our period. Narrations of the execution of Hallaj for the way he expressed the idea of the Unity of Existence were frequently illustrated (fig. 22).[14] Fully embracing that idea, which, as we saw, played a part in strident defences of intimacy between males and the use of images, was perceived as daring. Abu'l-Fazl saw his patron Akbar as exceptional in speaking his mind about the Unity of Existence, since others kept silent for fear of being labelled madmen or standing accused of unbelief (*kufr*) or heresy (*ilhad*), which would make certain men lust for their blood.[15] A century later Akbar's descendant Zeb al-Nisa concurred in an ironic vein: her every hair proclaiming "I am the Truth" (the phrase for which Hallaj was condemned) had her thirst for the blood of love.[16] Her father Aurangzeb, however, locked her away and, as we saw in Chapter 1, had Sarmad executed for the way he expressed himself.

Both worlds therefore saw, with some degree of difference, the rise of circles of people who considered themselves elect and chose to discuss dangerous ideas only among themselves. Relatively speaking, in Europe the adherents of a laxer attitude towards divine proscriptions remained more on the fringe of their communities. Whereas, in the Latin world, the strict could always invoke the support of their Church organisations, in the Persian world we see that both the strict and the flexible could receive the backing of rulers. The institutionalisation of the role of admonisher in a relatively independent Church in the Latin world will have played a role in this difference of degree.

In both worlds we can perceive both short- and long-term fluctuations in the balance between strict and flexible approaches to divine law. We can perceive these balance shifts particularly at the level of courts and governing bodies, but I would argue that those in the ruling class were often swayed by sentiments among sections of the population. Thus, we see "purity drives" punctuating the history of both areas in periods of distress or war, but also longer term fluctuations in authoritarian responses. Altogether, the short-term drives as well as the longer periods of strictness contributed to an ever-growing consciousness of the ins and outs of divine law in both worlds.

The process is well described by Rudi Matthee in his book on stimulants in the history of early modern Iran. The drinking of wine among the military elite had been the subject of admonitions on the part of the alims from before the beginning of our period (recall the image of the court where the party ceased upon the advent of the poet and alim Nizami), but became increasingly contested under the

14 See e. g. Morgan Library and Museum MS M.466, fol. 99v, or Walters Art Museum accession number W.650.22B, or Brooklyn Museum accession number 69.48.2.

15 Abu'l-Fazl, *A'in*, 1: 158—9.

16 Zeb al-Nisa, *Diwan*, 1.

Safavids in the sixteenth and seventeenth centuries. Matthee perceives a great number of bans on alcohol issued by the various shahs, which generally did not last very long and which he attributes to passing conditions like anxieties about the economic or military situation or the character of the ruler. Outside periods of complete bans on alcohol, most Safavid rulers continued to drink wine as their forebears had done, but wine-drinking at court became less and less unself-conscious, something that became especially apparent from the reign of Shah Abbas II in the mid-seventeenth century. Thus, what at first sight appears to be a continuous stream of short-term bans ignored in practice, in a longer-term perspective appears as an incrementally growing awareness of the proscription of alcohol.[17]

How might we envisage the long-term development in the two respective worlds? To start, it seems clear that both the Latin and Persian worlds saw a wave of strictness around the turn of the fourteenth century. The anxiety that gave rise to this shared wave of authoritarianism can perhaps be linked to external threats like the onset of climatic changes, or to the incursions of the Mongols (which were also perhaps linked to these climatic changes) into the eastern part of the Latin world and the heart of the Persian world. Historians have made much of it with respect to Europe. We already saw how John Boswell describes this wave and its manifold targets in Europe. Delumeau argues that Europe at the time saw itself besieged by enemies such as "Turks," idolaters, Jews, heretics, and witches, and at the same time turned this fear into a "scruple sickness," a fear of the sinfulness of the self.[18] Yet in the Persian world we see it as well, both in Iran which was conquered by the Mongols and South Asia which was threatened by the Mongols and where many Muslims sought refuge from them.[19] In Iran, the Mongol ruler Ghazan, having recently embraced Islam, proclaimed the strict enforcement of the sharia bans on usury and idolatry and a limited enforcement of the proscriptions of sodomy and alcohol. Apart from the destruction of Buddhist and Zoroastrian temples under his anti-idolatry legislation, for a while he also targeted churches and synagogues and gave Buddhist lamas the choice between conversion and emigration.[20] In that way he perhaps responded to the fear that the Mongols themselves had sown among their subjects, and the calls for the policing of the boundaries of Islam that may have generated. He was also in the middle of fighting off competitors to the throne. In South Asia, we saw that Sultan Ala al-Din Khilji issued strict ordinances which people characterised as "do this, don't do

17 Matthee, *Pursuit*, 62, 64, 68, 84, 87, 88—9, 95—6, 300.
18 Delumeau, *Le péché et la peur*, 7.
19 Fischel, *Local States*, 108.
20 Amitai-Preiss, "Ḡāzān Khan."

that." Zia al-Din Barani, who described these events and criticised laxity wherever he found it, was himself also an advocate of the stratification of society. Also, just two years after Ala al-Din came to the throne in 1296, Amir Khusrau completed the poetic ethical treatise in which he threatened the usurer with hell. After Ala al-Din's measures lapsed, such expressions found a renewed application in the measures Firuz Shah Tughluq took to enforce sharia by the third quarter of the century, which included his campaign against images at the court.

A long-term trend towards flexibility seems to have set in in both our worlds after this, starting earlier in the Persian world, but culminating in both worlds in the second half of the sixteenth and early seventeenth century. In the Persian world this was the period in which textiles with animate figures were worn by some Muslims, a number of royal buildings were painted with animate beings in both Iran and India, Safavid ruler Shah Abbas had himself depicted embracing a wine-pourer boy, Mughal emperor Akbar declared his *sulh-i kull* or universal peace which his successor Jahangir continued to follow, Muhammad-Quli Qutb Shah of Golconda expressed his physical admiration for both female and male beloveds and declared his agnosticism with respect to the right way to salvation, and Ibrahim Adil Shah II of Bijapur celebrated Indic aesthetics and attracted European painters to his court. On the whole this was a period of relative tolerance in many respects, even while there were counter-voices and the just mentioned rulers themselves also expressed less flexible sentiments at times.[21]

A countermovement started in the Persian world as an undercurrent to the main trend already in the second quarter of the sixteenth century but became dominant only a century later. We see the first stirrings in the public repentances of the Safavid ruler Shah Tahmasp and the Mughal emperor Babur in the 1530s. Yet the emperor Babur was also aware that one could not purify everything at the same time, and that just as his renunciation of wine had for a long time "remained under a veil in the chamber of deeds pledged to appear in due season," his wish to destroy the gods of the idolaters also had to remain under moratorium for practical reasons. Under Shah Tahmasp facial veils first appeared in paintings of the prophet Muhammad. Around the turn of the seventeenth century some important alims turned towards a certain conservatism which was often also inflexible (though not necessarily so). Prominent among them were Muhammad Amin Astarabadi in Iran, who advocated a return to the Shi'i Reports, Ahmad Sirhindi, who considered himself the renewer of the second millennium of the Islamic calen-

21 Kruijtzer, *Xenophobia*, 8, 20—1, 28, 83—4, 87—8, 101, 166—7, 266—7; Fischel, *Local States*, 169—79.

dar,[22] and Abd al-Haqq Dehlawi, who was remembered as a great scholar of Sunni Traditions. After this generation of relatively unbending theologian-jurists, a generation of rulers came up who were more sharia-minded themselves. In the Mughal empire these were in particular Shah Jahan and Aurangzeb, who together ruled from 1628 till 1707. In Iran the turn was marked by Shah Abbas II who ruled from 1642 to 1666,[23] and in Bijapur by Muhammad Adil Shah who ruled from 1627 to 1656. That this sharia-mindedness came so sharply into focus by the end of our period under Mughal emperor Aurangzeb partly has to do with the particular military-political constellation that Aurangzeb faced (in particular his confrontation with the Marathas), which made an appeal to Muslim identity necessary.[24] But Aurangzeb's enforcement of sharia must also be seen as part of this long-term trend. It was mirrored in Iran by the ascendancy of Majlisi, who as a theologian-jurist increasingly came to dominate the court starting from "the year of breaking idols."[25]

In my view, we should see both the advocates of tolerance and the advocates of intolerance as partaking in a steady, if intermittent, process of growing awareness of sharia as something to be reckoned with. As I tried to show in the chapters, a relatively flexible person like Akbar was highly aware of what the opinion of the less flexible was on such topics as painting and interest, even though he tried to steer clear of their position. Thus my argument is certainly not that in the periods in which tolerance had the upper hand there was no consciousness of the demands of sharia.

Again, contemporaries were to an extent aware of this process. Sher Ali Khan Lodi, who, as we saw in Chapter 1, applauded Aurangzeb's sharia-abidence in condemning Sarmad, provides an interesting passage. Writing about Sarmad's influence on Dara Shukoh, the Mughal prince and heir apparent to Shah Jahan, he lauded the accession of Aurangzeb as the end of that influence as well as Dara's aspiration to the throne: "Thereafter, the resounding voice of divine worship descended on the world. The regulations [*rusum*] of Akbar and Jahangir dwindled, and the innovations [*bid'atha*] of Dara Shukoh and and Murad Bakhsh were set aside."[26] Lodi thus defined the set of non-sharia-abiding Mughal emperors and princes as including Akbar and Jahangir, who together ruled from 1556 to 1627, and two of the sons of Shah Jahan, who were Aurangzeb's competitors for the throne. Shah Jahan himself is not part of this set and neither is Aurangzeb.

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22 For a nuanced appraisal see Damrel, "'Naqshbandi Raction'."

23 Matthee, *Pursuit*, 25—6, 54.

24 See Kruijtzer, *Xenophobia*.

25 See Chapter 2 and Matthee, *Pursuit*, 56, 92—3.

26 Lodi, *Mir'at*, 124. Translation modified from Kinra, "Infantilising," 190.

Thus Lodi painted a clear historical trajectory toward sharia-abidence, starting with Shah Jahan and attaining fruition with Aurangzeb. Aurangzeb's princely competitors were merely stalwarts in the development.

Chapter 1 sketched the curve and context of the rise and decline of libertinism in a large swath of Europe. On the axis Italy-France-England, we see libertine ideas being expressed relatively openly from the beginning of the sixteenth century, with a peak in the late sixteenth and early seventeenth centuries, before such expressions were again more heavily constrained after around 1630. The decreasing space for justifications of sodomy at this point was a canary in the coalmine of tolerance. We may note that the turning point of 1630 coincides quite precisely with the renewed turn towards strictness in the Persian world. As with the coinciding waves of authoritarianism around 1300, it is perhaps possible to link this turn to climatic and social-economic upheaval. But the debate on the "seventeenth-century crisis" (or not) is still ongoing.[27]

Just as in the Persian world, the backlash started earlier, however. The Reformation already brought a heightened awareness of divine law despite the emphasis on divine grace. While painters who were in touch with Luther depicted the Law embodied in the Old Testament and the Jewish heritage as the way to hell and the New Testament and Christ's heritage as the way to heaven,[28] Luther himself struggled with the antinomian tendencies in the Reformation. Apart from writing a treatise against the antinomians, he also, as we have seen, advocated a strong stance against usury on the basis of the biblical injunctions. The Counter-Reformation, which, as numerous scholars have argued, shared many features with the Reformation, had a similar effect of heightening awareness of divine law in Catholic Lands.

Like Babur, the advocates of strictness in Europe in the long sixteenth century recognised the limits of their ambitions. The purifiers in this era still recognised that they did not live in an ideal world. Calvin, often seen as puritanism incarnate, noted that in an ideal world there would be no usury, but since the world was not ideal, one would have to come to terms with it and mitigate it rather than try to extirpate it. Earlier, Savonarola had made his peace with the taking of interest in the context of charity. He expressed his view on the non-perfectibility of the world in the remark that one should not acquire a courtesan in order to debauch, but that one might, if the need was high, debauch with one's wife once one had one.

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27 See, however, Parker, *Global Crisis*.

28 Weniger, "'Durch und Durch Lutherisch'."

By the second quarter of the seventeenth century, it was the flexible who were forced to recognise the limits of their possibilities. It was the refusal of the post-1630 French libertines to go as far as to get oneself burned at the stake that carried over into the Enlightenment, which was in some respects, notably its cautious treatment of religion, a watered-down version of the libertine thought that circulated in the circles of men who were trying to get the Church out of their bedrooms in the sixteenth and early seventeenth centuries. As Paolo Fasoli has argued, in certain respects Rocco was more radical than the more famous late eighteenth-century libertine De Sade who was a product of the Enlightenment, especially in his criticism of the use of religious authority to prop up the status quo. Moreover, where the act that Rocco defended was performable, and indeed performed by countless people, the acts described by De Sade were quite unfeasible in the real world.[29] While De Sade's was entirely an exercise in testing the limits to which the mind could go, Rocco's exercise was both to tease the mind and to make a point about real physical acts.

Public and Private Spaces

In both our worlds, the dynamic between the two camps generated a distinction between the private and public spheres. Agents in both worlds strategically employed the boundary between private and public. On the one hand the idea of what constituted the private sphere was very precise (see Ghazali's note on how having a guest changed the status of a home in that respect), but on the other everyone knew that one could not keep knowledge from spreading and pretences to keep knowledge private were just pretences. For Europe this is often seen by historians as a process of removing religion from the public sphere by those who governed in a bid to maintain the peace between the adherents of different Christian denominations. But we can also see it as a process emerging from the agency of non-governing people trying to decide for themselves and carving out as large a space as they could for the purpose. This is the way Christine Kooi presents it. In both worlds we see people carving out spaces outside the demands of divine law from early in our period, if not before. Chapter 1 highlighted the rise of elect circles, first in the Persian world and from the fifteenth century also in the Latin world. These were circles of freethinkers who gathered in private spaces and wrote as if they were writing for a circle of friends even if their writings might circulate more widely.

29 Compare Fasoli, "Body Language," 32—3 and passim.

In the Persian regions, the distinction may have predated our period. While some modern scholars see the distinction between private and public as a feature of modernity invented in the West, Priscilla Soucek sees the dichotomy developing as early as the Umayyad Caliphate with regard to the use of images of animate beings, and Andrews and Kalpaklı in their study on erotic poetry remark that Muslim societies of many times and places have displayed clearer boundaries between public and private behaviour than other contemporaneous societies, while Ahmed sees it as fundamental to Islam and inherent in the "spatiality of Revelation."[30] In any case, it would appear that a shielding of the private sphere from the enforcement of divine law was already in place in the Persian world by the beginning of our period. As we have seen, this shielding was respected for many injunctions of divine law, from the proscription of hanging images to the proscriptions of various sexual acts.

For Europe the development of a private sphere is often seen as a late development that was the ultimate result of the Reformation and a hallmark of "modernity." According to Faramerz Dabhoiwala, this transfer of sexuality from the public to the private sphere has been overlooked by academics focussing on Foucauldian forms of disciplining the body developed from the nineteenth century onwards.[31] He argues that as a result of this transfer there was a fundamental shift already in the eighteenth century from a worldview "in which all sex outside marriage was publicly punishable to one in which it was not." As we saw in chapter 2, Christine Kooi takes the development of the distinction back to the seventeenth century, with the efforts to shield Catholics in the Netherlands from the proscription of idolatry. But as we also saw in that chapter, the context of the proscription of idolatry already gave rise to safe spaces like the home during the sixteenth-century iconoclasms in places like Zurich, while in England the boundary of the home was fiercely embattled in the mid-century. And if we take into account the elect circles where male-male intimacy was celebrated, we can take the distinction back even further in time. I would argue that it was the very dynamics of Judeo-Christo-Islamic divine law that necessitated the public-private distinction and turned it into a reality.

The dynamic between the flexible and the strict often necessitated some form of accommodation and the private space was convenient for that purpose. As we saw in the chapters, visibility was a crucial aspect of that accommodation. In Chapter 2 it was about literal visibility, in Chapter 1 it was about the invisibility of elect circles to the masses, and in Chapter 3 it was about the infinite ways to disguise

30 See Chapter 2 and Andrews and Kalpaklı, *Age of Beloveds*, 16; Ahmed, *What Is Islam*, 381—6.
31 Dabhoiwala, "First Sexual Revolution."

interest payments on loans. This is not to deny the specificities of the way divine law was linked to the private and public spheres by people of the three Abrahamic religions in various periods. A surprising contrast is for instance pointed out by Nomi Heger. She notes that already well before the Common Era specialists of Jewish law started to make a point about images in public and private that is the diametrical opposite of the fragile consensus reached in the Persian world that images should be left alone in private spaces. With the idea in mind that Jews would not openly practice idolatry, they tolerated images in synagogues and other public buildings but proscribed them for the domestic sphere. Thus the solution for the apparently unstoppable desire to have images reached in this strand of the Jewish tradition is the opposite of that reached in the strand of the Islamic tradition that we have investigated.[32] Nevertheless, both positions underscore my view that divine law necessitated a distinction between public and private.

Formalism and Its Discontents

Beside the dynamic between the strict and the flexible, we have also encountered a dynamic between formal and substantive ways of reasoning about the law. The two dynamics overlap only partly. Because strict or authoritarian characters are inclined to think of the rules they seek to enforce as transcendent,[33] but only have access to those transcendent rules through authoritative texts present in this world, they often incline to literal, or more generally, formal, interpretations of those rules. Moreover, they can create a climate in which formalism thrives, also among those who seek to escape the rules. The following paragraphs look at the role of formalism and at the patterns or developments in its presence or absence.

In the context of a comparison between world regions that touches on law it is inevitable to mention the work of the theorist Max Weber. His ideal-types are certainly still useful as thought-starters, even though we now dispose of a far greater body of empirical studies of law in different societies than he did a century ago.[34] Weber compares a great number of legal systems from China to Europe and from antiquity to his present. He elevates the Western European, and especially the continental European, systems above all other systems because of their predictability on account of their being largely "formal rational." He is rather dismissive of "informal" or case-by-case judgements, for which he uses the phrase *kadijustiz*, which

32 Heger, "The Status," 48 n.120.

33 Compare Stenner, *Authoritarian Dynamic*, 267.

34 D'Avray, *Medieval Religious Rationalities*, 17—8; Gerber, *State, Society, and Law*, 26.

literally means justice as delivered by the qazi. If we put all the instances of Weber's use of the phrase side by side, it would seem that to him *kadijustiz* has the potentiality to be either rational or irrational and that traces of it are to be found in many systems, including English common law.[35] The phrase was perhaps meant by Weber as no more than a shorthand for legal phenomena that were non-formal rational,[36] but the contrast that it at first sight suggests between the administration of law in Europe and the Muslim world survives into some of the most recent secondary literature. We can trace it through the ethnographic work of Lawrence Rosen, which explicitly adopts Weber's framework and seems to see the qazis observed in modern-day Morocco as to an extent representative of *the* qazi or even the functioning of Islamic law in general, to the recent legal historical work of Wael Hallaq, who cites Rosen with approval. In contrast to Weber, however, Rosen and Hallaq see the eye of Islamic law dispensers for social circumstances as a positive feature. Although an eye for social circumstance was an important feature of sharia application as we have seen in many of the case studies, I must agree with Haim Gerber, who has done extensive work on legal treatises and qazi court records from the Ottoman empire, that the contrast to Europe in the period that concerns us here was much less than suggested. In his view, sharia, or at least its Hanafi variety, had as much "'artificial' logic," or reasoning removed from social reality, as Western legal systems.[37]

Besides his term "formal rationality," Weber also employs the partly overlapping term "formalism."[38] I will stick to using the latter here, not only because it is the more common, but also because this study is less concerned with what was rational and irrational, and more with what was conscious and unconscious – which is not exactly the same. Just as the term rationalism suggests the conscious advocacy of *ratio*, so the term formalism suggests the conscious application or advocacy of legal form, and therefore it denotes more precisely what we are looking for here. In both the Latin world and the Persian world, formalism could be employed both by those who were strict on enforcement and those who were looking to circumvent. In my view formalism did three things: 1) it embraced the artificial space[39] that law provided for the discussion of rules and their application, admit-

35 Weber, *Economy and Society*, 493, 795, 823, 845, 891—2, 976—80, 1115—6, 1395.

36 D'Avray, *Medieval Religious Rationalities*, 155 n.26.

37 Gerber, *State, Society, and Law*, 11—2, 17—8, 25—9 and *Islamic Law and Culture*, 12, 104, 134; Hallaq, *Sharīʿa*, 164—9, 366; Merry, "The Culture of Judging."

38 Compare Weber, *Economy and Society*, 226, 657, 980, 1115. Also in other writings, Weber commented unfavourably on some aspects of formalism. See Pirie, *Anthropology*, 226.

39 I see this "artificial space" as encompassing Bourdieu's "juridical field," but I think that lay people also availed of it. Bourdieu, "Force of Law."

ting only artificially relevant considerations, 2) it applied rules to the letter so as to secure that artificial space, 3) it required only outward conformity.

In the chapters we have seen many examples of artificial reasoning, as well as people advocating it, from both worlds. There was a great creativity in finding approved forms to apply to less approved substance. In Chapter 2, for instance, we saw Catholic and other advocates of images likening their images to the brazen serpent erected by the great law-giver Moses, the cherubs on the Ark of the Covenant, or the true icon of Jesus on the cloth of Veronica. In Chapter 1 we saw how some Muslims assimilated sexual access to male slaves to generally approved sexual access to female slaves. As we saw in Chapter 3, formalistic reasoning was especially prominent in the domain of usury, with people in both worlds latching on to the approved form of the sale. Further on I will try to explain why jurists in both worlds were bending over backwards in this particular field, but what I want to highlight here is the great similarity between the two worlds in this respect.

Formalism did not have not one clear opposite, but many antagonists.[40] In both worlds formalism was countered by a number of alternatives, which sometimes went hand in hand. Among those was, first of all, what we may call purposivism or reasoning on the basis of the spirit as opposed to the letter of rules.[41] Then there was intentionalism or the idea that the intention of the actor determines the validity of an act. This was very important in sharia, but also played an increasing role in thinking about usury and judging sexual transgressions in the Latin world, where the later scholastics came up with the concept of "mental usury" and sixteenth-century jurists applied it to crimes like sodomy, so that "passive" partners might go free. Last but not least, there was consequentialism, the application of certain principles that we may call ethical to the final outcome of the act that the rule might seem to apply to. All three antagonists of formalism might blend into one another. This was the case in the thought of people like Hafiz and Calvin, in some of whose ideas purposivism and consequentialism blended into each other through the idea that underlying all divine law is one principle.

Nor were formalism and its others mutually exclusive. In many of the cases that we have seen, a measure of formalism was combined with other considera-

40 I am building on but diverging from Weber here. In *Economy and Society* (657) he gives the following inexhaustive list of "norms" that differ from both of his kinds of formalism: "ethical imperatives, utilitarian and other expediential rules, and political maxims." See also D'Avray, *Medieval Religious Rationalities*, 19 n.72, 23—4 and *Rationalities in History*, 146—84.

41 Compare Shapiro, *Legality*, 353—5

tions.[42] The Hanafi *hila*s for instance keep an interesting middle between form and consequence. Arguments for *hila*s were often consequentialist but they were also very much about the intention to conform and to take form seriously. And jurists did take the form seriously, as we can see in their insistence on treating temporary sales as real sales in cases of damage or default on payment.[43] Hallaq's term quasi-formalist for the Hanafi school is therefore apposite.

There is a deep connection between the struggles over formalism in the two worlds. We can see both struggles as part of the ebb and flow of formalism that was set motion by the Mosaic dispensation. The consciousness of divine law simply necessitated a measure of thinking about *how* it was to be implemented. Moreover, the two worlds shared the heritage of Platonic thinking about substance and its manifestation as form. This is why the key terms in which arguments against formalism were put overlapped: *spiritus* in the Latin world and *ma'ni* in the Persian world.

On the eve of our period both worlds saw a turn to formalism. In the Muslim world, the late eighth through early tenth centuries saw a competition between rationalists and traditionalists over the way Muhammad's sharia was to be approached, with first the *mu'tazila* rationalists gaining the upper hand and subsequently the traditionalists.[44] During the twelfth-century legal revolution, the Latin Church also returned to a more formal approach to canon law, as we have seen in the chapters on sodomy and usury. Yet in both worlds the formalism of the jurists was ridiculed. In the Latin world, the renewed formalism of the canonists came in for ridicule almost immediately.[45] In the Persian world, the ridiculing reached a peak in the early part of our period with Ubayd Zakani and Hafiz. And slowly but steadily, all kinds of non-formal concerns were allowed back into writings about divine law. In the Persian world, and the Muslim world more generally, a move towards a greater interpenetration of law and ethics and thus away from plain formalism can once again be detected in the works of jurists from the eleventh century onwards, with a spike in the fourteenth century.[46] The Latin world also saw a guarded return of non-formal concerns into certain areas of canon law from the start of our period.

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42 See also D'Avray, *Medieval Religious Rationalities*, 26; Schluchter, *Entwicklung*, 131—2; Weber, *Economy and Society*, 1115.

43 Gerber, *State, Society, and Law*, 104—5 and *Islamic Law and Culture*, 104. The same treatment of the temporary sale that Gerber perceives in Ottoman *fatwa*s can be seen in the *Alamgirian Rulings*' discussion of the topic (for which see Chapter 3).

44 Compare Hallaq, *Sharī'a*, 55—60.

45 Compare Brundage, *Medieval Origins*, 214—7.

46 Compare Katz, *Wives and Work*, 197, 211 and passim.

Purposivism was one of the anti-formalist ways of reasoning that crept back into thinking about law, and the terms *spiritus* and *ma'ni* haltingly (re)gained popularity. At the start of our period, the jurist Marghinani used the term *ma'ni* to distinguish the substantive reasoning of the disciples from the formalist argument of Abu Hanifa concerning the punishment for sodomy.[47] He upheld the argument of Abu Hanifa, however. As we saw in Chapters 1 and 2, in the fifteenth century Jami celebrated the refined gaze at the *ma'ni* behind the human form, and a sort of craze for *ma'ni* developed over the sixteenth and seventeenth centuries. The contrast between *surat* and *ma'ni* could be read on two levels: as the contrast between an image and the idea transmitted by it, or as the contrast between the form of divine law and its substance. In the Latin world Gratian already argued that some of the Old Testament commandments were to be interpreted spiritually. He was able to hark back to the apostle Paul's dictum with a Platonic tinge: "for the letter kills, but the spirit gives life."[48] Nevertheless, canonists and popes clung to the *forma* of lending agreements for the first centuries of our period. But as we saw in Chapter 3, emphasising the spirit gained renewed currency in the Latin world from Pope Leo X's 1515 pronouncement on usury onwards.

The remainder of this section focuses less on purposivism and more on the rise of that other kind of anti-formalist reasoning, the concern with good consequences.

In the Persian world the idea that one might have to take into account the consequences of an action when evaluating it, even within a framework of divine law, had been floating around for centuries before our period. Such ideas seem to have been especially popular among Sufis and the students of Greek style philosophy but came to influence theologians who were close to the Ash'ari school, even though the "classic" Ash'ari position was simply that good is what God commands and bad is what God forbids. About a century before our period Ghazali allowed for a measure of consequentialism. Ghazali's limited consequentialism was tied to *maslaha*s, or general goods, and at a still deeper level to the basic aims of sharia. We witnessed a practical expression of this debate in the arguments that people at the court of Ghazan Khan brought concerning the consequences of the khan's anti-usury legislation. The khan concluded this debate with a deontological argument packaged as a consequentialist argument: that sharia was what it was because God and Muhammad knew best what the *maslaha*s were.

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47 See Chapter 1. Shafi'i jurists already well before our period used the term *ma'ni* for legal principles. See Emon, *Islamic Natural Law*, 126, 145.

48 2 Cor. 3:6. On Paul's Platonism and association of Judaism with formalism see Nirenberg, *Anti-Judaism*, 51—66, 69—77, 104—5.

At the start of our period the originally Ash'ari theologian Fakhr al-Din Razi went quite far in the application of a consequentialist approach. What is noteworthy from the point of view of the long history of approaches to Judeo-Christo-Islamic divine law is that Razi appealed to the tradition of all the prophets and all sharias in establishing the principles of benefit and harm as the values underlying his consequentialism. Razi's determination of benefit and harm was tied to ultimate values that Razi, like Ghazali, deemed to be universal. Following Ghazali, Razi listed the five basic aims of the law as: the preservation of life, of property, of family lineage, of religion, and of the mind. The rules against *zina* and sodomy fitted the aim of preserving family lineage. So he was not willing to allow that *zina* and sodomy could be good, even though he recognised that they were pleasurable and hence on one level beneficial to the involved. Yet as we may recall from Chapter 1, Razi adduced further reasons why sodomy was forbidden which did not apply to *zina* and were not consequentialist, but which were also partly connected to his concept of a universal nature.[49] Razi's deliberations show once again how consequentialist reasoning could be combined with other modes of reasoning.

In Europe, theologians started thinking about consequences around the beginning of our period. In the mid-twelfth century, Bernard of Clairvaux could already envisage that monastic rules might be omitted, intermitted, or changed for the sake of charity, since their very foundation was, in his view, the safeguarding of charity.[50] A few early glossators on the *Decretum* argued that when confronted with a choice between two proscribed actions, one was to choose a way out on the basis of the best outcome from the point of view of charity. Avoiding the major sin from the point of view of charity, one could do penance for the lesser sin.[51] But the first major struggle with the question of consequences in relation to divine injunctions we see in the work of Aquinas. It is interesting to compare how he treated consequences with respect to crimes against nature on the one hand, and theft, proscribed in the Ten Commandments, on the other. He considered both to be mortal sins. As we saw in Chapter 1, Aquinas was aware that the principle of charity might be brought into an evaluation of the gravity of crimes against nature. And indeed, the principle of harm was implicit in sub-deacon Arnald de Vernhola's somewhat later favourable comparison of sodomy to "the wrongful defloration of a virgin, adultery, and incest." But in the case of the crimes against nature Aquinas upheld a formal application of divine law. He trumped his constructed opponent's argument that no harm was done to one's neighbour in the

49 Compare Shihadeh, *The Teleological Ethics*, 49—56, 71—2, 83, 96; Emon, *Islamic Natural Law*, 134—5, 155—6 and passim.

50 D'Avray, *Medieval Religious Rationalities*, 109—10.

51 Kuttner, *Kanonistische Schuldlehre*, 270.

commission of the sins against nature, with the argument that harm was done to God in their commission. Regarding theft, however, Aquinas did allow for consequentialist arguments on the basis of the combination of necessity and charity. Arguing that theft is a mortal sin because it is against charity in the sense of love of one's neighbour, he moved on to concerns about the need of one's neighbour. Distinguishing between need and extreme need, he upheld the injunction laid down in the *Liber Extra* a few decades earlier that the atonement for theft in case of need should be reduced to three weeks of penance, and further argued that in cases of extreme need the act of secretly or openly taking another's property was licit and should not be considered theft at all, and that the same went for secretly taking another's property in order to give the proceeds in alms to a third person in extreme need. Elsewhere he argued that the end (*finis*) for which theft was committed modified its degree of goodness.[52] After that significant but limited application of consequentialist reasoning, it would be a few centuries before the principle of charity gained recognition as a basis for evaluating the consequences of usury from leading figures in the Church, be they of the Catholic or Protestant variety.

Tying consequentialist reasoning to the so-called golden rule led to particularly radical conclusions. In this, Hafiz and Calvin were important trailblazers, although both could hark back to earlier rejections of formalism in the Judeo-Christo-Islamic tradition. As we saw in Chapter 3, Calvin resorted to the rule of equity expressed by Jesus in the Sermon of the Mount in arriving at his advice on usury: "Therefore all things whatsoever ye would that men should do to you, do ye even so to them: for this is the Law and the Prophets" (Matthew 7:12). Through this so-called golden rule Calvin arrived at the consequentialist conclusion that taking interest "without doing injury to anyone" was not a crime or a sin. Sweeping aside the centuries of comments and meta-comments on the passages in the Bible that talk about usury by reminding his readers that Christ's principle of equity obviates the need for a lengthy discussion of usury, Calvin defined the spirit of the rule and at the same time made it clear that this was the spirit of all divine rules and that their application should be judged from their consequences.

However, the so-called golden rule expressed in Matthew 7:12 is not unique to the teaching of Jesus. Expressions of it can be found in all three Abrahamic traditions, as well as in many other traditions, in various forms (positive or negative): do as you would be done by or don't treat others in the way you do not want to be

52 Aquinas, *Summa*, pt. 1 of pt. 2 question 18 article 7 and pt. 2 of pt. 2 question 66 articles 6—7. Compare Selling, "Looking Toward," 397—8.

treated.[53] Thus, we find it circulating also in the Persian world in the time of Hafiz. Hafiz' contemporary Ali Hamadani, in general much more of a hardliner with regard to the enforcement of sharia, also provided a form of the golden rule in his advice to rulers. In fact, he made it the first of the conditions for good rulership. At every occasion, the ruler should think of himself as being in the place of his subjects and think about how he would feel about a certain command: "all that he does not like for himself, he should dislike for any Muslim." The specifics of this formulation are that it was geared to the position of the ruler and that it only applied to fellow Muslims, but it reflects the same general concern.[54]

Hamadani, however, stopped short of elevating outcomes to the level of ultimate criterion for the justness of actions. Here Hafiz went much further. As we can see in the quotation at the top of the chapter, Hafiz did posit that actions should be judged by their outcomes and that the criterion was "avoiding harm." This principle is a broad version of the golden rule (potentially taking into account not only harm the agent can imagine but also harm the other might indicate). Hafiz also expressed this principle elsewhere in his poetry, e.g.: "What matters it if you and I drink some goblets of wine/ wine is from the blood of grapes, not from your blood." Hafiz went on to suggest that none of the transgressions (*'aib*) like wine-drinking that the guardians of sharia were always so keen to point out were actually harmful (adding that even if they were, one should keep in mind that no-one is without flaws).[55]

Lewisohn shows that Hafiz borrowed the idea that avoiding harm was the main principle of sharia from the Sufi shaikh Amin al-Din Balyani, who died when Hafiz was about nineteen. One of Balyani's disciples recorded his acts and sayings in a biography, devoting a section to the principle of avoiding harm to others (*tark-i azari*). Balyani reportedly said that "Whoever causes injury/distress to any servant of God brings upon himself the sin of not having faith in God. There is no greater sin than distressing someone's heart, nor is there any greater act of devotion than making someone's heart pleased." In support of this view, Balyani cited the eleventh-century Iranian Sufi and jurist Abdallah Ansari, who pithily put it thus: "whatever is not pleasing is not an act of devotion and whatever is not injury is not a sin." Notably, Balyani limited his principle of not doing harm to "servants of God," but specified that Jews and Christians were included in that cat-

53 Baggini, *Without God*, 1—12. See Strathern, *Unearthly Powers*, 24 for an explanation why the golden rule was adopted by so many civilisations.

54 Hamadani, *Zakhirat*, 253.

55 Hafiz, *Diwan*, 66 (no. 25).

egory. In addition, Balyani taught, one should be forgiving of the faults of others as well as the injuries done by them to you and bear no grudges. To support these points, he quoted liberally from many authorities, including Jesus. Balyani cited a few sentences from the part of the Sermon of the Mount where Jesus recommended turning the other cheek (Matthew 5: 39 – 41).[56]

All this is why we can find a similar thrust against formalists in the poetry of Hafiz on the one hand and the works of post-Reformation English poets on the other.[57] To be sure, consequentialism tied to the golden rule was not the major thrust of the thinking of either Hafiz or Calvin. But even the main thrust of their thinking was quite similar, namely the emphasis on the role of divine grace (Calvin) or divine love/mercy (Hafiz), as opposed to works (Calvin) or slavish adherence to sharia (Hafiz). In this respect the ideas of both of these thinkers tied in with a much broader trend. Calvin's idea of grace was of course preceded by Luther's thoughts on the same, and Hafiz' idea of love as the ultimate value tied in with a much broader strand of thinkers in the Persian world that had started some two centuries before him. Rumi, who was not as radical as Hafiz we saw in Chapter 1, could already hark back to a verse that the poet Sana'i had written around the beginning of the twelfth century: "Could the great jurists, Shafi'i and Abu Hanifa, know what love is?"[58]

Although the period saw a growing prevalence and sophistication of consequentialist argumentation, opposition to it was strong. We see this particularly during the authoritarian phases, including the one at the end of our period. One means to selectively block consequentialist reasoning was to divide divine law into two segments: absolute laws governing man's relation to God, and relative laws governing the relations between people within the community of the faithful. As we just saw, Aquinas half-explicitly made such a division precisely in order to be able to evaluate theft and crimes against nature in different ways. Half a century after Aquinas, we find the Anglo-Norman *Mirror of Justices* explicitly distinguishing within the category of mortal sins two classes of crime against majesty, those against the king of earth (murdering him, raping his womanfolk etc.), and those against the king of heaven, which was of three kinds: heresy, apostasy, and *sodemie.*[59] By the fifteenth century Panormitanus had decided that it was precisely sex-

56 Lewisohn, "Religion of Love," 164—6; Usman, *Miftah*, 152—60. Ansari's ethics one can also describe as virtue-based rather than merely consequence-based, because he linked proper action to good character. See Zargar, *Polished Mirror*, 8—9, 217.

57 The comparison of Hafiz to post-Reformation English poets runs through the article by Lewisohn, "Religion of Love."

58 Cited in Schimmel, *As through a Veil,* 126.

59 Horn, *Mirror of Justices*, 15—6. Compare Smith, *Homosexual Desire*, 43.

ual intercourse against nature, worshipping idols, and usury that offended God and made their perpetrators liable for prosecution by the Church. As was noted in Chapter 3, in the Persian world, Hanafi jurists distinguished between the *huquq Allah*, the rights of God, and the *huquq al-ʿibad*, the rights of individuals. They saw the rights of God as absolute, while the rights of individuals were relative to just exchanges. Central Asian Hanafi jurists writing on the eve of our period already saw the two as mutually exclusive. Ala al-Din Kasani wrote that "[a]s far as the claims of God are concerned, the just exchange is not taken into consideration."[60] We witnessed a clash at an audience of Mughal emperor Aurangzeb during which the emperor seems to have decided that under certain conditions the proscription of usury was to give way to the right of the troops to have their salary. Giving preference to the proscription of usury as a right of God would have blocked the consequentialist argument that the necessity to pay the troops justified paying interest on a loan. With respect to sodomy, the Hanafi jurists at Aurangzeb's court seem to have leant stronger than their predecessors towards considering it liable for *hadd*-punishment, which entailed its consideration as a right of God.[61]

Consequentialism can and could be tied to all sorts of values. Some tied it to values that ended up upholding the divine proscriptions. Both Razi and fictive opponents of Rocco's equally fictive professor brought forward the argument that safeguarding procreation was the aim of the proscription of sodomy. But the upholders of divine law did not have to come up with values to employ in consequentialist arguments, since, as was noted in the last paragraph, they could simply proclaim the applicability of the kind of reasoning we now call deontological. Did the upholders of the divine proscriptions realise that they would open a floodgate if they started engaging in consequentialist argumentation? Libertines like Rocco's professor, the dean of the Oporto cathedral, and the more guarded interlocutors of princess Elisabeth Charlotte seized on the argument that safeguarding procreation must be the aim of the proscription of sodomy, and countered that the practice of sodomy by some did not stand in the way of this aim. And as we also saw in Chapter 1, numerous educated men in seventeenth-century Sicily reasoned that as long as an equitable amount of children was being produced there was no harm in heterosexual sodomy.

In any case, consequentialist reasoning was mostly employed by those seeking to create room for earthly concerns. The values they tied into that reasoning can be divided into three families: the respect family, the fairness family and the expediency family. In the latter we find the appeal to necessity (*zarurat*) and state reason

60 Johansen, *Contingency*, 210—1; Emon, "Ḥuqūq Allāh," 380.

61 Compare Emon, "Ḥuqūq Allāh," 330—1, 336—7, 343, 346—8, 354 and passim.

(*siyasat*, *'umur al-mulk*, *mulki*). While expediency at first sight appears and appeared as mere instrumental reasoning, appeals to necessity and state reason often seem to have been presented as ethical values, which is why they should be included here.[62] In the fairness family we have the more evident values of justice (*'adilat*) and equity (*insaf*). In the respect family we then find the principles of not doing harm and doing as one would be done by. Arguments from the expediency and fairness families were sometimes blended together, as in the concept of "the lesser evil," which we saw employed especially with regard to usury. It was the basis of the *hila*s conceived for usury in the Persian world as well as of the space created for lending by Jews in the Latin world. A more explicit blending of necessity and *insaf* we find at the court of Akbar in the argument for state loans on interest. Arguments from the respect family stood a bit apart, however. Recourse to the "no harm" principle or the golden rule was presented as a breakthrough, a casting aside of received argumentations.

The values from the respect family were intermittently embraced, as I highlighted in the comparison between Hafiz and Calvin. The "no harm" principle was implicit in many of the strident expressions about sodomy and idolatry. Associations with innocence hinted at harmlessness, especially in the later part of the period. Barnfield set his farmer's pursuits in a bucolic idyll, while Saenredam marked the return of figurative art to the church with children's graffiti, and to Zeb al-Nisa idols were "stone children," who paradoxically brought what others found blameworthy to her hand. Yet while a few were willing to playfully hint at anal intercourse and numerous others flauntingly embraced certain risqué uses of images, I found no evidence of anyone willing to present her- or himself as a strident usurer. Why was no-one willing to wear the taking of interest as a badge of honour? Apparently people at the time found it harder to make the case that interest could be harmless than to argue that sodomy and idolatry could be harmless. Justifications of usury were initially mostly formalist and then increasingly based on the fairness and expediency values, but largely not on the respect values. Only Calvin argued that lending at interest between well-off merchants was harmless. One of the paradoxes this study brings out is that the taking of interest was for centuries the most often justified but the least stridently defended of the three proscriptions.

The increasingly widely shared consequentialism of the era looked at the consequences for individuals more than at the consequences for society at large (as the "invisible hand" or "greed is good" idea came to do in later capitalism). Reasoning about lending at interest was much more about whether an individual borrow-

62 Compare D'Avray, *Rationalities in History*, 163—84, in particular 176.

er would be better off having a loan with interest than not having a loan. Calvin's ideas about interest were not yet the ideas about economic prosperity of Adam Smith or Gordon Gekko. In the Persian world we do see some people at the imperial courts reasoning in terms of what was good for the state, but this reasoning was not accepted by the monarchs. We saw the courtiers of Ghazan Khan arguing that lending at interest was necessary to keep transactions in general, and the cash flow to the imperial coffers in particular, going. The Hindu moneylenders to the Mughal emperor argued that they would run out of capital in the absence of interest, and that this would spell the end of the availability of capital all over the empire. With respect to sodomy, the procreation argument did look to the benefit for society, but as we saw, that was not often brought forward. Thus, on the whole, the consequentialism of the late medieval and early modern period was not exactly what it has become in our day when it has become both more far-reaching and pervasive. Then as now, consequentialism depended on decisions about what the ultimate value is. Antinomian Sufis had by the beginning of our period decided that love in all its forms was the ultimate value, and they posited this in a very strident way as we saw in Chapter 1. In the Latin world the somewhat more limited concept of charity or neighbourly love was carefully brought forward as an ultimate value and finally embraced by influential figures in the sixteenth century. In reasoning about legal dilemmas, both of these principles seem to have come down to the greatest good for the people who were directly involved, not the greatest good for the greatest number of people.

The reason, I suppose, for the difference of degree between Western consequentialism today and the consequentialisms of the era is that two further shifts have taken place since the seventeenth century. First, in the words of Hannah Arendt, "authority has vanished from the modern world." By this Arendt intended the kind of authority that commands respect without having to resort to violence, not the law-and-order authoritarianism that did and does need violence to prop it up.[63] While Hafiz and Calvin contested the authority of a certain class of men to interpret scripture, they did not contest the authority of scripture itself. Second, instead of thinking in terms of duties to God or the community we have become accustomed to thinking in terms of individual rights, certainly since the Universal Declaration of Human Rights in 1948 (even though the Declaration also mentions "duties to the community" as well as the limitation of individual rights in deference to the rights of others in article 29). Legal historians speak of "the modern language of rights."[64] To be sure, the development in Western thought of the

63 Arendt, *Between Past and Future*, 91—141.

64 Finnis, *Natural Law*, 210—2; Davis, "Centres of Law."

idea of inalienable individual rights has been a very gradual one, which can be traced into the era we are concerned with here, but it seems to have sped up only after the period we are looking at here.[65] The point is that, apparently, consequentialism has historically not required a wholesale rejection of authority and duty, and a moderate scepticism of authority and duty were enough to get it going. Or perhaps the causality was the other way around: a measure of consequentialism was necessary to develop a moderate scepticism of authority and duty.

Different Proscriptions, Different Treatments

From the chapters the conclusion emerges that the different proscriptions were treated very differently by the guardians of divine law. In the case of usury an increasing number of guardians actively participated in creating loopholes and exceptions as well as the narrowing of definitions. In the case of sodomy enforcement might be relaxed in tolerant periods, but the guardians made only relatively small changes to their definitions of it. While they were willing to lower the punishment in some periods, they only rarely helped to create loopholes for those considered sodomites. With respect to the use of images there is less of a clear pattern in the stance of the guardians, except that even when they were strict on certain images, they were generally willing to allow those in private spaces.

There is something to be said for the economic historian Richard Goldthwaite's suggestion that the continuous development of the usury doctrine in Latin Europe formed part of a dialectic process.[66] We may see this as starting out with the growth of the economy and the increasing use of complex financial instruments on the one hand and ever fiercer condemnations of usury on the other at the beginning of our period and ending with a synthesis by the end of this period. He sees this dialectic process as generating compromises both on the side of the practitioners of credit and the theorists of divine law. We should, however, take care not to overstate the rift between theory and practice (if the distinction can be made at all), since some of the theory came out of very practical engagements

65 In the first edition of his *Natural Law and Natural Rights*, John Finnis spoke of a watershed between Aquinas writing in the twelfth century and Franceso Suarez and Grotius writing in the early seventeenth century, but in the 2011 edition he modified that view because of his realisation that the sense of subjective right was in fact already present implicitly in Aquinas view of *ius*. Finnis, *Natural Law*, 205—10, 465—6.

66 Goldthwaite, *Economy*, 410, 585—6. To be sure, Goldthwaite only speaks about this dialectic for 14th- and 15th-century Italy.

and the practice of earning money with money was slowly being turned into a value nested among other values.

In the second half of our period the tension between the pursuits of money and heaven came to be mediated by the values of work and equity. Through their emphasis on piety on the one hand and their drive to alleviate the very concrete suffering of the poor on the other, the Franciscans were forced to reach a compromise that explicitly acknowledged the practicalities of a money economy. In the process they contributed to turning the reward for the efforts of the banker into a value, as was laid down in the statutes of the Florence Mount of Piety. The "work ethic" is also what, in Weber's famous thesis, mediated between the pursuit of capital growth and the afterlife in the outlook of early Calvinists, who saw their calling to generate profit as a testimony of their salvation.[67] Calvin himself, however, demonstrably under pressure from money through his friends seeking an outlet for their savings, justified moderate usury not on the basis of work as a value but on the basis of equity.[68] What the approaches of Calvin and the Franciscans had in common was that they rejected formalism in interpreting the injunction against usury.

Looking at the Persian world, we see a similar dialectic, but less intense. Perhaps we should conclude that the Persian world reached a satisfactory synthesis of guardianship and practicality at an earlier point than Latin Europe. Yet, as we saw in Chapter 3, by the mid-sixteenth century the Persian world had lost its initial advantage. To be sure, Akbar did apply some consequentialist thinking to the matter of usury and even his great-grandson Aurangzeb unblocked the issue by considering it a right of the individual, but neither of them was an alim, although Akbar tried to gain recognition as one. By the late seventeenth century Chardin observed the same formalist practices in use in Iran that one could have observed in Europe centuries before. We can only speculate on the consequences of this continued formalism. The economic historian Timur Kuran has also perceived this parting of ways between the Middle East and the West over the period and sees the continuing divergence between form and content of commercial transactions by Muslim merchants of the Middle East as the main cost of the proscription of *riba* in the long run. Because commercial, financial and monetary matters could not be discussed honestly and openly, he argues, public discourse would have become impov-

67 Weber, *Protestant Ethic*, 32—3, 177 and passim.

68 See Chapter 3. Weber deemed the prohibition of usury and Calvin's stance on it irrelevant to his investigation of the spirit of capitalism among early Calvinists. *Protestant Ethic*, 167—8 n.23, 176—8 n.32.

erished and that "would have clouded individual understandings of the time value of money, delaying the development of a capitalist mentality."[69]

However, the bigger picture is that in both worlds jurists were allowed to employ the full breadth of their creativity, whether in a formalist way or not. This goes equally for the Ottoman empire, in the context of which Haim Gerber notes that it was especially the proscription of usury that gave rise to the invention of *hila*s and that this did not mean that all proscriptions (such as those of *zina* and drinking wine) were equally open to elaborate treatment by legal fictions. One might therefore say that the proscription of usury gave rise to both the highest expression of pragmatism and of artificial logic in Islamic law. Elsewhere, Gerber argues that it was precisely in the Ottoman debates about another economic institution, the *waqf* or charitable foundation, that one sees the "horror" with which attacks by inflexible jurists were viewed. In those debates the alims in the highest official positions, such as the Shaikh al-Islam, were "forced…to go along with the public." An instance was the debate on the cash *waqf*, which was an instrument that arose in the Ottoman empire in the fifteenth century consisting in a cash endowment that generated income for its more or less charitable functions through charging interest. In the middle of the sixteenth century the instrument came under attack from an important scholar, but this was immediately countered by the Shaikh al-Islam Ebu Suud, who basically proposed that since it was "popular and generally practiced" it was "perfectly sound."[70]

Ebu Suud's verdict points to the popular pressure exerted on the guardians concerning the issue of usury. We can demonstrate this pressure from the state and the community at certain points throughout the period and the two regions. Every now and then we can catch a glimpse of the pressures the guardians were exposed to from their environment. Henry of Ghent, for instance, whom we have encountered as an opponent of annuities, seems to have been under considerable pressure from his environment to take a more lenient stance. In 1277 he called on God as a witness that he had not spoken out of favour or hatred for anyone, but had simply said what he believed to be true.[71] Apparently he deemed it necessary to protect the boundaries of scholarly expression in the matter. For the case of Calvin's views on usury we were able to demonstrate the connection to practice in quite a bit of detail, since we have access to his correspondence, which shows that he was beseeched by friends who were keen for the ban on usury to be relaxed. As for the Persian world, we saw that Muhammad bin Tughluq

69 Kuran, *Long Divergence*, 151, 153—6.

70 Gerber, *Islamic Law and Culture*, 104, and *State, Society, and Law*, 102—10.

71 Wei, "Predicting," 22—3.

was prepared to behead alims who objected to one of his economic measures. According to the poet Isami, however, the qazis of the state struck back against the "thumbscrew" the sultan put on the *mufti*s by condemning him to death and also closing the door of salvation on him in their verdict (*qaza*).[72] Much later, Akbar simply proclaimed himself the final arbiter of shariatic disputes, which allowed him, among other things, to subject the question of usury to considerations of equity. Of course, it was not just because of the prohibition of usury that Akbar came to this step. His detractor Badauni pointed for instance to the question of how many wives a man was allowed to take and noted that in general Akbar "considered following another person an insufferable burden." Yet the point is that Akbar attempted to unite in his person the practice of lending at interest and the authority to rule on the subject.[73] Clearly those who needed as well as those who provided loans had a voice that was loudly heard in both worlds.

If we turn to the issue of sodomy, we see a completely different picture in both worlds. Jurists and theologians were not bending over backwards to create loopholes. Nor did they apply any flexible consequentialist thinking to this issue. The only people who applied such thinking to sodomy were people who were cast or cast themselves as fringe. The Ockham's razor explanation for the differential treatment of the proscriptions of usury and sodomy by the guardians of divine law is that which John Boswell provided with regard to Europe in his 1980 classic *Christianity, Social Tolerance, and Homosexuality*. He suggests that credit became more and more "a part of everyday majority culture," while on the other hand, "there were few popular reasons for reinterpreting thirteenth-century strictures against gay people, Jews, witches, or other groups who remained objects of suspicion or hatred on the part of the general population."[74] In short, Boswell sees it as a majority versus minority issue: more people needed credit than needed homosexual intercourse, and that explains the divergence.

As noted in the introduction to Chapter 1, Boswell's idea that homosexuality was a matter of innate disposition or orientation and that one can speak of gay people in the Middle Ages is rejected by a large segment of scholars in the field of queer and gender studies today. These scholars argue instead that we can only speak of situational acts for this period, or in any case that homosexuality as an exclusive or preponderant inclination is a nineteenth-century Western invention. So that would mean that it was indeed a majority concern throughout our period since without such exclusive inclination all males might potentially

72 Isami, *Futuh*, 515; Conermann, *Beschreibung*, 120—3.
73 Badauni, *Muntakhab*, 2: 268; compare Lefèvre, "Beyond Diversity," 116—24.
74 Boswell, *Christianity*, 332.

commit sodomy. And, indeed, there were contemporary voices warning against the proliferation of the practice through the male population. Yet, some of the contemporary voices in Chapter 1 support Boswell's idea that some men were more inclined to same-sex intercourse than others, and that too in both our worlds. These propositions of proliferation and inclination were and are not mutually exclusive.[75] Scott Kugle in his study on the intersections of homosexuality and Islam through different periods and regions makes a distinction between situational and dispositional homosexuality, and perceives the two as having existed side by side throughout.[76]

The comparison with the issue of usury can and should play a role in our thinking about the question whether and to what extent we can speak of people inclined to the same sex as a minority in Christian and Muslim communities in the medieval and early modern periods. But we need multiple distinct angles to get at the comparison. Apart from voice/influence, we can look at the issues of necessity and consent. With respect to necessity there is the question of what percentage of men needed recourse to what was defined as usury or sodomy respectively, but also the question of how badly those people needed that recourse. The issue of consent comes up not only because it is foremost in our modern consequentialist thought when we consider sexual and economic interactions, but also because both usury and sodomy were widely perceived as arrangements between unequal partners (and this conception fed into stereotypes of the sodomite and the usurer). We can look at these issues from both the contemporary and modern perspectives.

How loud was the voice of the advocates of sodomy and associated practices in comparison to the voice of the people clamouring for lending or receiving credit at interest? Certainly in Europe most of what was said in favour of sodomy was immediately suppressed. The 1325 sodomy statute of Florence even imposed a fine for singing songs about it and the like.[77] As we saw, even in the relatively libertine late sixteenth and early seventeenth century, the most explicit libertines were prosecuted and/or their printed works quickly removed from circulation. In the Persian world too, the antinomian poets constantly speak of the *muhtasib* and keeping things behind closed doors. In a way, therefore, sodomites were like the "subalterns" or people from the lower strata of colonial society that the Subaltern Studies

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75 Contemporaries who combined these two propositions included Albertus Magnus, Bernardino of Siena and Rocco in the Latin world and Suzani in the Persian world. See respectively Boswell, *Christianity*, 316—7; Mormando, *The Preacher's Demons*, 124, 134—5, 146—8, 158; Chapter 1; Sprachman, *Licensed Fool*, 48—9.

76 Kugle, *Homosexuality*, 10—1.

77 Dall'Orto, "'Socratic Love'," 62 n.2.

collective has tried to give a voice in the final decades of the twentieth century. The voice and agency of subalterns can be seen as buried under a colonial archive that was inimical to their causes. A historian needs a great deal of attentiveness to read these colonial archives against the grain if the voice of the subaltern is to be heard at all. In a similar way, I have tried to read against the grain texts produced by representatives of the Church of the stiff variety like Thomas Aquinas, Bernardino of Siena and the various branches of the Inquisition, as well as the Persian discourses that approved pre-emptive strikes against sodomites and other forms of their punishment. But in another way, sodomites were not like the colonial subalterns, since many of them were well-educated, part of the elite, and produced prodigious amounts of texts themselves. Yet as we have seen, if such texts alluded to sodomy at all, the allusions were mostly oblique, carefully wrapped in layers of metaphors, allegories, or satire, and that goes for even the most explicit of the texts. This requires a slightly different kind of attentiveness of the historian. Rather than try and read agency back into inimical sources one needs to read sodomy back into carefully, and purposely, "silenced" yet sympathetic texts.[78] Clearly, if we have to go through so much trouble to find the voice of sodomites, we cannot say that it was a widely accepted voice. Moreover, we see a constant recurrence of the connection between homeroticism and antinomianism/libertinism. Is it possible that people who were more inclined to the same sex were more likely to think about what divine law was and what the role of authority was in the interpretations of the sources of that law, because these interpretations were being hung over their heads time and again, whether they engaged in sodomy or not?

In some instances, however, we get the impression that homosexually inclined men did have the influence necessary to deflect the attention of those in charge of enforcing divine law. We saw that in the Akhbari-influenced Shi'i regions, people, including those in charge of enforcement, suspended judgement by referring to the absence of the Imam. We also saw that the Dutch observer Havart thought that this looking-away came about through the influence of the "big" men who indulged in the act. Similarly, we saw that certain strident sodomites enjoyed protection from those higher up in the Latin world. Bazzi had protection from the pope and Rocco was never prosecuted despite five informations against him. This was the context of the strategy of pointing to the gods, kings, and popes and getting away with it, of which we encountered quite a few instances. We may also wonder why the attention of prosecutors in a limited but significant set of places in the Latin world drifted to bestiality. Places where the majority of the cases brought to court under the heading of sodomy concerned acts between men and animals were Austria, the

78 Compare Fasoli, "Body Language," 33.

French-speaking parts of Switzerland, and Saragossa in Spain, all in the late sixteenth century and early seventeenth centuries, which was also the high tide of libertinism.[79] It may also be true for the larger part of the German world in that period and the explanation for the shift in the popular understanding of the term *sodomie* in German towards bestiality, where it remains till this day. The question is what occasioned the shift of focus in these places. My speculation is that the urban men with a say in the legal system consciously or unconsciously steered the attention away from the things that also happened in their own circles to a marginal phenomenon that occurred mostly in the countryside. Still, such pressures from people high-up only affected the way and measure of prosecution, and not really the formulation of the law.

The issue of consent was implicit in some of the reasoning around sodomy. In both worlds distinctions were made with regard to volition, which let young boys off the hook in the case of a trial. In the Persian world the absence of consent seems to have played into Rumi's condemnation of the *luti* and was implicit in some (but not all) of the evaluations of pre-emptive strikes we encountered. The discussion in *The Sea of Precious Virtues* of killing in the name of commanding the praiseworthy – with the example of killing a master who sodomises his slave – immediately follows a discussion of killing in self-defence. Other authors made it a point to emphasise how those who ended up killing their superiors dreaded being penetrated. On the other hand, it was recognised that there were those who actively sought to be penetrated, but they were also unanimously deemed deserving of punishment by our authors. That suggests again that consent was not that important to those of a sterner bent. But on the other side of the debate were the poets who sought to convince their beloveds to give them intimacy and ambiguous union. Without such begging for consent from beloveds much of Persian poetry would not exist. In the Latin world non-consent and force seem to have been important in evaluations of sodomy in the time of James I. In the Latin world too, the voices advocating male-male intimacy recognised the need to obtain consent. Rocco and Barnfield devoted quite a bit of space to the effort of convincing the desired boy. So from a contemporary perspective consent did matter somewhat, even if, from a modern perspective, the age and power differences in many male-male couplings were such that consent would seem impossible.

With respect to usury, consent was similarly implicit in many of the argumentations around it. Those who sought to loosen the restrictions on usury tended to

79 Hehenberger, *Unkeusch*, 81—159; Monter, "Sodomy and Heresy," 45, 47; Monter, *Frontiers*, 276—90; Crompton, *Homosexuality*, 296, 298.

emphasise that there was consent. In the Persian world we see it in the justifications or *hila*s, which present the borrowers as actively seeking a loan. The agreement of the borrowing party to the conditions was carefully registered in the model contracts or before a judge. Non-consent seems to have played a role in the condemnation by the alims of Muhammad bin Tugluq's agricultural lending scheme. They associated him with the *zalimin*, the wrongdoers or oppressors whom Noah escaped. In the Latin world we see an emphasis on consent from the precise fourteenth-century stipulations by the textile importers guild in Florence regarding the certification of the voluntariness of "gifts" to Calvin's ideas about lending between well-to-do equal merchants. Here contemporary and modern perspectives largely overlap, although we could point to the many situations where the lenders were not in a more powerful position than the borrower, even if contemporaries viewed them as bloodsuckers.

A big difference between the core concerns with respect to sodomy and usury – anal penetration and what we now call interest – was that the latter had more potential to become a matter of degree. There were attempts to introduce degrees with respect to anal intercourse. In the Persian world Fakhr al-Din Razi regarded male-to-female sodomy as less evil than male-to-male sodomy. Shi'i jurists in particular saw the heterosexual variety as much less of a crime. Also in the Latin world, there were voices saying that heterosexual sodomy was no or less of a sin. In Sicily the Church had a hard time suppressing such voices and Della Casa was keen to point out that his *Chapter of the Oven* had been about the heterosexual variety. The Inquisition in Portugal did introduce two further degrees of sodomy: with and without the emission of semen. But the continued focus on anal penetration ensured that sodomy was mostly seen as a zero-sum act in both worlds. For usury people could, and increasingly did, perceive a whole range of rates. The reasoning that a low interest rate was acceptable attached to the concern with the borrower's consent. This idea occurred, as we saw, to people in both worlds, but became much more important in the Latin world than in the Persian world.

With respect to necessity the issues of sodomy and usury also diverged. The concept of necessity was taken very seriously in the context of usury, but real or imagined attempts to introduce it in the context of sodomy were satirised in both worlds, also, incidentally, by sympathetic writers like De Viau. Why? Was it because some did in all seriousness make such appeals to necessity? Or was it because sodomites came up with other, more sophisticated, justifications that their ridiculers did not want to consider? Or should we, from a modern perspective, take into account the possibility that penetration was not the telos of all same-sex orientation? After all, it is and was homophobic discourse par excellence that male-male attraction equals an obsession with anal penetration. Perhaps, despite all the scepticism over Platonic love in both worlds, people like Rumi and

James I who sought out male lovers throughout their lives but distanced themselves from the act of sodomy were perfectly happy with whatever non-penetrative bond they achieved with their lovers. That would mean that even people more inclined to the same sex did not need sodomy as much as many people needed credit. Still, we cannot escape the sense that some men felt, as it were, compelled to test the boundaries of this particular proscription in writing.

We can extend this evaluation to the issue of idolatry by asking some of the same questions: was the use of images a majority concern, was it perceived as such, was the voice of the users of images heard, and how strong was the need for images? As David Freedberg argues, the very efforts at proscribing images testify to an eager propensity to make the kind of images that were proscribed. It seems a human universal that images are deemed powerful, a power that some have sought and some have feared (or both at the same time).[80] Certainly, it seems that some people saw images as irrepressible. A recurrent theme in Persian Sufi and antinomian poetry is the beautiful *naqsh* which haunts the subject of the poem, and the subject therefore continues to seek out and chase. Of course, these irrepressible images are idols that the poet conjures only in the mind of the reader. The drive to have physical images, on the contrary, was ascribed to the uneducated Hindus by thinkers from Biruni to Lal Das, which would have made this need of less concern to the elite and certainly to the Muslim elite. Nevertheless, elite Hindus did make their voice heard at the Mughal court concerning the taxes on pilgrimages to Hindu sacred sites, which were perceived as compensation for idolatry as we saw. During the reign of Shah Jahan, the Brahmin scholar Kavindracharya was credited by fellow Sanskrit literati with getting the tax on pilgrims to two important sites rescinded as an imperial favour.[81] In Europe, the need for mental images was also recognised, but thinkers went a bit further in the extent to which they recognised a general need for physical images. Martin Luther saw mental image making as a natural part of the human psyche, a necessity for humans to visualise what they think. He also noted that if people were going to paint anyway, they might as well paint edifying stories from the Bible.[82] With regard to physical images, the idea that images were necessary as books for the laity was one of the pillars of the defence of the sacred use of images already before our period. The popular perception that images might weep, bleed, or strike back when attacked by Lollards, Hussites, and the later Reformists also spoke to a sense of their irrepressibility. Also, in the midst of the strictest circumscription of the use of images

80 Freedberg, *Power*, 60, 161—3, 427—8, 436 and passim.

81 Truschke, "Contested History."

82 Christensen, "Art," 74; Eire, "Iconoclasm," 306; Tümpel, "Reformation," 318.

in Europe, the surreptitious appearance of graffiti and scattered murals on church walls in the works of the Dutch church interior painters Saenredam and De Witte asserted that the inclination to make art was irrepressible.[83] We might say that in Western Europe both mental and physical images were seen as a majority concern and something that people were going to create regardless of pressure, while in the Persian world mental images were seen as necessary to the majority and physical images were deemed less so. Yet in both worlds, and here we have a similarity once again, it seems to have been recognised that it was not necessary to have images everywhere even for those who seemed to need them most. As we saw in Chapter 2, space came to be manipulated in both worlds in such ways that all could have their physical images as long as they were out of the sight of the guardians.

Consciousness Revisited

In a variety of ways, scholars have sought to address what appears at first sight as a large scale discrepancy between ideals and practices in both worlds over our period. This study has been investigating the ways in which people sought to come to terms with the gap through justification. But modern observers have also pointed out how people might have ignored the discrepancies because they were simply unaware of the demands of divine law, and/or because divine law was relegated to a separate social compartment, or because a generally ambivalent attitude might have enabled them to live with the contradictions. These modern scholarly views are elaborated in the introductions to the chapters. Contemporaries, in addition, often pointed to the role of hypocrisy in bridging the gap. This section applies the gathered evidence to the general debate about the gap between ideals and practices over this period. While contemporaries and an older generation of scholarship overstated the prevalence of hypocrisy, modern scholars have overstated the role of compartmentalisation and ambivalence. Finally, I want to look briefly at period discussions of hypocrisy as a way to perceive consciousness of consciousness.

In many cases where formal procedures or language were used to stay within the bounds of divine law, it is indeed difficult to establish whether those formalities point to individual consciousness or reflect a collective consciousness in the form of what Bourdieu calls habitus. One can argue that some of these forms had become conventional to the extent that those who applied them were unaware

83 Vanhaelen, *Wake*, 43.

of the context in which they were created. Haim Gerber makes this point in connection to the temporary sale. He argues that the instrument became so common in the Ottoman heartland in the seventeenth century that it ceased to be regarded as a *hila.* He notes that not only do the contracts for temporary sales explicitly lay bare the elements of the formal transaction, they may also proceed to decode what is really meant by each term (for which he cites one case).[84] But I would argue that such laying bare and decoding points to a high level of awareness of the divergence between form and substance. The laying bare of the parts of such a transaction we have encountered in the example of the temporary sale contracts from seventeenth-century Samarqand, where the phrase "the lifting of the shariatic obstacles" was used. The question remains whether these two contracts did not come off a template and were mindlessly copied and approved to get everything over with. Yet, would the learned person who had these documents drawn up not have at least read them and then perhaps paused for a moment at the phrase that lays the transaction so explicitly bare?

Another approach to what sometimes appears as a gap between ideals and practice has been to say that people could avoid making the connection between their practices and what was proscribed, or in other words, were able to engage in "multi-think" (as Jamal Elias has put it). Some studies that have appeared since 2010 emphasise this point. For the Latin world, Barbara Newman detects a pervasive ambivalence in the twelfth century and early part of our period, and Caroline Bynum detects it in the way Latin Christians would have simultaneously embraced and rejected the role of sacred images and objects between the fourteenth and sixteenth centuries.[85] The influential works of Thomas Bauer and Shahab Ahmed argue that ambiguity and ambivalence played a large role in the Muslim world before modernity. Ahmed, who seeks to define Islam as encompassing all of Muslim or Muslim-influenced thought and life, sees ambivalence (or even multivalence) and ambiguity as continuous with each other and argues that the latter played a large role not only in reconciling but also in generating and maintaining the contrasts and contradictions that in his view constitute Islam. While there were in his view, "orthodoxizing" impulses and trends, the dominant trend in the Persian and Ottoman worlds would have been to explore multiple values and truths at the same time. Many or most people would have suspended judgement. Even in the legal field where the orthodoxising trend was strongest, jurists often would have suspended judgement through the admission of *ikhtilaf*, the

84 Gerber, *State, Society, and Law*, 22, 74—5. The "decoding" example is from a collection of mainly eighteenth-century documents.

85 Newman, *Medieval Crossover*, 1—53; Bynum, *Christian Materiality*, 268—72 and passim.

existence of disagreement between and within the juridical schools. Bauer, who seeks to characterise premodern Islamic culture as a "culture of ambiguity," similarly argues that the tolerance for ambiguity was great within the Muslim world, also among jurists. Bauer does, however, distinguishes sharply between ambiguity as the inhering of different meanings in a concept, practice, or object, and ambivalence as the simultaneous presence in a person of contradictory feelings, wishes, and thoughts.[86] This is an important distinction.

In addition, it is important to distinguish between the level of the individual and the level of the community. Ahmed and Bauer, while writing more about ambiguity, in effect seem to characterise the whole premodern Muslim world as thoroughly ambivalent, at all levels. At the community level there was indeed a constant back and forth between the flexible and the strict, making the whole appear ambivalent. However, this was not necessarily the case at the level of the individual. The issue of ambivalence revolves around individual consciousness of the contradictions between conflicting aims.

Firstly, could people hold two conflicting views without weighing them against each other if they were conscious of the contradictions between the two? Indeed, we saw that some people in the Persian world were very consciously suspending judgement – like the Muslims in Golconda who felt unable to judge in the absence of the Imam, or Astarabadi who chose to suspend judgement on wine-drinking by choosing a very particular angle. But these are cases from a very particular corner of the debate, the Akhbari side in the Shi'i world. Others within the Persian world were not suspending judgement. While Astarabadi suspended judgement in the face of *ikhtilaf*, Hanafi books of jurisprudence also gave multiple opinions on various questions (as we saw in the sections on definition), but they tended to rank them through the order in which they presented them. Moreover, while canon law was also made up of a layering of contradictory authoritative statements and glosses, all presented side by side for instance in the 1582 edition of the *Corpus*, no scholar has interpreted this as showing a great tolerance for ambiguity or a willingness to suspend judgement. In short, some conscious suspension of judgement or ambivalence can be detected, but it concerned only a fraction of all the cases of legal consciousness we have sorted through.

What then if people were *not* conscious of the contradictions between two of their aims? In that case we cannot say they were suspending judgement, but we could still say they were ambivalent. This study has been looking only at cases where people did weigh different viewpoints on certain practices against each other. The perspective of this study can thus only provide part of the answer, be-

86 Ahmed, *What Is Islam*, 201, 285—6, 402—3, 453—4; Bauer, *Kultur*, 38—53, 165—6 and passim.

cause it is possible that the people I found to be doing such conscious weighing were not representative. Both ambivalence and the creation of ambiguity can be conscious and unconscious, and I have not looked for the unconscious.

What I did find is that ambiguity was often employed by people who had made up their minds which of the possible readings of their ambiguous expressions was to be preferred. In Chapter 1, we saw numerous examples of poetry ambiguously referencing sodomy. We also saw that contemporaries perceived the authors of these poems as walking a tightrope, and often suspected that the decent layer in the poems was only a ruse. Such poetry was in greater abundance over more periods in the Persian world than in the Latin, but the Latin world did offer a few more pieces of ambiguous visual art for a while. With regard to ambiguous representations of sodomy in the visual arts of the premodern Latin world, Robert Mills has made some trenchant observations, which can be extended to the Persian world. First, that it is through associations with certain markers that the subject of intercourse between males might be rendered visible. These markers include gender, physical appearance, physical position, age (the beloved boys), religion (especially in Persian poetry the beloved boys were often Zoroastrian or Christian), regional background (Italians, Turks), social status, and symbols of sin (fallenness, lasciviousness, wine cups, etc.). Second, that "this entry into visibility via extraneous systems of classification provides opportunities not only for clarification – for bringing identities and interiorities into the light of day – but also for further manifestations of obfuscation and ambiguity."[87] So here we touch on what the anthropologist Donald N. Levine calls the "protective function" of ambiguity (which Bauer also recognises).[88] It protected strident points that we can observe creators to have made, by couching them in acceptable markers and terms. Ambiguity was not simply a given of this era, it was consciously created.

Ambiguous texts and images were made that way precisely to reflect the ambivalence of the community as a whole. As we saw in Chapter 2, some painters in the Dutch Republic indicated in various ways that they thought the 1566 iconoclasm had gone too far. Yet, as Angela Vanhaelen remarks, the paintings that in some way questioned the iconoclasm seldom impose a definite meaning and instead derive their attraction from their well-crafted ambiguity, because they were intended to appeal to a diverse audience of potential buyers.[89] Similarly, the makers of the ambiguously worded statutes regarding interest rates that we find spreading in the sixteenth century from the Netherlands to England to the Ot-

87 Mills, *Seeing Sodomy*, 12, 226, 301.
88 Bauer, *Kultur*, 40—1.
89 Vanhaelen, *Wake*, 17, 97.

toman and Mughal empires clearly thought it was time for a change, but they nevertheless acknowledged the ambivalence of their communities as a whole in the very ambiguity of the wording.

The theories of Bauer and Ahmed about how contradictory values could exist side by side in Muslim communities are explicitly intended to provide an alternative to the explanation that generations of Western so-called Orientalist scholars would give, namely that the Muslim world was full of hypocrisy.[90] Yet hypocrisy is quite a different mental state from that of suspension of judgement or not choosing between contradictory aims. Hypocrisy is to choose between two aims and pursue one, while outwardly espousing the other. If we look at what people at the time thought was going on in the heads of their contemporaries, we quickly find that the view that there was a lot of hypocrisy did not originate with the Orientalists. It was commonly held in both worlds all through our period that some or all members of the own community were hypocritical when it came to matters of divine law. In the Persian world both antinomians like Hafiz and satirical writers inveighed against the hypocrisy (*riya*) of the alims and other self-proclaimed guardians, just as castigating the clergy and associates was a major theme in medieval and early modern satirical writing in the Latin world. A shared symbol of this hypocrisy were the various distinctive cloaks or robes that the alims, Sufis and clergy (especially friars) tended to wear. As the literary scholar Ehsan Yarshater notes, we fail to appreciate much of Hafiz' poetry if we do not realise the intensity of his animosity towards the alims as well as the *zahid*s among the Sufis who were wont to hide forbidden things under their distinctive *khirqa*s or cloaks. Similarly, one of the main characters in the part of the *Romance of the Rose* written by Jean de Meung, about a century before Hafiz' diwan, is the friar *Faus Semblant* (False Seeming), whose father is Fraud and mother *Ypocrisie.* The friar himself is "the filthy hypocrite [*ypocrite*] with a rotten heart / who has betrayed many a region / with his religious habit [*habit de religion*]."[91]

So how does the hypocrisy that contemporaries so widely diagnosed relate to our main theme of justification? Contemporaries saw some of the ways of justification detailed in the chapters as hypocritical, especially the ones in the category circumvention and in the in-between category of *hila.* While we cannot establish consciousness in all cases of justification, hypocrisy is by definition conscious.

90 Ahmed, *What Is Islam*, 376 n.155, 382—5; Bauer, *Kultur*, 52—3.

91 Yarshater, "Hafez"; Emmerson and Herzman, "Apocalyptic Age," passim (quotation 619, translation as there, brackets added). In Dante's *Hell* some of the *ipocriti* are friars who wear robes with dazzling gold on the outside but lead on the inside. Dante, *Divina Commedia*, Inferno: canto 23.

The contemporary emphasis on hypocrisy points to a consciousness of consciousness of the implications of divine law.

Although I disagree with the argument that late medieval and early modern people who were not guardians of divine law were largely unaware of what its demands were, I do agree with another point those who argue this tend to make, namely that people today are more aware of many more issues than people in the past. People today have access to a cumulation of thought that people in the past did not. As Rainer Forst points out, justification too is incremental. Old justifications fall by the roadside, to be replaced or superseded by new ones, yet an awareness of this history remains. For Forst the very definition of progress is the aspiration of a society to new levels of justification and he sees the "conjunction of justification" underlying all norms become more complex with the becoming more complex of societies in general.[92] We have seen this especially in the increasing adoption of consequentialist approaches which replaced older justifications of usury in Europe and all kinds of justifications that came to be deemed hypocritical in the Persian world. This is precisely what the growing emphasis on hypocrisy points to: an awareness that older justifications just didn't work anymore.

In painting one's opponent as a hypocrite the finer points that the opponent might make to justify the apparent contradiction between ideals and practices were often glossed over, precisely because they were deemed overruled. A case in point is the already mentioned *Book of Refutation* written on the eve of our period by the Twelver-Shi'i Qazwini, aiming to refute the accusations levelled against his creed by a recent convert to Sunnism from Shi'ism. Both the main text and the quoted text of the Sunni author seek to flatten the nuances of the other's thought. In one passage the author reflected on the relation between the awareness of what was permitted and forbidden among different classes of people and the actions of those people. He observed that the would-be moral leaders of the Sunnis, the alims, *faqih*s, *pir*s and *zahid*s, engaged in activities forbidden by their legal schools, including playing harp and other musical instruments, drinking alcohol and playing with boys (*ba-shahid-bazi*). To that he noted: "It may be that they know alcohol to be forbidden but they still drink it, they know oppression to be forbidden but still do it, they call *zina* and *liwata* forbidden but still do it, and in the legal schools of all sects of Islam people know prayer to be obligatory and there may be many common people who don't perform prayer and drink alcohol, so that mister author [of the text that Qazwini is refuting] may know that knowing is one thing and doing another, and the example in these matters is with the alims, not with the

92 Forst, *Normativität*, 46, 100, 109.

common people."[93] So Qazwini made two points in this passage. First, knowledge of the proscriptions of sharia was widespread. Second, lay people did not feel inclined to follow the proscriptions since they saw the example of the alims who were also appearing not to follow them (claiming of course that the Shi'i alims were better in this respect than their Sunni counterparts). The implication is that if the alims with all their sophistication did not follow the rules they preached, the common people could not be blamed for not following them either. What this passage leaves out are the finer distinctions that the Sunni alims brought to bear on some of the issues mentioned. Elsewhere, however, Qazwini did note that Sunni jurists made a distinction between slave and non-slave boys with respect to *liwata* – as we saw in Chapter 1. As we also saw, Qazwini was keen to restore the nuance to the Shi'i position on heterosexual anal intercourse in the face of his opponent's accusation that they deemed it "neutral." Thus, the accusation of hypocrisy often relied on such flattening.

We can indeed trace a certain progression through the debunking of "hypocritical" points of view. In the work of Hafiz, with its many accusations of hypocrisy, we get a few glimpses of how his opponents construed the ways around the law that that Hafiz saw as hypocritical. They would use the Quran as a basis for circumvention (*tazwir*) or make strategic *fatwa*s. Hafiz also closely associated *hil*(*a*) with *riya.*[94] Hafiz' contemporary, Ali Hamadani, took aim at the strategy of euphemising. To this effect he cited a Tradition about Muhammad: when the prophet was asked how Muslims could be drinking *khamr* (alcohol) despite God having declared it forbidden in the Quran, Muhammad replied that they would just hold it to be permitted under different names such as arrack, red wine, fennel, and date.[95] While certain justifications for drinking were a particular target in the Persian world, the great many formalist approaches to usury came in for ridicule in both the Persian and Latin worlds. This ridiculing seems to have kept pace with the rise of consequentialist approaches and therefore occurred earlier in the Persian world. In the Persian world we find it with Amir Khusrau, the celebrated poet active in Delhi around 1300. In the Latin world, as we saw in Chapter 3, it was the main reformers who ridiculed the formalist approach to usury. Calvin traced the history of euphemisms for it back to the Old Testament. Just as Hamadani, Calvin

93 Qazwini, *Naqz*, 587—8.

94 See the quotation at the top of Chapter 3 and Hafiz, *Diwan*, 34—5, 456—7 (nos. 9, 220).

95 Hamadani, *Zakhirat*, 21—2. Variants of the Tradition that some Muslims would be drinking alcohol under different names are already attested in the ninth to early tenth-century collections of Ibn Majah, Abu Dawud and al-Nasa'i, but Hamadani's gloss is more explicit about the specific euphemisms and the regarding as *halal.* www.sunnah.com with a search on "alcohol" and "name."

clearly deemed euphemisms not just overruled, but *long* overruled. Once a new level of justification was reached, the old suddenly seemed very old.

To underscore the episodic striving for new levels of justification that I detect in both worlds over our period, I want to put side by side two artistic approaches to the thinking about the usurer, one by Amir Khusrau and the other by the painter Frans Francken. The first represents a consequentialist reaction to formalism and the second represents a partial incorporation and partial rejection of Reformation thought in a Counter-Reformation environment. Both are striking in the amount of attention they pay to the reasoning of the usurer:

Amir Khusrau would admit neither formalist arguments nor arguments from necessity from the usurer. In a subsection of the ethical-didactic part of his *Khamsa* that warned against the idea that one might steer clear of hell by any means other than straightforward (*rast*) adherence to sharia, Amir Khusrau of Delhi singled out usurers (and gamblers). Khusrau had no patience for their self-justifications and reached the conclusion that "in none of the schools of law under any circumstances / will pass for permitted the property of the usurer [*ribakhwur*] or the gambler." He reached this conclusion through a three-pronged argument. First usurers and those like them represented the pinnacle of perfidy "since they think of straight writing as crooked." The straight writing in question was what constituted sharia and Khusrau seems in this passage to condemn formalist strategies such as picking and choosing from different legal schools and interpretations that tried to bend the letter of the law. Second, the attempts by usurers to set their own standards for justice (*'adl*) were fundamentally flawed. If they or anyone had such a right, it would be as if the coin of the money-lender (*baqqal*) were allowed to weigh itself: "if the coin of the *baqqal* were the scales / the column of the [*baqqal*'s] ledger would turn straight from its melodious sound." Sharia was the scale or yardstick to measure justice in the view of Khusrau, not the other way around. Finally, while Khusrau was willing to admit the argument from necessity for transgressions of the proscription of theft on the basis of social circumstance, such arguments could not apply to transgressions of the proscription of usury, since, it is implied, the usurer by definition had money. He wrote, "the theft of the small-time dealer might arise from penury / but what is the ground for the avarice of the great merchant?" Usurers therefore represented the height of avarice as well as that of perfidy, because as "haves" they were trying to have even more. To sum up Khusrau's view: in the context of sharia proscriptions, no-one was allowed formalist strategies, nor was anyone allowed arguments from the point of view of jus-

tice, only arguments from necessity were allowed but those had to depend on social position.[96]

A parallel to Khusrau's critique of the excuses of the usurer is found in the Frans Francken's early seventeenth-century visual commentary on the track that the Calvinist Reformation had taken, of which we have already encountered an example in Chapter 2. Avarice in general and usurers in particular had been targeted in the northern European visual arts for at least a century, but the Francken paintings are more specific in criticising not only the vanity of gathering money for its own sake, but also the vanity of the defences against that critique. In a number of his paintings Francken presents usurers being visited by death in the shape of a violin or lute-playing skeleton (fig. 23).[97] In these the usurer can be recognised by his rich dress, his ample belly,[98] and the coins and bonds in the shape of papers with a number of seals attached on the table that he is sitting at. In a scene in the background a man in noble attire is discussing with a second skeleton. This is possibly the nobleman who makes use of the usurer's services and thereby abets the transgression of the usurer, or it is the usurer himself in his younger days making a pact with death. However that be, in the foreground death rests his one foot on an hourglass or a little footstool in an elegant pose and seems to invite the usurer to dance. But the usurer leans back in an averse posture and points to his foot resting on a plush pillow on an elaborately carved footstool. He cannot dance because his foot is indisposed. The usurer is making excuses, the strategy through which he hopes to deflect his final judgement, but it seems that, in the view of the painter, the loopholes and euphemisms that work on earth will not work at the gates of heaven. As in the literary depiction by Amir Khusrau, the argument from necessity (symbolised by the pointing to the indisposed foot) is denied this man who already has more than enough of what is available in this world.

To sum up the argument of this section: scholars have brought forward a number of ways in which Muslims and Christians of the era before modernity might have dealt with the contradictions between the aim of following divine law and other life aims, namely: ignoring of the legal sphere, ambivalence, hypocrisy, and I am adding: justification. While all of these social and mental processes may have occurred on some scale, the question has been: which of these prepond-

96 Amir Khusrau, *Matla' al-Anwar*, 254—65.

97 Francken and his workshop seem to have produced three main versions of this scene, at least one of them in multiple copies. See Brinkman, "Memento mori"; Härting, *Frans Francken*, 105 and cat. no. 403. One more version, not reproduced there, is in the collection of the National Bank of Belgium.

98 Already in the Middle Ages the usurer was depicted and described as "fat." For examples see Le Goff, *La bourse*, 35—6.

Fig. 23: *Memento Mori* by Frans Francken the Younger, early seventeenth century. Death plays the fiddle while the usurer plays for time by pointing to his indisposed foot. CC-BY-SA 4.0: Historisches Museum Frankfurt (Pr340), photo: Horst Ziegenfusz.

erated? Establishing the extent to which people were conscious of the demands of divine law is key to reaching some sort of conclusion on this. The cases in the chapters contain a large number of pointers to legal consciousness, also among people

who were written about and not writing themselves. That rules out the possibility that whole communities were able to largely ignore the divine rules, having locked them up in a separate sphere. It also makes doubtful that unconscious ambivalence played a large role, although this point would require further investigation. The evidence for the large-scale occurrence of conscious ambivalence does not stand up to scrutiny. In particular, we can demonstrate that ambiguity was generally not an expression of ambivalence but rather of strategy. Hypocrisy is what contemporaries detected a lot of, especially among the guardians. The accusations in this vein tell us much about the consciousness of a consciousness of divine law, but it might be necessary to make distinctions between kinds of hypocrisy that contemporaries did not make. For instance, it would be interesting to see to what extent people were consciously saying one thing and doing another without justification. Such – let's call it pure – hypocrisy would be difficult to establish on the basis of the sources, but one could delve into it further. This leaves justification, which this study has been scrutinising. The multitude of cases demonstrating a myriad ways of justification that we have seen throughout the chapters indicate that Rainer Forst is on to something when he argues that people in general need and use grounds for action as soon as they start to reflect on their position in relation to others.[99] In any case, justification was an important aspect of the lives of those who were conscious of what other people and God expected of them in the Persian and Latin worlds between 1200 and 1700.

99 Forst, *Normativität*, 53.

Coda

The Ethics of Exception

Some historians of premodern pasts celebrate the way things were before some present-day predicament started. Karl Popper has argued at length against this utopian view of history, specifically as espoused by those he calls the enemies of the open society. He berates the thinkers he sees as such for their use of history in showing how the past offers examples of a time when the community was still unified and strictly guided by its laws.[1] But the opposite is also true today, seventy years after Popper wrote his *Open Society and Its Enemies*. Today it is especially academics who advocate an open society who look to the past for examples of how things can be better than today. In these pages we have seen examples of historians who found a world of untroubled homosexual love in Europe before Aquinas, or a world of untroubled and ungendered love in the early modern Arabic regions of the Ottoman empire, or in both sixteenth-century Europe and the Ottoman empire, or a world of great openness to different points of view in premodern Persian and Ottoman regions, or in the premodern Arabic world, or a world economic system in balance between 1250 and 1350, etc. I too started this study from a present-day predicament and have some ideas about how some things I have investigated in this book ought to be. I therefore think it is best to lay bare here exactly what my stakes are in this research.

The incident that first got me thinking about the gap between law and justice and the different ways of interpreting rules took place at the Amsterdam train station in the summer of 2006. I had left a backpack in an automatic locker there, to which I returned at 23.20 hours, only to find two security guys blocking the entrance to the locker area, which was half closed (or half open) by way of an iron roll-down shutter. So, I asked them whether it would be ok for me to just fetch my stuff quickly, at which question they pointed my attention to a letter-size printed note saying that the place was locked between 23.00 and 7.00. Meanwhile a lady came out from under the shutter with her roller case. So I said, "why can she go and not I," and upon their repeated refusal I just decided to go in. Soon enough the guards floored me and escorted me out – with quite a bit more violence than I think the situation required. Then it was off to the police station. The policemen were much more professional than the guards, using a more proportionate level of force and asking the relevant questions. In the police car

1 Popper, *Open Society*, 1: 25, 84, 171, 183—4, and 2: 278—9 and passim.

 https://doi.org/10.1515/9783111218014-008

they tried to establish my "motive." Once at the police station, their superior, who doubled as an assistant DA, gave me a bit of a sermon, suggesting that I should repent. If I had already written this book at the time, I would have understood that this was my chance to become a well-meaning rule-breaker. But at that moment I found the offer preposterous. The end of it was that I got a fine.

This incident is in a way typical of the many by-laws that capitalism creates and their consequences for everyday life. Here is a privatised rail company enforcing its rules by means of people who clearly have no training in law enforcement, and then leaving it to government agents to clean up the mess. In the present Western world in which the logic of profit and shareholder value has superseded the logic of afterlife salvation, jurists are no longer concerned with refining divine law but with generating an endless stream of rules that are intended to enhance the efficiency of capitalist forms of cooperation. Perhaps even more than in the age of divine law, which was also the age of authority as Hannah Arendt defined it, the rules need to be backed by physical force. As David Graeber puts it: "The bureaucratization of daily life means the imposition of impersonal rules and regulations; impersonal rules and regulations, in turn, can only operate if they are backed up by the threat of force."[2] As noted in the introduction, I see all rules as basically enablers of cooperation, and therefore see no basic distinction between divine law and secular law, or for that matter any of the by-laws generated by companies today. I do think that we can draw lessons from how people dealt with the kind of law that happened to be most important then, namely divine law, for how we deal with our laws and by-laws today, but we should try to do so without painting some part of the past as a utopia.

What unnerved me in the encounter with the security guards, was their seeming refusal to think. The guards could have paused to ask why this rule was there in the first place (it must have had something to do with the lack of oversight at night and the opportunities that might create for sleeping, urinating etc. in the space), they could have justified their position, they could have let me justify my position (I had not seen the note before and would have to travel for three hours to come back the next day), they could have directed me to the desk that had, as I found out later, made an exception for the lady with the roller case on the grounds that she had to catch a cruise ship with the luggage. In short, there would have been so many other possible outcomes if the security guards would not have refused to think. By comparison, the policemen obviously had much more training in thinking about what was necessary and what was not, and they were interested in my justification, and also ventured one for the other side, namely that if the guards

2 Graeber, *Utopia*, 3—44 (quotation 32). See also Hallaq, *Sharīʿa*, 5—6.

would have allowed me in, everyone would come to retrieve their stuff from the lockers at all times. This is the "slippery slope" argument also familiar from some of the voices presented in the previous chapters. I could have countered by asking (I don't remember if I did) how "everyone" would get to know about such an exception. Even better it would have been to quote Hafiz to them:

> Come on, the capacity of this place of public works [*karkhana*] will not diminish
> By the austere abidance [*zuhd*] of people like you or the frivolous transgression [*fisq*] of people like me.[3]

While I had not read any of Hannah Arendt's work, her idea that unthinking bureaucratic rule-following played a large role in enabling the evils committed under the Third Reich has become engrained in Dutch consciousness since the late nineteen-sixties. The year of my encounter with the security guards happened to be a time when there was a minor national debate about the following of rules for their own sake. It so happened that the Dutch minister for immigration issues Rita Verdonk had, regarding the question whether the parliamentarian of Somalian origin Ayaan Hirsi Ali should be allowed to retain her Dutch citizenship, said: "rules are rules." This in turn led to an outpouring of opposition to that point of view from the Dutch public, which according to one publication reflected a widely felt sense of shame and discomfort with Verdonk's position.[4] So when the policemen asked for my motive, I said I was angered by the Verdonkian rule-fetishism of the two security guards. But we do not need to resort to the history of the Third Reich or high politics to find examples of the evils that strict rule-enforcement brings about on any scale. Graeber's work on bureaucracy contains a few examples and he rightly speaks of the dead zones of the imagination that bureaucracy creates, areas "devoid of any possibility of interpretative depth."[5]

But would thinking on the part of rule-implementors suffice to eradicate or alleviate such great and small evils? In recent years it has come to be shown that Arendt was partly fooled by her prime example of the unthinking bureaucrat, Adolf Eichmann, with his defence that he was simply carrying out orders within the legal framework of the Third Reich. The taped interviews that he did with a sympathiser between the end of the war and his trial, and which have surfaced in the meantime, quite clearly show that, beside a bureaucrat, he was an avid anti-Semite and believed in his task.[6] That is to say, he had been thinking all

3 Hafiz, *Diwan*, 952—3 (no. 468).
4 Pessers, *Regels zijn regels*, 6.
5 Graeber, *Utopia*, 45—103.
6 Lilla, "Arendt & Eichmann: The New Truth"; Stangneth, *Eichmann*.

along, and the "just carrying out orders" was his justification to the outside world. Throughout this book, we have seen how thinking about the application of rules was tied up with "othering." There was a tendency in both the Persian and Latin worlds to turn non-compliance with any one of the three proscriptions into an identity: the sodomite, the idolater, the manifest usurer. And it worked the other way round as well: the sins/crimes in question only became visible when tied to the identity of the perpetrators. Even in my petty locker-incident I don't know if the refusal to have a dialogue about the rule on the part of the guards at the station was indeed the result of their attachment to upholding the system, as the policemen suggested on their behalf, or down to a clash of identities. With different levels of education, privilege, and masculinity, the guards and I immediately found ourselves on opposite sides of the Dutch culture wars.

If an obligation to think in Hannah Arendt's sense appears less of a solution on second glance, a right to justification in Forst's sense might be preferable: at least the other gets to have their say. But ultimately justification and thinking about rules and values are tied up. Arendt saw thinking as a dialogue with the self, a sort of running one's plans and acts against one's conscience, while any actual dialogue about justification must also begin internally, by the process of coming up with reasons why and why not. Moreover, both the processes of thinking and justification are boundless. As Arendt writes about thinking: "it does not create values, it will not find out, once and for all, what 'the good' is, and it does not confirm but rather dissolves accepted rules."[7] In short, both thinking in Arendt's sense and justification in Forst's sense lead to a constant weighing of principles. As Julian Baggini puts it, we may discover moral regularities (in the way that ethicists tend to do this: by probing how certain cases feel), but we need to continuously weigh those morally relevant factors against each other.[8] This is why many of the cases presented in this book still speak to us. We understand the principles that past agents were weighing against each other, even if we would reach different conclusions than they did.

The obvious objection is that such weighing might lead to a paralysis of social life. Arendt herself is well aware of the paralysing effect of applying thought to the intersection of general rules and particular cases.[9] We might say that rules are in fact meant to stop endless deliberation over principles. In defence of the "organisational turn," which seems to have gone by his own discipline of legal philosophy unnoticed, Scott Shapiro remarks: "just as the economist asks why economic actors

7 Arendt, *Responsibility*, 159—89; Butler, "Arendt's Death Sentences," 280—3.
8 Baggini, *Without God*, 196—8.
9 Arendt, *Responsibility*, 176.

organize themselves into firms instead of engaging in continuous market-based, arm's-length bargaining, so too philosophers can productively ask why moral agents form legal systems that produce rules rather than deliberate about and negotiate over the terms of social interaction among themselves."[10] Looked at from this perspective, formalism makes life easier by alleviating the need to think through every decision, and perhaps a measure of such simplification of daily life is necessary.

Moreover, Forst's construction of the right to justification relies heavily on an idea of perfect cognition and rationality. Perhaps too heavily, as Seyla Benhabib notes.[11] The locker incident, for one, was also a confrontation between a PhD-candidate in history and people with (this I am presuming) little training in history, law, or ethical philosophy. This is the aspirational aspect of Forst's call. He argues – and this study confirms – that the need for justification is widely felt. But our being justificatory beings does not automatically generate a right to justification. To achieve that right, we all need to become more conscious about the justifications we owe and are owed. Arendt, too, insists that if we recognise the connection between the refusal to think and the problem of evil, we must call on everyone to practice her kind of thinking, not just philosophers.[12] So there is quite a bit of aspiration here, yet the alternative as practiced by the members of the self-declared elect circles of premodernity – from Hafiz to Lodi and to Kyd to Rocco – seems outdated.[13] They effectively reserved the right to justification to their own circle of literati.

Apart from the risk of paralysis and the risk of expecting too much, there is one more caveat the chapters of this book present. If there is anything that we can learn from history, it is that there are patterns in human behaviour. We may applaud the anti-formalists (I certainly do) but history shows that they have never waged their debate without opponents, the formalists. Hafiz, for one, was constantly inveighing against them. The formalists abhor the slippery slope, the moral decay, the boundlessness of it all. With Karen Stenner I think that liberals only ignore the voice of the formalists at the peril of being swept up in one of the backlashes that history also presents so many examples of. We may cherish what rights to justification we have, are allowed, or manage to get, but need not always insist on using them.

10 Shapiro, *Legality*, 6.
11 Benhabib, "Uses and Abuses," 781—9.
12 Arendt, *Responsibility*, 166.
13 Compare Dall'Orto, "'Nature'," 96.

A Note on Usage

For Persian and Arabic words, the text follows the dictionary of Steingass, except with respect to the *izafa* and the Arabic article al-, for which it follows the Library of Congress system. In order not to clutter the text too much, diacritical marks are omitted, but ‘ and ’ are retained, except at the beginning and end of personal names.

The following words are treated as English words: Quran (*Qur’an*), sharia (*shari‘at*), alim (*‘alim,* plural *‘ulama’*), qazi.

For Indic words, the system used by the government of India today, known as “Hunterian,” has been followed, with omission of the optional macrons.

For transliterating Hebrew words, the system of the Hebrew Academy (2006) has been used.

Quotations from the Quran are according to the Sahih International translation.

Quotations from the Bible are according to the Clementine Vulgate and its Challoner translation for Catholic contexts, and according to the King James translation in modern spelling for Protestant contexts.

 https://doi.org/10.1515/9783111218014-009

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 https://doi.org/10.1515/9783111218014-011