

In Defense of the Mystical Body: Giovanni da Legnano's Theory of Reprisals

Jasonne Grabher O'Brien

“Propterea sancimus nullam omnino pignorationem in nostra republica praevalere, neque in mercatis (hoc quod maxime ibi praesumptum invenimus) neque in agris neque in civitatibus neque in vicis, neque in civibus neque in vicaneis neque in agricolis neque alio omnium quocumque modo vel tempore, sed praesumentem alium pro alio secundum pignorationis formam aurum aut aliquid aliud exigere, hoc reddere in quadruplum violentiam passo, et cadere exactionem fecit.”
Nov. 52.1.

“Etsi pignorationes, quas vulgaris elocutio repressalias nominat, in quibus alius pro alio praegravatur, tanquam graves legibus et aequitati naturali contrariae civili sint constitutione prohibita, ut tamen earum prohibitio in personis ecclesiasticis tanto amplius timeatur, quanto in illis specialius inhihentur...Illi autem, qui contra fecerint, adversus personas easdem pignorationes seu repressalias concedendo, vel extendendo ad eas...si personae singulares fuerint, sententiam excommunicationis incurrant, si vero universitas, ecclesiastico subiaceat interdicto.” VI 5.8.un.

Roman and canon law forbade reprisals for the majority of the Middle Ages. *Novels* 52.1 emphatically prohibits the seizure of money or property, either as security or in an attempt to compel a defaulting debtor to pay.¹ Nearly 700 years later, this ban on the use of *pignorationes*, as such seizures were termed, was echoed by VI 5.8, a canon of the second Council of Lyon (1274) acting under the authority of Gregory X. The canon forbids the use of *pignorationes* against ecclesiastical persons under penalty of excommunication in the case of individuals and interdict in the case of group offenders. It also notes a shift in terminology, beginning “*pignorationes*, which in vulgar speech are called reprisals” and points out that their use goes against “law and natural equity.” For centuries there was little disagreement among medieval legal scholars about the validity of these two texts: *pignorationes*/reprisals were not only illegal,

¹The text of *Novels* 52.1 was preserved in the Middle Ages as *Authentic* 5.5.

their use contravened basic principles enshrined in the Roman law tradition.

These prohibitions, however, never succeeded in eliminating the use of reprisals. The dramatic and steady increase in their incidence in the latter years of the thirteenth and early decades of the fourteenth centuries, in particular, was unprecedented.² In addition to reprisals sparked by the seemingly endless wars of the time, they were ever more frequently used by individuals who wished to recoup losses by means of private non-sanctioned violence. Widespread differences in how and when reprisals were used as a form of sanctioned violence, as well as a growing recognition that their limitation was vital to the preservation of peace and property, compelled legal scholars of the Roman law tradition to reconsider the long standing ban on their use. Giovanni da Legnano's *Tractatus de bello, de represaliis et de duello* (1375–76) constitutes the first attempt to formulate a *ius commune* theory of reprisals within the larger context of state sanctioned violence.³ His interest in the subject was based on a very real need to regulate and limit the use of reprisals, and his

²See A. del Vecchio and E. Casanova, *La rappresaglie nei comuni medievali e specialmente in Firenze* (Bologna 1984); G.I. Cassandro, *Le rappresaglie e il fallimento a Venezia nei secoli XIII–XVI*. Documenti e studi per la storia del commercio e del dritto commerciale Italiano pubblicati sotto la direzione di Federico Patetta e Mario Chiaudano, XIV (Torino 1938); René de Mas Latrie, *Du droit de marque ou droit de représailles au Moyen Age suivi de pièces justificatives* (Paris 1875); E.S. Tai, “Honor Among Thieves: Piracy, Restitution, and Reprisal in Genoa, Venice, and the Crown of Catalonia–Araon, 1339–1417.” Unpublished PhD. Dissertation (Harvard University 1996); M.H. Keen, *The Laws of War in the Late Middle Ages*. Studies in Political History, edited by Michael Hurst (London and Toronto 1965) 218–238.

³Giovanni da Legnano, *Tractatus de bello, de represaliis et de duello*. Edited by Thomas E. Holland, The Classics of International Law Series 8 (Oxford 1917; reprint Buffalo 1995); hereafter *Tractatus*. Two other fourteenth century scholars wrote full treatises on reprisals at approximately the same time as Giovanni. See Bartolus de Saxoferrato, *Tractatus represaliarum* (1354) in *Consiliorum Bartoli libri duo* (Lyon 1555) fol. 125r–131r and Albericus de Rosate, *Commentarium de Statutis, libri quatuor*, I, q. 53a and *De represaliis*, in *Tractatus universi iuris* 2 (Venice 1584). It is generally held that Bartolus completed his treatise first and influenced the work of the other two scholars: G. Ermini, “I Trattati della Guerra e della Pace di Giovanni da Legnano,” *Studi e memorie per la storia dell'Università di Bologna*, 1st series, VIII (Bologna 1924) 111–112; A. del Vecchio and E. Casanova, *Le rappresaglie*, xxiv–xxv; M.H. Keen, *The Laws of War*, 219.

conceptualization of the remedy as an extension of existing theories on the law of war and self-defense sets his work apart.⁴

Giovanni defined reprisals as a species of what he termed "Particular War," a category which included individual self-defense.⁵

But lawful particular war is of two kinds. For one kind is waged in defense of the true body, or what belongs to or concerns the true body [self-defense of persons and property]...Another kind is waged in defense of a mystical body, or a part of it, meaning a community, which is called a body, and the individuals who compose it are called its limbs and parts...If therefore, a community declares war in defense of one of its citizens, who is oppressed by a foreigner, in default of justice being rendered by a judge of the oppressor, this is called particular war in defense of the mystical body, or a part of it; and this is called reprisals.⁶

Thus, a community may institute reprisals on behalf of one of its citizens provided that the injured party has not been able to obtain justice from the legal authorities of his attacker's

⁴For a discussion of Giovanni's career and an analysis of his contribution to medieval theories on the law of war see J.G. O'Brien, "The *Ius commune* Law of War: Giovanni da Legnano's '*De bello*' and the Medieval Origins of International Public Law." Unpublished PhD. Dissertation (University of Kansas 2001).

⁵Giovanni divided war into several categories including Celestial Spiritual War, Human Spiritual War, Universal Corporeal War and Particular War. He classified self-defense, reprisals and duel under the larger heading of Particular War.

⁶"Bellum autem particulare iustum est duplex, nam quoddam fit propter tutelam veri corporis, vel adhaerentium, sive contingentium verum corpus...Aliud fit propter tutelam corporis mystici, vel partis, ut dicimus in universitate, quae appellatur corpus, et singuli appellantur membra et partes...Si igitur universitatis propter defensam civis sui ab extraneo oppressi, deficiente iustitia iudicis opprimentis, bellum indicat, hoc appellatur particulare propter tutelam mystici corporis, sivi partis, et hoc appellatur represalia..." *Tractatus* c. 79, 130. Page references to Holland's edition of the *Tractatus* are to the Latin transcription unless otherwise noted. The English translation found in the edition should be used cautiously.

community. But what of the Roman and canon law prohibitions on the use of reprisals? Giovanni simply cited *Novels* 52.1 and VI 5.8 and proceeded with his analysis of the Particular War of individual self-defense in which he laid the groundwork for his later formulation of a theoretical model of reprisals.⁷

Giovanni began *De represaliis* by launching into a discussion of the legal foundations of reprisals: *ius commune* scholarship held that reprisals were inherently illegal and contrary to natural law principles of equity.⁸ Thus, Giovanni's first task was to justify a reversal of accepted legal principles. To set the stage, he began with a short history summarizing the transmission of governmental authority and jurisdiction from the creation of heaven and earth to his own day. Initially, God ruled directly, establishing precepts and punishing transgressors himself.⁹ This state of affairs lasted until the time of Noah, when God transferred the authority He had wielded to Noah as His minister.¹⁰ Eventually, Patriarchs,

⁷See J.G. O'Brien, "The *Ius commune* Law of War," 147–190.

⁸Chapter 122 contains only the rubric introducing chapter 123. "Quintus tractatus tertii principalis, scilicet, de Particulari Bello quod sit ob defensam corporis mystici, quod 'Represaliae' nuncupatur. Unde et a quo ortum habuerint Represaliae, et propter quid insurrexerint." *Tractatus* c. 122, 155. In the English translation (page 307), the Holland edition does not follow either the manuscript (page 41) or the table of contents of the manuscript (page 201), nor does the translation correspond to the chapter division of the Latin transcription. Instead, the English version divides the rubric into two: the first sentence is labeled chapter 122 and the second sentence is given as the rubric to chapter 123.

⁹"Ecce Altissimus Creator a principio creavit coelum et terram, et quae in eis sunt, necnon angelicam et humanam naturam, spiritualia et temporalia, et ipsa per seipsum rexit, et homini quem creavit praecepta dedit, et transgredienti poenam imposuit, Genesis ii capitulo [*Gen.* 2:16–17]. Qualiter autem per seipsum rexerit apparet, nam per seipsum, et non per ministrum, delicta puniebat." *Tractatus* c. 123, 155.

¹⁰"Et haec mundi gubernatio processit usque ad tempora Noe. A tempore autem Noe coepit mundum regere per ministros, quorum primus fuit Noe, de quo quod fuerit rector populi apparet. Nam Dominus commisit sibi gubernationem et administrationem arcae, Genesis v et vi capitulis. Et per arcam significatur Ecclesia. Et qualiter Dominus Noe et filiis commiserit gubernationem legitur Genesis ix capitulo, et, licet Noe sacerdos non fuerit, legitur tamen officium sacerdotis exercuisse, antequam leges populi darentur, Genesis viii capitulo." *Tractatus* c. 123, 155.

Kings and Judges succeeded Noah and his descendants and ruled the Jews, again as God's ministers.¹¹ Jesus inherited this authority and divided it among "two lights on the earth—a greater light for the day, which is the supreme Pontiff, and a lesser light for the night, which is the Prince of the Romans."¹² The papacy was entrusted with the government of spiritual matters and the emperors with things temporal.¹³ Reprisals, Giovanni continued, were not needed in the first phase of history because God administered justice directly.¹⁴ Reprisals were also unnecessary in the period when Noah and his successors ruled, for the people recognized the authority of God's ministers and obeyed them.¹⁵ The early popes and emperors, finally, were recognized as superior authorities by all of Christendom; in law as well as in fact, justice was administered by these princes and the due process of law was observed.¹⁶ This utopian state of affairs, according to Giovanni, was altered when "the Empire gradually began to be weakened," with the

¹¹"In hac autem gubernatione et vicaria successerunt Patriarchae, Reges, et Iudices, qui fuerunt pro tempore in regimine populi Iudaeorum." *Tractatus* c. 123, 155. Note that Giovanni listed the rulers of the Israelites in ahistorical order; the judges ruled prior to the kings. It is very possible that Giovanni reverses the order for emphasis; he later locates the authority to declare reprisals in judges.

¹²"Et illa duravit usque ad Christum, qui fuit naturalis Dominus et Rex Noster...Ipse autem Christus duo luminaria dimisit in terris, luminare maius et diurnum, scilicet, Summum Pontificem, luminare minus et nocturnum, scilicet, Romanorum Principem..." *Tractatus* c. 123, 155. The term *princeps* in this sense can refer to an uncrowned emperor as well as to an emperor after his coronation.

¹³"...quibus [the popes and emperors] commisit administrationem et gubernationem mundi, uni in spiritualibus, et alteri in temporalibus." *Tractatus* c. 123, 155.

¹⁴"Tempore primitivo, quo Dominus per seipsum gubernabat, non fuit opus represaliis, cum per Dominum iustitia exhiberetur." *Tractatus* c. 123, 155.

¹⁵"Tempore Noe et successorem, in regimine populi Iudaeorum, non fuit opus represaliis, cum per ministros iustitia exhiberetur, et subditi de populo recognoscerent superiorem cui obtemperabant." *Tractatus* c. 123, 155.

¹⁶"Tempore praecedente Summorum Pontificum et Romanorum Imperatorum, cum omnes subiciebantur et de iure et de facto, non erat opus represaliis, cum per principes, iuris ordine servato, iustitiae complementum exhiberetur." *Tractatus* c. 123, 155.

result that “now there are some who recognize no superior in fact, and by them justice is neglected.”¹⁷ It was, therefore, the failure of certain *de facto* authorities to render justice that created the need for reprisals, a “subsidiary remedy,” Giovanni cautioned, to be used only when ordinary remedies have failed.¹⁸

Giovanni continued his theory of reprisals along rather startling lines by arguing that the remedy has its origin in both the law of nations and divine law. That the *ius gentium* and the *ius divinum* are the ultimate source of licit reprisals is an opinion that Giovanni most likely borrowed from Bartolus. Both scholars equated reprisals with lawful war, although their reasoning was slightly different.¹⁹ For Bartolus, the similarities between the declaration of reprisals and the declaration of war was paramount; both must be waged on the authority of one who has no superior,²⁰ both are the only justification for the taking of spoils, and both permit the capture of innocent persons.²¹ Because the law of nations and divine law regulate public warfare, Bartolus argued that reprisals, having many of the same characteristics, ought to be regulated by the same

¹⁷“Postquam autem Imperium paulisper coepit exinaniri, adeo quod sint qui de facto nullum recognoscunt superiorem...” *Tractatus* c. 123, 155.

¹⁸“...et per eos iustitia neglegitur, idcirco fuit opus subsidiario remedio, deficientibus ordinariis, quibus exstantibus, ad illud nullatenus recurrendum, ff. De minor., l. *in causae* [Dig. 4.4.16]; ff. De oper. nov. nunci., l. *in provinciali* [Dig. 39.1.3].” *Tractatus* c. 123, 155. *Dig.* 4.4.16 is an opinion of Ulpian which states that when a minor protected by ordinary remedies and “the normal law,” extraordinary relief ought not be available to him. *Dig.* 39.1.3, also by Ulpian, is more complex. It concerns the right of a co-owner of a tenement to serve a notice of new work on his partner when the latter carries out repairs on their tenement that cause damage to another tenement owned solely by the former. Ulpian agrees with Labeo who said that the notice of new work (which would stop the repairs) cannot be used in this instance. The reason is that there are other, more suitable, remedies available.

¹⁹“...rationes et iura quae ad hoc cogunt, sunt magis de iure divino et de iure gentium, quo bella licita permittuntur, quem de iure civili.” Bartolus, *Tractatus represaliarum* c. 3.1, fol. 127ra.

²⁰“...ex parte concedentis repraesalias, requiritur quod sit talis qui superiorem non habet.” Bartolus, *Tractatus represaliarum* c. 3.2, fol. 127ra.

²¹“In illo bello etiam innocentes capiuntur.” Bartolus, *Tractatus represaliarum* c. 6.4, fol. 129ra.

laws. Giovanni made a somewhat different argument when he pointed out that the *ius gentium* and the *ius divinum* permit the defense of one's own body and further, that not only "one's individual and private body" may be defended with arms, but also the mystical body of which one is a part.²² The community, argued Giovanni, is one body made up of its individual members, and the community may act to "defend the parts of its own body."²³ Thus, for Giovanni, reprisals originated in the same laws that governed self-defense, the law of nations and divine law. Given this equation of reprisals with self-defense writ large, Giovanni's long analysis of individual self-defense earlier in the *Tractatus* makes perfect sense. Not only does it serve to lay the groundwork for the treatise on reprisals, it also provides a bridge between the legal theories surrounding public wars and those being developed for reprisals. Where Bartolus simply stated that reprisals were similar in many ways to wars declared on superior authority, Giovanni took pains to illustrate the links between public war, individual self-defense and reprisals in his construction of an overarching *ius commune* law governing the various forms of sanctioned violence.

Giovanni next dealt with what he termed "the productive cause" of reprisals which "is the same thing as asking who may declare" them.²⁴ He reminded the reader that no positive law sanctioned the use of reprisals because both civil and canon law provided other remedies for obtaining justice.²⁵ Indeed, both *ius commune* traditions specifically forbade the use of reprisals,

²²"Istud autem remedium extraordinarium ortum habuit ex iure gentium. Nam est quaedam species belli liciti. Nam licitum est ob tutelam corporis sui arma movere, ff. De iustit. et iure, l. ut vim [Dig. 1.1.3]; C. Unde vi, l. i [Cod. 8.4.1]; De restitut. spoliati., cap. olim [X 2.13.12]; et nedum corporis sui privati et individualis, immo et mystici." *Tractatus* c. 123, 155.

²³"Nam universitas est unum corpus, cuius partes sunt singuli de universitate, ff. Quod cuiuscumque universit., l. i [Dig. 3.4.1]; et sic universitati licitum est defendere partes sui corporis. Habuit etiam ortum a iure divino, ut legitur xxiii, q. ii, cap. Dominus Noster [C. 23 q. 2. c. 2]." *Tractatus* c. 123, 155–156.

²⁴"Ad primum, quae sit causa productiva, hoc est quaerere, quis possit indicere represalias." *Tractatus* c. 124, 156.

²⁵"Hic attendendum est quod, ut supra dictum est, nulla lege postiva, canonica vel civili, disponitur represalias indici debere. Nam utraque lege disponitur modus consequendi effectus iustitiae." *Tactatus* c. 124, 156.

even, according to Roman law, if the property captured rightfully belonged to the person who seized it.²⁶ Nevertheless, Giovanni went on, because positive law remedies have failed, “having recourse to this action was necessary, so that war might be declared, lest justice should fail.”²⁷ Not everyone, however, may declare reprisals when justice proves elusive. Only one who has no superior, in law or in fact, has the power to declare this type of war, “for one who has a superior cannot, on his own authority, violate the remedies of law.”²⁸ Giovanni extended this distinction to include those against whom reprisals might be declared, although he conceded that they could be declared in instances where another’s superior failed to do justice.²⁹

Giovanni continued with a discussion of where a magistrate who recognized no superior in fact obtained his power to declare reprisals. He noted that some argue that such a magistrate must be specially empowered to authorize reprisals by the community “with whom the full sovereignty resides, and they [reprisals] should be declared on its [the community’s] authority.”³⁰ Giovanni disagreed with this assessment in cases where the community had transferred all power to its ruler, “for

²⁶“Immo inhibitum est occupare rem propriam, C. Unde vi, l. *si quis in tantam* [Cod. 8.4.7]; et l. *exstat*, ff. Quod met. causa [Dig. 4.2.13]. Immo etiam haec expresse inhihentur lege civili et canonica, ut in Authent., Ut pign. non fiant [Auth. 5.5=Nov. 52.1]; et cap. uno, De iniur. Lib. VI [VI 5.8.un].” *Tractatus* c. 124, 156.

²⁷“Sed deficientibus iuris positivi remediis, ad hoc fuit habendus recursus, ut fiat belli indictio, ne depereat iustitia.” *Tractatus* c. 124, 156.

²⁸“Haec autem belli indictio spectat ad illum solum qui superiorem non habet, ut l. *hostes*, ff. De captivis [Dig. 49.15.24]. Nam habens superiorem auctoritate propria, non potest violare iuris remedia. Ille ergo indicere potest qui superiorem non habet, et de iure, vel de facto.” *Tractatus* c. 124, 156.

²⁹“Expedit etiam quod ille contra quem indicuntur non habeat superiorem, vel si habet, negligat iustitiam facere.” *Tractatus* c. 124, 156.

³⁰“Ex quo quidam inferunt quod potestas civitatis, quae non recognoscit superiorem de facto, non possit indicere, nisi specialiter habeat in mandatis, sed haberi debet recursus ad universitatem, apud quam est plenum ius, et eius auctoritate indicentur.” *Tractatus* c. 124, 156. Giovanni frequently referred to the opinions of others without identifying them or providing specific citations to their works. A complete analysis of his sources awaits further research.

then he can do anything that the community can do" because he has "general and unlimited power."³¹ Another argument raised by scholars concerned a count, margrave or other such subject of a *princeps*. These men could not, according to some, declare reprisals without the consent of their superior and Giovanni agreed with their assessment in so far as *ius commune* texts were concerned.³² However, he argued,

if we speak according to the disposition of municipal laws, according to which the right of declaring reprisals is allowed, we must say that those persons to whom a municipal law grants the right may declare them.³³

Here we see Giovanni relying on contemporary practice: the declaration of reprisals in Italy during the fourteenth century was effected and regulated by the statutes of the various city-states.³⁴ In answer to critics who maintained the illegality of reprisals declared without the authority of a *princeps*, Giovanni turned to local laws, the *ius proprium*, to uphold the rights of

³¹"Istud non credo verum, ubi universitas transtulerit omnimodam potestatem in rectorem, nam tunc potest totum quod universitas, sicut dicimus in habente generalem cum libera, ut l. *procurator cui*, ff. De procuratoribus [Dig. 3.3.58]." *Tractatus* c. 124, 156.

³²"Inferunt etiam quodsi Comes, Marchio, vel similis, subditus est Principi, quod sine Principis auctoritate indici non poterunt, argumentum praedictae regulae quam tradidit in cap. *olim*, De restit. spoliatorum [X 2.13.12]. Et haec procedunt loquendo de iure communi." *Tractatus* c. 124, 156.

³³"Nam, si loquamur secundum dispositionem iurium municipalium, secundum quae conceditur facultas indicendi represalias, illi indicare poterunt quibus a lege municipalis conceditur." *Tractatus* c. 124, 156. Even in this latter case, however, reprisals ought to be used only in cases of "urgent necessity;" in such circumstances, he pointed out, even the civil law permits a man to "take the law into his own hands." "Et haec, ut dixi, conceduntur propter urgentem necessitatem, sicut aliquando propter necessitatem concedit ius civile facultatem alicui ius sibi dicendi, ff. Quae in fraudem cred., l. *ait praetor*, § *si debitorem* [Dig. 42.8.10.16]; ff. Quod vi aut clam, l. [Si] *alius*, § *bellissime* [Dig. 43.24.7.3]." *Tractatus* c. 124, 156–57.

³⁴For information on reprisals in Europe generally see A. del Vecchio and E. Casanova, *Le rappresaglie*; G.I. Cassandro, *Le rappresaglie e il fallimento a Venezia*; René de Mas Latrie, *Du droit de marque ou droit de représailles*; E.S. Tai, "Honor Among Thieves;" M.H. Keen, *The Laws of War 221–223*.

rulers possessing statutory authority. He supported this assertion by reference to the Roman law *condictio ex lege* which governed instances where a statute created an obligation but did not specify a specific remedy.³⁵ Just as formal claims of restitution (*condictiones*) are possible by the enactment of a statute, so too is the right to declare reprisals instituted by legislation.³⁶

Giovanni dealt with one final objection to the imposition of reprisals by a state which possesses a *de iure superior*. Once again, the objection is grounded in *ius commune* principles:

If, however, we speak according to the disposition of the *ius commune*, some say that neither an action nor a duty is intended. Their reason is that only by the law of nations is this power granted, and by that law all things proceeded from royal power [*Dig.* 1.2.2]. Thus they say that today a royal power is required, according to divine statutes and the law of nations. ³⁷

Giovanni, of course, did not agree with this assessment, although he conceded that recourse must be made to ordinary remedies first.³⁸ He also agreed that the power to declare reprisals originated in the *ius gentium*. He went on

³⁵*Dig* 13.2.un. *Condictio* actions lay to enforce claims for a sum of money or a specific thing. See J.A.C. Thomas, *Textbook of Roman Law* (Amsterdam, New York and Oxford 1976) 77–78, 326–328; H. Lévy–Bruhl, *Recherches sur les actions de la loi* (Paris 1969) 263ff.; G. Pugliese, *Il processo civile romano, I* (Milan 1963) 346ff.; M. Kaser, *Das römische Zivilprozessrecht*. New edition edited by Karl Hackl (Munich 1996).

³⁶"Ex praedictis inferri potest quo iure petatur indictio represalium. Nam si vigore statuti concedantur condictiones, ex lege hoc petitur, ff. De condict. ex lege, l. una [*Dig.* 13.2.un]." *Tractatus* c. 124, 157.

³⁷"Si autem loquamur secundum dispositionem iuris communis, dicunt quidam quod nec actio nec officium intentatur. Ratio. Nam solo iure gentium haec facultas conceditur, quo iure omnia expediebantur via regia, ff. De orig. iuris, l. ii, in principio [*Dig.* 1.2.2.pr.]. Sic dicunt hodie requiri manum regiam, secundum statuta divina et iure gentium." *Tractatus* c. 124, 157.

³⁸"Hoc non credo verum. Nam licet facultas non sit nisi servetur modus traditus. Nam primo debet recurri ad remedia ordinaria..." *Tractatus* c. 124, 157.

to argue, however, that the civil law recognizes the legitimacy of reprisals by implication if not by express declaration:

For the civil law implies, or rather it expressly declares, that rebels and those who disobey the law may be proceeded against by military force...And so it has provided a remedy by way of request to a magistrate to allow recourse to be had to this military force, when the appropriate remedies fail.³⁹

The law Giovanni referred to is *Dig.* 6.1.68, an edict of Ulpian which allows, among other things, the use of armed force to dispossess a man withholding property that a judge had previously ordered him to relinquish. The reasoning here is that reprisals in essence are a judicial remedy sought by a private citizen against a non-citizen when all other legal avenues have failed to produce justice. The citizen appeals to a magistrate of his own community who has the power to order the property of the non-citizen confiscated by military force. The question all along is from whence the magistrate gets the authority to authorize such a thing. As Giovanni pointed out earlier, it is possible for the power to have a statutory origin. Even if this is not the case, however, Giovanni's concluding sentences provided a *ius commune* justification for the declaration of reprisals: Roman law grants a judge the power to confiscate property from "rebels and those who disobey the law." If a citizen, therefore, seeks out the ruler of his community and appeals to him in his role of *magistrate*, the ruler, whether he possesses a *de iure* superior or not, has the power to declare reprisals on behalf of the citizen who has been denied justice.

After discussing the laws instituting reprisals and the authority required to declare them, Giovanni turned to the nuts and bolts of who may seek the remedy, for what reasons, when and against whom. He organized each of these topics under the

³⁹"Nam licet de iure gentium haec facultas processerit, tamen de iure civili approbata est, immo etiam ex verbis, quod contra rebelles et inobedientes iuri procedatur manu militari, ut l. *qui restitutum*, ff. De rei vindicatione [*Dig.* 6.1.68]. Et sic proditum est remedium implorationis officii, ut ad hanc manum militarem recurratur, remediis opportunis deficientibus." *Tractatus* c. 124, 157.

Aristotelian category of the “material cause” of reprisals, first introducing the various sub-categories and then answering questions surrounding each of the topics.⁴⁰ He began by stating that the right to take reprisals is granted (by a magistrate) to citizens “for citizens are a part of the mystical body, that is, of the community.”⁴¹ He then referred back to his discussion of individual self-defense and his assertion that men are allowed to defend their own bodies in both the individual, corporeal sense, and in the mystical sense.⁴²

On the face of it, the argument here seems fairly straightforward; reprisals may be granted to citizens for their own defense by the state which, in turn, has an interest in the defense of one of its members. In actual practice, however, the situation was not so clear cut, as Giovanni clearly demonstrated with the question of whether reprisals may be granted to residents of a state who do not possess citizen status.⁴³ Some authorities, Giovanni pointed out, make a distinction between residents who “bear the burdens of the state” and those who do not. The former possess the right to reprisals while the latter should not have recourse to this remedy for “one who does not share a burden ought not to share a benefit either.”⁴⁴ Giovanni

⁴⁰Restat examinare causam materialem. De materiali ergo causa est videndum, de materia in qua, de materia circa quam, de materia contra quam, quae est obiectum, et de materia ex qua." *Tractatus c.* 125, 157.

⁴¹Civibus conceditur, propter rationem superius tactam. Nam cives sunt pars mystici corporis, id est, civitatis, ut l. i, ff. Quod cuiuscunque universitatis [*Dig.* 3.4.1.pr.–1]." *Tractatus c.* 125, 157–58. The citation is to Gaius' treatise on the Provincial Edict, which states that corporate bodies may not be formed at will, but are regulated by statutes, *senatus consulta*, and imperial constitutions. Further, the pattern on which licit corporations are to be formed follows that of the state in that both have property in common, a common treasury, and a representative through whom the affairs of the corporation are transacted.

⁴²Et, ut supra deductum est, licitum est cuilibet defendere corpus suum, ut l. *ut vim*, ff. De iustit. et iure [*Dig.* 1.1.3]; et l. i, C. Unde vi [*Cod.* 8.4.1]. Et hoc procedit tam in corpore mystico quam in individuali." *Tractatus c.* 125, 158.

⁴³Et primo quaeritur an incolis concedi debeant." *Tractatus c.* 125, 158.

⁴⁴Quidam hic distinguunt, an incolae subeant honora, et tunc concedi debeant; an non subeant, et tunc concedi non debeant. Ratio secundi membri. Nam qui non sentit honus, nec commodum sentire

posited a further distinction which he believed was equally important. He argued that the cases of residents who do not bear the burdens of the state are twofold; either they do not carry their share of the load through contumacy, or they do not because the state has granted them a special privilege.⁴⁵ His reasoning in the first case is that residents who choose to reside in a state of which they are not citizens have made a tacit contract with that state to share in its burdens. This contract, furthermore, is binding on both parties, for the state is required to protect the interests of resident aliens if they uphold their end of the bargain. If the residents refuse to carry out their fair share of the burden, then the state is not bound to protect them, nor may they ask the state to do so.⁴⁶ Finally, if residents are granted some privilege which remits their obligation to bear the burdens of the state, then they ought not be penalized through a denial of their right to reprisals.⁴⁷

Giovanni put forward a similar argument concerning citizens over whom the state holds no jurisdiction and who "are

debet, ut l. *manifestissimi*, § *sed cum in secunda*, C. De furtis [Cod. 6.2.22.3]; regula *secundum naturam*, ff. De regul. iuris [Dig. 50.17.10]; et regula *qui sentit*, pr. vi [VI 5.13.55]. Probatur per l. *qui sub praetextu*, C. De episc. et clericis [sic] [Cod. 11.18(17).1] et l. i, De colonis Illyricanis, l.xii [sic] [Cod. 11.53(52).1]." *Tractatus* c. 125, 43, 158. Holland's Latin transcription of this passage on page 158 is erroneous. I have taken the text from the photostat reproduction of the manuscript, page 43.

⁴⁵"Hanc opinionem non puto veram indistincte, immo puto distinguendum sic. Aut incola non subit onera propter eius contumaciam, quia requisitus non vult subire, si tenetur...Aut incola non subit onera, qui super hoc privilegiatus est a civitate, hoc onus remittere potuit..." *Tractatus* c. 125, 158.

⁴⁶"Nam inter civitatem recipientem quem ad incolatum et incolas, tacite oritur quidam contractus ultro citroque obligatorius, quo incola tenetur subire onera, ff. Ad municip., l. i et l. *incola* [Dig. 50.1.1, 29]; et civitas tenetur ad eius protectionem, ut l. *illicitas*, § *ne potentiores*, ff. De offic. praesidis [Dig. 1.18.6.2]. Et hoc casu, si denegat adimplere contractum ex parte sua, nec civitas tenetur ipsum defendere, nec ille hoc petere potest, ut l. *Iulianus*, § *offerri*, ff. De act. empti. [Dig. 19.1.13.8]." *Tractatus* c. 125, 158.

⁴⁷"Et tunc incolae concedi debent, nam privilegia concessa in eorum favorem redundare non debent in eorum laesionem, C. De legibus, l. *quod favore* [Cod. 1.14.6]; regula *quod ob gratiam*, l.i, vi. [VI 5.13.61]." *Tractatus* c. 125, 158.

otherwise not part of" the state. If, he pointed out, such people fall outside of the state's jurisdiction by privilege of clerical status or secular rank, then reprisals ought to be granted to them because "a privilege granted in their favor should not result in an injury to them."⁴⁸ In addition, states have obligations to all native-born citizens, which are not abrogated when citizens pass out of their state's jurisdiction because of special privileges.⁴⁹ Those who are "not a part of the state" because of their own contumacy, however, do not possess the right to reprisals.⁵⁰

The complexities surrounding reprisals and citizenship within the context of fourteenth century practice are further highlighted when Giovanni asked whether a citizen "by convention," i.e., one who has been granted citizenship by a state into which he was not born, might seek the remedy of reprisals against the state of his birth.⁵¹ He began his treatment of this question, following established scholastic format, with the arguments against granting a naturalized

⁴⁸"Secundo quaeritur, an civibus non subiectis iurisdictioni civitatis, et alias non facientibus factiones, sint indicendae represaliae. Quidam distinguunt, an non sint subeuntes ex privilegio, ut clerici, ut l. ii et Authent., *statuimus*, de episcop. et cleric. [*Cod.* 1.3.2; **Cod.* 1.3.33(32)] an propter dignitatem saecularem, ut l. ii, C. Ubi sena. vel cla. [*Cod.* 3.24.2]; ff. De vacat. mun., per totum [*Dig.*50.5]; et talibus sunt concedendae... Ratio primi, ne redundet in eius laesionem quod favorem inductum est..." *Tractatus* c. 126, 158.

⁴⁹"...et quia in civibus ex nativitate perficitur obligatio inter ipsum et civitatem, quae non potest mutari, ff. Ad municip., l. *adsumptio* [*Dig.* 50.1.6]." *Tractatus* c. 126, 158–159.

⁵⁰"...an non subeant propter contumaciam, et tunc non." *Tractatus* c. 126, 158.

⁵¹"Tertio quaeritur, an civi per conventionem concedantur represaliae contra civitatem originis." *Tractatus* c. 127, 159. The topic of created citizenship was of real importance in fourteenth century Italy due to the frequency of its occurrence. See J. Canning, *The Political Thought of Baldus de Ubaldus*. Cambridge Studies in Medieval Life and Thought, 4th series (Cambridge, London, New York, etc. 1987) 169–184; J. Kirshner, "Civitas sibi faciat civem." Bartolus of Sassoferrato's Doctrine of the Making of a Citizen," *Speculum* 48 (1973) 694–713; "Paolo di Castro on *cives ex privilegio*: A Controversy Over the Legal Qualifications for Public Office in Early Fifteenth-century Florence," in *Renaissance Studies in Honor of Hans Baron*, edited by A. Molho and J.A. Tedeschi (De Kalb, Illinois 1971).

citizen the remedy of reprisals against his state of origin. First, he wrote, injuries done to citizens come under the jurisdiction of their native state, and reprisals may not be declared against a state which has jurisdiction.⁵² Second, the state of origin may have legislated against its citizen prior to his becoming a citizen *per conventionem* of the second state.⁵³ And finally, legal issues arising between a citizen and his community ought to be heard before a judge of that community.⁵⁴ In opposition to these views, Giovanni pointed out that if two entities have the same subject, each has the right to defend him against injuries inflicted by the other.⁵⁵ This conclusion is supported by the fact that a state may punish a father who harms his son and by the principle that dual property rights, even if unequal, entitle both parties to bring an action should the other party cause harm to the thing jointly held.⁵⁶

Giovanni's solution to these conflicting views begins with the statement that some authorities uphold a naturalized citizen's right to reprisals without qualification.⁵⁷ For Giovanni, however, some qualification is essential for

⁵²"Sed si fiat iniuria huic civi civitati originis, quaeritur ius indicendi represalias, ergo contra eam non competit." *Tractatus* c. 127, 159.

⁵³"Nam civitas originis poterat in subditum suum statuere, antequam efficeretur civis alterius per conventionem, nec civitas per conventionem potest conqueri." *Tractatus* c. 127, 159.

⁵⁴"Nam de his quae aguntur inter civem et civitatem solum coram iudice illius civitatis agi debet." *Tractatus* c. 127, 159.

⁵⁵"In contrarium probatur. Nam si duo habent eundem subditum, uterque potest defendere adversus iniuriam quae ab alio infertur." *Tractatus* c. 127, 159.

⁵⁶"Nam civitas punit patrem offendentem filium, ff. De patria [sic] per totum [Cod. 4.43]. Confirmatur. Nam si duo habent ius in re, licet unum ius sit debilius alio, tamen habens ius debilius agit contra habentem ius potentius, si damnificat rem in qua concurrunt illa duo iura, ff. Ad leg. Aquil., l. *item Mella* [sic], § fin. [Dig. 9.2.11.10], et l. *si dominus servum*, eodem titulo [Dig. 9.2.17]." *Tractatus* c. 127, 159.

⁵⁷"Quidam dicunt indistincte quod possint indici, et ratio est quia facultas indicendi represalias succedit in locum deficientis iurisdictionis. Sed si civitas civem offendit, licitum est superiorem adire, ut l. *metum*, § *animadvertendum*, ff. Quod met. causa [Dig. 4.2.9.1]. Ergo deficiente iurisdictione locus est represaliis." *Tractatus* c. 127, 159.

we must distinguish between cases where the injury inflicted by the state of origin arises from some act prior to the agreement whereby the man became a citizen of the other state and cases where it arises from something done afterwards.⁵⁸

In the first instance, the adoptive state may not grant reprisals against the state of origin, because the injury occurred prior to the citizen's membership in the mystical body of his adoptive community.⁵⁹ If, however, the second situation holds, then the naturalized citizen has the right to seek reprisals, and the adoptive state has the right to grant them, even against the citizen's state of origin, as Giovanni had earlier demonstrated.⁶⁰

Throughout the sections on citizenship and reprisals discussed above Giovanni made no substantive distinction between native citizenship and citizenship *per conventionem*: a person holding either type who was in good standing in the community was assumed to possess the full rights and responsibilities inherent in citizen status. In fourteenth century reality, however, there were other categories of citizenship limited by a variety of factors. Giovanni turned to these types of citizenship when he discussed limited citizenship as it applied to particular groups of people who were considered only partial members of the mystical body of the state. Mercenaries employed for pay fall into this category, as do students who study in states other than those of their birth. In each case, Giovanni argued, members of these groups are considered limited citizens in that the state is required to protect them from harm only in specific instances, and the individuals in turn

⁵⁸"Ego non puto hanc conclusionem sic indistincte veram, sed puto distinguendum an iniuria irrogata a civitate originis insurgat ex facto praecedenti conventionem, per quam effectus est civis alterius civitatis, an insurgat ex post commisso." *Tractatus* c. 127, 159–160.

⁵⁹"Primo casu, non possunt concedi represaliae per civitatem conventionis. Nam oportet quod sit pars corporis defendendi, tempore quo iniustitiam patitur. Nam ad novam civitatem non transit hoc ius, ff. De servo corrupto, l. *doli* § fin [*Dig.* 11.3.5.4]; ff. Depositi, l. i, § *si servus* [*Dig.* 16.3.1.30]; et l. *quaecunque*, ff. De oblig. et actionibus [*Dig.* 44.7.11]. Per quae infertur quod facto civi per conventionem post iniustitiam factam non debent concedi represaliae." *Tractatus* c. 127, 160.

⁶⁰"Secundo casu procedit praedicta solutio." *Tractatus* c. 127, 160.

possess only limited rights.⁶¹ Providing no further comment, Giovanni stated that some argue in favor of granting limited reprisals to such persons

as where an injury is done to a student in matters regarding his studies, and to a soldier in matters regarding his service; but not in other matters, since in other matters they are not regarded as members of the body.⁶²

Giovanni also discussed instances where one state agrees, by pact or statute, to treat the citizens of another state as if they were its own citizens.⁶³ He pointed out that the wording of the particular document creating the agreement might be considered determinative; if the document uses the words "as if they were citizens," it is important to note that the pact or statute does not make them *actual* citizens, and this may be understood to mean that they should be treated as such only in matters belonging to the *ius commune*.⁶⁴ The implication of this

⁶¹"Quarto quaeritur, quid de civibus et habitis pro civibus, limitate tamen. Ecce potestas civitatis quoad quid est civis, ut l. *cives*, C. De incolis [*Cod.* 10.40(39).7]. Stipendiarii etiam, ubi merentur stipendium conveniuntur, ut l. *municipes*, § fin., ff. Ad municipalem. Scholares etiam quoad quid, ut protegantur rectoribus civitatum, ut in i, De pecunia constituta, ff [*Dig.* 13.5.1]; et Authent., *habita*, C. Ne fil. pro patre [**Cod.* 4.13.5]." *Tractatus* c. 128, 160.

⁶²"Numquid talibus represaliae sunt concedendae? Quidam dicunt quod pro his, et in his in quibus habentur pro civibus, limitatae sunt concedendae represaliae, ut si scholari fiat iniuria in spectantibus ad studium, et militi in spectantibus ad militiam, in aliis non, cum in aliis non reputetur corpore." *Tractatus* c. 128, 160.

⁶³"Quinto quaeritur, an, si ex pacto vel statuto cives unius civitatis tractari debeant ut cives alterius, ipsis concedi debeant represaliae per civitatem in qua tractari debent." *Tractatus* c. 129, 160.

⁶⁴"Solutio. Ponderanda sunt verba pacti et statuti, nam per illa verba tractentur ut cives, non efficiuntur cives, ut l.[ms. damage] *appellatione*, ff. De verb. significat. [*Dig.* 50.16.196]; et ibi notandum, et ibi per Iacobum de Arena. Illa igitur, verba intelliguntur ut tractantur in his quae de iure communi fieri debent, ut l. *ei qui fundum*, § *si tutor*, ff. Pro emptore *Dig.* 41.4.7.3]." *Tractatus* c. 129, 160. It is uncertain which section of *Dig.* 50.16 Giovanni intended to cite. Paragraph 196 seems the most likely to me for it holds that children born are part of the father's household and not the mother's, ie. they are not *made* a part of their mother's household by birth.

argument is that the remedy of reprisals would not lie because there is no provision for such a remedy in the *ius commune*. Giovanni went on to state that he did not accept this conclusion, and believed that reprisals ought to be declared for such persons.⁶⁵ He admitted that the words of the pact or statute did not create actual citizens, but he did believe that the words “as if they were citizens” conveyed the “right to all that the citizen has a right to.”⁶⁶ Thus, reprisals ought to be granted to those whom pact or statute have equated with citizens. This was not, however, Giovanni’s last word on the subject; he went on to state that he did not find the granting of reprisals in these instances inconsistent with the statement that “there should be granted to him all that belongs to a man by the *ius commune*” for the remedy of reprisals is not hindered by the common law, “if all of the due formalities are observed.”⁶⁷

In the next section of the treatise Giovanni turned to the Aristotelian category of “the final cause” for which reprisals are licitly granted. His initial conclusion here is terse; reprisals are granted when property rights have been infringed.⁶⁸ He goes on, however, more fully to explain and qualify this statement.

For they [reprisals] affect the movable and immovable property of those against whom they are granted, which is found in the territory of the state which grants

⁶⁵Hanc conclusionem non credo veram, immo credo ipsis iudici debere." *Tractatus* c. 129, 160.

⁶⁶Nam fateor quod per illa verba non est effectus civis, sed ei debentur quae debentur civi. Nam hoc probant verba a quibus recedi non debet, nec eorum proprio significato, ff. Qui et a quibus, l. *prospexit* [Dig. 40.9.12]; ff. De leg., iii, l. *non aliter* [Dig. 32.1.69.3]; et l. i, § [Si] *is qui navem*, ff. De exercitoria [Dig. 14.1.1.19]. Sibi ergo concedantur quae civi conceduntur, at illi conceduntur represaliae ut supra deductum est." *Tractatus* c. 129, 160.

⁶⁷Ergo. Nec obstat quod dicitur quod sibi concedi debent quae de iure communi competunt, nam hoc remedium, servata debita forma, non est a iure communi inhibitum." *Tractatus* c. 129, 160.

⁶⁸Restat videre de materia circa quam conceduntur, hoc est de rebus, et hoc est clarum." *Tractatus* c. 130, 160.

them. But in regard to this many questions may be asked.⁶⁹

And raise questions Giovanni certainly does, including ones where his answers are contrary to the words just quoted.

The first question to which Giovanni devoted himself was whether reprisals may be declared against those whose persons cannot be seized under the same remedy.⁷⁰ Once more the status of the person targeted by reprisals is the determinative issue. If the person is exempt from bodily seizure because of age, madness or the like, then reprisals may be leveled against his property.⁷¹ If, however, the person in question has been granted a privileged status by law, then the property related to his privileged status may not be confiscated. Giovanni mentioned two specific groups of people to illustrate this point, students and ambassadors, and argued that property necessary to their studies or embassies could not be taken through reprisals. Property that was nonessential, he argued, could be seized.⁷² Presumably this distinction applied to other groups as well, and Giovanni said explicitly that it answered another question. If a student or ambassador brings another's property with him, then it is also exempt from confiscation so long as it is necessary to his work.⁷³ None of Giovanni's conclusions here are

⁶⁹"Nam in rebus mobilibus et immobilibus illorum contra quos conceduntur, quae repertae fuerint in territorio civitatis concedentis. Sed circa hoc quaeri potest de pluribus." *Tractatus* c. 130, 160.

⁷⁰"Et primo, an contra res eorum qui capi non possunt vigore represaliarum indici possint represaliae." *Tractatus* c. 130, 161.

⁷¹"Solutio. Si sint personae quae capi non possunt, propter inhabilitatem insurgentum ratione aetatis, vel furoris, vel consimilium, tunc in eorum res exerceri poterunt represaliae, ff. De in ius vocando, l. *satisque* [Dig. 2.4.19]; in Authent., Ut nulli iudicum, § *necessarium* [Auth. 9.9 v. *necessarium*=Nov.134.9]." *Tractatus* c. 130, 161.

⁷²"Si autem in personas exerceri non possunt, propter quandam praerogativam eis a iure concessam, ut sunt scholares et ambasciata, tunc nec etiam contra res eorum quas deferunt, necessariae pro studio vel ambasciata, non poterunt exerceri, in aliis autem sic, ut ff. De publican., l. *si publicanus* [Dig. 39.4.4]." *Tractatus* c. 130, 161.

⁷³"Per hoc infertur solutio alterius quaestionis tritae, ambasciator vel scholaris defert secum res aliorum, numquid in eas exerceri poterunt represaliae? Dic quod non, si sint eis necessariae ut equi et similia, ut l. [in lege] *ensoria*, ff. De verb. significatione [Dig. 50.16.203; alter sic." *Tractatus* c. 130, 161.

surprising; immunities granted to students and ambassadors were well entrenched by the middle of the fourteenth century.⁷⁴ Nor does this section contradict what he said regarding property and its location *vis a vis* reprisals.⁷⁵ The same cannot be said about the chapter which follows.

In chapter 131, Giovanni argued directly against his earlier statement that reprisals affect property “which is found in the territory of the state which grants them.”⁷⁶ He began with the question of whether a “simple declaration” of reprisals may be leveled against goods which lie in the territory of the state against which the reprisals are declared; can such property be seized and carried back to the first state?⁷⁷ The usual answer to this question is no, because such property is “outside the territory” (i.e., the jurisdiction) of the state declaring the remedy, and “to enter the territory of others is considered to be a cause of even greater disturbance.”⁷⁸ Giovanni disagreed with this rationale

for resort is made to royal power because of a defective jurisdiction, the forms of the customary administration of justice having failed, and thus this may be done

⁷⁴See D. E. Queller, *The Office of the Ambassador in the Middle Ages* (Princeton 1967); W. Stelzer, “Zum Scholarenprivileg Fredrichs Barbarossas (authentica *Habita*),” *Deutsches Archiv für Erforschung des Mittelalters* 34 (1978) 123–165.

⁷⁵The property in question had been carried by the target of reprisals into the territory of the state granting them.

⁷⁶*Tractatus* c. 130, 160.

⁷⁷“Secundo quaeritur, an represaliae simpliciter indictae exerceri possint contra bona existentia in territorio civitatis contra quam sunt indictae, ut capiantur et reducantur in territorium civitatis indicentis.” *Tractatus* c. 131, 161.

⁷⁸“Quidam dicunt quod non, quia ‘extra territorium,’ etc., ut l. *extra territorium*, ff. De iurisdictione, in fin. [*Dig.* 2.1.20]; et l. *cum unus*, § *is cuius*, ff. De rebus auctor. iudic. possidend, [*Dig.* 42.5.12.1]; et cap. ii, De constit., Lib VI [VI 1.2.2]. Praeterea ingredi territorium alienum conceditur causa maioris tumultus. Ergo in dubio non videtur concessum, ut l. *non est singulis*, ff. De reg. iuris. [*Dig.* 50.17.176]” *Tractatus* c. 131, 161.

anywhere, for it is lawful for a man to defend his own body anywhere...⁷⁹

Thus, Giovanni argued that the ruler of the state against which reprisals are declared had, by definition, failed to provide justice. If the "customary administration of justice" had been carried out, there would be no need for reprisals in the first place. Given this failure of ordinary jurisdiction, Giovanni returns to his equation of reprisals with individual self-defense; just as an individual may defend his physical body from harm anywhere, so too may the mystical body defend its members from harm in territories that lie outside of its usual jurisdiction. Thus, property located outside the borders of the state declaring reprisals may be seized. On a practical note, Giovanni added that some states against which reprisals might be declared lie far away geographically from the state declaring them. In this situation the remedy would be of little use if only property physically within the latter's borders was open to confiscation; citizens of distant states were less likely to own property so far from home or to travel to the state seeking justice.⁸⁰ Giovanni, therefore, extended the right to confiscate and transport not only property located in the territory of the state against which reprisals were declared but also property owned by citizens of a magistrate who failed to do justice no matter where the property was located.⁸¹

The third of the Aristotelian categories discussed by Giovanni involves the material cause against which reprisal may be declared and constitutes the longest section in this part

⁷⁹"Hanc conclusionem non credo veram, nam propter defectum iurisdictionis recurritur ad manum regiam, deficiente formula ius sollemniter dicendi, et sic ubique hoc fieri potest, quia ubique licitum est cuilibet defendere corpus suum, ut l. *ut vim*, ff. De iustit. et iure [Dig. 1.1.3]; et l. i, C. Unde vi [Cod. 8.4.1]." *Tractatus* c. 131, 161.

⁸⁰"...etiam contingeret represalias nihil operari, ut si contra civitatem distantem, cuius cives nihil haberent, nec cives accederent in civitate indicente. Sic ergo intelligantur, ut in omnem eventum aliquid operari possint, ff. De legat. primo, l. *si quando* [Dig. 30.1.109]; ff. De reb. dub., l. *quotiens* [Dig. 34.5.12(13)]; De reg. iur., l. *quotiens* [Dig. 50.17.67]." *Tractatus* c. 131, 161.

⁸¹Giovanni elaborated on this subject in chapter 132 where he argued that a ruler may execute reprisals against property located in another state after he has written to that state's ruler and received no satisfaction. *Tractatus* c. 132, 161–162.

of the treatise. He began by asking whether reprisals declared by Milan against Bologna may be carried out against residents of Bologna as well as against citizens.⁸² Not surprisingly, given his earlier opinion concerning the right of residents to obtain grants of reprisals, he argued here that the property of residents is liable to confiscation.⁸³ But what happens if, for example, “the city of Milan has declared reprisals against the men of Bologna or against the Bolognese.” Can reprisals be executed against Bolognese who live elsewhere?⁸⁴ This was obviously a question that had interested scholars prior to Giovanni for he continued with a catalogue of various opinions. Some authorities held that reprisals could be leveled against such men “because their place of origin does not change.”⁸⁵ Others began with the question of whether reprisals may be declared against the men of a province; in cases where this is allowed those men who live elsewhere are exempt from reprisals “because they are not considered to belong to the province.”⁸⁶ Still others say that

⁸²“Et primo quaeritur, an, si civitas Mediolanensis indixit represalias contra homines Bononienses, vel de Bononia, represaliae exerceri possint contra incolas civitatis Bononiae.” *Tractatus* c. 133, 162. Giovanni’s choice of states for this question is interesting; he was a citizen of Milan and resident of Bologna at the time *De represaliis* was most likely written.

⁸³“Solutio. Ista verba ‘Bononienses’ et ‘de Bononia’ idem important, ff. De excus. tut., l. *sed [et] reprobari, § amplius [Dig. 21.1.6.2]*, et ibi glossa. Sed ista verba ‘homines Bononienses’ respiciunt municipes, ut l. i, ff. Ad municipalem [*Dig. 50.1.1*]; et verbum ‘municeps’ est genus ad cives et incolas, ut notat C. De incolis, l. *cives [Cod. 10.40(39).7]*. Probat textus ff. Ad municipalem, l. *fili, § municeps [Dig. 50.1.22.2]*. Ergo, inferendo de primo ad ultimum, sequitur quod, ex natura verborum, contra incolas exerceri possint represaliae. Et haec vera, quando incolae subeunt honora, ut l. i, Ad municipalem [*Dig. 50.1.1*]. Secus, si non subeunt.” *Tractatus* c. 133, 162.

⁸⁴“Secundo quaeritur, retento eodem themate, ut puta si civitas Mediolanensis indixerit represalias contra homines de Bononia sive Bononienses, an exerceri possint contra Bononienses alibi morantes.” *Tractatus* c. 134, 162.

⁸⁵“Quidam dicunt quod sic, quia origo non mutatur, ut l. *adsumptio*, ff. Ad municipalem [*Dig. 50.1.6*].” *Tractatus* c. 134, 162–163.

⁸⁶“Alii distinguunt, an indicantur contra homines de provincia, et tunc non exercentur contra alibi morantes, quia non censentur de provincia, ut l. *provinciales*, ff. De verbor. signific. [*Dig. 50.16.190*]; aut contra homines de una civitate, et tunc procedit prima opinio.” *Tractatus* c. 134, 163.

those who live elsewhere, but still within the same province, are liable.⁸⁷ Another group argued that the term “Bolognese” strictly means all Bolognese regardless of where they live, while in “the common use of speaking” those living elsewhere are not included and thus not liable to reprisals.⁸⁸ And finally, some argue that the Bolognese living elsewhere are liable to reprisals, but only if they continue to bear the burdens of that state.⁸⁹ Giovanni made no further comment on any of these opinions, but his conclusions in chapters 125–129 make it probable that he leaned toward the last of them. His construction of who had the right to reprisals is heavily influenced by the concept of “bearing the burdens of the state,” and there is no reason to suppose that he would move away from this rationale when considering the liability side of the equation.

This survey of opinions set the stage for Giovanni’s discussion of a related issue, the use of reprisals against those who possess dual citizenship or against residents who bear the burdens of two states. The situation envisioned, while involving complex issues, was one that was likely to come up in fourteenth century Italy; Giovanni himself was a resident of Bologna and citizen of Milan (from c.1350 to 1377) and later possessed full citizenship status in both city–states (from 1377 until his death in 1383). Giovanni’s specific question was “whether reprisals can be executed against citizens or residents of Bologna who are subject to the burdens of Bologna but who are also citizens of Milan.”⁹⁰ An element not included in the question but clear

⁸⁷“Tertii distinguunt an alibi morentur, tamen intra eandem provinciam, et tunc contra illos exerceri possunt, aut in alia provincia, et tunc secus, per ea quae notat glossa in l. *in adoptionem*, C. De adoptionibus [*Cod.* 8.47(48).7].” *Tractatus* c. 134, 163.

⁸⁸“Quarti dicunt quod, secundum propriam significationem vocabuli ‘alibi morantes,’ censentur Bononienses, sed secundum communem usum loquendi secus, et communis usus loquendi praevallet, ff. De legat., iii, l. *librorum*. § *quod tamen Cassius* [*Dig.* 32.1.52.4]; et sic contra istos non poterunt exerceri.” *Tractatus* c. 134, 163.

⁸⁹“Alii dicunt quod contra Bononienses alibi morantes, honera tamen subeuntes Bononiae, poterunt exerceri. Si autem non subeant, secus, l. i, ff. Ad municipalem [*Dig.* 50.1.1]; et l. *si duas*, § *sed et reprobari*, § *amplius*, ff. De excusationibus [*Dig.* 27.1.6.pr–2]; et l. *cum scimus*, in fine, C. De agric. et censitis [*Cod.* 11.48(47).22.5].” *Tractatus* c. 134, 163.

⁹⁰“Tertio quaeritur, an possint exerceri represaliae contra cives vel incolas Bononienses, honera subeuntes Bononiae, qui etiam sunt cives Mediolani.” *Tractatus* c. 135, 163.

from the discussion that followed was that Milan was the state which had declared reprisals against the citizens and residents of Bologna. An argument which supported the execution of reprisals in such circumstances was the idea that a state which can levy reprisals against those who fall outside of its jurisdiction must certainly possess the power to do so against those who do fall within its sphere of authority.⁹¹ Some men, Giovanni pointed out, hold the opposite view “without qualification,” arguing that reprisals are levied in cases of “defective jurisdiction. But a state is well able to exercise jurisdiction over its own citizen.”⁹² There is also the opinion that states are bound to protect their citizens and cannot, therefore, use reprisals against them.⁹³ And finally, if a citizen of Milan living in Bologna was subjected to the confiscation of his property, the state declaring reprisals would in effect be acting against itself.⁹⁴ As we have seen on numerous occasions, Giovanni objected to opinions given “without qualification,” and the same holds true here. He strongly disagreed with the idea that a state can always constrain its own citizens and used a familiar example to show that law and reality are not always in accord.

But as a matter of law, jurisdiction ought not to fail,
 since in law all are subject to a *princeps*...But in fact it
 fails, because in fact men do not recognize him.
 Therefore, just as in fact jurisdiction may fail when a
 non-subject does a wrong, so too one who in law is a

⁹¹“Videtur quod possint contra eos exerceri. Nam si potest civitas indicere contra non subditum, multo fortius contra subditum.” *Tractatus* c. 135, 163.

⁹²“In contrarium tenent indistincte. Ratio. Nam hoc ius succedit in locum deficientis iurisdictionis. Sed civitas in civem suum bene potest iurisdictionem exercere, ergo non subicietur represalii, ut l. i, § *utique*, ff. Si quis test. [sic] [Dig. 29.4.1.9 v. *utique*], l. *si eadem res* [Dig. 29.4.20].” *Tractatus* c. 135, 163.

⁹³“Praeterea civitas tenetur defendere civem suum, ergo represaliae indictae non artabunt eum, ut l. *vindicantem*, ff. De evictionibus [Dig. 21.2.17].” *Tractatus* c. 135, 163.

⁹⁴“Praeterea, si quis Mediolanensis artaretur, tunc civitas sic concedens videretur contra seipsam, contra id quod habetur, ff. De iur. fisci., l. *in fraudem*, § *neque* [Dig. 49.14.45.5].” *Tractatus* c. 135, 163.

subject may resist in fact, and so resort may be had to the extraordinary remedy.⁹⁵

The citizen of the state declaring reprisals is thus liable to confiscation of his property under the terms of the remedy when he refuses to obey the directives of superior authority. Giovanni went on to qualify this far-reaching opinion by admitting that reprisals may not be levied in such cases unless the contumacious citizen remains rebellious after he "has been specially proceeded against by due process of law."⁹⁶ Thus, an additional procedural step was necessary in cases where a state wished to execute reprisals against one of its own citizens. Given that the citizen in question presumably already faced the confiscation of his property according to the regular legal processes of his state, a process which he was actively defying, it is difficult to see how another hearing would compel him to comply. What the extra procedural step does is remove the onus from a state which levels reprisals against one of its own citizens and places such an action firmly within the realm of acceptable judicial practice.

Giovanni next discussed those groups who are protected from reprisals. The first category of such persons is that of soldiers (*milites*) who are exempt from reprisals "for they cannot be seized in person," and the power to do so "allowed by the law of nations, ought to be understood according to civil law."⁹⁷

⁹⁵"Hanc conclusionem non credo veram indistincte. Immo si de facto non possit artare civitas civem suum, etiam civem civitatis contra quam indicuntur represaliae, optime contra eum exercebuntur represaliae, nam propter defectum iurisdictionis indicuntur, ut supra pluries tactum est. Sed de iure non debet iurisdictionis deficere, cum de iure omnes subiciantur Principi, ff. Ad leg. Rhod. de iact., l. *deprecatio* [Dig. 14.2.8]; ix, q. iii, cap. *cuncta per mundum*, et cap. *per principalem* [C. 9 q. 3 c. 17, 21] Sed de facto deficit, quia de facto non recognoscunt. Sicut igitur de facto deficere potest cum non subditus iniuriatur, sic et de iure subditus de facto resistere potest, et sic recurri potest ad remedium extraordinarium." *Tractatus* c. 135, 163.

⁹⁶"Fateor tamen quod subditum non artabunt, donec specialiter contra subditum processum fuerit iuris ordine servato, nec processus sortiri possit effectum propter facti rebellionem." *Tractatus* c. 135, 163.

⁹⁷"Quarto quaeritur, an in milites Bononienses exerceri possint...Contrarium est verum, nam in persona capi non possunt, C. De offic. eius qui vicem alic. iud. obtinet [Cod. 1.50], Authent., *sed hodie* [Auth. ?] ; et C. De execut. rei iudicatae [Cod. 7.53], Authent., *sed novo iure* [Auth. ?]. Et illa facultas, concessa a iure gentium, debet intelligi

Clerics are also exempt from reprisals, even those in minor orders.⁹⁸ Giovanni noted, however, that the question of reprisals against Bolognese churchmen became more complex if schism was involved. If a schismatic bishop failed to render justice against his subordinate clerics, could recourse then be had to secular authorities, since the bishop had been unable to discipline a wayward underling and no other superior was available to do so?⁹⁹ Giovanni concluded that so long as the schismatic bishop and his subordinates possessed clerical status, reprisals cannot be declared against them by a secular judge. The bishop's superior, however, could licitly turn to the secular authorities for help in the matter, at which point a lay judge would have the power to declare reprisals against the clerics.¹⁰⁰ Other people who are safe from the execution of reprisals include Bolognese students traveling to Padua to study and students studying in Bologna so long as they study law in

civiliter, ff. De servit., l. *si cui* [Dig. 8.1.9]." *Tractatus* c. 136, 164. For some unexplained reason the Holland transcription of the manuscript inserts the word "mulieres" as an alternative for "milites." The manuscript, however, quite clearly reads "milites," and the Roman law citations support this reading. Giovanni's conclusions here are based on the fact that those captured in war were no longer considered slaves despite the survival of Roman law theories concerning slavery and *postliminium* in medieval academic discourse. The citations to the *Authenticum* are mysterious: I have yet to discover the texts to which Giovanni referred.

⁹⁸"Quinto quaeritur, an contra clericos Bononienses possint exerceri? Textus est quod non, in cap. uno, De iniur., Lib. VI [VI 5.8.un.]. Quid de clericis coniugatis? De his dicendum est, ut cap. uno, De iniur., Lib. VI [VI 5.8.un.]." *Tractatus* c. 137, 164.

⁹⁹"Sexto quaeritur, an, si Episcopus negligat facere iustitiam de clericis suis, nec haberi potest recursus ad superiorem, quia Episcopus est schismaticus, an possint contra clericos indici represaliae per iudicem saecularem? Quidam in hoc dubitant." *Tractatus* c. 137, 164.

¹⁰⁰"Nec est dubitandum, quia laicis nulla concessa est potestas contra clericum, qualitercunque delinquentem, ut cap. *contingit*, et cap. *in audientia*, De sent. excom. [X 5.39.45, 25] ; et cap. *si iudex laicus*, eod. tit., Lib. VI [VI 5.11.12]. Poterunt ergo coerceri per superiorem suum, et poterit haberi recursus ad iudicem saecularem per viam invocationis, ut cap. i, De offic. iud. ord. [X 1.31.1]; xxiii, q. v, *regum*, et cap. *administratores*, et cap. *principes* [C. 23 q. 5 c. 23, 26, 20]." *Tractatus* c. 137, 164.

places granted privileged status by the university.¹⁰¹ Bolognese ambassadors are also exempt,¹⁰² as are those who travel to a festival (*nundina*), on a pilgrimage or to a place of indulgence, and who, while sailing are blown off course and into the territory of the state that has declared reprisals.¹⁰³ Finally, Giovanni extended the exemption from reprisals to persons who could not, for a variety of reasons, be called before a court.¹⁰⁴ Overall, the categories of persons who were safe from the

¹⁰¹"Septimo quaeritur, an contra Bononienses euntes Paduam pro studio possint exerceri, vel etiam studentes Bononiae? Textus est quod non, in Authent., *habita*, C. Ne fil. pro patre [*Auth.=*Cod.* 4.13.5; *Cod.* 4.13]; et hoc vindicat sibi locum, si studeant iura, ut in locis privilegiatis, privilegio studii, secus autem si in aliis studeant iura, ut in proemio, ff. [Quibus ex casibus in poss.], § *haec autem tria* [*Dig.* Proemium 7]. In aliis autem facultatibus ubique doceri potest, ut l. *si duas*, § *cum autem*, ff. De excusationibus [*Dig.* 27.1.6.2]." *Tractatus* c. 138, 164. Note that students of other disciplines are exempt no matter where they study. The exemption given to students is also extended to those in occupations that provide services to the students (*scriptores* and *bedelles*) and to family members who travel to visit students studying away from home.

¹⁰²"Octavo quaeritur, an contra Bononienses ambasciatores possint exerceri? Solutio. Non poterunt..." *Tractatus* c. 139, 165.

¹⁰³"Nono quaeritur, an contra Bononienses euntes ad nundinas possint exerceri? Textus est in l. una, C. De nundinis [*Cod.* 4.60.un.], quod non. An contra bononienses euntes ad Sanctum Iacobum, vel aliam peregrinationem, possint exerceri? Respondeo non, ut De clerici peregrini, per totum [X 2.29.un.]; et cap. *si quis Romipetas*, xxiv q. iii [C. 24 q. 3 c. 23]; C. Communia de success. [*Cod.* 6.59], Authent., *omnes*: ibi libere [*Auth.=*Cod.* 6.59.10] Idem de euntibus ad locum indulgentiae, propter tenendum hospitium, vel aliquid simile, in servitium accedentium pro indulgentia. An contra navigantes, qui vi ventorum deferuntur ad civitatem indicentem, exerceri poterunt? Respondeo, non per Authent., *navigia* [*Auth.=*Cod.* 6.2.18], C. De furtis [*Cod.* 6.2]. Ad idem, C. De naufragiis, l. i [*Cod.* 11.6(5).1]." *Tractatus* c. 140, 165.

¹⁰⁴"An etiam contra illos qui in ius vocari non possunt poterunt exerceri, qui enumerantur in l. ii, ff. De in ius vocando [*Dig.* 2.4.2]? Respondeo non." *Tractatus* c. 140, 165. The following persons may not be summoned to court according to *Dig.* 2.4.2.: a consul, prefect, praetor, proconsul, or other magistrate; a priest while he is performing sacred rites; those who cannot leave a sacred place; those who have the public horse and are on public business; a man and woman who are being married; a judge hearing a case; anyone conducting a case before the praetor; anyone conducting a funeral for a member of his household or performing the rites of the dead. Note that many of these exemptions are valid for only a limited period of time.

implementation of reprisals parallels older and well established protections and privileges granted to the same groups of people. Soldiers, clerics, students, and travelers had all been protected under the *ius commune* from various kinds of legal action, and Giovanni's exclusion of these categories of people from the threat of reprisals served to better constrain, in legal terms, the implementation of this extraordinary remedy according to the principles of Roman and canon law.

Giovanni next asked whether reprisals may be granted against a Bolognese citizen who acts as a magistrate in Milan for injustices done in the latter city.¹⁰⁵ Once again we see him dealing with a situation that paralleled his own life experience: he was a magistrate in Bologna while a citizen of Milan. One line of argument held that if the magistrate cannot be sued for the specific injustice of which he is accused, or if by reason of his office he is exempt from prosecution, then reprisals may not be granted.¹⁰⁶ When his term of office has ended, however, he may be liable to reprisals so long as the syndic of the city in which he served has granted permission for the action to take place; recourse must be had to the city in which he served as magistrate and not to the city of which he is a citizen.¹⁰⁷ If, however, he is not protected from prosecution while in office, then reprisals may be leveled against him.¹⁰⁸ Giovanni disagreed, arguing first that "reprisals are declared to remedy a failure in jurisdiction," and if an official may be sued according to ordinary judicial processes, there is no need for the

¹⁰⁵"Decimo quaeritur, an contra Bononiensem potestatem, Mediolani ibi iniustitiam facientem, possint concedi represaliae?" *Tractatus* c. 141, 165.

¹⁰⁶"...an fecerit talem iniustitiam pro qua conveniri non possit officio durante, vel sit talis qui conveniri non possit, ut l. *pars literarum*, ff. De iudic. [*Dig.* 5.1.48]; et l. *nec magistratus*, ff. De iniuriis [*Dig.* 47.10.32]; et tunc non possunt indici." *Tractatus* c. 141, 165.

¹⁰⁷"Finito autem officio, poterunt indici, prius requisito syndicato, nec debet requiri iudex civitatis suae, quia ibi non debet conveniri ratione talis commissi, C. Ubi de ratiociniis agi. oportet [sic], l. i et ii [*Cod.* 3.21.1–2]; et C. Ut omnes tam civil. quam militares, l. i [*Cod.* 1.49.1]; et in Authent., Ut iudi. sine quoque suff., § *necessitatem* [*Auth.* 2.2.9=Nov. 8.9]." *Tractatus* c. 141, 165–166.

¹⁰⁸"Si autem tales sint qui conveniri possunt, tunc poterunt indici." *Tractatus* c. 141, 166.

extraordinary remedy of reprisals.¹⁰⁹ The same reasoning holds in the case of a magistrate who cannot be sued until his term in office expires, "for then he may be sued and the form of law observed."¹¹⁰ Giovanni's goal here was to reemphasize the extraordinary nature of reprisals as a legal remedy, although his own personal interests were clearly served as well. Nevertheless, he did concede that when there is no legal means of addressing injustices perpetrated by magistrates, recourse may be had to reprisals, but the jurisdiction lies with the city where he held office, and not with the city of which he is a citizen.¹¹¹

In all of the cases discussed above regarding persons against whom reprisals may be declared the crime or injustice was perpetrated by the individual under discussion. In the next section of *De represaliis*, however, Giovanni discussed persons who were liable to reprisals because of the actions of another. The officials of a magistrate or ruler who does injustice, for example, are liable to reprisals if they have taken an oath to their superior promising to commit an illegal act.¹¹²

The same is true for officials who are present when an unjust act is committed if they are "counselors" and do not

¹⁰⁹"Hanc solutionem non puto veram in hoc secundo membro, nam represaliae indicuntur in defectum iurisdictionis deficientis. Si ergo durante officio conveniri possunt, et in loco commissi, ut in l. ii. C. Ubi de ratiociniis [sic] [*Cod.* 3.21.2]; et Ut omnes tam civil. quam militares, l. i [*Cod.* 1.49.1]; ad quid est opus represaliis?" *Tractatus* c. 141, 166.

¹¹⁰"Nec puto veram in primo membro, ubi dicitur quod finito officio possunt indici, nam finito officio possunt conveniri, et iuris forma servari. Ergo non est opus hoc remedio." *Tractatus*.141, 166.

¹¹¹"Fateor tamen quod utroque casu, ubi per viam iuris non posset arceri, recurrendum esset ad represalias, et hoc casu non est requirendus iudex civitatis propriae, quia super hoc non potest ius facere per iura superius allegata." *Tractatus* c. 141, 166.

¹¹²"Undecimo quaeritur, an contra officiales potestatis, vel rectoris, iniustitiam facientis, possint indici represaliae? Iacobus de Belvisio dicit quod sic. Alii dicunt hoc verum, ubi officiales expresse iuraverunt rectorem ad faciendam iniustitiam, ut C. De advoc. diver. iud., l. *per hanc* [*Cod.* 2.7.26]; C. De excu. mili. [sic] [*Cod.* 12.38(39)?] [et] l. pro., li. x [*Cod.* 10.53(52)?] ." *Tractatus* c. 142, 166. Giovanni's last two references to the *Code* here are difficult to decipher and do not follow his usual citation pattern. He also failed to provide a specific citation to Jacobus de Belvisio's opinion, and I have not yet located the appropriate passage.

expressly consent to or oppose the commission of the crime; the opposite holds if they are officials of lesser rank.¹¹³ Even private persons of a city or state who are absolutely innocent of any wrongdoing may face reprisals because of an action done by their lord or another private citizen of their state.¹¹⁴ Giovanni supported this conclusion with canon law texts that allow innocent persons to be punished along with guilty ones when a region is placed under interdict. He also drew an analogy between innocent persons facing reprisals, prisoners of war and prisoners detained by the state. In all of these cases the state has jurisdiction over the individual regardless of his guilt or innocence.¹¹⁵ Persons who are only partially subject to a magistrate or ruler, as in the case of states or communities who are dependents but possess exceptions or jurisdictions by agreement, are not liable to reprisals. If the states or communities, however, commit an offense, then reprisals may be declared against them “just as war may lawfully be made against them.”¹¹⁶ Indeed, reprisals may be declared against an

¹¹³“Si autem sint praesentes, nec consentiant nec contradicant, tunc si sint officiales deputati ad merum officium, qui non vocantur ad consilia, ut sunt notarii et socii et tabernarii, tunc etiam contra tales non poterunt indici, ff. De magistr. conceniendis, l. i [Dig.27.8.1]. Et ratio. Quia non possunt resistere, ut C. Ut omnes tam civil. quam militares, l. i § *officii* [Cod. 1.49.1.1]. Si autem sint officiales assumpti ad consulendum, contra illos poterunt indici.” *Tractatus* c. 142, 166.

¹¹⁴“Tertiodecimo quaeritur, an contra singulares personas possint indici, quae sint penitus innocentes, propter delictum domini, vel alterius privati, de quo non sit iustitia? Iacobus de Belvisio dicit quod non, quia non debet quis gravari pro delicto alterius, Regula *non debet*, De reg. iuris., Lib. VI [VI 5.12.22]. Alii contra, per cap. *dominus*, xxiii q. ii C. 23 q. 2 c. 2]. Nam sententia interdicti puniuntur singuli, etiam innocentes, ut cap. *si sententia*, De sent. excom., Lib. VI [VI 5.11.16]. Etiam in bello iusto capiuntur innocentes, sed represaliae sunt quoddam bellum particulare, etiam licet captus sit innocens, tamen civitas habet ius in eum, et hoc videtur servari.” *Tractatus* c. 145, 166–167.

¹¹⁵See footnote 114.

¹¹⁶Quartodecimo quaeritur, an contra homines subditos, quoad quid, civitati Bononiae, non autem plene, indici possint represaliae? Solutio. Si sint civitates vel universitates simpliciter suppositae civitati Bononiae, sed ex pacto habent aliquas exceptiones vel iurisdictiones, contra istas indici non poterunt, quia non sunt subditae quae sunt liberae, sed quoad quaedam se subiecerunt. Et contra istas, propter delictum domini habentis eas subiectas, non indicentur represaliae, quia sunt liberae, ut l. *non dubito*, ff. De captivis [Dig. 49.15.7]; sed propter

entire class of persons so long as the proper form is observed.¹¹⁷ Thus, for example, if a merchant of Milan has committed an offense against the city of Bologna, and justice cannot be had from the proper authorities, a declaration of reprisals against all merchants of Milan is licit. Giovanni then, while previously upholding the exemption from reprisals for certain groups of people, here allows non-protected groups to be punished for injustices perpetrated by individual members of the group regardless of their personal innocence. With this assertion of collective responsibility, Giovanni concluded his theoretical model of reprisals. Subsequent sections of *De represaliis* focus on the actual practice of obtaining and carrying out the remedy, and thus, fall outside this discussion.

Using the Roman law tradition that explicitly prohibited reprisals, Giovanni da Legnano, stimulated by necessity, created a theory to classify, explain and regulate what had once been banned. As endemic warfare, individual self-interest, the collapse of traditional authority, and the rise of powers recognizing no superior swept Europe in the 13th and 14th centuries, legal scholars were forced to adapt the legal tradition to changing reality. Giovanni's incorporation of reprisals into the larger category of the laws of war and self-defense established an analytical framework within which established Roman and canon law principles could be applied to meet the needs of changing political, military and legal practice. The old prohibitions remained, but in attempting to maintain the primacy of law over simple brute force, Giovanni and those who came after him, laid the footings upon which laws governing reprisals as licit violence rest.

delictum dictarum civitatum, indici poterunt represaliae, sicut et bellum licitum fieri poterit." *Tractatus* c. 145, 167.

¹¹⁷"Quintodecimo quaeritur, an contra certum genus hominum, iustitiam facere denegantium, represaliae possint indici? Et dicendum quod sic, servata forma." *Tractatus* c. 146, 167.