Studien zur
europäischen Rechtsgeschichte

Veröffentlichungen des
Max-Planck-Instituts
für Rechtsgeschichte und Rechtstheorie
Frankfurt am Main

Band 339

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Frankfurt am Main
2023

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Ordinatio ad casum

Legal Causation in Italy (14th–17th Centuries)

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Bibliographische Information der Deutschen Nationalbibliothek
Die Deutsche Nationalbibliothek verzeichnet diese Publikation in der Deutschen Nationalbibliographie; detaillierte bibliographische Daten sind im Internet über *http://dnb.dnb.de* abrufbar.

Druck und Bindung: docupoint GmbH, Barleben
Typographie: Elmar Lixenfeld, Frankfurt am Main

Gedruckt auf Eos Werkdruck.
Alterungsbeständig ISO 9706 und PEFC-zertifiziert

Printed in Germany
ISSN 1610-6040
ISBN 978-3-465-04608-0

to Beatrice Pasciuta

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Main abbreviations

auth.	*authentica*
c.	*canon*
C.	*Codex*
C.q.c.	*Causa*, *quaestio*, *canon* (second part of the *Decretum* of Gratian)
coll.	*collatio*
cons.	*consilium*
D.	*Digest*
D.c.	*distinctio*, *canon* (first part of the *Decretum* of Gratian)
dec.	*decisio*
diff.	*differentia*
Inst.	*Institutes*
Nov.	*Novellae*
PS.	*Pauli Sententiae*
reg.	*regula*
res.	*resolutio*
X	*Liber Extra*

Introduction

The main contention of this book is that the development of legal causation in the Italian Peninsula should be traced to Bartolus de Saxoferrato (1314–1357) and the way he developed some pre-existing ideas. Many other things related to this focal point will be either shortly summed up or just skipped, on the basis of their proximity to it: the more remote their connection, the shorter their mention.

This work moves diagonally across different 'clusters' of scholarly enquiry, which are often considered as different subjects altogether. This will no doubt disappoint those expecting an exhaustive (i.e., exhausting both the subject and the reader) account of everything touching on legal causation, from the foundation of Bologna University (to say nothing of classical Roman law) to the end of the *Ancien Régime* and beyond.

Book introductions can be a lengthy business, which the reader's instinct of self-preservation might suggest to skip altogether. I tried to keep things simple.

i. What this book is not about

When making a wooden sculpture, it is easier to chop off some unneeded large bits of the log than chiselling into shape what is left of it. The same goes for explaining the content of a book that deals with a subject familiar to a modern reader, but not quite in the way most contemporary jurists would think of it. This book is not about the *concept* of legal causation. It is about how medieval and early modern jurists *used* causation. In other words, the purpose is not to abstract a concept from the contingent reality within which jurists worked and thought, and to present the reader with some neat, clear and orderly legal principles. It might not be fortuitous that there is no systematic account of legal causation across the centuries, despite the widespread temptation to deal with legal history as the history of a legal system. A scholar seeking to present a systematic account of the concept of legal causation from the Middle Ages onwards (or, if really brave, from Roman law to the present day) will need much fantasy. This is not because, across the centuries, there was no generally accepted idea of what legal causation should roughly mean. As we shall see, this idea will emerge fairly soon in the late Middle Ages and become remarkably successful and widespread. But its application was never as uniform as one might wish.

Much unlike present-day lawyers, who embody the highest moral principles, centuries ago their predecessors did not consider it beneath themselves to bend a legal principle a little when doing so could help their clients win their case. Yet those same lawyers were often also renowned jurists, and their opinion carried much weight. Thus, in the space of a few generations, a same principle often came to be applied in a remarkable variety of ways.

This book does not seek to provide a history of legal causation stretching up to modern times. To do that, another book would be needed, possibly starting from the later early modern period onwards. The present work makes no effort to look at the present day, nor does it seek to show the path leading to it. Roughly speaking, it will end in the early eighteenth century when looking at causation in private law, and much earlier when looking at causation in criminal law. This chronological disparity follows the same logic outlined above. During the late Middle Ages the concept of causation was one and the same across the whole civil law. During the first early modern period, however, its application in criminal law began to undergo a complex and long evolution, which would progressively detach the way causation was used and understood *in criminibus* from the way it continued to apply in private law. We are not going to look at that whole evolution, but only at the manner in which the initial concept (so far applied on both 'sides') began to be challenged among criminal lawyers and eventually superseded. Going further in time would mean writing another work, on a different history.

As the approach of this book is practice-based, learned and somewhat abstract discussions will not be considered, despite their crucial relevance to the development of legal thinking (it suffices to think of the great impact that early modern Scholasticism had on the law of obligations). This choice might appear too radical to some, yet it is necessary to bestow coherence to this work, which aims to explain the actual (i.e., practical) use of legal causation, not its elaborate theorisation. Doing otherwise would require amalgamating two things and, ultimately, bestowing a somewhat dogmatic approach upon a work that aims to be practice-based. Influential as the early modern Scholasticism was, for instance, practice-based sources did not seem to take much notice of it, at least in Italy.

Lastly, this book is as limited in space as it is in time: it looks only at the Italian peninsula.[1] A truly pan-European research would have needed a large team of scholars and a series of books. A possible alternative – picking a few authors and presenting them as representative of their *Zeitgeist* – would have fed into some of

1 With the (unsurprising) exception of Venice – one of most 'uncommon' regions of the Continental *ius commune*.

the grand narratives that have already enriched scholarship enough. The specific choice of Italy was dictated both by the very large number of printed volumes of *decisiones* and *consilia* – certainly far higher than, say, Castile or Portugal – and especially by the fact that, in law, the road from the late Middle Ages to the first early modern period was less bumpy in Italy than elsewhere, all the more so as some crucial tenets on legal causation continued to be applied with remarkable continuity well into the early modern period.

ii. What this book is about

Unless written by a fervent post-modernist, a book whose title points to the history of legal causation will probably deal with causation in legal history. By and large, medieval and early modern jurists saw causation in terms of *conditio sine qua non* – but they did so in their own terms, and not necessarily the way a modern legal theorist would expect. Legal causation in the late Middle Ages and the early modern period both greatly simplifies the causal problem and makes it harder to understand. It simplifies the problem of causation in that it overlooks (sometimes deliberately, scorning them as unimportant, other times unwittingly, ignoring their very existence) many aspects that a modern scholar would consider significant. Some causally relevant factors that are clearly not *conditiones sine quibus non* would still be taken as conclusive evidence to assert one's liability. So, to recall a famous example, if driver D drives a car in breach of statute S, which punishes driving without a licence, and injures pedestrian P without any negligence whatsoever,[2] a medieval lawyer would have no hesitation in stating that D is liable for P's injury because of the breach of S, regardless of the purpose of that statute.[3] The difference between 'wrongful' and 'causally relevant' is not necessarily so obvious in the past as it is today. The way jurists dealt with legal causation centuries ago is also more difficult for us, in that it requires the constant effort to forsake our own approach and seek to adopt theirs. Their approach, alas, is never spelled out clearly. Most of the times legal causation is applied, but seldom explained. And even those rare cases where an explanation is provided – such as Bartolus' scheme of causality, perhaps the most significant of all such schemes – the questions it raises are more numerous than the answers it provides. Applying our entire conceptual arsenal to interpret what remains rather a rough approach would be misleading, as it would create a series of

2 H.L.A. Hart and T. Honoré, *Causation in the Law* (2nd edn., Oxford: Oxford University Press, 1985), pp. 116–117.

3 This principle, called *versari in re illicita*, will be discussed later on, together with its manifold ramifications.

problems (which a medieval jurist would not have seen) while solving others in appearance only.

In principle, many an event may be said to be the *conditio sine qua non* of another, but not all of them are causally connected with it.[4] Of those that are causally connected with that other event, some might still have played a secondary role in its occurrence. A medieval lawyer would pay little attention to them, being content to relegate the thorny problem of separating 'secondary' from 'primary' causally relevant facts to common sense and not to analytical logic. As more complex circumstances (from contributory causation to multiple and alternative causation, let alone co-causation and overdetermination) hardly played any role in their approach, many problems that a modern lawyer has to deal with when approaching the *conditio sine qua non* test should not concern us. Doing otherwise would lend creative force to what must remain interpretative tools.

Banal truisms make for poor caveats. Nonetheless, it might be useful to state the blind obvious: this book has little to do with one's personal views about legal causation. Rather, it seeks to understand how Italian jurists did look at causation centuries ago. The reason why it is useful to indulge in this specific truism is that it is never entirely true: the attempt to distantiate oneself as a lawyer (and, more generally, as a rational being) from those held by other lawyers (and rational beings) centuries ago is never entirely successful. Claiming the ability to have a fully distanced, entirely dispassionate and perfectly objective approach towards any form of reasoning made by another human being, even if formulated a long time ago, is lulling oneself into a false sense of certainty – and so, is the best way to actually fall into the trap that one seeks to avoid. Instead, when looking at the legal reasoning of a lawyer I have tried to follow his line of thought, seeking to understand – insofar as possible – the context within which he operated. Often the specific context of a discourse is impossible to reconstruct, or just painfully complex and, therefore, not feasible when one needs to look at many hundreds of such discourses. It is sufficient just to think of the hard time one would have in reconstructing all the salient features of a specific dispute for which a certain *consilium* was written, and multiply that by a fairly large number. If the specific context of any given piece of writing is often hard to fully understand, the intellectual context within which it was elaborated is, at least, conceivable. With the knowledge of a fairly large amount of similar discourses developed across the same period, it is possible better to appreciate the specific elements of each of them. Indeed, even the absence of certain specific elements can be revealing of a certain attitude. Given that the number of pros and cons to any given argument

4 Hart and Honoré, *Causation in the Law*, p. 121.

were, by and large, known both to a certain author and to his readers, their use – and, above all, the logical order within which they were used – says much about the line of thought followed by its author.[5] Law is not mathematics: as it lacks the commutative property, the order in which a jurist places a number of propositions is often material to the conclusion he wants to reach.

The focus of this book is on the late Middle Ages and the first early modern period. While ample attention will be given to some late medieval jurists, the purpose of the book is not to explore the genealogy of legal concepts. Trying to understand where a jurist might have found an idea and reconstructing the genealogy of that same idea are two very different things. So, for instance, when looking at the concept of *ordinatio* – which will be the cornerstone of the whole discourse on legal causation in the early modern period – much attention will be devoted to Bartolus, because early modern jurists and law courts alike will derive their understanding of *ordinatio* from him. To understand what Bartolus actually meant by *ordinatio*, then, it will be necessary to see whether the causal meaning of this term was already in use among his contemporaries, and to what extent. Thereafter, it will be also necessary to see whether and to what extent was Bartolus original in his writing of it, or whether he was applying a concept devised by other jurists (and, in this case, whether he was stretching its scope or not). But all this will be instrumental to a rather specific, practice-oriented purpose. It would be fascinating to explore the genesis and development of the idea of causal *ordinatio*, the way the concept of *ordo* began (perhaps in the late Antiquity) to bestow a causal meaning on the term *ordinatio*, whether and to what extent did this emerge in the writings of the Glossators across the whole thirteenth century, and finally how that same concept came to be employed to solve problems of legal causation. But that would be a different book.

As a good part of this work deals with practice-oriented literature, especially *consilia* and *decisiones*, a short premise on both is needed.[6] Following chronology, we may want to start with *consilia*. While *consilia* literature has not been ignored by legal historians,[7] it has hardly been at the centre of their attention. Legal historians studying *consilia* literature usually distinguish on the basis of their

5 These few notes are, of course, thought of in addition (and not in opposition) to the path-breaking approach of Quentin Skinner. His methodological contextualism remains fundamental, yet it is so widely known that it requires no explanatory note here.

6 For a classical summary of those sources within their (dogmatic) context, see E. Holthöfer, *Literaturtypen des* mos italicus *in der europäischen Rechtsliteratur der frühen Neuzeit (16.–18. Jahrhundert)* (1969) 2 *Ius commune,* pp. 130–166, esp. 138–142.

7 For example, W. Engelmann, *Die Wiedergeburt der Rechtskultur in Italien durch die wissenschaftliche Lehre* (Leipzig: Scientia Verlag, 1938), pp. 243–335; G. Rossi,

recipient – that is, whether they were written for the judge or for the litigants. When written for the judge, *consilia* are usually divided between those binding on the judge and those with a purely advisory function. In turn, *consilia* written for the litigants are often distinguished from legal briefs (*allegationes*), though the difference between them is sometimes ambiguous, if not artificial.[8] For our purposes, however, distinguishing different kinds of *consilia* would be of little help. This is not because most of the *consilia* circulating in early modern Italy were written for the litigants, but rather because, once circulating across Italy (and, often, Europe), a *consilium* became an authority in its own right, regardless of the original purpose for which it had been written. The same consideration can put our minds at rest as to another problem: how can we tell whether any specific *consilium* is really representative of the law, or rather of the attempt of a jurist to win the case? The problem, of course, is real.[9] Sometimes, we shall see how ambiguous (or even plainly bad) a *consilium* can be, even when coming from the most respected jurists. To understand the approach to legal causation, however, such *consilia* are most useful. In order to twist a widely shared point,

Consilium sapientis iudiciale: studi e ricerche per la storia del processo romano-canonico, vol. 1: *secoli XII–XIII* (Milan: Giuffrè, 1958); G. Kisch, *Consilia: eine Bibliographie der juristischen Konsiliensammlungen* (Basel / Stuttgart: Helbing & Lichtenhahn, 1970) (a contribution that should be highlighted for its particular importance); P. Riesenberg, *The consilia literature: A prospectus* (1962) 6 *Manuscripta*, pp. 3–22; L. Lombardi, *Saggio sul diritto giurisprudenziale* (Milan: Giuffrè, 1975), pp. 119–164. See also the contributions in I. Baumgärtner (ed.), *Consilia im späten Mittelalter. Zum historischen Aussagewert einer Quellengattung* (Sigmaringen: Jan Thorbecke, 1995) (especially the less specific ones within the volume). For a concise and excellent introduction on the modern historiography on *consilia* see W. Druwé, *Loans and Credit in Consilia and Decisiones in the Low Countries (c. 1500–1680)* (Leiden: Brill, 2019), pp. 24–30, and the vast bibliography he cites in the ponderous notes. See also M. Lucchesi, *Si quis occidit occidetur: l'omicidio doloso nelle fonti consiliari (secoli XIV–XVI)* (Padua: CEDAM, 1999), xiv–xxiv, and the works cited therein, esp. at xiv, note 1.

8 A. Padoa-Schioppa, *Note sui consilia nell'evoluzione dello ius commune*, in M. Charageat (ed.), *Conseiller les juges au Moyen Âge* (Toulouse: Presses universitaires du Midi, 2014), pp. 15–24, at 22.

9 Cf. U. Falk, *In dubio pro amico? Zur Gutachtenpraxis im gemeinen Recht* (14 August 2000) *Forum Historiae Iuris*, n. 72–76. Falk explains how German authors were very much against the practice of favouring their clients, and he may well be right. Yet one might feel less positive about their Italian colleagues, if only because of Muratori's vitriolic comments in his *Dei difetti della giurisprudenza* (Venezia, presso Giambattista Pasquali, 1742, ch. 6, esp. pp. 44–48), where he explains well the 'worst evil' of all those 'defects' (*difetti*), that of the absolute unscrupulousness of the jurists writing *consilia*. See, however, the more balanced remarks of Lucchesi, *Si quis occidit*, pp. 201–204, and the literature quoted therein.

one must 'work the system' from within. Thus, even when the conclusions of an author are somewhat unorthodox, in reaching them that author needed to follow certain legal conventions – despite being unfavourable to the client – shrewdly bending them instead of flatly denying them. Thus, a crooked *consilium* often helps us to understand causation more than a perfectly orthodox one. Besides, there are limits to what even a lawyer can say.[10]

It is often said that, by the close of the sixteenth century, *consilia* began to lose their importance in favour of the growing number of collections of *decisiones* that were being printed.[11] The point is generally true, especially considering the growth of the influence and weight of the high courts,[12] but the decline of *consilia* literature was a long process, especially since older *consilia* often lived a

10 In principle, a jurist should be more conservative and follow the *communis opinio* in his *consilia*, whereas he could be more original in his scholarly commentaries (see for all U. Falk, *'Un reproche que tous font à Balde'. Zur gemeinrechtlichen Diskussion um die Selbstwidersprüche der Konsiliatoren*, in A. Cordes (ed.), *Juristische Argumentation – Argumente der Juristen* (Cologne / Weimar / Vienna: Böhlau, 2006), pp. 29–54). Besides, since one's prestige (and level of retribution) as author of *consilia* ultimately depended on his scholarly reputation, no jurist could go too far in a *consilium*, as that would eventually backfire and erode one's reputation as a scholar: W. Druwé, *Loans and Credit in Consilia and Decisiones*, p. 50. Cf. T. Woelki, *Juristische Consilia im Spätmittelalter zwischen Kommerzialisierung und Rechtsfortbildung*, in C.R. Lange, W.P. Müller and C.K. Neumann (eds.), *Islamische und westliche Jurisprudenz des Mittelalters im Vergleich* (Tübingen: Mohr Siebeck, 2018), pp. 199–214.

11 Cf. M. Ascheri, *Tribunali, Giuristi e Istituzioni dal medioevo all'età moderna* (2nd edn., Bologna: Mulino, 1995), pp. 152–153.

12 Again, a complex subject whose literature is vast. Suffices to mention G. Gorla, *I Tribunali Supremi degli Stati italiani fra i secc. XVI e XIX, quali fattori della unificazione del diritto nello Stato e della sua uniformazione fra Stati (Disegno storico-comparatistico)*, in B. Paradisi (ed.), *La formazione storica del diritto moderno in Europa*, vol. 1 (Florence: Olschki, 1977), pp. 445–532; M. Ascheri, *Tribunali, Giuristi e Istituzioni*, p. 85–183; Id., *s.v.* 'Italien', in H. Coing (ed.), *Handbuch der Quellen und Literatur der neueren europäischen Privatrechtsgeschichte*, vol. 2, pt. 2: *Neuere Zeit (1500–1800)* (Munich: C.H. Beck, 1976), pp. 1113–1221, at 1130–57; R. Savelli, *Tribunali 'decisiones' e giuristi: una proposta di ritorno alle fonti*, in G. Chittolini, A. Mohlo and P. Schiera (eds.), *Origini dello Stato. Processi di formazione statale in Italia fra medioevo ed età moderna* (Bologna: Mulino, 1994), pp. 397–421; I. Birocchi, *Alla ricerca dell'ordine. Fonti e cultura giuridica nell'età moderna* (Turin: UTET, 2002), pp. 85–95. For some particularly significant contributions on some of the Italian high courts, see U. Petronio, *Il Senato di Milano. Istituzioni giuridiche ed esercizio del potere nel Ducato di Milano da Carlo V a Giuseppe II* (Milan: Giuffrè, 1972); A. Monti, *Iudicare tamquam deus. I modi della giustizia Senateria nel Ducato di Milano tra cinque e settecento* (Milan: Giuffrè, 2003); M.N. Miletti, *Stylus iudicandi. Le raccolte di 'decisiones' del Regno di Napoli in età moderna* (Naples: Jovene, 1998); M. Sbriccoli and A. Bettoni (eds.), *Grandi tribunali e rote nell'Italia di antico regime* (Milan: Giuffrè, 1993). For a concise and

second life in combination with courts' *decisiones* during the seventeenth and early eighteenth centuries. This combination was doubtlessly facilitated by the similarities between the two genera,[13] the dialectical approach (*pro*, *contra*, *solutio*) on which both were ultimately based,[14] and the weight that the common or mainstream opinion (*communis opinio*) had on the *decisiones*.[15]

The same question on the reliability of *consilia* is often asked with regard to *decisiones*. This of course is not because of the bias of the court, but because it is extremely difficult to check whether and to what extent the editor was faithful to the decision given by the court.[16] *Decisiones* are not reports of the actual sentences (which, as it is well known, were often not even motivated),[17] but instead elaborations on the discussions that took place before the bench. To what extent such elaborations report those discussions, however, is far from clear.[18] Reports are not records. This is even true of common law reports, which are not punctual records of the actual decisions.[19] Admittedly, however, common law reports tend to be considerably closer to the actual decision than their

recent Europe-wide synthesis see G.C. Machado Cabral, *Literatura Jurídica na Idade Moderna. As Decisiones no Reino de Portugal (Séculos XVI e XVII)* (Rio de Janeiro: Lumen Juris, 2017), pp. 47–52, where ample literature is quoted.

13 Cf. Miletti, *Stylus iudicandi*, pp. 229, 236–237.

14 Ascheri, *Tribunali, Giuristi e Istituzioni*, pp. 124–127. See recently also F. Di Chiara, *Le raccolte di decisiones: I supremi tribunali del Regnum Siciliae* (Palermo: Palermo University Press, 2017), pp. 13–16.

15 Ascheri, *Tribunali, Giuristi e Istituzioni*, p. 94.

16 See, for example, V. Piergiovanni, *Una raccolta di sentenze della Rota civile di Genova nel XVI secolo*, in M. Sbriccoli and A. Bettoni (eds.), *Grandi tribunali e rote nell'Italia di antico regime*, pp. 79–91, at 80; Ascheri, *s.v.* 'Italien', p. 1139; J. Hilaire and C. Bloch, *Connaissance des décisions de justice et origine de la jurisprudence*, in J.H. Baker (ed.), *Judicial records, law reports and the growth of case law* (Berlin: Duncker & Humblot, 1989), pp. 47–68, at 56–57. For a recent and very useful summary of the scholarly literature on the point, see Machado Cabral, *Literatura Jurídica na Idade Moderna*, pp. 73–82.

17 To some extent, noted Savelli, the more 'supreme' a court truly was, the less it had to motivate its decisions: Savelli, *Tribunali 'decisiones' e giuristi*, p. 404. On the motivation of decisions among early modern high courts, see, for example, Ascheri, *Tribunali, Giuristi e Istituzioni*, pp. 99–120; V. Demars-Sion and S. Dauchy, *La non-motivation des décisions judiciaires dans l'ancien droit français: un usage controversé*, in W.H. Bryson and S. Dauchy (eds.), *Ratio decidendi: guiding principles of judicial decisions*, vol. 1: *Case Law* (Berlin: Duncker & Humblot, 2006), pp. 87–116; M. Taruffo, *L'obbligo di motivazione della sentenza civile tra diritto comune e illuminismo*, in B. Paradisi (ed.), *La formazione storica del diritto moderno in Europa*, vol. 2 (Florence: Olschki, 1977), pp. 599–633.

18 On the point, see esp. Ascheri, *Tribunali, Giuristi e Istituzioni*, pp. 103–123. Cf. Di Chiara, *Le raccolte di decisiones*, pp. 10–11.

19 Cf. the well-known preface of John Baker to the collection of essays that he edited in Id., *Judicial records*, pp. 5–12.

Continental counterparts,[20] since their focus is the decision itself and not the broader legal questions of which the specific case is but a concrete application. Thus, even in the hands of the most reliable Continental 'reporter', a *decisio* will seldom be a summary of the original decision of the court on which it was based. This can be a serious problem for our understanding of specific cases, but not for our understanding of the law. Scholars may well discuss (and often disagree) as to the precise relationship between printed *decisiones* and the original court decisions, but not on the impact of those same *decisiones* on the development of practice-oriented literature and especially of case law. Thus, even if one were to accept the most pessimistic approach to *decisiones* (namely, that most collections of *decisiones* were sophisticated doctrinal re-elaborations of court decisions, with little in common with the 'originals'), their influence would nonetheless remain so profound and widespread as to play a crucial role in the way that lawyers and especially judges would think of specific legal issues, and therefore contribute significantly to the development of case law anyway.

Let us take a practical case. In the third chapter we shall look at how the formal elements of the mainstream approach to causation became more stringent during the early modern period, and the role that a specific decision of the Roman Rota had on this development, as reported by the judge *referens* (the one who, according to the procedure of that court, would follow the whole case up to the decision, in which, however, he did not vote). Judging from its printed version, that decision was based on (a very *sui generis* interpretation of) a *consilium* of a jurist. Was the actual decision really based on that *consilium*, or was that *consilium* added later on by the editor (the same *referens*) to embellish the decision with some learned references? Most of the times, such a question will not find a precise answer.[21] But even if an answer could be provided, this would make no difference as to the effects that the same decision had on the development of causation. Even if that specific *consilium* was never brought up during

20 *Ibid.* This excellent and pioneering work paved the way for many other comparative and European-wide works on supreme courts, whose focus, however, shifted towards their role and functioning, and no longer on their case law. A most conspicuous exception is the volume published in the same series (vol. 17/1) eight years later by A. Wijffels (ed.), *Case Law in the Making. The Techniques and Methods of Judicial Records and Law Reports*, vol. 1, *Essays* (Berlin: Duncker & Humblot, 1997). What is said in the main text would not be affected accepting the main tripartition proposed by scholars such as Walter to accommodate the – in fact, significant – difference in the way that decisions were reported in French and other western European territories. G. Walter, *s. u.* 'Frankreich', in Coing (ed.), *Handbuch der Quellen*, vol. 2, pt. 2, pp. 1223–1269, at 1244–1255.

21 Ascheri, *Tribunali, Giuristi e Istituzioni*, p. 132.

the discussion among the judges, or it did not influence their decision in any way, later jurists nonetheless behaved as if the Roman Rota had based its decision on it. To find out whether that was really the case or not might be important in a study focused specifically on the formation of the decisions of law courts, but considerably less so in a study on the development of (the legal understanding of) causation.

This book could have been monumental – and monumentally useless. I looked at virtually all the works listed in Coing's *Handbuch* for the early modern Italian peninsula[22] (barring a very few, very difficult to find ones), as well as practice-oriented treatises and compilations. After the long (and not terribly exciting) job of collecting piles of *consilia*, *decisiones*, chapters of treatises and the like on a certain (and very broad) subject, the temptation of the collector was lurking in the shadows: why not use (or at least cite) them all? I opted for the opposite approach: having collected vast amounts of material, I chose to use what was more significant and/or more often cited by later jurists and courts (the two things – significance and notoriety – may often coincide, but definitely not always), so as to give a clear picture of things.

Different emphasis has been given to different elements, depending on whether they were decisions of important courts, highly regarded *consilia* often cited by jurists and judges alike, or the isolated opinion of a court[23] or of a single jurist seldom (if ever) cited by others.

The third part (on criminal law), admittedly, could have been shorter. I deliberately inserted several lengthy translations from Latin because I wanted the reader to see for herself and, perhaps, come to a different conclusion from mine. Some of those discussions constitute the very foundations of the dialectic between causation and intentionality in criminal law. On something so important one should not rely on someone else's summary.

22 Ascheri, *s. v.* 'Italien', pp. 1179–1192 (*decisiones*), and 1211–1221 (*consilia*).

23 Isolated decisions, however, may just be ahead of their times, though it is easy to jump to this conclision (since there is often little evidence), and overestimate something that in fact would not deserve much attention. As a rule of thumb, the length of time elapsing between an isolated decision and the ones building on it is inversely proportional to the actual influence that the first had on the others, especially when it comes from a different court. At times the posthumous influence of an isolated decision should rather be seen as an *ex post* claim of later authors (judges and lawyers alike), delighted to have found an unexpected foothold in older sources.

iii. *Communis opinio* and legal precedents: the law of attraction[24]

It does not take a rocket scientist to say that the stronger the gravity force, the shorter the distance one will be able to jump. Legal authorities worked precisely in the same way: the stronger their weight, the more limited the 'movement' they allowed to the judge. So, a vast number of jurists all agreeing together on the interpretation of a rule could not be ignored altogether: the sheer mass of their writings was such as to exert a strong force of 'attraction' on the court. Legal attraction – today as much as in the past – is not too different from gravitational attraction, and this is particularly visible in early modern *ius commune* literature.[25] The 'mass' of a single court was much smaller than the 'mass' of the common opinion. So, the attraction worked largely in one direction only. This does not mean that the court had to be supine and necessarily accept the mainstream position. Rather, it means that it required a strong effort to steer away from such a position and that, in any case, it was not possible to end up too distant from it. If the judges wanted to reach a different outcome from the position commonly accepted, they could not say that that common opinion was wrong. Rather, they had to qualify the situation they were discussing as peculiar and different from the mainstream one, hence deserving a different outcome. Even so, this outcome could not challenge the commonly accepted one. In short, it was possible to move sideways (within limits) to get around the obstacle, not to run head-on against it.[26]

If, however, it was not the first time that a law court dealt with a certain matter, then the 'mass' of the court was not that insignificant, and so not to be discounted too easily from our pseudo-Newtonian equation. On the contrary, the more often a court had already ruled on a subject, the greater its 'mass' had

24 This short section is meant as a brief and very basic introduction to a very complex subject: the reader familiar with the civil law in the early modern period may want to skip it altogether.

25 The concept of gravitational attraction in legal history has already been used, and in a far better and more elegant manner by no less a scholar than Manlio Bellomo, to describe the relationship of the *ius commune* (the sun) with the *iura propria* (the planets within its orbit). M. Bellomo, *L'Europa del diritto comune* (Rome: Cigno, 1989; English translation, *The Common Legal Past of Europe* (L.G. Cochrane, transl.), Washington: The Catholic University of America, 1995), pp. 192 and 206. Admittedly, however, the present metaphor is somewhat different, and possibly not entirely in line with Bellomo's.

26 On the early discussions about the problem of the contrast between the *decisio* of a high court (in particular, that of the Roman Rota) and the *communis opinio* see G. Ermini, *La giurisprudenza della Rota Romana come fattore costitutivo dello 'Ius Commune'*, in *Studi in onore di Francesco Scaduto*, vol. 1 (Florence: Casa editrice poligrafica universitaria, 1936), pp. 285–298, esp. 288–291.

become. Of course, this 'mass' would never have accumulated in sheer opposition to the common opinion (if only because, at the time of the first of those decisions, there was no 'mass' yet). But this mass now allowed the court to 'move' with somewhat more freedom: the attraction of the common opinion was still powerful, but no longer overwhelming. This is what happened when a court – especially one that had no superior court above itself: a supreme court has more legal weight (its 'legal mass' is 'denser') – was called to decide on a matter on that it had already ruled on at other times. The judges would still relate to the position of mainstream jurists and other courts alike. But they would do so while being conscious of their own approach. Surely enough, no early modern court was bound to its previous decisions – *stare decisis* is a modern innovation. But no early modern court could have easily dismissed its own previous decisions either, especially when there was a string of them.[27] Here, 'legal gravity' also applied. This time, the gravitational attraction was between the court and its own case law: the more decisions had already reached a certain conclusion, the more difficult it was to avoid that conclusion in a new lawsuit on the same subject. The saying 'sometimes the rota rotates' (*rota quandoque rotat*) was meant as a pun, to acknowledge some occasional changes in a court's approach, not as an accusation of legal schizophrenia.[28]

It is possible to find moments of genuine discontinuity in the case law of high courts. But these moments are usually difficult to identify, because the judges often went to great lengths in covering their tracks: most of the time the rupture with tradition is camouflaged behind a forest of citations slightly manipulated to provide an impression of false continuity. Even if one were to know those citations well, spotting the trick is not always easy: the jurists and the decisions

27 On the strength of previous decisions see the literature quoted in Machado Cabral, *Literatura Jurídica na Idade Moderna*, pp. 52–60. Most recently, for a European perspective on the subject, see G. Rossi (ed.), *Authorities in Early Modern Law Courts* (Edinburgh: Edinburgh University Press, 2021). A wholly different issue is whether and to what extent did the decisions of the high courts help in maintaining (or creating) some unity in the interpretation of the law also outside the borders of the countries where they had jurisdiction. For two somewhat different perspectives on this complex issue, see G.P. Massetto, *s. v.* 'Sentenza (diritto intermedio)', in *Enciclopedia del diritto*, vol. 41 (Milan: Giuffrè, 1989), pp. 1200–1245, and I. Birocchi, *Alla ricerca dell'ordine*, esp. pp. 87–89.

28 This, however, does not mean that the normative 'system' (a term to be used only in inverted commas, and only for want of a better one – sometimes, normative conundrum would be more appropriate) was linear either. A concise and clear summary of the main problems may be found, *inter multos*, in M. Morello, *Il problema delle citazioni nella crisi del diritto comune. Interventi a carattere antigiurisprudenziale in alcuni ordinamenti italiani tra XV e XVIII secolo* (2017) 68 *Studi Urbinati,* pp. 161–222, at 161–169, where ample literature may be found.

cited effectively said almost exactly what the court had them saying – almost. But the very small difference between what was reported and what was actually said is sufficient to bring about a change, reaching a very slightly different conclusion. Just as the change of a few degrees on a map makes almost no difference from the starting point, so the difference between reported and true statement of previous jurists and law courts was often rather thin in principle. But the farther we move from that starting point, the more the difference becomes considerable. The same happens with the subtle differences in the way an older authority is reported: what would initially seem just a question of nuance in the way the authority is recalled may lead to a different outcome of the case at stake. And that case, in turn, will be invoked to decide on others. Thus, building on subtle nuances, the rule has changed.

Because the change is very small at the outset, it is within the limited range of autonomy that the 'gravitational force' of previous authorities allows. The judges are not denying those authorities, but slightly altering some details in the way they report them. In itself, it is a little step. Besides, we should not think of the judges as consummate actors, deliberately lying to bring about legal changes. Very often, the situation they had to deal with was not precisely the same discussed by the older authorities. Small adjustments were often needed. This meant that the old solution could not be supinely imposed to the new case without any adjustment: applying the old solution onto the new case, the small differences between the two cases would create some interstices between them, which the judges had to face. In filling those interstices, small adjustments to the old solution were necessary.

iv. A few last caveats

Jurists' names are in Latin up to the close of the Middle Ages, and in vernacular for the early modern period – unless an exception (e.g. Heineccius instead of Heinecke) is so widespread that ignoring it would just create confusion. Few jurists operating in between the late fifteenth century and the early sixteenth were so punctual in their lives as Petrus Philippus Corneus, who died the same year as the discovery of the Americas.[29] Sometimes therefore the choice between Latin and vernacular in a jurist's name will also depend on how he is better known. When the vernacular name of a medieval jurist is as widespread as its Latin version, it will also be provided a first time (in round brackets) so as to avoid ambiguities, but then the Latin name will be used throughout for the sake of consistency.

29 But a month after Columbus' landing on San Salvador. No Italian could be that punctual.

This book is about legal ideas, not legal biographies. No description of the life or works of any jurist will be given (unless strictly necessary to make a precise point), to avoid unnecessary digressions.

Unless otherwise stated, translations are my own. For the sake of clarity, lengthy translations are usually indented. In such cases, round brackets are used either according to the original text (but this happens only very seldom) or, and far more commonly, to report (Roman law) *leges* or (canon law) canons cited in the original, while square brackets are used to add one of more words implied in the original text.

On specific and rather 'technical' procedural matters wholly unrelated to the subject of this work, I chose simplicity over precision. So, for instance, sometimes a second decision of a same court on the same dispute will be referred to as 'appeal', even though such terminology is not entirely correct. Nontheless, legal causation is complicated enough as it is, and this book is meant for a readership that might not be aware of (or interested in) the procedural details of early modern 'high courts' in Italy.

Lastly, grammar and gender. Whenever an impersonal subject in Latin could not really be rendered with 'one' and a choice between masculine and feminine had to be done, I opted for the feminine 'she' insofar as viable, after current English usage. The native English speaker will however forgive me if I resisted using the plural form 'they', as it might have created confusion in some cases. One of the many shortcomings of medieval jurists is no doubt their failure to promote gender-neutral language.

Part I – *Ordinatio culpae ad casum*

Chapter 1

The limits of fault

Legal causation may be understood in many ways, for instance, as the causal connection required to trigger liability for a specific contract or a specific delict. This book, however, deals with causality as the connection between fault and liability in general terms, as medieval and early modern jurists did not have subject-specific approaches to causality, but rather applied a single concept to a variety of different contexts. This broad approach to causality requires a similarly broad range of enquiry. It is therefore with fault that we must begin – not a specific kind of fault, but fault as a legal category: more precisely, fault as the violation of a standard of care.

1.1 Setting the scene: *culpa levissima* and the Accursian Gloss

To understand the approach of medieval jurists to causation, the best way to start is looking at the grey zone between purely fortuitous accident (in Latin, especially medieval Latin, *casus fortuitus*) and actual fault. Although this might seem counterintuitive, that 'grey zone' should be explored moving from the inner border with actual fault, not from the outer border with genuinely faultless mishaps occurring by sheer chance. Most definitions of fortuitous mishap (surely, all the most fortunate ones) are based on the impossibility to avoid its occurrence. To be fortuitous, therefore, a mishap has to be unavoidable. But this unavoidability can be predicated in abstract terms or in practice.[1] If predicated in abstract terms, it will point to kinds of mishap that typically cannot be avoided – shipwrecks, fires, and so on. Yet, sometimes, these events may well be prevented, or at least their consequences (in terms of damages) contained. General categories of mishaps may be considered fortuitous only presumptively – that is, unless proved otherwise. A presumption, however, is no definition. Hence the need to predicate the criterion of unavoidability of the mishap in practical terms: a specific mishap is fortuitous when it was not possible to prevent its actual occurrence. This approach avoids abstract statements, but it

1 In an important and famous study, Domenico Maffei distinguished two approaches to *casus*, an 'objective' and a 'subjective' one. The first sought to define *casus* independently of human conduct; the other defined as *casus* only what happened in absence of any human fault. D. Maffei, *Caso fortuito e responsabilità contrattuale nell'età dei glossatori* (Milan: Giuffrè, 1957), esp. pp. 16–25.