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The influence of the principle "*Necessitas non habet legem*" on Nordic medieval laws on theft[1]

Introduction

The chapter on theft in the Norwegian Code of the Realm, compiled through the initiative of King Magnus VI Lawmender (r. 1263–80) and ratified by him in 1274, opens by observing that nobody was allowed to steal from another.[2] Then, in a seeming volte-face, it continues such that, when a man stole food to save his life, such larceny by no means merited punishment if he had been unable to get any job to support himself and therefore lived in starvation.[3] The Code of 1274 then turned to prescribe the sanctions of petty larceny for first-time offenders, who worked to support themselves. Thus, the Code explicitly distinguished between starving unemployed persons, who stole food out of necessity, and those who, though they had access to a livelihood, nonetheless committed theft. Could the norm be inspired by the canonical maxim "*Necessitas non habet legem*" (Necessity knows no law)?

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[1] This article was written as part of the research project *Social Governance through Legislation* at the Centre for Advanced Studies in Oslo 2021–22. Mia Korpiola also worked on this article in the Academy of Finland research project *At the Frontiers of Humanity: Extreme Necessity in the History of Ethics, Law and Politics, 300–1600* (nr. 330872) and the Käte Hamburger Kolleg "*Einheit und Vielfalt im Recht*" at the WWU University of Münster. We gratefully acknowledge the help of Virpi Mäkinen and Helle Vogt. We would also like to thank the two anonymous readers of this article, Virpi Mäkinen, Sophia Mösch, and Heikki Pihlajamäki, for their comments on a previous version of this article and Ralf Bureck for his help in finalizing the manuscript. Translations are our own unless otherwise indicated.

[2] Book IX chapter 1 [hereafter abbreviated IX-1], *Kong Magnus Håkonsson Lagabøtes landslov: Norrøn tekst med fullstendig variantapparat, 2* [hereafter *MLL*], ed. Magnus Rindal and Bjørg Dale Spørck (Oslo: Arkivverket, 2018), 951: "ÞAt er nu þui nest at var skal engi annan stela."

[3] IX-1, *MLL*, ed. Rindal and Spørck, 951: "Nu er þat greinande, ef sa maðr stelr mat er eigi fær ser vinu til forsterss ok hællppr suo lifi sinu firir hunggrss saker þa er sa stulldr með engu mote repssingar værðr."

This was especially relevant because the Code had been drafted for the whole of rural Norway and remained in force well into the seventeenth century.

The principle of *necessitas* has been the subject of many studies analyzing its intellectual history in the Early and High Middle Ages.[4] As criminal intent and will became determinants of guilt in twelfth-century learned jurisprudence, it became important to discern whether one acted with criminal intent or out of necessity. Thus, discussions on culpability came to encompass questions related to blamelessness, while theft due to hunger-induced necessity was analyzed as a special case.[5] Particularly Gilles Couvreur's important book *Les pauvres ont-ils des droits?* investigated the nexus of theft and extreme necessity between Gratian's (fl. ca. 1120–50) *Decretum* (ca. 1140) and the *Liber extra* (1234). He and Brian Tierney have analyzed the works of a multitude of theologians and canonists, who accepted the right of the starving to take what they needed for survival as a natural right of self-preservation.[6]

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[4] E.g., Gilles Couvreur, *Les pauvres ont-ils des droits? Recherches sur le vol en cas d'extrême nécessité depuis la Concordia de Gratien (1140) jusqu'à Guillaume d'Auxerre (+ 1231)* (Rome: Presses de l'Université Grégorienne, 1961); Johannes W. Pichler, *Necessitas: ein Element des mittelalterlischen und neuzeitlichen Rechts, dargestellt am Beispiel österreicher Rechtsquellen* (Berlin: Duncker & Humblot, 1983); Franck Roumy, "L'origine et la diffusion de l'adage canonique *Necessitas non habet legem* (VIII^{e}–XIII^{e} s.)," in *Medieval Church Law and the Origins of the Western Legal Tradition: A Tribute to Kenneth Pennington*, ed. Wolfgang P. Müller et al. (Washington D.C.: Catholic University of America, 2006), 301–19; Jonathan Robinson, "Poverty and Need in the 14th Century: Johannes Andreae, Bartolus of Saxoferrato, and Baldus de Ubaldis," in *Rights at the Margins: Historical, Legal and Philosophical Perspectives*, ed. Virpi Mäkinen et al. (Leiden: Brill, 2020), 31–62; Scott Swanson, "The Medieval Foundations of John Lock's Theory of Natural Rights: Rights of Subsistence and the Principle of Extreme Necessity," *History of Political Thought* 18:3 (1997): 399–459. See also Kenneth Pennington, "Innocent III and the Ius commune," in *Grundlagen des Rechts: Festschrift für Peter Landau zum 65. Geburtstag*, ed. Richard Helmholz et al. (Paderborn: Verlag Ferdinand Schöningh, 2000), 349–66. On examples on the use of *necessitas* in early medieval political thought, see, e.g., Sophia Moesch, *Augustine and the Art of Ruling in the Carolingian Imperial Period: Political Discourse in Alcuin of York and Hincmar of Rheims* (London – New York: Routledge, 2020), 188–95.

[5] E.g., Stephan Kuttner, *Kanonistische Schuldlehre von Gratian bis auf die Dekretalien Gregors IX*. (The Vatican City: Biblioteca apostolica Vaticana, 1935), 56–76, 291–98. On the development more generally, see, e.g., Virpi Mäkinen and Heikki Pihlajamäki, "The Individualization of Crime in Medieval Canon Law," *Journal of the History of Ideas*, 65:4 (2004): 525–42. See also Elizabeth Papp Kamali, *Felony and the Criminal Mind in Medieval England* (Cambridge: Cambridge University Press, 2019).

[6] E.g., Couvreur, *Les pauvres*, passim; Brian Tierney, *The Idea of Natural Rights: Studies on Natural Rights, Natural Law and Church Law 1150–1625* (Grand Rapids – Cambridge: William B. Eerdman Publishing Company, 1997), 70–76. For a recent overview, see Marco Bartoli, "Theft in Case of Need: Reflections on the Ethical–Economic Lexicon of the Middle Ages," *Journal for Markets and Ethics/Zeitschrift für Marktwirtschaft und Ethik* 6:1 (2018): 27–38.

Tierney as well as Virpi Mäkinen[7] have investigated necessity as a natural right in several works relating to university discussions in later medieval theology and moral philosophy. These debates on natural law and the right of self-preservation were especially spurred by thirteenth- and fourteenth-century disputes on Franciscan poverty.[8] Poverty and necessity has been another major perspective in Brian Tierney's work on poor law in medieval England.[9]

In medieval European laws, theft was deemed a severe crime meriting fines, mutilation, and hanging.[10] Yet, the literature on medieval legal practice on theft suggests that hunger and need could be taken into account as mitigating circumstances in some individual cases when sentencing thieves.[11] But did the necessity principle have any influence on medieval

[7] Virpi Mäkinen, "Rights and Duties in Late Scholastic Discussion on Extreme Necessity," in *Transformation in Medieval and Early-Modern Rights Discourse*, ed. Petter Korkman and Virpi Mäkinen (Dordrecht: Springer, 2006), esp. 41–58; Virpi Mäkinen, "Self-preservation and Natural Rights in Late Medieval and Early Modern Political Thought," in *The Nature of Rights: Moral and Political Aspects of Rights in the Late Medieval and Early Modern Philosophy*, ed. Virpi Mäkinen (Helsinki: Societas philosophica Fennica, 2010), 93–108. See also Rudolf Weigand, *Die Naturrechtslehre der Legisten und Dekretisten von Irnerius bis Accursius und von Gratian bis Johannes Teutonicus* (Munich: Theologische Fakultät München, 1967); Jason Taliadoros, "Contrasting Approaches among Canon Lawyers on the Twelfth Century Shift from *ius naturale* to Rights," in *The Use of Canon Law in Ecclesiastical Administration, 1000-1234*, ed. Melodie H. Eichbauer and Danica Summerlin (Leiden: Brill, 2019), 89–107.

[8] E.g., Virpi Mäkinen, *Property Rights in the Later Medieval Discussion on Franciscan Poverty* (Leuven: Peeters, 2001), esp. 57–63, 119–23; Joseph Canning, "The Paradox of Franciscan Use of Canon Law in the Fourteenth-Century Poverty Disputes," in *The Franciscan Order in the Medieval English Province and Beyond*, ed. Michael Robson and Patrick Zutshi (Amsterdam: Amsterdam University Press, 2018), 255–70; Tierney, *The Idea*, 74–75, 83–87.

[9] Brian Tierney, *Medieval Poor Law: A Sketch of Canonical Theory and Its Application in England* (Berkeley – Los Angeles: University of California Press, 1959). Also, Christopher Dyer, "Poverty and Its Relief in Late Medieval England," *Past & Present* (2012): 41–78; Elaine Clark, "Institutional and Legal Responses to Begging in Medieval England," *Social Science History* 26:3 (2002): 447–73.

[10] E.g., Leo Leesment, *Die Verbrechen des Diebstahls und des Raubes nach den Rechten Livlands im Mittelalter* (Tartu: Universitas Tartuensis, 1931); Valérie Toureille, *Vol et brigandage au Moyen Âge* (Paris: Presses Universitaires de France, 2006); Trevor Dean, *Crime in Late Medieval Italy* (Cambridge: Cambridge University Press, 2007), 182–99; Ernst Schubert, *Räuber, Henker, arme Sünder: Verbrechen und Strafe in Mittelalter* (Darmstadt: WBG, 2007), esp. 185–204; Richard W. Ireland, "Law in Action, Law in Books: The Practicality of Medieval Theft Law," *Continuity and Change* 17:3 (2002): 309–31; Torsten Wennström, *Tjuvnad och fornæmi: Rättsfilologiska studier i svenska landskapslagar* (Lund: Gleerupska Universitetsbokhandeln, 1936), 263–528; Eva Österberg & Dag Lindström, *Crime and Social Control in Medieval and Early Modern Towns* (Uppsala: Acta Universitatis Upsaliensis, 1988), esp. 42–54, 109–16; Christine Ekholst, *För varje brottsling ett straff: Föreställningar om kön i de svenska medeltidslagarna* (Stockholm: Stockholm University, 2009), esp. 84–126.

[11] E.g., Schubert, *Räuber*, 187–88, 200; Toureille, *Vol*, 202–5; Couvreur, *Les pauvres*, 195–96; Kamali, *Felony*, 66–67.

legislation? Elizabeth A. R. Brown observed that moral norms were not necessarily transformed into law, "interesting and persuasive as they may [have] seem[ed]," but rather inspired no more than "a transient interest in the rulers that heard them."[12] According to Scott G. Swanson, who wrote more specifically on the principle of extreme necessity, there was hardly a "basic moral principle of medieval canon law and theology resisted by the common laws of the various European states." In addition, he denied knowing of cases in which "judges ever considered applying the principle […] in any secular law court in the Middle Ages."[13] On a similar note, Virpi Mäkinen has observed that, even if the necessity excuse became part of the European medieval *ius commune*, "it had hardly any justification in practice, and was thus more an ethical standard invoking moral statements."[14]

Nevertheless, the above-cited section in Norwegian law suggests that certain secular law-givers made the principle more binding than a mere moral guideline. In this article, we scrutinize the norms sanctioning larceny in the Nordic medieval laws—the laws of the kingdoms of Denmark, Sweden and Norway as well as Iceland that was incorporated in the Norwegian Realm in the thirteenth century—mainly focusing on the period of ca. 1100–1350. There are no existing Nordic court records from the period apart from scattered documents. Consequently, no analysis of practice is possible.

This article argues that the canonical discussions of necessity were known in the medieval Nordic Countries and that they influenced sections on theft is certain secular laws. Through

[12] E.g., Elizabeth A. R. Brown, "Taxation and Morality in the Thirteenth and Fourteenth Centuries: Conscience and Political Power and the Kings of France," *French Historical Studies* 8:1 (1973): 9.
[13] Swanson, "The Medieval," 410.
[14] Mäkinen, "Rights and Duties," 40. Cf. Virpi Mäkinen, Jonathan Robinson, and Pamela Slotte, "Introduction: Rights and Justice towards the Margins," in *Rights at the Margins: Historical, Legal and Philosophical Perspectives*, ed. Virpi Mäkinen et al. (Leiden: Brill, 2020), 9: "the principle of extreme necessity […] was, nevertheless, included in several European civil laws up to the Reformation period and even after."

these laws, especially the Norwegian Code of King Magnus Lawmender, they probably also had relevance to legal practice. We have registered that in a Norwegian case in 1651—36 years before the Code of 1274 went out of use in 1687—the theft of a sheep for consumption seems to have been excused because of poverty and hunger,[15] even if this is beyond this article's focus. As our interest is normative, we analyze the laws, their background and possible sources for such norms in the larger framework on the influence of canonical learning on medieval Nordic legislation.

In arguing for such influence, we need to show the possible channels of such influence and identify people who could have transmitted such knowledge. Accordingly, we briefly present our main sources, the medieval Nordic laws we analyze in this article and contextualize the milieu in which the laws were compiled and drafted. We also investigate the contacts of Nordic clerics with major European seats of learning where *necessitas* was discussed. Before analyzing the Nordic laws, we need to understand how extreme necessity was construed, argued, and exemplified in major canonical and theological sources widely known in Europe at the time in order to assess the possible influence. We will present the main arguments and discussions of the canonical principles of extreme necessity and "*Necessitas non habet legem*" in medieval canon law and theology as these were likely conduits in the Nordic Countries.

Then, we move on to analyzing the Nordic medieval laws (ca. 1100–1350). We start with the earlier Norwegian and Icelandic law before moving on to the Norwegian Code of the Realm from 1274. There, we have found the most potent examples of the necessity principle with probable lasting practical relevance. In Sweden and Denmark, only one Swedish law demonstrated ephemeral influence of the canonical *necessitas* principle. Regardless of

[15] The State Archive in Bergen, Bergen, Norway, The Archive of the Nordhordland legal province, Court Records I.A.2 for 1648–51, 82a.

whether the principle was adopted or rejected, our research shows that law-drafters knew about it when formulating sections on theft. Thus, our contribution to research on the *necessitas* principle is to analyze its influence or lack of influence on secular legislation on the outskirts of the medieval Catholic world.

The Intellectual Horizons of Medieval Nordic Laws

The lack of sources makes it impossible to know with certainty when Nordic medieval laws were put into writing. In Iceland, Norway, and Denmark, this probably took place in the twelfth century, while the trend seems to have reached Sweden in the following century. The oldest surviving manuscripts date mainly from the thirteenth and fourteenth centuries. Most of the Nordic laws are regional compilations, since each realm consisted of several provinces with their own laws from different periods. The laws contained different elements: statutes, customs, previous rulings by the public assembly (*thing*) or borrowings from learned law, without there being a clear distinction between them. In Norway and Sweden, national laws for the whole realm gradually replaced the provincial laws: Norwegian Code of King Magnus Lawmender in 1274, also adopted in Iceland with some modifications as *Jónsbók* in 1281, and the mid-fourteenth-century laws of King Magnus Eriksson (r. in Sweden 1319–64, in Norway 1319–55) for towns and the countryside. In Denmark, the three provincial laws remained in force until the seventeenth century.[16]

[16] For a concise English-language overview, see Mia Korpiola, "High and Late Medieval Scandinavia: Codified Vernacular Law and Learned Legal Influences," in *The Oxford Handbook of European Legal History*, ed. Heikki Pihlajamäki, Markus D. Dubber, and Mark Godfrey (Oxford: Oxford University Press, 2018), 379–404, here 381–85; Helle Vogt, *The Function of Kinship in Medieval Nordic Legislation* (Leiden – Boston: Brill, 2010), 37–57.

It is generally accepted that learned law – especially canon law – markedly influenced the Nordic medieval laws but researchers debate the extent of this impact. Family law and procedural law have especially been researched, and our research adds new dimensions to the field.[17] Law-drafters or compilators belonged to the secular and ecclesiastical elite. As clerics were literate, they usually participated in the law-drafting processes. Unfortunately, almost no sources on the medieval law-drafting processes in the Nordic Countries have survived. Neither do we usually know the names of the persons—clerical or secular—involved in the preparation and influencing the content of the laws. Therefore, we will discuss the intellectual horizon of the ruling elites more broadly.

The evidence we have of the education of twelfth-century Danish, Norwegian, and Icelandic clerics is sketchy. We only know of some examples of their connections with the Paris schools and monasteries. Paris was the most popular center of learning for Nordic clerics at the time, and it was famous for its teaching in the arts, theology, and canon law. Archbishop Eskil of Lund (archep. 1137–77) had strong connections to the Parisian schools and

[17] The following represent just a few examples of the historiography on the influence of learned law on Nordic medieval law: L. M. Bååth, *Bidrag till den kanoniska rättens historia i Sverige* (Stockholm; O. L. Svanbäcks boktryckeri 1905); Georg J. V. Ericsson, *Den kanoniska rätten och äldre Västgötalagens kyrkobalk: En jämförande studie* (Stockholm: Institutet för rättshistorisk forskning, 1967); Ole Fenger, *Romerret i Norden* (Copenhagen: Berlingske, 1977); Bertil Nilsson, *De Sepulturis: Gravrätten i Corpus Iuris Canonici och medeltida nordisk lagstiftning* (Uppsala: Almqvist & Wiksell International, 1989); Peter Landau, "The Importance of Classical Canon Law in Scandinavia in the 12th and 13th Centuries," in *How Nordic are the Nordic Medieval Laws?*, ed. Ditlev Tamm and Helle Vogt (Copenhagen: DJØF Publishing 2005), 23–39, Mia Korpiola, "On Ecclesiastical Jurisdiction and the Reception of Canon Law in the Swedish Provincial Laws," in *How Nordic are the Nordic Medieval Laws?*, ed. Ditlev Tamm and Helle Vogt (Copenhagen: DJØF Publishing 2005), 202–31, Mia Korpiola, *Between Betrothal and Bedding: Marriage Formation in Sweden, 1200–1600* (Leiden: Brill, 2009); Vogt, *The Function of Kinship*; Per Andersen, *Legal Procedure and Practice in Medieval Denmark* (Leiden: Brill, 2011); Jørn Øyrehagen Sunde, "Innovative reception," in *Liber Amicorum Ditlev Tamm —Law, History and Culture*, ed. Per Andersen, Pia Letto-Vanamo, Kjell Åke Modéer, and Helle Vogt (Copenhagen: DJØF Publishing 2011), 217–29, Orazio Condorelli, "The Ius Decretalium and the Development of the Law of Succession in Medieval Europe: Some Examples from Denmark and Sweden," in *Succession Law, Practice and Society in Europe Across the Centuries*, ed. Maria Gigliola di Renzo Villata (Cham: Springer 2018), 105–47; Heikki Pihlajamäki, "Summoning to Court: *Ordines Iudiciarii* and Swedish Medieval Legislation," *Scandinavian Journal of History* 45:3 (2020): 1–26.

monasteries.[18] Eskil's successor Absalon (archep. 1177–1201) is believed to have studied either at the monastery of Saint Victor or with the canons of Sainte-Geneviève.[19] Later, he invited the French Augustinian monk William of Æbelholt (ca. 1127–1203) to Denmark, in order to reform Danish monasteries around 1165. William had studied at Saint-Germain-des-Prés before entering the secular canons of the Abbey of Sainte-Geneviève in Paris, The Danish kings entrusted William with several diplomatic missions to the papacy, Venice, and France.[20]

Archbishop Absalon's successor Anders Sunesen (archep. 1201–28) may have first pursued his studies in Paris—possibly also England—and in Bologna, but relatively few hard facts exist. Yet, Parisian influences have been identified in his poetry and influences of the famous canonist Huguccio (d. 1210) in his legal learning. He penned the commentated translation (paraphrase) of the Law of Jutland into Latin.[21] Some Danes may have had a more thorough education in theology and law. The renowned French decretist Stephen of Tournai (1128–1203), known to have discussed necessity in his works, wrote to Archbishop Absalon of Lund apparently around 1185 to laud Absalon's nephew Salomon's scholarly assiduity (*in scholis*

[18] Mia Münster-Swendsen, "History, Politics and Canon Law: The Resignation of Archbishop Eskil of Lund," in *The Use of Canon Law in Ecclesiastical Administration, 1000-1234*, ed. Melodie H. Eichbauer and Danica Summerlin (Leiden: Brill, 2016), 51–54, 57.
[19] Birger Munk Olsen, "Absalons studier i Paris," in *Absalon fædrelandets fader*, ed. Inge Skovgaard-Petersen, Frank Birkebæk and Tom Christensen (Roskilde: Roskilde Museums Forlag, 1960), 57–72.
[20] E.g., Nanna Damsholt, "Abbot William of Æbelholt: A Foreigner in Denmark," in *Medieval Spirituality in Scandinavia and Europe*, ed. Lars Bisgaard et al. (Odense: University Press of Southern Denmark, 2001), 3–19; Anthony Perron, "Fugitives from the Cloister: Law and Order in William of Æbelholt's Denmark," in *Law and Learning in the Middle Ages*: *Proceedings of the Second Carlsberg Academy Conference on Medieval Legal History 2005*, ed. Helle Vogt and Mia Münster-Swendsen (Copenhagen: DJØF Publishing Press, 2006), esp. 123–25.
[21] Aksel E. Christensen, "Sunesen, Anders," in *Dansk Biografisk Leksikon*, 14 (Copenhagen: Gyldendal, 1983), 208–11. See also Per Andersen and Helle Vogt, "Legal Reform Around 1200 in Denmark: Archbishop Absalon (1128–1201) and Anders Sunesen (d. 1228)," in *Law and the Christian Tradition in Scandinavia: The Writings of Great Nordic Jurists*, ed. Kjell Å. Modéer and Helle Vogt (London – New York: Routledge, 2021), 20–21.

assiduus) and to commend him to all.[22] Apparently, Salomon had pursued his studies under Stephen at the Abbey of Sainte-Geneviève. Stephen had become abbot there in 1176, after studying the liberal arts at Orléans and Roman law in Bologna under Bulgarus (b. bef. 1100–d. ca 1167) in the 1150s. Although Stephen embarked on a monastic career, his legal expertise was frequently used in litigation both before and after he became bishop of Tournai in 1192.[23]

In Norway, the first influential archbishop of the diocese of Nidaros, Archbishop Eystein (or Øystein, archep. 1157–88), spent time at St. Victor in 1161. His two successors, Eirik Ivarsson (archep. 1188–1205) and Tore Gudmundsson (archep. 1206–14) had also studied at St. Victor.[24] As a sister of Ernis, abbot at St. Victor 1161–72, had married a Norwegian aristocrat, this personal connection may have contributed to several Norwegian clerics residing there.[25] Early twelfth-century Icelandic bishops had, like their Danish and Norwegian colleagues, studied in Paris.[26] The study connections between Nidaros and the Parisian schools continued to flourish in the late twelfth and thirteenth centuries and, for instance, Bishop Peder of Hamar (ep. 1253–60) studied under Albertus Magnus (ca. 1200–80) at the university in Paris.[27] This suggests Norwegian clerics had access to and knowledge of the latest learned discussions in Paris, where the main canonical sources, the *Liber extra* and Gratian's *Decretum*, were being taught.

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[22] Nr. 88, *Diplomatarium Suecanum*, vol. 1, ed. Johan Gustaf Liljegren (Stockholm: P.A. Norstedt & Söner, 1829), 111–12. For the dating, see The Main Catalogue of Diplomatarium Suecanum (SDHK), SDHK No: 239, Register of Diplomatarium Suecanum, available at https://sok.riksarkivet.se/sdhk (accessed on 9 Sep. 2023).
[23] Kenneth Pennington, "Stephen of Tournai (Étienne de Tournai)," in *Great Christian Jurists in French History*, ed. Olivier Descamps and Rafael Domingo (Cambridge: Cambridge University Press, 2019), 35–51, here 35, 37–42.
[24] Einar Molland, "Om nordmenns studiereiser i middelalderen," in *Streiftog i kirkehistorien* (Oslo: Kirkehistorisk samfunn, 1996), 59–60; Sverre Bagge, "Nordic Students at Foreign Universities," *Scandinavian Journal of History*, 9 (1984): 2–3.
[25] Molland, "Om nordmenns studiereiser," 58.
[26] Bagge, "Nordic Students," 4.
[27] Einar Jenssen, *Prinsesse Kristina – myte og virkelighet* (Tønsberg: Stiftelsen Gamle Tønnsberg, 2012), 25.

By contrast, less is known of the persons and studies of twelfth-century Swedish prelates, partly because of the somewhat later Christianization and a lack of sources. Yet, we have evidence that several Swedes had studied in Paris in the latter half of the thirteenth century. According to Bishop Brynolf of Skara's *vita*, Brynolf (ep. 1278–1317), the offspring of the magnate and provincial judge (*lagman*) Algot Brynolfsson (ca. 1228–98~1302), had studied assiduously in Paris for 18 years.[28] Another Parisian scholar was *magister* Andreas And (d. 1317), dean of the cathedral chapter of Uppsala, who bought a house in Paris to the use of students (*domus Upsaliensis*). The dioceses of Skara and of Linköping had bought houses for their students in the early 1300s. Moreover, 34 Swedes and 9 Danes studied in Paris in 1329.[29] Considering the pre-eminence of Paris as a seat of study for Swedish clerics, some Swedish medieval synodal statutes were unsurprisingly influenced by those of Bishop Eudes (Odo) de Sully of Paris (d. 1208). For example, statutes from Skara during Brynolf's episcopate contain several sections copied almost word for word from the Parisian statutes.[30]

Bolognese sources surviving from the 1280s onward confirm especially the presence of Danes and Swedes in the town, but also of Norwegians, possibly in pursuit of studies at the university there. For example, *legum doctor* Berengarius Lodouixij "de Norvia" was mentioned in 1293 together with several other northerners, while *dominus* Karolus Erlandi (d. 1296), canon of Uppsala, and *magister* Henricus, archdeacon of Lund, were referred to as

[28] *Den helige biskop Brynolfs av Skara levnad jämte hans kanonisationsprocess*, trans. Sven Blomgren (Skara: Föreningen för Västgötalitteratur, 1998), 16; Pernler, "Brynolf;" Tryggve Lundén, "Sankt Brynolf, biskop av Skara, 1: Hans liv och författarskap," *Credo: Katolsk tidskrift*, 26 (1945): esp. 184–85. See also Bertil Nilsson and Stina Fallberg Sundmark, "Swedish Church Law around 1300: Andreas And, Brynolf, and Laurentius Olavi," in *Law and the Christian Tradition in Scandinavia: The Writings of Great Nordic Jurists*, ed. Kjell Å. Modéer and Helle Vogt (London – New York: Routledge, 2021), 34–56.
[29] Herman Schück, "Svenska Pariserstudier under medeltiden," *Kyrkohistorisk årsskrift*, 1 (1900): esp. 44–56.
[30] Jaakko Gummerus, *Beiträge zur Geschichte des Buss- und Beichtwesens in der Schwedischen Kirche des Mittelalters 1* (Helsinki: [Jaakko Gummerus], 1900), 74–76.

Bolognese students (*scolaris bononie*) the same year. Archdeacon Henricus was called *doctor decretorum* in Bologna five years later.[31] This suggests a growing awareness of canon law.

We lack information on the ownership of canonical literature from the period. It is probable that the libraries of the archbishoprics contained the *Decretum Gratiani* and the main decretal collections in the early thirteenth century. The *Decretum* was known in Norway in the 1160s,[32] and extensively quoted in a long Norwegian political text, "The Speech against the Bishops" from ca. 1200.[33] However, some surviving thirteenth-century wills and other sources indicate that those Nordic clerics who had studied abroad also owned at least the basic canonical sources. These included the *Decretum Gratiani* and the *Liber Extra*, sometimes with Ordinary Glosses, other *summae* and commentaries by decretists and decretalists.[34] These learned prelates, belonging to the leading land-owning families, could through their studies and books act as conduits of high medieval intellectual currents and ecclesiastical doctrines. The cathedral cities were important literary centers from which texts and influences radiated to the secular elite—and the compiled laws.[35]

Necessity and theft in medieval canon law and theology

[31] Åke Sällström, *Bologna och Norden, intill Avignonpåvedömets tid*. (Lund: CWK Gleerup, 1957), 151–81, 249.
[32] Gudmund Sandvik, "Norwegian Legal History," in *Stud. Jur. 50 år – Jubileumsskrift*, ed. Tord Eide, Lars Swanstrøm, and Ola Viken (Oslo: Otto Falch, 1986), 171.
[33] Lars Boje Mortensen, "The Nordic Archbishoprics as Literary Centres around 1200," in *Archbishop Absalon of Lund and his World*, ed. Karsten Friis-Jensen and Inge Skovgaard Petersen (Roskilde: Roskilde Museums Forlag, 2000), 142–47.
[34] E.g., Mia Korpiola, "Literary Legacies and Canonical Book Collections: Possession of Canon Law Books in Medieval Sweden," in *Law and Learning in the Middle Ages: Proceedings of the Second Carlsberg Academy Conference on Medieval Legal History 2005*, ed. Helle Vogt and Mia Münster-Swendsen (Copenhagen: DJØF Publishing Press, 2006), 88–101.
[35] Mortensen, "The Nordic," esp. 142–54.

The seventh commandment of the Decalogue, "Thou shalt not steal" (Exodus 20:15) plainly ordered people not to appropriate property belonging to others. Yet, twelfth- and thirteenth-century scholars accepted that things necessary for the preservation of life originated in natural law. Such were the right of self-defense (*vim vi repellere*) and the concept of necessity as its extension. For example, wartime slaying *ex necessitate* was categorized separately from intentional killing, while the right of self-defense can be found in Roman law.[36]

French twelfth-century theologians such as Peter Lombard (ca. 1096–1160) and Peter of Poitiers (ca. 1130–1215) debated whether stealing in order to save one's own life or the life of one's father was sinful. They argued against its sinlessness as they denied that the end justified the means.[37] By contrast, canonists grasped and developed the *necessitas* principle, as observed by Gilles Couvreur and Franck Roumy, who patiently traced the intellectual history of the evolving concept through the Early and High Middle Ages. After some initial hesitation, theologians followed. Subsequently, the maxim was discussed and accepted in several fields of learning in the later twelfth and early thirteenth century: theology, liturgy, moral philosophy, Roman law, and literature.[38] More generally, necessity and contingency were also debated in medieval philosophy.[39]

Citing the Digest, Gratian observed in his authoritative *Decretum* that the right to legitimate self-defense was based on natural law. Commenting on this in his *Summa* (ca. 1160), Stephen

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[36] Franz Josef Schreiber, *Die Beurteilung der Notwehr in der christlichen Literatur zwischen dem 4. und 12. Jh*. (Munich: Diss. jur. Erlangen-Nürnberg, 1966), esp. 134–43, 147; Weigand, *Die Naturrechtslehre*, e.g., 53, 157–58; Kuttner, *Kanonistische Schuldlehre*, 234–74; Moesch, *Augustine and the Art of Ruling*, 188–89; Digesta. 43.16.1.27., ed. Theodorus Mommsen and Paulus Krueger in *Corpus iuris civilis*, 1 (21. ed.) (Dublin – Zurich: Weidmann, 1970), 736.
[37] Couvreur, *Les pauvres*, 29–44.
[38] Roumy, "L'origine," esp. 303–18; Couvreur, *Les pauvres*, passim and 255–84.
[39] Guy Jalbert, *Nécessité et contingence chez saint Thomas d'Aquin et chez ses Prédécesseurs* (Ottawa: Éditions de l'Université d'Ottawa, 1961); Hester Goodenough Gelber, *It Could Have Been Otherwise: Contingency and Necessity in Dominican Theology at Oxford, 1300-1350* (Leiden: Brill, 2004).

of Tournai added that "all legislation and all law permitted one to repel force with force with moderation for one's protection."[40] Other *dicta* in the *Decretum* directly refer to the necessity principle. Discussing sacraments, Gratian observed, building on an apparently well-known maxim, that "as necessity knew no law, it itself could make law."[41] Stephen of Tournai rephrased the necessity principle into "a person in need is not subject to law," while Huguccio added that in these situations, one cannot be called a law-breaker even if one did otherwise than the law commands.[42]

In addition, Gratian mentioned that while natural and divine law considered all things owned jointly (*omnia sunt communia omnibus*), human law (*iure constitutionis*) had created private property rights, the mine and thine.[43] The referred notion of all being common in natural law originated in Roman law.[44] Gratian cited Ambrose (ca. 339–ca. 397) arguing provocatively that it was no less a crime to take from those who owned than not to give superfluous property to help and redeem the poor, to give bread to the starving and clothes to the naked.[45] As larceny was defined as the unauthorized taking of something from an unwilling owner, one

[40] E.g., Gratian, *Decretum*, D. 1 c. 7. The maxim or "proverb" appears to have been well known already in the twelfth century, see Couvreur, *Les pauvres*, 67. Stephen of Tournai, *Die summa über das Decretum Gratiani*, ed. Johann Friedrich von Schulte (Giesen, 1891). Reprint (Aalen: Scientia, 1965), Summa to D. 1 c. 7, 10. On the dating of the *Summa*, see Pennington, "Stephen of Tournai," 41. See also Canning, "The Paradox," 263–64.
[41] Gratian, *Decretum*, C. 1 q. 1 d. p. c. 39: "Quia enim necessitas non habet legem, sed ipsa sibi facit legem, […]."
[42] Stephen of Tournai, *Die summa* to C. 1 q. 1 d. p. c. 39 *necessitas.* Huguccio quoted in Pennington, "Innocent III," 351, fn. 11. Also Tierney, *The Idea*, 71–74, 142–43.
[43] Gratian, *Decretum*, D. 8 c. 1; Kuttner, *Kanonistische Schuldlehre*, 295. For Gratian and the Decretists, see also Weigand, *Die Naturrechtslehre*, 164–66, 193, 307–36, 390–93; Tierney, *Medieval Poor Law*, 28–30. See also Brian Tierney, *Liberty and Law: The Idea of Permissive Natural Law, 1100-1800* (Washington D.C.: The Catholic University of America Press, 2014), 52–55.
[44] Referring to the air, running water (*profluens*), sea and the shore (*litora maris*). Digesta. 1.8.2.1, ed. Mommsen and Krueger in *Corpus iuris civilis*, 1:39; Institutiones. 2.1.1., ed. Paulus Krueger, in *Corpus iuris civilis*, 1 (21. ed.) (Dublin – Zurich: Weidmann, 1970), 10: "Et quidem naturali iure communia sunt omnium haec: [...]." Weigand, *Die Naturrechtslehre*, 85–92. See also Tierney, *Medieval Poor Law*, 32–33. For communality and property in Roman law in the *Lex Rhodia de iactu*, see also Digesta. 14.1, ed. Mommsen and Krueger in *Corpus iuris civilis*, 1:219.
[45] Gratian, *Decretum*, D. 47 c. 8.

could—like Huguccio—solve the dilemma by construing that the needy thought or could think that the owners would have granted them permission to take the needed things.[46]

Nevertheless, Gratian wrote elsewhere that "will, not necessity, makes robbers and thieves." The rubric can be interpreted in many ways—in fact, Stephen of Tournai seemed unsure how to understand the whole. However, the biblical text (Luke 6:1–4; Matthew 12:1–8) that Gratian quoted referred to Christ's disciples who, compelled by hunger, ate ears of grain growing in the field on the Sabbath. Because of this, Christ called them innocent of breaking the law.[47] Therefore, Gratian could be interpreted to mean that people who took what they needed out of necessity were not to be considered actual thieves or robbers. The opinions of early decretists diverged on the sinfulness or sinlessness of theft out of necessity. However, the vast majority came to adopt the latter notions, expressed most thoroughly by Huguccio and Alanus Anglicus (fl. 1190–1215). By the time Raymond of Penyafort (ca. 1175–1275) wrote his *Summa de casibus conscientiae* (1226), the principle of extreme necessity excusing theft had become the *communis opinio* of canonists.[48]

Consequently, the necessity rule was adopted in the *Liber extra*,[49] giving it papal authority and influence throughout Christendom. The source is given as the seventh-century Penitential of Theodore [of Canterbury]. As cited in the *Liber extra*, the text imposed a relatively light three-week penance for persons stealing food, clothes, or a domestic animal out of the necessity of hunger or nudity. In case of a relapse, fasting was not to be imposed. (Indeed,

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[46] Couvreur, *Les pauvres*, 86–91; Kuttner, *Kanonistische Schuldlehre*, 296; Tierney, *The Idea*, 71; Bartoli, "Theft," 36–37.
[47] Gratian, *Decretum*, De con. D. 5 c. 26. Cf. Stephen of Tournai, *Summa* to De con. D. 5 c. 26 *raptorem*, 280; Couvreur, *Les pauvres*, 51–52.
[48] Couvreur, *Les pauvres*, 53–62, 77–106, appendix A, 296; Kuttner, *Kanonistische Schuldlehre*, 296–97; Tierney, *The Idea*, 73.
[49] X 5.18.3.

fasting may have been perceived as a useless form of penance for a sinner already suffering from daily starvation.) Yet, this particular rule seems to be lacking in many versions of the Penitential of Theodore.[50]

Nevertheless, the interpretation in the *Liber extra* went further than the referred penitential authority. The latter refrains from claiming that theft would be completely sinless in case of urgent necessity, but the title of the decretal implies this. It differentiates indirectly between "urgent necessity" and "not very urgent necessity" (*ex necessitate non multum urgente*) as the motivation of the crime. The latter was a lesser sin meriting only light penance.[51] Later, Hostiensis (ca. 1200–71) called the latter "moderate necessity" (*modica necessitas*) that was not completely blameless and consequently required penance.[52] Thus, the *Liber extra* suggested that theft in case of urgent necessity was pardonable and merited no penance.

Writing in the 1220s, the theologian William of Auxerre (ca. 1150–1231) accepted the natural law principle of community of property in case of extreme need as under such conditions, one's neighbor's life and health was to be prioritized over worldly private ownership of goods.[53] Certain canonists took steps even further to suggest that the poor could take recourse to ecclesiastical courts, and the bishop could force the rich to donate some of their wealth to charity under threat of excommunication.[54] The things necessary for subsistence were also determined in the context of ecclesiastical taxation in the *Liber extra*. Based on canon 5 from

[50] See, e.g., Pœnitentiale Theodori, 1:3 (*De Avaritia Furtiva*), *Councils and Ecclesiastical Documents Relating to Great Britain and Ireland, 3*, ed. Arthur West Haddan and William Stubbs (Oxford: Clarendon Press, 1871), 179–80. On necessity and theft in the penitentials, Couvreur, *Les pauvres*, 46–50.
[51] X 5.18.3.
[52] Hostiensis. *Summa aurea*. Venice, 1574, lib. 5, tit. *Quid sit furtum*, 1598.
[53] Couvreur, *Les pauvres*, 224–41; Tierney, *Liberty*, 54–55.
[54] Couvreur, *Les pauvres*, 80–84, 108–15; Tierney, *Medieval Poor Law*, 36–39. On the duty of almsgiving, see also Mäkinen, *Property Rights*, 38–42.

the Third Lateran Council (1179), the decretal permitted moderate taxation, covering the necessities of running the diocese, but no sumptuousness.[55]

As to theft and other crime, how far did the exception of extreme necessity extend? The canonist Huguccio referred to Mosaic law authorizing the picking and eating of grapes in another's vineyard. This he authorized in reference to natural law and the principle of communality in case of need.[56] Geoffrey of Trani (Goffredus Tranensis, ca. 1200–45) discussed this in his *Summa* on the Decretals. He accepted the principle that one could be excused the crime if forced to steal food or clothes in extreme necessity, as everything was common in time of need.[57] Geoffrey excused killing another in self-defense, but he refused to extend the necessity of hunger to starving women committing fornication.[58] Rather, he referred to the Digest and the classical Roman authority of the eminent Ulpian (d. 228) that "a life in utter turpitude was not excused by the pretext of poverty."[59]

In his *Summa aurea*, Hostiensis reiterated the notion that, in situations of great necessity, all was common according to natural law.[60] Necessity authorized primarily the use of

[55] X 3.39.6. See also Brown, "Taxation," 3–8. For "the necessities of life," see canon 5, Concilium Lateranense III (1179) in *Conciliorum oecumenicorum decreta* (3rd ed.), ed. Josepho Alberigo et al. (Bologna: Istituto per le scienze religiose di Bologna, 1973), 214. This canon gave bishops the duty to provide the priests and deacons they ordained with the necessities of life (*necessaria vitae*) until these obtained office in the Church, unless they had personal or inherited property to support them. On the Canons of the III Lateran Council and their dissemination, see Danica Summerlin, *The Canons of the Third Lateran Council of 1179: Their Origins and Reception* (Cambridge: Cambridge University Press, 2019).
[56] Couvreur, *Les pauvres*, 125–27; Tierney, *Liberty*, 32.
[57] Gottofredo da Trani (Goffredus Tranensis), *Summa super titulis Decretalium.* Lyon, 1519. Reprint (Aalen: Scientia Verlag, 1968), 218r. See also more generally, Couvreur, *Les pauvres*, 119–54.
[58] Gottofredo da Trani, *Summa*, 218r–v.
[59] Digesta. 23.2.43.5, ed. Mommsen and Krueger in *Corpus iuris civilis*, 1:332. Accepting these principles and denying the parallel to self-defense, Hostiensis argued further that not even starving women could sinlessly resort to fornication to save their lives. Women sinning voluntarily were not excused, but if they were taken against their will while resisting the use of absolute force, they were blameless. Similarly, persons were blameless if they committed homicide against their will defending themselves and protecting their bodies, Hostiensis. *Summa aurea*, lib. 5, tit. *Quid sit furtum*, col. 1597. On having sex in order to save one's own life or that of others, see also Couvreur, *Les pauvres*, 32, 38, 103.
[60] Hostiensis. *Summa aurea*, lib. 5, tit. *Quid sit furtum*, 1597.

consumables including food and victuals, drink, clothes, and shoes as well as a roof over one's head.[61] In the works of later medieval jurists such as Johannes Andreae (ca. 1270–1348), discussions on necessity were self-evident.[62] According to the scholarly *communis opinio*, once all other reasonable avenues of help had been explored, people were allowed to act to save their lives.[63] The extreme necessity of others could conversely signify a positive duty to act. People were absolutely obliged to help paupers in extreme necessity with all property they themselves did not require for their own survival. This applied equally to doctors and lawyers who were to help gratis the utmost needy.[64] Thus, the necessity principle had become generally accepted in canon law.

In theology, the maxim "*necessitas non habet legem*" came to be adopted in the twelfth-century Ordinary Gloss of the Vulgate Bible that draws from Venerable Bede's formulation: "what is not licit in law necessity makes licit."[65] In addition, Thomas Aquinas's (1225–74) *Summa Theologiae* (1265–74) witnesses how mainstream theology had come to incorporate the principle of *necessitas* and permissibility of larceny in extreme need. Discussing theft and robbery, he asked (art. 7) whether it was licit to steal in case of need.[66] Aquinas presented several points as arguments against such permission: firstly, the ambiguity of the Penitential of Theodore in requiring penance as presented through the *Liber extra*. Secondly, that a thing that was bad in itself could not be rendered good even if it was done for a virtuous end.[67] Thirdly, if it was unlawful to steal to give it as alms as Augustine of Hippo (354–430) had written, the same also applied to stealing for one's personal needs.[68]

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[61] E.g., Mäkinen, *Property Rights*, 60–62.
[62] Robinson, "Poverty," 41–45.
[63] Swanson, "The Medieval," 408.
[64] Swanson, "The Medieval," 408–10.
[65] Roumy, "L'origine," 317.
[66] Thomas Aquinas, *Summa Theologica*, II-II, Q. 66, pr., *Doctoris Angelici divi Thomæ Aquinitatis Opera omnia*, vol. 3, ed. Stanislaus Eduardus Fretté and Paulus Maré (Paris: Ludovicus Vivès, 1872), 544.
[67] Thomas Aquinas, *Summa Theologica*, II-II, Q. 66, pr. art. 7 arg. 2, ed. Fretté and Maré, 544.
[68] Thomas Aquinas, *Summa Theologica*, II-II, Q. 66, pr. art. 7 arg. 3, ed. Fretté and Maré, 544.

Then Thomas moved on to counter these three arguments. He observed that all property, including private possessions, became common in case of need. Property rights were created by human law that was inferior to natural and divine law, which in turn required that any superabundance was to be used for the subsistence of the poor. He cited Gratian on withholding the bread of the hungry and the clothes of the naked.[69] If the necessity was both manifest and urgent, for example, in case of imminent danger that could not be otherwise remedied, it could be relieved by any possible means. One could take property belonging to other persons either secretly or openly. As the intention of stealing or robbing was lacking, the deed could not properly be called larceny.[70] Thus, urgent or extreme necessity (*urgens necessitas*; *necessitatis extremae*) made licit the taking of another person's property for the support of one's own life or that of another.[71]

Bridging canon law, theology, and practical use in his handbook for priests hearing confessions. Raymond of Penyafort accepted that persons stealing food, drink, or clothes because of life-threatening need, hunger, thirst, or cold did not really sin or steal.[72] His authoritative *Summa de poenitentia* (or *Summa casuum* or *de casibus poenitentiae*, 1224–26) cited the Penitential of Theodore and the example of Jesus's disciples in the field as an example that everything had to be common when in need. He also observed that necessity knew no law, but if the need was not big (*magnam necessitatem*), the person sinned but the need attenuated the sin.[73]

[69] Thomas Aquinas, *Summa Theologica*, II-II, Q. 66, pr. art. 7 s.c. and co, ed. Fretté and Maré, 544.
[70] Thomas Aquinas, *Summa Theologica*, II-II, Q. 66, pr. art. 7 co and art. 7 ad 2.h, ed. Fretté and Maré, 544.
[71] Thomas Aquinas, *Summa Theologica*, II-II, Q. 66 art. 7 ad 2 & 3, ed. Fretté and Maré, 544.
[72] 2.6.10, Raymond of Penyafort, *Summa de pœnitentia, Summa S:ti Raymvndi de Peniafort Barcinonensis ord: praedicator: De pœnitentia et matrimonio cvm glossis Ioannis de Fribvrgo* (Rome: Ioannis Tallini, 1603), 224.
[73] 2.6.10, Raymond of Penyafort, *Summa de pœnitentia*, 224–25.

We can find shadowy echoes of discussions relating to the *necessitas* principle also in secular law. Peter of Blois (ca. 1130–ca. 1211) told with indignation about a destitute man, who had stolen something of small value in order to save himself and his starving wife and children. As the man had been taken in the act, the judge had sentenced him to death. Peter criticized this severely.[74] The English *Tractatus de legibus et consuetudine Angliae* or "Bracton" (bef. ca. 1235) mentions the necessity plea, albeit not in the context of excusing theft. However, Britton, the French-language summary of English law (ca. 1290~1329), suggests that the actions of starving burglars stealing victuals worth under twelve pence may have been considered either justified or attenuating. The text mentions minor children, lunatics and other groups "incapable of felony" as comparable with the starving perhaps suggesting that as their actions lacked criminal intent, the persons could not be treated as felons.[75] Alternatively, they received a lesser penalty.

The same notions were reflected in the Romanistic *Summa legum brevis, levis et utilis* of Raymundus Parthenopensis or Neapolitanus (prob. fl. in the fourteenth century) that listed extreme necessity as a circumstance excusing punishment for crime. Raymundus discussed how extreme necessity—hunger or cold—excused theft, provided that only things without which people could not live were purloined. He referred to the oft-mentioned principle that everything was common in case of need when a modicum of food, clothes, or other necessities were required. However, from this followed that only relatively worthless things, such as a tunic or cloak, could be taken. Stealing good clothes or several pieces of clothing in a row, first a tunic, then a cloak, and then furs or a hood, was punishable as theft.[76] This was

[74] Couvreur, *Les pauvres*, 9–11; Bartoli, "Theft," 27–28.
[75] *Britton: An English Translation and Notes*, trans. Francis Morgan Nichols (Washington D.C.: John Byrne & Co., 1901), book 1, ch 11, 16:7, 36, 52; Green, "The Plea of Necessity," 18, 22–24.
[76] *Die Summa legum brevis, levis et utilis des sogenannten Doctor Raymundus von Wiener-Neustadt*, ed. Alexander Gál (Weimar: Hermann Böhlaus Nachfolger, 1926), III.29, 561–62: "Excusatur enim fur a pena furti,

in line with the French lawyer Jehan Boutiller (ca. 1340–95), the author of the *Somme rural* on the customs of Northern France. Necessity was no valid excuse for stealing horses, fine robes, or expensive objects as theft of such items was a hanging offence.[77]

During the High Middle Ages, the notions of necessity were first accepted in canon law, then theology. As mentioned above, it has been suggested by Brown, Swanson, and Mäkinen that the principle of extreme necessity barely played a role in society beyond being a moral standard. However, it got practical relevance through penitential manuals and some legal commentaries in later medieval Europe. However, hitherto it has been unclear to what extent the discussions and arguments of the canonists were reflected in Nordic medieval law. This will be analyzed next.

Extreme necessity in Norwegian and Icelandic medieval law prior to 1274

Necessity as a concept appeared in Norwegian law already before the Code of 1274. Norway consisted of four legal provinces, each with a public assembly and a provincial law. There are two surviving provincial laws, the Older Gulathing Law and the Frostathing Law. Both manuscripts date approximately from 1260, while the content is of various age. The Younger Gulathing Law from 1267 is lost together with all other Norwegian provincial law

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si pro necessitate extrema, id est famis vel frigoris, furatur cibum aut vestem aut alia necessaria in parva quantitate, quia in necessitate extrema omnia sunt communia. Et dico in parva quantitate, sicut [the parallel German version ads "grapes" here: "ein Weintraub"] unam vilem rem, antiquam tunicam aut vile pallium et similia. Et hec racio, quia si hodie furaretur tunicam, eras pallium, post cras pellicium vel capucium cel bonum vestimentum, iste esset puniendus. Extrema enim necessitas est, sine qua homo vivere non potest, ut est victus et vestitus aut amictus."; Pichler, *Necessitas*, 125–26.

[77] Toureille, *Crime*, 291; Toureille, *Vol*, 204. On the *Somme rural*, see Georges Martyn, "Somme rural," in *The Formation and Transmission of Western Legal Culture: 150 Books that Made the Law in the Age of Printing*, ed. Serge Dauchy et al. (Cham: Springer, 2016), 47–49.

manuscripts. In both provincial laws, necessity was applied in many of the same contexts as they came to be found later, in 1274, only to a lesser extent.[78] They do not link hunger and unemployment to necessity. Yet, they otherwise contain roughly the same definition of necessity as illness or injury as we find later in the Code of 1274:[79] "it is a legitimate necessity for the person who is to pay if they are ill or injured, or some other necessities come up which good people testify that these prevented them from coming on the appointed payment day."

The Frostathing Law incorporated parts of a decree by Pope Alexander III (r. 1159–81). The decree permitted the inhabitants of the archdiocese of Nidaros (present-day Trondheim) to fish for herring even on holidays, except during the most prominent feasts like Christmas and Easter.[80] However, the Frostathing Law allowed the starving and the poor (the poor defined as families with no more than a cow and a calf) to fish for consumption even during these major feasts.[81] Such a dispensation from the Church's own regulation is something very different from exemption from punishment for theft, but is still based on the same *necessitas non habet legem* logic.

[78] Bo Alexander Granbo, Nauðsyn *i Magnus Lagabøters Landslov. En studie av rimelighet som rettferdighetsideal i 1200-tallets rettskultur* (Oslo: LL.M. Thesis in Law, University of Oslo, 2019), 1, fn. 6; Ebbe Hertzberg, "Glossarium," in *Norges gamle Love indtil 1387* [hereafter *NGL*], 1, ed. Rudolf Keyser et al. (Christiania: Chr. Gröndahl, 1846–95), 5:465–66 (*nauðsyn*, *nauðsynja*, *nauðsynjaát*, *nauðsynjalauss***,** *nauðsynjalaust*).
[79] The Older Gulathing Law [hereafter G] will be referred to through *The Older Gulathing Law*, ed. and trans. Erik Simensen (London – New York: Routledge, 2021), here ch. 32, 39, while The Frostathing Law [hereafter F] will be cited through *The earliest Norwegian laws, being the Gulathing Law* and *the Frostathing Law*, trans. Laurence M. *Larson* (New York: Columbia University Press, 1935), III-12, 250. Cf. quotation from Code of 1274 I-8, translation by Jóhanna Katrín Friðriksdóttir (forthcoming as *Magnus the Lawmender's National Laws* [Abingdon: Routledge]).
[80] F II-26, trans. Larson, 236–37.
[81] F II-27, trans. Larson, 237.

The Frostathing Law penalized all theft harshly, including theft of food. Theft of milk from cows out on the fields, vegetables, or hay were all punished with loss of legal protection,[82] a kind of outlawry, meaning that thieves had no right for compensation if beaten and all they possessed and wore could freely be confiscated.[83] Theft of an animal for food (dogs excepted), sheaves, or victuals from a storage shelter were punished with death if the value of the stolen goods exceeded 1/3 ounce of silver.[84] If the stolen food was worth less, the thief was to be turfed, running between two rows of people throwing turf. The thief was from that moment on without legal protection (*eigi engan rétt á sér síðan*), as the case with theft of milk, vegetables, and hay.[85]

Theft of food was less regulated in the Older Gulathing Law, which only imposed outlawry on those who stole animals for food. Apart from this, the Law also stated that theft of items worth less than one ounce silver was punished with turfing, with stoning as an alternative, after the same procedure as in the Frostathing Law. If the value exceeded one ounce, the penalty was outlawry.[86] Therefore, stealing an animal for food was always treated as the most punishable of thefts.

Unlike the Frostathing Law, the Older Gulathing Law contains a specific rule on former slaves starving. Directly unrelated to theft of food, it still displays the sentiment towards starvation and charity before the Code of 1274. If a former slave and his family were starving, they lacked the right to beg for food from his previous owner and descendants. However, if they disobeyed, they became "grave men": the previous owner or descendants were to dig a

[82] F XIV-13–15, trans. Larson, 398.
[83] F XIV-14, trans. Larson, 398.
[84] F XIV-12, trans. Larson, 397–98.
[85] *NGL*, ed. Keyser et al., 1:253.
[86] G, ch. 253, ed. and trans. Simensen, 177–78.

grave in the churchyard, put the family in, and feed the longest survivor.[87] The law presented an alternative: to take the family in and make them debt slaves.[88] This meant that they had to work for food and lodging. Debt slaves could be driven to work by beating,[89] which explained the later rule in the Code of 1274 that beggars put to work enjoyed no legal security.

The general sentiment towards theft of food and a duty to charity that we find in the Older Gulathing Law and the Frostathing Law can also be found in Icelandic law prior to 1270.[90] All considered theft of food harshly punishable. The first surviving Icelandic compilation of law is *Grágás* (Grey Goose), supposedly revised and enacted in 1118, the *Codex Regius* (*Konungsbók*) declared: "It is possible to summon to full outlawry for theft of food, however much or little the quantity, whenever a man steals anything edible or freshly slaughtered."[91]

Iceland accepted the Norwegian king as their ruler in 1262–64. A new law reform in Iceland followed quickly, and in 1271, a law code called *Járnsiða* (Iron Side) was introduced. Replacing the *Járnsiða*, the new code of law known as *Jónsbók* was introduced in 1281.[92] Both laws contain the same rule as in the beginning of this article, based on the *necessitas* principle and operating with permissibility of larceny in extreme need.[93] Since *Járnsiða* is regarded to be a product of the legislative process that started with the issuing of a new law for Gulathing in 1267, it is highly plausible that the *necessitas* principle was introduced in

[87] G, ch. 3, ed. and trans. Simensen, 98.
[88] G, ch. 298, ed. and trans. Simensen, 199–201.
[89] G, ch. 71, ed. and trans. Simensen, 101–3.
[90] Andrew Dennis, Peter Foote, and Richard Perkins, "Introduction," in *Law of Early Iceland: Grágás: The Codex Regius of Grágás with material from other manuscripts*, 1, ed. Andrew Dennis, Peter Foote, and Richard Perkins (Winnipeg: University of Manitoba Press, 1980), 1.
[91] Andrew Dennis, Peter Foote, and Richard Perkins (ed.), *Law of Early Iceland: Grágás: The Codex Regius of Grágás with material from other manuscripts*, 2 (Winnipeg: University of Manitoba Press, 1980), ch. 228, 179.
[92] Jørn Øyrehagen Sunde, "Daughters of God and counsellors of the judges of men: a study in changes in the legal culture in the Norwegian realm in the High Middle Ages," in *New Approaches to Early Law in Scandinavia*, ed. Stefan Brink and Lisa Collinson (Brepols: Turnhout, 2014), 137–41.
[93] *Jarnsiða*, chapter 131, in *NGL*, ed. Keyser et al., 1:298; *Jónsbók* IX-1; *Jónsbók: The Laws of Later Iceland*, ed. Jana K. Schulman (Saarbrücken: AQ-Verlag, 2010), 331.

Norwegian law before the summer of 1267. Since this rule was not included in the criminal law reformed in 1261, we suggest that the principle and permissibility of larceny in extreme need in Norwegian law date to the period 1263–67 when the Younger Gulathing Law was prepared. For Icelandic law, the reform of Magnus Lawmender regarding necessity and theft was just as radical as for his Norwegian realm.

Theft and necessity in the Norwegian Code of 1274

We have argued so far that roughly when Thomas Aquinas was writing his *Summa Theologiae*, the idea of extreme necessity and licit larceny was adopted in Norwegian law during the reign of King Magnus Lawmender in 1263–80. We know little of King Magnus's early life, except that he received teaching at the Franciscan monastery in Bergen.[94] He apparently kept close ties with the Franciscans. He chose their Church of St. Olaf as his final resting place—breaking with the tradition of Norwegian kings. The Church of St. Olaf was one of the beneficiaries in his testament. All the poor of Norway also benefitted from King Magnus's will: all of Norway's approximately 50 administrative units received a sum of money according to their size to be distributed among the poor.[95]

In the Code of 1274, the moral concerns for the starving poor became law. The Code consists of nine books, a tenth containing additions. Norms on theft were included in its ninth book and, as first quoted in the introduction of this article, it starts with the most fundamental rule on theft (IX-1) categorically forbidding stealing. What follows forms an important exception

[94] *The Chronicle of Lanercost, 1272-1346*, ed. Herbert Maxwell (Glasgow: James Maclehose and Sons, 1913), 21–22.
[95] *Diplomatarium Norvegicum*, ed. Christian A. Lange and Carl A. Unger, 4 (Christiania: Malling, 1857), nr. 3.

to the main rule: "[…] if someone steals food who is unable to get work to support themselves, and so, on account of hunger, saves their life, that theft is by no means worthy of punishment."[96] Hungry unemployed thieves were not free to steal—theft was still a crime and a sin. However, they could not be punished for theft, since they were in a situation of extreme necessity. Even if the term necessity was not used here, it was well known and applied in 38 instances in the Code, when exceptions were made to a main rule.[97] Examples of this include when men attended military musters, when persons had caused someone's death, or persons failed to claim their inheritance within the time limit.[98]

Why did the law not stress that necessity made theft unpunishable, when the mechanism of exceptions from the main rules was known to the drafters of the Code of 1274? One possible reason might be the gravity of theft. It was a shameful deed as demonstrated by it being the only crime, in addition to stabbing,[99] that the Code sanctioned with corporal punishment. A reference to necessity might not have been sufficient to justify the exception of punishment in such a shameful crime. In addition, the *King's Mirror* (ca. 1260) treats theft repeatedly on a par with murder and robbery.[100] Another possible explanation is that illness or injury constituted necessity in the Code,[101] as we have seen was the case in the *Liber extra*, while the necessity concerning theft was hunger and unemployment. It is impossible to know if the Code could have adopted such a systematic approach. However, it is not unthinkable.

[96] Code of 1274 IX-1, trans. Jóhanna Katrín Friðriksdóttir (forthcoming).
[97] Bo Alexander Granbo, "*Nauðsyn* i Magnus Lagabøters Landslov," in *Lov og lovgivning i middelalderen: Nye studier av Magnus Lagabøtes landslov*, ed. Anna Catharina Horn and Karen Arup Seip (Oslo: Nasjonalbiblioteket, 2020), 138–50.
[98] Code of 1274 III-8, IV-14 and V-12. See Granbo, "*Nauðsyn*," 142, 144–45 and 148.
[99] Code of 1274 IV-14.
[100] *Kongespeilet*, ed. Anton Wilhelm Brøgger (Oslo: Den norske bokklubben, 2000), 101, 104, 166 and 194.
[101] Code of 1274 I-8.

In another case, larceny was also excusable because of starvation and unemployment. Book seven on natural resources in the Code contains a rule on the theft of herring:

Now, people take herring from other people's nets and they are not beggars or their servants, and this is confirmed with witness testimonies, then the owners of the nets are to receive all the herring that the other person had moved on land, and that they scooped out without permission.[102]

Thus, beggars could take herring from other people's nets without legal penalties. This would be a typical theft by the hungry in a part of Europe where fish in general, and herring specifically, belonged to the staple diet. Grain harvests were always precarious this far north which made theft of grain more problematic than the theft of fish. Again, this paragraph appears as a specified rule that support the more general main rule (IX-1). The same does a norm defining the legal protection of beggars:

Every person of age who goes between houses and receives alms has no right to personal compensation while they go with a beggar's staff—even though they are forcefully driven away—and they are healthy and fit to work, unless they ask for work with board and lodging and are refused.[103]

Beggars fit to work enjoyed no legal protection, even if beaten and driven away, unless they asked for work. By contrast, the rule implies that beggars unfit for work could not be so mistreated but had a right to receive alms. Thus, beggars, who could take herring or other food without being punished, were to be unfit for work.

[102] Code of 1274 VII-51, trans. Jóhanna Katrín Friðriksdóttir (forthcoming).
[103] Code of 1274 IV-20, trans. Jóhanna Katrín Friðriksdóttir (forthcoming).

These two rules operated independently of each other in different parts of the Code of 1274, but were closely related by suggesting that starvation and poverty due to lack of work created exceptions from sanctions. We see that also other rules on larceny, such as theft of seed grain, are based on the same ideas.[104] If harvest failed and there was not enough seed grain in a locality, while others had more grain than they needed, they were obliged to sell their surplus of seed grain and flour for the market price.[105] The law called this situation *stornavðsyníum*, "large necessity," probably the Old Norse translation of extreme necessity.[106] It resembles the *magnam necessitatem* making all goods common, the idea that we have seen promoted by canonists and theologians such as Geoffrey of Trani, Raymond of Penyafort and Thomas Aquinas.

According to the Code of 1274, if owners failed to sell their surplus, the king's sergeant was to confiscate and divide it among the needy. In case the door was locked, and the king's sergeant failed to assist those in need, these were authorized to break the door and take what they needed. If the surplus grain was defended with armed force, the defenders lost their rights to compensation for any received injuries. If the defenders of the grain died, the king had the power to decide the consequences.[107] This rule has no precursor in the Frostathing nor the Older Gulathing Law, and is not found in *Járnsiða*. This is a strong indication that the idea was introduced in Norwegian law from learned law between the issuing of the Icelandic lawbook in 1271 and the Code of 1274. It can also be noted that *Hænsa-Þóris saga* (The saga of Tore the Chicken) seem to be written to explain this new idea of community of property in

[104] Code of 1274 VII-13.
[105] *MLL*, ed. Rindal and Spørck, 642–43.
[106] In nine of 41 surviving manuscripts of the Code of 1274, the term *naudsynium*, necessity, is applied instead of *stornavðsyníum*; *MLL*, ed. Rindal and Spørck, 642, fn. 1115.
[107] Code of 1274 VII-12.

case of extreme need, that was introduced in Iceland with *Jónsbók* in 1281, to wider audience.[108]

Later, a rule on the return of cattle (VII-12) in the Code of 1274 was based on the same *necessitas* logic. According to the general rule, cattle that broke through fences and damaged neighbor's fields could be kept in custody by the injured neighbor. However, the neighbor had to return the cattle if sureties guaranteed the eventual payment. If the injured party still failed to return the cattle, causing the owner and his family to face hunger, the king's sergeant was to muster all the local men and reclaim the cattle by force. If anyone who opposed the cattle's release was killed or injured, their families forfeited the right to compensation. In this case, the Code does not apply the term necessity, but again we see poverty and hunger justifying radical action. Although poverty was not explicitly mentioned here, it was implied through the owner's inability to pay for the damage and starvation if the animals were not returned. In four of the 41 surviving manuscripts of the Code, the rule was explicitly said to deal with a poor (*fætakr*) person's cattle.[109] As with the seed grain and hunger, this rule justified the use of force with killing as a possible outcome in extreme cases, but presupposed the participation of the king's sergeant, meaning that such action was officially authorized.

Summing up, the Norwegian Code of 1274 did not penalize the hungry and unemployed poor for stealing food to save their lives, thereby demonstrating the influence of the principle of extreme necessity. Unlike its predecessors, the Code recurrently uses the Old Norse words for necessity, repeatedly linking hunger and extreme necessity in discussing exceptions to theft. In addition to great or extreme necessity, the notion of everything being common in the time

[108] Johanne Fjesme Nakrem, "Hønse-Tores oppgjør med ny rett: En juridisk lesing av *Hænsa-Þóris saga*," in *Lov og lovgivning i middelalderen: Nye studier av Magnus Lagabøtes landslov*, ed. Anna Catharina Horn and Karen Arup Seip (Oslo: Nasjonalbiblioteket, 2020), 324–32.
[109] *MLL*, ed. Rindal and Spørck, 717, fn. 3319.

of crop failure and famine suggest influences of learned doctrines on Norwegian and Icelandic law. The adoption of the *necessitas* principle changed considerably the norms regulating theft in Norway and Iceland.

Necessitas and theft in Swedish and Danish medieval law

Four of the eight existing Swedish provincial laws, largely surviving in manuscripts dated ca. 1280–1350, contain a special chapter on theft.[110] The other four provincial laws incorporated the norms on theft in chapters with a more mixed content.[111] King Magnus Eriksson's Law of the Realm (ca. 1348~50) included a special chapter on theft. These chapters, like book nine in the Code of 1274, discuss larceny and its punishments, the procedure for searching a house for stolen goods, stealing special types of property, finding property, as well as lawful purchase.

Swedish laws graded sanctions depending on the value of property as was typical of medieval law on theft in Europe. Field theft—stealing growing produce from fields, gardens, and orchards—was separately penalized in most laws. Swedish provincial laws held in unison that picking heads of grain in fields was a serious offence as in the Frostathing Law. Some laws used a special word, *agnabak* (*agnæ bakær*), for grain thieves.[112] Growing crops were

[110] There are two versions (the Older and Younger) of the Law of Västgötaland, the Law of Dalarna, and the Law of Södermanland.
[111] The Laws of Uppland, Hälsingland, and Västmanland included norms on larceny in the Chapter on Personal Peace (*Manhælghis balkær*, hereafter M), while the Law of Östgötaland (East Gothia) had them in the Chapter on Accidental Killing and Wounding (Vådamålsbalken).
[112] E.g., M 49, Codex Iuris Uplandici, *Corpus iuris Sueo-Gotorum antiqui* [hereafter *CISGA*], vol. 1–13, ed. H. S. Collin and C. J. Schlyter (Stockholm – Lund, Z. Haeggström and C. W. K. Gleerup, 1827–77), 3:174; 58, Þiufua bolker [Chapter on Theft, hereafter Þ], Juris Vestrogotici codex recentior [hereafter VgL II] in *CISGA*, ed. Collin and Schlyter, 1:176–77: Ragnar Hemmer, *Studier rörande straffutmätningen i medeltida svenska rätt*

vulnerable to theft as they could not be protected under lock and key. Stealing from a field was punishable regardless of whether the field had already been harvested or not—in the former case the fine could be smaller.[113] Thus, medieval canonists and theologians may have cited Jesus's disciples as an example of the hunger and necessity rule, but it was emphatically repudiated in Nordic medieval law.

Instead, discussing paupers stealing food, the Younger Law of Västgötaland (West Gothia) contains an equivalent to the *necessitas* and theft section in the Norwegian 1274 Code. According to the section, if a poor man stole a loaf of bread or a full meal, he would not be punished. However, the law stipulated he had to be a "true eleemosynary man," living on alms and unable to work for a living. In addition, stealing food could only take place three times. After that, thieves would be considered pilferers and punished with fustigation and amputation of ears.[114] Thus, the Law impeded abuse of the exception of extreme need, preventing beggars from becoming customary thieves.

Concerns of recidivism were shared by certain French mid-thirteenth-century customary laws. The customs of Orléans were ready to show some clemency to pilferers: if they were taken for petty theft (*petit larrecin*) and apparently motivated by poverty, they were only to be exiled from town. However, this was only possible if the thief had "neither been mutilated nor

(Helsingfors: Mercators Tryckeri, 1928), 162–64, 172–73; Wennström. *Tjuvnad*, 37–40. For field theft in other European laws, e.g., Leesment, *Die Verbrechen*, 20, 36–50; Dean, *Crime in Late Medieval Italy*, 182, 186.

[113] *Bygninga Balker* [hereafter B, Chapter on Buildings] 5, Codex Iuris Sudermannici, *CISCA*, ed. Collin and Schlyter, 4:89.

[114] 14, Þiufua bolker [Chapter on Theft, hereafter Þ], Juris Vestrogotici codex recentior [hereafter VgL II] in *CISGA*, ed. Collin and Schlyter, 1:164–65: "Stiæl fatöker maþer leef æller fullan mals mat. þen rætter almoso maþer ær. ok eig orkær at æruoþæ sik til föþo. væri saklöst. stiæl eig optære sva æn þrim sinnum at sak löso. stiæl han optare. væri huin ok miste huþ ok ören." Cf. Ekholst, *För varje brottsling*, 90. She has interpreted the text to mean fruit and vegetables. On the words *huinzku*, *huinzkæ* and *huin* for pilfering, see Wennström, *Tjuvnad*, 17–19. The Laws of Västgötaland have been translated and introduced into English by Thomas Lindkvist as *The Västgöta Laws* (Abingdon: Routledge, 2021).

banned"—probably meaning that habitual thieves and other criminals forfeited the right to use this excuse. Certain other *coutumiers* considered necessity an extenuating circumstance meriting lenience for first-timers while recidivists could expect hanging.[115] According to Parisian fourteenth-century practice, beggars stealing bread were reputedly searched. If they possessed enough money to buy the stolen bread, the noose awaited them, but had they no money, they went unpunished.[116]

Some manuscripts of the Law of Västgötaland had rubricated the section: "If a 'stave man' steals" equaling them with "eleemosynary men."[117] "Stave men" (*stafkarl*), wandering beggars, were also mentioned in several provincial laws, including both Laws of Västgötaland, in the context of what priests received for their burial—their staves and pouches as they had practically nothing else.[118] Thus, the Younger Law of Västgötaland differentiated between the deserving poor, beggars unable to work and living on alms, and underserving vagabonds (*nokkædrumber*; *ældræ*) who did not pay taxes or rent and refused to take service. The former could merit compassion if starving, while anybody could whip the latter with impunity just for being beggarly vagrants.[119]

No other Swedish provincial law contains a similar norm clearly connecting stealing food and poverty. Moreover, when the law commission created what became King Magnus Eriksson's

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[115] Toureille, *Crime*, 290–91; Toureille, *Vol*, 204.
[116] Green, "The Plea of Necessity," 22.
[117] VgL II, in *CISGA*, ed. Collin and Schlyter, 1:160: "Vm stafkarl stiæl."
[118] Kirkiu Bolkær [Chapter on the Church, hereafter Kk] 15 §2, Juris Vestrogotici codex antiquior [hereafter VgLI], in *CISGA*, ed. Collin and Schlyter, 1:8; Kk 33, VgL II, in *CISGA*, ed. Collin and Schlyter, 1:92; Kristnu balkær 12, Codex Iuris Ostrogothici, in *CISGA*, ed. Collin and Schlyter, 2:11.
[119] Vt giærþæ bolker [Chapter on Unfenced Land] 29, VgL II, in *CISGA*, ed. Collin and Schlyter, 1:221–22. Vagrancy had associations with criminality, especially theft and robbery, in medieval Europe, and vagrancy also became criminalized in itself in many late-medieval European regions such as Poland, Castile, France and Italy, e.g., Trevor Dean, *Crime in Medieval Europe, 1200–1550* (Longman: Harlow, 2001), 48–52, 62.

law for the countryside in the 1340s, this section of deserving hungry paupers stealing a small amount of food with impunity was omitted.[120]

Generally, Swedish medieval laws do not link extreme need such as poverty to cases of field theft.[121] Nevertheless, the Law of Dalarna contains an oblique reference to need when allowing travelers with exhausted (*þröttan*) horses arriving at another person's hay barn to help himself to fodder. If they took only as much hay as the horses ate, they escaped fines. However, if thieves broke into the barn "without necessity" (*at oþrængdo mali*) and took more hay, or transported it away on pack animals or carts, they were fined.[122] Even if need was mentioned here, the section can be interpreted as a means of providing travelers with some horse fodder especially outside the months when grazing was possible. Instead of finding a clear parallel in the *necessitas* principle, it may also have been inspired by the vicissitudes of traveling in less populous parts of the country with long distances between villages and without taverns.

Yet, medieval Swedish laws contained other examples of *necessitas*. For example, the Chapter on Land of the Younger Law of Västgötaland forbade women from selling land unless "she was forced to do it through hunger, lack of clothing or other dire necessity." The following section mentions the same compulsion, a need to obtain food or clothes, authorizing the sale of land of both men and women.[123] The reference to food and clothing implies a link to the necessity principle. The concept of necessity was also referred to in special

[120] Þ, Codex Iuris communis Sueciae Magnæanus [hereafter MEL], *CISGA*, ed. Collin and Schlyter, 10: 342–71. The same applies to King Christopher of Bavaria's Law of 1442.
[121] The example from the Law of Södermanland, mentioned in Mäkinen, Robinson, and Slotte ("Introduction," 9), does not actually refer to need and the section in the Law is misquoted there.
[122] Þ 14, Iuris Vestmannici codex antiquior, *CISGA*, ed. Collin and Schlyter, 5:57.
[123] 5–6 Iorþæ balkær [Chapter on Land], VgL II, in *CISGA*, ed. Collin and Schlyter, 1:181: "[5…] vtan henni vræki hunger til æller klæþe lösæ æller annur þrang. [... 6] Þaf maþer æller kona siælia iorþ sina til föþo æller klæþe lösæ æller annur þrang." For similar notions in German laws, see Pichler, *Necessitas*, 131–32.

circumstances (*þrang*; *þranglöso*) that could prevent people from harvesting before Michelmas.[124]

As for Denmark, the only law referring to necessity was an addition from 1241 to King Valdemar's law for Zealand. It contains a lengthy rule on theft. The main principle is that thieves could not be tied and brought to the public assembly unless the stolen good was worth five pence. Grain thieves (*agnbak*) formed an exception. They could be tied even if they stole only half a bushel of grain.[125] This indicates severity towards grain thieves. After long discussions on several aspects of theft such as procedure for searching for stolen goods, the chapter ends with the following reflection:

But if any man steals food for himself or his wife in a year of hunger because he cannot feed them otherwise, then he is harsh, both before God and before men, who lets him hang or causes him great suffering when it was done out of hunger's need.[126]

Thus, hanging a starving thief for stealing food was considered harsh, but not forbidden. Apparently, the principle of extreme necessity was not unknown in Danish law, but only considered an attenuating circumstance applicable at the judges' discretion.

As the necessity exception in the case of theft only appears in Sweden in this clear-cut form in the Younger Law of Västgötaland, this begs an explanation. The Older Law, dated to the first half of the thirteenth century, does not contain a similar section. Thus, it was only introduced

[124] 13:3 B, MEL, *CISGA*, ed. Collin and Schlyter, 10:146.
[125] King Valdemar's law for Zealand, ch. 87, in *The Danish Medieval Laws: The Laws of Scania, Zealand and Jutland*, ed. Ditlev Tamm and Helle Vogt (London – New York: Routledge, 2016), 149.
[126] King Valdemar's law for Zealand, ch. 87, in *The Danish Medieval Laws*, ed. Tamm and Vogt, 152.

in the Younger Law, traditionally dated to the 1290s.[127] Even if a later, post-1315 dating has been proposed,[128] the norm is clearly later than the Norwegian Code of 1274. We suggest the Younger Law of Västgötaland may have been influenced by the Norwegian Code. Alternatively, close ecclesiastical and social contacts between the diocese of Skara (Sweden) and the archdiocese of Nidaros (Norway) may have inspired similar legislation, including the sections of necessity and theft. Västgötaland shared a long border with Norway, and it its provincial law has similarities with Norwegian laws.

The similarities may also derive from the close links between Västgötaland's ecclesiastical and secular magnates and Norway. When Archbishop Jon (Johannes) Raude (archep. 1267–82) of Nidaros fell afoul of first King Magnus and then of Norwegian secular magnates on ecclesiastical privileges, he was outlawed. However, he found refuge in Skara in the autumn of 1282. There he probably resided with Bishop Brynolf of Skara for some months until he died in December 1282. Later, Brynolf's father and several brothers came to reside in Norway in and after 1288.[129]

We know nothing about the person(s) behind the updating of the Law of Västgötaland. While Bishop Brynolf is known to have issued synodal statutes for his diocese, it has been suggested he also played an active role in the revision of the secular law in the province.[130] However, the existing sources remain silent. Nevertheless, it is worth observing that the most obvious examples of the adoption of the *necessitas* principle in the medieval Nordic Countries can be

[127] On the dating, see, H. S. Collin and C. J. Schlyter, "Praefatio," *CISGA*, ed. Collin and Schlyter, 1:ii–iii, xviii; Åke Holmbäck and Elias Wessén, "Inledning," in *Svenska Landskapslagar*, vol. 5, ed. and trans. Åke Holmbäck and Elias Wessén (Stockholm: Awe/Gebers, 1946), xiii. See also Thomas Lindkvist, "Introduction," in *The Västgöta Laws*, trans. and ed. Thomas Lindkvist (Abingdon: Routledge, 2021), 4–5.
[128] Göran B. Nilsson, *Nytt ljus över Yngre Västgötalagen: Den bestickande teorin om en medeltida lagstiftningsprocess* (Stockholm: Institutet för rättshistorisk forskning, 2012), esp. 179.
[129] Pernler, "Brynolf," 93, 98.
[130] Nilsson, *Nytt ljus*, esp. 72–88, 98–99, 188–90.

found in pieces of legislation reputedly influenced by persons with known ties (in the case of King Magnus, as discussed above) or alleged ties (Brynolf) with the Franciscans. As mentioned above, disputes about Franciscan poverty and the right of self-preservation fueled thirteenth-century scholarly discussions on the *necessitas* principle.

Researchers have disputed whether or not the Franciscans, whose convent had been established in Skara in 1259, influenced Brynolf. Sven-Erik Pernler dismissed the notion of clear influences as "unfounded in the source material."[131] However, the Skara Franciscans were actively involved in Bishop Brynolf's canonization process by collecting miraculous stories and preserving the tradition.[132] Consequently, direct Franciscan influence on theft legislation through connections with key persons linked to the laws seems merely circumstantial. The Danish laws were largely compiled prior to the country's first Franciscan monastery (1232) even if the Danish kings patronized them in the second half of the thirteenth century. Several Swedish kings favored the Franciscans during the same period, and the Franciscan convent church in Stockholm became the royal burial place in the later Middle Ages.[133] Yet, the link between *necessitas* and theft in Danish and Swedish law is slight. Thus, Franciscan influences alone cannot sufficiently explain the adoption of the *necessitas* rule in certain laws.

Conclusion

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[131] Sven-Erik Pernler, "Brynolf Algotsson, lagmanssonen som blev biskop," in *Brynolf Algotsson—scenen, mannen, rollen,* ed. Karl-Erik Tysk (Skara: Viktoria Bokförlag, 1995), 98–99; Henrik Roelwink, *Riddarholmens kyrka och kloster: Varför är Sveriges kungar begravda hos fransiskanerna?* (Stockholm: Veritas Förlag/Stockholmia Förlag, 2008), 16, 38.

[132] Anders Fröjmark, "Biskop Brynolfs kanonisationsprocess," in *Brynolf Algotsson—scenen, mannen, rollen,* ed. Karl-Erik Tysk (Skara: Viktoria Bokförlag, 1995), 139, 143.

[133] Jarl Gallén, *Det "Danska itinerariet": Franciskansk expansionsstrategi i Östersjön,* ed. John Lind (Helsinki: Svenska litteratursällskapet i Finland, 1993), 34–40; Roelwink, *Riddarholmens kyrka*, 13–61.

Current scholarship has argued that the *necessitas* principle was more a theoretical and moral rule than law. Nevertheless, as has been demonstrated here, *necessitas* influenced norms and practice on larceny in medieval Europe. An examination of theft and necessity norms in Nordic medieval laws determines that the principle of necessity left its imprint on these to a varying degree.

In Norway and Iceland, the principle of extreme necessity came to play a central role in the theft of food. The Norwegian Code of 1274, meant for the whole country, and the Icelandic codes of 1273 and 1281, all issued by King Magnus Lawmender, endorsed the principle of *necessitas non habet legem*. For Swedish law on theft, the relevance was smaller, mainly confined to the Younger Law of Västgötaland, influenced by Norwegian law. The ecclesiastical connections between Norway and Västgötaland were close which may explain the similarities, while the role of Franciscans may have had some additional relevance. Moreover, the norms differentiated between poor that were able to work and deserving beggars. By contrast, the *necessitas* principle's influence on Danish medieval law was trivial.

Nordic law did not excuse stealing clothes despite the inclement climate. Canonists used the biblical example of Jesus's hungry disciples eating grain as authorizing the use of the property of others in a state of necessity. Nevertheless, picking heads of grain was explicitly forbidden and fineable in many Nordic medieval laws.

Although Nordic twelfth- and early thirteenth-century prelates and their circles studied in Paris, why, then, did the earlier Danish and Norwegian provincial laws not discuss necessity in connection with theft? When these earlier Nordic laws were compiled, theologians—unlike

most canonists—had not yet universally accepted the excuse of necessity, as Gilles Couvreur has shown. Whether need made theft of necessities permissible was disputed by twelfth-century scholars. Gratian accepted the principle in his *Decretum*, and decretists largely confirmed the principle with arguments like everything being common in need, culled for example from the Bible, Roman law, and penitentials. "Necessity knows no law" was included in the *Liber extra* in 1234. Theologians embraced it after some initial hesitation. From lively scholarly discussions by jurists, theologians, and philosophers, the principle of necessity was echoed in medieval secular literature in works such as William Langland's *Piers Plowman* (ca. 1370–86) and popular religious works like Henry Parker's (d. 1470) *Dives et pauper*.[134] It permeated many fields of late medieval society.

However, by the later thirteenth century, the *Liber extra* and theological authorities had confirmed the principle. Changes in European intellectual horizons probably partly account for the use of *necessitas* in certain later medieval Nordic laws, while political will probably accounted for its omission in later national Swedish law. This analysis of Nordic medieval law demonstrate that learned discussions and canon law could have direct legal effects on secular law even in the remotest parts of medieval Christendom.

As Kenneth Pennington has observed, one of the most piercing and influential aspects of *ius commune* jurisprudence on medieval and early modern European legal institutions was the "creation of norms, maxims and rules of law. Scholars ignore the power of these norms to mould thought and institutions at their peril."[135]

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[134] Richard Firth Green, "The Plea of Necessity in Medieval Literature and Law," in *Living Dangerously: On the Margins in Medieval and Early Modern Europe*, ed. Barbara A. Hanawalt and Anna Grotans (Notre Dame: University of Notre Dame Press, 2007), 9–30; Swanson, "The Medieval," 412.
[135] Pennington, "Innocent III," 350.

This is very true when searching for traces of necessity in medieval legal norms on theft. While the necessity principle's clear influence on King Magnus Lawmender's legislation in the 1270s is not without parallel in European legal history, later medieval natural rights discussions carried more pronouncedly the nexus between self-preservation, necessity, and theft to early modern scholarly discussions.[136]

[136] Swanson, "The Medieval Foundations"; Tierney, *The Idea*, 80–83; Mäkinen, "Self-preservation," 102–6.