

WILL THE REAL INNOVATOR PLEASE STAND UP?: HERETICS, PAGANS, MAGICIANS, AND THEODOSIUS I

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ABSTRACT

The development of the field of Late Antiquity since the 1970s has yielded a number of important changes in the way we think of the development from the Classical period to the Middle Ages. Perhaps the greatest of these is the way we think about religion and law. Theodosius I's edict in 380 in Codex Theodosianus (CTh) 16.1.2 declared Catholic Christianity to be the legal religion of the Roman Empire, giving it unparalleled privileges and dominance over non-Christian groups and other Christian sects. The rapidity of Christianity's ascension to dominance is striking. This change in power becomes what many considered to be the defining feature of the Middle Ages, and it greatly influenced how power was exercised and the legislative capacity of civil authorities. This article will demonstrate that Theodosius I's declaration is not, however, as unexpected as previously thought and has less to do with exclusivist Christianity than with the legal preoccupation with enforcing uniformity. Theodosius' innovation, rather, is in the tactic he uses to achieve this end.

The development of Late Antiquity as a field has cast doubts on the notion that the collapse of the Western Roman Empire and the rise of Christianity were inexplicable inevitabilities and that modern Europe is a direct descendent of classical antiquity, with only the "probate" Middle Ages separating them.¹ But scholarship on Late Antique Roman law and imperial ideologies has shed light on the role of western medieval secular and canon

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1 Andrew Gillett "Rome's Fall and Europe's Rise: A View from Late Antiquity" (2007) 07.10.12 *The Medieval Review* 1.

law on the relationship between civil and ecclesiastical authorities.² The influence of Roman law and canon law on modern European law and self-identity is well-attested.³ The influence of Christianity is hotly debated and at times a delicate issue, particularly in regard to state-church relationships and understandings of modern identities.⁴ How historians, legal historians and historians of law deal with these problems must be rooted in understanding and communicating religious and legal history.

This article will shed light on this complicated matter and provide some necessary historical context. At the beginning of the fourth century, Christianity was a disliked, banned religion; by the end of the fourth century, it was the only official religion. This rapid development has naturally led to attempts to understand how this might have happened. Theodosius I's landmark edict in 380 was when the tide turned.⁵ Less discussed, however, is the historical context of the law, how it differed from what came before it, or the escalation of rhetoric and legal restriction against various groups in the century leading up to 380. A closer inspection of fourth-century law shows that Theodosius I's edict was the climax of a long-standing trend by emperors in controlling behaviour that threatened social and political order. Encouraging religious uniformity, as Theodosius' law does, was one part of this larger effort.

Theodosius' law was different because it defines only one acceptable religion, *not* because of its intention to enforce religious uniformity. A distinction should be made between innovative intentions and innovative legal tactics. Fourth-century laws, starting with the First Tetrarchy (293–305), focused on enforcing religious uniformity and, up until 380, emperors did this by increasing restrictions on unacceptable rituals, particularly magic and divination, as opposed to dictating acceptable beliefs or theology. Law

- 2 Compare Sabine MacCormack *Art and Ceremony in Late Antiquity* (University of California Press, Berkeley, 1981); Tony Honoré *Law in the Crisis of Empire, 379–455 AD* (Clarendon Press, Oxford, 1998); and John Noël Dillon *The Justice of Constantine: law, communication, and control* (University of Michigan Press, Ann Arbor, 2012) to name a few. For an overview of the relationship between the Church and law up until the modern period, see Charlie Donahue Jr "Reflections on the Church and the Law over the Centuries" (2005) 65 *Jurist* 1 at 4–26. For the complicated development of religious leadership in western Christianity, see Peter Brown *The cult of the saints: its rise and function in Latin Christianity* (University of Chicago Press, Chicago, 1981).
- 3 Gillett, above n 1. Compare with Alan Watson *The Evolution of Western Private Law* (Johns Hopkins University Press, Baltimore, 2000).
- 4 For excellent introductions into this complex relationship, see James A Brundage *The Medieval Origins of the Legal Profession* (The University of Chicago Press, Chicago, 2008). He also provides a good introduction to Graeco-Roman law and how it functioned.
- 5 CTh 16.1.2. Compare María Victoria Escribano Paño "Heretical Texts and wrongdoing in the Codex Theodosianus (CTh 16.5.34)" in RL Gordon & FM Simón (eds) *Magical Practice in the Latin West: Papers from the International Conference held at the University of Zaragoza, 30 Sept–1 Oct 2005* (Brill, Leiden, 2010) 105 at 119–120; and TD Barnes *Athanasius and Constantius* (Harvard University Press, Cambridge, MA, 1993) at 174.

was central to encouraging and discouraging behaviours according to what emperors perceived to be in the empire's interest.⁶ This behaviour included religion as well as rituals, such as magic, astrology, divination, and the like. A brief summary of fourth-century law on religion and magic will illustrate how Theodosius' legal tactics to enforce religious uniformity is both the same and different compared to his predecessors, rather than purely innovative, when placed in its wider historical context.

Before we discuss "religion" as opposed to "magic", we must first understand that these words had different meanings in Late Antiquity than they do now or in other historical periods. In the modern world, we tend to consider magic, astrology and divination as superstitions, completely separate from religion, which we associate with "correctness" or "legitimacy". In the ancient world, these distinctions did not exist. Magic was very commonly practiced, and was usually divided into "good" magic and "bad" magic. The legal category into which bad magic practitioners were generally placed was *maleficium*, literally, "wrongdoing". In legal terms, it referred to magical rituals designed and intended to cause harm.⁷ This will be the primary distinction in this essay as well.⁸ Divination could potentially provide its practitioner with answers about the future emperor and the proper ritual action could bring harm to the person the ritual was directed against. Emperors tried to control these practices because of their perceived efficiency and their potential to cause social disruption. It has little to do with religious doctrine or any particular sect of Christianity.

A quick explanation of our legal sources, however, is necessary. The two primary sources of Roman law in the fourth century are the *Codex Theodosianus* and the *Codex Justinianus*. Theodosius II (402–450) wished to consolidate Roman law, which by the early fifth century was confusing and contained a number of out of date and contradictory laws. Many of the laws were lost in the editing process and we no longer have the letter that would have accompanied the edicts, removing the context of the original pronouncement. While the compilers kept the more colourful language, they removed what was probably the majority of the original edict, leaving only the basic law intact. The result, the *Codex Theodosianus* (CTh), which was officially promulgated in 438, is an extremely useful but highly condensed

6 Jane F Gardner *Women in Roman Law & Society* (Indiana University Press, Bloomington, 1991) at 3.

7 Escribano Paño, above n 5, at 122.

8 See James B Rives "Magic in Roman Law: the Reconstruction of a Crime" (2002) 22(2) *Classical Antiquity* 313; and James B Rives "Magic in the XII Tables Revisited" (2003) 52(1) *The Classical Quarterly* 270 for similar treatment.

version of hundreds and hundreds of years of Roman legal tradition.⁹ It only starts with Constantine I, after the Tetrarchic period (293–313).

Justinian I published the *Codex Justinianus* (CJ) as part of a wider legal programme in the 530s to consolidate centuries of law into an easily digestible format and as a guide for lawyers.¹⁰ This also meant that they also left out laws that were out of date in the sixth century.¹¹ Like the earlier CTh, it is organised by similar themes such as heresy or magic. The basic legal pronouncements were preserved, separate from the rest of the edict and its accompanying letter. Unlike the CTh, the CJ compilers removed a lot of the rhetoric that so characterised Late Antique law. On the other hand, the CJ includes laws prior to Constantine I, so it provides us with a majority of the surviving Tetrarchic laws and several even earlier laws. There are, of course, other sources of Roman law, but this article will focus on these two legal codes, with an emphasis on Books 9 and 16 of the CTh, which are the books on magic and religion, respectively. This article will use the CJ only for periods before Constantine I. Book 1 and Book 9 of the CJ are the books on religion and magic, respectively. I will focus on these two books of the CJ for the sake of space.

Beginning with the First Tetrarchy, emperors concentrated on legally curtailing unacceptable rituals and practices in order to promote unity and order. Roman law was largely cumulative and reactionary: a law implicitly associating a religious group with bad magic could be used as a precedent regardless of the fate of the emperor who promulgated it or consequent imperial decisions.¹² Over the course of the fourth century, the practices and groups that constituted “magic” and “unacceptable practices” gradually

9 Theodosius *Codex Theodosianus* (T Mommsen, P Meyer, and J Sirmund (eds) Weidmann, Berlin, 1905) at 16.1.2 (CJ 1.1.1). All Latin text is from the *Codex Theodosianus* (CTh). Equivalencies to the *Codex Justinianus* (CJ) are added for convenience. Laws found in the CJ but not the CTh are included. There are countless studies on the CTh. Perhaps the best are: John Matthews *Laying Down the Law: a Study of the Theodosian Code* (Yale University Press, New Haven, 2000); Jill Harries and IN Wood *The Theodosian Code: studies in the imperial law of Late Antiquity* (Duckworth, London, 1993); and Tony Honoré *Law in the crisis of empire, 379–455 AD* (Clarendon Press, London, 1998). All translations are mine unless otherwise indicated. For full translations, Pharr’s text remains the standard. *The Theodosian Code and Novels, and the Sirmundian Constitutions* (C Pharr (ed) (tr), Princeton University Press, Princeton, 1952).

10 The CJ is only one part of Justinian I’s *Corpus Iuris Civilis*. For an excellent introduction to the CJ, see Alan Watson *The Evolution of Western Private Law* (Johns Hopkins University Press, Baltimore, 2000) at 2–4.

11 See Justinian’s address to the Senate at the beginning of the Codex in Justinian *Codex Justinianus* (P Krueger (ed) Weidmann, Berlin, 1877). The most recent attempt at translating the vast codex is by Justice Fred H Blume. See *The Codex of Justinian: a new annotated translation, with parallel Latin and Greek text based on a translation by Justice Fred H Blume* (F H Blume (translator) in B W Frier et al (eds), Cambridge University Press, Cambridge, UK, 2016).

12 See Clifford Ando “Roman Law” in Markus Dirk Dubber and Christopher L Tomlins (eds) *The Oxford Handbook of Legal History* (Oxford University Press, Oxford, 2018) at 674–675.

expanded to include a variety of groups—the heretics, pagans, and magicians of the title of this article. Diocletian, the most senior of the four emperors comprising the First Tetrarchy, intended to simplify Roman law under more direct central control by promulgating the Gregorian and Hermogenian Codes.¹³ In Late Antiquity, religion and religiosity seem to have increased in importance in general, including in conceptualisations of power; Diocletian certainly took advantage of this and used it in his laws.¹⁴ For example, a letter sent to Damascus refers to people who make incestuous marriages as “certain people” [*quibusdam*].¹⁵ What makes this otherwise rather innocuous referent more dismissive and marginalising is that, just before referring to “these people”, the Tetrarchs state their mission as emperors quite clearly.¹⁶

The Tetrarchs describe themselves in this letter first and foremost as pious and religious [*piis religiosisque mentibus nostris*]. Roman law established things in a chaste (or pure) and holy way [*quae Romanis legibus caste sancteque sunt constituta venerabilia maxime*], and this should be defended by the ancient religion [*videntur atque aeterna religione servanda*], referring to the traditional body of Roman religious practices and beliefs that the Tetrarchs dedicated themselves to enforcing. Most importantly, the Tetrarchs assert that they will not and ought not to ignore those who violate these rules.¹⁷ “Some people” is used to marginalise a practice that was probably more common than the Tetrarchs are implying, but the purpose is to reinforce imperial authority and specific understanding of Roman law, which are both cast in religious terms. “Pious”, “religious” and “sacred”, of course, have their equivalents in Christianity. They are cultural terms that should not be ascribed solely to Christian emperors like Theodosius I. The marriage law also uses a variety of other marginalising language to describe the proscribed practice and the people who practice it, and the Tetrarchs frame the issue as a matter of preserving

13 See Jill Harries “Constantine the lawgiver” in S McGill, C Sogno and E Watts (eds) *From the Tetrarchs to the Theodosians* (Cambridge University Press, Cambridge, 2010) 73 at 76.

14 Robert M Frakes *Compiling the Collatio Legum Mosaicarum et Romanarum in Late Antiquity* (Oxford University Press, Oxford, 2011) at 13–14. See here for a full translation of the entire document.

15 *Collatio Legum Mosaicarum et Romanarum* (Robert M Frakes (ed)(translator) Oxford University Press, Oxford, 2011) at 6.4.1.1. Frakes provides a full translation of the entire text but I have used my own translations here. Different regions of the empire appear to have had slightly different customs as to what degree of relationship counted as “incestuous”. The practices the Tetrarchs are describing here likely prefer to traditions or customs in and around Damascus. The unknown compiler of the *Collatio Legum Mosaicarum et Romanarum* preserved fragments from classical legal jurists Ulpian and Paulus for comparative purposes at 6.2.1 and 6.3.1. Compare with Gardner, above n 6, at 36.

16 *Collatio Legum Mosaicarum et Romanarum*, above n 15, at 6.4.1.1. See Frakes, above n 14, for a full translation of the law. Traditional Graeco-Roman religion had no concept of “heresy” or “orthodoxy”, however.

17 *Collatio Legum Mosaicarum et Romanarum*, above n 15, at 6.4.1.1.

the favour of the gods towards Rome.¹⁸ This matters because it illustrates how Late Antique emperors understood their relationship to religion and how important they thought religion was to the empire. The use of religion and religious language was one avenue of enforcing order and could be applied to issues like marriage that were important to social and political life. The addition of marginalising language to describe the proscribed practice further helped isolate such practitioners from the rest of society.

Persecutions, however, were the most obvious and dramatic demonstration of the imperial emphasis on unity and uniformity than with any (mis) understandings of religious doctrine and difference. The Great Persecution, as it came to be known in Christian sources, seems to have been in multiple stages with the inclusion of the Christians only actually beginning around 303.¹⁹ The Manicheans appear to have been targeted first because the Tetrarchs associated with Persia which, therefore, made Manichaeans dangerous and disruptive during a renewed Romano-Persian war.²⁰ The polluting presence of Christians in a divination rite ordered by Diocletian—and their refusal to participate in a state rite—ultimately led to a purge of Christians from the army before it was widened across the empire.²¹ For present purposes, what is most interesting about the persecutions is that the First Tetrarchy demanded a public demonstration of appropriate piety, in this case sacrifice. Refusal to do so was interpreted as treasonous because it was understood as a refusal to perform a religious ritual in support of the empire.²² The need for public proof of appropriate religious practice and, to a limited degree, religious belief indicates the importance of enforcing imperially approved religion. By being religiously deviant—according to the Tetrarchs’ definition of traditional Roman religion—Christians and Manichaeans were being socially and politically deviant. They were essentially disrupting the carefully ordered empire the Tetrarchs were trying to create by refusing to participate in a specified public religious ritual.²³

Aside from explicit requirements for subscribing to a specific religious practice, legal proscriptions were also made against deviant or divergent practices, especially bad magic. The CJ contains only one legal fragment on

18 At 6.4.1.1–6.4.1.2 and 6.4.1.6. Examples of marginalising language used in the law include: *nefaria*, *nefas* and *libidinosus*, to name a few. *Nefarius* and *nefas* both had connotations of “crime”, “forbidden”, “sinful” or “wrong”. *Libidinosus* technically had a good and a bad meaning, but here it is quite clearly negative.

19 For the separate stages see: Roger Rees *Diocletian and the Tetrarchy* (Edinburgh University Press, Edinburgh, 2004) at 65. Our primary source for the persecutions, Lactantius, does not give dates for them, and he collapses them into one enormous persecution. Lactantius also ignores the persecution of the Manichaeans.

20 Rees, above n 19, at 58–9. The texts of these edicts unfortunately do not survive.

21 Lactantius *De Mortibus Persecutorum* (JL Creed (ed)(translator) Oxford, Clarendon Press, 1984) at 10.1–10.5.

22 Bill Leadbetter *Galerius and the will of Diocletian* (Routledge, London, 2009) at 122–123 and 134.

23 See n 16 above.

magic before the First Tetrarchy: the words of Antoninus Augustus, stating that killing someone with poison was far worse than doing so with a sword.²⁴ The entry is short, with no marginalising language used against proscribed individuals or practices. The word for poison in Latin is *venenum*, which can refer to either poison or medicine. This is similar to the ambiguousness of the English word, potion: the precise meaning depends largely on the specific context and the intention and perception of the user of the word. The ambiguity of the words for magic, in Latin and in English, allow for a significant degree of flexibility. The lack of a concrete, easily definable legal category facilitated various emperors to expand and change what constituted magic. As we will see, practices previously regarded as religious could be reinterpreted or closely associated with bad magic.

The First Tetrarchy's surviving law on magic largely keeps traditional definitions but introduces marginalising language. The emperors differentiate between surveying, which is legitimate, and astrology, which is not. The difference, in Latin, is between an art that is in the public interest (surveying) and an art that is not (astrology).²⁵ Emperors periodically proscribed astrology, particularly in periods of political uncertainty such as a recent turnover in power when astrologers could or were asked to divine the emperor's successor. Astrologers not authorised by the state could find themselves on the wrong end of the law by having their practices mistaken for, or interpreted as, treason. Astrology described by the First Tetrarchy, however, is called "damnable". Under Diocletian, the civil and procedural rights of those convicted of *maleficium* in general were "drastically curtailed".²⁶ This process included the use of marginalising and derogatory language against both practices and their practitioners.²⁷ CJ 9.18.2 uses this kind of language long before Theodosius I did.

It is in 319, however, that we begin see a real change in how emperors approached and defined "bad" practices. Up until that time, diviners were popular and could be consulted in public or private, for a variety of reasons. But Emperors Constantine and Licinius prohibited diviners from entering a private household for *any* reason and recommended denunciation, even of friends who practice such arts. Any diviner caught breaking the law was to be burned alive and their summoner exiled to an island, with all their property confiscated. In a rare legal move, the emperors argued informers ought to be congratulated for coming forward in such cases.²⁸ Boundaries are absolute. There is no distinction made between acceptable variations

24 CJ, above n 11, at 9.18.1.

25 CJ, above n 11, at 9.18.2.

26 Escribano Paño, above n 5, at 122.

27 This applies to all Roman laws of this period, not just those on religion.

28 CJ, above n 11, at 9.18.3. Informers had a very mixed reception in the Roman world, somewhat analogous to modern socio-legal treatment of whistle-blowers. CTh, above n 9, at 9.16.2 is virtually the same and from the same year, indicating how concerned the emperors were about unauthorised, independent practitioners.

and unacceptable variations, only state approved diviners are allowed. Constantine and Licinius are not arguing divining is itself incorrect or illegal. What they are encouraging is the complete social isolation of figures deemed to be practicing in an unacceptable manner by removing them from legal protections. The encouragement of informants heightens the tension between newly untouchable figures and the rest of society, as well as in society as a whole. In a period of tension between the two emperors, which would result in a final civil war five years later, CTh 9.16.1 illustrates the kind of environment that could produce such heightened fears. This kind of tension will repeatedly appear throughout the fourth century, most often in periods with competing emperors, such as in Theodosius I's reign. The stigma attached to non-imperially sanctioned diviners is a matter of state security and uniformity, not a matter of religious convictions.

Under Constantine I, the continued assault on undesirable practices expanded into groups perceived to be a threat to the new preferred imperially sanctioned religion, Christianity. Constantine I punished those who used their skills in magic [*qui magicis ad cunctis artibus*] against people's health or to incite lust in the chaste [*contra hominum moliti salutem aut pudicos ad libidinem*]. Like the First Tetrarchy before him, Constantine I also differentiates this "bad" magic from the good, in this case magic meant to encourage good weather for crops.²⁹ The interesting development with this law is that "punishment and vengeance" will be committed with the most severe laws against those who practice bad magic.³⁰ This language is different from its immediate predecessor for two reasons: first, the law in the Latin places "punishment and vengeance" first. "Vengeance" implies the active righting of a perceived wrong, which is a slightly more positive understanding of enforcing proper behaviour than the First Tetrarchy's proscription of marriage law. Second, the fact that it comes first suggests it is the aspect that the emperor Constantine I most wished to emphasise. There are threads here leading to Theodosius I's proactive promotion of pro-Nicene Catholic Christianity. The use of marginalising language to describe practitioners of proscribed practices can be juxtaposed to gradual privileging of Christianity and its practitioners. CTh 16.8.1, from 315, forbids attacks on converts to Christianity from the Jewish community, which Constantine I describes as a "mad" act by a "feral" and "nefarious" sect, while CJ 1.13.1, CTh 4.7.1 and CTh 16.2.4 begin to integrate the church into the wider Roman legal

29 CTh, above n 9, at 9.16.3. Crop failures could lead to food shortages and its consequent problems.

30 At 9.16.3.

framework.³¹ This continual and steady integration of the church indicates that it was firmly established and had been for decades by 380.

But what about the heretics of the title of this article? Constantine I, more than anyone else, is associated with the beginning of a “Christian empire”.³² He also suffers from extensive mythologising, and in our extra-legal sources, he tends to appear as an exclusively Christian emperor whose every action was to promote Christianity and with full awareness of Christian doctrine.³³ The term *haereticus* and its cognates do not appear in surviving imperial legislation until 326, at CTh 16.5.1 from Constantine I.³⁴ This law limits all the previously mentioned benefits to the imperially sanctioned church (Catholic Church) at the exclusion of other Christian groups.³⁵ There is no evidence, however, of attempts to enforce the beliefs of this church, although it illustrates that Theodosius I’s privileging of one church was hardly ground breaking. The primary concern here is still with deviance. Given that the law dates to one year after the Council of Nicaea, which established the Nicene Creed, it is likely that the law was intended to act as an imperial reaffirmation of the Council’s decisions regarding official Christian doctrine and the excommunication of divergent individuals and groups. Constantine I called for the Council of Nicaea and he attended it himself, so his focus on groups that do not conform to what the emperor considered the norm is

31 At 16.8.1 (equivalent to CJ, above n 11, at 1.9.3): “*furor*”. CJ, above n 11, at CJ 1.13.1, incorporated the Church as an acceptable place of legal manumission; CTh 4.7.1, equivalent to CJ, above n 11, at 1.13.2, reinforced this particularly in regards to assuring subsequent citizenship; and CTh, above n 9, at 16.2.4 (equivalent to CJ, above n 11, at 1.2.1) allowed people to leave the church property in wills.

32 This is a result largely of authors like Eusebius of Caesarea, a contemporary of Constantine I, and fifth-century authors who rely on inaccurate or misleading accounts by figures such as Athanasius (mid fourth century) or Rufinus (late fourth century). See TD Barnes, above n 5, at 7. For the supposed “bishop’s court” set up by Constantine I, see Caroline Humfress “Bishops and Law Courts in Late Antiquity: How (Not) to Make Sense of the Legal Evidence” (2011) 19(3) *Journal of Early Christian Studies* 375.

33 For the mythologising of Constantine I, see SNC Lieu (2005) “Constantine in Legendary Literature” in N Lenski (ed) *The Cambridge Companion to the Age of Constantine* (Cambridge University Press, Cambridge, 2005) 298. See Harries, above n 13, at 74 for later distortion by Christian authors.

34 Compare A Cameron and S G Hall “Commentary” in A Cameron and S G Hall (eds) *Life of Constantine* (Clarendon Press, Oxford, 1999) 183 at 322 for general legal severity from Constantine I after 326. I would agree here that *Panegyrici Latini* 4 is likely a closer resemblance to Constantine I’s “restoration of morality”. Like under the First Tetrarchy, Constantine I was interested in enforcing a unified empire under a specific understanding of proper Roman behaviour. This is cultural, not religious. Emphasis again must be placed on imperial control of social and political order.

35 Equivalent to CJ, above n 11, at 1.5.1. “Imperially sanctioned” is used to describe the specific church supported by the emperor. There were a large number of different Christian groups or sects in this period.

hardly surprising.³⁶ His letters to the churches emphasise that these groups are disruptive, and his—and by extension the Church’s—interest is in unity, uniformity and law and order, just like his Tetrarchic predecessors.³⁷

The isolation of non-favoured groups and the promotion of Christianity under Constantine’s sons grew very quickly, and they were far more interested in promoting a specific doctrine.³⁸ In 339, Jews were forbidden from buying Christian slaves and from circumcising their slaves.³⁹ In 341, all sacrifices were abolished.⁴⁰ Temples outside cities were preserved, however.⁴¹ In 343, Christian clergy and their slaves were exempted from new levies and quartering soldiers and, eventually Constantius II officially closed all temples and forbade sacrificing.⁴² Constantius II justified the closing of the temples as a preventive measure, to keep people from committing a terrible wrong. Constantius II is here equating traditional Roman religions (“pagans”) and their practices *as a form of wrongdoing* 26 years before Theodosius I promulgates his edict. In December 357, he assures a bishop that clergymen are exempted from monetary demands of the state and cannot be called for menial liturgies (*munera sordida*) or provide post-wagons. Anything accumulated by legal means, the clergy should distribute to the poor. These privileges go towards not only the clergy, but also their wives, children, servants, and their servants’ children.⁴³ Constantius’ and Constantius II’s repeated—and ultimately failed—attempts to create orthodox doctrine at a number of episcopal councils illustrate imperial attempts to organise and unify Christianity under central

36 Equivalent to CJ, above n 11, at 1.5.1: “The privileges, which have been granted from a contemplation of religion, ought to benefit only observers of the Catholic law. However, we wish not only that heretics and schismatics are alien to these privileges, but also that they are shackled and subjected to compulsory duties.” Compare with Cameron and Hall, above n 39, at 306–308. See also Theodosius, above n 9, CTh at 16.5.2.

37 See Harries, above n 13, at 74 for Constantine I as a traditionalist.

38 Eusebius preserves several of these letters. See his work: A Cameron and S G Hall (eds) (translators) *Life of Constantine* (Clarendon Press, Oxford, 1999) at 2.24–2.42, 2.46.1–2.46.3, 2.48–2.60, 2.64–2.72, and 3.17–3.20.2 to name a few. See Cameron and Hall, above n 39, at 247, for Constantine I’s even-handed attitude towards religion, despite Eusebius’ assertions. Compare with Edward Watts “Three generations of Christian philosophical biography” in S McGill, C Sogno and E Watts (eds) *From the Tetrarchs to the Theodosians* (Cambridge University Press, Cambridge, 2010) 117 at 126 and 128.

39 CTh, above n 9, at 16.9.2 (equivalent CJ, above n 11, at 1.10.1).

40 CTh, above n 9, at 16.10.2. Supposedly, this was based on a law of Constantine I, which has not survived.

41 At 16.10.3. He uses *superstitio* in its original meaning of “excessively religious”.

42 At 16.2.8 (equivalent to CJ, above n 11, at 1.3.1) and CTh, above n 9, at 16.10.4 (equivalent to CJ, above n 11, at 1.11.1), respectively. There is some confusion as to the date of CTh 16.10.4.

43 At 16.2.14 (equivalent to CJ, above n 11, at 1.3.2).

control.⁴⁴ These attempts could create dissent and public disorder more often than not, but the basic point is that Constantine and Constantius II were trying to do away with such disagreements and prevent the often very public fighting that could erupt between different Christian groups.

There is a corresponding escalation in marginalising language in this period as well. Constantius II described Jewish assemblies as sacrilegious [*sacrilegis coetibus*].⁴⁵ He expanded his father's law against private divination by banning all consultations with diviners (*haruspices*), astrologers (*mathematici*), soothsayers (*harioli*), augurs (*augures*), seers (*vates*), Chaldeans (*Chaldaei*), magicians (*magi*) and sorcerers [*et ceteri, quos maleficos ob facinorum magnitudinem vulgus appellat*].⁴⁶ Punishment is death. There is no further distinction between harmless public divination and dangerous private divination, or between previously legal divination practices and ones that had always been illegal. Constantius II will later add that people who use magical skills are unnatural and will reach a bad end [*Hos, quoniam naturae peregrini sunt, feralis pestis absumat*].⁴⁷ He further declared that public officials could be tortured if suspected of consulting magicians or were themselves magicians, who Constantius II called "enemies of the human race" [*humani generis inimici*]. If found guilty, they are to be torn apart on a wood rack. He reiterates an almost identical list of wrongdoers a year later.⁴⁸ As mentioned at the beginning of this article, practices like divination and magic could be used for disruptive purposes. Constantius II's borderline obsession with blanket bans on these practices indicates how seriously he took them and how dangerous to himself and public order he thought them.

In 364, Valentinian I and Valens, Jovian's successors, less than a year into their joint reign, command that any excessively successful merchants who belong in "Our House" [*domus nostra*] are required to aid Christians "belonging to the truth faith" [*quibus verus cultus*] if they are poor or in need.⁴⁹ This indicates that, 16 years before Theodosius, the church of the emperors was clearly favoured and was specified as "the true faith". Unlike Theodosius I, Valentinian I and Valens do not specify what "the true faith" meant, allowing some flexibility of interpretation. The two emperors do seem to have tried to maintain some kind of neutrality. Around this same period, the two emperors order Remigius, the Master of Offices, to remove anyone who tries to take

44 For detailed discussions of these councils and their very complicated written records, see Brown, above n 2, at 71; and Barnes, above n 5. These attempts are different than their father's methods. Constantine I apparently did not try to formulate doctrine at Nicaea himself, although his presence would surely have affected the proceedings. See also CTh, above n 9, at 16.2.15 (equivalent to CJ, above n 11, at 1.3.3).

45 CTh, above n 9, at 16.8.7 (equivalent to CJ, above n 11, at 1.7.1).

46 At 9.16.4 (equivalent to CJ, above n 11, at 9.18.5).

47 At 9.16.5 (equivalent to CJ, above n 11, at 9.18.6).

48 At 9.16.6 (equivalent to CJ, above n 11, at 9.18.7). He lists *magi, magus, maleficus, haruspex, hariolus, augur, mathematicus, narrandis somniis occultans artem* (divination to interpret dreams).

49 At 13.1.5 (equivalent to CJ, above n 11, at 1.4.1).

over a synagogue because they cannot use a place of worship.⁵⁰ Valentinian I and Valens are careful not to take sides and their interest is in maintaining order. There must have been some problems, however, with their total ban on nocturnal rituals, for either prayers, magical purposes or funeral sacrifices.⁵¹

It is under Valentinian I and Valens, however, that we see the biggest jump between an imperial focus on curtailing practices or rituals considered socially and politically disruptive to a focus on beliefs considered socially and politically disruptive. Valentinian I and Valens equate learning with teaching prohibited material.⁵² The law is specifically concerned with astrology [*mathematica*], but this legal reasoning drastically shrinks the possibility of alternative practices by attaching a stigma to anyone involved, in any capacity, for any reason. It steps up the earlier law by focusing on content rather than practice. Both learning and teaching are described as faulty or blameworthy (*culpa*), indicating a negative ethical or moral dimension rather than a purely negative result or act, such as treason. The intention is to reinforce to the public how unsafe such behaviour *and* the beliefs behind them are to what the emperors consider proper or normal order. Demonstrating an interest (learning) indicates a person with “bad” beliefs that could, potentially, turn into practicing proscribed practices. Whereas previous legal proscriptions focused on the proscribed practices themselves, Valentinian I and Valens try to “nip it in the bud” by proscribing learning and teaching these practices at all.

We can see the effects of this gradual build-up of legal restrictions and imperial preoccupation with enforcing imperial authority and good behaviour in the magic trials of 369–372 under Valentinian I and Valens. Ammianus Marcellinus, our main source for the trials, notes the tense atmosphere and fear resulting from the efforts to find criminals.⁵³ While he is doubtless exaggerating how many people were actually prosecuted and convicted, what is important is that Ammianus illustrates the effect such laws can have.⁵⁴ The trials ensnared not just the senatorial class, but lower classes as well: Ammianus includes a philosopher, a charioteer, a soothsayer and an unidentified number of others in a very long and often vague account of the events.⁵⁵ The conduct of the trials, with its imperial overreach, apparent disregard for legal processes and excessive emphasis on “imperial dignity” made the emperors infamous,

50 At 7.8.2 (equivalent to CJ, above n 11, at 1.9.4). Presumably, these are Christians.

51 At 9.16.7.

52 At 9.16.8 (equivalent to CJ, above n 11, at 9.18.8): “The practice of astrology must cease. For if anyone, in public or private, during the day or night, be caught while turning to this error, the two will be struck with capital punishment. For error of teaching what is forbidden is not dissimilar than that of learning (what is forbidden).”

53 Ammianus Marcellinus *History* (J Rolfe (translator), Harvard University Press, Cambridge, MA, 1950) vol 3 at 29.2.4.

54 Noel Lenski *Failure of Empire: Valens and the Roman State in the Fourth Century AD* (University of California Press, Berkeley, 2002) at 221–222. He notes that Ammianus only lists 17 aristocrats: nine executed, three exiled and four acquitted.

55 Ammianus Marcellinus, above n 59, at 28.1 and 29 for the main narrative.

at least to Ammianus and the conservative elite that he represented.⁵⁶ Even so, no one convicted in the magic trials was targeted based on religious beliefs.⁵⁷

The later 370s is the final stage in the removal of proscribed groups from imperial protections. In 377, priests who give repeat baptisms “defile and pollute” the sacraments and such priests are no longer worthy of priesthood.⁵⁸ The law associates false doctrine with poison and secrecy.⁵⁹ The law still targets a practice but it removes these groups from imperial financing and legal protections based ultimately on a religious belief and ritual. Further, the law assumes the emperor has the power and authority to define orthodoxy. Further, CTh 16.5.5, from 3 August 379, includes all of the previous laws discussed and applies them specifically to heretical groups. The law orders the complete cessation of all heresies proscribed by imperial and divine law. It includes a ban on teaching and learning heretical doctrines, as well as forbidding their priests to preach or to appoint ministers. The law further orders imperial officials to be diligent and to enforce this law.⁶⁰ The imperially sanctioned church is now the only real legitimate authority in all but name. Finally, in 380, Theodosius establishes the imperially sanctioned church and its beliefs and practices as the legal religion of the empire to the exclusion of all others.⁶¹

Is Theodosius I’s edict really a break with tradition? Yes and no.

What makes CTh 16.1.2 innovative is that Theodosius I tried to regulate Roman religion by dictating precisely what it *is* rather than targeting what he thinks it is *not*: Theodosius I defines Nicene Catholic Christianity as the only legitimate Roman religion, adding on acceptable authorities, in this case Damasus, the Bishop of Rome, and Peter the Apostle. Anything outside of this specific chain of authority is outside of acceptable religion—belief or practice.⁶² Theoretically branded as religiously deviant, disparate groups and practices such magicians and Jews could be equally associated as disruptive and therefore illegal and subversive. Non-imperially sanctioned churches, which had been increasingly marginalised through targeted defunding and other forms of marginalisation, could also be associated as “antisocial” or “mad”.⁶³ Clearly socially disruptive, in other words, and not legitimate. There is some indication that Theodosius followed through on this promise,

56 Lenski, above n 54, at 230–231.

57 At 222. He notes that some of the names, such as Esaias and perhaps Claritas, are Christian.

58 CTh, above n 9, at 16.6.2 (equivalent to CJ 1.6.1). Compare with CTh, above n 9, at 16.6.1 (equivalent to CJ, above n 11, at 1.6.1).

59 CTh, above n 9, at 16.6.2.1.

60 Equivalent to CJ, above n 11, at 1.5.2. CJ 1.5.2, however, is a conglomeration of several different laws from various years.

61 CTh, above n 9, at 16.1.2 (equivalent to CJ, above n 11, at 1.1.1).

62 At 16.1.2. See above for Valentinian I and Valens’ prohibition on teachers of banned doctrine.

63 While the first explicit legal link between heretics and magicians in a legal source is not until 398 under Theodosius’ sons, this connection underlies Theodosius’ edict. See Escribano Paño, above n 5, at 136 for CTh 16.5.34.

if Zosimus' report of destruction of "pagan" temples in Egypt after 380 is correct.⁶⁴ However, we should not overestimate Theodosius' innovation.

The purpose of Theodosius' law is to enforce religious uniformity, which was a very important part in creating and maintaining social and political order. There is nothing new in regards to the underlying intention of the law. The use of marginalising language, such as "mad and insane", to describe the perpetrators of proscribed practices and the use of violent punishments are both common in fourth-century law. As we saw in the survey, laws from the First Tetrarchy introduced marginalising language against deviant groups and used religion as part of their imperial ideology in much the same way as Theodosius I does in his 380 edict. All Christian emperors, including Theodosius I, maintain the traditional understandings of good and bad magic. Theodosius I is not innovative in terms of language, intention, or understanding of legal terminology—he is not inventing new categories. Further, heretics, pagans and magicians were already considered wrongdoers, by direct or indirect legal association. The only difference between the uses of "heretic" by Constantine I and Theodosius I is the degree to which these groups were socially and legally marginalised in their respective time periods. Again, the increase in such language to marginalise or remove proscribed practices stretches across the fourth century, and is therefore not surprising or innovative in Theodosius I's edict.

Theodosius I's personality does play a part in his decision-making, but we must not misjudge the motivation of CTh 16.1.2. Escribano Paño has noted that the chapter on heretics in the CTh is far longer than the chapter on pagans, despite the fact there were more pagans than heretics.⁶⁵ Escribano Paño has suggested that heresy was a more favoured topic to the compilers of the CTh, hence the enormous disparity.⁶⁶ This is undoubtedly true. Theodosius II and Justinian I, the titular emperors of the two codes, are both justifiably known primarily for their relationship to religious debates. The observation that Theodosius I was responsible for 19 of the 66 laws on heretics in the CTh, however, still needs explanation.⁶⁷ The author would suggest that Theodosius I probably did have a greater preoccupation with heretics than his predecessors did, but for reasons besides holding a more exclusivist Christianity. Late Antique emperors were particularly preoccupied with centralising authority and encouraging uniformity as ways of enforcing order. Religion was a way of achieving both, and religious unity was important in its own right. Theodosius' preoccupation with heretics is a preoccupation

64 Zosimus *Historia Nova* (F Paschoud (ed)(translator), Les Belles Lettres, Paris, 1971) at 4.33.4. Pagan is itself a derogatory word: it has connotations that translate as something like "ignorant" or "country bumpkin".

65 Escribano Paño, above n 5, at 109. There are 66 entries on heretics compared to 25 on pagans. There are more laws outside the chapter on heretics (CTh 16.5).

66 At 119–120. I would agree that this is probably why the compilers kept the derogatory language in this particular chapter.

67 At 119–120.

with deviant Christians. After Theodosius I, of course, this preoccupation with Christians not falling into line will expand to a wholesale removal of pagans from legal protections, but not before the end of the fourth century. Theodosius I's decision was a logical step in a longer-term trend. His tactic, not his motivation, was an innovation.

Theodosius I's attempt at regulating Roman religion was the culmination of a long-term trend in Late Antiquity of imperial fixation on deviants who threatened social and political order, it was not, in its intentions and language use, an innovative act. From the First Tetrarchy (293–305) onwards, Roman emperors focused heavily on proscribing rituals that they considered counter to the social and political order they sought to enforce and, therefore, disruptive. Religion formed the basis of Late Antique imperial self-conceptions, so its focus on removing and/or isolating rituals or groups who failed to conform is not surprising. The use of marginalising or pejorative language to describe the individuals who practiced these proscribed practices further isolated these groups from society. Over time, however, this legal habit escalated and more and more groups and practices were proscribed. Illegal divination escalated from individual prosecution to prosecution of anyone involved in the act, which would eventually be included in proscriptions against teaching or learning banned material. The gradual shift to legally targeting groups based on beliefs considered deviant and therefore dangerous was not far behind.

The real innovation behind Theodosius' landmark law is that it tries to encourage unity, not by proscribing specified practices, rituals, and groups, but by specifying one single belief and its accompanying practices and rituals as the only legal religion of the empire. These are very different legal tactics. While hundreds and hundreds of legal fragments indicate that, despite these efforts, local practices and deviant religious groups continued to exist, the momentousness of Theodosius' innovation should not be underestimated. It was a very different way of understanding and utilising the law. It changed the relationship between emperors and ecclesiastical authorities, and it changed the way people were—or at least could be—treated by the law. By creating only one official religion and one chain of authority, not only was Theodosius I officially, legally defining religious orthodoxy, he was using the law to dictate the private lives of individuals in his quest to promote unity and remove dissention and its potential for social and political disruption. It certainly changed the course of history by changing how the law could be used and how it could affect social change.

