

## IMPERIAL CONVIVIALITY

### What Medieval Spanish Legal Practice Can Teach Us About Colonial Latin America

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#### ABSTRACT

Late medieval and early modern Iberian monarchs governed through a competitive delegation of certain forms of jurisdiction. This created a tense form of everyday conviviality, wherein group members were intimately knowledgeable about aspects of the laws of other groups. The analytic of conviviality reveals the ways that consensus had to be constantly renegotiated within multiple group dynamics rather than imposed or achieved.

**KEYWORDS:** *law; republics; indigenous peoples.*

#### Convivialidade imperial: o que a prática jurídica espanhola medieval pode nos ensinar sobre a América Latina colonial

#### RESUMO

Monarcas ibéricos medievais e do início da era moderna governavam por meio de uma delegação competitiva de certas formas de jurisdição. Isso criou uma forma tensa de convivência cotidiana, na qual os membros do grupo estavam muito cientes de aspectos das leis de outros grupos. O quadro analítico da convivialidade revela as maneiras pelas quais o consenso tinha que ser constantemente renegociado nas múltiplas dinâmicas de grupo, em vez de imposto ou alcançado.

**PALAVRAS-CHAVE:** *direito; repúblicas; povos indígenas.*

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In 1475, two Jewish men, Rabbi Mosé Matutel and his son-in-law, Maestre Muysé, and a Christian, Alfonso de Córdoba, walked into the office of one of Seville's many Christian notaries. The two Jewish men "renounced the law of Moses," thereby placing themselves subject to the law written by the notary and enforced by the municipality for this particular occasion and announced their business. Along with some other Jews, they had abandoned their synagogue and were praying together in another house. The document they asked the notary to draw up obligated them all to return to the synagogue and not to pray or hold cabildo meetings elsewhere with any other Jews, under a substantial cash penalty. The one who violated the agreement would pay the sum to the third party, Alfonso

de Córdoba, a member of the household of a powerful Castilian nobleman.<sup>1</sup> The Rabbi and his son-in-law gave authority to “whatever judges of this city” to exact the penalty, renouncing as well their right to appeal and their right to customary law.<sup>2</sup>

In the fifteenth-century, the Castilian kingdom was largely governed through a web of corporate units, often called republics, which enjoyed constrained self-governance under their own customary laws and authorities, while ultimately subject to the monarch and the Catholic church. Town government, in *concejos* or *cabildos*, was an instance of this governance: monarchs granted towns status under *fueros* or legal terms that set out those constraints, including taxation schedules, market arrangements, and the like. This was largely done to attract settlers, but also to act as a political constraint on local aristocrats (Nader, 1990). Artisan guilds also functioned as republics, as did groups of resident foreigners. Muslim and Jewish populations were also received as republics of a sort, granted the right to live under the monarch but to be judged by their own religious authorities according to their own law, within constraints. Jews and Muslims were also subject to the king’s law, and occasionally that of local authorities. In these cases, they had certain responsibilities and obligations, for example as *vecinos* of a particular place, but could venue-shop between their religious judges and the Christian authorities of the town or region. The Muslim or Jewish republic was commonly known as *aljama*, representing the political authority of the religious community’s interests rather than the sum of its congregants: that is, not all Jews or Muslims were members of an *aljama* (Catlos, 2007, pp. 126-8).

Rabbi Matutel was one of those religious authorities in Seville. Whatever controversy had precipitated his exit with at least nine other Jewish men—the minyan or ten required to set up prayer services—they had now come to an understanding with the rest of the Jewish congregants. Rabbi Matutel and his son-in-law sought to prevent another split in the congregation. But enforcement of the penalties for splintering would best come from outside the community: not only could an outsider better enforce the penalty, but perhaps the shame of paying a Christian for failure to carry out a Jewish obligation would confer additional punishment. He would invite the Christian to enforce a Jewish obligation in the public space of the Christian notary’s office.

This eccentric episode illustrates an important aspect of what is sometimes termed *convivencia* in late medieval Castile. That term has lost much of its power in recent years, as historians have called into question the uniqueness of the interactions between Christians, Muslims, and Jews on the Iberian peninsula (Soifer, 2009). Coined in 1948 by Américo Castro, its recognition that members of the three religions often coexisted peacefully was seen as a political

[1] Pedro de Astúñiga was the son of the man who had been awarded all of Seville’s remaining synagogues after the pogrom of 1391. It is possible that Córdoba was a convert to Christianity from Judaism.

[2] Archivo de Protocolos de Sevilla (APS) Oficio 4, Pedro Alvarez, leg 2154 (1475) ff 220-221r.

redemption for Spain's intolerant past. But through its translation into the English "conviviality," scholars have used the term to analyze normative "living together," not necessarily unique to Spanish history or the medieval world, problematizing civility within tense circumstances (Nowicka; Vertovec, 2014). Bringing conviviality back to the history of medieval, Castile allows for a fresh analysis of its cosmopolitanism without the preciousness of a White Legend. It was not only that peoples coexisted, but that their differentiated existences were interdependent.

Tension and consensus often went hand-in-hand in Castilian cities. Everyday life in fifteenth-century Seville included both moments of conflict and violence against religious minorities as well as long periods of mundane collegiality and interdependence. But both were premised on the very real fact that Muslim, Jewish, and Christian residents knew one another well, interacted regularly, and largely shared a cosmopolitan worldview. That knowledge allowed them to use tension and differentiation as a strategy for getting along. What the anecdote reveals is that the mundane world of conviviality was premised on a difference that was mutually constructed by all practitioners. After centuries of living side by side, Jews, Muslims and Christians shared many values but they also differentiated themselves, and their others, in ways that could be characterized as threatening or useful according to circumstances (Nirenberg, 1996; Constable, 2017; Echevarría Arsuaga, 2011; Meyerson, 2004; Soifer Irish, 2016; Soifer, 2009).

Law was a key way through which Iberian kingdoms managed conviviality, particularly by marking and articulating sameness and difference between dominant and subordinate populations. Using law to understand this articulation also sheds light on the ways that identity was coevally produced: subaltern juridical difference was not inherent or isolated from the dominant class's juridical position, and vice versa. Instead, conviviality had to do with the ways that knowledge of the other was constructed from daily interactions which could occasion mutual understandings of sameness and difference.

Muslims, Christians, and Jews had lived side by side for centuries on the Iberian Peninsula. While their religious and legal practices differed, most of their everyday life activities overlapped in a shared habitus. They hired one another, bought and sold goods from one another, and lived in the many of the same neighborhoods. Seville's notarial archives—which only hold documents left by Christian notaries—demonstrate that when Muslims or Jews interacted with Christians they did so with perfect knowledge of one another's economic and social practices. Their difference was associated with religious practices, with religious law, and with cultural practices associated with religion, like diet. That very intimacy fueled tensions

in the fifteenth and sixteenth centuries, culminating with the expulsions first of anyone who refused to convert to Catholicism, and then suspicion of those who did convert.

The New World was, at least initially, different. Spanish travelers noted religious or spiritual difference (or what they considered its absence) in native peoples of the Americas, but they also identified social practices that they found exotic or esoteric. While these differences were often exaggerated or invented, there is no doubt that Spaniards and indigenous peoples were often mystified by each other's everyday practices, from the way work and governance were structured to gender roles to forms of exchange and property relations. Those chasms were bridged, as Spanish and indigenous agents came to work and live together. But those differences were nonetheless exaggerated, generalized, or mystified as part of the Spanish imperial project.

This obscurity could lend itself to all sorts of projections while parties dealt with their learning curves, affecting the ways that native peoples, Africans, and Spaniards produced their own identities. I will end with the case of the Jesuit-controlled Indian town called Santiago del Cercado, outside Lima. Within its walls, the Jesuits, the Spanish *corregidor*, its indigenous officials, and indigenous permanent and temporary residents co-invented new practices which were packaged as an instance of indigenous customary law, producing difference even in an urbanized and cosmopolitan setting.

### **INCORPORATING DIFFERENCE**

Muslims and Jews posed a threat to Christian society in late medieval Castile due to what Christina Lee calls the anxiety of sameness, the inability to detect an interloper by visual inspection (Lee, 2016). A Spaniard of noble blood and unblemished heritage could not necessarily recognize a plebeian or a non-Christian at a mere glance, particularly if they were dressed in the same style as everyone around them. This was the reason for the existence of sumptuary laws: some items, usually expensive fabrics and jewelry, had to be reserved for elites to distinguish themselves from the upwardly mobile. Precisely because of the closeness of Jewish, Muslim and Christian communities—made even more complicated by conversion and thus familial relationships that crossed confessional categories—authorities attempted to legislate distinction.

Iberian rulers sought to require Muslims and Jews to physically differentiate themselves from Christians through clothing and hairstyles. Henry I of Castile rejected the Fourth Lateran Council's demand (1215) that European Jews and Muslims wear distinctive insignia on their clothes, as a mark of humiliation, arguing that the

wealthy Jews whose taxes supported his kingdom would flee. But Iberian monarchs did attempt to control the physical appearance of resident religious minorities. Muslims were sometimes required to wear beards and cut their hair in particular styles, though as fashion changed, Christians might adopt the Muslim haircut and ban it from Muslim heads (Constable, 2017, p. 36). Indeed, many fashions were shared or transformed across the lines of religious difference: from veils to waistcoats to riding shoes.<sup>3</sup>

[3] The Spanish *jubón* or fitted waistcoat derived from the *aljuba* or *burnus*, a looser tunic that was associated with Muslim men. Likewise, buskins were *borceguines* (Anderson, 1979, pp. 53-4, 227-8).

But most of this legislation derived from the difficulty of telling a Christian from a Muslim or Jew, as when the Council of Valladolid in 1228 complained that Jews were wearing “closed capes like those worn by clerics,” or the Cortes of Madrigal denounced in 1476, “it is not possible to tell if the Jews are Jews or if they are clerics or learned men of great estate and authority, or if the Moors are Moors, or if they are gently bred courtiers” (Constable, 2017, p. 41). Of course, some Jews and Muslims were learned men of great estate, suggesting the true problem. There is little evidence that, other than at particularly tense moments of conflict, such rules were followed. But the law sought clarity.

That differentiation also crept into language. The honorifics and titles of Spanish elites were diluted by the upwardly mobile. “Don,” according to Covarrubias’ dictionary of 1611, was a designation offered by a lesser man to a more noble one, from *dominus*, and in medieval Castile “many seignorial houses refused it, and did not use it; and from these few who leave it aside, it has been taken up by many to whom it does not pertain” (Covarrubias Horozco, 2006, p. 726). The king issued the honorific to members of the high nobility, though the lower nobility—*hidalgos*—appropriated it. So also did elite Jews, as well as *conversos* inventing a noble Christian past for themselves (Lee, 2016, chap. 1). This usage survives in Golden Age literature in ironic commentary on social climbing and Jewishness. Fray Juan Guardiola wrote in 1591, “others came to call themselves Don [...] as the Jews did in Spain such that one can hardly find an old document of theirs in which they do not call themselves Don” (Ferrer-Chivite, 1985, p. 133). In my own fifteenth-century study, Seville’s elite Jews—some members of the royal court, others men of high status within the Jewish community—represented themselves as *don* to Christian notaries, who did not contradict them.

Seville’s Muslims, however, were largely of a plebeian social class and did not use the “don.” Instead, they invented another differentiation. Most of the Muslims who are recorded in Seville’s archives in the 15th century were skilled artisans and craftsmen. Because guilds were largely closed to them, they could not call themselves *maestros*, master artisans, with few exceptions.<sup>4</sup> Instead they took the title *maestre*, possibly coined from the Arabic term *mu’allim*, teacher or master, and

[4] One Muslim architect was appointed the city’s *maestro mayor* to maintain the Alcázar and Atarazanas, the Muslim-built palace and shipyards. APS Oficio 15, Juan Rodríguez de Vallecillo, Libro de 1480-90, f. 98v (27 March, 1484).

close enough to the Castilian to be suggestive of an equivalence. Not all Muslim laborers used the title—subordinates did not, but every member of Seville’s Muslim *cabildo* did—which suggests that they coined the term to differentiate within their own community and make a claim parallel to that of Christians. *Maestre* suggested a level of competence in arts associated with Muslims, as a form of branding. It was the very proximity of Muslims, Christians, and Jews that made sameness a source of anxiety across groups as well as a site from which in-group status could be carved out.

By the end of the fifteenth-century, as we know, conviviality was refused. In 1480, the first Inquisitors arrived in Seville, where they largely policed the city’s wealthier converts from Judaism to Catholicism.<sup>5</sup> Between 1483 and 1484, they condemned 47 men and women to death by burning, and 456 to perpetual imprisonment in their first *autos de fe* (Wagner, 1973, p. 6). In 1483 the monarchs also expelled Jews from Andalucía, judging them to be the cause of the backsliding of so many Christian converts. Without Jewish support, the city’s Muslim community was powerless to prevent its mass relocation to a site within the parish of San Pedro. In 1492, Jews were expelled from the rest of Castile as Muslim Granada was brought into the kingdom—under restrictive conditions—and by 1501, Muslims except those in Granada or enslaved were expelled or forced to convert (Coleman, 2003). This was the end as well of juridical difference: converts were now subject to the laws of the church, the crown, and their local Christian officials. Their incorporation into the Catholic world was accompanied by an insistence that they were still different, resulting in new ways of measuring conformity that emerged in codes of *limpieza de sangre*, as well as cultural representation (Martínez, 2011).

#### NEW WORLD DIFFERENCE

Although it did not allow the continued practice of pre-conquest religions, the crown used its pluri-jurisdictional approach to incorporate the indigenous peoples conquered in the Americas (Benton, 2001; Graubart, 2015, 2016). The king sought to constrain the power of its new nobility through the creation of town councils, much as monarchs had carved new municipalities out of aristocratic holdings in Castile. Further, the crown recognized most native hereditary nobles as natural lords, receiving their polities as republics, removing them from the juridical sphere of their *encomenderos* and *cabildos* though not from that of the monarch himself.<sup>6</sup>

As Spain consolidated those settlements and exercised some control over native peoples, they required them to convert to Catholicism—their customary law could not be religious law, though the

[5] We know little of the first inquisitorial processes in Seville, as that documentation has been lost. See Dominguez Ortiz (2010).

[6] The king’s insistence on this jurisdictional separation was repeated when Philip II refused the terms of the *encomenderos*’ bribe in the perpetuity negotiations—they demanded criminal jurisdiction over native peoples, but Philip held fast (Mumford, 2012, pp. 53-71).

distinction could seem arbitrary. Viceroy ordered indigenous communities reorganized, both physically into *reducciones* or urbanized, concentrated towns, and politically into *pueblos de indios* governed by elected indigenous officials. The crown placed its own royal officials—*corregidores* or magistrates—over them, but continued to require that local civil law be carried out by Christian indigenous authorities according to their custom.

In the New World, however, the encounter with difference produced new material effects. While chroniclers persisted in seeing “*mezquitas*” in all prominent buildings, and drew upon anti-Semitic and anti-Muslim stereotypes when they critiqued indigenous practices, in truth they (mostly) knew they had not stumbled upon lost tribes of Muslims and Jews roaming the Caribbean (Pagden, 1987, p. 156). Instead they found peoples whose practices they could not read, and who could not always decipher European intentions. Consider Columbus’s logbook entries on his first voyage. While he claimed that he immediately understood that the native peoples of the island he called “Guanahani” could be converted with love, avoiding force, despite substantial linguistic barriers, he also noted that they failed to understand the value system he brought from Europe. Indians expressed fascination with bits and bobs of leather and glass and were willing to trade their gold for anything on offer (Colón, 1992, pp. 62-3, 123, 135, 151; Vilches, 2010, p. 207). Indeed, he states that he had to prevent his crew from trading their worthless junk for indigenous wealth, a line which acted as a safeguard against the fact that Columbus would be returning to the crown without the gold and spices that he promised. His descriptions of Caribbean natives are predicated on the idea that they misunderstand and yet are somehow capable of understanding under proper circumstances.

Columbus was not alone in characterizing indigenous natives as naïfs who failed to comprehend intertwined economic and moral concepts. Indigenous men’s and women’s failure to use markets, to hold property individually, and to embrace wage labor became the standard line, particularly among reformers who wanted to place Indians in *reducciones* in order to train them in proper social and economic behavior, or *policía*. Some Spaniards, like the jurist Polo Ondegardo, warned against stripping them of their customs and rendering them simply poor replicas of Spaniards’ worst characteristics (Ondegardo, 1916, v. III: pp. 47, 60-1; Graubart, 2018). But both these visions were predicated on a belief that indigenous people were utterly different from Spaniards, from the ways their bodies worked in their environments to their conceptualizations of money, society, and property (Vilches, 2010; Earle, 2007, 2010).

For example, many chroniclers of the Andes repeated a similar tale about how the Incas demanded forms of tribute correlated with

a collective ownership of land. It was not only Spaniards who bought into this story, the mestizo chronicler Garcilaso de la Vega also told it. According to him, when the Incas—his ancestors on his mother’s side—conquered a territory, they sent engineers to extend the amount of land under cultivation. Once terraced, irrigated and measured, arable lands were divided into three parts, “one for the Sun, one for the king [Inca], and one for the inhabitants.” The lands cultivated for the Sun and the Inca were tilled collectively and their bounty set aside as tribute. The community’s lands were subdivided into measures for each family, assigned according to family size, as well as land for the *curaca* or chief. Garcilaso pauses in his telling of this imperial claim to quote from the Jesuit José de Acosta regarding the community land:

*No one owned any of this third as personal property, for the Indians never possessed anything as their own, but always as a special concession from the Inca. The land could thus not be alienated or divided as an inheritance. The communal land was divided annually, and everyone was apportioned a piece sufficient for the maintenance of himself, his wife, and his children. He therefore received more or less from year to year in accordance with the size of his family and with a predetermined scale [...].* (Garcilaso de la Vega, 1966, pp. 241-50)

This story was a bit of an imperial fairy tale, a simplification of diverse practices across the Andes to make a claim about Inca rule. For some, like Garcilaso, it established the Inca’s dominance and fairness; for others it demonstrated Inca tyranny and the naiveté of the native peoples, who were too ignorant and oppressed to hold property individually. In whatever form, it became central to the conceptualization of land policy in the Spanish viceroyalty of Peru. The Inca’s divisions, and the commoners’ inability to possess, were the foundation for Spanish expropriation of land and imposition of rule. Land that had been set aside for royal and religious tribute was now the property of the King and church. Some of the rest could be assigned to the community as a concession, and some titled to their natural lords. This formed part of an emerging narrative about indigenous men and women as backward, naive, and in need of protection and civilization (Graubart, 2017a, 2017b).

In reality, native peoples rapidly added Spanish practices to their own understandings of land tenancy, which were assuredly neither homogeneous nor naive. For example, Don Gonzalo Taulichusco, the cacique of Lima, wrote a rambling will in 1562 that demonstrated not only a heterogeneous approach to property, but an energetic—if misguided—agenda of joint ventures (Lohmann Villena, 1984). He described vast holdings, mostly outside the city of Lima, which his father had conceded to Pizarro under contested circumstances. Some of these

lands he characterized as pertaining to the office of cacique, others were personal lands inherited from his father, and others still belonged to his subjects in the Lima valley. He had entered into partnerships with a number of Spaniards, offering land and labor to their seeds, expertise and marketing; he argued that those Spaniards should be compensated for “their labor, whatever might be merited,” while the land and the rest of the harvest should be returned to don Gonzalo’s subjects. He clearly worried that Spaniards might seize the lands, and in defense he assigned them directly to the community, inventing collective agricultural holdings that probably had not existed before the Spanish conquest.

Much of his will, however, amounted to a confession of his misuse of property and an attempt to provide restitutions. Like most coastal caciques in Peru, Don Gonzalo considered himself the owner of his territory, with no gesture towards the Inca tripartite collective division. But he contrasted his personal lands, which could be sold, with those belonging to his office or the community, which could be used but not alienated. He had, in fact, sold off large parcels to Spaniards which were not his to sell—one belonged to the subjects of a subordinate cacique, others were assigned to his own community. His will called for restitution, reclassifying some sales as rentals and offering to return the sales price of others. Don Gonzalo might have acted naively, but more likely he acted in self-interest by extending Spanish mores onto property previously defined in other ways, and came to regret his bad acts as he watched his community diminish and grow poor. His solution seems to have been to reinvent collective holdings and protect them from future alienation.

Thus the colonial legal conundrum was that indigenous people had to have a kind of triple consciousness. They had to craft legal personalities that understood not only the ways that they and that Spanish people used law, but also they had to understand how Spanish courts expected Indians to use law. There is no doubt that many learned this lesson—indigenous litigants were often successful (Puentes Luna, 2018). But Spaniards had a great deal at stake in maintaining the fiction that Indians were inherently different from, and thus lesser than, them. Indian legal identities were co-created by indigenous and Spanish actors to serve a variety of purposes, but ultimately were predicated on a mutually understood difference.

#### **ENCLOSING CUSTOMARY LAW**

In 1571 Peruvian viceroy Francisco de Toledo inaugurated Santiago del Cercado, an Indian town on the outskirts of the city of Lima.<sup>7</sup> It was surrounded by a high wall and breached by three doors, one of the few walled Indian towns outside of frontier missions. There, in

[7] The following draws upon Graubart, 2017a.

the words of the Jesuits charged with overseeing the town's Catholic mission, "the Indians who are dispersed around the city and the new immigrants might be brought together" and "the Prelate and those who govern this Republic will assure that they do not sin as much as they have on their own" (Egaña, 1954, v. I, p. 416). The Cercado, as it was popularly known, became a significant indigenous neighborhood in the vice-regal capital. Its initial residents were men carrying out the forced labor draft (*mita*) in the region, but they were quickly joined by permanent settlers who built homes and formed an Indian cabildo for its governance. Spaniards and Africans were theoretically excluded from residence there, as it was intended to separate Indians and thereby protect and indoctrinate them.<sup>8</sup>

The Cercado was a kind of halfway point between the two most common statuses for Indians in sixteenth-century Peru. The majority lived in *pueblos de indios*, usually relocated, concentrated settlements in rural areas where they were governed by their own officials and collectively produced tribute either through agriculture and ranching, or by selling their labor. Another large group left those *pueblos* to live in cities like Lima, founded by Spanish settlers. Lima's population in 1613 was about 25,000, of which about 40% was of African descent, a slightly smaller percentage was Spanish, and the rest indigenous (Salinas y Córdoba, 1957, p. 245). The city was surrounded by rural Indian towns in the Rimac valley, which provided more temporary and permanent indigenous migration into the center.

While rural indigenous communities theoretically lived under customary law and their own leaders, Lima's Indians did not. They were served by a variety of Spanish officials, including a royal *corregidor* and various attorneys and defenders. But, other than a few figure heads, they could not call upon customary law or their own officers to defend their world view. The Cercado changed this. Its wall instantiated an Indian republic that was largely integrated with the city, and delimited a specific legal regime enforced by its own political agents. But because the Cercado was not a pre-existing indigenous settlement—it was a heterogeneous collection of men and women from across the viceroyalty—its customary law was not tied to any local practice or any collective beliefs. Its walls delimited a legal Indianness that was neither allowed to determine its own self-interests nor to fully assimilate into Spanish citizenship.

The Cercado was a *reducción*, a resettlement intended to civilize indigenous spiritual practices and behaviors, to create "*policía*". The architects of *reducción*, such as the jurist Juan de Matienzo, were explicit: "Given the laziness of the Indians and their condition and that danger that follows from it, it is understood that to incline

[8] A census of the Cercado taken in 1812 shows that Spaniards and Africans came to outnumber Indians in the late colonial period. Lynn Lowry attributes this to the 1767 expulsion of the Jesuits, ending the phase of protectionism (Lowry, 1991, p. 147).

and compel them towards work is a good thing” (Matienzo, 1910, p. 15). The requirement that Indians learn to love work and desire wages and *policía* meant that they had to be treated as neophytes not only spiritually but legally. They were collectively assigned to a limited version of the legal category of *miserables* or wretches, a protected class, like minor dependents (Premo, 2005; Borah, 1983). The jurist Solórzano Pereira noted that Indians have the qualities of “frailty, gullibility [*facilidad*] and lack of constancy,” like children and women, and they must be sheltered from the treachery of the ill-intentioned (Solórzano Pereira, 1648, p. 122). This was done by assigning them a protector general, as well as a network of judges, solicitors, notaries and other sources of *amparo* or support.

Who were the ill-intentioned from whom Indians needed protection? For the most part, officials understood this to be Spaniards who would take advantage of their natures. Spanish farmers and entrepreneurs were feverishly acquiring agricultural property from shrinking communities in the Lima valley, and royal officials were eager to stem this loss of lands intended to provide indigenous tribute (Graubart, 2016). Authorities also assumed malevolence on the part of the large and growing population of Africans in the city and its environs—approximately as large as the Spanish population—who were also targeted with laws and curfews.<sup>9</sup> But in their extreme innocence and gullibility, Indians even had to be protected from their own caciques, of whom one viceroy memorably noted “these will rob them and not even leave them the wax in their ears” (Levillier, 1921, v. I, pp. 529-30).

Thus the Cercado was envisioned to enclose urban Indians in a protected space, where they could learn *policía* and Catholic doctrine. It was not really intended to segregate Indians from Spaniards and Africans. Indeed, the vast majority of the city’s indigenous permanent residents lived outside it. And even for those who lived within the walls, it was a pretty porous arrangement: residents left its gates every morning to attend to work; they purchased African slaves who likely lived in their homes or workshops; and its churches welcomed a multi-ethnic parish.<sup>10</sup> Instead, part of what they were protecting was a form of Indian law. The Cercado created a physical space within which an indigenous jurisdiction could enforce customary law, producing its residents as distinct from the neighbors with whom they were increasingly sharing and co-creating a colonial world.

The *corregidor*’s office was intended to oversee the ways that Indians intersected with property law, in particular protecting them from adopting certain forms of tenancy which might worsen their already immiserated condition. Even within the city of Lima and its environs, Indians were not supposed to buy and sell houses or land without the *corregidor*’s license. Within the Cercado’s walls, new property

[9] Ordenanzas de la ciudad de Lima, Archivo General de Indias (AGI), Patronato 187 r14 (1550). Stereotypes about Indians and Blacks, often in counterpoint, were commonly deployed to deter unity (O’Toole, 2012, chap. 1).

[10] Archivo Arzobispal de Lima, *Co-fradías* 10:2 (1605-6); 70:1 (1607-20); see also the list of witnesses in AGI Patronato 248, r24.

relations were invented that were intended to mimic the collectivity Spaniards associated with indigenous culture but also train Indians for life outside. These relations were overseen by elected indigenous officeholders, by the *corregidor*, and by the Jesuits.

The Cercado was founded in 1580 upon agricultural land appropriated (with compensation) from Spanish *encomenderos*; after it was walled the site was divided into plots called *solares*. The indigenous communities already required to send *mita* workers to the city had to purchase enough *solares* to house them: the *solares* came to be known by the names of these communities. *Mitayos* stayed for as long as a year, and many remained even after their term ended. They invested time and money in building shelter, fencing in gardens and planting fruit trees, and they considered themselves owners at least of the material structures and plants. In practice, the collective *solares* owned by communities mutated into private property, as shown in a number of wills that Cercado residents left between 1605-10, a generation after its founding.<sup>11</sup> Four testators called themselves owners of houses on *solares* associated with the communities of Pisco and Huarochirí, though none of them hailed from these places. Permanent residents had built structures and then placed those into an emerging real estate market. For example, Diego Sedeño had originally purchased his house for 24 pesos from Juan Paichucama, adding a bedroom and living room with draperies and unfinished roof, a locked door to the street, and many fruit trees. These improvements, then, marked the residence as his property even if he had no title to the solar on which it was constructed. Other Cercado residents did not claim to own homes in their wills, suggesting that claims to title were not made until structures changed hands, through sale or inheritance.

These physical and titular changes, which increased over time, took place with full knowledge of the Cercado's authorities. Indigenous notaries drew up and indigenous *alcaldes* witnessed these exchanges, lending tacit and explicit approval to the process. Indigenous leaders officiated, as when, in 1687, a brother and sister appealed to *alferez* Hernando de Rivera, the *alcalde ordinario* of the Cercado, to have a *solar* and house they inherited from their parents legally divided in two.<sup>12</sup> The community's indigenous office-holders gathered at the solar, measured out two equal sectors, and had their notary document the acts for posterity; he kept them in a locked box in the town for safety.

So to a degree, the division of the Cercado into collectively-owned lots gave way to the development of private property in built structures, on the model of the real estate market in nearby Lima. But these changes happened informally and unevenly, leading to confusion. In 1686, the *alcalde ordinario* was called to adjudicate the ownership of a solar claimed by Diego Tobar and his wife Ynes Lázaro.<sup>13</sup> Lázaro claimed to have inherited the solar from her late father Cap-

[11] "Testamento de Diego Lastara," "Testamento de Magdalena Yauri Chumbi," "Testamento de Catalina Carguay Chumbi," all in AGN Testamentos de Indios (hereafter TI) leg 1A; "Testamento de Diego Sedeño," TI legajo 1.

[12] AGN, Corregimiento del Santiago del Cercado (hereafter CSC) leg 1 doc 4, 02.10.1687, Lima.

[13] AGN, CSC leg 1 doc 3, 1686, Cercado.

tain Gerónimo Cansinos, but had no papers to prove her case. She was challenged by a man who had rented the property from the family after the Captain's death. Lázaro's witnesses, some of whom titled themselves *vecinos* [or permanent residents with political rights] of the Cercado, testified to Captain Cansinos's long occupation of the site, interrupted only by a period of rental to the third party before Cansinos's son "displaced" him and moved in with his own family. At the son's death, the former tenant claimed possession, and was challenged by Lázaro, as Cansinos's remaining heir. The indigenous cabildo found Ynes Lázaro and her husband to have legitimate possession of the solar by virtue of direct inheritance, apparently taking Cansinos's long term possession as establishing ownership, and his heirs as having legitimate claims on that title.

But other incidents show that the Cercado was considered something other than simple private property.<sup>14</sup> Concern about the Cercado's lots was tied up with ongoing debates about Spanish encroachment on indigenous lands. The crown protected rural property associated with indigenous communities against sale, at least in theory, placing its use subject to the customary law of the polity. *Reducciones* usually involved the creation of a new residential town, which could be divided and distributed in ways consonant with the desires of the community. The Cercado was, then, a hybrid: set next to a city where most property could be bought and sold, it invented a special case of collective property that sometimes transformed into a kind of alienable individual commodity, but not alienable to just anyone or under all conditions. The walls around the Cercado delineated a space where indigenous people were managed in their self-governance, offering them incentives to live as Spaniards did but restraining their ability to do so freely.

A final example will show how indigenous customary law was invented and protected as a signifier of difference. In 1652, the highland community of the Yauyos filed a complaint with the Viceroy to evict the widow Juana Ñusta, aka Juana de Avalos, from their solar in the Cercado.<sup>15</sup> The Yauyos had purchased their site in the Cercado in 1580 to house their *mitayos* but lost control of part of it, leaving them without a place to live while they rented farmlands in the Lima valley.

Through their lawyer, the Yauyos argued that the loss of their solar in the Cercado meant that they had difficulties meeting tribute and *mita* obligations, and moreover that their children "lacked Christian doctrine and were being raised like barbarians" outside the Cercado's walls.<sup>16</sup> They drew deftly upon the rhetoric of the *reducción*, which was intended to provide stability as they farmed and became Christians, and noted that the Crown was required to "give protection [*amparo*] to these poor ones." They also identified themselves as *forasteros* or mi-

[14] There was no "simple" private property in the New World, insofar as the crown reserved ownership to itself of all land, but simultaneously understood native peoples to be legitimate (communal) owners of parts of the land. Nevertheless, the Cercado appears to be treated differently than the *traza* of Lima, and more like rural towns where local custom could govern how property was distributed and transferred.

[15] "Autos que siguieron los indios Yauyos," AGN, Derecho Indígena, leg.9, cuad. 130, 1653.

[16] "Autos que siguieron los indios Yauyos," f. 2v.

grants rather than *vecinos* or permanent residents, highlighting their transitory occupation of the site for the sole purposes of *mita* and tribute production. This language was key to the appeal they were making to the Cercado's original function.

The rector of the Cercado, the Jesuit Luis de Teruel, gave testimony that

*the Yauyos have a site of two or three blocks, purchased with their community's funds, which, because it was unused, some have planted with gardens, but this is done with the knowledge of the caciques of said province, and thus whenever they have wished to take residence in it, it must be restored to them as their own property.*<sup>17</sup>

[17] "Autos que siguieron los indios Yauyos," f. 2v

The *corregidor*, under direction of the Viceroy, restored the property to the Yauyos in August 1653, in a ceremony with Father Teruel present. They established the boundaries and then walked through it, "they closed and opened the doors, they broke branches and did other acts all in sign of the said possession which they took quietly and peacefully without contradiction and in this the said *corregidor* gave them protection."<sup>18</sup>

[18] "Autos que siguieron los indios Yauyos," f. 3v

But in September, they returned to court. A lawyer representing Juana Ñusta, who called herself *vecina* and widow of Captain Domingo Francisco, and their children asked the *corregidor* to assert their ownership of the solar in question. According to that account, Captain Domingo Francisco, recently deceased, had spent 6000 pesos improving the site, which he left to his widow and children. The couple had occupied the site for more than fifty years continuously, and the story the Yauyos had presented just months before was a sinister, if convincing, fiction. Juana Ñusta, who used a Quechua title of nobility rather than her family name of de Avalos, presented her late husband's will into evidence.<sup>19</sup>

[19] "Autos que siguieron los indios Yauyos," f. 4.

The will helps explain the contested transformation of the Cercado. The son of don Luis Santa Cocha, Captain Domingo Francisco had risen through the indigenous militia, and acquired a large portfolio of lands in the nearby Late valley, most of which he rented to Indian farmers on annual contracts. He paid fees to receive titles to those lands from the king during a land *composición* or official legal titling.

He understood his ownership of the *solar* in the Cercado to emanate from the fact that he had transformed uncleared territory into cultivated land, a *huerta*, which he had fenced in after winning a lawsuit over the land. Among the other goods he noted as his personal property were five African slaves, four horses with saddles, two *arcabuces* (muskets), a sword and dagger, a helmet and buckler, all the privileges associated with service in the militia and correlated economic success.

Captain Domingo Francisco, in other words, was a man of complete *policía*. He was an active Christian, requesting burial in the Cercado's church shrouded in a Franciscan habit and leaving bequests to numerous confraternities. He had risen to a position of status by becoming captain of the city's Indian militia, and gained the privilege denied to plebeian Indians of wearing a sword and dagger, riding a saddled horse, and having a wardrobe of imported finery. He had purchased a number of African slaves, the most powerful symbol of colonial authority available to him. And most to the point, he had bought the lands that indigenous communities were placing in desperation on the market and was provisioning Lima by renting them back to now-landless Indians to farm. He had had these lands officially titled by the crown, removing them from indigenous patrimony, and he had cultivated and fenced them. He was the very model of a colonial Indian, exactly what religious and jurists had hoped to produce by requiring Indians to learn Spanish ways.

And yet, the Viceroy and the *corregidor* ruled against him, returning the solar to the Yauyos as a collective. The *corregidor's* decision reveals the Cercado's status as a space where Indians were differentiated in their path to becoming colonial subjects. The depredations against indigenous territories in the valleys surrounding the city worried the crown. While royal officials sought to expropriate "excess" lands from shrinking communities for their own purposes, they acted aggressively to monopolize privatization. While some of the community *solares* of the Cercado had almost immediately been transformed into private residences through acts of physical improvement, the crown reserved its preference for collective use of the land as part and parcel of the legal definition of its Indian subjects: Indians are those who do not hold private property. The Viceroy's final word on the subject in August had been to tell the *corregidor* to "demand that the alcaldes of the Cercado turn the *solares* over to [the Yauyos], wherein they can have a house and from there take care of their fields, where they find lands for rent, and charge the Jesuits to admit them and enroll them, like others, in the said town."<sup>20</sup>

The Cercado's walls marked boundaries between property regimes, which are part of the ways that peoples are culturally defined. The walls indicated Indian space and non-Indian space, an insurmountable difference between Indian and Spaniard, and the association of collective property regimes with indigenous law, whether or not it actually had this pedigree. It was part of the marking of the liminal status of urban Indians.

Convivial relations in the Iberian empire produced legal markers of difference between groups that interacted regularly. That difference could reflect the way that superior powers dominated, but subaltern

[20] "Autos que siguieron los indios Yauyos," f. 2.

actors could also use those differentiations strategically. Jews could use the threat of Christian law enforcement to bring their own community into line. Indians could claim an invented past that allowed them to control valuable property. The courts provided a key venue for this contestation, and indigenous actors, like religious minorities and people of African descent, became adept in using the ways they were perceived for their own ends. The analytic of conviviality, as a way to focus on the ways that difference functioned within everyday life rather than acted solely as a barrier, reveals the ways that consensus had to be constantly renegotiated within multiple group dynamics rather than imposed or achieved.

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