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Brian P. Owensby

The Theater of Conscience in the "Living Law" of the Indies

I

In early September 1690, Juan Rodríguez, a royal notary, accompanied Spaniard Juan Moreno de Acevedo, owner of an *obraje* in Puebla, to an open field between the Indian towns of Santa Ana Acolco and Santa Bárbara Tamasulco, in the parish of Santa María Nativitas, Tlaxcala. Rodríguez had been charged by the *audiencia* in Mexico City with conducting a legal ceremony that was supposed to officially put Moreno into possession of the land as his own. On its face, this was to have been a routine proceeding. But all did not go according to plan. The *audiencia* had issued its order pursuant to a lawsuit between Moreno and the residents of Santa Ana and Santa Bárbara. In the late 1670s, Moreno had bought an *hacienda* adjoining the towns. He had then claimed certain lands as part of his purchase, lands which the towns insisted were theirs from "time immemorial," as one witness put it. Indian litigants relied on two sources to bolster their assertion: a map showing the boundaries of town lands and *títulos y recaudos*, or notarized documents, some in Nahuatl, dating to 1597 and establishing uncontested transmission from 1624 to 1663. Moreno had first pressed his claim in 1679, shortly after buying the *hacienda* adjacent to the towns. In 1682 he had obtained an order from the *audiencia* awarding him a particular piece of land, alleging that he had bought the parcel in question. Much litigation followed over the intervening years.

So when in early September the two Spaniards arrived at the site that Rodrigúez, in his notarial capacity, had noticed and were met by a group of indignant residents from Santa Ana and Santa Bárbara, there was a long history of suspicion between parties. In their September 1690 petition for a protective writ of *amparo*, the Indians stated that Rodríguez had noticed that the land on which they stood did not match the parcel described in the *audiencia's* order favoring Moreno. In the discharge of his notarial obliga-

tion, Rodríguez had looked at the document describing Moreno's claim, noting boundary markers and other telltale signs, and had concluded that he could not match the description to the land on which he was standing. At that point, the two Spaniards had argued. After heated words, Rodríguez told Moreno that he would not "burden his conscience" by awarding the land erroneously. He refused to conclude the ceremony and left. He may have known that Moreno and the towns had been disputing this land for some time and that the Indians had long claimed to have possessed and cultivated it before Moreno bought the *hacienda* next door.

Temporarily thwarted by Rodríguez's act of conscience, Moreno sought another notary to execute the order and put him in possession. The officers from Santa Ana and Santa Bárbara then filed their September 1690 petition with the *audiencia* arguing that Rodríguez's initial refusal to proceed with the ceremony demanded the suspension of the subsequent order until the matter of which land was being referred to could be cleared up and the towns' legal claim settled. The audiencia agreed, rescinding its earlier order in favor of Moreno. To ensure the Indians were not dispossessed without a hearing, the *audiencia* dispatched a *juez receptor*, a judge with a special commission answerable directly to the *audiencia*, who ordered Moreno not to plow the land or bother the Indian residents, on pain of a 500-peso fine. This order would remain in place pending further litigation.[1]

Such an explicit reference to an act of "conscience" in a legal proceeding was not common during this or any period of viceregal history, at least not in the documents I have seen. Indeed, this is the most explicit one I have found in an actual court record.[2] Yet "conscience" was vital to the workings of law and justice in Spanish America. In any viable legal order, individual human beings must make judgments about how to act in relation to the laws, customs, procedures, rules, doctrines and facts that underwrite legal outcomes – whether awarding land, parsing contractual agreements regarding labor, property or money, interrogating witnesses, enforcing royal decrees governing political arrangements, making restitution, imposing fines, or determining the guilt and punishment of criminal defendants. This essay takes Rodríguez's moment of conscience seriously on its own terms. I see his

1 AGNT 127 (1a pte.).2 and (2a pte.).1. Ultimately, the town officials were awarded the land, but not until 1706. AGNT 226 (2a pte.).21.37.

2 The word did appear in other legal documents, especially testaments.

refusal to proceed, and the reason he gave for it, as an occasion to think through the role and implications of conscience in the legal relationship between Spaniards and Indians, and between the king and his indigenous vassals in the New World. My chief aim is to see past the explicit rules, conventions or doctrines that governed everyday matters of law and focus on the spirit of judgment that animated relations between Spaniards and Indians in the context of imperial rule. I will also explore how that spirit was expressed in relation to and came to be challenged by the expanding role of self interest in social life between the sixteenth and eighteenth centuries.

My point of departure is Víctor Tau Anzoátegui's reaction against the modernist assumption that law can be understood chiefly in terms of its "systematic" qualities – explicit rules, procedures and legal norms as the baseline for how law *works*. Rather, Tau reminds us that law's role in a society depends as much on the "spirit" governing legal interactions as on the mechanics of a given legal arrangement. By "spirit" Tau means the "deep strata of a society's mentality and culture," its *ideas*, *convictions* and *beliefs*. A historical inquiry into the spirit of law demands that we attend to the ways philosophy, religion, morality, ethics, economy and politics are interwoven with technical issues of legality in a particular place, at a particular time, in a particular historical context.[3] With Tau, thus, I see *Derecho Indiano* – the Law of the Indies – more as a yielding and adaptive framework than as a rigid structure of tightly mortised connections, at least – until the end of the Hapsburg period of Spanish imperial rule in the Indies.

Tau's seminal contribution to our understanding of Derecho Indiano is his distinction between *casuistry* and *system*. Employing these two "categorial concepts" – not quite ideal types – Tau argues that early Spanish imperial law was essentially casuistic, rooted not in abstract norms or doctrines, but in attention to the individual *case* and its particularities. He is as concerned with casuistry as a "social belief" underlying all legal thought and action as he is with casuistry as a specific hermeneutical device. Through the sixteenth and seventeenth centuries and culminating in the nineteenth century, Tau claims, this understanding of law gave way to a more system-oriented sensibility emphasizing technical matters and positive law over close attention to the peculiarities of each the peculiarities of each unique set of facts.

3 Tau (1992) 9, 11.

According to Tau, we have misunderstood early law by assuming that the move from case-based casuistry to systemic positive-law represented a telesis from traditional to modern notions of law, often represented as a normative accomplishment of the European Enlightenment. This has made it almost impossible to engage *Derecho Indiano* on its own terms, for the "spirit," "beliefs"' and "convictions" that Tau argues were at the core of legality in *Derecho Indiano* are largely bracketed out of discussions on contemporary systems of law.[4]

By looking to legal treatises, training manuals, primers, as well as philosophical, religious and political texts, Tau makes a powerful argument for seeing case-based casuistry as the means by which Spanish rule attended to the realities of the New World and its peoples.[5] Legal decision makers were charged first with looking to the empirical and experiential side of transactions and disputes. Their duty was not to the law as such, or to any sense of abstract legal consistency, but to *justicia*, and specifically to producing just outcomes in light of all the circumstances. Each case was different and could not be otherwise; no rule could be universal because each case was a law unto itself – a medieval theological idea that can be traced back to Aristotle – perhaps especially amidst the wild diversity of circumstances in the New World.

Though legal officers had to exercise conscience in all of their dealings – whether deposing witnesses, disposing of civil lawsuits, judging guilt and punishment in criminal matters, or deciding whether and what to notarize – Tau has little to say about conscience as such. Though he refers to "*conciencia*" in passing while discussing "the world of moral cases" and probabilism in the introduction to *Casuismo y Sistema*, and to "rectitude of conscience" as one of the requirements for a "good judge" in his final chapter, he does not develop *conciencia* as a theme.[6] In this essay, I argue that conscience was a crucial animating force of Spanish imperial law and specifically of *Derecho Indiano*. For a time it represented a precept of right and just interpretation in the face of ever-present temptations to excess and self-dealing among the king's judges, *corregidores*, *alcaldes mayores*, *receptores* and notaries. In political and legal treatises and confession manuals, *conciencia* connected what was

4 I have made a similar point in Owensby (2008).
5 Tau (1992) 19 (quoting García-Gallo).
6 Tau (1992) 58, 60, 488.

known as the *fuero interior* – the interior court of the soul's sense of right and wrong – to the fuero exterior of the soul's sense of right and wrong to the *fuero exterior* of positive law enshrined in royal decrees, ordinances and accepted legal practices and customs. As such, *conciencia* was part of the matrix of doctrinal and institutional restraints characteristic of Spanish viceregal legality, such as overlapping and competing jurisdictions, the right of appeal to the viceroy and the king and, crucially for the Indians, the ability to seek a protective writ known as the *amparo*, which effectively preserved a factual status quo until a full hearing on a matter could be held.[7] While it is true that individuals often ignored *conciencia*, the fact that casuistry grounded legal thinking and practice in *Derecho Indiano*, as Tau argues, meant that proper conduct in accord with conscience was universally recognized as an obligation of all ministers of justice – even if many often laid their duty aside.

Conciencia, therefore, is better understood as a *belief* (*creencia*) – "a deep and elemental manifestation of facing reality, more vital than intellectual, of which little or nothing is said and which [is] considered to be a basic premise of the society" – than an *idea* announced and proven by means of a precise intellectual operation."[8] I think of *conciencia* as a self-effacing principle, a deep reflex expressing the conviction that ultimately men and their judgments, rather than unmediated impersonal norms, sustained the project of governing human communities. Following Tau, this reflex began to lose meaning as a new spirit of abstraction and distrust for casuistic thinking and its emphasis on the particular took root in the soil of European jurisprudence from the late seventeenth century onward, a process that ran parallel to the emergence of economic concerns at the core of all social and political thought.

II

As an intellectual, or at least definitional matter, there was little disagreement on the meaning of conscience among early-modern Spanish jurists. In 1611, Sebastián de Covarrubias defined *conciencia* as "knowledge of oneself,

7 On *amparos*, see Lira González (1971); Owensby (2008) chaps. 3–5.

8 Tau (1992) 39–40. See also Marías (1984) 233–245; Marías (1972) 123. Ultimately, the distinction goes back to Ortega y Gasset (1986).

or certainty or near certainty of that which in our souls is bad or good." To be without conscience was to be "without a soul." To act without conscience was to have "no scruple."[9] The *Diccionario de autoridades* published between 1724–1739 by the Real Academia Española retained this definition and commented that "[j]ust as nothing gives more life to hope than good conscience, so one of the things that most tears down [*derrumba*] and saps [*desmaya*] the vitality of hope is bad conscience." The *Diccionario* supplied a further gloss, noting that to "charge one's conscience" was to demand that a thing be done "with knowledge, rectitude and without trickery, malice or fraud. … And so we *charge the consciences* of judges."[10]

This connection between conscience and legal decision making was hardly new in the early eighteenth century. In his 1612 *Arte legal para estudiar la jurisprudencia*, Francisco Bermúdez de Pedraza argued that law – *ius* – was essentially homologous to conscience, for it was the "art, that is knowledge" of the good and the bad within society. This knowledge called upon legal decision makers to deal honestly with their fellows, live by a commitment not to harm others, and above all dedicate themselves to the idea that each person was entitled to that which was properly theirs (*a cada uno lo suyo*). While *justicia* rested firmly on these three pillars, a "constant and perpetual will" was necessary to ground the last of them, for justice was "a habit conceived in the soul of men." And though laws varied by time, land, and nation, said Bermúdez, justice was "one, constant and perpetual." Jurists and judges – and by extension all charged with producing binding legal effects – were "true priests, not of the habit but of the soul, employing equity and justice" to defend the law – *la ley* – "fortress of the universe." Who would protect the poor, the orphans, the widows, the prisoners, the pilgrims if there were no law?, asked Bermúdez. Law was "the soul of the Republic" and jurisprudence the guarantor of "human happiness."[11]

In effect, every royal officer of the law and every churchman acting through the king's power under the *Patronato* bore a responsibility to see that justice was done. The will and obligation to justice lay especially heavy on those charged by training, vocation and duty with the defense of royal law. The *Recopilación de 1680*, the most authoritative and enduring legal

9 De Covarrubias Orozco (1674) 157.
10 Diccionario de autoridades (1969) vol A–C 474.
11 Bermúdez De Pedraza (1612) 12–13, 27.

compilation of the period regarding *Derecho Indiano*, called all those involved with the law to be "men of good conscience," for the king had "unburdened the Royal Conscience" by assigning to his officers the duty to carry out the law with justice.[12] For Castillo y Bobadilla in his *Política para corregidores* (1640), *corregidores* – royal officers at the front lines of justice in relations between Indians and Spaniards – should above all seek justice, because in doing so consisted "the service of God, the discharge of the king's conscience and the good of the republic." The monarch, after all, appointed judges, *corregidores*, *alcaldes mayores*, notaries and others because he was in no position to administer justice across the kingdom by himself. By these appointments he "discharged his conscience" in service to "the administration of justice."[13] Failure to act in light of the royal conscience amounted to a kind of internal subversion of justice and thus of political order. As Jerónimo de Ceballos put it in his *Arte real para el buen gobierno de los reyes, y príncipes de sus vasallos* (1613), the "tribunal of justice" was the "firm chain and column on which rests the Empire, with which the good consonance and harmony of political government is assured, the master of political and social life …" Aristotle had noted that the destruction of the Republic followed from a failure to maintain "justice," a "habit of the soul that conserves public utility" and enables the king and his officers to "resist … the people of power in the Republic." As such, justice was the "joy of the afflicted, solace of the poor and unprotected and medicine for the soul" for it "humiliated the arrogant" and "lifted up the humble."[14] Law, in its broadest understanding, served as a counterweight to power within the social order. St. Thomas, noted Bermúdez, had made the point long ago: "The unbridled greed of men would pervert all things if justice did not check their appetites with the bit of its laws."[15]

According to Friar Luis de León in his widely-read *De los nombres de Cristo* (1583), government by men could not match Christ's perfect government. Yet the spirit of the "living law" that characterized divine governance could guide human affairs, so long as men in positions of political power heeded

12 See Recopilación de leyes delos reynos de las Indias, 1680, (lib.tit.ley) 1.1.5; 1.6.28; 1.7.13; 1.7.30; 1.7.53; 1.19.1; 2.2.31; 2.3.8; 4.1.2; 5.5.2; 5.14.7; 6.2.9; 6.5.1; 6.10.7; 6.12.24; 6.15.7.

13 Castillo de Bobadilla (1750) 207, 222.

14 Zevallos (2003) 59r, 62v, 66v.

15 Bermúdez de Pedraza (1612) 12–13, 27.

the pastoral call to care for those in their charge "according to the particular conditions of each one."[16] Their job was not an easy one. Those who came to the law often told "lies and falsehoods to obtain their justice by trickery" and in no other arena than judging was "friendship" (*amistad*) so pressing and fickle.[17] Hardly surprising, then, that so many – particularly New World *corregidores* and *alcaldes mayores* – were corrupt and self-serving.[18] Indeed, the difficulties and temptations faced by all officers of the law in the Spanish Empire were widely acknowledged. Not only were the souls of individuals at risk; the republic itself faced genuine danger.

A sense of moral hazard hung over all legal affairs in the New World. Between the mid-sixteenth and the mid-seventeenth centuries, Friars Bartolomé de las Casas (Dominican), Alonso de Molina (Franciscan) and Jerónimo Moreno (Dominican) insisted that confessors attend to the "juridical character of confession" in deciding proper penitence for all ministers of justice who wished to ease their consciences, make their souls ready for communion and ensure their salvation.[19] As legal historian Andrés Lira has argued, these men, writing from deep moral shock and political disquiet at the treatment of Indians by the Spaniards during the first century after conquest, opened the privacy of the confessional to the public realm by insisting that confessors withhold absolution from all who sinned against God by violating or ignoring positive law.[20] Put another way, these three writers insisted on a vital connection between *conscience* and public obligation: to violate the law, or to fail to uphold it was to sin against God and absolution depended on heartfelt contrition and a willingness to right the wrong.

This connection expressed a well-established political idea: that the king's great task was to rule according to *conciencia*, implying the convergence of private and public concerns at the very core of political order. This notion pointed to a critical role for confessors. As Robert Bellarmine noted in his *On the Duties of a Christian Prince Toward His Confessor* (1513), "[n]ot without reason do we place the priest-confessor of the prince among those people

16 León (1917) 115.
17 Castillo de Bobadilla (1750) 137, 222.
18 See Solórzano y Pereira (1996) III, 1873–1874 (5.2.17/24/25).
19 Lira González (2006) 1139–1178.
20 Lira González (2006).

whom the prince should consider as his superiors. For the priest, in hearing the confessions of the powerful (regardless of whether they are princes or private persons), acts as a judge in the place of God and has the power of binding or loosening in the sphere of conscience. … [T]he prince's eternal salvation depends, to a remarkable degree, on his confessor." This was not merely a matter of contrition for private acts: a prince's confession solely to "sins that relate to him as a private person" is not a full confession if he "skips over the sins he has committed as prince." This implicated all of the king's officers, and especially those charged with dispensing justice. As Bellarmine noted, a king's confession to narrow sins of commission or omission should not satisfy if the confessor knows "how badly his administrators are behaving in administering the country."[21]

Two notions followed from this proposition. First, the king needed to attend closely to what his officers were doing; he had a duty to ensure that they were behaving properly in the public, political realm, chiefly by obeying and enforcing the law justly. Second, all who operated with the color of the king's authority should be held to a standard of conscience that recognized their public role vis-à-vis the law. Lira puts it this way: "Conscience, beginning with the king's, was the premise and preoccupation of that public order in which Christian government was considered the only legitimate one and had to be on display at all times."[22] So when Las Casas in his *Confesionario* of 1545 demanded that confessors refuse absolution unless *conquistadores* and *encomenderos* made restitution for the harm they had caused the Indians, he was extending Bellarmine's point regarding the dual private-public role of the prince to all those in the New World who acted in the king's name or by the king's license. In effect, the fate of their souls depended on satisfying the demands of conscience by confessing and remedying wrongs made possible by the fact that they held office.[23] The goal, of course, was that they obey and uphold the law, and thereby not succumb to sin; if they had sinned by violating the law, then they were obliged to make

21 From Bellarmino (2006) 223.

22 Lira González (2006) 1158.

23 Lira González (2006) 1151. Though Las Casas's document is generally known in the scholarship as the *Confesionario*, its published title was Avisos y reglas para confesores que oyeren confesiones de españoles que son y han sido a cargo de los indios de las Indias del mar océano.

up for it. In practical effect, Las Casas was insisting that conscience have a role in everyday political life in a place where so many people – especially the Indians – were vulnerable to the wiles of the powerful.

Alonso de Molina took this notion one step further in his *Confesionario mayor en lengua mexicana y castellana* (1578), instructing confessants to consider their conduct after taking on some "office of lordship and governance."[24] Confessors were to ask office holders seeking absolution whether they had issued unjust sentences or ruled against claimants because of a bribe or out of "greed."[25] Such an officer was obliged to make good those who had been hurt. But Molina did not stop at the most banal sorts of wrongdoings. He held ministers of justice to a higher standard. Thus, a proper confessional "inquisition" would press penitent judges on whether they had "disturbed or impeded" petitioners from appealing or seeking justice at the *audiencia*, or had not received them "gently" with the intent of helping them, but instead "quarreled with them and dismissed them" so that they "would not dare to come before you."[26] The soft sin of turning people away from law was just as erosive of justice as feckless inattention to the demands of office or the more hard-edged corruption of outright avarice. A confessant was always responsible for the state of his conscience, public as well as private, and so was obliged to "rectitude, justice and prudence" in all his affairs.[27] In broader terms, this is what Barcelona printer Sebastián Cormellas meant in his dedication of Manoel Rodrigues' 1596 *Summa de casos de conciencia con advertencias muy provechosas para confessores con un orden iudicial a la postre*, where he insisted that anything that "benefits conscience aids the republic."[28]

With the publication in 1637 of Jerónimo Moreno's *Reglas ciertas y precisamente necesarias para iuezes y ministros de justicia de las Indias y para sus confesores*, the process begun in the mid-sixteenth century that gradually bound conscience to positive law for those who held office and exercised power through the king's political authority reached its culmination. This is Lira's seminal point. In Moreno as in Las Casas and Molina, the confessional bridged the gap between private life and public. Among those concerned for

24 Molina (1578).
25 Molina (1578) 44r.
26 Molina (1578) 46v.
27 Molina (1578) 10v.
28 Rodrigues (1596).

the plight of the Indians, this was a welcome development. Martín Acosta y Mezquita, audiencia lawyer and advocate for the poor and prisoners in Mexico City, wrote a foreword to the *Reglas ciertas*. Bemoaning the sad state of the Indians, he congratulated Moreno for his proposal that those charged with ensuring royal justice be held to account in the court of conscience. It was, said Acosta, a measured response to the fact that royal decrees had been so often ignored by those trusted with enforcing them. As Pope Pius V had once noted: "Grant me that confessors will do their jobs as they should and I will give you Christian government maintained in peace and tranquility."[29] For Moreno, the temptations even of petty power in the New World were so great that "ministers of justice" were under a heavy burden of conscience and thus liable to confess even the smallest misstep in their relations with the Indians. This was not simply a matter of rendering judgment in cases at law. It touched every economic, contractual, adjudicative and administrative action ministers of justice might take under color of royal authority, from property agreements, to labor allocations, to tribute collection, to election mediations, to prices paid and charged pursuant to the *repartimiento de mercancías*. In all things, they were obliged strictly to observe the King's laws. So that even if he otherwise acted justly, a minister sinned by entering into any business or contract with his charges for his own benefit, because there was a royal decree forbidding it.[30] The obligation ran further still. As Lira notes, Moreno's "First Rule" for confessors (of thirty) states that anyone who tells a minister of justice that he may legally have personal business dealings with the Indians is himself in mortal sin pending confession and restitution, because the law clearly forbids such dealings; enabling or even condoning sin was itself sinful, for otherwise ministers of justice would duck legal prohibitions by claiming that they had been assured in conscience by their confessors that they could act as they did.[31]

For Moreno, mere procedural correctness was never enough to satisfy the spirit of the living law, rooted in natural and divine precepts, to which all ministers of justice owed their conscientious attention. This is what accounts

29 Moreno (1637). See also Mayagoitía (1996).

30 Moreno (1637) 19. And because doing so converted the relationship into one of private benefit rather than common good, a notion at odds with the fundamental pact underlying Spanish legality in the New World. See Owensby (2011) 59–106.

31 Moreno (1637) 2. Lira González (2006) 1163.

for his references to the "*fuero exterior*" and the "*fuero de la conciencia*." In the sixteenth and seventeenth centuries, *fuero* referred broadly to the place where matters of law and justice were properly decided. *Las Siete Partidas* defined "*fuero*" as law properly used, something akin to jurisdiction. Etymologically the word derived from the Latin *forum* and according to Covarrubias it was equivalent to the Castillian *plaza*, "because trials and hearings were conducted in the most public places of the city and where there was the greatest congregation of people."[32] In the early eighteenth century, the *Diccionario de autoridades* gave as a first definition of "*fuero*" the "law or particular statute of some kingdom or province" encompassing the "use and custom" characteristic of that place, pointing to the locative quality of all law.[33] Covarrubias did not refer to "*fuero de la conciencia*," but Solórzano y Pereira did in the *Polítíca indiana* in 1648 and linked it to "mortal sin" and a duty of restitution (with regard to the obligation to pay tribute). The *Diccionario de autoridades* did offer an entry for "fuero de la conciencia," giving as a definition "the tribunal of reason, which directs and arranges the operations of man, absolutely according to divine and human laws."[34] In essence, by distinguishing between the *fuero exterior* and the *fuero de la conciencia*, Moreno was making the point that public laws in the political world ultimately could not be meaningful instruments of justice unless those charged with keeping them were bound by an inner compulsion to abide by their spirit, not merely by their external formulation.

The crucial point, as with the notion of *fuero* generally, was that one could not be reduced to the other. The two fueros were intimately related, though ultimately each held to what was properly its own. The *fuero exterior* was the realm of positive law and royal decrees interpreted and applied by ministers of justice, where power and rights often butted heads. In the *fuero de la conciencia* the confessor was in charge and confessants answered to a higher standard of judgment. Thus, because "in the *fuero exterior* a sin can be absolved without absolving other sins" and "everyone should confess." For the "judge of the republic is a judge for the community, and so his judgment must be for the community, according to proof … [B]ut the confessor is a

32 Covarrubias (1674) part. II, 19r–v.
33 Diccionario de autoridades (1969) vol 3–4 (D–N) 807.
34 Diccionario de autoridades (1969) vol 3–4 (D–N) 807.

particular judge, next to God." As such, the confessor is charged not only with hearing the penitent's words but also attending to "particular knowledge" regarding the state of the penitent's soul. As Moreno pointed out, a minister of justice who has come to confess may not rely on the completion of a post-tenure *residencia* to claim that he is free from further demands, because "he is not free in the *fuero de la conciencia*" until he has made restitution to those he has harmed, regardless of the outcome of the residencia. This was true even if those harmed – usually Indians – had come to some sort of settlement with the outgoing officer, because such agreements tended to be "violent and against their will" or the result of fraud.[35] And even if the *residencia* was entirely above board, confessants could not claim absolution merely by asserting lawful behavior; they owed an ineluctable duty of conscience to the spirit of the law in the *fuero exterior*.

III

This appeal to conscience can seem quaint, even quixotic at a time when it was commonly said that "self-interest accomplishes all."[36] Life, it struck many contemporaries in the seventeenth century, had become lonely, brutish, competitive and petty, an arena of "distrust and suspicion" in which there were no true friends because everyone was involved in a "perpetual war, without any sort of truce or peace" and each person pursued only "his own business and not the common and good of all." This was thought to be especially so in the New World, where Indians were the object of the Spaniards' (and others') manipulative fantasies and abusive energies.[37] The point was not lost on the theological moralists who sought some way to ensure that royal officers were governed by conscience in their official lives. In a postscript to his *Reglas ciertas*, Moreno detailed the extent to which "unfaithful ministers of justice" "offended and aggrieved the majesty of God and of the king" by their treatment of the Indians. The majority of judges and ministers of justice did not confess because "their consciences did not gnaw

35 Moreno (1637) 12r, 18v, 47v, 49v, 50r, 51r.

36 Anon., Romance a México.

37 See Owensby (2008) 29 n. 68 (Calderón de la Barca, *Darlo todo y no dar nada*, act I); 29 n. 69 (Suárez Figueroa, *El pasajero: advertencias utilísimas a la vida humana* (1617), Saavedra Fajardo, *Empresas* (emblema 43)); 30 n. 72; 30 n. 73 (*Romance a México*).

at them," a sign for Moreno of how unconcerned they were for the state of their souls and for the fate of the Republic.[38]

So why bother spelling out rules for confession in response to official misdoings if the people in question rarely confessed? For Moreno the answer was clear: far more than individual souls was at stake in the unconscionable behavior of *corregidores*, *alcaldes mayores*, *tenientes* and other ministers of justice on the ground in the Indies. By their conduct, such officers not only violated the king's law but sinned against the passion of Christ. They offered worse examples "even than the Gentiles," and by their "ambitions" and "greed" they threatened to "undo what the savior accomplished through his death." As a result, some "poor and wretched Indians (those who are Christians) abandon the faith, and those who are not Christians do not want to receive it," because those who have the "obligation of justice, to sustain and ennoble it with Christian acts" instead "discredit and dishonor it with pagan works, scandalizing [the Indians] with trickery, theft and the great blindness of greed," saying that "as they are Indians they are not Christians, and it does not matter if they are tricked and robbed."[39] The individual souls of Indians and ministers of justice themselves were imperiled by such malfeasance, insisted Moreno.

Worse still, abuse by ministers of justice threatened the very fabric of New World society. If Indians fell away from the faith or would not receive it because of the mistreatment they suffered, the kingdom itself was at risk, for as Solórzano y Pereira noted, the king's indigenous vassals were liable to pay just tributes to offset the cost of "their evangelization and Christian governance."[40] If the Indians were driven away from the church by the misdeeds of judicial officers and others, the rationale for tribute became tenuous, at least in principle. *Conciencia* in Spain's imperial legal order, thus, should not be understood solely in terms of whether it was effective in restraining undesired behavior by individual officers of the law – often it was not. Rather, the concern for conscience expressed deep anxieties, about religious faith, good government, justice and right action in human affairs. At a time when human relations seemed increasingly instrumental and competitive, in a place where distant royal authority faced constant challenge by individual

38 Moreno (1637) 54r–59r.
39 Moreno (1637) 55v.
40 Solórzano y Pereira (1996) I 435 (2.19.2).

interests on the ground and still-recent converts to Christianity struggled to shield themselves from the arrows of abuse that rained down on their lives, Moreno insisted that everyone be reminded of their obligations in the *fuero interior*. Yet this was not a strictly interior matter, as Castilllo y Bobadilla noted in his treatise on *corregidores*: Cicero had long ago pointed out that nothing was "more public, more rigorous and more faithful" than the "theater of conscience."[41]

Alonso de Peña Montenegro's *Itinerario para párrocos* (1662–63), written from Peña's judicial experience in Quito, suggests something of the intricate action that took place on this proscenium that thrust into the exterior drama of the New World. An instruction manual for priests of Indian parishes in New Spain, the *Itinerario* touches on every issue a pastor might face in ministering to his flock. The tome (running to over 500 pages), spared no ink in discussing the challenges of conversion, idolatry and witchcraft, of tribute and its collection, of justice among the Indians and between Indians and Spaniards, of the role natural law played in the lives of Indian subjects, and of the sacraments, including confession. It paid attention to the prickly relationship between locally powerful Spaniards – land owners, miners, *alcaldes mayores* and their *tenientes* – and vulnerable Indian parishioners. *Conciencia* ran like a bright thread through this tapestry of topics, reiterating the idea raised by Las Casas, Molina and Moreno that confessors were to hold all Spaniards to high standards in the *fuero interior*, especially those charged with specific duties by the king's law. *Encomenderos* had a duty of conscience to treat the Indians well, a principle enshrined in countless royal decrees.[42] Judges of *residencia* were bound by conscience to hold ministers of justice fully accountable, and to demand full restitution for harm done. Those who failed to do so were "unjust judges," said Peña. Having accepted the obligation to "discharge royal conscience," they were "traitors to their Lord and King, carried away by interest and suborned by money" and so "approve injustices and dissemble abuses" of *corregidores* and *alcaldes mayores*.[43]

Such charges against ministers of justice were a logical extension of the fact that the New World's Indians were obligated in the *fuero interior* of law

41 Castillo de Bobadilla (1750) 418.
42 Peña Montenegro (1662) 242 (lib. II, trat. X, sec. II).
43 Peña Montenegro (1662) 249–250 (lib. II, trat. X, sec. X).

as well as in the *fuero exterior* to pay just tribute. Peña was clear. To be "just", tribute had to be measured and proportionate to the ability of the subjects to pay, and always in relation to the benefits provided by the king, especially the administration of justice.[44] As a consequence, the tributary obligation was not unqualified. Indians subject to excessive or unauthorized tribute exactions, or to "abuse and vexations" by *encomenderos*, *corregidores*, Indian *caciques*, or parish priests, could with "just and rightful title" flee their jurisdiction. Having fled, they were not bound in the "*fuero de conciencia*" to pay tribute they might otherwise have owed, for an abusive *encomendero* lost the right to demand tribute from his subjects (even if this meant loss to the Crown).[45] Nor were these Indians, or *hacendados* or others who might receive them in another jurisdiction, liable to restitution of unpaid tribute in these circumstances.

Moreover, the Indians' decision to pay tribute, like any other judgment at law, was casuistic. A long-established doctrine held that those who in the *fuero exterior* were too poor bore no obligation, in law or in conscience, to pay tribute. The danger in this doctrine was obvious to Peña: if it were too easy for the Indians to claim poverty, "everyone would want to enter by this door and not pay tribute." Yet as natural law favored the poor, allowances had to be made for tributaries, and judges before whom they might appear had to consider "how poor they are." A man who could not feed and clothe his family, was under no compulsion, interior or exterior, to pay tribute.[46]

There is a crucial point here. As Peña noted, obligation in the *fuero exterior* of the law was intertwined with an obligation in conscience, as much for tributaries as anyone else bearing a specific legal duty to the king. Tribute was a public matter – "chief nerve of the republic," according to Solórzano y Pereira[47] – that made claims on the *fuero interior* of those under a burden to pay it. The burden of tribute was never absolute, for circumstances of abuse and poverty could justify non-payment. Even so, there is no doubt that decisions to suspend payment could be and often were instrumental. Yet as I have argued elsewhere, Indians involved in lawsuits made much of their tributary duties, embracing them to assert a kind of moral superiority over

44 Peña Montenegro (1662) 151 (lib. II, trat. II, sec. II), quoting Solórzano y Pereira.
45 Peña Montenegro (1662) 153 (lib. II, trat. II, sec. IV).
46 Peña Montenegro (1662) 150 (lib. II, trat. II, sec. I).
47 Solórzano y Pereira (1996) 3 2354–2355 (6.8.1).

Spaniards, especially *encomenderos*, *hacendados*, *corregidores* and *alcaldes mayores*, who so often ignored royal decrees protecting the Indians.[48] Indigenous litigants advanced such claims understanding that willing acceptance of their duties in ordinary circumstances gave them a certain credibility when the time came to bring grievances before a judge. Individuals or whole villages might go before a judge to complain of excessive tribute exactions, to claim poverty in periods of trouble, or to argue that changed conditions – often epidemics or flight from a village – made it impossible for them to adhere to previous rates and schedules.[49] In doing so, they generally pointed to conscientious payment during normal times and expressed a desire to return to recognized and customary arrangements disrupted by the greed of local tribute collectors or to adjust their obligation to match their circumstances.

From Peña's perspective, Spaniards and Indians in the New World shared an obligation to act from conscience in matters of law, each according to his station in a hierarchy that bound all into a single political and moral project. Although it was established law by the seventeenth century that the Indians had the reason and discernment to exercise conscience, some Spaniards continued to contest the idea. For the most part, however, Spaniards and Indians alike appear to have recognized what conscience demanded. The Indians' status as men required it. And as Castillo de Bobadilla noted in his well-known *Política para corregidores* (1640), addressed to all judges, governors, lawyers and "other public officials," there are "sparks of original flame" in all men, which Christians call "the dictates of conscience." At times, *conciencia* finds its path to virtue without "raciocination or acts of understanding," but for the most part it must be "regulated by reason, and not by absolute will, and is not free of the censure of a superior, nor can one who has the faculty to do an act, use it when the act is contrary to equity."[50] In other words, conscience inheres in all men and compels them to right thinking in judging and discerning right and wrong, but it is neither a guarantee of proper conduct, nor a license for arbitrary acts of will. "The chief intent and aim which the good *Corregidor* must have" – and by extension anyone else under an obligation to the law and justice – "is reverence for and observance of justice, as much in what he says and does as in that

48 Owensby (2008) 67, 87, 299.
49 Peña Montenegro (1662) 250 (lib. II, trat. X, sec. XI).
50 Castillo de Bobadilla (1750) 61, 241 (online).

which he must judge in others, … because in this object of justice rests the service of God, the discharge of the King's conscience and the good of the Republic."[51]

For Peña and Moreno in the Indies, and Castillo as a more general proposition, *conciencia* lay at the very core of the political arrangement of society. It was a theological requirement, political principle and moral precept that had to obtain for society to live up to its divine purpose. Those who failed to live by its "dictates" – and there were many – violated the very essence of Christ's passion, betrayed the King and threatened the order and stability of society.

IV

In the Indies, where order depended on a delicate balance between the exploitation and protection of the king's indigenous subjects, *conciencia* was a critical belief that gave a spark of life to legal decision making at all levels. Rarely mentioned in everyday judicial proceedings, it was frequently invoked in legal treatises, confession manuals and the *Recopilación*, bridging religious notions of sin and obligation to the duties of law in the *fuero exterior*, where power and interest were in play at all times. By the seventeenth century, all of the king's subjects were bound by fearful and principled adhesion to the dictates of conscience in confronting the difficult choices implied in all affairs of law.

This is precisely what the representatives of Santa Ana and Santa Bárbara understood when they filed their petition in 1690. By that time they had been in litigation for at least eight years over the land Moreno claimed. Their situation looked bleak, as Moreno had in hand an *audiencia* order awarding him the parcel and he was prepared to start plowing. They understood that as soon as he did they were almost surely lost. With crops in the ground and his farmhands living there, the towns would be unlikely to recover the land, given that productive use and occupation constituted prima facie evidence of proper possession. This was why the Indians hustled to the *audiencia* to stop Moreno from working the land. They invoked their status as "poor and powerless" people, "humble vassals and tributaries, who after our powerful

51 Castillo de Bobadilla (1750) 270 (lib. II, cap. II).

God have no other protection." They included with their petition a statement sworn out in late August 1690 by the local priest, *bachiller* (university graduate) Father Pedro Camacho de Campos Villavicencio who, *in verbo sacerdotis*, insisted that Moreno's claim was improper. The land abutted the Indians' church, said Camacho, "where we continually celebrate the holy sacrifice of the mass throughout the year" as had been done "from time immemorial," and it encroached on their cemetery, "where the faithful are buried." This amounted to a "grave offense against God our Lord and prejudice to the native Indians, who for so many years have lived and died as Royal Tributaries of your Majesty and residents of said towns."[52] On the basis of this petition, the *audiencia* agreed to override its previous order and freeze the status quo. So it remained for the next decade and a half until a terse 1706 order awarded the towns the land that had been in dispute for over twenty-five years.

The turning point of the case had been Rodríguez's refusal to "burden his conscience" by following an order that did not describe the landscape before him. He could have executed the document in hand and been on solid legal ground. Many other notaries would have done so; Moreno found another who did. But Rodríguez said no and walked away. Of course, there were other plausible reasons for refusing to execute the order. Rodríguez may simply have wanted to avoid further trouble. He surely knew that the Indians would not stand idly by, given the history of this litigation, and he may have been worried about looking bad before the *audiencia* if he went ahead. At the very least he might have been summoned to explain his decision to proceed in the face of Indian resistance; not a pleasant prospect under any circumstance. A stand on conscience in favor of the Indians was unobjectionable at law and he may have anticipated that Moreno would do as he did – seek another notary to carry out the order – rather than complain to the *audiencia* about Rodríguez. This other notary may not have known much of the litigation and may have executed the order as a pro forma matter; after all, the *audiencia* had spoken, and more than once. Then again, he may simply have enjoyed greater moral flexibility than Rodríguez.

The explicit appeal to *conciencia* was not legally necessary for Rodríguez to walk away. He could have asserted the fact that the description did not

52 AGNT 127 (2a pte.).1, 223r–v, 224r–v.

match the land in question and suspended proceedings *tout court*. Yet Rodríguez's concern for *conciencia* was exactly what Lira says ministers of justice were under a theological and moral compulsion to do from roughly the mid-seventeenth century onward – worry about the *fuero interior* when acting as legal officers and understand that knowing error in the *fuero exterior* exposed them to penance and restitution.[53] We have no idea how God-fearing a man Rodríguez was, or whether he confessed on a regular basis. As a royal notary he may well have been concerned, as his profession and duty required him to be, with doing right by the royal conscience. Though he probably had not reviewed the case record, he would have been familiar with the gist of the royal decree attached to a 1688 order favoring the residents of Santa Ana and Santa Bárbara. Citing sections of the *Recopilación*, that order stated that all officers of the king were obligated to "see to the Indians who suffer such great injustices and vexations … for of all my vassals they are the ones who, by their tribute, most benefit and strengthen my Royal Crown."[54] Nor was the outcome on that September day just a matter of Rodríguez's act. Indian petitioners chose to highlight Rodríguez's statement. In doing so, they were appealing not merely to the letter of the law, but critically to the spirit of judgment and right conduct underlying it: a Royal Notary of good conscience rejected Moreno's bald-faced, self-serving attempt at fraud. The contrast could not have been sharper, which probably was the point.

At least in theory, order and justice in the Empire depended on this contrast. We know that many did not hear the voice of conscience, or ignored it. The confessional was there to remind all who acted on behalf of the law that their decisions were not merely private matters and that there was no hard boundary between the *fuero interior* and the *fuero exterior*. So while many ministers of justice did not confess and many who did doubtless did so formulaically, the principle that conscience burdened all defined the limits of permitted malfeasance and enabled victims of mistreatment to seek redress, especially if they could claim to have abided by the demands of conscience themselves. In effect, *conciencia* was part of a yielding web of meanings and reliances that stood against unrestrained abuse. *Corregidores*,

53 We need far more research on how and the extent to which officers of the law were subject to penalties of restitution for wrongly decided cases.

54 AGNT 127.(2a pate.).1, 204v–205r.

certainly, were the most prone to transgression, facing as they did the enticing vulnerability of indigenous people. Those further from the source of temptation, whose interests often ran against the open depredation of the Indians – such as ministers of tribute collection in Mexico City or Lima, royal notaries and judges of special commission – might be more receptive to conscience. For conscience never spoke in a social or political vacuum. It was an ethical baseline in a notoriously conflictual world characterized by the frequent disregard for legality and by unabashed self-regard, a *belief* and *conviction* linking each vassal's immortal soul to the operations of law, the idea of justice, the king's authority and the good of society.

If, as Lira argues, the private consciences of public officials became a matter of political concern during the seventeenth century, it was in response to a broad sense that the din of private interests – generally referred to by such words as *codicia* (greed) and *interés* (interest or self-interest) – was drowning out the law's voice on behalf of justice and good government. This disquiet was hardly new. In Spain and the Indies, the "universal confrontation of all, of some against others," as Maravall has argued, was characteristic of the long rupture between the Middle Ages and the emergence of a new, "modern" way of being in the world.[55] For Tau, this was the same period in which *casuistry*, as a basis for legality, began to give way to *system* in *Derecho Indiano*. If older assumptions and understandings held through much of the seventeenth century, in part by insisting on the relevance of conscience, as Lira suggests, it was against the run of historical processes rooted in the growing commercialization of society as a whole from the fifteenth century onward.

By the middle of the eighteenth century, economic concerns had taken center stage in reformist debates within Spanish realms. The *arbitristas* of the late seventeenth century and early eighteenth century wrote chiefly about trade and the imperial fisc. Reformist minister José del Campillo y Cosio in his 1741 *Nuevo sistema de gobierno económico para la América* focused on economic structures and policies, and sought to recast the role of indigenous people in the Empire as the only viable basis for rescuing the imperial system from collapse. For Campillo, law was to be oriented toward "the good economy of the state" rather than toward the "political" and just governance

55 Maravall (1975) 341.

of society – i. e., the "good order that is observed and kept in Cities and Republics, by enforcing laws and ordinances established for their good government."[56] Without acknowledging it, perhaps because he could not grasp the full implications of his language, *good government*, once linked tightly to *justice*, had become a matter of "good order" above all. And if Campillo's prescriptions were thought extreme in 1741, elements of his economic program, and significant elements of his reasoning and his meanings, became common sense by the late eighteenth century in the context of the Bourbon reforms.[57]

Two documents written in 1749 in Peru hint at an indigenous perspective crosswise to Campillo's optimism that a "system of economic government" could displace justice in resolving the tensions of imperial rule. In the *Verdadera relación y exclamación* and the *Breve y compendiosa satisfacción*, Friar Calixto de San José Túpac Inca, who claimed descent from the last Inca, addressed himself in the form of a Lamentation and Jeremiad to the newly enthroned Ferdinand VI regarding the plight of the "American Indians." He catalogued the abuses of Spanish landowners, miners and officials, noting that the Indians, "innumerable vassals" and "most faithful subjects," had been abandoned by their King and Lord to the tender mercies of greedy Spaniards guided only by self interest.[58] The answer proposed by Friar Calixto was not Campillo's turn to "economic government" but instead to shore up "law and justice" by cashiering Spanish *corregidores* and allowing the Indians to elect their own judges and conduct their own legal affairs, separate from the Spaniards – a jurisdictional solution. Only in this way could the Empire "put into practice a Christian, Catholic and proper justice, that is to say, law and reason" that would ensure the "souls of all [the king's] vassals, Spaniards as well as Indians." Thus would Spaniards "be relieved of weighty burdens of conscience," for though "they may gain gold and silver" by their self-regarding actions they are left with "heavy faults of conscience and

56 Campillo y Cosio (1789) 4; Diccionario de autoridades (1969) III 311–312. There has been some debate about whether Campillo wrote this tract. See Navarro García (1983); Navarro García (1995).

57 Artola (1952); Stein/Stein (2010) 231–259; Stein/Stein (2003); Tiryakian (1978) 233–257.

58 Clamor de los Indios Americanos 81 (15v). There is some debate about authorship of these two documents, though Friar Calixto was punished for them. See Dueñas (2010) 75–78.

soul."[59] In essence, where Campillo looked at a world of self-interest and concluded that the only solution was to give the Indians free rein or even force them to act from the same impulse, Friar Calixto took the view that justice pursuant to the royal conscience was all that could stand between the Indians and those who would trample them and call it good government.

Given the burdens economic processes and legal systems have imposed on vulnerable people in the modern age, perhaps Friar Calixto had a point. In the affairs of men, the voice of *conciencia* is never silent. But historical processes can produce understandings that drown it out, or make it sound thready and irrelevant in the grander schemes of human activity. This is one way to think about what happened between the sixteenth and nineteenth centuries, as Europe, both within and in its contacts with worlds outside itself, underwent the "great transformation" that brought economic systems to the center of social and political thinking.[60] Acute observers – such as Las Casas, Molina, Moreno, Peña, Castillo and Friar Calixto – sensed what was happening without fully compassing it. They worried and offered tenuous solutions drawn from their understanding and experience. Actors such as Rodríguez and the residents of Santa Ana and Santa Bábara did the best they could in the theater of conscience to speak above the din of *codicia* and *interés*. They might have succeed in an individual case, but in the long run the stentorian voice of self-interest and economic imperatives carried the day in the political imagination – at least for a time.

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59 Clamor de los Indios Americanos 119 (44v–45r).

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