

ANCIENT BELIEFS ON THE ESSENCE OF SANCTITY:

Further Eastern attestations of a lost Gaian excursus*

A. Introduction

In a recent article,¹ I concluded that Gaius had originally suggested, as part of his discussion on *divisio rerum* (Gaius 2,1-11), that *res sanctae* were inviolable, and that this in effect accounted for their very sanctity, and, accordingly, their divinity. The primary evidence on which I based the proposal is to be found in Justinian's Institutes, Theophilus' *Paraphrasis* of that work, and the Western *Epitome Gai*, all of which have close textual ties to Gaius' Institutes. Many further sources were explored, ranging from the pre-Justinianic through to Justinian's corpus generally and contemporary commentaries on it, and taken together, the material was seen to strongly support the salient aspects of the theory. This supplementary enquiry into *res sanctae* would have taken place, it was argued, in the now illegible section of the Verona palimpsest manuscript (V)² at Gaius 2,9, fitting logically with what was said both beforehand and afterwards. Furthermore, although most of 2,9 had been omitted by the compilers when replicating Gaius 2,1-11 at D. 1,8,1,pr. (*Gai. 2 Inst.*), I contended that this may have been because the purported discussion on sanctity was retrospectively branded

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1 H. Weber, '*Res sanctae* and *res publicae*: reconstructing Gaius' *divisio rerum* at *Gai. Inst.* 2.9' (in print)

2 V is replicated in an apograph prepared by G. Studemund, *Gaii Institutionum commentarii quattuor Codicis Veronensis denuo collati apographum confecit et iussu academiae regiae scientiarum Berolinensis*, Lipsiae 1874. For later re-appraisals, see bibliography at Weber, '*Res sanctae*' (note 1 above), section A (introduction), note 3. References to the palimpsest are cited as 'V', with pagination as established by Studemund. Gaius 2,1-11 are found at pp. 55-56.

heretical in light of Christian sensibilities. The comments may also have been associated with an additional analysis of *ius publicum*, again lost, and rejected along with the latter simply because it represented bad law. There were clearly sound reasons, abiding by sixth-century considerations, for leaving out from the Digest version of Gaius 2,9 any discussion on why things were considered *sanctae*.

However, although the provisions relied on in my study expressly claim to tell us about why items are *sanctae*, they only really say that nothing could be taken away from such things precisely because they were inviolable, and this in turn led to their sanctity. So we could see the consequences of being sanctified, but not actually how or why anything was considered untouchable and *sanctae* to begin with. The passages did not delve any further into the origins of sanctity, even though we could have expected this, given their stated aim. But we shall here weigh up evidence that such an analysis was indeed present at Gaius 2,9, and that the compilers once more made D. 1,8,1,pr. skip these very words when replicating the original.

B. Evidence of a discussion on how things came to be *sanctae*, and an overview of its origins

(i) Background

As far as we can tell from V, which probably represents the manual's wording in its original form³ (disregarding minor orthographic issues and deterioration/damage), Gaius does not tell us at 2,1-11 how things become *sanctae*, despite telling us how the two other elements of *res divinae*, namely sacred and religious things, attained their rank:

[p. 55] [1.**I illegible line**...] [exposuimus; modo videamus de rebus: quae vel [in nostro patrimonio sunt vel extra nostrum pa]trimonium habentur. 2. Summa itaque rerum divisio [in duos articulos diducitur: nam aliae sunt divini iu]ris, aliae humani. 3. Divini iuris sunt veluti res sac[rae] [et religiosae. 4. Sacrae sunt, quae diis superis consecra]tae sunt; religiosae, quae diis Manibus relict[ae] [sunt. 5. Sed sacrum quidem hoc solum existimatur, quod [ex]]

3 We can be relatively confident that V is generally faithful to Gaius' original text; see H.L.W. Nelson, *Überlieferung, Aufbau und Stil von Gai Institutiones*, (Studia Gaiana, VI), Leiden 1981, 294-334; B.H. Stolte, 'Gaius in the Paraphrase of Theophilus' (in print, at note 22); W.M. Gordon / O.F. Robinson, *The Institutes of Gaius*. Translation and introduction, with the Latin text of E. Seckel and B. Kuebler, London 1988, 11-12. See also Weber, '*Res sanctae*' (note 1 above), section A (introduction), with notes 1 and 4.

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auctoritate populi Romani consec[rat]um est, veluti lege de lea re lata aut senatus consulto facto. 6. Religiosum vero nostra vo||untate facimus mortuum inferentes in locum nostrum, si modo eius mortui funus ad nos pertine|at. 7. Sed in provinciali solo placet plerisque solum re||igiosum non fieri, quia in eo solo dominium populi Romani |est vel Caesaris, nos autem possessionem tantum et u|sumfructum habere videmur; utique tamen, |etiamsi non sit religiosum, pro rel[ig]ioso habetur: |item quod in provinciis non ex auctoritate populi Romani con|secratum est, proprie sacrum non est, tamen pro sa|cro habetur. 8. Sanctae quoque res, velut muri et por|tae, quodam modo divini iuris s[unt.] 9. Quod autem [di]vini iuris est, id nullius in bonis est: id vero, quod humani |[... ..p. 56, 11 illegible lines...|...]e domino. 10. Hae autem [res], quae humani iuris sunt, [aut pu]blic[ae] sunt aut privatae. 11. Quae publicae sunt, null[ius vi]dentur in bonis esse; ipsius enim universita[tis] e[ss]e c[r]e[d]untur. Privatae sunt, quae singuloru[m] homin[um] sunt].

So having told us at 2,3 that *res sacrae et religiosae* are divine, Gaius then tells us at 2,4 that things are made *sacrae* by being consecrated to the ‘gods above’, and that they are made *religiosae* by being left to the ‘gods below’. Then at 2,5-7 he informs us of the procedures for consecration and burial, and of the situation of both categories in the provinces. But although he goes on to tell us that *muri et portae* are *sancti*, and so are also in a way divine (2,8), this lukewarm assertion fails to tell us how things first came to be seen as *sanctae*. Because Gaius had already shown in 2,4-7 how the other two components of the tripartite divine consortium achieved their status, it makes considerable sense that he should also address this matter in the context of *res sanctae*, as part of his dissection of *divisio rerum*. However, although the lacuna at 2,9 may speak volumes in this respect, there is no actual trace in V of such a discussion.

D. 1,8,1,pr. reveals nothing further on the matter either. Justinian indeed appears to have ordered that the compilers delete from the excerpt not only Gaius 2,9 but also 2,4-7.⁴ In combination with the absence of any words on how *res sanctae* reached sanctity, we can perhaps infer a concerted effort to crush the old thinking on the origins of *res divinae*.

However, as I investigated in my aforementioned study, other sources boasting of a close relationship with Gaius’ Institutes do contain declarations on why *res sanctae* first came to be considered sanctified, telling us what Gaius had apparently failed to elaborate

4 The provisions at Gaius 2,4-7 are not in the *Florentinus*’ version of D. 1,8,1,pr. W. Kaiser, ‘*Res sacrae und res religiosae – Zur Textconstitution von D. 1,8,1,pr (Gaius 2 inst.)*’, *Index* 44 (2016), 7-20 (11-15) (section 4), argues that 2,4 was originally included but later missed out due to scribal error, but this view is challenged here; see section D (v) (a)-(b) below. There is no suggestion that Gaius 2,5-7 was ever part of D. 1,8,1,pr.

on himself. As an intrinsic part of a discussion on the classification of things, they each claim to tell us the reason behind why anything was *sancta*, and are all premised on the unlawfulness of damaging or looting anything that had been designated as such: (a) Inst. 2,1,10: *muros sanctos dicimus, quia poena capitis constituta sit in eos qui aliquid in muros deliquerint*; (b) Theoph. 2,1,10: *...τὰ τεῖχη εἰρήκαμεν SANCTA ἐπειδὴ κεφαλικὴ ὄρισται τιμωρία κατ' ἐκείνων οἴτινες τι κατὰ τῶν τευχῶν ἤμαρτον, οἶον λίθον λαβόντες ἢ καὶ ὅπωςδὴποτε βλάβαντες τὸ τεῖχος*; (c) Gai. Epit. 2,1,1: *Publici iuris sunt muri, fora, portae, theatra, circus, arena, quae antiqui sancta appellaverunt, pro eo, quod exinde tolli aliquid aut contingi non liceret*.

That the actual works containing these extracts are in effect based largely on Gaius' Institutes is uncontentious. Justinian avowedly updated Gaius' manual in preparing his own Institutes,⁵ and long tracts were simply replicated, even though other juristic works provided the basis of some provisions.⁶ Theophilus' *Paraphrasis*, itself a sixth-century commentary on the Justinianic manual, has to all intents and purposes the same Gaian origins. Even though one step further removed, it may even contain additional excerpts taken directly from Gaius' original, as we shall see. And the slightly earlier Western *Epitome Gai* is a summary of the same work, even though it also reveals other influences and modernisations.⁷ So particularly given the identical roots of the above extracts, although we cannot discount the possibility that they stemmed from some source other than Gaius' Institutes, my enquiry showed that this was unlikely. As such, the attestations strongly corroborate the proposal that Gaius had indeed looked into the issue of why things were *sanctae*. Furthermore, he must have done so at the lines within 2,9 that can no longer be read, as nowhere else in Gaius' *divisio rerum* permits such a finding, and the discussion would in any event have formed a rational part of the surrounding provisions that still survive.

However, there is a caveat. The answers for what lay behind a thing's sanctity seem inadequate. As noted, the extracts simply beg the question as to why any one thing was singled out as meritorious of sanctity, and we have to simply accept that it was this very sanctity that resulted in penalties for the stated infractions, rather than being taken through

5 Const. *Imperatoriam*, § 6: [*easdem institutiones*] ... *praecipue ex commentariis Gaii nostri institutionum ...compositas...*

6 Const. *Imperatoriam*, § 6, which confirms that Justinian's manual was also compiled *ex omnibus antiquorum institutionibus praecipue ex commentariis Gaii ... rerum cottidianarum aliisque multis commentariis*. By way of example, rather than relying only on Gaius 2,1-11, most of the initial discussion on *divisio rerum* in Inst. 2,1 cites Marcian: 2,1,pr.-1, 6, 8, 9 (= D. 1,8,2,pr.-1, h.t. 4, h.t. 6,1, 3-4 (*Marci. 3 Inst.*)); and it follows Papinian within 2,1,8 (= D. 18,1,73,pr. (*Pap. 3 resp.*)).

7 See D. Liebs, *Römische Jurisprudenz in Gallien (2. bis 8. Jahrhundert)*, (Freiburger Rechtsgeschichtliche Abhandlungen. Neue Folge, 38), Berlin 2002, 129-30, 132-3. Cf C. Smith / E. Tassi Scandone, 'Gai. 2.8 e la classificazione delle res sanctae. Un'ipotesi interpretativa', *BIDR CVII* (2013), 253-286 (283).

why anything was sanctified to begin with. We are not told why *res sanctae* could not be tampered with, or what it was about them that made them so special; we are simply told that it was their inviolability that made them *sanctae*. Inst. 2,1,10 and its paraphrase do go on to confirm that the parts of laws that confer punishment for their breach are, consequent to the above, known as *sanctiones*. But again, this is merely the outcome of sanctity, not its cause, so it does not redress the balance. Without such elucidation we are in effect left with circular thinking: things were *sanctae* and inviolable precisely because they were *sanctae* and inviolable, which does not really take us very far.

However, there are jurisprudential fragments that tell us how a thing earned its sanctity, and why, and I will be arguing here that the roots of these provisions may also be found in Gaius' original Institutes, not just from within his analysis of *divisio rerum*, but particularly from 2,9. To provide an overview of these attestations, we turn first to the 'commentary'⁸ on D. 1,8,1,pr. prepared by the sixth-century jurist Stephanus. His analysis was saved from oblivion when eventually, around three hundred years later, it was added to the margins of the Basilica as the first scholion to B. 46,3,1, itself a summary of D. 1,8,1 that had also been produced contemporarily to the Justinianic enterprise.⁹ At lines 15-16 of the scholion, Stephanus avers that:

Καὶ τὰ σάγκτα δέ, οἷον τὰ τεῖχη καὶ αἱ πύλαι, τρόπον τινὰ θεοῦ δικαίου εἰσὶν περιποιούσι γὰρ ἡμῖν τὸ ἀσφαλές καὶ ὄχυροῦσιν ἡμᾶς, διὸ καὶ σάγκτα προσαγορεύονται.¹⁰

Sanctified things, we are told, preserve for us that which is steadfast, and secure us from harm. It was due then to these protective qualities that such things were *sanctae*. In some ways the passage is fairly inscrutable, as we are not told why any of the protected things are known as τὸ ἀσφαλές in the first place,¹¹ even though the extract confirms that walls and gates were examples of the things that actually provided the protection. But now we know at least that anything sanctified would protect τὸ ἀσφαλές, as well as keeping mankind safe,

8 Justinian forbade actual commentaries on the Digest (const. *Deo auctore*, § 12, const. *Tanta*, § 21). Although his restrictions were probably not as far reaching as hitherto thought (see Sp. Troianos, *Le fonti del diritto bizantino*. Traduzione a cura di Pierangelo Buongiorno, Torino 2015, 55-59), Stephanus may have styled his work as a collection of *paratitla* or *indices*.

9 The part of the scholion that corresponds to D. 1,8,1,pr. is found at BS 2744/6-25, although the scholion as a whole also proceeds to encompass D. 1,8,1,1 (BS 2744/25-2745/12), which is relevant to the current enquiry as well, as we shall see. The actual text that the scholion adjoined (B. 46,3,1 (BT 2124/4-12)) translates just scraps of D. 1,8,1,pr., so provides only scant assistance here. But its vocabulary usage may be instructive; see section D (vi) below.

10 Sch. Pc 1 ad B. 46,3,1 = D. 1,8,1 (BS 2744/14-16).

11 See however below at s. D (vii) (b) regarding Stephanus' likely intentions for ἀσφαλής.

so we get far closer to ascertaining the fundamental issue of why a thing ended up being considered *sancta* to begin with. There is no hint of this assertion in V, nor indeed in D. 1,8,1,pr., but the text seems to respond to the very question that was asked of *res sacrae et religiosae*, but not of *res sanctae*, in Gaius 2,4-7.

We turn now to Theoph. 2,1,10, and to clauses that do not stem from Justinian's Institutes. Theophilus is also seen here telling us that *res sanctae* protect us, and that this accounts for their name. With its direct confirmation that sanctified things are so named because they fortify and safeguard us, we see another passage potentially filling in the information that seems to be lacking from Gaius 2,1-11, and largely bearing the same meaning as the words of Stephanus:

λέγονται δὲ καὶ ἐντεῦθεν SANCTA· SANCIRE γὰρ ἔστι τὸ ὄχυρον. ἐπειδὴ οὖν ἀσφαλίζεται ἡμᾶς τὰ τεῖχη, διὰ τοῦτο SANCTA προσαγορεύεται.¹²

Moreover, revealing a penchant for historical anecdotes, Theophilus immediately goes on to expound on an ancient legend concerning how things became *sanctae*. This time, the passage is not in Stephanus' commentary; it is particular to Theophilus. He tells us that as of old, when the gods still had dealings with men, they provided them with protection, but when they eventually condemned mankind they withdrew this assistance, which humans replaced by building walls. Because the gods' guardianship had been so precious, and precious things generally were *sanctae*, the walls that came to substitute their protection were considered *sanctae* too:

δυνατὸν δὲ καὶ μυθώδη τινὰ αἰτίαν ἀποδοῦναι τῆς προσηγορίας. φασὶ γὰρ πάλαι τοὺς θεοὺς συνεῖναι τοῖς ἀνθρώποις καὶ ἀβλαβεῖς αὐτοὺς πανταχόθεν διαφυλάττειν, τοῦ δὲ χρόνου προϊόντος καταγόντας τῶν ἀνθρώπων ἀπολιπεῖν αὐτούς. οἱ τοίνυν ἄνθρωποι τῆς ἐκείνων βοήθειας ἐρημωθέντες πρὸς μίμησιν τῆς ἐκείθεν φυλακῆς ἐπενόησαν τὰ τεῖχη. ἐπειδὴ οὖν SANCTON ἔστι τὸ τίμιον, διὰ τοῦτο ὡς εἰς τάξιν τῶν τιμιωτάτων ἐπινοηθέντα τὰ τεῖχη καὶ τὰς πύλας ὠνόμασαν SANCTA.¹³

12 Theoph. 2,1,10, p. 184/7-8, in J.H.A. Lokin / R. Meijering / B.H. Stolte / N. van der Wal (edd.), *Theophili Antecessoris Paraphrasis Institutionum*. With a translation by A.F. Murison, Groningen 2010 (hereinafter, references are made to this edition, with page and line numbers). See also Smith / Tassi Scandone, 'La classificazione' (note 7 above), 278-279.

13 Theoph. 2,1,10, p. 184/8 - p. 186/15.

Here, the Groningen edition starts a new paragraph beginning with ‘also’ to translate Theophilus’ introduction to the ‘legendary reason’ behind a thing’s designation as *sancta*. Implicit to this rendition is the understanding that the initial [δυνατὸν δὲ] καὶ indicated that the passage as a whole was making an entirely different point. But whilst it is clearly possible grammatically that a fresh matter was started here, it is by no means a requisite inference. The section may instead simply run on from the previous sentence, containing the reasons for why a thing’s function of fortifying and safeguarding us had the consequence of giving it the quality of *sanctitas*. In other words, the legend serves to explain the preceding passage at lines 7-8. Indeed, although by telling us in the second passage what the ancients used to think, Theophilus treads an arguably fine line between the historical and the heretical, protection as the reason behind divine status is key to both this and the earlier extract. As such, it seems that they are intimately connected to each other.

However, there is no vestige of any of these remarks in V or D. 1,8,1,pr., or anywhere else. But this stage of Stephanus’ commentary, and Theophilus’ work generally, are both descendants of Gaius’ own Institutes, so there is clearly scope for each author to hold the key to some more of the words lost from Gaius 2,9, specifically explaining that the protectiveness of *res sanctae* accounted for their designation, supplementing the other provisions whose potential details have already been explored in my parallel study. Stephanus would have discarded direct mention of the ancient roots behind the beliefs in question, including the background legend, but retained the kernel of the old story. Come what may, both commentators address an issue that in many respects was crying out to be addressed in V, and they addressed it in ways that are remarkably similar to each other: it was the protective nature of *res sanctae* that gave them their sanctity.

Interestingly, further to an in-depth exploration of literary sources dating back to the Republic, Smith and Tassi Scandone conclude that the original defining quality of *res sanctae* was the protection they gave.¹⁴ As such, we find Cicero accusing the high priests of replacing the fortifications of *muri sancti* with religious ceremony, and Varro writing about the religious purposes of building a ditch and walls around a city.¹⁵ In epitomising the work of the Republican-era Flaccus, Festus also talked about herbs being grown in sanctified

14 Smith / Tassi Scandone, ‘La classificazione’ (note 7 above), 262-265, 269-279.

15 Cic. *N. D.* 3,94: *est enim mihi tecum pro aris et focus certamen et pro deorum templis atque delubris proque urbis muris, quos vos pontifices sanctos esse dicitis diligentiusque urbem religione quam ipsis moenibus cingitis.* Var. *L.* 5,143: *Oppida condebant in Latio Etrusco ritu multi, id est iunctis bobus, tauro et vacca interiore, aratro circumgebant sulcum (hoc faciebant religionis causa die auspicato), ut fossa et muro essent muniti.*

places to ensure the untouchability of ambassadors.¹⁶ *De Munitiōibus Castrorum*, probably drafted around the early third century CE,¹⁷ after discussing the defensive trench surrounding a military encampment, also confirmed the sanctity of its adjacent ramparts.¹⁸ These sources certainly support a general classical cognisance of an association along the lines of protectiveness bestowing sanctity, which would in some ways corroborate the allegation that Stephanus and Theophilus learnt of the link through Gaius.

However, it is also admittedly possible that it was this very material that provided the information for the sixth-century Greek legal scholars whose provisions are under review here. After all, in sch. Pc 2 ad B. 46,3,9, which contained the remarks of the sixth-century Anonymus, we discover that any soldier who leapt over the ditch around his barracks was to be discharged from military service: πρὸ δύο θεμάτων τοῦ τέλους ὁμοίως τῷ ἐνταῦθα, ἐν ᾧ φησιν, ὅτι ὁ τὴν φόσσαν ὑπερπηδῶν ἀποστρατεύεται.¹⁹ Not being present in any other legal source, and with faint overtones of paganism, and with wording distinctly evocative of *De Munitiōibus Castrorum*, this extract too may have been taken from a text such as those just referred to.

But it is intrinsically more likely that it was Gaius who passed on the idea regarding *res sanctae*, whether he himself was inspired by such lay extracts, or had simply absorbed the received wisdom of his day. As we have seen, in addition to his work relating ancestrally to those of both Stephanus and Theophilus, he had also already addressed the origins of *res sacrae et religiosae*, and such discussion was inherently likely to generate a similar analysis for *res sanctae* too. Furthermore, I have already shown how Gaius probably broached the issue of sanctity in other ways in the lengthy lacuna at 2.9, which could have accommodated a further passage of the appropriate size in addition to the wording already roughly identified.²⁰ And as a classical-era pagan jurist, who moreover was very keen on the history behind

16 Fest. *Verb. sign.*, s.v. *sagmina*, p. 424 / 426 L: *sagmina vocantur verbenae, id est herbae purae, quia ex loco sancto arcebantur a consule praetoreve, legatis proficiscentibus ad foedus faciendum bellumque indicendo vel a sanciendo, id est confirmando*. A related legend is addressed by Marcian and others; see below with notes 32-34.

17 A. Grillone, *Gromaticae militares: lo ps. Iginio. Prefazione, testo, traduzione e commento*, (Collection Latomus, 339), Bruxelles 2012, 14-19.

18 Ps.-Hyg. *Munit. castr.* 50: *Vallum loco suspectiori extrui debet cespite aut lapide, saxo sive caemento... Causa instructionis sanctum est cognominatum*. See also 48-49.

19 Sch. Pc 2 ad B. 46,3,9 (BS 2749/30-31), added to the Basilica text summarising Pomponius' D. 1,8,11.

20 The hypothesised said provisions are set out by Weber, '*Res sanctae*' (note 1 above), sections C-D and conclusion.

legal thought,²¹ Gaius may himself have been au fait with the old legends that explained why particular rules and categorisations had arisen. All these factors may allow us to deduce that Gaius was behind the words of Stephanus and Theophilus.

Sixth-century legal antiquarians, on the other hand, could well have been denied the ‘knowledge’ of their forebears, as awareness of and access to details on censured pagan beliefs must have become limited. Christian emperors had already exhibited intolerance towards paganism,²² and Justinian ratcheted this up a notch through C. 1,11,10,pr.-7, enacted ἐπὶ τοῖς ἀλιτηρίοις Ἑλλησι. His ruling prohibited pagans from teaching and receiving a public salary, outlawed their ownership of property, deprived them of all civil rights, exiled them, and prescribed forcible baptism and indoctrination for their children. Whoever feigned conversion for the purposes of retaining imperial rank would be punished similarly, and would face the death penalty for still adhering to paganism. Theophilus’ remarks do seem rather brave in such a climate, as does even Stephanus’ distilled version (but see section E below). Yet we can at least infer that both lawyers were more likely to have consulted an approved legal source like *institutes Gaii nostri*, a description immortalised through const. *Imperatoriam* § 6 itself. Using such a venerated work would have provided them with cover, whereas relying on an account of pagan practices in literary sources, such as those considered above, could have left them vulnerable to adverse repercussions.

(ii) *Res sanctae as understood in the classical jurisprudence excerpted for the Digest*

Nevertheless, other than Gaius’ inclination towards historical enquiry, there is little firm evidence that this particular story had jumped the species barrier to form part of jurisprudential thought, before being dredged up again in the sixth century. No surviving classical-era legal fragment, whether by Gaius or a peer, declares in as many words that city walls were *sanctae* due to their protective qualities, so it is not necessarily the case that the remarks by Theophilus and Stephanus originated as proposed. Even though there are excerpts in D. 1,8 that tell us how things became *sanctae*, and we can even sometimes begin

21 F. Gallo, ‘La Storia in Gaio’, in *Il Modello di Gaio nella formazione del giurista*. Atti del convegno torinese, 4-5 maggio 1978 in onore del Prof. Silvio Romano, (Memorie dell’Istituto giuridico, Università di Torino, Volume 12), Milano 1981, 95-106.

22 For example, sacrificing and divination using entrails was punishable by death: CTh. 16,10,4; 16,10,6; 16,10,12,1-3; 16,10,25.

to discern that such status was given because the things in question kept certain individuals safe, we struggle to find general protectiveness as the basis for sanctity.²³

Thus, Ulpian (D. 1,8,9,3 (Ulp. 68 ad ed.)) proclaims the sanctity of things, including laws, that were by *sanctione quadam confirmata*, and details how the death penalty could be incurred by the infraction of the law in question.²⁴ At h.t. 9,4 he tells us that the emperor's approval was needed before city walls could be repaired.²⁵ But in neither case does he inform us about why the sanctified things under discussion had to be treated with such respect, and we are left wondering why certain laws were backed by sanctions when they were flouted, but others not, and why imperial consent was necessary for such essential tasks as restoring damaged walls. It is not disputed that Ulpian's insistence on the sanctity of *sanctio legis* can be traced back to earlier recognition of the protection given by *res sanctae*,²⁶ but the idea as expressed by Ulpian was too far removed from its roots to form the basis of Stephanus' and Theophilus' remarks.

Pomponius at h.t. 11 also tells us how the same penal consequences as those just considered applied where an individual climbed over city walls, or exited otherwise than by the gates.²⁷ And we learn from Marcian too that 'setting upon' such structures was

23 Fragments outside of D. 1,8 that deal expressly or impliedly with *res sanctae* do not give protectiveness as the reason for their status either: D. 11,7,2,4 (Ulp. 25 ad ed.): *Purus autem locus dicitur, qui neque sacer neque sanctus est neque religiosus, sed ab omnibus huiusmodi nominibus vacare videtur*; D. 39,3,17,3 (Paul. 15 ad Plaut.): *Sed loco sacro vel religioso vel sancto interveniente, quo fas non sit uti, nulla eorum servitus imponi poterit*; D. 41,3,9 (Gai. 4 ad ed. Prov.): *Usucapionem recipiunt maxime res corporales, exceptis rebus sacris, sanctis, publicis populi Romani et civitatum, item liberis hominibus*; D. 43,6,2 (Hermogen. 3 iur. epit.): *In muris itemque portis et aliis sanctis locis aliquid facere, ex quo damnum aut incommodum irrogetur, non permittitur*; h.t. 3 (Paul. 5 Sent.): *Neque muri neque portae habitari sine permissu principis propter fortuita incendia possunt*; D. 48,13,13 (Ulp. 68 ad ed.): *Qui perforaverit muros vel inde aliquid abstulerit, peculatus actione tenetur*; D. 50,7,18,pr. (Pomp. 37 Quint. Muc.): *Si quis legatum hostium pulsasset, contra ius gentium id commissum esse existimatur, quia sancti habentur legati*.

24 D. 1,8,9,3: *Proprie dicimus sancta, quae ... sanctione quadam confirmata [est]: ut leges sanctae sunt, sanctione enim quadam sunt subnixae. Quod enim sanctione quadam subnixum est, id sanctum est, etsi deo non sit consecratum: et interdum in sanctionibus adicitur, ut qui ibi aliquid commisit, capite puniatur*.

25 D. 1,8,9,4: *Muros autem municipales nec reficere licet sine principis vel praesidis auctoritate nec aliquid eis coniungere vel superponere*.

26 Smith / Tassi Scandone, 'La classificazione' (note 7 above), 257-262, 279.

27 D. 1,8,11 (Pomp. 2 ex var. lect.): *Si quis violaverit muros capite punitur, sicuti si quis transcendet scalis admotis... Nam cives Romanos alia quam per portas egredi non licet, cum illud hostile et abominandum sit*.

prohibited.²⁸ Yet once more, these fragments do not tell us the reasons behind the rules and deterrents, and still less consider the protective nature of *res sanctae*. The leap from the rule of law to protection and sanctity was clearly there to be made, but was not spelt out. So it is not accepted here that the jurists' words, as reported to us by the compilers, can be relied on to establish the root behind the sixth-century linkage of protection with *res sanctae*.

Indeed, all the above provisions may have hinged on words of the Republican-era Aelius Gallus, reported by Festus, that *res sacrae* may also be *sanctae*, simply because neither category could be violated without punishment.²⁹ Although his thinking is not reflected in the jurisprudence, his disregard of the innate protective qualities of *res sanctae*, as required by the earlier literary authors, leaves us in the dark as to the true reasons for the penalty, just as the legal extracts do.

Marcian's D. 1,8,8 may be more helpful, although here too there are problems. Firstly we have h.t. 8,pr.³⁰ where Marcian touches on defence, and therefore protection, in discussing how the term *res sanctae* came about: a thing 'defended and fortified against the aggression of men' is *sanctum*. So it seems that it is at least implied that where a thing was deemed worthy of protection, it led to its designation as *sancta*. But even here, despite appearances, the primary focus is on whatever was defended from the harmfulness of others: that which was *defensum* and protected was *sanctum*, rather than that which defended it and provided the protection, too basic a difference with the sixth-century accounts of Stephanus and Theophilus to infer a common root. We can be fairly sure that Marcian did indeed mean that *sanctitas* lay in the protected rather than the protector, as we find the same idea in sch. 1 ad B. 46,3,6, which accurately summarises D. 1,8,8,pr.: it reminds us that a sanctified thing is that which is safeguarded from the violence and abuse of men.³¹ The approach is almost the opposite of what we see in the comments of Stephanus and Theophilus, whose primary objective was to illustrate actual protective ability, whereas for Marcian at D. 1,8,8,pr., this simply does not feature as a causative factor in a thing's designation as *sancta*. In any event, it is implausible that *both* Byzantine scholars mistook his meaning, that neither referred to *iniuria hominum*, and that each changed the basic focus.

28 D. 1,8,8,2 (*Marci. 4 reg.*): *In municipiis quoque muros esse sanctos Sabinum recte respondisse Cassius refert, prohiberique oportere ne quid in his immitteretur.*

29 Fest. *Verb. sign.*, s.v. *religiosus*, p. 348 L: *si quidem sacrum est, idem lege aut instituto maiorum sanctum esse putant, ut violari id sine poena non possit.* (Cf. *id.*, s.v. *sanctum*, p. 420 L).

30 D. 1,8,8,pr. (*Marci. 4 reg.*): *Sanctum est, quod ab iniuria hominum defensum atque munitum est.* Cf. Smith / Tassi Scandone, 'La classificazione' (note 7 above), 263-265.

31 Sch. Pc 1 ad B. 46,3,6 (BS 2748/8-9): Σάγκτον ἔστιν ὕπερ ἐκ τῆς τῶν ἀνθρώπων ὕβρεώς τε καὶ ἐπιρείας ἡλευθέρωται καὶ ἡσφάλιστα.

But Marcian also gave us D. 1,8,8,1, where we find our first real inkling in the legal sources that the capacity to protect was relevant to sanctity. We learn that the term *sanctum* was derived from *sagmina*, the herb carried by Roman legates to guard them against attack, thereby actually providing protection, and eventually evolving into the term *sanctum*.³² Sch. 1 ad B. 46,3,6 confirms Marcian's interpretation of the law,³³ as does the apparently independent sch. 4 ad B. 46,3,7.³⁴ But whilst the Marcianic provision and its Greek renditions look into the history of the word, telling us in effect that it was rooted in a thing's protective powers, the passages self-evidently do not look into the properties of walls and gates (the focus of Stephanus and Theophilus), talking only of ambassadors, impliedly when they were travelling in enemy territory. Neither does the word 'protection' feature; but even if it is an obvious inference, we still lack a direct precursor to the sixth-century terminology. It is too much of a stretch to conclude that Marcian's words bore any further relationship to Stephanus' and Theophilus' version of where sanctity emerged from, even though the underlying themes may have had a common root.

So none of these fragments contains the information on ancient beliefs that could have provided the impetus for the remarks under review. Also, irrespective of the detail imparted, had any of the extracts reflected what Gaius said in 2,9, there would be no reason at all to earmark the same words for omission from D. 1,8,1,pr., given that they were to appear again slightly later in D. 1,8.³⁵ Why delete reasoning by one jurist only to include the same thinking authored by another in the same short title? But more importantly for current purposes, we can at least infer that D. 1,8 is unlikely to have assisted either Stephanus or Theophilus on the protectiveness of *res sanctae*.

However, this may not really mean much. The fact remains that the Digest compilers may simply have rejected an extract that talked about these matters, particularly if it was built on old pagan accounts and myths. After all, Stephanus did not set out Theophilus' legend, suggesting that it was unsuitable for basic legal purposes, as opposed to being a part of legal history. And although Marcian's D. 1,8,8,1 perhaps sails a bit close to unacceptability, he only tells us about a harmless old superstition about herbal properties, as opposed

32 D. 1,8,8,1 (*Marci. 4 reg.*): *Sanctum autem dictum est a sagminibus: sunt autem sagmina quaedam herbae, quas legati populi Romani ferre solent, ne quis eos violaret.* (See also Festus' definition of *sagmina*, quoted in note 16 above).

33 Sch. Pc 1 ad B. 46,3,6 = D. 1,8,8 (BS 2748/10-11): 'σάγμινα' δέ εἰσι βοτάναι τινές, ἃς οἱ πρεσβευταὶ τοῦ δήμου <τῶν> Ῥωμαίων βαστάζειν εἰώθασιν, ἵνα μὴ βιάσῃται τις αὐτούς.

34 Sch. Pc 4 ad B. 46,3,7 = D. 1,8,9 (BS 2749/6-9): [Ἐν τῷ ῥητῷ λέγει, ὅτι ...] σάγκτα λέγεται ἀπὸ βοτανῶν οὕτω λεγομένων, ἅτινα οἱ πρεσβευταὶ τῶν Ῥωμαίων ἐπεφέροντο πρὸς τὸ μὴ ὑπ' οὐδενὸς ἐπιπράξεσθαι.

35 See also Weber, '*Res sanctae*' (note 1 above), B (ii), regarding the evidential value of excerpts in D. 1,8.

to Theophilus' convoluted account based on mythological divine intervention. So if a classical jurist had set out the account documented in Theoph. 2,1,10, and toned down in the scholion, it may well have been rejected by the compilers, which could explain the absence from the Digest of such a provision, but it may or may not have been Gaian.

C. The influences behind Theophilus' *Paraphrasis*

This uncertainty requires us to consider further where our Byzantine jurists were most likely to have found their guidance on the matter. Starting with Theophilus, an exploration of where this *antecessor* obtained his inspiration generally may provide insight into where his comments at Theoph. 2,1,10/7-14 originated from. And indeed, we do have a fairly good idea about his sources. First and foremost, the *Paraphrasis* was clearly intended as a commentary in Greek on Justinian's Institutes, so any analysis of Theophilus' wording must necessarily start with the latter, entailing that Gaius' original text is reflected in the Greek *Paraphrasis* too. Yet we also find in the imperial manual a whole medley of other influences that by implication lay behind Theophilus' work too. Although Justinian's Institutes largely followed Gaius', and we see a lot of material in Inst. 2,1 that was lifted straight from Gaius 2,1-11, modernisations and adaptations were nevertheless made, and other juristic works feature also, as discussed in greater detail below (section D (iv) (a));³⁶ and this necessarily is what formed the basis of the *Paraphrasis*. As such, we should be prepared for much of Theophilus' material to originate from a source other than Gaius' Institutes, at least where it had been endorsed through the Justinianic update.

In terms of establishing which of Theophilus' 'new' comments came from Gaius 2,1-11, it is certainly not fatal that the content and sequence differs, because of the paraphrator's undeniable interest in the history behind the legal provisions he was commenting on.³⁷ In his historian's garb, he may have dipped in here and there where convenient. And although a cogent explanation is required for why Inst. 2,1 would have included any original Gaian comments that had been actively rejected from D. 1,8,1,pr., Theophilus is not vulnerable in the same way. This is because he went beyond simply translating his emperor's manual into Greek, providing significant extra commentary. So although it will not be straightforward showing Gaian provenance for his wording, we must keep an open mind on this front. Yet establishing the Gaian roots of any part of Theophilus' work is immediately problematic, as clauses in the emperor's manual that had been taken from Gaius' Institutes,

36 See also note 6 above.

37 See e.g. Nelson, *Überlieferung* (note 3 above), 279-283; Stolte, 'Gaius in Theophilus' (note 3 above). Theoph. 1,5,3 is particularly illustrative of this approach.

but which Theophilus then paraphrased in Greek, need to be disentangled from any that he may have taken directly from Gaius' *Institutes*, and this is arduous where we no longer have testimony due to the condition of V. So we may have real difficulties telling whether the paraphrator turned directly to Gaius' *Institutes* or just made do with its Justinianic counterpart, complete with all its Gaian clauses.

Nevertheless, Nelson has shown that a significant number of provisions in the *Paraphrasis* do not mirror passages in Justinian's manual, yet are found in Gaius' work,³⁸ demonstrating that Theophilus must have had the latter to hand. So rather than being simply a commentary on Justinian's *Institutes*, we can say with confidence that there are direct links between Theophilus' *Paraphrasis* and Gaius' *Institutes*, and that the paraphrator was often inclined to cite passages from this work. His interest in history works to his advantage in this respect as well, not simply because of the inherent historical value in what the third-century Gaius had said, but also because Gaius himself tended to look to the past in his *Institutes*, going beyond a strictly legal remit.³⁹ So to some extent, because Theophilus' remarks at 2,1,10/7-14 resemble Gaius' approach generally in this respect, they may stand a greater chance of being from his work. And the lines quite plainly find no potential instigation in Inst. 2,1, nor indeed in any other comment from the Justinianic compilation. In light of these circumstances, there is a viable argument that the words may indeed have emanated directly from the part of Gaius 2,9 that is no longer available to us, and perhaps this should be our starting point.

Yet we must still take care before making such an attribution,⁴⁰ precisely because Theophilus may have found the material at 2,1,10 in some other work no longer known to us. We again find that the historical interest he shared with Gaius is not enough in itself to create a more definitive connection, and further evidence supporting the notion would undoubtedly be helpful.

D. The influences behind Stephanus' commentary

And this is why the history behind Stephanus' remark at sch. 1 ad B. 46,3,1 (BS 2744/15-16) may be so instructive. Stephanus' work as a whole almost definitely post-dated that of Theophilus (see section D (vii) below), but its importance lies in the tie between both works

38 Nelson, *Überlieferung* (note 3 above), 285-287. See also G. Segrè, 'Sulla questione se la parafrasi greca alle istituzioni giustinianee abbia avuto per fondamento il testo dei commentari di Gaio', in *Scritti Giuridici*, II, Roma 1938, 1ff.; Stolte, 'Gaius in Theophilus' (note 3 above).

39 See note 21 above.

40 Nelson, *Überlieferung* (note 3 above), 289.

and Gaius' Institutes, through D. 1,8,1 on the one hand and Inst. 2,1 on the other. As pointed out above, that their Gaian roots were potentially the same, and the comments so similar, gives us further reason to believe that these particular passages may both have been taken directly from the Gaian manual, and more precisely from 2,9. And as we have seen, there are also reasonable grounds for believing independently that Gaius had addressed here the origins of *res sanctae*, just as he had regarding *res sacrae et religiosae* at 2,4-7. But we may be able to establish such provenance with even greater certainty if we can plausibly link *other* sections of Stephanus' sch. 1 ad B. 46,3,1 to the opening of book 2 of Gaius' Institutes. If such a connection can be made out elsewhere in the scholion as well, we would stand a much better chance of ascertaining whether Stephanus sought assistance through Gaius' Institutes generally. We may also be able to properly understand the implications of both these Byzantine jurists producing such similar material on the essence and protectiveness of sanctity, and to determine the avenue through which the ancient beliefs may have come to their attention. Or can Stephanus' influences not reasonably be pinned down at all, beyond the Digest fragment he was addressing?

(i) *The basic trajectories of Gaius 2,1-14 and sch. 1 ad B. 46,3,1 (BS 2744-2745)*

The story of Stephanus' sources is self-evidently complex, and to undertake a thorough enquiry into the roots of the one short excerpt at lines 15-16, we need to assess the extent to which the entire scholion corresponds with a wide range of works, from Gaius' Institutes through to D. 1,8,1,pr., Inst. 2,1, and Theophilus' *Paraphrasis* of the latter. And to make the most of all the available evidence, we need to broaden the base of our enquiry as well, to encompass not only Gaius 2,1-11 (set out in section B above) but also the subsequent provisions that follow on immediately at 2,12-14 (V p. 56/16-24 – p. 57/1-15); and to consider the corresponding sections of the other sources, starting with the scholion.

With the assistance of D. 1,8,1,1 (disregarding its final phrase after *rusticorum*, see section D (ii)), and with the insertion of words at the end reached through minor conjecture based on the *Epitome Gai*, we can establish that after Gaius 2,1-11, Gaius provided as follows for 12-14:

[p. 56] 12. Quaedam praeterea res corporales sunt, [quaedam incorporales. 13. Corporales hae sunt, quae tangi possunt, velut [fundus, homo, vestis, aurum, argentum et denique aliae res innumerabiles. 14. Incorporal[es sunt,] q[uae] [tangi non possunt, qualia sunt ea, quae in iure consi]stunt, sicut hereditas, ususfructus, obligationes [quoquo modo contractae. nec ad rem pertine[t, quod in hereditate res corporales continentur,] et fru]ctus, qui ex fundo percipiunt[ur,] corporales [sunt,] [et [id], quod ex aliqua obligatione [nobis] deb[etur,] |[p. 57] plerumque corpo[r]ale est, veluti] fundus, homo, pecu[n]ia: nam ipsum ius successionis et

ipsum iu[s] u[ten]di fruendi et ipsum ius obligationis incorpora[le] est. eodem numero sunt iura praediorum urba[norum] et rusticor[um ... ¾ of 1 illegible line ... ius] altius tollend[i] aedes et officie[n]d[i] luminibus vicini aed[ium aut] non extollen[di, ne luminibus vicini officiatu[r].]item fluminum et stillicidiorum idem ius [... ... 3 ½ illegible lines ...] ius aquae ducendae. [2 mostly illegible lines...; Gai. Epit. 2,1,3: haec iura praediorum tam urbanorum quam rusticorum] serv[it]utes vocan[t]ur.

Comparing the scholion, although Stephanus' reproduction of the whole of Gaius 2,1-14 omits certain sections, its individual components stay very close to the subject matters and order, as far as is represented in V; no new theme is present, other than the comment on the protectiveness of *res sanctae*. They both mention the previous book's discussion of *ius personarum*, and then tell us of their intention to turn to the matter of *res* (Gaius 2,1; BS 2744/7-8). Stephanus skips the third clause of 2,1, but they both then talk of the main division of things into two categories, divine or human (Gaius 2,2; BS 2744/9-11), followed by statements on how the former consisted of *res sacrae et religiosae* (Gaius 2,3; BS 2744/12), which were godly dedications in the form of temples and burials (Gaius 2,4; BS 2744/13-14). As discussed below, Stephanus misses out Gaius' further remarks on *res sacrae et religiosae* (Gaius 2,5-7), but both go on to discuss an apparent third division of *res divinae* into *res sanctae* (Gaius 2,8; BS 2744/14-15). As we know, Stephanus' subsequent clarification, on how the protectiveness of τὰ ἁγία explains a thing's sanctity (BS 2744/15-16), is not found in V. But the accounts converge again when discussing how *res divinae* are *nullius*, and *res humanae* are usually *alicuius*, with inheritance being offered as an exception (Gaius 2,9, partly supplied by D. 1,8,1,pr.; BS 2744/16-21). After missing out the rest of this latter section (also illegible in V), Stephanus reverts to the same honest approach, his treatment of *res humanae* confirming, as Gaius does, that they are either public or private, respectively under the ownership of no-one or of individuals (Gaius 2,10-11; BS 2744/21-25).

Stephanus' treatment of *res corporales et incorporales* again seems mostly faithful to the Gaian original (Gaius 2,12-14; BS 2744/25-2745/12). Both look at the nature of corporeality and give examples, and then do the same for incorporeality, going on to explain how even though the two concepts may appear intermingled, this was only because the actual rights, as opposed to the object of those rights, were incorporeal. The latter part of the overall discussion is mostly absent from V p. 57/10-15, and is not in D. 1,8,1,1 either, nor the scholion, so we have no record from these sources of Gaius' wording here (see Table 1). But although the section is largely intractable in V, general consensus surrounds the supposition that Gai. Epit. 2,1,3 duplicated Gaius 2,14 in part here, and it is to some extent

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relied on to fill the gap,⁴¹ with its examples of rights pertaining to urban and countryside property. However, these are clearly not taken up by Stephanus, so the (mostly) accurate replication of Gaius' content and order seen in the first half of his scholion is not mirrored in the second half.

Elaborating further on this sequence clash, unlike the order taken by D. 1,8,1,1 (see section D (ii) below), Gaius is very unlikely to have concluded his sentence at V p. 57/10 with reference to such rights being known as *servitutes*, as enough remains of V to infer that he does exactly this at the very end of 2,14 (V p. 57/14-15), *after* the missing sections. We cannot be absolutely certain that he did not do so also at V p. 57/10 as the palimpsest is illegible here, but it is unlikely that Gaius would have said the same thing twice. Indeed, Nelson and Manthe follow Krüger's proposal that Gaius had said *haec iura praediorum tam urbanorum quam rusticorum servitutes vocantur* at the end of 2,14,⁴² and not before the gap. The last two words match surviving characters in V, as well as largely coinciding with the words at the end of Gai. Epit. 2,1,3 (*servitutes appellantur*), so the suggestion is clearly plausible. However, we can tell from the scholion that Stephanus differed from Gaius in this respect, finishing off the section that had corresponded to Gaius' earlier words at V p. 57/10 with confirmation that the rights regarding the laws of houses in a community and of land are incorporeal, and were known as rustic and urban servitudes, only reflecting V at the later p. 57/14-15:

Table 1

Gaius 2,14 (V p. 57/2-15)	D. 1,8,1,1 (<i>Gai. 2 inst.</i>)	Sch. 1 ad B. 46,3,1 (BS 2745/6-12)
nam ipsum ius successi- onis et ipsum ius utendi	nam ipsum ius successionis et ipsum ius utendi fruendi	Οὐδεμίαν τοίνυν εἰσάγει διαφορὰν τὸ ἐν τῇ κληρονομίᾳ καὶ τῷ οὐσου- φρούκτῳ καὶ τῇ ἐνοχῇ σωματικὰ πολλάκις εὐρίσκεσθαι πράγματα· τὸ γὰρ δίκαιον αὐτὸ τῆς κληρονο- μίας καὶ τὸ δίκαιον τοῦ οὐσου-

41 Aspects of D. 8,2,2 (*Gai 7 ad ed. prov.*) and Inst. 2,2,3 may also feature, see e.g. E. Seckel / B. Kuebler (edd.), *Gai Institutiones*, Lipsiae 1935⁷, 56 (see Gordon/Robinson, *The Institutes of Gaius* (note 3 above); F. de Zulueta, *The Institutes of Gaius*. Part I: Text with critical notes and translation, Oxford 1946, 68 with note 2; U. Manthe, *Die Institutionen des Gaius*. Herausgegeben, übersetzt und kommentiert, (Texte zur Forschung, Band 81), Darmstadt 2004, 116 note 1. Regardless of the correctness of these suggestions, we are none the wiser as to why the sixth-century compilers rejected the passage.

42 See M. David / H.L.W. Nelson (Hrsg.), *Gai Institutionum Commentarii IV mit philologischem Kommentar*. Text, (*Studia Gaiana*, II/2), Leiden 1960, 68, apparatus on lines 14-15; M. David / H.L.W. Nelson (Hrsg.), *Gai Institutionum Commentarii IV mit philologischem Kommentar*. Kommentar, (*Studia Gaiana* III/2), Leiden 1960, 241-242; Manthe, *Die Institutionen des Gaius* (note 41 above), 116.

<p>fruendi et ipsum ius obligationis incorporale est.</p> <p>Eodem numero sunt iura praediorum urbanorum et rusticorum. [... ¼ of 1 illegible line ... ius] altius tollend[i aedes et officien]d[i] luminibus vicini aed[ium aut] non extollendi, ne luminibus vicini officiat. item fluminum et stillicidiorum idem ius... [... 3 ½ illegible lines ...] ...ius aquae ducendae. [...2 mostly illegible lines...; but see Gai. Epit. 2,1,3: haec iura praediorum tam urbanorum quam rusticorum] serv[it]utes vocan[t]ur.</p>	<p>et ipsum ius obligationis incorporale est.</p> <p>Eodem numero sunt et iura praediorum urbanorum et rusticorum,</p> <p>quae etiam servitutes vocantur.</p>	<p>φρούκτου καὶ τὸ δίκαιον τῆς ἐνοχῆς ἀσώματόν ἐστι, καὶ διὰ τοῦ ἀσωμάτου τὰ σωματικὰ μεθοδεύομεν.</p> <p>Ἐπὶ τὸν αὐτὸν ἀνάγεται ἀριθμὸν, τουτέστιν ἀσώματὰ ἐστὶ καὶ τὰ δίκαια τῶν οἰκημάτων τῶν πολιτικῶν καὶ τῶν ἀγροικικῶν,</p> <p>τουτέστιν αἱ δουλεῖαι τῶν ἀγρῶν καὶ τῶν οἰκημάτων.</p>
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Another aspect of Stephanus' analysis that requires comment is his tendency to repeat Gaius' words in different ways, in a way not seen in the original. Thus, Gaius' *res divinae et humanae* are *diuiniuris* and οὐμναιοῦρις, but are also θεῖου δικαίου and ἀνθρωπίνου δικαίου (BS 2744/10-11, 21-22), the partially Hellenised Latin references to divine and human law being juxtaposed with their pure Greek equivalents. At BS 2744/12, τὰ σάκρα are mentioned in addition to τὰ ἱερά and τὰ ῥελεγίσα, but this is not a confused reference to the third limb of *res divinae*, namely τὰ σάγκτα; these are clearly dealt with separately (BS 2744/14-16), as in Gaius 2,8. The words are as they appear, again a hellenisation, this time of *res sacrae* (see also section D (vi) below). After replicating Gaius' words that divine things belong to no-one, Stephanus also clarifies that οἶα δὲ μόνῳ ἀφιερωμένα θεῷ (BS 2744/17), resorting again to his explanation of Gaius 2,4 regarding *res sacrae*. He is more verbose in explaining that things under human law are sometimes not ownable, asserting that he had good cause to use the words ὡς ἐπὶ τὸ πλεῖστον (BS 2744/18-19, referring back to Gaius' *plerumque* at 2,9). Explaining himself, he confirms that an inheritance is not owned either πρὶν ἢ τις ἀδιτεῦσει or [πρὶν] γένηται κληρονόμος (BS 2744/20), in contrast

to Gaius' *antequam aliquis heres existat*. And he then explains that hereditary things sometimes οὐκ ἔστιν ὑπὸ οὐσίαν τινός or ἀδέσποτα εἶναι πιστεύεται (BS 2744/21), in contrast to Gaius' *nullius in bonis sunt* (2,9). But these 'additions' are inconsequential, as nothing new is said, and there is no evidence of a non-Gaian influence.

Stephanus littered the second half of the scholion, with its analysis of *res corporales*, with even more subsidiary comments. He explains why debts are not always corporeal (BS 2745/2-6), further to Gaius' *plerumque* at 2,14. And prior to concluding with τὸ γὰρ δίκαιον αὐτὸ... (his rendition of Gaius' *nam ipsum ius...*), Stephanus clarifies that it makes no difference that corporeal things are often found in an inheritance, usufruct and obligation, as the very rights are incorporeal, and that 'through the incorporeal we deal with corporeal things' (Table 1). He sometimes even appears to touch on novel areas when seeking to exemplify Gaius' own explanations, and was possibly influenced by Theophilus in doing so (see section D (vii) (b) below).

So Stephanus does not include all provisions from Gaius 2,1-14 in his commentary, and this will be considered in more detail below (section D (ii)), and as well as BS 2744/15-16, there are further additions of sorts in both halves of the scholion. But rather than being new substantively, these extra comments all illustrate explanations, or expand on Gaius' own attempts to provide clarification, or say things in a different way, and do not amount to a failure by Stephanus to follow the basic order of Gaius' original. In reality, he always sticks to the underlying themes and order of the original manual. So the crucial additional remark on τὰ σάγκτα seems to be Stephanus' only genuine addition to Gaius 2,1-14, which may well point to it coming from the lacuna at Gaius 2,9. But we still need to consider other angles before we can be reasonably certain that such a conclusion is correct.

(ii) 1,8,1,pr.-1, Gaius 2,1-14 and the omissions from sch. 1 ad B. 46,3,1

Because the scholion started life as a commentary on D. 1,8,1,pr.-1, which itself replicated Gaius 2,1-14 with considerable accuracy,⁴³ the obstacles in the way of showing whether Stephanus followed only the Digest extract or also referred directly to Gaius' original, or relied on both, may to all intents and purposes appear insurmountable. We need to consider whether it withstands scrutiny that Stephanus adhered purely to D. 1,8,1,pr.-1, but can it really be ascertained that in particular sections he was influenced by one source over the other?

43 See Appendix, scholion with translation. As noted above, the actual Basilica text (BT 2124/4-12) was drastically shortened, translating only a fraction of the original wording.

To answer this we need to consider what Stephanus misses out from Gaius 2,1-14, and how this compares to D. 1,8,1,pr.-1. We saw above how despite his general replication of Gaius' order and content, on more than one occasion Stephanus dispenses with Gaian provisions. And it turns out that these on the whole are the very same sections of Gaius 2,1-14 that the compilers themselves excluded from D. 1,8,1,pr.-1: Stephanus' omissions coincide with the Digest's omissions. So we are confronted more obviously with evidence of Stephanus simply being guided by the Digest only. This is precisely what we would expect: Stephanus is after all commenting on the Digest, and this imitation of its sequence would therefore naturally detract from the likelihood that he ever turned to Gaius' original manual. If he simply followed the Digest's lead in terms of its exclusions, unquestioningly, he may also have refrained from including the rest of Gaius 2,9 simply because the compilers had rejected it. Were this so, the spare unaccounted-for clause in BS 2744/15-16, confirming that a thing was considered *sancta* due to its protectiveness, would not have been plucked from Gaius 2,9.

However, the very existence of BS 2744/15-16 shows that Stephanus must sometimes have looked beyond D. 1,8,1,pr. when commenting on it. And on closer inspection, the coinciding omissions in the scholion and D. 1,8,1,pr. probably tell us little about where he did look.

Firstly, Stephanus did not include any version of Gaius' remark at 2,1, on things being either within or outside of our ownership: *quae vel in nostro patrimonio sunt vel extra nostrum patrimonium habentur* (Table 5, section D (iv) (b) below). Nor is this found in D. 1,8,1,pr., so Stephanus may have been blindly following the approach of the compilers here. However, as we shall see, he includes the previous two clauses, despite the Digest's abandonment of them, so he must have deliberated over which sections he should include when omitted by the Digest. Moreover, Stephanus' excision of *quae vel ... habentur* is comprehensible, as Gaius asserts in his very next sentence that actually, the main division of things was between *res divinae* and *humanae* (2,2). So he may well have deemed the missing sentence not only superfluous to requirements, but also downright confusing, leaving it out to avoid perplexing the reader. Indeed, the capacity of things to be owned by humans is central to the discussion at Gaius 2,9, both as discernible in V and as reconstructed through D. 1,8,1,pr. Although Stephanus did not mind repeating the same thing twice using different lexical formulations, because the relevance of the last clause of Gaius 2,1 was questionable, it is unsurprising that he should save his clarifications for later. His ensuing omission of *quae vel...habentur* is as such of limited import, indicative more of an attempt to portray the law divested of confusion, rather than an unconditional acceptance and replication of D. 1,8,1,pr.

We also find no hint of Gaius 2,5-7 in sch. 1 ad B. 46,3,1, and there is also an absence of these provisions from D. 1,8,1,pr. (Tables 2-4, section D (iv) (a) below). This second instance of a coinciding omission again tells us that Stephanus must have received basic

direction from D. 1,8,1,pr. But the very fact that Gaius 2,4 was requisitioned by Stephanus, albeit stripped of its pagan overtones (see section D (iii) - (iv)), and as such met with his approval despite apparently being rejected from D. 1,8,1,pr., may again show us that he was thinking about the relative merits of all of Gaius' words, and not just neglecting sections simply because the compilers had done so before him.

It should also be asked why Gaius 2,5-7 were thought not to qualify for inclusion in either work, and there is clear reason to believe that the passages were now mostly obsolete, or stated more concisely elsewhere. As such, there was no question even of toning these down, as Stephanus seems to have done with Gaius 2,4. So firstly, the Digest may have compensated for the absence of Gaius 2,5 through the inclusion of D. 1,8,6,3 (*Marci. 3 Inst.*, Table 3) and *h.t.* 9,pr.-2 (*Ulp. 68 ad ed.*),⁴⁴ both of which took different angles to Gaius. Hence D. 1,8,6,3 gives considerable emphasis to the impossibility of consecrating things privately, whereas this is merely assumed in Gaius 2,5. Also, D. 1,8,6,3 and *h.t.* 9,1 talk of consecrating things *publice*, without specifying the *auctoritas populi romani* referred to by Gaius. They also avoid explaining in more detail how consecration was performed, as distinct from the alternatives of *leges* or *senatus consulta* given by Gaius. At D. 1,8,9,2, we learn about *sacraria*, and about the Emperor's imprimatur being needed to dedicate public places, which probably reflected creeping progress of the imperial prerogative between the Antonine and Severan age,⁴⁵ rather than interpolation. So Gaius' *populus romanus* no longer had a role. The very fact that the compilers chose not to alter Gaius 2,5 amounts to compelling evidence that it was much less suitable than the provisions authored by Ulpian and Marcian. So there are reasonable grounds for concluding that Stephanus chose to give Gaius 2,5 a wide berth in order to safeguard his lawyerly reputation, rather than simply copying D. 1,8,1,pr., even though the fact that this fragment was omitted must also have been influential.

We reach similar conclusions when looking at Gaius 2,6. Although the first part, whereby anyone can make land *religiosus* by using it for burial, is replicated in Marcian's D. 1,8,6,4 (*Marci. 3 inst.*, Table 4), albeit using a different verbal construction, the latter then goes on to discuss other matters: burial on commonly-owned land, or on another's land with their permission before or after the burial, and the religiosity of the cenotaph. Gaius 2,6 instead proceeds to deal only with funerary matters, which Justinian must have felt were

44 D. 1,8,9,pr.-2: *Sacra loca ea sunt, quae publice sunt dedicata, sive in civitate sint sive in agro. 1. Sciendum est locum publicum tunc sacrum fieri posse, cum princeps eum dedicavit vel dedicandi dedit potestatem. 2. Illud notandum est aliud esse sacrum locum, aliud sacrarium. Sacer locus est locus consecratus, sacrarium est locus, in quo sacra reponuntur, quod etiam in aedificio privato esse potest...*

45 K. Tuori, *The Emperor of Law: The Emergence of Roman Imperial Adjudication*, (Oxford Studies in Roman Society and Law), Oxford 2016, partic. 241-291.

otiose for this discussion, as none of the provisions chosen for D. 1,8 make any reference at all to funerals in the context of land imbued with *religio*. Finally, Stephanus' omission of Gaius 2,7, on provincial land and burial, was also highly predictable, given the pointlessness of differentiating the 'provincial' position after *Constitutio Antoniniana*.⁴⁶ So as with Gaius 2,5-6, this entire section had no value whatsoever to Stephanus' commentary.

Stephanus also appears to disregard the section of Gaius 2,9 that follows the discussion on ownerless inheritances, and the Digest does likewise. Even though the very purpose of the current study is to examine the possibility that part of this section at least *did* make its way into sch. 1 ad B. 46,3,1, we have seen that the provenance of all other provisions in the scholion is accounted for, so at the very most it could contain just this one line from what the Digest missed out of Gaius 2,9. So it must have disregarded the rest, just as D. 1,8,1,pr. did, and we must countenance the likelihood that these further sections were dropped because this is precisely what the compilers had done here too. However, much of the section missed out by the Digest and Stephanus, and irretrievable from V, is highly likely to have been both heretical and wrong in law by the time of Justinian in any event.⁴⁷ So the same considerations as identified above could well apply again: Stephanus may simply have been obeying legal strictures by not regurgitating, or even manipulating, laws in desuetude.

As we have seen, Stephanus also disregards the lengthy but mostly illegible section in V within Gaius 2,14 that follows the words *eodem numero sunt iura praediorum urbanorum et rusticorum*. In doing so, he in effect follows D. 1,8,1,1 (see above, with Table 1). He even appends to his Greek version of the aforementioned sentence (namely, Ὑπὸ ... ἀγροικικῶν...) the clarification *τουτέστιν αἱ δουλεῖαι τῶν ἀγρῶν καὶ τῶν οἰκημάτων*, and concludes the discussion accordingly. This is again a rough replication of what the compilers did at the very end of D. 1,8,1,1, when after *eodem...rusticorum* they added *quae etiam servitutes vocantur*. These words probably coincide more or less with what is *after* the same illegible section in V, at the very end of Gaius 2,14,⁴⁸ marking a distinct departure from the original sequence. It is highly improbable that Stephanus and the compilers both decided independently to shorten the section, and that they came up with exactly the same solution on how to do so. We therefore have little choice but to infer that Stephanus took the Digest's lead in this respect, and that following the compilers he simply omitted the extensive section that is probably now found mostly in Gai. Epit. 2,1,3, with the exception

46 See W.W. Buckland, *A Text-Book of Roman Law from Augustus to Justinian*³, rev. P. Stein, Cambridge 1968, 51-52.

47 See generally Weber, '*Res sanctae*' (note 1 above), particularly sections C (iii) and D (vi).

48 David/Nelson, *Gai Institutionum Commentarii IV*. Text (note 42 above), read '*serv.utes vocant.r*' at the end of Gaius 2,14. Krüger's attempt to supplement the missing section also contains exactly these words at the end, see Gordon/Robinson, *The Institutes of Gaius* (note 3 above), 56; De Zulueta, *The Institutes of Gaius* (note 41 above), 68 note 2.

of its last words, which he joined to the end of the preceding paragraph. However, the possibility remains that the provision had become, through time, as meaningless as those just considered, so Stephanus' omission of it may again have been the result of fuller reflection.

It seems clear then that Stephanus omitted much of what the compilers themselves omitted when preparing Gaius 2,1-14 for inclusion in the Digest. The coincidence with the Digest's approach is too much not to infer that D. 1,8,1,pr.-1 played a meaningful role in guiding Stephanus, even though he did not always follow its lead. But the corresponding omissions are not necessarily fatal to the argument that Stephanus had Gaius 2,1-11 in sight when drafting his commentary. It seems to be the case that each provision omitted by Stephanus no longer had any currency or was obfuscatory, for whatever reason. If so, Stephanus had as much cause to avoid them as did the compilers. Although it is impossible to conclude definitively that he did not simply imitate the Digest here, suffice it to say that he may not merely have had the automatic impulse to omit these portions just because D. 1,8,1,pr. had, without any further thought. If the provisions had been rendered redundant, Stephanus had no option: he would have been negligent as a lawyer had he retained them. The omissions cannot be examined in isolation from the real possibility that Stephanus had good reason to pass over the provisions in question because they had no role anymore, not just because the compilers had taken this position too.

(iii) Stephanus' retention of clauses from Gaius 2,1-14 despite rejection from D. 1,8,1,pr.-1

Moreover, in contrast to Stephanus' tendency to omit sections that had already been deemed redundant or irrelevant by the compilers, he is also to be found taking up elements of Gaius' account that the Digest had sidelined. We have already touched briefly on how he actively included sections from Gaius 2,1-11 that had been comprehensively rejected by the compilers. These borrowings by Stephanus are quite remarkable, and need further investigation, as they may well demonstrate again that he weighed the merits of simply following the Digest's lead, but also sometimes felt it appropriate to incorporate passages that the compilers had rejected. By analogy then, such inclusions may form cogent evidence that he was prepared to encompass in his commentary wording from Gaius 2,1-14 (but no longer extant in V) regarding the protectiveness of *res sanctae*, even though the compilers had rejected it.

We see an example of this type of excerpt in Stephanus' first two clauses, which are not found in the Digest. He resurrects perfectly Gaius' original claim at 2,1 to have already discussed the law and status of persons, and confirms his intention to now deal with the law of things (Table 5, section D (iv) (b)). These clauses did not avoid being ruthlessly excised

by the compilers at D. 1,8,1,pr., and yet they found their way into Stephanus' own commentary in the same place in which they are found in Gaius 2,1, namely prior to the first sentence of D. 1,8,1,pr. (As noted, Gaius' third clause is missed out by both). And this despite D. 1,8,1,pr. ostensibly being Stephanus' guide.

It was also observed above that after the scholion's confirmation that divine things are either sacred or religious (also in D. 1,8,1,pr.), we then witness Stephanus' inclusion of Gaius 2,4 on how things were made *sacrae et religiosae*, although he makes certain Christianising transformations (Tables 3-4). But this passage was comprehensively purged from D. 1,8,1,pr., not just shorn of untoward content. Not only had Gaius contemplated the existence of many gods, he also thought that some of them were situated in the heavens above, and others in the underworld, and implied moreover that they all needed to be appeased with dedications, things left to the former being sacred, and religious when left to the latter. For Stephanus, minimal tampering was needed to convert both into things given over or committed to the one Christian God. But D. 1,8,1,pr. simply continues directly on from its confirmation that *res sacrae et religiosae* were divine, with the statement that *res sanctae* were too, which Gaius only says later, at 2,8. So because of the absence of Gaius 2,4 from D. 1,8,1,pr., we can again deduce that Stephanus, in adjusting the content of Gaius' original words and retaining the results, was in principle not necessarily deterred when Justinian omitted the same section from the Digest, and indeed that Stephanus himself possibly consulted and copied provisions straight from Gaius' Institutes, or adapted them where need be.⁴⁹ So Stephanus' approach to both Gaius 2,1 and 2,4 is clearly supportive of him behaving in a like manner regarding Gaius 2,9.

(iv) *Inst. 2,1 compared to Gaius 2,1-11 and sch. 1 ad B. 46,3,1*

However, it is also essential to consider whether Stephanus came across Gaius 2,1 and 4 in some other way, and first and foremost we need to ask whether Justinian's Institutes provided him with the material in question. This is because of the obvious similarity of the Gaian passages with sections in Inst. 2,1. If indeed provenance of these comments from the Justinianic manual is feasible, it may be detrimental to the argument that Stephanus resorted directly to Gaius' original for the passages identified as missing from D. 1,8,1,pr. but kept in sch. 1 ad B. 46,3,1, which would also undermine the argument that he took his remark on the protectiveness of *res sanctae* from Gaius 2,9. So in order to fully appreciate the implications of Stephanus' inclusion of these provisions, which had been rejected by D. 1,8,1,pr.,

49 Manthe, *Die Institutionen des Gaius* (note 41 above), 24. But see D (v) below for Kaiser's position on this.

we need to consider the general role that Inst. 2,1 may itself have had in influencing Stephanus. This in itself requires a closer look at how Gaius 2,1-14 and sch. 1 ad B. 46,3,1 as a whole compare to this particular Justinianic oeuvre.

(a) *The general sequence and content of Inst. 2,1, as compared with Gaius 2,1-14 and sch. 1 ad B. 46,3,1.*

It should first be observed that despite an initial flurry of identical clauses in its introduction (see (b) below), Inst. 2,1,pr.-6 follow a distinctly different version of the *divisio rerum* to that which Gaius had in mind, despite the inclusion of Gaius 2,1-14 in D. 1,8,1,pr.-1.⁵⁰ A wholly new path to that taken by Gaius is followed, and his sequence and content is profoundly disrespected. Justinian clearly had a general re-think, which led directly to Gaius' thematic sequence undergoing significant changes in the imperial manual, with the incorporation of many sections that reflected non-Gaian excerpts in the Digest, either on a verbatim basis or more generally. When we contrast the treatment of *res sacrae et religiosae* in Gaius 2,4-7 with that of Inst. 2,1,7-8, we can also see straightaway the changes stemming from the adoption of Christianity. As such, Justinian's manual deviates from D. 1,8,1,pr., and sch. 1 ad B. 46,3,1 likewise, espousing a categorisation of things that differed so fundamentally that it is enough to query whether Stephanus looked to Inst. 2,1 at all.

Hence, we see that Inst. 2,1 misses out Gaius 2,2-3, which we find in D. 1,8,1,pr. and sch. 1 ad B. 46,3,1 (Tables 2, 5). Gone is the principal division of things into two (*res divinae et humanae*), we are not told here that *res divinae* include *res sacrae et religiosae* (we are only ever told this obliquely, at Inst. 2,1,7), and *ius humanum* is actually overlooked entirely. Quite apart from these basic issues, the second half of Inst. 2,1,pr. tells us suddenly that *quaedam enim naturali iure communia sunt omnium, quaedam publica, quaedam universitatis, quaedam nullius, pleraque singulorum*. And up until Inst. 2,1,7, we are given a detailed breakdown of things that fell under these categories, and about ownership under *ius gentium*. This then is the *divisio rerum* according to Justinian's Institutes, rather than a *divisio* into Gaius' two umbrella concepts of *res divinae et humanae*. The 'new' rules were parachuted into the Justinianic manual from D. 1,8 and elsewhere, from Marcian's *Institutiones*, the *liber responsorum* by Papinian, and even Gaius' *rerum cottidianarum*; but not from D. 1,8,1,pr. / Gaius 2,1-11. So the whole discussion on *divisio rerum* in Inst. 2,1 took a turn here that is scarcely discernible in Gaius' Institutes, D. 1,8,1,pr. or Stephanus' commentary itself.

50 For discussion on this, see Weber, 'Res sanctae' (note 1 above) section D (iv) (c).

This deviation from Gaius' order is also seen in the reference at Inst. 2,1,7 to the individual types of divine thing, as it is the first time *res divinae* are mentioned, whereas it is central almost from the word go for Gaius (at 2,3-8, see also D. 1,8,1,pr. and the scholion). Inst. 2,1,7 is also mixed with the question of ownership, but the ownability of *res divinae* is not dealt with until Gaius 2,9 *et al.*, Gaius 2,3-8 having detailed divine things separately. Indeed, the specific confirmation in Inst. 2,1,7, that *res sacrae, religiosae et sanctae* could not be owned privately, is surely from Marcian's D. 1,8,6,2 (*Marci. 3 inst.*), as Gaius 2,9, D. 1,8,1,pr. and the scholion do not list the three components again at this stage:

Table 2

Gaius 2,2-9	Sch. 1 ad B. 46,3,1 (BS 2744)	Inst. 2,1,pr.-7	D. 1,8,1,pr., (<i>Gai. 2 Inst.</i>)	D. 1,8 (<i>Marc. 3 Inst.</i>)
2,2: divisio rerum in duos... [Table 5]	lines 9-11: Ἡ ... πραγμάτων διαίρεσις εἰς δύο... [Table 5]	pr.-6: quaedam enim naturali iure communia sunt omnium... [Justinian's new divisio rerum, based largely on Marci. 3 inst.]	...divisio rerum in duos...[Table 5]	[D. 1,8,2,pr.-1] Quaedam naturali iure communia sunt omnium... [Marcian's divisio rerum]
3. Divini iuris sunt veluti res sacrae et religiosae. [2,4-8: res sacrae et religiosae, Tables 3-4]	12-17: Καὶ θείου δικαίου ἐστὶ τὰ πράγματα τὰ ἱερά, τὰ σάκρα καὶ τὰ ῥελεγιόσα. [4 lines on τὰ σάκρα, ῥελεγιόσα, Tables 3-4]		Divini iuris sunt veluti res sacrae et religiosae.	
8. Sanctae quoque res velut muri et portae quodam modo divini iuris sunt.	Καὶ τὰ σάγκτα δέ, οἷον τὰ τεῖχη καὶ αἱ πύλαι, τρόπον τινὰ θείου δικαίου εἰσὶν· περιποιούσι γὰρ ἡμῖν τὸ ἀσφαλές καὶ ὀχυροῦσιν ἡμᾶς, διὸ		Sanctae quoque res, veluti muri et portae, quodam modo divini iuris sunt.	

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<p>9. Quod autem divini iuris est, id nullius in bonis est....</p>	<p>καὶ σάγκτα προσαγορεύονται. Ἄλλὰ τὰ μὲν διῶδνι ἰοῦρις οὐκ ἔστιν ὑπὸ οὐσίαν τινός, οἶα δὴ μόνῳ ἀφερωμένα θεῶ.</p>	<p>7. Nullius autem sunt res sacrae et religiosae et sanctae: quod enim divini iuris est, id nullius in bonis est. 8. Sacra sunt quae ... (Table 3)</p>	<p>Quod autem divini iuris est, id nullius in bonis est...</p>	<p>[h.t. 6,2] Sacrae res et religiosae et sanctae in nullius bonis sunt... [h.t. 6,3] Sacrae autem res sunt hae... (Table 3)</p>
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We again find evidence of disjointedness in the version of Gaius 2,4-7 provided by Inst. 2,1,8-9. These provisions are a little more forthcoming than D. 1,8,1,pr., even if attenuated, as they do correspond in some ways to Gaius 2,4, even containing some elements of the first half through an updated version (see (b) below). But it soon becomes apparent that quite apart from an overall wayward order, Inst. 2,1,8-9 have only marginal similarities with the Gaian original: they split it up and embellish the resulting words with additions and explanations from Justinian's Code or elsewhere in D. 1,8, replacing much of Gaius' text with legal discussions by Marcian and Papinian that had taken an entirely different angle, with only hints of Gaius 2,4-7 remaining. As a consequence, this stage of the scholion again finds scant support in the Justinianic manual.

Thus *res sacrae* are not delineated until Inst. 2,1,8, in contrast to the sequentially earlier Gaius 2,4 (*et al.*). Inst. 2,1,8 goes on to discuss new topics such as churches and gifts to God, and the inalienability of *res sacrae*, other than in exchange for prisoners. In doing so, it imitates Justinian's legislation,⁵¹ eschewing Gaius' discussion on things becoming sacred only on authority of the Roman people. It mentions the on-going sacredness of land after a church is taken down, following Marcian's D. 1,8,6,3 and Papinian's D. 18,1,73,pr.,⁵² and refers to the impossibility of making a thing sacred oneself, again reflecting Marcian. Gaius 2,5 touches only on the latter point, but merely implies the impossibility of private consecration. And Justinian necessarily ignores what Gaius had to say at 2,7 about things in the provinces not really being sacred, despite being treated as such. So the order in Inst. 2,1,8 is mixed up compared to Gaius 2,4-7, and there are significant modernisations, to the extent that the rules are virtually unrecognisable, other than a few glimmers of the original.

51 Cf. C. 1,2,21,2 (529): *Nam si necessitas fuerit in redemptione captivorum, tunc et venditionem praefatarum rerum divinarum et hypothecam et pignorationem fieri concedimus...*

52 D. 18,1,73,pr. (*Pap. 3 resp*): *Aede sacra terrae motu diruta locus aedificii non est profanus...*

The scholion on the other hand, like D. 1,8,1,pr., ignores Gaius 2,5-7 totally. And other than its initial Christianised version of 2,4, it also shuns the further analysis of sacredness found in Inst. 2,1,8, saying nothing about priests or captives or fallen-down churches:

Table 3

Gaius 2,4-5	Sch. 1 ad B. 46,3,1 (BS 2744/12-14)	Inst. 2,1,8	D. 1,8,6,3 (Marci. 3 Inst.)
<p>4. Sacrae sunt, quae diis superis consecratae sunt; religiosae, quae diis Manibus relictæ sunt.</p> <p>5. Sed sacrum quidem hoc solum existimatur, quod ex auctoritate populi Romani consecratum est, veluti lege de ea re lata aut senatus consulto facto.</p> <p>[6-7. Res religiosae, see Table 4]</p> <p>...item quod in provinciis non ex auctoritate populi</p>	<p>Καὶ σάκρα μὲν ἔστι τὰ ἀφιερωμένα θεῷ,</p> <p>[τὰ ῥελεγιόσα, see Table 4.]</p>	<p>Sacra sunt, quae rite et per pontifices Deo consecrata sunt, veluti aedes sacrae et dona quae rite ad ministerium Dei dedicata sunt,</p> <p>quae etiam per nostrum constitutionem alienari et obligari prohibuimus, excepta causa redemptionis captivorum. si quis vero auctoritate sua quasi sacrum sibi constituerit, sacrum non est, sed profanum. locus autem, in quo sacrae aedes aedificatae sunt, etiam diruto aedificio, adhuc sacer manet, ut et Papinianus scripsit.</p>	<p>Sacrae autem res sunt hae, quae publice consecratae sunt, non private:</p> <p>[see C. 1,2,21,2, note 51.]</p> <p>si quis ergo privatim sibi constituerit sacrum, sacrum non est, sed profanum. Semel autem aede sacra facta etiam diruto aedificio locus sacer manet.</p> <p>[see also Ulpian, D. 1,8,9,pr.-2, (note 44) and Papinian,</p>

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Romani consecratum est, proprie sacrum non est, tamen pro sacro habetur.		[9. Res religiosae, see Table 4]	D. 18,1,73.pr. (Pap. 3 resp.) (note 52).]
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Inst. 2,1,9 misses out the basic premise found in the second half of Gaius 2,4 that religious things are necessarily connected to the underworld, neutralised in Stephanus' commentary as relating to burials (Table 4). Even though this is the probable implication of the Justinianic provision, an express statement to such effect is lacking. When Inst. 2,1,9 discusses how land is made religious by burying a dead body there, Gaius' 2,6 puts in an indirect appearance. But Inst. 2,1,9 then goes on to deal at some length with consent for interment in co-owned land or tombs, and in a third party's land, adopting in effect provisions by Marcian, who discusses these two situations in continuation of his previously mentioned passages. Gaius however deals with none of these matters, which are also ignored by the scholion. Stephanus' reference to the actual things (τὰ) that were prescribed for funerary rites and the burial (as opposed to Justinian's preoccupation with consent) also seems to be much more obviously akin to Gaius' reference to *quae diis manibus relictæ sunt*, and to his mention of funerals at the end of 2,6, but these are ignored in Inst. 2,1, just as with D. 1,8,1.pr. And the discussion on *res religiosæ* is only commenced after the lengthy additions in Inst. 2,1,8 regarding *res sacrae*, in contrast to Gaius' short and snappy references to both at 2,4, which we can appreciate in the scholion also. This not inconsiderable number of intervening clauses in Justinian's 'version' would have made it impossible for Stephanus to guess at Gaius' original wording, which he replicates faithfully here (bearing in mind the Christianisations).

Finally, the reference in Inst. 2,1,9 to a *dominus* obtaining the usufructuary's consent is seemingly not replicated in any source other than Theoph. 2,1,9. Gaius 2,7, on *res religiosæ* in the provinces, has been discarded entirely (unsurprisingly again, given *const. Antoniniana*), as in D. 1,8,1.pr. and the scholion. Stephanus is clearly not tempted to incorporate any of the additional remarks found in Inst. 2,1,9, declining to include any further comment beyond his initial replication of Gaius 2,4:

Table 4

Gaius 2,4-7	Sch. 1 ad B. 46,3,1 (BS 2744/13-14)	Inst. 2,1,9	D. 1,8,6,4 (Marci 3 Inst.)
4. ... religiosae [sunt], quae diis Manibus relictæ sunt. [Table 3: 5. Sed sacrum ...]	...ῥελεγίωσα [ἔστι] δὲ τὰ περὶ τὴν ὀσίαν ἤτοι τὴν τῶν τελευτησάντων ἀφορισθέντα ταφήν.		

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<p>6. Religiosum vero nostra voluntate facimus mortuum inferentes in locum nostrum, si modo eius mortui funus ad nos pertineat. 7. Sed in provinciali solo placet plerisque solum religiosum non fieri, quia in eo solo dominium populi Romani est vel Caesaris, nos autem possessionem tantum et usumfructum habere videmur; utique tamen, etiamsi non sit religiosum, pro religioso habetur.</p>		<p>Religiosum locum</p> <p>unusquisque sua voluntate facit, dum mortuum infert in locum suum. in communem autem locum purum invito socio inferre non licet: in commune vero sepulcrum etiam invitis ceteris licet inferre. item si alienus usus fructus est, proprietarium placet, nisi consentiente usufructuario, locum religiosum non facere. in alienum locum, concedente domino, licet inferre: et licet postea ratum habuerit quam illatus est mortuus, tamen religiosus locus fit.</p>	<p>Religiosum autem locum</p> <p>unusquisque sua voluntate facit, dum mortuum infert in locum suum. In commune autem sepulchrum etiam invitis ceteris licet inferre. Sed et in alienum locum concedente domino licet inferre:</p> <p>et licet postea ratum habuerit quam illatus est mortuus, religiosus locus fit.</p>
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So although Inst. 2,1,7-9 contain traces of Gaius 2,4-7, they are minimal, and mostly have an entirely different approach. Marcian's excerpt contained at D. 1,8,6,2-4 is undoubtedly Justinian's principal influence. The sequence of Inst. 2,1 regarding sacred and religious things, and description of how these states were achieved, are accordingly all over the place in comparison to Gaius' original, and as such bear no real comparison with the scholion.

Inst. 2,1,10 does include on an almost verbatim basis the assertion at Gaius 2,8, also present in the Digest and the scholion, that *sanctae quoque res velut muri et portae quodam modo divini iuris sunt*. Furthermore, the point on incurring the *poena capitis* for violating *res sanctae* may possibly also be taken from another illegible part of Gaius 2,9, although this is unclear.⁵³ But these are isolated examples of the Justinianic manual (potentially) following Gaius' original, and the replication is spoilt even after the first clause (*sanctae quoque...iuris sunt*), as we are then told once more that *res sanctae* are *nullius in bonis*, despite Inst. 2,1,7 having already said as much regarding each of the three types of *res divinae*. Gaius on the other hand only confirms that *res divinae* as a whole cannot be owned, and this moreover is not until 2,9. And the next clause of Inst. 2,1,10, on the link between *sanctiones* and the contravention of a statute, is highly unlikely to be from the lacuna at Gaius 2,9, given the retention of a very similar concept in D. 1,8, in Ulpian's *h.t.* 9,3. And whatever their provenance, the 'new' sections of Inst. 2,1,10 are not to be found in the scholion.

Straight after dealing with *res sanctae*, Inst. 2,1 launches into a debate on the acquisition of individual things (Inst. 2,1,11-48) not seen until Gaius 2,19-96, and *res (in)corporales* (Gaius 2,2,12-14) are only dealt with in Inst. 2,2. So had Stephanus based his commentary on Justinian's manual, he would only have known about the entire second section of the scholion after ploughing through the very lengthy remaining part of Inst. 2,1 and proceeding to the next title. Moreover, Gaius' intervening remarks at 2,10-11, on *ius humanum* being split between *res publicae et privatae*, and on the ownership of each, are not to be found as fundamental precepts in Inst. 2,1, but Stephanus again follows Gaius in this respect. To some extent they are unstated assumptions behind Inst. 2,1,pr.-6 and 11-48, but this was clearly not enough to inform Stephanus of the order and subject matter that echo Gaius' original so carefully.

So Justinian's manual only occasionally adopts the content and sequence of Gaius 2,1-14, and indeed often pays it very scant regard. Accordingly, it has the same disjuncture with sch. 1 ad B. 46,3,1. And in contrast to the unruly order of Inst. 2,1, we find that Stephanus retains virtually all of Gaius 2,1-14, the only exceptions being his update of one old law, the omission of provisions in desuetude, and the rejection of just one solitary 'relevant' phrase that was confusing and unnecessary in any event. These factors provide grist to the mill for arguing that Inst. 2,1 did not feature amongst Stephanus' influences. And this in turn is

53 Weber, '*Res sanctae*' (note 1 above), section C (iii).

important to our next consideration, when we look to particular clauses in the scholion that replicate passages of Gaius' manual, and which are only otherwise found in Inst. / Theoph. 2,1.

(b) *The approach of Inst. 2,1 to substantive wording in Gaius 2,1 and 2,4.*

It is acknowledged that some of the material wording in Inst. 2,1 is the same as that found in its Gaian counterpart and the scholion, despite being overlooked by the compilers; and we must not forget that like the scholion, Justinian also Christianises a section ignored by the Digest. This may mean that Stephanus did not consult Gaius' manual, instead simply taking the words from Inst. 2,1 or Theophilus' paraphrase of it. Although the sequence followed by Inst. 2,1 as a whole is fundamentally different to that of Gaius 2,1-14, D. 1,8,1,pr.-1 and Stephanus' commentary, and although it is therefore unlikely that Stephanus would have found it a trustworthy source in terms of addressing even the first clauses of D. 1,8,1,pr., this cannot be taken to imply that he *never* referred to Inst. 2,1, or mimicked the odd passage.

Firstly, it flies off the page that the three opening clauses of Inst. 2,1,pr. mirror those of Gaius 2,1 absolutely, that Stephanus emulated the first two, and the Digest omitted them all:

Table 5

Gaius 2,1	Sch. 1 ad B. 46,3,1/7-10	Inst. 2,1,pr.	D. 1,8,1,pr.
<p>[Inst. 2,1,pr.: Superiore commentario de iure personarum] exposuimus; modo videamus de rebus:</p> <p>quae vel in nostro patrimonio sunt vel extra nostrum patrimonium habentur.</p> <p>Summa itaque rerum divisio in duos articulos diducitur:</p>	<p>Ὅσαπερ ἔδει περὶ τοῦ δικαίου τῶν προσώπων καὶ τῆς αὐτῶν ἐπιόντες καταστάσεως, νῦν εἴπωμεν καὶ περὶ τῆς τῶν πραγμάτων διαιρέσεως.</p> <p>Ἡ πρώτη καὶ ἀκροτάτη τῶν πραγμάτων διαίρεσις εἰς δύο ταύτας <τάς> ἀρχὰς κατάγεται καὶ διαίρεται.</p>	<p>Superiore libro de iure personarum exposuimus: modo videamus de rebus:</p> <p>quae vel in nostro patrimonio vel extra nostrum patrimonium habentur.</p> <p>[Inst. 2.1.pr-6: Justinian's new divisio</p>	<p>Summa rerum divisio in duos articulos deducitur:</p>

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<p>nam aliae sunt divini iuris, aliae humani.</p>	<p>Τῶν γὰρ πραγμάτων τὰ μὲν ἐστὶ διuiniuris, τὰ δὲ οὐμάνιοδρις, τουτέστι τὰ μὲν ἐστὶ θείου δικαίου, τὰ δὲ ἀνθρωπίνου δικαίου.</p>	<p>rerum, based largely on Marci. 3 inst.]</p>	<p>nam aliae sunt divini iuris, aliae humani.</p>
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Gaius' initial words (*Superiore libro de iure personarum*) are illegible in V: it is supposed that they were written in red ink, which fades more quickly than black, as the same is to be said of the first lines of *Commentarii* I and IV (the whole first page of III is missing).⁵⁴ The missing words of V are taken nowadays from the beginning of Inst. 2,1, as it accords with V as from ...*exposuimus, modo videamus de rebus*.⁵⁵ The *Epitome Gai* also corresponds in terms of meaning, if not the exact wording,⁵⁶ corroborating the modern approach. It seems safe to say then that Inst. 2,1 can be relied on to complete these first words in V, and therefore that Justinian copied the first three clauses of his manual from Gaius 2,1: *superiore...exposuimus; modo...rebus; quae vel...habentur*. The very fact that Inst. 2,1,pr. aids the modern reader in this way must then alert us to the possibility that it was from here that Stephanus ascertained the content of the first two clauses of Gaius 2,1; Inst. 2,1,pr. also reflects these words of sch. 1 ad B. 46,3,1, and we have to accept the possibility that it provided Stephanus' stimulus here, rather than Gaius' manual itself.

However, it is again the sequence that undermines this theory, insofar as Stephanus' knowledge of the sentence order is concerned. Inst. 2,1,pr. and its Greek *Paraphrasis* are the only sources to replicate the third clause of Gaius 2,1 (*quae vel ... habentur*), but the very fact Stephanus does not take it on board may in itself decrease the likelihood that he used either as a guide for the first two clauses. And instead of setting out Gaius' third clause, Stephanus goes straight on to tell us that things are principally divided into two limbs, divine and human. Taking into account the repetitions, these further words of his coincide with Gaius' fourth clause, at 2,2, and the opening of D. 1,8,1,pr.: *summa ...humani*. But the provision, as we have seen, is categorically rejected by Inst. 2,1, no doubt because it ran a coach and horses through its own take on *divisio rerum*. Already the fourth clause of the

54 Studemund, *Gaii Institutionum* (note 2 above), 1, implicit at 55, 189; De Zulueta, *The Institutes of Gaius* (note 41 above), 2.

55 At 30, the character count is low for lines in V. But we have no precedent for how the first line of each book was written: whether, for example, the initial letter was stepped out into the margin, or indented, or larger letters used.

56 Gai. Epit. 2,1,pr.: *Gaius superiore commentario de iure personarum aliqua disputavit, nunc in hoc commentario de rebus iterum tractat.*

self-same *principium* to Inst. 2,1 (*quaedam enim...apparebit*) bears no relationship whatsoever to Gaius 2,1 or D. 1,8,1.pr., or the scholion.

Taking these considerations together, it is clear that Stephanus could not have inferred from the skewed sequence of Inst. 2,1.pr.-1 that its first two clauses definitely began Gaius' commentary, or were in it at all, or that the fourth clause of Gaius' work came after the third clause, which he had missed out. Stephanus must therefore have been aware of the order of all the clauses from Gaius 2,1 to 2,2, but could not have known this through Inst. 2,1. So Stephanus' replication in Greek of the wording found in Inst. 2,1.pr. is not remotely reliable as an indication of its provenance. He must have found out from another source that his first two clauses also commenced Gaius' original, and that the fourth came after the one he omitted. And as far as we can be aware from the sources, the only way of deducing this information was from Gaius 2,1 in its original, unadulterated form, irrespective of the fact that Stephanus himself missed out the third clause. (Section D. (vii) (a) below discusses, and rejects, the possibility that Theophilus influenced Stephanus here).

Moving on to the first clause of Gaius 2,4 (*sacrae sunt, quae diis superis consecratae sunt*), substantive wording here on the consecration of *res sacrae* is found, amended, in the first clause of Inst. 2,1,8: *sacra sunt, quae rite et per pontifices deo consecrata sunt*, just as it is in Stephanus' commentary at BS 2744/12-13 (Table 3). These passages correspond more than just vaguely to a Christian version of Gaius' words, in both cases the plurality of gods being transformed into a single God. Clearly, the two each represent an updated version of Gaius' original, which is not to be found in D. 1,8,1.pr. So it could be said that Stephanus translated these words directly from the Justinianic manual.

But there are obvious problems with this thinking, not least the fact that Justinian's manual could once more not have helped Stephanus correctly ascertain, as he does, where such wording was positioned in Gaius' original text. As such, it could not have made up for the Digest's own omission of the clause. And the very fact that Stephanus in no way replicates Justinian's reference in Inst. 2,1,8 to *rites* or *pontifices*, whether taken from a now unknown excerpt by Marcian and Papinian or from the emperor's own legislation, should in itself ring alarm bells, and militates strongly against Stephanus learning about Gaius' wording at 2,4 from the imperial manual.

The specific pattern of retention and rejection in Inst. 2,1, regarding both the content and thematic order of Gaius' second book, ensure that the two works are seldom mutually recognisable. Because the sequence is so unpredictable, Stephanus is very unlikely to have relied on Justinian's manual when he replicated/de-paganised/revised either Gaius 2,1 or 2,4, bearing in mind also that he raised both matters in the precise order found in Gaius' original, other than a few strategic omissions that themselves are probably explained by their redundancy, and the odd reformulated phrase. The absence of Gaius 2,1 and 2,4 from D. 1,8,1.pr., Stephanus' painstaking faithfulness to still-relevant parts of Gaius' text, and the very obvious disconnect between Inst. 2,1 and both Gaius 2,1-14 and the scholion, make

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it virtually inconceivable that Inst. 2,1 was Stephanus' guiding force for *any* part of his commentary. Instead, there is far more than just a mere suspicion that his opening words were taken directly from Gaius 2,1, and that his remarks on how things became *sacrae et religiosae* were adapted from Gaius 2,4.

Accordingly, because Stephanus' order and content have such slender links to the Justinianic manual in general, we are not deflected from the view that he sometimes followed the Gaian manual directly where original Gaian clauses were missing from D. 1,8,1,pr., or from the particular inference that he was likely to have done so regarding BS 2744/15-16. The only substantive phrase in the scholion that is not to be found in V, namely the one on the protective nature of *res sanctae*, could as such have been feasibly taken from Gaius 2,1-11, from a section that can no longer be read; in other words, the second half of 2,9. Inst. 2,1 not only does not detract from this conclusion, it actually supports it.

(v) *The plausibility of the scholion evidencing Stephanus' direct access to Gaius' Institutes*

However, Kaiser doubts quite fervently that Stephanus had followed Gaius 2,4 directly, concluding that no aspect of his commentary could have been based on Gaius' original.⁵⁷ Self-evidently, such scepticism could be damaging to the current argument, as even though the objections are made in the context of Gaius 2,4, they would apply equally to Gaius 2,9.

(a) *General reasons for doubting direct Gaian influence on Stephanus.*

Kaiser's opinion is based primarily on there being no reason why Stephanus should pick and mix his sources for a commentary on D. 1,8,1,pr., given const. *Tanta* § 19. Through this, in furtherance of the crackdown on relying on ancient law other than through the Digest, Justinian pronounced:

nemoque vestrum audeat vel comparare eas prioribus vel, si quid dissonans in utroque est, requirere, quia omne quod hic positum est hoc unicum et solum observari censemus... nisi temerator velit falsitatis crimini subiectus una cum iudice, qui ei audientiam accommodabit, poenis gravissimis laborare.

57 Kaiser, '*Res sacrae*' (note 4 above), 9-11 (section 3).

It is also worthwhile highlighting that const. *Deo auctore* had already frowned severely on any future implied criticism of the Justinianic compilation that could occur through comparing it with earlier versions of the texts.⁵⁸ Justinian clearly had it in mind that he should stifle any dissent over the accuracy of his version of classical law, and Kaiser believes this meant that Stephanus would not have lifted provisions directly from Gaius 2,1-11.

But in objection to Kaiser's thinking here, it must be pointed out that we know Theophilus frequently relied on Gaius' Institutes to guide his *Paraphrasis* (see section C above). So sixth-century legal scholars saw no impediment in doing this, at least if there were no express attributions. The extent of Theophilus' Gaian importations exemplifies the lengths to which he went to re-explain concepts, and to differentiate his work from that which he was paraphrasing. Whether it was to genuinely make his own composition more user-friendly, or just to add spice by imbuing an overall impression of erudition, he cited Gaius directly (through translation), despite the iron fist apparently used by Justinian to prevent this. Such factors more than corroborate the contention that Stephanus could have operated in a similar fashion. In any event, Justinian's prohibition applied only to explicit comparisons, and to citations *in iudicio*,⁵⁹ neither of which feature in sch. 1 ad B. 46,3,1. And as for the apparent nonsensicality of Stephanus mixing the material he relied on, we have only to look to the considerable evidence that he was guided by Theophilus in the latter part of his commentary (see section D (vii) (b) below). It seems that contemporary lawyers did not flinch from adding material from other works, effectively under their own steam, finding neat ways of saying things differently to the principal work they were summarising or paraphrasing, and of adding the odd splash of scholarly prowess.

But Kaiser also fails to consider the double circumstance of Gaius 2,1 being missing from D. 1,8,1,pr., despite its first two clauses being present in the scholion. Clearly, these points impact positively on the consequential likelihood that Stephanus pilfered statements from Gaius' Institutes generally. As addressed in detail above, the presence of such comments in sch. 1 ad B. 46,3,1 may well demonstrate that Stephanus was on the whole prepared to return to the original textbook. This matter should at least be taken into account when considering the likely provenance of Stephanus' words on *res sacrae et religiosae*.

Kaiser also fails to mention Stephanus' extra comment that is at the centre of this study, on how the protective nature of *res sanctae* gave rise to their very sanctity (BS

58 Const. *Deo auctore* § 7: *et nemo ex comparatione veteris voluminis quasi vitiosam scripturam arguere audeat.... si aliter fuerant apud veteres conscripta, in contrarium autem in compositione inventantur, nullum crimen scripturae imputetur, sed nostrae electioni hoc adscribatur.*

59 Const. *Tanta* § 19: *... Nec in iudicio nec in alio certamine, ubi leges necessariae sunt, ex aliis libris, nisi ab isdem institutionibus nostrisque digestis ... aliquid vel recitare vel ostendere conetur.*

2744/15-16). Not only may the evidence considered here signify that Stephanus turned to Gaius 2,9 for these words, there is also a possibility of there being a pattern, whereby D. 1,8,1,pr. missed out the causes of divinity in all types of *res divinae*, but Stephanus adapted them and included them in his commentary. In other words, we see how the compilers may have purposefully missed out both Gaius 2,4-7 and most of 2,9, with Stephanus going out of his way to include them, albeit in their amended Christian versions. But because Kaiser did not engage with this evidence, he does not consider this distinct likelihood.

Building on his above-mentioned conclusions, it is also contended by Kaiser that Gaius 2,4 had originally been included in D. 1,8,1,pr., but was later omitted in error by a scribe.⁶⁰ His thinking proceeds on the basis that originally, only Gaius 2,5-7 had been (purposefully) left out by the compilers, 2,4 being retained in some shape or form, but most importantly with *sacrae* still starting the clause off. So *sacrae* and *sanctae* became the first words of two consecutive clauses (those representing Gaius 2,4 and 2,8), and when the Digest was copied on a subsequent occasion, the pairing led to a leap from the *sacrae* at the beginning of the reformulation of Gaius 2,4 to the *sanctae* taken from 2,8.⁶¹ As a consequence, the part of D. 1,8,1,pr. that corresponded to Gaius 2,4 was overlooked in error. In mirroring the words of Gaius 2,4, Stephanus (it is argued) was merely replicating those of D. 1,8,1,pr. prior to their accidental excision. His omission of Gaius 2,5-7 would have corresponded with this same Digest version, as these clauses had been intentionally left out to begin with.

Kaiser then takes us through several supportive examples of Basilica texts and scholia that aid the correction of similar scribal omissions that had found themselves embedded in and perpetuated by the *Florentinus*, but which errors had not yet been committed by the time the early Byzantine commentaries were prepared. It is also observed here that if the Digest scribe was engaging with the meaning of his text, confirmation of the divinity of *res sanctae* (Gaius 2,8) followed on logically from the statement that *res sacrae et religiosae* were *divinae* (Gaius 2,3). Even though the intervening clauses were all relevant, these bare assertions of divinity are the same, which could help justify Kaiser's proposition that a scribe missed out the explanatory words in between, as a consequence of 'ein Sprung von *sacrae* zu *sanctae*'.⁶²

60 Kaiser, '*Res sacrae*' (note 4 above), 11-15 (section 4).

61 Kaiser, '*Res sacrae*' (note 4 above), 15: 'Ein saut du même au même dürfte daher auch für das Fehlen der Definition der *res sacrae et religiosae* in D. 1,8,1,pr. in den Lateinischen Handschriften verantwortlich sein'.

62 Kaiser, '*Res sacrae*' (note 4 above), 15.

However, the above reasoning does not pass muster. It is not disputed here that the compilers deliberately left out Gaius 2,5-7, but the contention that 2,4 was originally kept, and then erroneously missed out, is not plausible. Even with 2,5-7 out the equation, forgetting about 2,4 would have required an oversight of thirteen words (72 characters), unparalleled in the examples given by Kaiser to justify his finding. Indeed, the mistakes in the *Florentinus*, as revealed by the Basilica comparisons, are of a different order. Sch. Ca 1 ad B. 11,1,23 (BS 243/16-17) corrects D. 2,14,23,1⁶³ so that it reads *pro reo*, as opposed to *pro eo*. Sch. Pa 1 ad B. 20,3,1 (BS 1217/19-22) establishes that the word *potest* appeared twice in D. 19,4,1,pr.,⁶⁴ the intervening seven words (44 characters) being lost when the second was mistaken for the first. B. 20,3,1 (BT 1006/12-13) shows that D. 19,4,1,4⁶⁵ mistakenly jumped eight words (39 characters) when taking *nostra* to agree directly with *res*, rather than the earlier *tradita*. And we see from B. 29,1,40 (BT 1453/17-20) and its scholia 4-5 (BS 2027/9-13, 15-16) that the second *promissa* of D. 23,3,44,1⁶⁶ was wrongly taken for the same term that appeared seven words before, leading to the intermediary 32 characters again being overlooked. The errors flow very naturally in each case, as identical terms are mistaken for each other, but the same simply cannot be said of mistaking *sanctae* for *sacrae*, as proposed by Kaiser. Moreover, at 72 characters the omission would be appreciably longer than the comparisons given, and of a completely different league. It is clearly questionable that such a long passage would be neglected.

Because Stephanus can also apparently be seen adopting the same changes made by the Digest to Gaius' original lexicon, Kaiser finds further reason to believe that he only had the compilers' version of the text before him when drafting his commentary. In particular, he finds, Stephanus' νομίζοντα corresponds to the Digest's *creduntur* in respect of Gaius' *videntur* in 2,11. Similarly, his καθ' ἑκάστων here reflects the compilers' use of *singulorum* for Gaius' *singulorum hominum*.⁶⁷ But these words were obviously interchangeable, and the replacement could have been made at any stage, whether or not advertently, and in no way

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- 63 D. 2,14,23,1 (Paul. 3 ad ed.): *Neque enim quoquo modo cuiusque interest, cum alii conventio facta prodest, sed tunc demum, cum per eum, cui exceptio datur, principaliter ei qui pactus est proficiat: sicut in reo promittendi et his qui pro reo obligati sunt.* (Character in bold missing from *Florentinus*).
- 64 D. 19,4,1,pr. (Paul. 32 ad ed.): *Sed cum debeat et res et pretium esse, non potest **permutatio emptio venditio esse, quoniam non potest** inveniri.* (Characters in bold missing from *Florentinus*).
- 65 D. 19,4,1,4 (Paul. 32 ad ed.): *non in hoc agemus ut res **tradita nobis reddatur, sed in id quod interest nostra illam rem accepisse, de qua convenit: sed ut res contra nobis reddatur...*** (Characters in bold missing from *Florentinus*).
- 66 D. 23,3,44,1 (Iul. 16 dig.): *utique si post nuptias **promissa dos est. Nam dote ante nuptias promissa eius temporis peculium aestimari debet, quo nuptiae fierent.*** (Characters in bold missing from *Florentinus*).
- 67 Kaiser, 'Res sacrae' (note 4 above), 10, with note 18 (section 3).

acting to change the meaning. It may be that in this situation, sixth-century Constantinopolitan parlance simply preferred νομίζομαι over δοκέω or φαίνομαι. As for καθ' ἑκάστων, this phrase had long been established as a way of elegantly expressing in Greek the idea of doing something separately.⁶⁸ And translations generally are notorious for using words that strictly speaking mean different things, but have the exact same connotation in a particular context. But also, even if Stephanus was malleable in the way suggested, and his changed vocabulary the direct result of translating the already altered D. 1,8,1,pr., it does not exclude the possibility of him turning directly to Gaius for 2,4 (or indeed for 2,1 or 2,9).

(b) *Coping with paganisms.*

However, it is also well documented that fragments originally considered intolerable religiously were Christianised when selected for the Digest, or during the editorial process.⁶⁹ As such, there are numerous references to *deus* in the singular in the Digest, but none to 'the gods', yet the amount of pagan references to 'the gods' found in pre-Justinianic sources is high,⁷⁰ leading to the high probability of deletions, changes and purges from the Digest texts. Indeed, in light of these instances it may be thought perplexing that the compilers did not also change and retain Gaius 2,4, rather than simply omit it. And this is relied on by Kaiser as a further reason for doubting that the compilers had not originally incorporated a modified version of this provision.⁷¹

But these considerations by no means require us to accept that an adapted Gaius 2,4 was included by the compilers before the hypothesised scribal misdemeanour undid their efforts. This is because changing the odd letter here and there may well have been acceptable to the compilers, but the evidence also suggests that they thought twice before modifying passages that were more challenging, and that it did not take much to fall within this category. Indeed, we find even only mildly awkward passages being omitted from the Digest rather than being changed. Then, after the appropriate adaptations were made, such texts reappeared in Justinian's Institutes.

In order to illustrate this, our point of departure is Gaius 1,52-53, along with D. 1,6,1,1-2 (*Gai. 1 inst.*) and Inst. 1,8,2, regarding a slave's reparation for his master's

68 E.g. Pl. *Th.* 188a, *Sph.* 259b; Arist. *Ph.* 189^a6, *EN* 1143^b4.

69 See e.g. R. Quadrato, 'Gaio Cristiano?' in *Studi per Giovanni Nicosia*, Vol. VI (Università di Catania. Pubblicazioni della Facoltà di Giurisprudenza, N.S. 214/6), Milano 2007, 325-361 (327-328 with the notes 14 and 16).

70 Id. In the VIR, s.v. *deus*, there are 11 references to *deus* (singular) in the Digest, but all the 8 plural references are in *Coll.* 15,2,5-6 (*Ulp. 7 de off. proc.*); Tit. *Ulp.* 22,6; Paul. *Sent.* 4,3,3; Gaius 1,53, 2,4.

71 Kaiser, '*Res sacrae*' (note 4 above), 16-17 (section 5 (a)).

inhuman treatment of him (Table 6). As we shall see, the manner in which the original Gaius 1,53 was tackled by Justinian has strong parallels with Gaius 2,4-7, D. 1,8,1,pr., and Inst. 2,1,8-9 (Tables 3-4, section D (iv) (a) above). Firstly, in reproducing Gaius 1,52 and the initial wording of 1,53 at D. 1,6,1,1-2, the compilers changed the original cosmetically. They replaced Gaius' *itaque* with *igitur*. They put an owner's power of life and death over his slave firmly in the past, as *esse* is replaced by *fuisse*. They also updated terminology: Gaius' *cives romani et ulli alii* is omitted from before *qui sub imperio populi romani sunt* in the Digest version, again no doubt due to the *Constitutio Antoniniana*; and *sub imperio populi romani* becomes *sub imperio romano*. We also find *legibus cognita* added to *sine causa*; *sacratissimi imperatoris Antonini* becomes *divi Antonini*; and *teneri (iubetur)* is replaced with *puniri*. None of these instances evinces substantive change, only really clarifying or updating the vocabulary, or just fine-tuning it.

Yet despite being prepared to alter their texts as such, the compilers also went to the lengths of omitting Gaius' subsequent words, whereby cruelly treated slaves fleeing *ad fana deorum* were entitled to be sold. Gaius 1,53 was not Christianised for the Digest; the offending passage was just left out. So even though the compilers were happy to amend outdated terminology, they were not always prepared to meddle with pagan texts beyond the most superficial of adjustments. Instead, they were more than capable of simply skipping them.⁷² And it is argued here that omissions took place where the problem was slightly more far-reaching than a straightforward change of plural *dei* to the singular; and because Gaius' text was one of these more problematic provisions, it was axed from D. 1,6,1,2. This trickiness of the Digest's template at Gaius 1,53 can be seen not only when it says that such buildings were of the *deorum*, but also in what may have been distasteful wording where it spoke of fleeing to a *fanum*. The term *fanum* indeed was only used disparagingly in the Digest: in the VIR, it is identified only in D. 21,1,1,10 (*Ulp. 1 ad ed. aed. cur.*), where mentally defective slaves are described cavorting around shrines in Bacchanalian festivities.⁷³ Yet there are many references to *fana* in earlier literature,⁷⁴ and for Gaius this was an entirely normal term: 1,53 is the only occasion he refers to temples, and he chooses

72 Cf Quadrato, 'Gaio Cristiano?' (note 69 above), 326-9.

73 See VIR, s.v. *fanum*. D. 21,1,1,10 (*Ulp. 1 ad ed. aed. cur.*): *...aliquando quis [ie servus] circa fana bacchatus sit et responsa reddiderit, tamen, si nunc hoc non faciat, nullum vitium esse: neque eo nomine, quod aliquando id fecit, actio est, sicuti si aliquando febrem habuit: ceterum si nihilo minus permaneret in eo vitio, ut circa fana bacchari soleret et quasi demens responsa daret, etiamsi per luxuriam id factum est, vitium [animi] tamen esse.* Outside the Digest, only Gaius 1,53 and Paul. Sent. 5,23,16 are referenced in the VIR as referring to *fana*.

74 OLD, I, s.v. *fanum*.

fana rather than *templa*. So perhaps we can infer that by the sixth century, the term was used to mock paganism.

Admittedly, this lexical development may not have been due to Christianity. When *Pauli Sententiae* was drafted, *templum* was perhaps already the word of choice when talking about defiling or invading temples, even though we do also find *fana*;⁷⁵ but as noted, this work retains references to the gods (plural), so if it ever suffered post-classical amendments, it is by no means definitive that these extended to Christianisations. The Theodosian Code talks almost exclusively of *templa*,⁷⁶ but it is again not always obvious whether they were the result of purposeful Christian updates;⁷⁷ and several of these instances, particularly those in CTh. 16,10 (the title on *de paganis, sacrificiis et templis*), are clearly pagan. However, the fifth-century Code only includes constitutions referring to *fana* on five occasions, and these are contained in this same title,⁷⁸ the context without doubt restricted *only* to the pagan. Furthermore, *fana* receive no mention at all in the Justinianic Code, and although provisions in CTh. 16,10 that refer to *fana* were not carried over to C. 1,11 when the theme was revisited, entailing that we cannot directly compare the two approaches, C. 1,11 only mentions *templa* (albeit just twice).⁷⁹ The backdrop here was of course indubitably pagan, and C. 1,7,2 (383) also talks of *sacrilegia templorum*. But *fana* had by now been obliterated, and several constitutions incorporated by Justinian talk unequivocally about *templa* as Christian, and others do so impliedly.⁸⁰ At the same time, the popularity of the term *templum*

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- 75 Paul. Sent. 5,23,16 talks of *qui fanum templumve polluerint*; 5,19,1 and 5,26,3 of *qui templum inrum-punt* and *templa armatis obsederit*.
- 76 CTh. 5,13,3; 9,17,5; 9,45,4,pr.-3; 10,1,8; 10,3,4, 5; 10,10,24, 32; 11,20,6; 12,1,112; 15,1,36, 41; 16,1,1; 16,7,2, 3,pr.-1; 16,10,3, 4, 7, 8, 10, 11, 12,3, 13,pr., 16, 19,pr.-2, 25.
- 77 If, for example, it were deemed that pagan words did not *ad rem pertinent*, they may not have been preserved, see CTh. 1,1,5 and 6,pr.
- 78 CTh. 16,10,7 (381): *Si qui [velut vesanus ac sacrilegus] vetitis sacrificiis ...se inmerserit fanumque sibi aut templum ad huiusmodi sceleris executionem adsumendum crediderit vel putaverit adeundum...; h.t.12,3 (392): Sin vero in templis fanisve publicis ... tale quispiam sacrificandi genus exercere temptaverit...; h.t. 13,pr. (395): Statuimus nullum ad fanum vel quodlibet templum habere quempiam licentiam accedendi vel abominanda sacrificia celebrandi quolibet loco vel tempore; h.t.19,1 (407): si qua etiamnunc in templis fanisque consistunt et quae alicubi ritum vel acceperunt vel accipiunt paganorum, suis sedibus evellantur; h.t. 25 (435): interdicens cunctaque eorum [sceleratae mentis paganarum] fana templa delubra... praecepto magistratuum destrui...[et] expiari praecipimus.*
- 79 C. 1,11,1,pr.; 7,pr.
- 80 The link is seen clearly in the *dei templa* of C. 1,3,27 (466); 1,3,30,2 (469); 1,5,10,2 (466-72?). Implied: C. 6,2,3 (215): *rem templo divino dedicatam*; C. 7,38,2 (387): *terra iuris templorum*; C. 11,59,6 (383), 11,70,4 (397?): *fundi, qui templorum iure descendit*; 11,62,14 (491): *conductio of fundos templorum*; 11,66,4 (382-4): *Universi fundi templorum ad rationalium rei privatae sollicitudinem curamque pertineant*; and the rubrics to C. 11,70, 71, 74, where the property of *templa* is discussed alongside that of *civitatum, civilium, fiscalium, rei privatae, dominicae*.

in the Digest, which as we have seen was divested of paganism, cannot be denied either.⁸¹

These curiosities surely speak of the term *fanum* slowly going out of fashion after Gaius' time, and of acquiring negative overtones in the Christian era, such that it had all but disappeared by the sixth century. This was possibly because it could not shake off its pejorative ties to the old pagan ways, due simply to the vagaries of linguistic change, as the word *templum* did not suffer in quite the same way. The subtext is that for Justinian, even if a law had originally been pre-Christian, *templa* were capable of being mainstream and Christian. After all, he himself referred to *templa iustitiae*.⁸² It is not suggested that the compilers would never have contemplated changing *fana* to *templa*, or indeed to *aedes*, or *ecclesiae*; but it is clear that Gaius 1,53 required more than one straightforward adaption to be acceptable to Christendom under Justinian.

Accordingly, it is proposed here that a need for multiple amendments of this type may have greatly increased the likelihood of the compilers declining to intervene at all, choosing simply to disqualify a fragment instead. This, then, may also account for the fate of Gaius 2,4: like Gaius 1,53, it needed too much care and attention to be included in the Digest, and it was dropped completely from D. 1,8,1.pr. rather than being modified.

This preference in the Digest for leaving out passages that were convoluted or wanting in some way, rather than amending them, also needs to be viewed in light of Justinian's Institutes, which provided a sanitised rendering of Gaius 1,53. At the outset, Inst. 1,8,2 reproduces the exact same scenario, and is mostly faithful to its predecessor's wording. But as we read on, not only are the *fana deorum* gone, but the slaves seek sanctuary in an *aedem sacram* instead, even though D. 1,6,1 had declined to include such a reference:

Table 6

Gaius 1,52-53	D. 1,6	Inst. 1,8,1-2
52. In potestate itaque sunt servi dominorum. quae quidem potestas iuris gentium est: nam apud omnes peraeque gentes animadvertere possumus dominis in servos vitae necisque potestatem esse ...	[h.t. 1,1-2 (Gai. 1 Inst.)] 1. Igitur in potestate sunt servi dominorum (quae quidem potestas iuris gentium est: nam apud omnes peraeque gentes animadvertere possumus dominis in servos vitae necisque potestatem fuisse)...	1. In potestate itaque dominorum sunt servi. quae quidem potestas iuris gentium est: nam apud omnes peraeque gentes animadvertere possumus, dominis in servos vitae necisque potestatem esse ...

81 See the multiple references in VIR, s.v. *templum*.

82 C. 1,17,1,5 (530); 1,17,2,20 (533).

ANCIENT BELIEFS ON THE ESSENCE OF SANCTITY

<p>53. Sed hoc tempore neque civibus Romanis nec ullis aliis hominibus, qui sub imperio populi Romani sunt, licet supra modum et sine causa in servos suos saevire. nam ex constitutione sacratissimi imperatoris Antonini, qui sine causa servum suum occiderit, non minus teneri iubetur, quam qui alienum servum occiderit. ...coercetur.</p> <p>nam consultus a quibusdam praesidibus provinciarum de his servis, qui ad fana deorum vel ad statuas principum confugiunt, praecepit, ut si intolerabilis videatur dominorum saevitia, cogantur servos suos vendere. et utrumque recte fit: male enim nostro iure uti non debemus...</p>	<p>2. Sed hoc tempore nullis hominibus, qui sub imperio Romano sunt, licet supra modum et sine causa legibus cognita in servos suos saevire. Nam ex constitutione divi Antonini qui sine causa servum suum occiderit, non minus puniri iubetur, quam qui alienum servum occiderit.... coercetur.</p> <p>[h.t. 2 (Ulp. 8 de offic. Proc.)] ...ex rescripto divi Pii ad Aelium Marcianum ... Cuius rescripti verba haec sunt: ...Ideoque cognosce de querellis eorum qui ex familia Iulii Sabini ad statuam confugerunt, et si vel durius habitos quam aequum est vel infami iniuria affectos cognoveris, veniri iube ita, ut in potestate domini non revertantur.</p>	<p>2. Sed hoc tempore nullis hominibus, qui sub imperio nostro sunt, licet sine causa legibus cognita et supra modum in servos suos saevire. nam ex constitutione divi Pii Antonini qui sine causa servum suum occiderit, non minus puniri iubetur quam qui servum alienum occiderit. ... coercetur.</p> <p>nam consultus a quibusdam praesidibus provinciarum de his servis qui ad aedem sacram vel ad statuas principum confugiunt, praecepit, ut si intolerabilis videatur dominorum saevitia, cogantur servos bonis condicionibus vendere, ut pretium dominis daretur: et recte; expedit enim rei publicae, ne quis re sua male utatur.</p> <p>Cuius rescripti ad Aelium Marcianum emissi verba haec sunt: ...ideoque cognosce de querellis eorum qui ex familia Iulii Sabini ad statuam confugerunt... et si vel durius habitos quam aequum est, vel infami iniuria affectos cognoveris, veniri iube, ita ut in potestatem domini non revertantur.</p>
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This tendency may also be visible in the imperial manual's discussion of the slave's forcible sale, as words are inserted insisting that he should *bonis condicionibus [vendi], ut pretium dominis daretur*, and referring to the public interest. As Gaius 1,53 said nothing on these matters, beyond sale to another, and D. 1,6,1,2 omits his words entirely, we can detect that

the compilers found the passage deficient, or at least in need of some further thought. Hence, even though it lacked the religious controversy of *fana deorum*, it was omitted from Justinian's Digest but included in his Institutes, once doctored.

Perhaps the repudiation of the second half of Gaius 1,53 was because the compilers preferred Ulpian's fragment (*8 de offic. Proc.*), included next at D. 1,6,2, as it sets out Pius' enactment in more detail, including flight *ad statuum*, and (apparently) said nothing about *fana deorum*. But even though new issues are introduced, Gaius 1,53 is unlikely to have been omitted from D. 1,6,1 on the grounds that Ulpian's alternative compensated for its pagan inadequacies. Gaius' objectionable reference to *fana deorum* is not replaced, there is no compromise by changing *fana* or reducing *deorum* to the singular. So D. 1,6,2 does not iron out the problems found in Gaius 1,53; it is only Inst. 1,8,2 that does so. Furthermore, the slave's remedy of being sold is prominent in both, yet described in innocuous terms, the slave simply being sold to another *dominus*. Nothing further is added. The pagan overtones of *fana deorum* seem to be the only reason for which much of Gaius 1,53 was eschewed from the more conservative Digest, and only when spruced up for Justinian's manual were changes and additions made.

It is therefore certainly by no means unequivocal that the compilers would have Christianised a juristic provision that they were looking to include in the Digest, but which had originally contained references to the old pagan beliefs. The assumption is inherently shaky. The evidence simply points to them leaving out any unpalatable sections that were not very easily rectifiable, but then getting the manual to massage such wording. And this, it is proposed, is exactly what happened with Gaius 2,4-7: the problems were too endemic to be made acceptable for D. 1,8,1,pr., but not so for Inst. 2,1,8-9, which, as we have seen, contain a Christianised version. The first half of Gaius 2,4 is instantly recognisable here, despite things left to the gods above and below having vanished, despite sacred things now being devoted to a single god, and despite brand new material on rites, pontiffs and gifts now also being incorporated to replace 2,5. As for the second half of Gaius 2,4, new information on *res religiosae* is imported into Inst. 2,1,9, and these details, in combination with further material on *res sacrae*, also replace the rest of Gaius 2,4-7 entirely. We have here then the exact same pattern identified above with Gaius 1,53, D. 1,6,1 and Inst. 1,8,2.

It may be argued that not all the compilers understood their excerption remit in the same way, it being a matter of chance whether difficult passages were omitted or rectified, no overall plan existing. But the evidence does not support individual teams being at odds in the way they understood their role. D. 1,6,1 and D. 1,8,1,pr. leave out the pagan passages at Gaius 1,53 and 2,4-7, with their references to gods in the plural, and outdated pagan practices, from two separate books of Gaius' Institutes. Honoré finds that these two books

were excerpted by the same team, as part of the so-called ‘Sabinian’ mass.⁸³ Whether we can say this with such precision may be debatable, but we can probably put their consistent positioning, near the beginning of individual Digest titles, down to their excerption taking place at roughly the same time, towards the start of the compilation project, and in all likelihood before significant disparities in approach had taken hold. But we also see that D. 48,13,4,1 (*Marci. 14 inst.*) was probably excerpted at this moment too,⁸⁴ despite its reference to *dona dei* being retained. This mention of a single god must be the result of a compilatorial change, perhaps even at the hands of the same team, despite the contemporaneous omissions from D. 1,6,1 and D. 1,8,1,pr. of texts with more ingrained problems. Many other excerpts that may have been taken by the same group also talk of *deus*.⁸⁵ So when preparing the Digest, the same individuals appear to have sometimes omitted, but other times amended, pagan references.

Clearly, the compilers may not all have approached paganisms consistently, even within the same teams, and without doubt it must have been an inexact science to distinguish between texts needing minimal intervention from those that could benefit from more detailed surgery. Inevitably, the difference must often have been blurred. But it is striking that without fail, whenever *deus* is mentioned in the Digest (wherein the references to divinity are unanimously to one god alone, as we have seen), the constructions are simple, involving religious duties, God’s majesty, statues of God, and offerings, consecrations and oaths to God.⁸⁶ Of course, we can never know what was originally said, but these concepts appear very straightforward. At the same time, the sections rejected from the Digest (the second half of Gaius 1,53; 2,4-7) have multiple issues. And it must be more than mere coincidence that on those rare occasions where we still have the full version of a more troublesome pagan text, and where that text was also included in the Digest but with the

83 Reviewing the *ordo librorum* of Bluhme and Krüger, T. Honoré, *Tribonian*, London 1978, 260-261, has them both excerpted from Dec. 531 – Jan. 532, albeit under different Sabinian Commissioners (A and B).

84 For Honoré, *Tribonian* (note 83 above), 260-261, D. 48,13,4,1 would have been dealt with as per note 83, under Comm. A.

85 The following texts referring to *deus*, as gathered by VIR, s.v. *deus*, may all be excerpted by the same team (the Sabinians): D. 24,1,5,12 (*Ulp. 32 ad Sab.*), Honoré, *Tribonian* (note 83 above), 257: Comm. A, Dec. 530 – Jan. 531; D. 12,2,33 (*Ulp. 28 ad Sab.*), *ibid.*, 257: Comm. A, Dec. 530 - Jan. 531; D. 48,13,7 (*Ulp. 7 de off. proc.*), *ibid.*, 263: Comm. B, Mar. - Apr. 532; D. 35,2,1,5 (*Paul. 1 leg. falc.*), *ibid.*, 265: Comm. A, May - Jun. 532.

86 D. 1,1,2 (*Pomp. 1 enchir.*), *deum religio*; D. 1,8,9,3 (*Ulp. 68 ad ed.*), *deo consecratum*; D. 4,8,32,4 (*Paul. 13 ad ed.*), *maiestas dei*; D. 12,2,3,4 (*Ulp. 22 ad ed.*) and *h.t. 33 (Ulp. 28 ad sab.)*, *per deum iurare*; D. 24,1,5,12 (*Ulp. 32 ad Sab.*), *oblationem dei*; D. 34,2,38,2 (*Scaev. 3 resp.*), *signum dei*; D. 35,2,1,5 (*Paul. 1 leg. falc.*), *legata quae deo relinquuntur*; D. 48,13,4,1 (*Marci. 14 inst.*), *donatum deo immortalis*; D. 48,13,7 (*Ulp. 7 de off. proc.*), *dona dei*.

paganism dropped, we can tell instantly that more significant modifications than merely singularising a plural would have been necessary to dampen the controversial elements in the original.⁸⁷

So even though an element of randomness attributable to individual compilers' tastes cannot be written off, it is proposed here that as a matter of policy, Justinian's lawyers steered clear of anything other than quite basic changes to the Digest excerpts, however loosely this was defined. They opted instead for omission where need be, anything involving significant alterations being left to the imperial manual. So it is highly questionable that Gaius 2,4 was originally retained by the compilers and subsequently lost.

There is however a possibility that Justinian's initial wording at Inst. 2,1,8 came from a source other than Gaius' Institutes, as the provision ends up differing so much from the latter. If so, it would tend to erode the theory that the compilers put Gaius 2,4-7 aside for the drafters of Justinian's manual to scrutinise more closely and adapt accordingly, placing in doubt that the situation was analogous to Inst. 1,8,2. Indeed, Kaiser concludes that the Justinianic clause at the beginning of Inst. 2,1,8 most probably came from Marcian's Institutes,⁸⁸ because this was where we would have found the third part of Inst. 2,1,8, and large tracts of Inst. 2,1,9 on *res religiosae*. Moreover, Inst. 2,1,7 was clearly taken from Marcian. (See Tables 2-4).

In the end, if Inst. 2,1,8-9 were based on classical law, the passages would have needed to be re-worked and fully re-appraised to accommodate Christian beliefs, whoever authored them, so we have to look at the broader picture to identify the source. And it is accepted that Justinian placed passages here that were plainly more sympathetic to his world view than Gaius' provisions were, and that Gaius' thread would have eventually been lost completely. So the link to Gaius 2,4-7 may be tenuous, whether or not Marcian provided the alternative. But this notwithstanding, the first 10 words of Inst. 2,1,8 take the exact same vein as Gaius 2,4. Furthermore, all of Gaius 2,1 and the first clause of Gaius 2,8, were without doubt taken into Inst. 2,1,pr. and *h.t.* 10, so the drafters were clearly amenable to lifting passages from his manual. At the same time, there was definitely no continuity in Marcian's words in Inst. 2,1,8-9. Justinian also wanted to expressly refer to his own constitution on prisoners and ransoms at 2,1,8, as well as Papinian's confirmation of sacredness permeating the ground even after the destruction of a sacred place. And the provision on usufructs, origins

87 At least as regards Gaius' Institutes, our most significant source on this point, there seem to be no further examples: see O. Lenel, *Palingenesia iuris civilis. Iurisconsultorum reliquiae quae Iustiniani Digestis continentur ceteraque iurisprudentiae civilis fragmenta minora*, I, Lipsiae 1889, 242, fragments 404-417, which contains the full list of Digest extracts taken from this work.

88 Kaiser, '*Res sacrae*' (note 4 above), 15-16: 'Nach dem geschilderten Befund ist es wohl wahrscheinlicher, dass der erste Teil von §8 auf die Institutionen Marcians zurückgeht, nicht auf die Institutionen des Gaius'.

unknown, is also dropped into the middle of 2,1,9. These clauses infiltrate between the allegedly Marcianic beginning of Inst. 2,1,8 and his later reference to the impossibility of acting privately to make a thing sacred, and also interrupt Marcian's clauses in Inst. 2,1,9. Neither is there evidence of Marcian reiterating Gaius' line at 2,4. So there is clearly insufficient basis for finding that Inst. 2,1,8 was modelled on a Marcianic provision. Yes, Justinian's words reveal a patchwork of sources, but Gaius 2,4 formed their backbone; and having been rejected from the Digest, its flaws were rectified for Inst. 2,1.

It is also interesting that neither Mommsen nor earlier Digest editions make any mention of Stephanus' scholion in the context of disputing the text of D. 1,8,1,pr., as indeed noted by Kaiser.⁸⁹ Accordingly, they do not actively accept that sch. 1 ad B. 46,3,1 shows D. 1,8,1,pr. to have originally contained Gaius 2,4, despite their agreement that scribal errors in the *Florentinus*, or just before, could be inferred from relevant Basilica texts. Perhaps the evidence regarding D. 1,8,1,pr. was felt to be too flimsy, not even warranting a mention.

So Kaiser's objections fall one by one by the wayside. It is too speculative to conclude that Gaius 2,4 was originally kept in D. 1,8,1,pr. but left out in error at a slightly later moment of textual transmission. Instead, the evidence points to it being omitted from D. 1,8,1,pr. as its paganism was irredeemable as far as the compilers were concerned, even though Justinian's manual was able to water it down. As such, Stephanus could well have relied on the original Gaian provision for this part of his commentary on D. 1,8,1,pr., despite the Digest's approach. All in all, this evidence leads us to the conclusion that Stephanus was more conscientious in sticking to Gaius 2,1-11 (in effect, his source's source) than D. 1,8,1,pr.-1 was in respecting its direct source. It was not Stephanus' avowed task to follow this work in preference to D. 1,8,1,pr.-1, yet several times in the course of his commentary our expectations are confounded, as he comments on Gaius more than on Justinian's version of Gaius. And commensurate with the pattern seen in Stephanus' adoption of Gaius 2,1 and 2,4, the sixth-century lawyer may also have referred to 2,9, so there is a real possibility that it was from here that he obtained his material regarding the protective qualities of *res sanctae*.

(vi) *Alternative sources on res sanctae*

It is now worth observing that there was a general tendency in the classical era to talk about *res sanctae* as public, and to steer away from their divine nature; although some Digest

89 Kaiser, '*Res sacrae*' (note 4 above), 9 (section 2 with note. 11).

extracts besides D. 1,8,1,pr. appear to attribute divinity to *res sanctae*, these were very few in number, and even then, the references were fleeting, and the connection with divinity often covert, discernible mainly because of the deference with which such things were treated.⁹⁰ So there may have been few sources that could have helped Stephanus with sanctity generally. There was some willingness to explore the matter, but we know only of Gaius expressly and unequivocally telling us that *res sanctae* were *divinae*. The Digest compilers themselves were content to place D. 43,6,2, on *res sanctae*, under the title on *ne quid in loco sacro fiat*, as if they had lost touch with the true meaning. These circumstances, and the fact that the compilers chose Gaius 2,8 for the general analysis on *divisio rerum*, should be factored in with the other indications that Stephanus followed Gaius' lead at sch. 1 ad B. 46,3,1 (BS 2744/15-16): there may have been no-one else to follow.

As argued in my parallel study,⁹¹ B. 46,3,1, is also instructive regarding the scarcity of juristic discussion on *res sanctae* at that time; being from writings eventually chosen for the Basilica text, the extract should be roughly contemporary with Stephanus. But quite apart from not telling us about how and why a thing achieved the state of sanctity, B. 46,3,1 does not even mention *res sanctae* as a separate category of divine thing: θείου [δικαίου ἔστι], ὡς τὰ ἱερὰ καὶ μνημεῖα καὶ τὰ τεῖχη καὶ αἱ πόρται.⁹² And this despite Stephanus making clear the divinity of sanctified things. So we see again how the term may already have been going out of use in some quarters in the Byzantine East. It is as if the author of B. 46,3,1 was aware that sacred and religious things were naturally grouped together along with one other class of thing, but was unsure of what this final element was, so just listed the things that fell under it.

The Basilica contain further signs of *res sanctae* having sunk into obscurity by the sixth century. B. 46,3,5 (BT 2125/9-19) is mostly faithful to D. 1,8,6, but does not translate h.t. 6,2, with its reference to all things that we know were divine, including *res sanctae*. B. 46,3,6,⁹³ only talks of city walls, and does not mention their sanctity. Two manuscripts

90 Weber, '*Res sanctae*' (note 1 above), particularly sections D (ii) and (iv) (b). Divinity of *res sanctae* may be implied when the three *res divinae* are talked of together (D. 1,8,6,2, D. 11,7,2,4, D. 39,3,17,3, D. 41,3,9), and when *res sanctae* are treated as special (D. 1,8,8,pr.-2, h.t. 9,3-4, D. 43,6,2, D. 48,13,13, D. 50,7,18,pr.) See notes 23-32 above.

91 Weber, '*Res sanctae*' (note 1 above), section D (iii).

92 BT 2124/4-6. Cf. M. Fiorentini, *Ricerche sui culti gentilizii*, (Università di Roma 'La Sapienza'. Pubblicazioni dell'Istituto di diritto romano e dei diritti dell'Oriente mediterraneo, 69), Roma 1988, 364-366.

93 BT 2125/20-21, apparently regarding D. 1,8,8,2. However, the text may reflect Pomponius' D. 1,8,11, which does not mention sanctity anyway.

containing B. 46,3,7 (on D. 1,8,9,pr.) have Ulpian's *res sacrae* as *ἱερὰ ἤτοι ἄγια*,⁹⁴ as if they were one and the same, whereas throughout the Basilica, *τὰ ἱερὰ* refer exclusively to things that the Digest used the epithet *sacer* to describe.⁹⁵ Moreover, we read that the *sanctae leges* of D. 1,8,9,3 are *ἱεροί* (BT 2126/5); and although one manuscript has *ἄγιοί*, the Anonymus apparently wrote *sacroi* (see Scheltema's apparatus). Additionally, B. 46,3,7 (BT 2126/5-6) talks of offences against *τὰ ἱερὰ ἢ τὰ τείχη* as incurring the death penalty, whereas Ulpian had simply told us that attacking sanctified things carried such consequences. The divine places in D. 11,7,2,4 (sacred, religious and sanctified alike) are only *πρὸς ταφὴν* or *ἱερός* in B. 59,1,2 (BT 2715/12-13), although the Anonymus also wrote *sanctos* (see apparatus). The occasional *ἄγιος* denotes sanctity in the Basilica,⁹⁶ but we are not told what falls within the category. Some Basilica scholia have *τὰ σάγκτα* in line with the Digest's *res sanctae*,⁹⁷ but compared with the writings chosen for the main text, these are in a distinct minority.

And there are further indications regarding the apparent desuetude into which the term *res sanctae*, or *τὰ σάγκτα*, had fallen, as we see elsewhere that the concept struggles somewhat to ever catch on in the East. Justin the Martyr uses it in the second century AD, when Hellenising the words of an inscription found on the Tiber Island, which he thought described a statue of the Samaritan god Simon.⁹⁸ Justin alleges that it was made out to *Σίμωνι δέω σάγκτω*. We know from a more recent discovery⁹⁹ that this may well have been his erroneous comprehension of *Semoni Sanco Deo*, which referred to the Sabine god Semo.¹⁰⁰ But Justin can only have used the term because he mistakenly thought that gods were considered *sancti*, whereas none of the sources attach sanctity to the gods. Any subsequent

94 BT 2126/1 with apparatus. Despite claiming to be on Marcian, the text seems to comment on D. 1,8,9,pr. (Ulpian).

95 See also references in Weber, '*Res sanctae*' (note 1 above), note 137 (section D (iii)).

96 See B. 50,3,8 (BT 2345/10-12, on D. 41,3,9); B. 58,13,17,4 (BT 2682/19, on D. 39,3,17,3); B. 58,15,2 (BT 2687/9-10, on D. 43,6,2). There are no scholia to these excerpts.

97 Beyond sch. 1 ad B. 46,3,1, see sch. 4 ad B. 46,3,5 (BS 2747/3-4), on D. 1,8,6; sch. 1 ad B. 46,3,6 (BS 2748/7-15), on D. 1,8,8,2; sch. 3, 4 ad B. 46,3,7 (BS 2748/29-31; 2749/6-10), on D. 1,8,9,3. The latter scholion is by the Anonymus, and the others may also be sixth century given the closeness of their renditions to the Digest text.

98 Just. *Apol.* 1,26: *Σίμωνα μὲν τινα Σαμαρέα... θεὸς ἐνομίσθη, καὶ ἀνδριάντι παρ' ὁμῶν ὡς θεὸς τετιμηται, ὃς ἀνδριάς ἀνεγήγερται ἐν τῷ Τίβερι ποταμῷ μεταξὺ τῶν δύο γεφυρῶν, ἔχων ἐπιγραφὴν Ῥωμαϊκὴν ταυτήν, Σίμωνι δέω σάγκτω.*

99 K. Lake (transl.), *Eusebius, Ecclesiastical History*, Vol. I, (Loeb Classical Library, 153), London / New York / Cambridge (Mass.) 1926 (repr. 1949), 137 note 2; CIL VI 567 = ILS 3474 = CIL VI 30795.

100 OLD, s.vv. *Sancus, Semo*. The misnomer may have been frequent, and with different manifestations, as we find other instances of Greek authors referring to the Sabine deity *Σάγκος* as *Σάγκτος*, see E.A. Sophocles, *Greek Lexicon of the Roman and Byzantine periods (from B.C. 146 to A.D. 1100)*, New York 1870, 976 s.v. *Σάγκος*.

evidence that the term was integrated into the Greek language is also slender. Although the post-classical Eusebius referred to Justin's account, albeit using (δεο) σανξτο instead of σάγκτω, he already had to explain that this meant θεῶ ἀγίω, and again failed to question the designation.¹⁰¹ We do find the notion in the other Byzantine sources seen here, but they mostly only transpose the Latin term, and Sophocles gives no further examples beyond these,¹⁰² so the word cannot have been widely used. So the East had hardly accommodated Gaius' concept, making it entirely natural that Stephanus should turn to his Institutes for help in explicating it.

As seen in the above examples, *res sacrae* and *religiosae* fared better, being much more widely understood in the (Hellenised) Latin, as well as in their Greek equivalents of τὰ ἱερὰ and, for example, μνημεῖα.¹⁰³ But Stephanus lacks transparency when we read in the scholion about divine things being divided into τὰ ἱερὰ, σάκρα and ῥελεγίωσα (BS 2744/12). He mentions τὰ σάγκτα a bit later, so they were not confused with τὰ σάκρα. So were the latter a subdivision of ἱερὰ, according to him, or just their opposite number in Latin? Or were τὰ σάκρα and ῥελεγίωσα both types of ἱερὰ? The ambiguity is not pressing, as Stephanus goes on to define only τὰ σάκρα and ῥελεγίωσα, entailing that he did not think that ἱερὰ had a separate meaning. But the situation is far from ideal, particularly given the overlaps seen above with τὰ σάγκτα. The ground was fertile for a much fuller clarification of all three, but above all of *res sanctae*.

So we find a barren environment in the late antique East from which any further commentary on *res sanctae* could be facilitated. This in itself may be conducive to the conclusion that Stephanus focused on an earlier text, prepared mainly for the West, for his own brief discussion at BS 2744/15-16, bolstering the argument that he used the part of Gaius 2,9 that is neither visible in V, nor reproduced in D. 1,8,1,pr. And indeed, the same is to be said of Theophilus as well.

(vii) *The influence of Theophilus' Paraphrasis on sch. 1 ad B. 46,3,1*

This brings us to the pivotal matter of whether Theophilus' provision at 2,1,10, on the protection provided by *res sanctae*, directly influenced Stephanus' own remark to this effect. We need to keep in mind that Theophilus' sequence is very erratic in comparison to

101 Eus. *H.E.* 2,13,4.

102 Sophocles, *Greek Lexicon* (note 100 above), 976 s.v. σάγκτος, citing Theoph. 2,1,10.

103 See Sophocles, *Greek Lexicon* (note 100 above), 595 s.v. ἱερός, 977 s.v. σάκρος; LSJ, s.v. μνημεῖον. See also note 95 above.

Gaius 2,1-14, by virtue of abiding by the Justinianic manual, as should be clear from the above. As such, it is impossible to argue that Stephanus relied purely on this work when preparing his own commentary. But this does not require us to find there was no influence at all. We know for example that elsewhere, Stephanus quite often cited Theophilus' Digest interpretation,¹⁰⁴ going to the possibility that D. 1,8,1,pr.-1 / Gaius 2,1-14 were not always his default props in the current scholion, and that he may have also turned to Theophilus for guidance.

Yet we have also seen how Justinian's endorsement of Gaius could have disguised the use of pagan material from this classical-era manual by contemporary writers. But if such material had already been recycled by a sixth-century peer, copying this second-hand version may have been fraught with danger, as the scope for words being twisted, even inadvertently, could have risen exponentially. And arbitrary condemnation as a heretic was obviously a possible consequence. So we can perhaps exclude such a source from our enquiries into the roots of BS 2744/15-16. However, this thinking is still not entirely satisfactory, as it is doubtful that reliance on a work by the *antecessor* and Digest compiler Theophilus, who enjoyed the high honorific titles of *vir illustris* and *magister iuris* (const. *Tanta* § 9), and was jointly entrusted with drafting Justinian's Institutes (const. *Imperatorium* § 3), could have attracted quite the same censure.

We can however at least discount the probability that any plagiarism occurred the other way round, as the *Paraphrasis* must have been drafted before Stephanus' commentary on D. 1,8,1,pr., given the likely publication of Theophilus' work around 533 / 534. It refers to no constitutions issued thereafter, nor to the second Code,¹⁰⁵ and Theophilus' death is likely to have been before the end of 534,¹⁰⁶ very soon after the Digest's promulgation on 16th December 533. And the paraphrator's greater detail on the ancient derivation of the term *sanctum* could not have been taken from Stephanus' very concise formulation. However, Theophilus could have held some sway over Stephanus, and we need to consider whether there is general evidence of this, which could allow us to infer that Stephanus copied the paraphrator when producing the lines 15-16 of his own commentary, rather than Gaius 2,9.

104 G.O. Reitz, *Θεοφίλου ἀντικλήνωρος τὰ εὑρισκόμενα. Theophili Antecessoris Paraphrasis Graeca Institutionum Caesarearum*, II, Hagae Comitibus 1751, 946-956.

105 Lokin / Meijering / Stolte / Van der Wal, *Theophili Antecessoris Paraphrasis Institutionum* (note 12 above), *Prolegomena*, ix with note 2.

106 Stolte, 'Gaius in Theophilus' (note 3 above).

(a) *Theoph. 2,1,10 and sch. 1 ad B. 46,3,1: general similarities and differences.*

To consider this matter it will firstly be instructive to cast an eye over the legal backdrop at the time of Stephanus and Theophilus, as a few interesting observations can be made. Primarily, we should note that Stephanus may have been helped to some extent by other sixth-century Greek works that were to form the basis of the Basilica and its scholia, as we can see that *divisio* as a legal concept was discussed using very similar vocabulary. This in itself may carry few real implications, due to the limited ways in which the matter could be talked about. But when we compare it to Theophilus' wording, we see tangible differences that may suggest Stephanus had turned to other contemporaries rather than the paraphrator.

Hence, all sources talk of *διαίρεσις πραγμάτων*, but on the few occasions that Stephanus talks of *divisio* when discussing persons, he uses *κατάστασις* twice (sch. 1 ad B. 46,1,1 (BS 2727/9); sch. 1 ad B. 46,3,1 (BS 2744/8)), thereby emphasising the idea of personal status rather than a mechanical, impersonal divide. Although the examples are infrequent, and even though he is not entirely averse to saying *διαίρεσις* in this context too (sch. 1 ad B. 46,1,1 (BS 2727/14)), he does seem quite emphatic in changing to *διαίρεσις* of things, after talking about *κατάστασις* of persons (sch. 1 ad B. 46,3,1 (BS 2744/6-10)). Enantiophanes also says *κατάστασις* in the context of *ἐλευθερούμενοι* (sch. 2 ad B. 46,1,1 (BS 2727/27)). In the rubric to B. 46,1, *κατάστασις* is used with *ἄνθρωποι*; *διαίρεσις* is used of persons as well, but this is when they are referred to in conjunction with *πράγματα*.¹⁰⁷ And in the two Greek renditions of D. 1,5 texts that expressly refer to status, *κατάστασις* is unflinchingly adopted.¹⁰⁸ This differentiation reflects the slightly different approach seen in the Latin of both Gaius' and Justinian's Institutes, which talked of *divisio de iure personarum* (Gaius 1,9; Inst. 1,3), and of varying status grades (Gaius 1,89; Inst. 1,5,3), as opposed to *divisio personarum*.

However, Theophilus repeatedly uses *διαίρεσις*, not just of things (Theoph. 2,1,pr., p. 178/2, 12-13), but also regarding the categorisation of human beings;¹⁰⁹ or else he talks of *τύχη* of Latins and *dediticii* (Theoph. 1,5,3, p. 36/23-24), or *τάξις* in the context of deportees pardoned by the emperor (Theoph. 1,12,1, p. 98/13), and does not say *κατάστασις*. An exception is seen in his discussion of *capitis deminutio* (Theoph. 1,16,pr., 3, p. 126/3-4, p. 128/2), with

107 B. 46,1 rubr. (BT 2117/4): *περὶ καταστάσεως ἀνθρώπων καὶ διαίρεσεως προσώπων καὶ πραγμάτων...*

108 B. 46,1,6 (BT 2118/9), on D. 1,5,8 (*Pap. 3 quaest.*); B. 46,1,17 (BT 2119/16), on D. 1,5,20 (*Ulp. 38 ad Sab.*).

109 Theoph. 1,3,pr., p. 26/16: *προσώπων διαίρεσις*; 1,5,3, p. 34/1: *ἀπελευθέρων διαίρεσις*; 2,1,pr., p. 178/6: *διαίρεσις ἀνθρώπων*.

which his fellow Byzantine jurists accord entirely,¹¹⁰ but because status was central here, rather than categorisation, this does not say much about how Theophilus tackled *divisio de iure personarum* generally. So we find little to mitigate the distinct rupture between the terminology used by Theophilus on the one hand, and different Byzantine scholars, including Stephanus, on the other, in the first half of the scholion. And this may well point away from Theophilus' *Paraphrasis* aiding Stephanus in setting out the basic *divisio rerum* of D. 1,8,1,pr., including his remark on the protectiveness of *res sanctae*.

Be this as it may, however, there is also evidence that could potentially point in the other direction. Firstly, had Theophilus guided Stephanus for the clauses that replicate Gaius 2,1, it could theoretically explain why the infamous third clause (*quae vel...habentur*) was dropped by Stephanus, given that Theophilus only reproduces it (albeit with greater emphasis)¹¹¹ after referring back in much greater detail to the contents covered in the previous book; indeed, this much lengthier excursus amounts to over 15 lines of discourse in the Groningen edition (Theoph. 2,1,pr., p. 178/1-16), whereas in Inst. 2,1,pr. and (probably) in Gaius 2,1, it is contained in a single short clause (*superiore libro de iure personarum exposuimus*). So if Stephanus had been using the *Paraphrasis* here, he may well have been put off the scent by Theophilus' own analysis, explaining his non-replication of *quae vel...habentur*.

But this rather awkward aspect of the *Paraphrasis* also counts against it as the potential instigator of Stephanus' words. Even though we can glean from Theoph. 2,1,pr. that his first book dealt with the law of persons, as Gaius before him had stated, there is no concise statement to this effect. Indeed, Theophilus talks of listing οἱ νομοθέται, and about the law of the Romans, and of this law dealing with three matters that comprised πράγματα, ἀγωγαί and πρόσωπα. These statements, and the rather long-winded synopsis of what had been, are particular to him alone. We clearly find no corresponding words in Gaius' or Stephanus' commentary. Stephanus then is most unlikely to have resorted to his contemporary here.

As for the provenance of Stephanus' version of Gaius 2,4, the first words of Theoph. 2,1,8 may be seen as a rendition of Gaius' provision, and could therefore have acted as a guide for Stephanus: SACRA ἐστὶν ἅτινα ὀρθῶς καὶ κατὰ τρόπον καὶ διὰ τῶν ἱερέων Θεῶ καθιέρωται. Interestingly, Theophilus had referred to offerings that are ἀφώρισται in the context of

110 B. 46,2 rubr. (BT 2121/3). Cf. Inst. 1,16,pr., 3, 5; Gaius 1,159-162 (*capitis deminutio, status commutatio / permutatio*).

111 See also section D (iv) (b) above. Theoph. 2,1,pr., p. 178/13-15: ἡ δὲ ἀνωτάτη τῶν πραγμάτων διαίρεσις ἐστὶν ἄντη, ὅτι τῶν πραγμάτων τὰ μὲν τελεῖ ὑπὸ τὴν ἡμετέραν δεσποτείαν τε καὶ περιουσίαν, τὰ δὲ ἐκτὸς τῆς ἡμετέρας ἐστὶ περιουσίας ἧτοι δεσποτείας.

the sacred, whereas Stephanus talks of τὰ ἀφορισθέντα in the context of religious things, which may speak of disguised imitation. Stephanus says ἀφιερῶ θεῶ and Theophilus καθιερῶ θεῶ, even though he puts the verb into its participial form rather than the finite version found in Theoph. 2,1,8. But in reality, because Theophilus' wording largely follows in the footsteps of Inst. 2,1,8, and Theoph. 2,1,9 also takes the line of the Justinianic manual, rather than Stephanus' Christianised connection of *res religiosae* to Gaius' underworld of 2.4, it bears little resemblance to the scholion, and little else gives us cause to think it does.

However, we still cannot write off Theophilus' *Paraphrasis* as a potential influence for Stephanus. An important observation on this front is that despite Stephanus' general sequence of comments and themes coinciding notably with those of Gaius, he makes points in the second half of the scholion, which covers D. 1,8,1,1 / Gaius 2,12-14, that are very likely to have stemmed directly from the *Paraphrasis*, as they are found in these two sources alone. Thus, only Theophilus and Stephanus tell us how perceptibility by sight was as important as touch in distinguishing corporeal things conceptually from the incorporeal: both tell us that the former are apprehended by θέα, as well as ἀφή, and that the latter are not,¹¹² whereas Gaius 2,13-14, the Digest and Inst. 2,2,1 mention only touch regarding both types of thing. So Stephanus may have cut and pasted these words and phrases straight from Theophilus.

We see Theophilus clearly once again in Stephanus' reaction to Gaius' straightforward statement at Gaius 2,14, that the actual rights of inheritance, usufruct and obligations are incorporeal, despite usually consisting of corporeal things. Gaius' words are echoed by each of D. 1,8,1,1, Inst. 2,2,2, Theoph. 2,2,2 (p. 224/9-14) and sch. 1 ad B. 46,3,1 (BS 2744/31-2745/3). But Stephanus specifically explains that the actual things owed may be *incorporeal* as well,¹¹³ (just like the debt itself), and Theophilus discusses this too,¹¹⁴ but the other sources do not. And both use very similar phrases when explaining why they had previously said that things owed were not always corporeal, Stephanus saying εἴρηται δέ μοι “ὡς ἐπὶ τὸ πλείστον” διὰ ... (BS 2745/3) and Theophilus “ὡς ἐπὶ τὸ πλείστον” εἶπον ἐπειδὴ... (Theoph. 2,2,2, p. 224/14). However, Stephanus illustrates the concept of debt of incorporeal things by actually referring in his ensuing analysis to a usufruct or servitude owed through *stipulatio*, whereas Theophilus simply reverts to how incorporeal rights included the vindication of a corporeal thing (Theoph. 2,2,2, p. 224/16 - p. 226/21). So their

112 Theoph. 2,2,1, p. 224/2-4: σωματικόν δέ ἐστιν ὃ καὶ ὀνόματι γνωρίζεται καὶ ἀφή καὶ θέα ὑποπίπτει... ἀσώματον δέ ἐστιν ὃ νῶ μόνῳ γνωρίζεται οὔτε δὲ ἀφή οὔτε θέα ὑποπίπτει; sch. 1 ad B. 46,3,1 (BS 2744/26-27): καὶ σωματικὰ μὲν ἐστὶ τὰ ἀφή δηλονότι ἢ θέα καταλαμβάνόμενα... ἀσώματα τὰ μὴ ἀφή δηλονότι μήτε θέα καταλαμβάνόμενα.

113 BS 2745/5-6: ...ἐνθα τις οὐσούφρουκτον ἢ δουλείαν ἐπηρώτησεν. Ἐνταῦθα γὰρ δια τῆς ueuis ἐνοχῆς δουλεία καὶ οὐσούφρουκτος ἐποφείλεται, ὅπερ ἐν ἀσωμάτῳ ἐξετάζεται.

114 Theoph. 2,2,2, p. 224/15: πολλὰκις καὶ ἀσώματόν τι διὰ τῆς ἐνοχῆς ἀπαιτοῦμεν.

main point is essentially the same, and individual to just them, but is only explored further by Stephanus. Nevertheless, it seems indubitable that Stephanus consciously emulated Theophilus when he made use of the exact same words in justifying the very same turn of phrase regarding the very same issue, namely on debts potentially comprising τὰ ἀσώματα as well as σωματικά.

But despite such conduct, Stephanus defers to Gaius and Justinian in the examples he gives of *res corporales*, namely ἀγρός, ἄνθρωπος, ἐσθής, χρυσός, ἄργυρος (BS 2744/27), whereas Theophilus differs slightly, referring to a οἰκία instead of gold and silver (Theoph. 2,2,1, p. 224/3). And unlike Theophilus, Stephanus does not say that σωματικὸν are known ὀνόματι, or that ἀσώματων are known νῶ μόνῳ.¹¹⁵ Furthermore, when discussing *res incorporales*, sch. 1 ad B. 46,3,1 includes also ἄλλα τινὰ πρὸς τούτοις ἀναρίθμητα for Gaius' *aliae res innumerabiles*, a phrase seen also in D. 1,8,1,1 and Inst. 2,2,1; but it is omitted by Theophilus. As examples of incorporeal things, each source lists inheritances, usufructs and obligations, however contracted, but Stephanus does not follow the *Paraphrasis*' lead of giving a basic explanation of what these were (Theoph. 2,2,2, p. 224/4-9).

The two versions also have striking similarities, and yet crucial differences, when using inheritances to illustrate incorporeality. Stephanus limits these to τὸ τῆς κληρονομίας ἀσώματων (BS 2744/28-31). As Stolte explains,¹¹⁶ a very similar phrase is used elsewhere by Theophilus, not signifying *hereditas*, but rather 'the abstract quality of being heir'. He usually employed the words ἀσώματων ὄνομα τῆς κληρονομίας (Theoph. 2,19,5, p. 388/10-11; 3,1,5, p. 490/11), but at 2,23,3 (p. 456/2-3) he used a short-cut, albeit with an identical meaning: τὸ ἀσώματων, regarding the κληρονομία that he had mentioned earlier. Stephanus' words are remarkably similar, and may well convey the same concept. We have already seen his avoidance of the word ὄνομα, so perhaps this was a tendency of his in the context of πραγμάτων διαίρεσις. And both seem keen to distinguish the different types of κληρονομία, perhaps because it did not have a direct Latin equivalent when used in this sense.¹¹⁷ However, Theophilus is more expansive in 2,2,2,¹¹⁸ and is not yet drawn down the route of encapsulating the concept, unlike Stephanus in his succinct summary, and unlike his own approach later at 2,23,3. So Stephanus was not wedded to Theophilus' strategies. Indeed, even if the idea of the incorporeal heir had not really taken off amongst the Latin-speaking

115 See note 112 above. B.H. Stolte looks into these word formulations in his study 'Theophilus and the "incorporeal" heir', *Fundamina* 20/2 (2014), 891-897 (893-894).

116 Stolte, 'The "incorporeal" heir' (note 115 above), 894-897.

117 Stolte, 'The "incorporeal" heir' (note 115 above), 894, 897.

118 Theoph. 2,2,2, p. 224/2-3: [κληρονομία ἐστὶ] δίκαιόν τι φανεροῖς τρόποις συνιστάμενον νῶ καταλαμβάνόμενον, ὃ ποιεῖ με τῆς ἑτέρου δεσποτείας ἀθρόον γενέσθαι δεσπότην.

jurists, Theophilus says the matter was εἴρηται πολλάκις (Theoph. 2,19,5, p. 388/10), presumably in the East. So Stephanus may have been influenced by others here.

So the evidence is clearly conflicting. We see Stephanus often allowing himself to be guided by other writers, and although these may have included Theophilus, they were by no means restricted to him. He may also show some independence of thought. Yet when dealing with *res corporales*, he apparently did not flinch from modelling some of his provisions on the *Paraphrasis*. The occurrences are intermittent, but we clearly find him using examples not found in Gaius' Institutes or D. 1,8,1,1, adopting phraseology that is eerily reminiscent of the paraphrator, even if he tried to impose his own individuality on the words.

However, whether or not Stephanus' remarks on *res (in)corporales* can be traced back to Theophilus, they are of a different nature to what is found at BS 2744/15-16. They illustrate the application of a principle through examples, or provide further instances of usage, whereas the comment relating to *res sanctae* was centred purely on the historical origins of the concept, having no practical value whatsoever. Clearly, we cannot draw any definite conclusions from these circumstances, but perhaps a pattern is emerging whereby Stephanus only turned to Theophilus for support in the second half of his commentary, when he was explaining still-relevant divisions. The first half simply does not have the same stylistic similarities as the second, perhaps showing instead that Stephanus looked to texts other than the *Paraphrasis* for support for his slant at lines 15-16.

(b) *Theoph. 2,1,10 and sch. 1 ad B. 46,3,1/15-16.*

Yet Theophilus' attestations regarding the protective nature of *res sanctae*, and regarding the legend that lay behind this link, may still lead us remorselessly to the possibility that he was the avenue through which Stephanus became cognisant of how *res sanctae* acquired their designation, as they are the only sources to attest to this. On the evidence viewed thus far, no adverse inference can categorically be drawn regarding whether Stephanus' remarks were influenced by the paraphrator. We cannot yet reject the possibility. And a closer inspection and comparison of the actual wording used by both scholars may give us further insight. Hence, many of the words used in Theophilus' passage have the same roots as those used by Stephanus, even though the grammatical form varies: in the space of only just over one line (in the Groningen edition), Theophilus says that SANCIRE γάρ ἐστι τὸ ὄχυροῦν, that walls (which are sanctified) ἀσφαλίζεται ἡμᾶς, for which reason SANCTA προσαγορεύεται. And in his passage on this, itself of equal brevity, Stephanus talks of τὰ σάγκτα preserving ἡμῖν τὸ ἀσφαλές, that they ὄχυροῦσιν ἡμᾶς, for which reason σάγκτα προσαγορεύονται (my emphasis).

In combination with the virtual certainty that Stephanus mined pieces of the second half of the scholion from Theophilus' work, these quasi-repetitions problematise any firm

conclusion that the scholion's lines 15-16, on the protection provided by τὰ σάγκτα, came directly from Gaius' Institutes. This must be tempered with the divergences that clearly exist between the scholion and the *Paraphrasis*, not least Theophilus' sequence being dictated heavily by the Justinianic manual. But this notwithstanding, the parallels may point to Stephanus' extra comment being from Theoph. 2,1, undermining the likelihood that it was from a currently illegible section of Gaius' Institutes.

However, a more careful examination of the precise wording in these provisions may change the analytical landscape. Comparing more closely the overlapping excerpts on *res sanctae* authored by the two Byzantine lawyers, we see that they come up with slightly dissonant material. Firstly, Stephanus does not initially display Theophilus' (necessary) readiness to emulate Justinian's manual at Theoph. 2,1,10, bypassing the explanation, derived in part from Ulpian's D. 1,8,9,3, whereby *res sanctae* were so named because their violation bore sanctions (Theoph. 2,1,10, p. 184/2-5). The comment was not obviously tinged with paganism, and Ulpian's text had been admitted to the Digest, whether or not it had been neutralised, so Stephanus had no obvious reason to disregard it. And as noted, a few lines later he avoids recounting the myth told by Theophilus in full.

But it is Stephanus' vocabulary usage that is particularly revealing. His reference to sanctified things preserving τὸ ἀσφαλές is very awkward. The word seems invariably to feature in literary sources when describing things as indestructable,¹¹⁹ rather than something that needs to be protected. Theophilus talks instead of sanctified 'fortification' protecting (ἀσφαλίζομαι) *us*, and what is paramount is the inherent vulnerability of mankind, as opposed to their invincibility. The meanings could even be said to be diametrically opposed. So Stephanus uses τὸ ἀσφαλές counter-intuitively, clashing with how the term is used elsewhere.

Yet despite these disparities, the two sixth-century jurists used vocabulary with the same stems precisely when explaining how the protective nature of *res sanctae* accounted for their name. Because the two versions are so reflective of each other, but ultimately so difficult to reconcile, it is here considered more likely that the similar-yet-disparate versions betray provenance from independent translations of the same foreign-language source. And because the accounts are found only in the scholion and *Paraphrasis*, both of which were descended directly from Gaius' Institutes, which moreover was one of the very few works to receive express Justinianic backing, this foreign-language source must surely have been Gaius' very Institutes. Stephanus' use of τὸ ἀσφαλές ultimately exposes his version as erroneous; if his aim was to portray defences as indispensable to security, and of this accounting for their sanctity, his words should perhaps have read more along the lines of ἀσφαλή ἐστί

119 LSJ, s.v. ἀσφαλής.

τὰ σάγκτα καὶ περιποιεῖ ἡμῶς. Such wording by Stephanus would correspond much more convincingly with Theophilus' depiction of walls as the protectors of mankind. But most importantly, it is maintained here that their mutual source must have been Gaius' Institutes, and that they translated it slightly differently. This, it is proposed, resolves the seemingly mixed messages of the sources as examined here.

It may be objected that the partial resemblance of the terms, and their uniqueness to the context, simply smack of Stephanus paraphrasing Theophilus' paraphrase, but erring in conveying the meaning. However, without the filter of (mis)translation, it is doubted that Stephanus would produce a rendering that was so different syntactically, and indeed in its overall meaning. Alternatively, perhaps Stephanus' inaccuracy stemmed from reliance by him on a pre-existing but defective paraphrase or translation of Gaius' Institutes.¹²⁰ Indeed, Ferrini suggested that such a work may have served as a template for Theophilus, because otherwise there was often no 'buona ragione' for why he should place in his own *Paraphrasis* entire passages from Gaius' Institutes. But Stolte has little enthusiasm for this explanation,¹²¹ and we have seen very good reasons for why both lawyers would scavenge these *gaiana* in the way envisaged.

The anomalies then may expose the reality: Theophilus' *Paraphrasis* was not Stephanus' source at lines 15-16, and instead of looking for the roots individually, we should do so jointly, on the basis that both lawyers produced their own separate interpretations of the same work. This conclusion is reinforced further when combined with the fact that the other Theophilean additions at 2,1,10 were not emulated by Stephanus. Together, the evidence simply outweighs the isolated and textually distant examples of Theophilus' footprint in the second half of the scholion, which are plagued by contradictions in any event. And although Stephanus borrowed from contemporary writers, including Theophilus, we can be reasonably confident that this was where there was a need for up-to-date, practical material in Greek, when Gaius was insufficient. But if there was a dearth of information on a concept that Stephanus wanted to explain, but which was no longer properly understood, it should not be surprising that Gaius was his first port of call, and was more important to him than D. 1,8,1,pr. The evidence suggests that just as he was in effect forced to turn to Gaius 2,1 for his introduction, and to 2,4 to explain the origins of *res sacrae* and *religiosae*, so he, and

120 See Nelson, *Überlieferung* (note 3 above), 287-291, on the existence of a work of this type. Nelson also finds that Theophilus was unlikely to have used a κατὰ πόδαζ of the Gaian work, given the very small number of word-for-word translations in his *Paraphrasis*, whether or not a Greek translation or paraphrase was already in circulation.

121 See Stolte, 'Gaius in Theophilus' (note 3 above), who also helpfully clarifies the unfortunate wording used by C. Ferrini, 'I commentarii di Gaio e l'indice greco delle Istituzioni', *BZ* 6 (1897), 547-565, when appearing to equate this hypothetical work with a κατὰ πόδαζ.

indeed Theophilus, turned to 2,9 for their explanations on how things acquired the honour of becoming *sanctae*, and on their basic protectiveness.

E. Rejection from or inclusion in the sources

Had Gaius indeed told us the pagan story that is still found in Theoph. 2,1,10, and which is diluted in sch. 1 ad B. 46,3,1, it is not hard to see how the compilers would have found it inappropriate for D. 1,8,1,pr., and cut it out accordingly. We have already seen that the fragment eschewed Gaius' treatment of how things became *sacrae et religiosae*, which corroborates the proposal that attaining divinity was an issue handled with kid gloves. And independently to this we also find cogent evidence that the compilers backed away from amending passages where it proved too onerous to produce an acceptable, Christianised form, preferring instead just to omit. So the rejection from D. 1,8,1,pr. of words in Gaius 2,9 may be squared with Gaius having addressed a subject in a manner that was later deemed inappropriate for the Digest.

But Theophilus seems to have been unperturbed by such considerations, due probably to his lofty position in Justinian's legal project, and his standing as legal professor. It is also self-evident that his fascination with history could have legitimised his inclusion of an otherwise controversial legend, and / or that this very interest hid any heretical aura such a provision may have had. So his unique tale on how it was thought long ago that walls replaced the gods' erstwhile custodianship of man, and his inter-connected remark that *res sanctae* acquired their name due to their protectiveness, could both have been received as a historical enquiry, true to Theophilus' apparent dual identity of lawyer and historian, and consonant with his work generally.¹²²

Stephanus was not as effusive, but his decision to omit the 'pagan' digression embraced by the lawyer-historian is more than adequately explained by a very understandable squeamishness with tackling such subjects in a legal commentary, as *his* remit could well have been much more constrained. If he was the Stephanus of const. *Tanta* § 9, he was at most merely a (relatively) lowly *vir prudentissimus*. So even though he was happy to provide esoteric explanations, perhaps he simply could not afford to risk being cavalier with heretical content, and had second thoughts regarding the appropriateness of the accompanying legend, unless much pruned.

122 Cf. Stolte, 'Gaius in Theophilus' (note 3 above); Nelson, *Überlieferung* (note 3 above), e.g. 279-283.

But it is of note that the Western *Epitome Gai* shows no sign of reproducing the myth, despite talking about the beliefs of the *antiqui* that vetoed the seizure of stones from *res sanctae*, and how this explained the old term (but not the reasons behind it). The inescapable conclusion is that the epitomisers were prepared to include ancient beliefs in their work. So why would they not have done so for the legend, and the protective nature of *res sanctae* generally? To answer this question, we need to bear in mind that the Christian mind-set may have started to question the veneration of city walls as holy. Perhaps now they were perceived in wholly secular terms. The ignominious fate of the walls of Rome, and of the defences of the now defunct Western empire generally, could only have encouraged this change. If this is correct, and had Gaius indeed relied on an ancient legend to account for the designation, it would only have made things more difficult for the epitomisers, and omission was an obvious solution. In contrast, the sturdiness of the Constantinopolitan walls was less obviously in dispute, so even if the concept of walls as *sanctae* was losing traction in the East, it was perhaps less likely to have actually raised eyebrows. In any event, because things that had been *sanctae* were now *publicae* in the West,¹²³ there was no point in giving any additional explanation, particularly if it was of dubious worth in the Western Christian world anyway. So the *Epitome's* failure to deal with this matter is neither here nor there in terms of the plausibility of Gaius having done so beforehand.

F. Fitting in: the sequence of Gaius 2,9

Gaius' proposed examination would need to be contained in an illegible section lengthy enough to house several lines of characters, so as to encompass the defensive nature of *res sanctae* and its mythological background. Ideally this would have been somewhere in the vicinity of the brief confirmation at 2,8 that *res sanctae* included *portae et muri*. And the lacuna at 2,9 appears ideal. I have already shown how this gap was likely to have contained other material regarding *res sanctae*,¹²⁴ but there would still have been ample room to accommodate further clauses. The analysis of ownership of *res divinae et humanae* (that is, the still-legible section of 2,9) would have intervened, but this too makes sense, as I also showed that the particular ownership status of *res sanctae* may well have been part of the issues dealt with in the rest of 2,9.

123 Gai. Epit. 2,1,1: *Publici iuris sunt muri, fora, portae, theatra, circus, arena, quae antiqui sancta appellaverunt...*

124 Weber, 'Res sanctae' (note 1 above), sections C-E.

But a discord is plainly created by Stephanus, as straight after telling us that walls and gates were *σάγκτα*, he tells us precisely why a thing is considered sanctified, only then proceeding to ownership and inheritances. Gaius on the other hand had raised the ownership of *res divinae et humanae* as soon as he had told us that walls and gates were *sanctae*, and on my analyses only then reverted to the issue of why and how things became *sanctae*. This disconnect with Stephanus' sequence could on some views disturb even the compelling evidence viewed above.

However, there may be a quite straightforward answer to why Stephanus should swap things round as such. I have already proposed that Gaius saw *res sanctae* as public as well as divine, and needed to set out the issue of ownership of *res divinae* and *humanae* (*res humanae* incorporating *res publicae*) before he could address the ownership status of *res sanctae et publicae*.¹²⁵ I also argued that this take on the interaction between *ius publicum* and *res sanctae* was rejected by the sixth-century legal regime in the East. If so, we can see why it was avoided by Stephanus. However, if he still wanted to illustrate the origins of *res sanctae*, the obvious solution would have been to extract the historical digression, Christianise it, expunge all mention of *res publicae*, and move the remark to a new home, where it could join the only other place that *res sanctae* were mentioned – namely, immediately after it was confirmed that *τείχη καὶ πύλαι* were *σάγκτα* (BS 2755/14-15). It no longer needed to be raised after the ownership point, as the ownership of *res sanctae* was no longer clarified by the law on ownership of *res humanae et publicae*, as *res sanctae* were nothing more than divine for Justinian, and accordingly for Stephanus too.

A discussion on the public nature of *res sanctae* could also have been the catalyst that provoked the enquiry into why *res sanctae* were first considered *sanctae*. The wording potentially retrieved from Theoph. 2,1,10, and in part from sch. 1 ad B. 46,3,1, gives us details on how walls 'protect us', and were originally designed to defend humankind after they had been forsaken by the gods. If this is what was said by Gaius, it would fit convincingly into a scheme that sought to explain why *res sanctae* were *publicae*. So it is not at all a foregone conclusion that insertions along the lines suggested here would create a sequential anomaly in Gaius 2,1-11.

125 Weber, '*Res sanctae*' (note 1 above), section D (v).

G. Concluding remarks and proposed reconstruction

There is inevitably a possibility that both Stephanus and Theophilus obtained their information on the protectiveness of *res sanctae* from an extract that the compilers had not included. But the evidence uncovered here suggests strongly that they both found their material in the part of Gaius 2,9 that had been removed from D. 1,8,1,pr., and which is also now illegible in V. The principal factors leading to this conclusion are that:

- Well before Gaius, the ancients believed that protectiveness was the essence of sanctity;
- The provisions surrounding 2,9 suggest Gaius addressed the roots of *res sanctae* here;
- Stephanus' commentary on D. 1,8,1,pr., which replicates Gaius 2,1-11 (with some omissions), remarks on the protectiveness of *res sanctae*, but this is not found in D. 1,8,1,pr., and is the only substantive addition to what we know was said in Gaius 2,1-11;
- As a whole, the scholion adheres to Gaius' original more closely than any other known source, retaining several elements from Gaius 2,1 and 4 not kept by D. 1,8,1,pr.; and it is not feasible that Stephanus followed Inst. 2,1 or Theoph. 2,1 for these provisions;
- This predisposition to follow the original Gaian wording suggests that Stephanus had no compunction in resorting to this work to ensure his commentary was as full as possible;
- Theophilus and Stephanus coincide independently in their central message regarding how it was the capacity to protect that made things *sanctae*;
- There were remarkable linguistic similarities, but also anomalies, between the accounts of these two Byzantine scholars, showing that (a) they were unlikely to have influenced each other on this point; but (b) they may well have had the same foreign-language source;
- From an entirely independent strand of enquiry, it seems indubitable that Theophilus also resorted to Gaius' work outside of 2,9;
- Both authors were bound to look to earlier sources for further material on *res sanctae*, as the concept was dying out in the East;
- We know that Theophilus' interest in historical issues is also apparent in Gaius' Institutes;
- Both Theophilus' *Paraphrasis* and Stephanus' commentary on D. 1,8,1,pr. were close descendants of Gaius' manual, even if indirectly;
- Justinian himself provided the pretext for sixth-century lawyers to adopt pagan comments found in Gaius' Institutes, even if their rank, and the overtness of the potentially subversive comments, ultimately determined what was taken up and how;
- All the above factors should be viewed in light of there being a lacuna at Gaius 2,9;
- And Gaius had, it is contended, already raised *res sanctae* at 2,9, for different reasons.

Separately, these individual circumstances are inconclusive and may have insufficient weight to carry the proposal that the passages on the protectiveness of *res sanctae* hail from Gaius 2,9. But together, they form a robust case, and it is plausible that Gaius' Institutes

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was ultimately the inspiration for both comments under analysis here. It is proposed then that the explanation for why things were considered *sanctae* would fit into the reconstructed provision as follows:¹²⁶

2,8 Sanctae quoque res, velut muri et portae, quodam modo divini iuris sunt. 2,9 Quod autem divini iuris est, id nullius in bonis est; id vero, quod humani [iuris est, plerumque alicuius in bonis est: potest autem et nullius in bonis esse; nam res hereditariae, antequam aliquis heres existat, nullius in bonis sunt. **Et res universitatis, sicut theatra, circus, stadia et fora, etiam humani iuris et publicae sunt. Sunt qui putant aliquas res sanctas quoque humani iuris et publicas esse. Quod dicitur antiquos muros aedificasse ut restituerent pretiosissimum praesidium a diis provisum pro hominibus ante eos in taedio relictos. Sed exinde tolli aliquid capite puniatur, quod sunt sanctae et sin]e domino. 2,10 Hae autem res, quae humani iuris sunt, aut publicae sunt aut privatae. 2,11 Quae publicae sunt nullius videntur in bonis esse; ipsius enim universitatis esse creduntur. Privatae sunt quae singulorum hominum sunt.¹²⁷**

‘2,8 Also, sanctified things, such as walls and gates, come under divine law in a way. 2,9 But what comes under divine law belongs to no-one. However, that which is under human [law generally belongs to someone. But it may also belong to no-one, for hereditary things belong to no-one before an heir comes forth. **And things held by the whole body of the people, such as theatres, racecourses, stadiums and fora, are also of human law and are public. There are those who think that certain sanctified things also come under human law and are public. For it is said that the ancients built walls to replace the most precious protection provided by the gods for men before abandoning them in disgust. But to take anything away from these things is punishable by death, because they are sanctified and do not have an] owner. 2,10 Moreover, things that are under human law are either public or private. 2,11 Things that are public are thought to belong to no-one for they are believed to belong to the community as a whole; things belonging to individual people are private’.**

126 The italicised sections represent surviving text in V. All words in square brackets are restored, but where they are also underlined they are directly corroborated by the sources, and where bold are based on the reconstruction proposed in Weber, ‘*Res sanctae*’ (note 1 above). The section in bold AND underlined represents the section advocated in this paper.

127 The lacuna in V accommodates 290± characters, and the reconstructed section contains 323 characters, without spaces or punctuation. But compendia and abbreviations may decrease the count by around 35-40, if *sunt* = *s*, *res* = *r*, *quoque* = *qq*, *esse* = *ee*, *quod/quae* = *q*, *praeterea* = *ptea/pterea*, *sed* = *s*. Almost all these instances are found elsewhere in Gaius 2,1-14, and are preferred to more distant examples in order to minimise the impact of scribal variations (see e.g. Studemund, *Gaii Institutionum* (note 2 above), 300, s.v. *sed*). But even Gaius 2,1-14 is inconsistent in how words are shortened.

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The proposal by no means purports to be definitive, absent direct sources for its exact wording; but it seeks to show at least that it would have been possible to discuss the identified matter within the physical constraints of the gap. And although it is accepted that the section may simply be lost to us, the suggested words and their placement are firmly rooted in the ancient written record, salvaged from sources that have been shown cumulatively to have a realistic prospect of reflecting Gaius 2,9. A whole series of independent factors points persuasively to Gaius raising here the legend on the ancients seeing protectiveness as the essence of sanctity, and to his words still being discernible in the sources.

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APPENDIX

Translation of sch. Pc 1 ad B. 46,3,1 = D. 1,8,1 (BS 2744/6 – 2745/12)

Stephanus: Having talked as much as necessary about the law of persons and their status, let us now also talk about the division of things. The first and foremost division of things is broken down and divided into these two basic principles. Some types of thing are of *divini iuris*, others are of *humani iuris*, that is to say some things are of divine justice, others of human justice. And relating to divine law are things that are sacred, *res sacrae* and *res religiosae*. And *res sacrae* are things that are consecrated to God, *res religiosae* are what has been prescribed for the funeral service, indeed for the burial of the dead. And sanctified things, such as walls and gates, are in a way under divine law; for they preserve for us that which is steadfast¹²⁸ and fortify us, on which account they are also called sanctified. But those things that are part of *divini iuris* are not under the ownership of anyone, such as indeed things that are consecrated to God alone; whereas things subject to human justice are for the most part under the ownership of someone. I said with good reason ‘for the most part’; for it is possible that for a time these things are under the ownership of no-one. For those things that are part of a *hereditas*, until such time that someone accepts them and becomes the heir, are not under the ownership of anyone, but are considered to be ownerless. Regarding things of *humani iuris*, that is to say those things that are part of human justice, some are *res publicae*, others *res privatae*. And *res publicae* are not held to be under the ownership of anyone; for they are held to be part of the community itself. But *res privatae* are the very things that are found under the ownership of each person separately. In addition to this, certain things are corporeal and others incorporeal. And corporeal things are those that are plainly apprehended by touch or by sight, such as a field, a slave, clothing, gold, silver, and countless other things in addition to these. Incorporeal things on the other hand are those that are plainly not apprehended by touch or sight, of the sort that consist of a right, such as inheritance, that is to say the incorporeal quality of being an heir, and *usus fructus*, and when things become obligations, in whatever way incurred. And that corporeal things are found in the inheritance does not make any difference; and those fruits that have been harvested from the fields are corporeal and nevertheless the *usus fructus* is incorporeal. And that which is owed out of any obligation is usually corporeal; for example, a field that

128 Stephanus’ use of ‘ἀσφαλῆ’ may be a mistranslation, the correct Greek possibly being ἀσφαλῆ ἐστὶ τὰ τείχη, καὶ περιποιεῖ ἡμᾶς: ‘walls are indestructible and they protect us’. See main text, section D (vii) (b).

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is owed to me, or a household slave or money. Let 'usually' be said by me because of *usus fructus* and servitudes, as when someone stipulates for the *usus fructus* or servitude. For here through the *obligatio verbis*, the servitude and *usus fructus*, which indeed are counted amongst incorporeal things, are still owed. Therefore it makes no difference that corporeal things are often found in an inheritance and a *usus fructus* and an obligation; for the very right of inheritance and the right of *usus fructus* and the right of obligation are incorporeal, and through the incorporeal we deal with corporeal things. Into the same category, that is to say the incorporeal, fall both the rights pertaining to houses in a polis, and those of farmers, that is to say rustic and urban servitudes.