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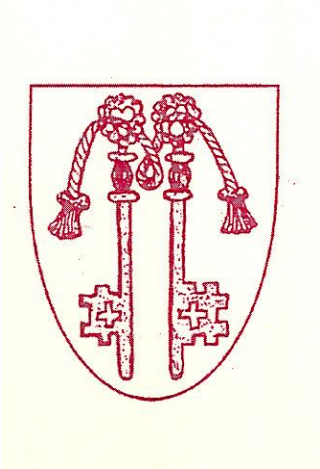
OF MEDIEVAL CANON LAW

NEW SERIES **VOLUME 31**

AN ANNUAL REVIEW



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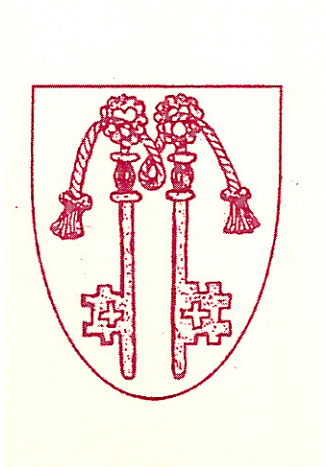

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Abbreviations

The following sigla are used without further explanation:

ACA	*Archivo de la Corona d'Aragon/Arxiu de la Corona d'Arago*
AHC	*Annuarium historiae conciliorum*
AHDE	*Anuario de Historia del Derecho español*
AHP	*Archivum historiae pontificiae*
AJLH	*American Journal of Legal History*
AKKR	*Archiv für katholisches Kirchenrecht*
ASD	*Annali di storia del diritto*
BAV	Biblioteca Apostolica Vaticana
BDHI	*Bibliothek des Deutschen Historischen Instituts in Rom*
BC	Bibliotheca/Archivio capitolare, capitular, chapter, kapitoly etc.
BEC	*Bibliothèque de l'Ecole des Chartes*
BIDR	*Bullettino dell'Istituto di Diritto Romano*
BISM	*Bullettino dell'Istituto Storico Italiano per il Medio Evo e Archivio Muratoriano*
BL	British Library
BM	Bibliothèque municipale, Stadtsbibliothek, Biblioteca comume, Landesbibliothek, civica, etc.
BMCL	*Bulletin of Medieval Canon Law, New series*
BNF/BN	Bibliothèque nationale de France / Biblioteca nazionale
BSB	Bayerische Staatsbibliothek
BU	Bibliothèque universitaire, Universitätsbibliothek, Biblioteca di Università, etc.
Cat. gén.	*Catalogue général des manuscrits des bibliothèques publiques de France* (*Départements*, octavo series, unless otherwise indicated)
CCL	*Corpus Christianorum, Series latina*
CCCM	*Corpus Christianorum, Continuatio mediaevalis*
CHR	*Catholic Historical Review*
CID	*Cuadernos informativos de derecho histórico publico, procesal y de la navigación*
Clavis	E. Dekkers, *Clavis patrum latinorum*, ed. 2
Clm	Codices latini monacenses-Bayerische Staatsbibliothek Munich
COD	*Conciliorum œcumenicorum decreta*, ed. Centro di Documentazione... (COD^3: ed. 3)
COGD	*Conciliorum oecumenicorum generalium-que decreta*, 2.1*: The Oecumenical Councils of the Roman Catholic Church*: *From Constantinople IV to Pavia-Siena (869-1424);* 2.2*: From Basel*

	to Lateran V (1431-1517, edd. Alberto Melloni et alii (Corpus Christianorum; Turnhout 2013)
CSEL	*Corpus scriptorum ecclesiasticorum latinorum*
DA	*Deutsches Archiv für Erforschung des Mittelalters*
DBI	*Dizionario biografico degli Italiani*
DDC	*Dictionnaire de droit canonique*
DGI	*Dizionario dei giuristi italiani (XII-XX secolo)*, edd. Italo Birocchi, Ennio Cortese, Antonello Mattone, Marco Nicola Miletti (2 vols. Bologna: Mulino, 2013)
DHEE	*Diccionario de historia eclesiástica de España*
DHGE	*Dictionnaire d'histoire et de géographie ecclésiastiques*
DMA	*Dictionary of the Middle Ages*
DThC	*Dictionnaire de théologie catholique*
EHR	*English Historical Review*
HDIE	*Histoire du droit et des institutions de l'Eglise en Occident*
HJb	*Historische Jahrbuch*
HLF	*Histoire littéraire de la France*
HRG	*Handwörterbuch zur deutschen Rechtsgeschichte*
HZ	*Historische Zeitschrift*
IRMAe	*Ius romanum medii aevi*
JEH	*Journal of Ecclesiastical History*
JK, JE, JL	Jaffé, *Regesta pontificum romanorum* ... ed. secundam curaverunt F. Kaltenbrunner (JK: an. ?-590), P. Ewald (JE: an. 590-882), S. Loewenfeld (JL: an. 882-1198)
LHR	*Law and History Review*
LMA	*Lexikon des Mittelalters*
LThK	*Lexikon für Theologie unk Kirche* ($LThK^2$: ed. 2)
Mansi	Mansi, *Sacrorum conciliorum nova et amplissima collectio*
Mazzatinti	G. Mazzatinti (continued by A. Sorbelli *et al.*), *Inventari dei manoscritti delle biblioteche d'Italia*
MEFR	*Mélanges de l'École française de Rome: Moyen âge – Temps modernes*
MGH	Monumenta Germaniae historica
• Auct. ant.	Auctores antiquissimi
• Capit.	Capitularia
• Conc.	Concilia
• Const.	Constitutiones
• D - DD	Diploma - Diplomata
• Dt. Chron.	Deutsche Chroniken
• Epp.	Epistolae (in Quart)
• Epp. saec. XIII	Epistolae saeculi XIII
• Epp. sel.	Epistolae selectae

• Fontes iuris	Fontes iuris Germanici antiqui, Nova series
• Ldl	Libelli de lite imperatorum et pontificum
• LL	Leges (in Folio)
• LL nat. Germ.	Leges nationum Germanicarum
• Poetae	Poetae Latini medii aevi
• SS	Scriptores
• SS rer. Germ.	Scriptores rerum Germanicarum in usum scholarum separatim editi
• SS rer. Germ. N.S.	Scriptores rerum Germanicarum, Nova series
• SS rer. Lang.	Scriptores rerum Langobardicarum

MIC	Monumenta iuris canonici
• Ser. A	Series A: Corpus Glossatorum
• Ser. B	Series B: Corpus Collectionum
• Ser. C	Series C: Subsidia

MIÖG	*Mitteilungen des Instituts für österreichische Geschichtsforschung*
ML	Monastic Library, Stiftsbibliothek, etc.
NA	*Neues Archiv der Gesellschaft für ältere deutsche Geschichtskunde*
NCE	*The New Catholic Encyclopedia*
NDI	*Novissimo Digesto Italiano*
ÖAKR	*Österreichisches Archiv für Kirchenrecht*
ÖNB	Österreichische Nationalbibliothek
PG	Migne, *Patrologia graeca*
PL	Migne, *Patrologia latina*
Potth.	Potthast, *Regesta pontificum romanorum*
QF	*Quellen und Forschungen aus italienischen Archiven und Bibliotheken*
QL	*Quellen und Literatur*
RB	*Revue bénédictine*
RDC	*Revue de droit canonique*
REDC	*Revista español de derecho canónico*
RHD	*Revue historique de droit français et étranger* (4^{e} série unless otherwise indicated)
RHE	*Revue d'histoire ecclésiastique*
RHM	*Römische historische Mitteilungen*
RIDC	*Rivista internazionale di diritto comune*
RIS^{2}	Muratori, *Rerum italicarum scriptores: Raccolta degli storici italiani*, nuova edizione…

RQ	*Römische Quartalschrift für christliche Altertumskunde und Kirchengeschichte*
RS	Rolls Series (Rerum Britannicarum medii aevi scriptores)
RSCI	*Rivista di storia della Chiesa in Italia*
RSDI	*Rivista di storia del diritto italiano*
SB	Staatsbibliothek/Stiftsbibliothek
SCH	*Studies in Church History*
SDHI	*Studia et documenta historiae et iuris*
Settimane	*Settimane di studio del Centro italiano di studi Spoleto sull'Alto Medioevo*
SG	*Studia Gratiana*
TRE	*Theologische Realenzyklopädie*
TRG	*Tijdschrift voor Rechtsgeschiedenis*
TUI	*Tractatus universi iuris* (18 vols. Venice 1584-1586)
ZKG	*Zeitschrift für Kirchengeschichte*
ZRG Kan. Abt.	*Zeitschrift der Savigny-Stiftung für Rechtsgeschichte*, Kanonistische Abteilung
ZRG Rom. Abt.	*Zeitschrift der Savigny-Stiftung für Rechtsgeschichte*, Romanistische Abteilung

The Proceedings of the International Congresses of Medieval Canon Law will be referred to as (e.g.): *Proceedings Boston 1965*.

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NOTE

Annual Report 2014

Peter Landau

The main event in 2014 was the transfer of the property belonging to the Stephan-Kuttner-Institute of Medieval Canon Law to Yale University in New Haven, Connecticut. The transfer will be celebrated in 2015 by a Conference and a Grand Opening of the Kuttner Institute in the Yale Law School from May 21 to May 22, 2015. Anders Winroth, secretary of the Institute, sent invitations for that grand opening on October, 17, 2014. The conference will include several sessions with twenty minutes papers and keynote lectures by Greta Austin, Richard Helmholz and Peter Landau. The keynote lecture by the President Peter Landau will deal with the subject of the origin of *Regula iuris* 29 (Quod omnes tangit) in the *Liber Sextus* in the canonical jurisprudence of the twelfth century.

2014 was a successful year for the editorial work of the Kuttner Institute. The critical edition of the *Summa in Decretum* written by Simon of Bisignano between 1177 and 1179 was published in the Corpus glossatorum, Series A of the Monumenta Iuris Canonici by Petrus V. Aimone Braida after many years of difficult work. Aimone's Prolegomena to his edition covers 242 pages. He was able to prove the important influence of Simon's *Summa* on the Anglo-Norman *Summa Lipsiensis 'Omnis qui iuste iudicat'*. Aimone also prints a register of the decretals that Simon cited. We are very thankful to Prof. Aimone Braida for his achievement and to the Biblioteca Apostolica Vaticana for its continuous support of our editions.

In 2014 the work on the edition of the *Summa Lipsiensis* could also be continued by the group of canonists from Rudolf Weigand's school in Würzburg, Germany with the financial support of the Deutsche Forschungsgemeinschaft (DFG). The first two volumes of this edition had been published in 2007 and 2012. They covered the commentary on D.1-C.10 of the Decretum. In 2014 the third volume was sent to the Biblioteca Vaticana that

edited C.11-C.22; it will be printed in early 2015. At the beginning of this year (2015) the fourth volume of the edition will almost be finished; a final fifth volume with a register is in preparation. We hope to present the total edition in 2016 during the Fifteenth International Congress of Medieval Canon Law in Paris.

Progress can also be reported in the work on the decretal collections. After finishing with the *Collectio Francofurtana*, Prof. Gisela Drossbach began studying the *Collectio Cheltenhamensis* and finished editing this important English decretal collection in 2014. Her edition was also sent to the Biblioteca Vaticana during 2014 and will be published in 2015 in Corpus Collectionum, Series B of the Monumenta Iuris Canonici as vol. 10.

Altogether I am very satisfied about the progress made in editing texts of medieval canon law during the last year. I can also report that the papers read during a conference (colloque) on 'L'oeuvre scientifique de Jean Gaudemet' in Sceaux and Paris in January 2012 were published by the University Panthéon-Assas Paris II, at the end of 2014. This volume gives a magnificent survey of the research done by this great French scholar in Roman and Canon Law during the twentieth century.

Visitors at the SKIMCL in 2014 were Prof. Danica Summerlin (UK), Prof. L. Field (USA) and Prof. Jason Taliadoros (Australia).

Munich.

Islam in Medieval Hungary: Judicial Power over Muslims as Evidence for the Christian-Muslim 'convivenza'.

Katarína Štulrajterová

Introduction

Muhammad who was born in Mecca is credited with the foundation of Islam. He went through a religious experience that changed not only his life, but the history of a large part of the world, Hungary included. Although Hungary was both nominally and de facto a Christian kingdom, the Christian religion was not the only one which touched its ethnically heterogeneous population. Islam too had its fair share of followers.[1]

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[1] The Muslim population in Hungary comprised Pechenegs, Khwarazmians, Oguz and Alans. The Pechenegs, a distinct ethnic group of Oriental origin which arrived in Hungary in the eleventh century. The actual history of Pecheneg conversion to Islam is confused but all authors cite Al-Bakrī, Abū ʿUbayd ʿAbdallāh Ibn ʿAbd Al-ʿAzīz Ibn Muḥammad writing in the eleventh century, as their source. He dated the conversion to c.1009-1010. see István Zimonyi, *Muslimische Quellen über die Ungarn vor der Landnahme: das ungarische Kapitel der Ğaihānī-Tradition* (Herne 2006), 84; Prof. Daniš asserts that Pechenegs adopted Islam as a state religion at the beginning of the eleventh century as a result of the influence of the neighbors from the East, see Miroslav Daniš, *Východna Európa v stredoveku* (Prešov 2010), 86. M. Miloš states that the majority of Pechenegs became Muslims shortly after their arrival in Hungary, see Miloš Marek, *Cudzie etniká na stredovekom Slovensku*, (Martin 2006); According to Abu Hamid al Garnathi in the late twelfth century, the Pechenegs in Hungary were Muslims, see Jozef Pauliny, *Arabské správy o Slovanoch (9.-12. storočie)* (Bratislava 1999) 155, 162-166; Ján Steinhübel, *Nitrianske kniežatstvo*: *Kapitoly z najstarších českých dejín* (Bratislava 2004) 149-150, 189; Miloš Marek, *Cudzie etniká na stredovekom Slovensku* (Martin 2006) 260-261, 280-289. The Khwarazmians, in Hungarian called kaliz, arrived to Hungary in the late tenth early eleventh century and there is little doubt that they were already Muslims. See J. Steinhübel, *Nitrianske kniežatstvo*: *Kapitoly z najstarších českých dejín* 88-89, 149-150, 189. Marek Miloš, *Cudzie etniká na stredovekom Slovensku* (Martin 2006) 260-261. The Oguzi, who had been Muslims since the tenth century, were another ethnic group living in Hungary; documentary evidence confirms their presence from the eleventh century

There are a few primary Arabic and Latin sources. The surviving Arabic sources were written by Muslim authors who either visited Hungary personally or recorded information given to them by Hungarian Muslims. The remainder were written by Muslims who drew on the information contained in travelogues or other general compendia for their descriptions of Hungary. The written testimony is complemented by numismatic evidence and some archaeological artefacts.[2] The Latin documents are of either royal or ecclesiastical origin and record royal and synodal legislation and correspondence between the Roman Curia and the Royal Court.[3]

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onwards. Marek Miloš, *Cudzie etniká na stredovekom Slovensku* (Martin 2006) 319-320 Another group of supposed Muslims in Hungary were the Alans; no written documentation exists that proves their presence in Hungary before 1318.

[2] Ildiko M. Antaloczy, 'A nyíri izmaeliták központjának, Böszörmény falunak régészeti leletei II', *Hajdúsági Múzeum Évkönyve* 4 (1980) 131-170; Zsigmond Hajdú – Gy, Emese Nagy, 'A nyíri izmaeliták központjának, Böszörmény falunak régészeti leletei II', *Hajdúsági Múzeum Évkönyve* 9 (1999) 31-45.

[3] In the Christian documents of the eleventh and twelfth centuries the Muslims are referred to as Ismaelites, meaning followers of Muhammad, a supposed descendant of Ishmael. In the bible, Ishmael was Abraham's first born child and Isaac was the second child. Islamic traditions consider Ishmael to be the ancestor of many of the Arab people; some Jewish traditions consider Ishmael to be the ancestor of the northern Arabs and all of them Isaac to be a patriarch of the Jews. The Qur'an considers Ishmael to be a prophet and the ancestor of Muhammad. According to this, any Muslim could be called an Ishmaelite as a follower of Muhammad, descendant of Ishmael. Church documents in the thirteenth century refer to all Muslims as Saracens whilst royal documents are somewhat inconsistent referring to them sometimes as Saracens, sometimes as Ishmaelites and occasionally as pagans. They are mentioned as such in the correspondence between the pope and the Hungarian king. The king himself is not consistent in referring to the ethnic and religious groups. In the Agreement of Silva Berehovo or the Golden Bull (1233) he used the following appellations: 'Iudeos, Sarracenos u(e)l Ismahelitas' or 'Iudei, Sarraceni siue Ismahelite' or 'Iudeos, Sarracenos siue Ismahelitas' and even 'Iudei, pagani, u(e)l Ismahelite'. He referred to Muslims sometimes as Saracens, sometimes as Ismaelites and sometimes as pagans in general. Finally, the Arabic trader Abu-Hamid (1100 – 1169/70) noted the differing origins of the two Muslim groups referring to them as Pechenegs (or Maghrebians) and Khwarazmians in his

This paper is intended to explore who had judicial power over Muslims in Hungary and asks three questions in making the exploration. Firstly, what was the legal power that Christian kings and other authorities had over the Muslim population? Secondly, who was competent to judge disputes between Christians and Muslims and finally did Muslims dispense justice within their own community according to Sharia law?

The biggest problem in answering these questions is the scarcity of documentation and, accordingly, information gained from that which does exist must be treated with great caution since corroboration is difficult. I would like to point out that the Muslim population in Hungary through the eleventh and fourteenth centuries was composed of several ethnicities amongst which were the Pechenegs and the Khwarazmians. The Khwarazmians were mainly traders whereas Pechenegs were originally soldiers serving in the king's army although they climbed the social ladder over the centuries.

What Was the Legal Power that Christian Kings and Other Authorities Had over the Muslim Population?

Although Pechenegs initially had the status of serfs and lacked special rights or privileges, their skill as horsemen meant that the Crown soon began to employ them where their rapid mobility was useful. To begin with they were stationed in border areas with orders to patrol and scout out unwanted incursions and were later used by the army as a form of light cavalry. They were also used as patrols on important trading routes within the country and as guardians of public order – 'precones'. As direct subjects

book, The Narrative about Magical Things in Maghrib (Al-Muʻrib ʻan baʻḍ ʻajā'ib al-Maghrib). ... Abu-Hamid lived in Hungary for three years and said that the Muslims living there professed their religion both secretly and publicly. He added that Hungary was an immense country and there were about ten thousand villages (a slight exaggeration!). However, he confessed that he personally visited only four of them, Ján Pauliny, *Arabské správy o Slovanoch (9.-12. storočie)* (Bratislava 1999) 163. In this paper I shall refer to them all as Muslims except when the ethnicity of the people is relevant or known.

of the king with no intermediate overlords these recent arrivals were placed in the group referred to as 'condicionales'. The king could dispose of them at will and transfer them from one part of the country to another depending on where he needed their services.

The Pechenegs' status on the social ladder may have improved later. According to the Chronicon Pictum,[4] whilst the battle for the throne between King Geza I (1074-1077) and his rival ex-king Solomon was going on, some of the Pechenegs settled in the west of the country offered to side with Geza in return for a release from their status of 'condicionales'. Geza appears to have agreed to this bargain since the Pechenegs gained some freedom soon afterwards.[5] We do not know exactly the extent of these freedoms, but even if they included the administration of justice, they would probably still depend on the king as supreme judge.

Disputes that only affected the Muslim community were probably resolved internally but any case that touched, however lightly, upon Christians outside the community would have had to have been referred to the king's courts. It is difficult to say whether ecclesiastical courts were involved at this early stage of the Pecheneg colonization but I am inclined to think that they were not.

Whilst the Pechenegs seem to have had the freedom to profess their religion, the other Muslim groups were treated differently. King Ladislas (1077-1095), the successor to Geza, enacted a law which referred to Muslim merchants. A literal translation of the beginning of the relevant sentence is 'On the

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[4] László Veszprémy, *The Book of the Illuminated Chronicle*, (Budapest 2009); *Képes krónika*, trans. by Janos Bollók (Budapest 2004); *The Hungarian Illuminated Chronicle: Chronica de Gestis Hungarorum*, ed. Dezső Dercsényi. Latin text trans. Alick West. (Budapest 1969); D. Dercsenyi and Sz. Vajay, 'La genesi della Cronaca Illustrata Ungherese', *Acta Historiae Artium* 23 (1977) 1-20; Július Sopko, *Kroniky Stredovekého Slovenska* (Budmerice 1995); *Chronici Hungarici Compositio saeculi XIV*, ed. Emerich Szentpétery, *Scriptores rerum hungaricarum* (*Budapest 1937, repr.*Budapest 1999).

[5] Sopko, *Kroniky Stredovekého Slovenska* 49-50.

merchants, who are called Ishmaelites, if after baptism they are found to have returned to their old law . . '.[6] It is interesting that Ladislas uses the words 'ad legem' rather than 'ad religionem'. This may imply that what he was most concerned about was that by apostatising the men in question removed themselves not only from the spiritual power of the Church but also from his secular courts' jurisdiction.

Furthermore Ladislas' regulation spelt out that, should a baptized ex-Muslim merchant revert to Islam, he would be removed from his home village and exiled to a different one. However, those who proved themselves innocent by ordeal (iudicium) would be permitted to remain in their own dwellings.[7] Resorting to the ordeal to prove the innocence or otherwise is less brutal than it appears at first sight. The accused had the right to refuse to take part in the ordeal, in which case his guilt was assumed. If however he agreed to participate, then he would have been required to spend six days with the priest who was to perform the ordeal.[8] A practicing Muslim would find it impossible to spend

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[6] Levente Závodszky, ed. *A Szent István, Szent Lászlo es Kálman korabeli törvenyek es zsinati határozatok forrásai*, (Budapest 1904, reprinted Budapest 2002) 159. *Decreta Regni Mediaevalis Hungariae 1000-1301*, edd. János M. Bak, György Bónis, James Ross Sweeney (3 vols. Bakersfield, Calif. 1989) 1.57 (henceforth DRMH 1).

[7] Závodszky, 159; DRMH 1.57.

[8] Details on the ordeal procedure in Anglo-Saxon England can be found in Felix Liebermann, ed. *Die Gesetze der Angelsachsen* (3 vols. Halle 1898-1916) 2.2, 601-604, 'Ordal'; On this evidence, Ian C. Pilarczyk, 'Between a Rock and a Hot Place: Issues of Subjectivity and Rationality in the Medieval Ordeal by Hot Iron', *Anglo-American Law Review* 25 (1996) 87-112 at 88, 98 described the procedure as follows. Before the ordeal, the accused would have spent three days with the priest who officiated over it, partaking in mass, prayer, and so on. After the ordeal another three days were spent with the priest before the 'wound' was unwrapped and the priest announced the result. These six days spent together would have permitted a priest to glean additional information about the accused man's guilt or innocence. Such information supplemented that which a priest received from observing a defendant's willingness to undergo the ordeal, facilitating his ability to identify (and thus condemn) a guilty defendant who took his chances with the ordeal. The text that is cited by Pilarczyk does indeed describe the accused going to the priest and hearing mass on each of three days

six days without praying.[9] If the accused was not an apostate, that would have become obvious to the priest who in all probability would have arranged a positive outcome. However, there was a get-out clause for those Muslims who had opportunistically converted to Christianity. Denial of their Muslim faith was allowed by the doctrine of takiyya which permitted the denial if they would otherwise be in mortal peril. Islam has never obligated the faithful to subject themselves to martyrdom.

Canon law had provisions dealing with a Christian layman's apostasy and clerical one.[10] Ladislas took it upon himself to add some more regulations. Ladislas' decision to use exile as a punishment for apostasy was clever. The guilty party would have been forcibly removed to a village where he was unlikely to be welcome. His property and assets would be dispersed, although Ladislas makes no ruling about who gets them, and his family would be destitute; no-one would have dared to help a family of an apostate. This law must have been widely known; since it was made in synod it must have been promulgated in every parish in the country.

How and why the merchants converted to Christianity must be left open to conjecture, but it would not be unreasonable to assume that the conversion was forced since Muslims would have been aware that apostasy from Islam carried an automatic death sentence.[11] Even if the merchants had converted voluntarily,

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before the trial but that does not necessarily imply that he spent the whole of those three days with the priest. The provisions are often not very precise. See Karl Zeumer, ed. *Formulae Merowingici et Karolini aevi* MGH LL nat. Germ. 5.1877. This said, I believe it would have been highly unlikely that a proband would have been allowed to leave the ecclesiastical institution since that would defeat the purpose embedded in the ritualistic and liturgical aspects of the procedure.

[9] Prayer is required five times a day – al-Salat.

[10] See Hostiensis, *Summa* to X 5.9 (Venice 1574) col. 1547.

[11] Tuhfat al-muluk" of Abu Bakr al-Razi (d. 661/1263), 357-358.
http://ia600606.us.archive.org/30/items/vcdy4/vcdy4.pdf
'The male apostate will be urged to return to Islam. He will be imprisoned for three days, and if he does not reverse his decision, he will be put to death. However, a woman will not be killed, but we will imprison her until she returns

the sincerity of their newly-found beliefs must remain in question for much the same reason. To be seen as Christians by the Hungarians would have been advantageous to them but to be able to swear to their fellow Muslims that they were still true believers in Islam and that their conversion was false might have saved their own lives. Ladislas was probably aware that the converted merchants might have feigned their sincerity, and he was therefore trying to make the point that apostasy from Christianity was also punishable.

It seems obvious that this law was probably not aimed at the Muslim population in general but only at those Muslims who came to Hungary to pursue their trading activities – most probably the Khwarazmians. It may have been intended to encourage the traders to join the official religion of the kingdom. Its wording implies that smart traders had converted but only in order to show their political correctness and within their own communities they happily carried on observing their original Islamic beliefs.

Ladislas' ruling would make some sense if we accept that these Muslim merchants no longer engaged in international trade, which was mostly handled by Jews, and instead engaged in trading with salt among other 'banking' and commercial activities. Should an ex-Muslim trader come into contact with an external Muslim trader, the latter would have had to follow the Qur'anic teaching on killing a convert, which was the punishment for an apostate. Evidently, the Muslim traders decided to settle in Hungary and carry on with domestic trade but, of course, Ladislas was worried about them spreading the word of Islam amongst the Christian population. His ruling would turn out to be nonsensical if the Hungarian Muslims had still carried on with their long-distance trade.

However, at the same time Ladislas did not see it necessary to rule on the rural Muslim population who lived in secluded villages and had little opportunity to meet with Christians. The fact that not all Muslims were treated equally regarding their religious

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to Islam. Similarly for a child who is in the age of discernment'. I am grateful to Dr. Farid Bouchiba for bringing this passage to my attention.

needs is partly supported by a statement in Abu-Hamid's travelogue, which was written sometime after 1150, that Khwarazmians were employed in important state offices and therefore could not openly profess their religion.[12]

While Ladislas was concerned with the apostasy of converts his successor, Coloman (1095-1116), aimed at rooting out Islam itself. He attempted a radical change in the everyday life of Muslims in his kingdom. Coloman did not see the church as being qualified to stop the overt profession of Islam since its power derived from Christian belief and canon law would have been ignored by Muslims. He decided instead to use his own royal power to sort the problem out.

In the first of his various articles ruling on Muslims he co-opted the help of his subjects by stating that Muslims caught displaying behavior typical of Islam, such as fasting (Ramadan), refusing to eat pork, ritual ablution or other misbehavior (referring to the rest of the five Islamic pillars) must be referred directly to himself for judgement and punishment,[13] and the accuser would be rewarded with a portion of the accused man's property. Although there appears to be no prescribed punishment for the Muslim, this does not mean that there was none; the reward for the informer implies that, at the very least, the unfortunate Muslim had his property confiscated.

In order to force the Muslim community into Christianity, in the following article, Coloman required each Muslim village to build a church, and provide an endowment. After it had been built, half the Muslims were to leave the village and settle in another place 'and they [the remainder] shall thenceforth live united in custom together with us in that house which is one and the same Church of Christ, harmoniously in one religion'.[14] The rationale

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[12] Pauliny, *Arabské správy* 155.

[13] Závodszky, *Szent István* 189. DRMH, I, 28, n. 46. It is worth noting that DRMH has an error in the translation of the Latin words 'regi deputentur'. It has 'shall be considered to belong to the king'; the correct meaning is 'shall be referred to the king'.

[14] Závodszky, *Szent István* 189-190.

was probably that the least intransigent would be allowed to stay and the more die-hard would leave. The sincerity of the conversion must remain in doubt. An aversion to moving to an unknown future amongst strangers must have encouraged those who stayed to lie about their real beliefs. When dealing with Christians they would act as if they were Christians and when in contact with Muslims — at home or within their own community — they would act as Muslims. The article did not specify what was to happen to the vacated properties, though filling them with committed Christians would have helped to keep the new converts in line.

Coloman also regulated marriage between Muslims and Christians saying that 'no Ishmaelite father should dare to marry his daughter to anyone of his own people, but only to one from among us Christians'.[15] Here we have a problem. What was the intention of King Coloman with regard to Muslim men? Did this law imply that a Muslim man could not marry at all? If it forbade marriage to Muslim men, this might indicate a clear attempt to eradicate Islam in the Hungarian kingdom, because the Muslim women would have been required to convert to the religion of their Christian husbands.

I am inclined to believe that none of these three laws was applied, or quickly fell into abeyance, because a later successor to Coloman took a radically different view of the relationship between Christians and Muslims. Geza II (1141-1162) proved to be sympathetic to Muslims. According to the merchant Abu-Hamid, Geza II allowed Muslims to marry without restriction.[16] So only twenty-odd years after Coloman's restrictive legislation, the new king not only allowed Muslim men to marry, but also allowed them to follow their normal pattern of Islamic marriage.

The peculiarity of the Muslim position within the kingdom of Hungary is best illustrated by the evidence given by the Arab geographer Yaqut in his *Mu'djam al-buldan*. This was written in 1220 and in it Yaqut records meeting a group of Hungarian students of Islam in Aleppo. One of the students tells him:

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[15] Závodszky, 190.
[16] Pauliny, 165.

> Our country is situated beyond Constantinople among the states of one of the Frankish peoples called Hungarians. Although Muslims, we obey their king. We occupy about thirty villages on the far edge of this country, each of which approaches in size a small town; but the Hungarian king prevented us from surrounding any of them with protective walls for fear that we might revolt against him. The Christians surround us on all sides: to the north are the Slavs, in the south the states of the pope, whom the Christians regard as a vicar of the Messiah, and who is for them [the same] as the Khalifa for the Muslims. To the west is the country of the Andalos (northern Italy and France) and to the east the empire of the Greeks of Constantinople. We speak the language of the Franks; we live alongside them, we serve in their armies and we fight with them against whoever they do, seeing as their enemies are those of Islam.

This description provides circumstantial evidence that certainly some Muslims in Hungary had achieved a stable position within society. Despite not having been culturally integrated into the mainstream Christian population, they acknowledged their duty of service to the king and it is likely that they also accepted the king's courts as arbiters in secular disputes.

Who was competent to judge disputes between Christians and Muslims?

According to the privilege that Andrew II granted to the Church, if a clergyman had a case against laymen he was bound to bring it before a secular judge. If a layman had a case against a clergyman he was bound to ask for redress from an ecclesiastical judge. This would hardly apply to the disputes between Christians and Muslims. A Christian was as much a subject of the King as the Muslim was; however, there may have been variations according to the status of the Christian.

Muslim individuals versus Christian individuals

One of the few sources of information about disputes between Muslims and Christians is the thirteenth century

Registrum Varadiensis. The register recorded all cases referred to the Bishop of Varad in which ordeal could have been used to determine the truth or falsehood of witness statements. Ordeals were reserved for cases where judges could not confidently conclude the defendants' guilt or innocence; it was used for both civil and criminal cases.[17] The common denominator was that all were crimes of stealth such as adultery, disputed paternity, robbery, homicide and arson, heresy and witchcraft. Although absolute certainty in ascertaining the facts was often elusive, uncertainty had to be avoided as intolerable. The records cover two decades of the thirteenth century (1210-1235) — a time when the popes, much under the influence of canonists, were already condemning the practice; and clerical participation in ordeals was forbidden by the Fourth Lateran Council in 1215.[18] Among the three-hundred and eight cases recorded there are precisely three which concern Muslims laying charges against Christians; obviously charges against Muslims would not have been referred to the bishop since an ordeal was not an option for an unbaptized person.

The first case dates from 1210. Two Muslims, Elias and Pentek from the village of Nyir, accused two groups of 'jobagiones' of theft (latrocinium). Each of the groups supplied one volunteer to undergo the ordeal and in this case the innocence

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[17] Before the thirteenth century, a panel of judges, or court presidents, usually heard criminal cases. Depending on the court, judges included royal justices, clerics, counts, and local landowners. Judges decided whether an ordeal was required and, if so, which one. Clerics administered the ordeals.

[18] Pope Innocent III at the IV Lateran Council (1215) rejected this practice, since it was considered blasphemous as it was asking God to interfere and because the clerics administered the ordeals and a good deal of mental and physical violence was involved. See John Baldwin classic study, 'The Intellectual Preparation for the Canon of 1215 Against Ordeals', *Speculum*, 36 (1961) 613-636; Robert Bartlett, *Trial by Fire and Water: The Medieval Judicial Ordeal* (Oxford 1986); and John W. Baldwin, 'The Crisis of the Ordeal: Literature, Law, and Religion around 1200', *Journal of Medieval and Renaissance Studies* 24 (1994) 327-353.

of the accused was proved.[19] The second example is unusual because it records three trials running concurrently. The accusers in all three trials were the same two Muslims, Elias and Pentek. The alleged crime is again theft.[20] Rather than allowing a representative from each of the three groups being tried, to undergo the ordeal, the bishop seems to have decided to test each defendant. The result was that all seven men were found guilty. The final case appears to be a civil dispute over money owed by some peasants (villanos) from the village of Cegan to a Muslim called Texa from the village of Nyir. The sum owed was twelve marks. The original hearing was held before 'comes' Alexander, a judge of the king's court. Alexander sent his assistant, the 'pristaldus' Stephen, to Varad to investigate the merits of the case. It must be presumed that Texa and the peasants accompanied Stephen since the only reason for going to Varad would have been for the process of the ordeal. A settlement was reached before the ordeal was administered and it was agreed that the peasants were to pay Texa five marks less four dinars (fertone minus) as well as the costs of the judge. In turn, Texa was to pay the costs of Stephen.[21]

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[19] Janos Karacsónyi-Samuel Borovszky, *Regestrum Varadinense examinum ferri candentis ordine chronologico digestum, descripta effigie editionis A. 1550 illustratum sumptibusque Capituli Varadinensis Lat. Rit.* [hereafter RV] (Budapest 1903) 14 n. 41, 229 n. 209: 'Ismaelite de Nyr, Iliaz et Pentek, coadiuvantibus aliis impetiere ioubagiones Martini comitis ne Villa Vamus de latrocinio, scilicet Egud, Botyka, Zobotha, Karasun, Torka, Zekus, Ioacyn, Tukay, Iroslou, Iacobum, et item ioubagiones monasterii de Taplucia, pertinentis ad genus Mizidaczij, de eadem villa, quorum nomina sunt haec, Benedic, Nunige, Zoboslo, Borathe, Henuc, Lusutha, Zamacziomut, BUchi, Tomas. Pro his omnibus Egud et Benedictus pro se ipsis et aliis, portato ferro, iustificati sunt, iudice Bank, pristaldo Bela'.

[20] RV 13 n. 38, 276 n.326: 'Ismaelitae de Nyr, Elias et Peter, coadiuvantibus aliis, impetiere Joannem, Costam et Micoum, de villa Salamonis de latrocinio, iudice Bank comite, pristaldo Bola. Praedicti Joannes, Costa et Mikon combusti sunt. Similiter filius Pose, scilicet Sentes et frater eius uterinus, Petur, eodem iudice et eodem pristaldo et adversariis eisdem existentibus, combusti sunt. Similter Hernicus et Gregorius de villa Bis combusti sunt'.

[21] RV n. 139, 203 : 'Texa, Ysmaelita de Nyr, impetiit villanos Cegan pro marcis duodecim, Alexandro comite, iudice a rege delegato, qui per pristaldum,

These disputes were to be decided in the seat of the bishop but in the presence of the royal judge (iudex and pristaldus). On one occasion, the Register mentions 'pristaldus' Nicolas 'de villa' Arpas.[22] Since Arpas was a village with a Muslim population, it would appear to have been convenient for the authorities to use him in the case where one disputing party was a Muslim.

Apart from revealing the dynamics of unilateral trials such as the ordeal, these cases confirm that Muslims were never required to undergo the test of the ordeal themselves, which would have been pointless since this procedure could be used only on baptized people. Secondly, the cases show that Muslims were trusted and respected citizens, whose word had the same gravitas as that of a Christian in terms of commencing legal actions against another party.

Muslim community versus appointed Royal dignitary

As further evidence dating from the thirteenth century, there is a letter (dating from 1224) issued by the Count Palatine, Iula, the most powerful secular dignitary after the King, to the Pechenegs in the village of Arpas. It clearly states that the Pechenegs came under the jurisdiction of the Count Palatine, who also had the power to appoint their 'comes'. The letter was sent to confirm the resolution of a complaint by the inhabitants of Arpas that their 'comes', Lucas, an appointee of the Count Palatine, had failed to respect their privileges (eorum libertas ab antiquo instituta).[23]

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nomine Stephanum, Varadinum missi, taliter convenerunt, quod predicti villani darent adversario suo quinque marcas, fertone minus, iidem iudici satisfacerent: ius autem pristaldi Texa persolveret'.

[22] RV n.20, 7.

[23] 'Iula Palatinus, et comes Suproniensis, ... ad universorum volumus noticiam pervenire, quod Bisseni de Arpas, ad nos, videlicet ad Palatinum pertinentes, ad nostram accedentes presenciam, conquesti sunt, quod eorum libertas ab antiquo instituta, per Lucam eorum Comitem, a nobis constitutum, fuisset in plurimis

In order to investigate the complaint, Iula had sent his deputy, Martinum de Pok (iudicem eis super hoc constitueremus vice nostri), who had confirmed the validity of their grievance. The letter went on to say that in order to keep an eye on things, several times a year the Count Palatine would be sending the 'Comes curialis' to whom they could address any future concerns.[24] The expression used is 'et causas, quae referuntur, iudicare', which could also be interpreted to mean that the 'Comes curialis' would actually decide any cases presented to him. This interpretation would however raise the question of what kind of cases he was bound to decide and whether this threatened the autonomy of sharia law within the community.

As an aside, according to the Golden Bull of 1222 article 8, 'The Count Palatine shall judge without differentiation all the men of our realm … but cases concerning nobles condemned to capital punishment and loss of possessions shall not be concluded without the king's knowledge. He shall have no deputy judge except for the one at his own court'. According the same article, 'Our judge royal (curialis comes noster) shall be able to judge all while he resides in our [the king's] court and shall have the right to pass sentence anywhere in cases initiated at the court, but when he stays on his estates he shall not be able to dispatch bailiffs or cite parties to a suit'. It is interesting that the Count Palatine, the supreme ordinary judge would be sending the 'Comes curialis', the king's extraordinary judge.

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diminuta', ed. György Fejer, *Codex Diplomaticus Hungariae ecclesiasticus et civilis* (Budae1829) (hereafter CDH) 3.1.362-364.

[24] 'Curialis comes debet saepe per annum circumire, et causas, quae referuntur, iudicare. . . Ut autem huius causae discussio legitima, seu libertatis reformatio, nullis valeat temporibus revocari, rei seriem in presentem paginulam fecimus adnotari'. CDH 3.1.362-364.

Muslim communities versus Church

There is indirect evidence of the high social and economic standing of the Pechenegs. It shows them as being reliable subjects of the king who were on many occasions rewarded with land, the highest reward that one could get as acknowledgement of his services.

The evidence is contained in a letter issued by the Count Palatine Dionysius regarding lands, the ownership of which was disputed between a Cistercian monastery and the Pechenegs. It is mentioned that the king, while recalling 'omnes terras Byssenorum alienatas' (all the lands which were previously taken away from Pechenegs) took away from the monastery land which the monastery could prove had been legally donated to it by the king at a previous time. We are informed that the king then decided to give the Pechenegs different lands in exchange.[25]

It would appear that the Pechenegs had lost several properties as a consequence of the royal habit of constantly redistributing lands — a generosity to which there were no limits, as Andrew II put in his own words. Naturally, the Pechenegs objected. They had few options and had to bring the case to the very person they were complaining about, the king himself. The king evidently recognized the unsuitability of his behavior and

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[25] Hans Wagner, *Urkundenbuch des Burgenlandes und der angrenzenden Gebiete der Komitate Wieselburg, Odenburg und Eisenburg*, 1: *Die Urkunden von 808 bis 1270* (5 vols. Publikationen des Instituts für österreichische Geschichtsforschung 7.1; Graz-Köln 1955) 1.161-162: 'Dyonisius dei gratia comes palatinus omnibus presens scriptum inspecturis salutem et omne bonum. Noverint universi, quod dum de mandato domini regis omnes terras Byssenorum alienatas revocaremus, inter cetera pro quadam terra nomine Legentou circa Galus conventus Sancte Crucis de Austria (Heiligenkreuz), quem indebite possedisse credebamus, citari per Benc iussimus, qui coram nobis assistentes super predictam terram privilegium regis et litteras precedentium iudicum nobis presentaverunt. Nos vero intuentes ipsos iuste possedisse et rege referente nobis, quod pro sepedicta terra Byssenis aliam terram dedisset, confirmavimus predicte ecclesie possidere perpetualiter et nos ipsis Byssenis terram, quam dominus rex eis contulit in concambio, litteris nostris cum sigilli nostri munimine in perpetuum roboravimus'.

tried to correct the 'mistake'. However, on this occasion, he clashed with the interests of another powerful community — the church. It was almost impossible to get donated land back from the church since all gifts once given were inalienable; a legal concept valid since Justinian's time and, of course, warmly embraced in canon law by the church and the papacy.

The aforementioned letter explains the attitude of the highest officer in the realm, the Count Palatine Dionysius, towards the Muslims as much as it gives some background to the charges which the Curia had raised against him. It is almost certain that the charges were based on complaints from local prelates. In 1232 the Archbishop of Esztergom proclaimed an interdict over Hungary. In the same document that promulgated the interdict, the archbishop also proclaimed several excommunications: amongst others was the one of the Count Palatine Dionysius who, amongst other charges, was accused of settling 'many Saracens and false Christians on his properties'.[26]

Christians versus Muslims

The last case I wish to present confirms once again the value of the Muslims to both the kingdom and the king. Since a Muslim with a complaint against a Christian would have a complaint resolved in the king's courts, how would the reverse be treated? It would seem logical that this too would be a matter for the secular lawyers. Instead, as is confirmed by a letter of 1236, the matter was referred to the ecclesiastical courts possibly because of the threat of religious contamination or maybe to prevent an attempt to force an out-of-court settlement in the face of severely protracted ecclesiastical judgments. Unfortunately, the

[26] Vatican Archives (ASV) Miscell. Arm. XV 1, fol. 273v-274r, ed. Augustin Theiner, *Vetera monumenta historica Hungariam sacram illustrantia (1216-1352)* [hereafter VMH] (Roma 1859) n. 187; ed. F. Knauz *Monumenta ecclesiae strigoniensis* I [hereafter MES] (Strigonium 1874) n. 327; *Codex diplomaticus et epistolaris Slovaciae*, (hereafter CDSl I) ed. Richard Marsina, (Bratislava 1971) 273 n. 384.

letter in which we learn of the value of the Muslims to the king does not give any clues how the courts enforced any penalties imposed, although it does give an idea of how long and drawn out ecclesiastical justice could be.

The letter was from Pope Gregory IX and was addressed to the Archbishop of Kalocsa and the Bishops of Vac, Eger, Csanad and Varad. Gregory was giving a ruling on a request made by King Andrew II to vary the frequency of the ecclesiastical hearings of disputes between Christians and Muslims. The original frequency laid down by Cardinal Pecorari, Apostolic Legate to Hungary, was that the hearings were to be held annually. Andrew had argued that since the cases often lasted longer than a year, he was being deprived of his Muslim subjects. Gregory acceded to Andrew's request and changed the frequency to a bi-annual one.[27]

Sharia

While the position of a Muslim laying a complaint against a Christian is fairly straightforward, by the end of the thirteenth century the position of Muslim against Muslim seems to be slightly less so. It may be assumed that left to their own devices,

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[27] Vatican Archives, Reg. Vat. 18, fol. 68v, An. IX. Ep. 218 'Gregorius episcopus uenerabilibus fratribus Colocensi archiepiscopo, Waciensi . . . Agriensi . . . Cenadiensi et Waradiensi Episcopis. Carissimus in Christo filius A. illustris Rex Ungarie nobis intimare curauit, quod Venerabilis frater noster . . . Prenestrinus episcopus tunc apostolice sedis legatus constituit, ut Christiani, quos cum paganis Regni sui discussione super hoc singulis annis facta reperiri contigerit ab illis debeant auocari, uobis in quorum diocesibus degunt pagani predicti super hoc executoribus deputatis. Cum autem sicut Rex ipse asserit, non annua si annuatim fieret,sed continua hec discussio esset potius, cum per anni spatium consummari non posset, et sarraceni iugiter huiusmodi occupati debita sibi nequirent seruitia exhibere, deuote ac humiliter supplicauit, ut prouidere super hoc misericorditer dignaremur. Nos autem uolentes ipsius Regis indempnitatibus quantum cum deo possumus precauere, fraternitati uestre per apostolica scripta stricte mandamus, quatenus discussionem huiusmodi de biennio in biennium faciatis. Datum Perusii II Kal. Sept. Anno Nono'.

Muslims would have preferred to have their legal problems sorted out under Sharia law.

The only mention of a Muslim judge by name is that of Abu-Hamid, who acted both as *imam* and *qadim* to the Hungarian Muslims in the twelfth century. Ironically, it is his own writings which alert us to his existence. If we are to take his statements at face value, they imply that the king, Geza II, had either totally withdrawn his jurisdiction over Muslims or that he had limited his own authority and left purely Islamic matters to the jurisdiction of the 'qadim'. This situation may have existed long before Geza II ascended the throne so that, in the account in Abu-Hamid's travelogue, he was only legalizing the existing status quo.

Abu-Hamid's comment that he left his older son Hamid, who was precisely thirty years old and was married to two Muslim women — the daughters of two well-to-do Hungarian Muslims who both gave him sons — implies that his son helped to raise the religious standards of the Hungarian Islamic community as Abu Hamid boasts that his son was a serious scholar. Hamid may well have acted as 'qadim' and continued the mission started by his father.

According to Yaqut in 1220, a group of Muslim students from Hungary informed him that they professed the Abu-Hanifa tradition. There is however little other evidence of the schools of thought that the Hungarian Muslims followed.[28]

However, a layer of complication was provided by the existence of the office of 'Comes Byssenorum', or Count of the Pechenegs. His function, it would appear, was to ensure adherence to the king's law in communities that were completely Islamic. Whether this 'comes' was entirely successful can only be the subject of conjecture, but there was certainly an effort being made to ensure that all communities adhered to the same secular law.[29]

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[28] M. Reinard [Joseph Toussaint], *Géographie d' Aboulféda*, 2: *Contenant la premiére moitié de la traduction du texte arabe* (Paris 1848) 2.294-295.

[29] Hansgerd Göckenjan, *Hilfsvölker und Grenzwächter im mittelalterlichen Ungarn* (Quellen und Studien zur Geschichte des östlichen Europa 5; Wiesbaden 1972) 105.

Each 'Comes Byssenorum' had judicial jurisdiction over the Pechenegs within a single county. He acted together with four advisers until 1352 when this institution was abolished by the Angevin King Louis (1342-1382) who elevated all the free Pechenegs in the County of Alba[30] into the ranks of Hungarian nobility.[31] The same happened a half century later to the Pechenegs in the County of Tolna, under King Sigismund (1387-1437).[32] Subsequently, judicial jurisdiction over Pechenegs in these two counties passed on to the 'zhupans' — the counties' highest officers — as was the practice for all noblemen.

In order to understand the position of the Pechenegs, it is useful to make an analogy with another privileged group within Hungary: the German community from Spiš.[33] The county's 'zhupan' was permitted to judge neither them nor their subjects with the exception of cases of theft. Minor disputes within the community were to be decided by a judge that the community had freely chosen. Should there be a dispute of the sort that could be decided by a duel, the case would belong to the king's jurisdiction; the 'zhupan' could not just come into the community and initiate proceedings against the accused.[34]

The Khwarazmians seem to vanish almost completely from the historical record by the fourteenth century. However, the Pechenegs, living as they did in self-contained and self-sufficient villages, certainly lasted longer. The existence of the office of 'Comes Byssenorum' until the middle of the fourteenth century

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[30] County of Fejer, now in Hungary.

[31] János Károly, *Fejér vármegye története* (Székesfehérvár 1896) 1.563-565.

[32] Miloš Marek, *Cudzie etniká na stredovekom Slovensku* (Martin, 2006) 303; György Györffy, *Besenyők es magyarok* (Budapest, 1989) 149, Elemér Mályusz, *Zsigmondkori oklevéltár* I. (1387–1399) (Magyar Országos Levéltár kiadványai, II. Forráskiadványok 1. Budapest, 1951) 691, (n.6208).

[33] Nowadays in Slovakia. Scepus in Latin, Szepes in Hungarian, Zips in German.

[34] (7 June 1243) *Codex diplomaticus et epistolaris Slovaciae*, ed. Richard Marsina, (Bratislava 1987) n. 131, 88-89 'comes . . . nec ipsos . . . possit iudicare, nisi in causis furti . . . Super causis autem minutis inter se ortis diffiniendis, ipsimet sibi iudicem possint eligere quem volent'.

and his presence in many trials involving them demonstrates a physical presence of Muslims in Hungary at that time.

The occasional Pecheneg pops up in miscellaneous documentation up until the end of the fifteenth century but we can no longer be certain of their religious persuasion. One example is one Stephan Bissenus (the Pecheneg) who is recorded as working as 'summus dispensator Regie Maiestatis'.[35] It is more than probable that the Islamic influence in Hungary had finally come to an end only to be reborn after 1526 with the Ottoman invasions. This new more pervasive influence was to last until the end of the 18th century.

Conclusion

Muslims, meaning mainly the Pechenegs — the Khwarazmians were not allowed to openly profess their religion — were subject to three different legal systems. Firstly, sharia law, administered by a 'qadim' and possibly 'a mufti', applied in cases of family law, dealing for instance with marriage issues, inheritance and patronage of orphans. I think that sharia law could have been in use during the reign of the Arpadian kings — that is until 1301. With the accession of the Anjou dynasty in the 1320's, it is hard to believe that they were still enjoying the same religious freedom. One reason for assuming this would be that the disputing parties in the 13th century bear non-Christian names whereas the fourteenth century records show fully Christianized names which might be an indication of conversion. The second system was possibly canon law, although we cannot be completely sure; this may have been administered by a bishop in cases with Muslims defendants and Christian plaintiffs. It is extremely likely that these cases were strongly biased towards the plaintiff. Why Andrew put these cases in the hands of the Church is open to question but a

[35] Magistro Stephano filio Gregorii de Berench, nostrae Maiestatis summo dispensatori CDH 10.4 722-725, n. 337 says nowhere that he was a Pecheneg; 8.5, 816 n. 392 anno 1404 'Relatio Stephani Bisseni summi Dispensatori Regie Maiestatis'.

clue in Pope Gregory's letter of 1236 hints that it was a concession to demands by Cardinal Pecorari. Finally, in trials where Muslims were the plaintiffs suing Christians, the case would finish in the royal jurisdiction. Andrew had neatly balanced the anti-Islamic bias of the Church courts. While the system ended up being more complex than it need have been there are definite indications that during the thirteenth century, Andrew and his successors were more interested in avoiding internal inter-religious conflicts by giving a balanced judicial system to the Muslims than in sticking rigidly to the church's anti-Islamic stance.

I interpret the efficiency of dealing with cases where Muslims were plaintiffs to be an excellent example that the Muslims were not only respected citizens but that their peaceful living together and alongside the rest of the prevalently Christian population resulted in a real 'convivenza'.

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Cicerón y Graciano

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I. *Secundam Gratianus in xxxvi. causas*

1. En su Historia de las fuentes del Derecho canónico, Alfonso María Stickler describió la *Concordia discordantium canonum* (CDC) como compilación y como tratado. El *Decretum Gratiani* (DG) es, ante todo, *terminus ad quem*: una colección universal y sistemática de las normas canónicas del primer milenio cristiano que superó y eliminó las colecciones precedentes. Al mismo tiempo, la obra es *terminus a quo*: un tratado, un libro de escuela, el primer manual de Derecho canónico, el origen de una Ciencia nueva, con objeto y método propios.[1]

Graciano — continuaba Stickler — no se limitó a yuxtaponer textos, porque su intención era buscar la conciliación. Con este fin propuso unos principios, proposiciones y disposiciones del Derecho (distinctiones) y unos casos, esto es, unas acciones judiciales (causae), que originan controrversias jurídicas (quaestiones).[2] Para probarlas, contradecirlas o conciliarlas enfrentó textos pro y contra. Para resolver las discordias entre argumentos de autoridad, aplicó las reglas de interpretación que Pedro Abelardo había expuesto de manera sistemática. Según Stickler, Graciano atendió a la significación de

[*] El autor quiere dejar constancia de su agradecimiento al personal de la *Biblioteca de la Facultad de Ciencias Jurídicas* y de la *Biblioteca General* de la Universidad de Las Palmas de Gran Canaria, así como a la *Fundación Derecho y Europa* (A Coruña, España) por la ayuda prestada para la elaboración de este estudio.

[1] Alfons M. Stickler, *Historia iuris canonici latini: Institutiones academicae. I. Historia fontium* (Taurini 1950) 201: 'collectio universalis et systematica' y 'primus liber manualis iuris canonici'.

[2] Ibid. 208-209: 'Textus non simpliciter iuxtaponit, nec ad finem compilatorium alios aliis adnumerat, sed potius . . . ad finem conciliationis inducit. Quem in finem ponit principia, propositiones, dispositiones iuris (Distinctiones), casus i. e. actiones iudiciales (Causas), ex quibus nascuntur et enucleantur variae quaestiones iuridicae (Quaestiones)'.

las palabras; al tiempo, al lugar y a los destinatarios originales de las normas; a la autoridad de la fuente; y a la índole de la disposición contraria: si es un consejo, un precepto, una excepción, una dispensa, o bien una regla común.[3] Así fue como 'el padre de la ciencia del Derecho Canónico' armonizó disposiciones en apariencia contradictorias.

2. No es posible entender el origen del DG a partir de las técnicas de composición propias de las compilaciones. El uso transformó en colección el escrito mediante el que un particular[4] explicó, alrededor de 1139, el sentir de los Santos Padres sobre puntos controvertidos de la disciplina eclesiástica. Los retos a los que se enfrentaba eran dos. Primero, racionalizar un proceso milenario de acumulación de autoridades heterogéneas. Segundo, armonizar esa tradición con las reformas que impulsaron los

[3] Stickler, *Historia iuris* en su opinión, la dependencia de G respecto a Pedro Abelardo era indirecta (a quo pendet saltem indirecte), p. 209).

[4] Conocido, desde el siglo XII, como Gratianus, el 'maestro Graciano', el 'monje Graciano' o incluso el 'obispo Graciano'. La atribución descansa sobre testimonios externos (cf. José M. Viejo-Ximénez, 'Graciano', J. Otaduy-A. Viana-J. Sedano, dirs. *Diccionario General de Derecho Canónico* 4 [Pamplona 2012] 239-246; y Kenneth Pennington, 'The Biography of Gratian, the Father of Canon Law', Villanova Law Review 59.4 [2014] 679-706). La obra solo suministra referencias anónimas. En D.5 pr., una primera persona del plural marca un período de la exposición: ' . . . Nunc ad differentiam naturalis iuris et ceterorum reuertamur'. Reaparece en D.15 pr.: 'De naturali iure et constitutione uel consuetudine hactenus disseruimus differentiam qua ab inuicem discernuntur assignantes; nunc ad ecclesiasticas constitutiones stilum uertamus, earumque originem et auctoritatem, prout ex libris sanctorum Patrum colligere possumus, breuiter assignantes'. En D.23 pr. presenta un tema nuevo: 'Nunc a summo incipientes et usque ad ultimum gradum descendentes qualiter quisque eorum debeat ordinari, sanctorum auctoritatibus ostendamus'. También se le escucha en D.25 d.p.c.3: 'Nunc autem per singulos gradus recurrentes . . . breuiter consideremus. Ac primum . . . diligenter inuestiguemus . . . '. En D.81 pr. introduce el epílogo de la primera parte: ' . . . Verum quia aliquantulum diffusius in is immorati sumus, precedentibus coherentia quedam sub epilogo ad memoriam subiciamus'. En D.101 d.p.c.1 dice: 'Hactenus de electione et ordinatione clericorum tractauimus. Nunc ad symoniacorum ordinationes transeamus . . . '. Al final de C.1 q.7 d.p.c.27 anuncia: ' . . . Et ut facilius pateat quod dicturi sumus . . .'. Estas palabras, ¿son del maestro-monje-obispo G? ¿de alguno de sus colaboradores directos?

romanos pontífices desde Gregorio VII.[5] La multiplicación de colecciones y de escritos polémicos a partir del último cuarto del siglo XI[6] pone de manifiesto las dificultades que encontró el poder eclesiástico ante un escenario que reclamaba sabiduría y prudencia. Este fue el camino por el que transitó G: interpretar y aplicar del Derecho mediante el concurso de razones y autoridades.[7] La razón de la autoridad y la autoridad de la razón fortalecieron la disciplina y orientaron el ejercicio de la *potestas* en la Iglesia.

Los estudiosos de la historia de las fuentes canónicas han destacado esta singularidad de la CDC. Desde el siglo XIX, la atención se ha centrado en las herramientas intelectuales que utilizó el maestro Graciano para concordar/armonizar 'auctoritates', así como en sus posibles modelos de inspiración.[8]

[5] Cf. Stephan Kuttner, *Harmony from Dissonance: An Interpretation of Medieval Canon Law* (Latrobe 1960) 6-9 (reimpr. *The History of Ideas and Doctrines of Canon Law in the Middle Ages* [Hampshire-Brookfield 1992] I con *Retractationes* p. 1-2 y New *Retractationes* p. 4); y 'Urban II and the doctrine of interpretation: a turning point?', SG 15 (1972) 53-85 (reimpr. *The History of Ideas and Doctrines* IV, con *Retractationes* p. 5-6 y New *Retractationes* p. 5-6).

[6] Stickler organizó este material en tres grupos: colecciones de la reforma gregoriana estricta, colecciones de la reforma gregoriana evolucionada y escritos y colecciones que preparan la CDC (*Historia iuris* 160-196). La clasificación conserva su valor pedagógico. Para la bibliografía reciente cf. Lotte Kéry, *Canonical Collections of the Early Middle Ages (ca. 400-1140)* (History of Medieval Cannon Law; Washington 1999) y Linda Fowler-Magerl, *Clavis canonum: Selected Canon Law Collections before 1140* (Hannover 2005).

[7] Kuttner habló de 'primacía de la razón sobre la historia' (*Harmony from dissonance* 11).

[8] Sirvan como ejemplo las siguientes obras: Schulte, *Geschichte der Quellen* §§ 13-15; Fournier-Le Bras, *Collections canoniques* 340-344; van Hove, *Commentarium* §§ 408-410; Joseph de Ghellinck, *Le mouvement théologique du XIIe siècle: Sa préparation lointaine avant et autour de Pierre Lombard, ses rapports avec les initiatives des canonistes: Etudes, recherches et documents* (Paris 1948) 203-213 y 416-510; Jacqueline Rambaud-Buhot, *Les Legs de l'Ancien Droit: Gratien*, (*Histoire du Droit et des Instituions de l'Église en Occident* 7; Paris 1965) 51-129; y Willibald M. Plöchl, *Geschichte des Kirchenrechts, 2: Das Kirchenrecht der abendländischen Christenheit 1055 bis 1517* (Wien-München 1961) 466-469.

Junto a los principios del *Sic et Non* de Pedro Abelardo, la diferencia entre derecho mutable y derecho inmutable, que estableció el Prólogo de Ivo de Chartres,[9] de las reglas de interpretación de Bernoldo de Costanza[10] o de la dispensación de la misericordia de Algerio de Lieja[11] son lugares comunes en la bibliografía. En el contexto de los métodos para interpretar y aplicar preceptos contradictorios también se ha destacado la elaboración de razonamientos mediante distinciones.[12]

La literatura especializada ha dejado en un segundo plano la estructura sistemática. Las sospechas que sembró la *Summa Parisiensis*, cuando en la segunda mitad del s. XII atribuyó la división en distinciones de la primera y de la tercera parte al discípulo de Graciano, Paucapalea,[13] han contribuido a desconectar la (desconcertante) división de la CDC de los métodos de conciliación que empleó Graciano. 'Distinción' y 'causa' son categorías de las artes liberales, que tienen un significado técnico en la puntuación e introducción de períodos (Gramática), así como en la resolución de controversias (Retórica). El DG se planeó originalmente como un tratado, no como una colección, porque el maestro elaboró un discurso con argumentos de autoridad (capítulos/autoridades) y con argumentos de razón (parágrafos/dichos), pero también porque la narración se articuló

[9] Cf. Bruce Brasington, *Ways of Mercy. The Prologue of Ivo of Chartres* (Münster 2004).

[10] Cf. Friedrich Thaner, ed. 'De excomunicationis vitandis, de reconciliatione lapsorum et de fontibus iuris ecclesiastici' y 'De statutis ecclesiasticis sobrie legendis', MGH *Libelli de lite* 2 (Hanoverae 1892) 112-142 y 156-159.

[11] Cf. Robert Kretzschmar, *Alger von Lüttichs Traktat 'De misericordia et iustitia': Ein kanonistischer Konkordanzversuch aus der Zeit des Investiturstreits* (Quellen und Forschungen zum Recht im Mittelalter 2; Sigmaringen 1985).

[12] Cf. Christoph H.F. Meyer, *Die Distinktionstechnik in der Kanonistik des 12. Jahrhunderts: Ein Beitrag zur Wissenschaftsgeschichte des Hochmittelalters* (Mediaevalia lovaniensia, Studia 29; Leuven 2000) 144-177.

[13] *Summa Parisiensis*: 'Distinctiones apposuit in prima parte et ultima Paucapalea . . .' See Friedrich Maassen, *Paucapalea: Ein Beitrag zur Literaturgeschichte des canonischen Rechts im Mittelalter* (Wien 1859) 19; y Terence P. McLaughlin, ed. *The Summa Parisiensis on the Decretum Gratiani* (Toronto 1952) [1].

'colore rhetorico'.[14] Graciano tuvo a su disposición colecciones divididas en libros: volúmenes que agrupan autoridades por materias, en series de fragmentos — los capítulos de la compilación — que, por lo general, siguen un orden cronológico. ¿Por qué motivo intentó armonizar tradición y reforma a partir de 'distinciones' y de 'causas'?

3. La división en distinciones de la 'prima' (D.1-D.101) y de la 'tertia pars' (D.1-D.5 de cons.) se sobrepuso a un texto que ya estaba escrito: 'hoc opere scripto', según un decretista de la segunda mitad del siglo XII.[15] En algunos casos se hizo con poco acierto, porque las secciones resultantes no mantienen la unidad temática. Las remisiones internas a los capítulos/autoridades de la primera parte no hablan de distinciones.[16] Más que con los principios, las proposiciones y las disposiciones del Derecho, estas distinciones tienen que ver con las 'positurae' que, según las reglas

[14] Esteban de Tournai empleó esta expresión, en su comentario a C.1 q.7 d.p.c.7. Al anotar D.101 d.p.c.1 habló de 'exornatione rhetorica'. Cf. Johann F. von Schulte, ed. *Stephan von Doornick [Étienne de Tournai, Stephanus Tornacensis]: Die Summa über das Decretum Gratiani* (Giessen 1891, reimpr. Aalen 1965) 157 y 120 respectivamentte.

[15] La *Summa Antiquitate et tempore*, compuesta en la década de los años 1170: 'Nihilominus sciendum quod hoc opere scripto quidam alius nomine Paucapalea . . . partem primam in centum et unam sive duas distinctiones divisit. Secundam partem non distinxit quia a magistro Gratiano sufficienter distincta est per causas, thematha, quaestiones. Tertiam in v. distinctiones divisit', Maassen, *Paucapalea* 9-10. La tradición francesa que atribuyó la división en distinciones a Paucapalea fue recibida por Sicardo de Cremona: 'Primam divisit ut quidam ajunt pauca palea in c. et i. disti. Secundam gratianus in xxxvi. causas et harum quamlibet in quaestiones. . . . Tertiam, ut ajunt, paucapalea in v. d'. Maassen, *Paucapalea* 24).

[16] Así lo pusieron de manifiesto Franz Gillmann, 'Rührt die Distinktioneneinteilung des ersten und des dritten Dekretteils von Gratian selbst her?', AKKR 112 (1932) 504-533 (reimpr. *Gesammelte Schriften zur klassischen Kanonistik von Franz Gillmann*, 1: *Schriften zum Dekret Gratians und zu den Dekretisten* [Würzburg 1988]); y Adam Vetulani, 'Über die Distinktioneneinteilung und die Paleae im Dekret Gratians', ZRG Kan. Abt. 23 (1933) 346-370 (reimpr. *Sur Gratien et les Décrétales*, [Aldershot 1990] I con *Addenda et Corrigenda* p. 1-5). Cf. también José M. Viejo-Ximénez, ''Costuras' y 'descosidos' en la versión divulgada del Decreto de Graciano', *Ius Ecclesiae* 21 (2009) 133-154.

de la Gramática, delimitan las partes de un discurso: 'subdistinctio' (punto bajo, o coma), 'distinctio media' (punto medio, o cola) y 'distinctio ultima' (punto alto, o período).[17] Las distinciones del DG divulgado marcarían el final de un período —'plena sententiae clausula', un discurso completo, separado de la siguiente 'integra sententia'[18] —, aunque sobrepasan el límite habitual: 'Periodos autem longior esse non debet quam ut uno spiritu proferatur'.[19] La división en distinciones no está relacionada con los métodos de interpretación y aplicación del Derecho canónico.

Los decretistas que cuestionaban la división en distinciones, tenían claro, por el contrario, cuál era la estructura original de la segunda parte y quién era su autor. En opinión de la suma *Antiquitate et tempore*, '[Paucapalea] Secundam partem non distinxit quia a magistro Gratiano sufficienter distincta est per causas, themata, quaestiones'.[20] En el mismo sentido se manifestó Sicardo de Cremona: 'Secundam Gratianus in xxxvi. causas et harum quamlibet in quaestiones'.[21] Mientras que los materiales de la primera y de la tercera parte del DG se ordenaron tardíamente en distinciones, la segunda parte se escribió en forma de causas. Las causas están en la concepción primitiva, o, si se prefiere, en el proyecto o plan de redacción. Como quiera que, desde el siglo XII, se atribuyen a Graciano, juegan un papel relevante en la búsqueda del *Ur-Gratian*. Para concordar la tradición y los principios de la reforma Graciano formuló causas. Las causas preceden a sus métodos de interpretación y aplicación de autoridades canónicas.[22]

¿Qué es una 'causa'? Los dichos/parágrafos de Graciano refieren distintos tipos de causa. El que más se asemeja a la

[17] Isidoro de Sevilla, *Etymologiarum sive Originum libri XX*, 1.20.1-2.
[18] Ibid. 1.20.5.
[19] Ibid. 2.18.2.
[20] Cf. Maassen, *Paucapalea* 9.
[21] Cf. Ibid. 24.
[22] Entre esos métodos se encuentran los razonamientos mediante distinciones, algo distinto a la agrupación de párrafos en distinciones. Sobre los signficados de la expresión 'distinctio' en la literatura canónica del siglo XII cf. José M. Viejo-Ximénez, 'Distinctiones', J. Otaduy-A. Viana-J. Sedano, dir. *Diccionario General* 424-428.

descripción que propuso Stickler — casos (casus), esto es, acciones judiciales (causae), que dan origen a diversas cuestiones (quaestiones) — solo está relacionado con la división sistemática de la segunda parte de la CDC de manera indirecta (apartado II del presente estudio). El punto de partida de los esfuerzos de Graciano por conseguir la 'concordia de los canónes discordantes' son las causas de la 'artificiosa eloquentia'. Los primeros decretistas explicaron esta categoría en sus glosas y comentarios al DG (apartado III). Este dato ofrece algunas pistas sobre el ambiente intelectual en el que se formó Graciano, el núcleo original de la CDC, así como sobre las relaciones entre legistas, teológos y canonistas en el renacimiento intelectual del siglo XII (apartado IV).

II. *Causa deducatur in médium*

4. El Derecho romano conoció diversos tipos de causas, en especial en el ámbito de los litigios y de las acusaciones. La causa Curiana, del año 93 a. C., enfrentó a L. Licinio Craso y Q. M. Scaevola a propósito de la interpretación de un testamento.[23] En el lenguaje del procedimiento civil, la 'causae collectio' o 'conjectio' consistía en la exposición breve del asunto que las partes presentaban al juez al comienzo del proceso (in iudicio). Gayo explicaba que, desde la ley Pinaria, en el sistema de las 'legis actiones', una vez realizada la 'collectio' se procedía a la instrucción.[24] En el sistema del procedimiento formulario, la 'causae collectio' tiende a confundirse con el exordio o el

[23] Cf. M. T. Cicerón, *De Oratore*, 2.24, 2.221; M. T. Cicerón, *De Inventione*, 2.42.122; y *Dig*. 28.6.4 (*Modestinus libro singulari de heurematicis*).

[24] Cf. Gayo, *Institutionum commentari quattuor*, 4.15: 'Postea tamen quam iudex datus esset, comperendinum diem, ut ad iudicem uenirent, denuntiabant; deinde cum ad iudicem uenerant, antequam apud eum causam perorarent, solebant breuiter ei et quasi per indicem rem exponere; quae dicebatur causae coniectio quasi causae suae in breue coactio'. Cf. también Dig. 50.17.1: '*Paulus libro 16 ad Plautium.* Regula est, quae rem quae est breviter enarrat. Non ex regula ius sumatur, sed ex iure quod est regula fiat. Per regulam igitur brevis rerum narratio traditur, et, ut ait Sabinus, quasi causae coniectio est, quae simul cum in aliquo vitiata est, perdit officium suum'.

comienzo de los demandantes (principium', 'exordium', 'proemium), de manera que es una parte de la 'oratio perpetua', ó 'continua' ó 'actio'.[25] El Derecho del bajo imperio distinguió entre causas (acciones/procesos) civiles (pecuniarias) y causas criminales.[26]

En algunos 'dicta' de la segunda parte del DG, causa es — como advertía Stickler — acción/proceso, civil o criminal.[27] En la resolución de la causa abierta contra el obispo acusado de un crimen contra la carne (C.2 pr., 'in ipsa uentilatione causae) fallan tres de los testigos propuestos. El obispo expulsado de su sede es llevado a juicio (C.3 pr., 'ducitur in causam), lo que plantea el problema de si es posible solicitar la suspensión temporal del mismo una vez que se ha producido el emplazamiento (C.3 q.3, 'post uocationem ad causam). C.4 q.2 pregunta si un menor de catorce años puede ser testigo en una causa criminal (in criminali causa). El obispo infamado, que no puede estar presente el día fijado para el juicio (C.5 pr., 'causae suae die statuta adesse non ualens), ¿cuántas veces debe ser convocado antes de que se dicte sentencia (C.5 q.2, 'quotiens sit uocandus ad causam)?, ¿puede actuar por medio de un procurador (C.5 q.3, 'an per procuratorem causam suam agere ualeat'?). La distinción causas civiles/causas criminales aparece en varios parágrafos de C.11 q.1, donde se

[25] Cf. G. Humbert, 'Causae collectio', C. Daremberg-E. Saglio dir. *Dictionnaire des Antiquités Grecques et Romaines* 1.2 (1877) 975.

[26] Cf., entre otros ejemplos, Nov. 8.6 (. . . in omnibus causis et uniuersis pecuniariis et criminalibus occasionibus . . .), Nov. 28.3 (Audiat autem et causas pecuniarias et criminales et alias minores .. .), Nov. 31.3 (. . . etiam in criminales audire causas . . .), Nov. 123.8 (. . . sed neque pro qualibet pecuniaria criminali causa episcopum ad iudicem ciuilem aut militarem . . .), o bien Nov. 134.2 (Et omnes que mote fuerint siue ciuiles siue criminales causas . . .).

[27] En el 'dictum' que introduce D.20, de la primera parte del DG, *causa* es la controversia o litigio cuya solución — absolución del inocente o condena del delincuente — se pone en manos de quien está revestido de *potestas*. Por esta razón, en la decisión de estas causas, la opinión de los Padres de la Iglesia y de los intérpretes de la Sagrada Escritura ocupa siempre un lugar secundario. Este 'dictum'-introducción de D.20 utiliza la palabra negocio (*negotium*) como sinónimo de causa. Negocio es también sinónimo de causa/acción/proceso en C.2 q.6 d.p.c.10 (in fine), C.2 q.6 d.p.c.37, C.6 q.4 d.p.c.2 y en C.11 q.1 d.p.c.47.

discute si un clérigo puede ser llevado ante un tribunal civil: la prohibición y pena subsiguiente que estableció el papa Bonifacio I (C.11 q.1 c.8)[28] se extendía a las causas civiles y a las criminales, así como a los jueces civiles y militares. Graciano utiliza la distinción causa civil/causa criminal en d.p.c.30, en d.p.c.31, así como al final de C.11 q.1 en d.p.c.47.[29] La prohibición de resolver causas (causam uentilare) los domingos se analiza en C.15 q.4.

'Causa' y 'quaestio' aparecen en C.13 pr., que propone un litigio sobre diezmos: los clérigos de la iglesia bautismal demandan (mouere quaestionem) a los clérigos de la diócesis en la que se habían refugiado las víctimas de un conflicto bélico, que seguían cultivando las tierras de las que habían huido. La expresión 'quaestionem mouere' aparece en la introducción de C.7 y de C.14,[30] con el mismo significado, mientras que C.11 pr. utiliza el equivalente 'quaestionem agitare'. En los dichos de las 'causae' de la segunda parte del DG, 'quaestio' nunca es un

[28] Bonifatius I JK †358: Mansi 4.398 : PL 20.789. En realidad, se trata de una falsificación realizada por Burcardo de Worms a partir de *Ep.* 436.10(115): cf. José M. Viejo-Ximénez, 'Las Novellae de la tradición canónica occidental y del Decreto de Graciano', edd. Luca Loschiavo-G. Mancini-C. Vano *Novellae Constitutiones: L'ultima legislazione di Giustiniano tra Oriente e Occidente da Triboniano a Savigny* (Napoli-Roma 2011) 207-279, 218-220.

[29] Causa civil/causa criminal aparece también en otras 'auctoritates' de C.11 q.1 como c.36 (*ex Constitutione Sirmondiana* 1) y c.43 (III Cartago c.9).

[30] C.7: 'Quidam longa inualetudine grauatus episcopus alium sibi substitui rogauit cuius precibus summus Pontifex annuit et quod rogauerat ei concessit. Postea itero conualuit idem episcopus et quod prius fecerat cupit rescindi. Aduersus eum, qui sibi accesserat quaestionem mouet suam cathedram tamquam sibi debitam reposcit'. Y C.14: 'Canonici cuiusdum ecclesie quaestionem mouent de prediis. Testes ex fratribus suis producunt. Negociatoribus pecuniam crediderunt ut ex eorum mercibus emolumenta acciperent . . .'

tribunal[31] y solo en contadas ocasiones tiene el sentido de investigación o interrogatorio.[32]

Graciano conocía la terminología causa/cuestión del 'proceso' romano que, por otra parte, había sido recibida en la disciplina eclesiástica. Ahora bien, no todas las 'causae' de la segunda parte del DG son acciones (judiciales), es decir 'causae' o 'quaestiones' en el sentido expuesto. Por el contrario, todas responden al tipo de las 'quaestiones' sometidas al dictamen de un jurista, o bien a las hipótesis o casos que el jurista plantea (quaer[-o][-itur] an . . .), es decir: su estructura es la propia del conflicto o controversia, hipotética o real, que reclama la 'responsio' de un hombre prudente.[33] Lo cual no significa que los 'libri quaestionum/disputationum' de los juristas clásicos, o que los fragmentos 'antiquorum prudentium libros' que Triboniano y su equipo compilaron sistemáticamente, por indicación de Justiniano (*Deo auctore*, 15 de diciembre del 530), fueran los modelos de inspiración próximos de las *causae* gracianeas.[34]

[31] El Derecho romano conoció las 'Quaestiones extraordinariae' desde el 413 a.C.: tribunales designados para conocer determinados procesos y cuyas decisiones escapaban de la 'provocatio ad populum'. La ley 'de pecuniis repetundis' de Calpurnio Piso, del año 149 a. C. estableció las 'Quaestiones perpetuae': tribunales penales permanentes para delitos especiales. Cf. también Dig. 1.2.2.32, con la enumeración de las 'Quaestiones publicae' que estableció *Cornelius Sulla*.

[32] Por ejemplo en C.15 pr.: ' . . . tandem episcopus quaestionibus confessionem extorquet . . . '. Sobre este sentido de 'quaestio' cf. los fragmentos de los títulos 'De quaestionibus' en Dig. 48.18 y en Cod. 9.4.

[33] Como, por ejemplo la 'quaestio domiciana' que *Domitius* propuso a *Celsus*: ¿puede ser testigo quien ha estampado su firma en un testamento? (*Dig*. 28.1.27).

[34] Cf. Hermann Kantorowicz-William Buckland, *Studies in the Glossators of the Roman Law: Newly discovered Writings of the Twelfth Century* (Cambridge 1938, reimpr. Aalen 1969), para quienes, el *Stemma Bulgaricum* originó un nuevo género literario, las colecciones de 'quaestiones disputatae': 'From Roman law this important type of university instruction and literature was transferred to Canon law and theology, non *vice versa*; Abelard's *Sic et non* in particular contributed nothing to the legal questions. The true models of Bulgarus in method and terminology were the classical *quaestiones*, *disputationes* and *responsa* in the Digest, and certain constitutions of Justinian'. (p. 82). En sus *Addenda et corrigenda* de 1969 (p. 325-55), Peter Weimar

5. Las causas y las cuestiones son algo más que las indicaciones en tinta roja en los márgenes de las copia confeccionadas en la segunda mitad del siglo XII. La lectura de la obra corrobora las afirmaciones de *Antiquitate et tempore* y de Sicardo de Cremona sobre el carácter original de la composición de la segunda parte.

En la primera parte, hay tres grandes bloques de temas: D.1-D.20 son un tratado sobre el derecho natural y las leyes civiles y eclesiásticas;[35] D.22-D.80 se dedican a los candidatos al sacramento del orden — en todos sus grados — y de quiénes, cuándo y dónde les ordenan;[36]; y las últimas 21 distinciones (D.81-D.101) analizan por segunda vez algunos asuntos considerados de manera difusa. La redacción del primer bloque tiene un tono asertivo — afirmaciones que se demuestran con autoridades[37] — con dos 'dicta' de enlace en D.5 pr y D.15 pr. El relato es lineal — salvo el 'excursus' sobre la polución nocturna, en los actuales D.6 pr.-c.3 —, y, al menos hasta D.16, destaca por su dependencia de las Etimología de Isidoro de Sevilla.[38]

matizó: 'Rhetorical patterns, other than Abaelard's *Sic et non*, might have been important even for the Romanistic *quaestiones disputatae*' (*addenda* n. 120, p. 335). Esta observación es trasladable al origen de la Ciencia canónica, cuyos métodos contribuyeron a la formación de la cultura jurídica occidental: cf. Carlos Larrainzar, 'Las raíces canónicas de la cultura jurídica occidental', *Ius Canonicum* 41 (2001) 13-35 (reimpr. 'Le radici canoniche della cultura giuridica occidentale', *Ius Ecclesiae* 13 [2001] 23-46).

[35] ¿El 'tractatus decretalium epistolarum', como dice la remisión interna de C.1 q.1 d.p.c.96 a D.19 c.9? En realidad, solo D.19 analiza las decretales de los papas. D.1-D.20 merece una rúbrica más general: 'de legibus'.

[36] El 'tractaus ordinandorum', o 'de promotionibus clericorum ', según las remisiones internas a las distinciones de este bloque que aparecen en C.1 q.7 d.p.c.6, C.3 q.1 d.p.c.6, C.11 q.3 c.15, C.16 q.1 d.p.c.20, C.16 q.1 d.p.c.40, D.1 d.p.c.50 de cons., o de D.4 c. 19 de cons.

[37] Si bien es cierto que, en al menos cuatro ocasiones, la narración responde a la estructura 'quaeritur . . . an'/'an . . . queritur' propia de las cuestiones: D.6 pr., D.14 pr., D.19 pr. y D.20 pr.

[38] Sobre la composición y fuentes de D.16 cf. Regula Gujer, *Concordia Discordantium Codicum Manuscriptorum? Die Textentwicklung von 18 Handschriften anhand der D.16 des Decretum Gratiani* (Köln-Weimar-Wien 2004).

El estilo enunciativo se mantiene, por lo general, en el segundo bloque[39], cuya conexión con el primer bloque se explica en D.21 pr. El 'dictum' introductorio (proemio) de D.21 explica que con el análisis de los decretos de los pontífices y con los cánones de los concilios, termina el estudio de los asuntos eclesiásticos; a partir de ahora, continúa, se considerarán sus ministros. El hilo argumental se mantiene gracias a los 'dicta' que desarrollan los puntos de un esquema,[40] que se ha construido a partir de modelos precedentes, entre otros: el 'nomen ecclesiasticorum graduum' de Isidoro de Sevilla;[41] las cualidades que debe reunir quien va a ser ordenado obispo, conforme a la enumeración de las epístolas a Tito y la primera a Timoteo;[42] y la primera parte del *Regulae Pastoralis liber* de Gregorio I, sobre los crímenes de los ordenados.[43] La reflexión sobre la interpretación y aplicación de los preceptos eclesiásticos 'ex causa, et loco, et tempore', de las actuales D.29-D.31, es, sin duda, el 'excursus' más interesante.[44]

[39] Con algunos 'dicta' del tipo 'quaeritur . . . an'/'an . . . queritur': D.23 d.p.c.11, D.23 d.p.c.13, D.24 d.p.c.6, D.27 pr., D.33 pr., D.34 d.p.c.12, D.37 pr., D.50 pr., D.63 d.p.c.34, D.63 d.p.c.35, D.65 d.p.c.8, D.68 pr., D.74 pr. y D.79 d.p.c.7.

[40] En concreto D.22 pr., D.23 pr., D.24 pr., D.25 pr., D.25 d.p.c.3, D.49 pr., D.60 pr., D.62 pr. y D.64 pr. Sobre D.62-D.63 cf. Brigitte Basdevant-Gaudemet, 'La composition des distinctiones 62 et 63 du Décret de Gratien sur les élections épiscopales', Orazio Condorelli, ed. *Panta Rei: Studi dedicati a Manlio Bellomo* (Roma 2004) 1.213-237.

[41] D.21 c.1 = *Etymologiarum* 7.12. También habría que mencionar la epístola a Luitfredo (D.25 c.1), una falsificación atribuida a Isidoro de Sevilla que comenzando por el hostiario y terminando por el obispo describe las funciones propias de cada oficio eclesiástico (cf. Peter Landau, 'Apokryphe Isidoriana bei Gratian', edd. F. J. Felten-N. Jaspert-S. Haarländer *Vita Religiosa im Mittelalter Festschrift für Kaspar Elm zum 70. Geburtstag* [Berlin 1999] 837-844).

[42] A partir de D.25 d.p.c.3, inspirado en la 'glossa ordinaria' a la Biblia: cf. Titus Lenherr, 'Die Glossa ordinaria zur Bibel als Quelle von Gratians Dekret: Ein (neuer) Anfang', BMCL 24 (2000-2001) 97-127.

[43] D.49 pr.-c.1 = Gregorio, *Regulae pastoralis liber* 2.10-11 (PL 77.23C-26C).

[44] Queda para otra ocasión el análisis comparativo de estas distinciones con C.1 q.7 d.p.c.5, sobre las reglas para la dispensación de la misericordia — 'pro tempore, pro persona, intuitu pietatis, uel necessitatis, siue utililatis, et pro

La conexión entre los bloques segundo y tercero de la primera parte se hace en D.81 pr., donde no se menciona el primer bloque (D.1-D.20). De hecho, ninguno de los temas que se vuelven a considerar a partir de ese momento se refieren a la teoría general de la ley. El conjunto D.81-D.101 es, en realidad, un epílogo a D.21-D.79. El esquema de composición de este último bloque de la primera parte del DG depende del esquema del bloque intermedio — D.81-D.92 c.2 tratan otra vez de las condiciones que deben reunir los ordenados —, al que se añaden nuevos puntos: la recepción del sacramento del orden de manos del obispo (D.92 d.p.c.2), la no recepción o no aceptación de la parroquia por parte del ordenado (D.92 d.p.c.3), la obediencia que los inferiores deben a los superiores (D.93-D.95), la intervención de los laicos en las elecciones pontificias (D.96-97), los quirógrafos necesarios para ordenar a los peregrinos (D.98), los primados (D.99), la recepción del palio (D.100) y la necesidad de que haya un solo metropolitano por provincia eclesiástica (D.101). La narración mantiene el estilo propositivo característico las distinciones del DG[45].

Mientras que las 'distinctiones' de la primera parte no son unidades cerradas y descansan sobre modelos precedentes, las 'causae' de la segunda parte son compartimentos estancos y sus dichos/parágrafos introductorios no tienen antecedentes en la tradición canónica.[46] Las remisiones internas (cf. el *Apéndice* de este estudio) denominan estas secciones con la palabra causa y las identifican por el tema que tratan (C.1, C.2 q.7, C.13), por las palabras con las que comienzan (C.3, C.5, C.9, C.11, C.17, C.24, C.33) o por la materia que desarrollan, a modo de rúbrica (C.1, C.13, C.16, C.23). La segunda parte de la obra se compuso por causas: un método nuevo — en relación a la primera parte de la

euentu rei'— inspiradas en Algerio de Lieja: cf. Kretzschmar, *Alger von Lüttichs Traktat* 141-154.

[45] Con, al menos, tres 'dicta' del tipo 'queritur . . . an'/'an . . . queritur': D.92 d.p.c.3, D.95 d.p.c.2 y D.99 pr.

[46] A pesar de que Graciano utilizó el *De misericordia et iustitia*, los dichos de Algerio de Lieja se parecen más a los parágrafos/'dicta' de la primera parte de la CDC que a los 'dicta' introductorios de las 'causae' de la segunda parte: cf. Kretzschmar, *Alger von Lüttichs Traktat* 141-154 (relación de paralelismos con Graciano) y 187-375 (edición del *De misericordia*).

CDC, pero también respecto a la tradición canónica — para concordar cánones discordantes.

6. Dos dichos del DG divulgado, escritos en primera persona del plural, ofrecen una orientación sobre el origen de la noción de 'causa' más precisa que la que se desprende del análisis de cada una de las 'causae'. Ambos cumplen el papel de piezas de enlace o 'transitiones', como advirtió Esteban de Tournai.[47] El dicho p.c.1 de D.101 marca el paso de la primera a la segunda parte:[48]

D.101 d.p.c.1 (*edF* 356.14-20)

> Hactenus de electione et ordinatione clericorum tractauimus. Nunc ad symoniacorum ordinationes transeamus et ut facile liqueat quid super hac heresi sanctorum Patrum decreuit auctoritas causa deducatur in medium cuius negotium et de scienter a symoniacis ordinatis et de ignoranter a symoniacis consecratis et de ordinationibus que per pecuniam fiunt contineat.

Como otros parágrafos de la CDC, este 'dictum' p.c.1 anuncia un cambio de tema[49]: 'Hasta aquí hemos tratado de la elección y de la ordenación de los clérigos. Ahora pasaremos a las ordenaciones de los simoniacos . . .'. La indicación que viene después confiere al pasaje un carácter singular: '. . . y para dejar claro con mayor facilidad lo que sobre esta herejía estableció la autoridad de los santos Padres propóngase a la vista de todos una causa cuyo supuesto de hecho comprenda a . . .'. El autor descubre su método de composición, 'causa deducatur in medium', lo que no ocurre en los dichos de las distinciones de la 'prima pars'. No considera necesario explicar qué es una causa, recurso que utiliza como

[47] Cf. el comentario de Esteban de Tournai a D.101 d.p.c.1: '*Hactenus.* Exornatione rhetorica utitur quae dicitur transitio qua continuantur dicta dicendis et dicenda dictis'; así como su comentario a C.1 q.7 d.p.c.27: '*His brev.* Transitione utitur scil(icet) illo colore rethorico quo continuat dicta dicendis et dicenda dictis'. (Schulte, *Stephan von Doornick* 120 y 157, respectivamente).

[48] Los textos del DG se citan conforme a la edición de Friedberg = *edF*.

[49] D.101 d.p.c.1 tiene un interés especial para la 'Redaktiongeschichte' del DG, así como para la relación entre los manuscritos más antiguos: cf. Carlos Larrainzar, 'El Decreto de Graciano del códice Fd (= Firenze, Biblioteca Nazionale Centrale, Conventi Soppressi A.I.402): In memoriam Rudolf Weigand', *Ius Ecclesiae* 10 (1998) 421-489, en especial 450-451.

supuesto en torno al que gravitan problemas abstractos: '. . . quienes son ordenados conscientemente por simoniacos, quienes son consagrados por simoniacos, ignorando que lo son, y las ordenaciones que se confieren por dinero'. En esta ocasión, 'negotium' no es sinónimo de 'causa'/acción/proceso.[50] La *Summa Quoniam in omnibus* (SQO) al DG, atribuída a Paucapalea, utiliza causa/negocio en el mismo sentido que el d.p.c.1 de la D.101.[51] Algunos comentarios de la primera mitad del s. XII a la *Rhetorica prima* (*De Inventione*) de Cicerón establecieron esta relación causa/negocio: 'negotium' es el dicho o hecho de las personas que provoca una causa (controversia)[52]. La causa/negocio de D.101 d.p.c.1 es una categoría retórica.

[50] Cf. supra la nota 27 de este estudio. Paucapalea empleó este sentido de la expresión 'negocio' al comentar C.1 q.4 d.p.c.12: ' . . . iuris civilis ignorantia nemini obest in damno vitando, si negotium, i. e. si causa . . . '. (Johann F. von Schulte, ed. *Die Summa des Paucapalea über das Decretum Gratiani* [Giessen 1890 reimpr. Aalen 1965] 55).

[51] Por ejemplo, en sus comentarios a C.15 pr. (Cuius negotium tale est *Clericus quidam* . . .), C.20 pr. (Quorum tale negotium ponit *Duo pueritiae annos agentes* . . .), C.22 pr. (Cuius thema tale est *Episc. quid, iur. fals.* etc. In hoc negotio v. notantur quaestiones), C.23 pr. (Quorum negotium tale est *Episcopi quidam cum p. e. i. h. i. s.* etc. In hoc themate octo formantur quaestiones.), C.24 pr. (Cuius negotium tale est *Quidam episc. i. h. i. a. d. s.* etc. In hac causa tres assignantur quaestiones), C.25 pr. (Cuius thema tale est: *Sancta rom. eccl.* etc. In hoc negotio duae sunt quaestiones), C.26 pr. (Cuius negotium tale est *Sacerdos quidam sortilegus* etc. In hoc negotio VII. assignantur quaestiones.), C.27 pr. (De quibus scilicet voventibus negotium ponit in quo auctoritates hinc inde controversantes distinguuntur et qui matrimonium contrahere possint vel qui non, aperte definitur. Quorum thema tale *Quidam votum castitatis habeas desponsavit sibi uxorem* etc. . . . In hoc negotio duae assignantur quaestiones.), C.31 pr. (Cuius negotium tale est *Uxorem cuiusdam alius constupravit* etc. In hoc negotio III. formantur quaestiones.), C.33 pr. (Cuius negotium tale est *Quidam impeditus maleficiis* etc. In hoc negotio v. notantur quaestiones.) y C.36 pr. (Horum negotium tale est *Filiam cuiusdam patre ignorante* etc. In hoc negotio duae formantur quaestiones.) (Schulte, *Summa* 84, 94, 96, 99, 104, 106, 108, 111-12, 124, 130 y 142, respectivamente).

[52] Thierry de Chartres, por ejemplo, explicó los 'lugares comunes' del *De Inventione*, 1.24.34 con estas palabras: 'Nunc de circumstantiis. Sunt igitur duo de quibus in rhetorica quaestione agitur, persona scilicet atque negotium. Persona est ille vel illa qui vel quae ducitur in causam, negotium vero est dictum vel factum personae propter quod ipsa devocatur in causam'. (Karin M.

El segundo dicho/'transitio' cierra el 'tratado' sobre la simonía (C.1 del DG divulgado) y propone nuevas materias, que tienen que ver con los procesos canónicos:

C.1 q.7 d.p.c.27 (*edF* 438.4-12)

> His breuiter premissis ad ea ueniamus que ecclesia seueritate discipline parata est ulcisci ostendentes quibus accusantibus uel testificantibus quilibet sint conuincendi, quo iudice quisque debeat dampnari uel absolui, si causa uiciata fuerit quo remedio possit subleuari, si accusatores defecerint an reus sit cogendus ad purgationem. Et ut facilius pateat quod dicturi sumus exemplum ponatur sub oculis in quo auctoritates hinc inde controuersantes distinguantur et quid sanctorum Patrum sentiat auctoritas liquido intimetur.

El parágrafo responde a un patrón similar: una advertencia sistemática que se complementa con otra sobre la metodología para la discusión. La expresión 'causa uiciata' corresponde a la acción/proceso, no a las 'causae' de la segunda parte de la CDC. El dicho p.c.27 de C.1 q.7 se diferencia del dicho p.c.1 de D.101 porque habla de 'exemplum', una herramienta nueva: 'Y para que quede patente con mayor facilidad lo que vamos a decir, póngase un ejemplo mediante el cual se distinga las autoridades que disputan (a favor) de una y otra parte y se de a conocer claramente el sentir de la autoridad de los santos Padres'. Numeroso 'dicta' del DG recurren a 'exempla' como argumentos que ponen de manifiesto que algo es probable por analogía.

> Así D.50 d.p.c.12: 'Econtra exemplis et auctoritate probatur . . . ut pretereamus multa exempla ueteris testamenti . . . '; D.50 d.p.c.52: 'Sed exemplo B. Petri . . . '; D.56 d.p.c.1: ' . . . exemplis et auctorittate non solum sacerdotes, sed etiam summi sacerdotes fieri possunt . . . '; D.61 d.p.c.8: ' . . . exemplo B. Nicolai et Seueri et Ambrosii eius electio potest rata haberi.'; D.63 d.p.c.25: 'Quibus exemplis et premissis auctoritatibus liquido colligitur . . . '; D.91 pr.: ' . . . exemplo Apostoli qui de labore manuum uiuebat . . . '; C.1 q.1 d.p.c.22: 'Exemplo itaque Saulis et uxoris Ieroboam patet, quod donum Spiritus Sancti emere uel uendere non est peccatum. Exemplo Christi liquet . . . '; C.2 q.5 d.p.c.26: ' . . . ex eorum exemplo intelligendum est; exemplo enim sue satisfactionis noluerunt . . . ';

Fredborg, ed. *The Latin Rhetorical Commentaries by Thierry of Chartres* [Toronto 1988] 128.28-31: la fuente de inspiración de Thierry sería Boecio [ibid. nota 29-31]).

C.2 q.7 d.p.c.39: ‘Hoc ergo exemplo prelati non coguntur recipere subditos in accusatione . . . Hoc ergo exemplo non probantur prelati accusandi a subditis, nisi a fide forte exorbitauerint, uel alios exorbitare coegerint . . . ’; C.2 q.7 d.p.c.40: ‘ . . . non hoc exemplo coguntur prelati suscipere reprehensionem subditorum . . . ’; C.2 q.7 d.p.c.41: ‘ . . . non tamen hoc exemplo probantur prelati accusandi . . . Hoc ergo exemplo subditi probantur reprehendendi . . . non in exemplum nostrae actionis trahenda . . . Exemplo ergo Danielis non solum . . . ’; C.2 q.7 d.p.c.42: ‘ . . . quod suo exemplo prelatis dederunt facultatem . . . ’; C.2 q.7 d.p.c.44: ‘Et ut iam non exemplis, sed legibus agamus . . . ’; C.3 q.2 d.p.c.8: ‘ . . . exemplo tutorum et curatorum, qui, dum sunt . . . ’; C.4 q.2 et 3 d.p.c.3: ‘Sed miracula diuina sunt admiranda, non in exemplum humanae actionis trahenda.’; C.6 q.1 d.p.c.21: ‘ . . . exemplo tamen lese maiestalis uana intelliguntur . . . ’; C.8 q.1 pr.: ‘Item exemplo B. Petri illud idem probatur . . . ’; C.9 q.3 d.p.c.3: ‘Probatur illud idem exemplo Apostoli . . . ’; C.13 q.2 d.p.c.3: ‘His omnibus exemplis colligitur . . . Exemplo igitur istorum liquet . . . ’; C.17 q.4 d.p.c.42: ‘ . . . exemplo B. Iohannis det illa recedenti, . . . Sequitur ergo aliud exemplum quo eadem . . . ’; C.17 q.4 d.p.c.43: ‘ . . . Verum non hoc exemplo recedenti . . . ’; C.22 q.2 d.p.c.18: ‘Sed in veteri testamento multa permittebantur quorum exemplis hodie uti non licet . . . ’; C.22 q.3 pr.: ‘Cum ergo, ut ratione et exemplo monstratum est . . . ’; C.22 q.4 d.p.c.23: ‘Quo exemplo euidenter datar intelligi, . . . ’; C.23 q.3 pr.: ‘Quod uero iniuria sociorum armis propulsanda non sit, exemplis et auctoritatibus probatur.’; C.23 q.4 d.p.c.30: ‘ . . . Moyses exemplo docuit . . . ’; C.23 q.8 d.p.c.28: ‘ . . . Licet ergo prelatis ecclesiae exemplo B. Gregorii . . . ’; C.24 q.3 pr.: ‘ . . . multorum exemplis probatur . . . ’; C.26 q.2 pr.: ‘Quod autem sortes exquirere peccatum non sit exemplis et auctoritatibus probatur’; C.27 q.2 d.p.c.26: ‘Sponsi uero, etiam inconsultis quas sibi desponsauerunt, exemplis et auctoritate probantur continentiam posse servare. . . . Horum exemplo patet quod sponsi non exquisito consensu suarum sponsarum continentiam profiteri ualent.’; C.32 q.4 pr: ‘Quod autem ex ancilla propter uxoris sterilitatem filios querere alicui liceat, exemplo probatur Abrahae . . . ’; C.32 q.4 d.p.c.2: ‘ . . . nec illorum exemplo, preter coniugale debitum, fecunditatem in aliqua licet alicui querere . . . ’; D.1 d.p.c.60 *de pen*.: ‘Quorum exemplis euidenter ostenditur, quod nullus a Deo consequatur . . . Quibus nimirum exemplis euidentissime datur intelligi . . . ’; D.1 d.p.c.87 *de pen*.: ‘Non sunt hec premissis auctoritatibus consentanea: sed multorum exemplis probantur aduersa . . . ’; D.3 d.p.c.43 *de pen*.: ‘Exemplo enim illius, qui Israelitas maledixerat . . . ’; y C.35 q.1 pr.: ‘Quod consanguineas nostras siue uxoris nostre in coniugium nobis ducere liceat exemplis et auctoritatibus probatur’, entre otros.

Estos ejemplos contradicen o confirman un hecho mediante la autoridad o la experiencia de personas — normalmente, protagonistas de historias bíblicas — o bien el resultado de acaecimientos o acciones similares[53]. El 'exemplum' del que habla el dicho p.c.27 de C.1 q.7, por el contrario, tiene que ver con las nociones de 'causa' y 'negotium' del 'dictum' p.c.1 de D.101. El uso indistinto 'causa'/'exemplum' — como el de 'causa'/ 'negotium'/'thema'[54] — también aparece en los comentaristas medievales de Cicerón, cuya fuente remota de inspiración es el rétor romano Mario Victorino.[55]

En suma, conforme a D.101 d.p.c.1 y C.1 q.7 d.p.c.27 las causae del DG son 'causae' retóricas. 'Ut facile liqueat quid super hac heresi sanctorum Patrum decreuit ', o bien 'ut facilius pateat quod dicturi sumus': el genio del maestro Graciano consistió en diseñar 36 causas/negocios/ejemplos que condensaban problemas abstractos sobre los que no había acuerdo entre las autoridades del primer milenio y que afectaban al programa promovido por los papas desde Gregorio VII. Esteban de Tournai señaló el 'color retórico' del primer manual de Derecho canónico. Es probable que no fuera el primer decretista en relacionar la composición del DG con la Retórica.

[53] Cf. M. T. Cicerón, *De Inventione*, 1.30.49: 'Exemplum est, quod rem auctoritate aut casu alicuius hominis aut negotii confirmat aut infirmat.'

[54] Recuérdese el párrafo de la suma *Antiquitate et tempore*: '[Paucapalea] Secundam partem non distinxit quia a magistro Gratiano sufficienter distincta est per causas, themata, quaestiones'.

[55] Al comentar *De Inventione*, 1.12.16, Thierry de Chartres explicó: 'Exempla vero causarum sunt res singulae quae in controversias adducuntur, quas Victorinus appellat themata, id est proposita ad controversandum de eis'. Sus palabras sobre *De Inventione*, 2.17.53 podrían dar lugar al intercambio causa/ejemplo: 'Notandum vero est quod thema proprie dicitur res quae habet in se controversiam. Dicitur thema eo quod proposita est, ut controversetur de ea. Omnis igitur causa thema est, sed non convertitur. . . . ' (Fredborg, *Latin Rhetorical* 100.97-99 y 182.1-3: en ambos casos la fuente es Victorino [ibid. 100 nota 98 y 182 nota 1-3.]).

III. *Hermagoras . . . oratoris materiam in causam et in quaestionem*

7. Las glosas de los manuscritos del siglo XII explicaron la noción de *causa*. Algunas son anteriores a la 'primera etapa de composición de glosas', que se data en la década de los años 1150.[56] Los *Exserpta ex Sanctorum Patrum* de Sankt Gallen, Stiftsbibliothek, 673 (Sg), por ejemplo, transmiten una antigua CDC breve en 33 *causae*: C.1 agrupa materiales que más tarde se integrarán en las distinciones de la primera parte del DG; C.2-C.33 corresponden a las actuales C.1-C.36 (sin correspondencias para C.24-C.26 y C.28). La glosa marginal a C.1 (incipit: 'Laicus quidam literatus) dice:[57]

Sg fol. 3^{rb} marg.

> Causa est res que habet in se controuersiam in dicendo positam cum certarum personarum interpositione.

La definición procede del *De Inventione*: [58]

> En cuanto a Hermágoras, parece que no presta atención a lo que dice ni comprende lo que propone cuando divide la materia de la oratoria en causas específicas y cuestiones generales. Define las causas

[56] Cf. los trabajos de Rudolf Weigand, *Die Glossen zum Dekret Gratians: Studien zu den frühen Glossen und Glossenkompositionen* (SG 25-26; Roma 1991) 401-425; y 'The Development of the Glossa ordinaria to Gratian's Decretum', W. Hartmann-K. Pennington, edd. *The History of Medieval Canon Law in the Classical Period, 1140-1234. From Gratian to the Decretals of Pope Gregory IX* (Washington 2008) 55- 97.

[57] Cf. Carlos Larrainzar, 'El borrador de la "Concordia" de Graciano: Sankt Gallen, Stiftsbibliothek MS 673 (= Sg)', *Ius Ecclesiae* 11 (1999) 593-666, en especial p. 621. En p. 664-666, una descripción sumaria del número y tipo de glosas de Sg.

[58] Salvador Núñez, ed. *Cicerón. La invención retórica* (Madrid 1997) 95-96. El original latino: 'Nam Hermagoras quidem nec quid dicat attendere nec quid polliceatur intellegere videtur, qui oratoris materiam in causam et in quaestionem dividat, causam esse dicat rem, quae habeat in se controversiam in dicendo positam cum personarum certarum interpositione; quam nos quoque oratori dicimus esse adtributam (nam tres eas partes, quas ante diximus, subponimus, iudicialem, deliberativam, demonstrativam). Quaestionem autem eam appellat, quae habeat in se controversiam in dicendo positam sine certarum personarum interpositione, . . . ' (*De Inventione*, 1.6.8).

> específicas como aquellas que implican una confrontación dialéctica en la que intervienen personas determinadas; también yo las reconozco como propias del orador, pues le he atribuido las tres partes ya mencionadas, la judicial, la deliberativa y la demostrativa. Por cuestiones generales entiende la confrontación dialéctica en la que no se mencionan personas concretas.

Causa es la 'hypothesis' o 'quaestio finita', distinta de la 'thesis' o 'quaestio infinita'[59] que, según Marco Tulio:[60]

> nada tiene que ver con la función del orador, pues carece de sentido atribuir al orador, como si fueran de escasa importancia, esos problemas a los que con gran esfuerzo han aplicado su ingenio los más insignes filósofos.

El autor de la anotación de Sg pudo tomar la definición de alguno de los comentarios medievales a la *Rhetorica prima*. Thierry de Chartres, por ejemplo, la repitió dos veces en su *Ut ait Petronius*, compuesto en la década de los años 1130: primero en la introducción de su escrito, 'accessus circa artem rhetoricam', y después en la explicación de *De Inventione* 1.6.8.[61] Sea como fuere, la primera glosa de los *Exserpta* vincula la 'causa' 'Laicus

[59] La distinción aparece en otros escritos de Cicerón: (i) *De partitione oratio*, 61, diferencia las cuestiones finitas, a las que denomina 'causae', que están delimitadas por circunstancias de tiempo y de personas, de las cuestiones infinitas, a las que denomina 'propositum', pues no tienen límites de tiempo ni de personas, (ii) *De oratore*, 1.31.138, habla de cuestiones 'sine designatione personarum et temporum' y de las cuestiones que 'de re certis in personis ac temporibus locata', que se corresponde a los dos tipos de cuestiones en los que se concreta la elocuencia, las infinitas y las ciertas (*De oratore*, 2.10.41-42, 2.15.65), y (iii) *Topica*, 79, distingue dos tipos de cuestiones, 'definitum', o causa, e 'indefinitum', o propósito.

[60] Núñez, ed. *Cicerón* 96 (= *De Inventione*, 1.6.8).

[61] Cf. Fredborg, *Latin Rhetorical*: 'Materia igitur artis rhetoricae est hypothesis, quae a Latinis causa dicitur, quoniam illam orator secundum artem rhetoricam tractare debet. Hypothesis vero sive causa est res quae habet in se controversiam in dicendo positam de certo dicto vel facto alicuius certae personae . . . ' (51.57-52.1); y 'Dixit ergo Hermagoras causam esse rem quae habet in se controversiam; sed quia controversia alia est in factis, alia in dictis, ad differentiam illius, quae est in factis, subiunxit in dicendo positam. Quoniam vero hoc totum habet causa commune cum thesi, idcirco additum est cum interpositione etc., id est circumstantiis implicitam. Nam interpositio certarum personarum in causa nihil est aliud quam in causa circumstantiarum inclusio, sive causa sit specialis sive individua'. (74.19-26).

quidam literatus' con las causas de la Retórica, no con las causas/acciones/procesos. El comentario es contemporáneo a la copia de esta versión de la CDC, pues se atribuye a la 'mano marginal 1', que coincide con la 'mano principal 2' del códice de Sankt Gallen.[62] Que los *Exserpta* estén organizados en causas y que su primera glosa transmita la definición de causa es algo más que una feliz coincidencia. Sg podría conservar la estructura original del DG.

8. Treinta y un manuscritos con la 'primera etapa de composición de glosas' ofrecen una versión ampliada de la anotación marginal de Sg.[63] En esta etapa, la glosa a C.1 —incipit: 'Quidam habens filium', esto es, la 'causa simoniacorum' — tiene dos partes: la enumeración de cuatro tipos de causas y la definición de Hermágoras/Cicerón. El texto se pudo elaborar en el mismo círculo de Graciano, pues aparece en uno de los testimonios antiguos de la CDC, el manuscrito Barcelona, Archivo de la Corona de Aragón, Ripoll 78 (Bc): [64]

Bc fol. 97^{vb} marg.

Causarum alia dicitur iudicium alia iustitia alia negotium alia lis. Causa est res que habet in se controuersiam in dicendo positam cum certarum personarum interpositione.

[62] Philipp Lenz (Sankt Gallen) facilitó al autor su descripción de las manos del códice 673. Cf. también Ph. Lenz, 'The Context of Transmission of the *Decretum Gratiani* in St. Gallen, Stiftsbibliothek, Cod. 673: An Investigation of pp. 201a-246b', texto de su intervención en el *Fourteenth International Congress of Medieval Canon Law, Toronto, 5-11 August 2012*, que aparecerá en el próximo volumen de la Serie C de los MIC.

[63] Esta glosa de la primera etapa fue editada por R. Weigand, 'Die ersten Jahrzehnte der Schule von Bologna: Wechselwirkung von Summen und Glossen', *Proceedings Munich 1992* 445-465 en especial 451. La 'quinta etapa de composición de glosas' conservó una versión más breve: 'Causa est controuersia in dicendo posita cum certarum personarum interpositione'. (ibid. 452).

[64] Sobre las glosas de Bc cf. Rudolf Weigand, *Glossen* 686-687. En 1991, cuando Weigand editó la glosa a C.1 (Die ersten), Bc se consideraba una abreviación tardía del DG.

Las categorías 'iudicium', 'iustitia', 'negotium' y 'lis'[65] están en los *Etymologiarum sive Originum libri XX*, enciclopedia que jugó un papel relevante en la composición de D.1-D.20.[66] Isidoro de Sevilla explicaba que:[67]

> El foro es el lugar donde se resuelven las querellas jurídicas . . . y supone la existencia de causa, de ley y de juez. La causa se llama así por derivar de 'casus', por lo que algo sucede. Es la materia y el origen de un asunto ['negotium'] que todavía no ha sido aclarado por el examen de la discusión. Cuando se está exponiendo, es 'causa'; mientras se discute, es 'iudicium'; una vez concluido, es 'iustitia'.

La Retórica relaciona las nociones de 'causa'/'negotium'. La consideración de la 'causa' como uno de los elementos constitutivos del foro parecería propia de la 'iusrisprudentia', pero también interesa a la 'artificiosa eloquentia': Cicerón advertía que Aristóteles:[68]

> pensó que la función del orador se desarrollaba en tres clases de materias: el género demostrativo, el deliberativo y el judicial; . . . el judicial, usado ante los tribunales, implica la acusación y defensa, o bien la demanda y la réplica.

Si el autor de la glosa de Sg conocía la glosa de Bc, sería difícil explicar porqué eliminó las categorías 'iudicium', 'iustitia', 'negotium', (iurgium) y 'lis'. Que los *Exserpta* carezcan del tratado sobre las leyes — D.1-D.20 — elaborado a partir de Isidoro de Sevilla, concede prioridad a la versión breve del comentario marginal. No todos los manuscritos de 'la primera etapa de composición de glosas' incluyen una aclaración similar a la

[65] La glosa de Bc — igual que la de otros siete manuscritos — omite 'alia iurgium' (cf. R. Weigand, 'Die ersten' 451), categoría que sí conocía Isidoro de Sevilla.

[66] Lo que sería un argumento a favor de la antigüedad de la glosa de Bc. Legistas y decretistas consultaron las *Etimologías* desde los comienzos del renacimiento boloñés: cf. Luca Loschiavo, 'L'impronta di Isidoro nella cultura giuridca medievale: Qualche exempio'', G. Bassanelli-S. Tarozzi, ed. *Ravenna Capitale: Uno sguardo ad Occidente: Romani e Goti-Isidoro di Siviglia* (Dogana 2012) 39-55, en especial 44-55.

[67] José Oroz Reta-Manuel A. Marcos Casquero, edd. *San Isidoro de Sevilla Etimologías* (2nd. ed. Madrid 1994) 2.403 (= *Etymologiarum*, 18.15.1-2).

[68] Núñez, *Cicerón* 94-95 (= *De Inventione*, 1.5.7). Para Cicerón 'son a estos tres géneros a los que se reduce el arte y la capacidad del orador' (ibid.). Cf. también *De Inventione*, 1.8.10-11.15).

versión ampliada de Bc, por lo que tampoco es seguro que proceda de la década de los años 1150.[69] Cabría pensar en un momento anterior. Ambas versiones de la glosa, la breve de Sg y la ampliada de Bc, están próximas a Graciano. Las nociones retóricas no solo se detectan en el interior de la CDC — en D.101 d.p.c.1 y C.1 q.7 d.p.c.27 — sino también en los comentarios contemporáneos o muy cercanos al proceso de su redacción. La cita marginal del *De Inventione* — o de sus comentaristas — ¿fue una indicación del maestro Graciano?

9. Según la SQO, la segunda parte de la CDC es una sucesión de controversias en la que están implicadas personas. La explicación de la suma sobre C.1 (incipit: 'Quidam habens filium) utilizó materiales que circulaban entre los decretistas próximos al taller de G. El editor moderno no identificó estas piezas. Su texto se aprovecha a continuación, aunque se completa con un nuevo aparato de fuentes:[70]

SQO ad C.1 (Schulte 51.2-24)

> Hucusque de clericorum electione et ordinatione tractatum est. Set quia in ordinatione sive electione peccatum symoniae quandoque committitur, ideo symoniacorum causam, quae prima est, non incongrue secundo loco ponit. Cuius negotium et de scienter a simoniacis ordinatis et de ignoranter a simoniacis consecratis et de ordinationibus que per pecuniam fiunt, continet.
>
> Ceterum quia causarum alia iudicium, alia iustitia, alia negotium, alia iurgium, alia lis vocatur, horum uniuscuiusque vocabulorum definitionem utile existimo ignorantibus aperire.
>
> Causa est res habens in se controversiam in dicendo positam cum certarum personarum interpositione.

[69] Weigand, 'Die ersten' 451. Por lo demás, Weigand no conocía la glosa de Sg — ni su relación con *De Inventione* — ni reparó en las Etimologías como posible fuente de inspiración de los tipos de causas (forenses) de la anotación marginal de Bc.

[70] Cf. Schulte, *Summa* 51. Sobre las deficiencias de esta edición cf. José M. Viejo-Ximénez, 'La 'Summa Quoniam in omnibus' de Paucapalea: Una contribución a la historia del Derecho romano-canónico en la Edad Media', *Initium* 16 (2011) 27-74. Una edición del comentario de la SQO a C.1, a partir de nueve manuscritos, en José M. Viejo-Ximénez, 'Una composición sobre el Decreto de Graciano: La suma 'Quoniam in omnibus rebus animaduertitur' atribuida a Paucapalea', *Helmántica* 190 (2012) 419-473 en especial 454-455.

Aliter causa est impulsus animi ad aliquid agendum.

Causa vocata a casu qui evenit. Est enim materia et origo negotii necdum discussionis examine facta. Quae dum proponitur causa est, dum discutitur iudicium est, dum firmatur, iusticia est. Vocatum autem iudicium quasi iuris dictio, et iustitia quasi iuris status.

Negotium uero multa significat, modo actum rei alicuius, cui contrarium est otium, modo actionem causae, quod est iurgium litis. Et dictum negotium, quod sit sine otio. Negotium autem in causis, negotium in commerciis dicitur, ubi aliquid datur, ut maiora lucrentur.

Iurgium dictum quasi iuris garrium, eo quod hi qui causam agunt, iure disceptant.

Lis a contentione limitis nomen sumpsit, de qua Virgilius: Limes erat positus litem ut disceret agri.

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de clericorum electione et ordinatione : *ex* D.101 d.p.c1 Cuius negotium — fiunt continet : *ex* D.101 d.p.c.1 Causa est — personarum interpositione : ¿*De Inventione*, 1.6.8? ¿Thierry de Chartres, 74.18-29? Aliter causa — aliquid agendum : Thierry de Chartres, 60.30-31 Causa vocata — disceret agri : *ex Etymologiarum*, 18.15.2-4

La SQO enlaza las distinciones (la 'prima pars' del DG) y las causas (secunda pars) con palabras de D.101 d.p.c.1.[71] Etiqueta C.1 como 'symoniacorum causa', dice que es la primera y afirma que ocupa el segundo lugar en el DG. Luego repite las categorías de Isidoro de Sevilla, que aparecían en primera parte de la glosa de Bc. Una primera persona del singular decide explicar el significado de cada una: ' . . . uniusquisque vocabulorum definitionem utile existimo ignorantibus aperire.' (Schulte 52.9-10). Primero transcribe la definición de Hermágoras/Cicerón de la glosa de Sg y de la segunda parte de la glosa de Bc. A continuación aporta un nuevo sentido de la palabra 'causa', que también procede de los tratados de Retórica: en su 'commentum' al *De Inventione*, Mario Victorino advirtió que 'Aliter causa est impulsus animi ad aliquid agendum'.[72] Por último, la SQO copia los párrafos de los

[71] La SQO volvió a emplear D.101 d.p.c.1 para el comentario de C.2: 'Hactenus *de scienter a symoniacis ordinatis et de ignoranter a symoniacis consecratis et de ordinationibus que per pecuniam fiunt* tractatum est. Sed quia . . .'. (Schulte, *Summa* 57.4-6).

[72] Carl Halm, ed. 'Q. Fabii Laurentii Victorini: Explanationes in Rhetoricam M. Tullii Ciceronis libri duo', *Rhetores Latini minores* (Lipsiae 1863) 153-304:

Etymologiarum sive Originum libri XX correspondientes a los estados por los que pasa una causa: 'iudicium', 'iustitia', 'negotium', 'iurgium' y 'lis'.

La SQO es una composición en mosaico que se confeccionó en la década de los años 1150[73]. Contiene enseñanzas de P, de otros decretistas e incluso del mismo G. Su autor manejaba con destreza las nociones de 'causa'/'negotium'/'thema'.[74] Cuando presentó C.1 — en general, la segunda parte del DG — recurrió a sus conocimientos de Retórica. Aunque el origen remoto de las palabras 'impulsus animi ad aliquid agendum' — desconocidas en los estratos antiguos de glosas al DG — es el rétor Victorino, el autor de la SQO pudo consultar el comentario *Ut ait Petronius* de Thierry de Chartres[75]. No sería la única vez que se inspiró en el maestro de las escuelas de París y de Chartres. *Ut ait Petronius* le proporcionó materiales para el prólogo de su explicación del DG, como la afirmación 'artis rhetoricae materia est hypothesis' (Schulte 3.19), original de Boecio.[76]

Graciano, sus colaboradores y sus discípulos directos emplearon herramientas de la 'artificiosa eloquentia'. El primer

'Causa est animi impulsus ad aliquid agendum' (p. 160). Cf. también München, BSB lat. 6400, fol. 62r. El códice monacense — que Halm empleó para su edición — titula la obra 'Incipit Commentum Victorini Rhetoris in M. T. Ciceronis Rhetoricam' (fol. 60r).

[73] Weigand, 'Die ersten' 451, concedió prioridad cronológica a la SQO respecto a la 'primera etapa de composición de glosas', porque en los márgenes de algunos manuscritos del DG, el estrato más antiguo de glosas combinaba extractos de la SQO con unas pocas glosas pertenecientes a la 'primera etapa', mientras que la mayoría de las glosas de esa 'primera etapa' se copiaron en estratos posteriores. Si se tiene en cuenta cómo fue compuesta la SQO, el proceso inverso tampoco carece de lógica.

[74] Cf. supra la nota 51 de este estudio.

[75] Cf. Fredborg *Latin Rhetorical* 60.30-32: 'Nam causa est animi impulsus ad aliquid agendum. Ratio vero est gerendorum ordo ex causa venientum, ut quid quo loco facias ac dicas intellegas'. (= C. Halm, ed. 'Q. Fabii' 160.4-6).

[76] Cf. Ibid. 'Materia igitur artis rethoricae est hypothesis, quae a Latinis causa dicitur, quoniam illam orator secundum artem rethoricam tractre debet'. (51.57-58 y nota 57). Sobre el prólogo de la SQO cf. José M. Viejo-Ximénez, 'Dos escritos de la decretística boloñesa: *Inter ceteras theologie disciplinas* y *Quoniam in omnibus*', REDC 71 (2014) 271-291.

manual de Derecho canónico no depende del re-descubrimiento del Digesto, ni del movimiento de enseñanza del Derecho, más o menos institucionalizado, que se localiza en Bolonia desde finales del siglo XI.[77] Las artes liberales, base de la educación en la Edad Media, influyeron en el diseño de la estructura original de la obra. Sin embargo, cuando Graciano intentó armonizar las autoridades contradictorias sobre los problemas abstractos (thesis' o 'quaestio infinita) que planteó en las causas (hypothesis' o 'quaestio finita), no recurrió a la tópica de las controversias legales[78], sino a las reglas para la interpretación y la aplicación de los cánones, atemperada por la dispensación de la misericordia, que habían utilizado Ivo de Chartres y Algerio de Lieja.

IV. *Inartificiosa eloquentia*

10. El *De Inventione* y la *Rhetorica ad Herennium* — atribuidos a *Marcus Tullius* — dominaron la enseñanza de la elocuencia cristiana hasta el siglo XI.[79] El interés por las relaciones entre

[77] Aunque G conocía el Derecho romano, cf. Viejo-Ximénez, 'Las Novellae' 207-279; y 'Un capítulo del *Authenticum* boloñés en la *Concordia discordantium canonum*', L. Berkvens-J. Hallebeek-G. Martyn-P. Nève [eds.], *Recto ordine procedit magister: Liber amicorum E. C. Coppens* [Brussel 2012] 313-329) y aprovechó los fragmentos justinianeos en las ampliaciones de la CDC original (J. M. Viejo-Ximénez, 'El Derecho romano 'nuevo' en el Decreto de Graciano', ZRG *Kan. Abt.* 119 (2002) 1-19; 'La ricezione del diritto romano nel diritto canonico', Enrique de León-Nicolás Álvarez de las Asturias, *La cultura Giuridico-canonica medioevale. Premesse per un dialogo ecumenico* [Milano 2003] 157-208; y 'Las etapas de incorporación de los textos romanos al Decreto de Graciano', *Proceedings Catania 2000* 139-152).

[78] Cf. M. T. Cicerón, *De Inventione*, 2.23-39.69-115 (preceptos relativos a la clase jurídica del estado de causa calificativo) y 2.40.116-50.156 (controversias sobre textos).

[79] Por influencia del libro cuarto del *De doctrina christiana* de Agustín de Hipona: cf. Thomas M. Conley, *Rhetoric in the European Tradition* (Chicago 1990) 78. Sobre la difusión de los escritos retóricos de Cicerón cf. Birger Munk Olsen, 'La réception de la littérature classique grecque et latine du IXe au XIIe siècle: Une étude comparative', *Classica* 19 (2006) 167-179: la tabla de la p. 169 contabiliza un total de 178 manuscritos de los siglo IX a XII del *De inventione*, la segunda obra clásica latina más copiada, después de la Eneida de Virgilio (192 copias).

Retórica y Dialéctica puso el acento en la revisión de los tópicos y debilitó la tradición de los comentarios a Cicerón.[80] Algunos maestros parisinos de la primera mitad del siglo XII, sin embargo, expusieron sus ideas sobre el oficio del orador mediante una lectura de la *Rhetorica prima* y de la *Rhetorica secunda* orientada a la elaboración de definiciones.[81]

Guillermo de Champeaux (c. 1070-18.01.1121), maestro de Retórica en Laon c. 1096 y, desde 1100, en la escuela catedralicia de París[82], compuso el comentario al *De Inventione* conocido como *In primis.*[83] Guillermo distinguió la elocuencia 'artificiosa' de la 'inartificiosa'. La primera es propia de los oradores, quienes disputan con argumentos. La segunda es propia de los jurisperitos, quienes recurren a la autoridad de las leyes. Ahora bien, según el maestro de Pedro Abelardo, el jurista 'potest tamen usurpare alienum officium quod est oratorum utendo

[80] Conley, *Rhetoric* organiza la Retórica 'medieval' en tres períodos: del siglo IV a comienzos del siglo XI; del siglo XI a la primera mitad del siglo XII; y de la segunda mitad del siglo XII al siglo XIV (p. 72-73). Distingue, además, dos tradiciones principales: de un lado, Casiodoro, Alcuino, Rábano Mauro y Honorio de Autun coinciden en definir la Retórica como un 'ars' que es parte de las ciencias civiles, tal y como se presenta en el *De Inventione* de Cicerón; de otro, Martianus Capella — y sus comentaristas del siglo IX — coincide con Boecio al asimilar la Retórica a la Dialéctica, tal y como hicieron Hugo de San Víctor y Juan de Salisbury en el siglo XII y Buenaventura en el XIII (p. 73).

[81] Conley, *Rhetoric* habla de un 'renacimiento de los estudios ciceronianos', cuyo resultado son los comentarios de Guillermo de Champeaux y Thierry de Chartres. Ambos escritos desarrollan una explicación de Cicerón desde la perspectiva de Boecio (ibid. 100).

[82] Cf. Charles de Miramon, 'Quatre notes biographiques sur Guillaume de Champeaux', ed. Irène Rosier-Catach *Arts du langage et théologie aux confins des XIe-XIIe siècles: Textes, maîtres, débats* (Turnhout 2011) 45-82 en especial 72-80.

[83] A finales del siglo XI o comienzos del siglo XII, en todo caso, antes de 1118, según Karin M. Fredborg, 'The commentaries on Cicero's De inventione and Rethorica ad Herennium by William of Champeaux', *Cahiers de l'Institut du Moyen Âge Grec et Latin*, 17 (1976) 1-39, en especial 5 y 12-14. Sobre el alcance de los argumentos que favorecen la autoría del *In primis* cf. las observaciones de Klaus Jacobi, 'William of Champeaux: Remarks on the tradition in the manuscripts', *Arts du langage* 261-71 en especial 270-271.

argumentis in disceptationibus suis'.[84] El propio Guillermo, consagrado obispo de Châlons-sur-Marne en 1113, llamó la atención por sus intervenciones en los concilios de Beauvais (1114), Soissons (1115), Châlons (1115), Reims (1115), Reims (1120) y Soissons (1120). Sus biógrafos le consideran uno de los protagonistas de la transformación del 'ius ecclesiasticum' en un sistema de actividad racional: inauguró un modo escolástico de aplicación de los canónes, que no pasó desapercibido entre sus contemporáneos.[85] En París y en el norte de Francia, la relación Retórica/Derecho canónico se fraguó en las escuelas de artes liberales y fructificó en una generación de maestros y hombres doctos consagrados al gobierno de la Iglesia.

Thierry (Theodoricus Brito, Theodoricus Carnotensis, c. 1085-c. 1155) archidiácono y sucesor de Guillermo Porretano como canciller de Chartres, compatibilizó sus obligaciones eclesiásticas con la enseñanza de Gramática, Lógica y Retórica en París, en los años 1130 y 1140, donde era conocido como 'Doctor Carnotensis'.[86] Compuso un comentario al *De Inventione* en los años 1130, cuyo prólogo comienza con las palabras *Ut ait Petronius*, y cuyas fuentes principales son Boecio, Victorino y Horacio. Thierry se sirvió de los comentarios de un maestro Manegold de finales del siglo XI, así como de los del discípulo de éste, Guillermo de Champeaux. A su vez, los comentarios retóricos de Theodoricus Brito influyeron en los maestros de las generaciones siguientes: Petrus Helias, Alanus, Matthieu de Vendôme, Dominicus Gundissalinus y Ralph de Longchamp.[87] Sus enseñanzas también dejaron huella en los decretistas, por ejemplo el autor de la SQO. Otra consecuencia de la relación

[84] Fredborg, 'The commentaries' 27-28.

[85] Cf. Miramon, 'Quatre notes' 70, quien considera a Guillermo uno de los representantes de la generación del Concilio de Clermont (1095).

[86] Cf. Fredborg, *Latin Rhetorical* 6. En su opinión es probable que enseñara en Chartres hacia 1121, pues la *Historia Calamitatum* de Pedro Abelardo menciona a un 'Terricus quidam scholaris magister' que ese año intervino en el Concilio de Soisssons.

[87] Cf. Fredborg *Latin Rhetorical* 12-13 Petrus Helias, por ejemplo, analizó el cisma de Anacleto II (1130-1138) como una 'constitutio negotialis' conforme a la interpretación de *De Inventione*, 1.11.14 que propuso Thierry (ibid. 11-12).

Retórica/Derecho canónico fue el nacimiento de una Ciencia nueva, distinta de la Teología.[88]

11. Graciano no terció en una controversia, ni pretendía pesuadir mediante el uso de la palabra.[89] Compuso la CDC con un propósito más ambicioso: 'ipsa decreta ordinare et in superficie dissonantia ad concordiam revocare'.[90] Puesto que combinó razones y autoridades, fue un jurista que usurpó el oficio del orador. Su manera de entender la 'inartificiosa eloquentia' — ese intrusismo que denunció Guillermo de Champeaux — era peculiar, porque no observó los preceptos de la tópica. El primer canonista tampoco asumió la teoría de las fuentes del Derecho del *De Inventione*.[91] Sin embargo, utilizó las causas de la 'artificiosa eloquentia' para escribir lo que probablemente fue el núcleo original de su obra: la segunda parte del DG. La Ciencia del Derecho canónico debe más a Cicerón y a sus comentaristas medievales que a los antiguos jurisconcultos romanos, a Irnerio o a los cuatro doctores.

Graciano, sus colaboradores y discípulos inmediatos recibieron instrucción en el 'trivium'. El ambiente intelectual en el que nacieron los métodos del 'ius canonicum' es el mismo que

[88] John O. Ward-Karin M. Fredborg, 'Rhetoric in the time of William of Champeaux', *Arts du langage* 219-233, han visto también una relación Retórica/Derecho canónico en el comentario a *De inventione*, 2.56 (168) de la colección de extractos de lecciones retóricas del manuscrito Durham, C.IV.29, fol. 214rb.

[89] Cicerón, *De Inventione*: 'Quare hanc oratoriam facultatem in eo genere ponemus, ut eam civilis scientia partem esse dicamus. Officium autem eius facultatis videtur esse dicere adposite ad persuasionem; finis persuadere dictione'. (1.5.6).

[90] Schulte, *Summa* 3. Así lo explicaba Esteban de Tournai: 'Intentio eius est, diversas diversorum patrum regulas, quae canones dicuntur, in unum colligere, et contrarietates, quae in eis occurrunt, in concordiam revocare'. (Schulte, *Stephan von Doornick* 5).

[91] Cf. D.1-D.20 con *De Inventione*, 2.22-38.65-68. Por otra parte, al DG llegaron algunas autoridades canónicas que transmitían las enseñanzas de Cicerón, bajo etiquetas diversas, entre ellas el mismo Isidoro: cf. Carlos Larrainzar, 'La mención de Cicerón entre las auctoritates canónicas', Alfonso Castro Sáez-Fernando Llano Alonso, edd. *Cicerón: El hombre y los siglos* (Madrid 2011) en prensa, cuyo manuscrito he podido consultar por gentileza del autor.

renovó la exégesis de las 'sacra pagina' y la exposición de la Teología[92]. En la época a la que se remontan las versiones más antiguas del primer manual de Derecho canónico, a orillas del Sena se vivía un renacimiento de los estudios ciceronianos. Pocas escuelas de las tres primeras décadas del siglo XII podrían disputar a las aulas de París el privilegio de contar entre sus alumnos a Graciano.[93]

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[92] Stephan Kuttner, 'The Revival of Jurisprudence', edd. Robert L. Benson-Giles Constable, *Renaissance and Renewal in the Twelfth Century* (Cambridge Mass. 1982) 299-323 en especial p. 310 (reimpr. *Studies in the History of Medieval Canon Law* [Aldershot 1990] III *Retractationes* 5-7): 'the old controversy on priority — were the lawyers or the theologians the first to apply these devices of logic and argumentation to their auctoritates? — has been quietly put to rest' (ibid.).

[93] Cf. Giuseppe Mazzanti, 'Graziano e Rolando Bandinelli', *Studi di Storia del Diritto* 2 (1999) 79-103. Cf. también J. M. Viejo-Ximénez, '"Costuras" y "descosidos"; 'La composición de C.28 del Decreto de Graciano', Bernard D'Alteroche-Florence Demoulin-Auzary-Olivier Descamps-Franck Roumy, edd. *Mélanges en l'Honneur d'Anne Lefebvre-Teillard* (Paris 2009) 1007-1029; 'Graciano' y 'Decreto de Graciano', *Diccionario General 2*.954-72.

Apéndice: Remisiones internas a las 'causae'

1. Remisiones antiguas[94]

(i) C.6 q.1 d.p.c.19: 'Hereticos namque accusare infamibus non prohibetur ut supra patuit in ea causa ubi de accusatione minorum aduersus maiores disputatum est.' (*edF* 559.18-20) = remisión a C.2 q.7.

(ii) C.13 q.1 d.p.c.1 §.13: 'Dicitur enim in quodam concilio 'Si quis laicus uel clericus seu utriusque sexus persona proprietatis suae loca' etc. sicut in eodem capitulo in causa monachorum notata inuenitur.' (*edF* 720.21-24) = a C.16 q.1 c.42.

(iii) C.13 q.2 d.p.c.1: 'Quomodo autem distinguendae sint haec auctoritates in causa monachorum inuenietur' (*edF* 720.55-56) = a C.16 q.3.

(iv) C.14 q.1 d.p.c.1: 'Vnde Prosper in lib. de uita contemplatiua 'Sacerdos cui dispensationis cura conmissa est' etc. require in causa eius a quo pro ingressu monasterii pecunia exigebatur.' (*edF* 733.4-7) = a C.1 q.2 c.9.

(v) C.16 q.1 c.16: 'Vbicumque facultas rerum et oportunitas temporum suppetit, etc. sicut in eodem capite supra legitur in causa eorum qui de diocesi ad diocesim transierunt.' (*edF* 764-765.2) = a C.13 q.2 c.6.

2. Remisiones modernas

(vi) D.32 d.p.c.6: 'Verum principia harum auctoritatum contrarie uidentur Ieronimo, Augustino et ceteris, qui Christi sacramenta neque in bono, neque in malo homine fugienda demonstrant, sicut subsequens causa simoniacorum plenius ostendit.' (*edF* 118.19-23) = remisión genérica a C.1.

(vii) D.62 c.1: ''Si qui autem clerici ab istis pseudoepiscopis in eorum ecclesiis ordinati sunt' etc. infra causa simoniacorum. ' (*edF* 234.16-18) = a C.1 q.1 c.40.

(viii) C.2 q.1 c.7: ''Si autem episcopum talem culpam' etc. et infra in prima causa monachorum.' (*edF* 441.26-27) = remisión a C.16 q.6 c.3.

[94] Se consideran 'remisiones antiguas' las que aparecen en la CDC de los manuscritos Aa Bc Fd P; las 'remisiones modernas', por el contrario, son propias del DG divulgado a partir de 1140: cf. Viejo-Ximénez, 'Costuras' en especial 138-140.

(ix) C.2 q.1 c.7: ‘‘De persona presbiteri’ etc. et infra in causa ‘Clericus aduersus clericum’.’ (*edF* 441.27-29) = a C.11 q.1 c.38.

(x) C.5 q.4 d.p.c.2: ‘Vnde Gelasius ‘ipsi sunt canones etc.’ infra causa ‘Sententia excommunicationis notatus’’ (*edF*. 548.34-35) = a C.9 q.3 c.16.

(xi) C.7 q.1 d.p.c.48: ‘Hinc etiam Augustinus: ‘Tu bonus tollera malum etc.’ infra de tollerandis malis in prima causa hereticorum. … quem quamuis sciret furem esse, tamen ad predicandum misit et ei eucharistiam dedit … ’ (*edF* 587.31-33 y 48-49) = a C.23 q.4 c.2.

(xii) C.11 q.3 d.p.c.21: ‘Hinc etiam Urbanus Vilimundo episcopo ‘Sane quod super Richardo’ et cetera. Require infra causam ‘Quidam episcopus in heresim lapsus’.’ (*edF* 649.22-25) = a C.24 q.2 c.3.

(xiii) C.11 q.3 d.p.c.24: ‘(…) item illud Prosperi ‘Facilius sibi Deum placabunt’ etc. require infra causa ‘Maleficiis inpeditus’ quest. I. de penitentia … ’ = (edF 651.15-17) a D.1 c.32 *de pen*.

(xiv) C.11 q.3 d.p.c.24: ‘Hanc distinctionem cuique licet aduertere ex auctoritate Iohannis Papae ‘Engiltrudam uxorem Bosonis’ etc. require supra in causa ‘Quidam episcopus a propria sede rejectus’ (*edF* 651.26-29) = a C.3 q.4 c.12.

(xv) C.11 q.3 d.p.c.24: ‘Item ex auctoritate eiusdem ‘Si quis domum Dei uiolauerit etc.’. Require infra causa ‘Quidam presbiter infirmitate grauatus’’ (*edF* 651.29-31) = a C.17 q.4 c.21.

(xvi) C.11 q.3 d.p.c.24: ‘Item ex auctoritate Siluestri Papae ‘Presenti decreto censemus’ etc. Require supra in causa ‘In infamia cuiusdam episcopi’ . . . ’ (edF 651.31-33) = a C.5 q.2 c.2.

(xvii) C.11 q.3 d.p.c.24: ‘Iuxta hanc ergo distinctionem intelligenda est illa auctoritas Innocentii ‘Si quis suadente diabolo etc.’ ut infra causa ‘Quidam presbiter’ . . .’ (*edF* 651.33-36) = a C.17 q.4 c.29.

(xviii) C.11 q.3 d.p.c.24: ‘ . . . sicut et illud Urbani ‘Quibus episcopi non communicant etc.’ ut infra in eadem causa.’ (*edF* 651.43-45) = a C.11 q.23 c.27.

(xix) C.11 q.3 d.p.c.24: ‘ . . . supra in causa duo fornicatores . . . ’ (*edF* 652.1-2) = a C.6 q.2 c.2.

(xx) C.11 q.3 d.p.c.26: '. . . Unde infra Urbanus 'Sane quod super Richardo' etc. Causa 'Quidam episcopus in haeresim lapsus'.' (*edF* 652.20-22) = a C.24 q.2 c.3.

(xxi) C.11 q.3 d.p.c.26: 'Item Nicolaus Papa 'Excellentissimus rex Karolus' infra circa finem huius causae' (*edF* 652.22-23) = a C.11 q.3 c.102.

Gratian's *De penitentia* in Twelfth-Century Manuscripts

Atria A. Larson

Through the research of Rudolf Weigand, Titus Lenherr, Regula Gujer, Anders Winroth, Carlos Larrainzar, José Miguel Viejo-Ximénez, and Melodie Eichbauer, certain twelfth-century *Decretum Gratiani* manuscripts have achieved prominence in textual studies of the work. These studies are important for determining which manuscripts to use in an eventual critical edition. Weigand focused his attention on early glosses, but his research on the glosses identified many *Decretum* manuscripts as belonging to the twelfth century.[1] Lenherr worked out a methodology for determining which of the many twelfth-century manuscripts could reliably be utilized to create a working edition of Gratian's text (and one superior to Friedberg's edition). He ultimately recommended four manuscripts.[2] Gujer used a total of eighteen manuscripts, including three of Lenherr's manuscripts

[1] Rudolf Weigand, *Die Glossen zum Dekret Gratians: Studien zu den frühen Glossen und Glossenkompositionen* (2 vols. SG 25-26 Rome 1991). See also his later articles in response to Winroth's announcement of an earlier recension: Weigand, 'Zur künftigen Edition des Dekrets Gratianus', ZRG Kan. Abt. 83 (1997) 32-51; idem, 'Chancen und Probleme einer baldigen kritischen Edition der ersten Redaktion des Dekrets Gratians', BMCL 22 (1998) 49-73.

[2] Titus Lenherr, *Die Exkommunikations- und Depositionsgewalt der Häretiker bei Gratian und den Dekretisten bis zur Glossa ordinaria des Johannes Teutonicus*, Münchener Theologische Studien III, Kan. Abt. 42 (St Ottilien: EOS Verlag, 1987); idem, 'Die Summarien zu den Texten des 2. Laterankonzils von 1139 in Gratians Dekret', AKKR 150 (1981) 528-551; idem, 'Arbeiten mit Gratians Dekret', AKKR 151 (1982) 140-166; idem, 'Fehlende "Paleae" als Zeichen eines überlieferungsgeschichtlich jüngeren Datums von Dekrethandschriften', AKKR 151 (1982) 495-507. His recommendations appear succinctly in 'Arbeiten' 163. He recommended (see n.11 for shelfmarks) Mk, Sb (which he noted as Sa but is now referred to as Sb), Py (called Pf by Lenherr: Paris, BNF lat. 3895), and Bi.

for her edition of *prima pars* D.16.[3] Winroth complicated matters but also breathed new life into old debates and answered many questions, by discovering an earlier recension of Gratian's text preserved in extant manuscripts.[4] Although each manuscript has its own characteristics and they do not all fall neatly into the category of a single, unified recension, the number of these confirmed manuscripts, including fragments and abbreviations, now stands at six.[5] Larrainzar properly drew attention to the unique and valuable characteristics of the Florence manuscript of those six.[6] He and Viejo-Ximénez have published numerous studies tracing the textual development of small portions of Gratian's text through at least three successive stages, beginning with UrGratian, or the original text of the *Decretum Gratiani*, which is not extant but to which, of all extant manuscripts, Sankt Gallen, Stiftsbibliothek 673 (Sg) might have the closest relationship.[7] They have emphasized how the *Concordia*, or the

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[3] Regula Gujer, *Concordia Discordantium Codicum Manuscriptorum? Die Textentwicklung von 18 Handschriften anhand der D.16 des Decretum Gratiani* (Forschungen zur kirchlichen Rechtsgeschichte und zum Kirchenrecht 23; Cologne 2004).

[4] Anders Winroth, *The Making of Gratian's Decretum* (Cambridge 2000).

[5] (1) Admont, SB 23 and 43 (Aa), (2) Barcelona, Arxiu de la Corona d'Aragó, Santa Maria de Ripoll 78 (Bc), (3) Firenze, BN Centrale, Conv. Soppr. A. 1.402 (Fd), (4) Paris, BNF nouv. acq. lat. 1761 (P), (5) the fragment Paris, BNF lat. 3884 I, fol. 1 (Pfr), and (6) the abbreviation München, BSB 22272, fol. 117r-122r (Mw). The first five are discussed in Winroth, *The Making of Gratian's Decretum* 25-32. The Munich abbreviation is a more recent discovery: Atria A. Larson, 'An *Abbreviatio* of the First Recension of Gratian's *Decretum* in Munich?' BMCL 29 (2011-2012) 51-118.

[6] Carlos Larrainzar, 'El Decreto de Graciano del codice Fd (=Firenze Biblioteca Nationale Centrale, Conventi Soppresi A.I.402): In Memoriam Rudolf Weigand', *Ius ecclesiae* 10 (1998) 421-489.

[7] Carlos Larrainzar, 'La formación del Decreto de Graciano pore tapas', ZRG Kan. Abt. 87 (2001) 5-83; idem, 'La edición critica del Decreto de Graciano', BMCL 27 (2007) 71-105; and idem, 'Métodos para el anàlisis de la formación literaria del Decretum Gratiani: "Etapas" y "esquemas" de redacción', *Proceedings Esztergom 2008* 85-116. Viejo-Ximénez, 'La composición del Decreto de Graciano', *Ius Canonicum* 45 (2005) 438-442; idem, 'La recepción del derecho romano en el derecho canónico', *Annaeus* 2 (2005) 139-169; idem, 'Variantes textuales y variantes doctrinales en C.2 q.8', *Proceedings*

stage of the *Decretum* present in Winroth's identified manuscripts (the stage which Winroth and others call the 'first recension') received numerous *additiones* and in the process transformed from the earlier *Concordia* into the later *Decretum* (the stage of Gratian's text which Winroth and others call the 'second recension'). Eichbauer has compared the *additiones* in the three relevant earlier manuscripts (Aa, Bc, and Fd).[8]

Collectively, the scholarship of the past three decades provides a surer basis for determining which manuscripts to collate for a critical edition of the *Decretum*, but much work remains to be done. Any critical edition of the *Decretum* must, as Kuttner urged thirty years ago, portray the various stages in the development of Gratian's text.[9] How precisely to do this remains unsettled. Certain manuscripts chosen by Lenherr and Gujer might be more valuable for 'first-recension' texts than for 'second-recension' texts, or vice versa.[10] The *additiones* of Aa, Bc, and Fd either should or should not be collated for a critical edition of 'second-recension' texts, but the research of Larrainzar, Viejo-Ximénez, and Eichbauer strongly suggests that they should at least be given serious consideration. Their research also strongly suggests that, in a future critical edition, the 'second-recension' texts should not be treated as a monolithic category but rather as a group of texts added organically or diachronically to the 'first recension', only the first (and largest) stage of which can be defined with any certainty.

My reflections in this essay on eight manuscripts result from my work in producing a new edition of Gratian's *Tractatus de penitentia*, or *Decretum* C.33 q.3. The eight manuscripts are:

Washington 2004 161-190; idem, '"Costuras" y "Descosidos" en la version divulgada del Decreto de Graciano', *Ius Ecclesiae* 21 (2009) 133-154.

[8] Melodie H. Eichbauer, 'From the First to the Second Recension: The Progressive Evolution of the *Decretum*', BMCL 29 (2011-2012) 119-167.

[9] Stephan Kuttner, 'Research on Gratian: Act and Agenda', *Proceedings Cambridge 1984* 3-26.

[10] A point noted by Winroth in his preparations for an edition of the first recension: 'Critical Notes on the Text of Gratian's *Decretum* 2', https://sites.google.com/a/yale.edu/decretumgratiani/home/critical-notes-2, accessed 5 December 2013.

Aa, Bi, Fd, Fs, Mk, Pf, Sb, and Sg.[11] I collated the first seven for my edition.[12] I transcribed the text of Sg for an appendix to the edition. The process of creating a new edition that improves upon Friedberg's has clarified different properties of these manuscripts, which should assist those in the future facing the daunting task of producing a critical edition of the *Decretum* in its entirety. I will present my findings in a discursive way with only limited statistical analysis, for the type of evidence I am interested in presenting has more to do with the qualities or nature of each manuscript than with numbers of common variants or other data commonly used for determining the familial relationship between manuscripts.

[11] The choice of Aa of Fd was easy since they are the only two 'first-recension' manuscripts to contain the latter part of the *Decretum* and thus *De penitentia*. Other scholars undoubtedly would have chosen different and perhaps more manuscripts that represent stages later than the first recension. My choice was determined largely by Lenherr's recommendation combined with Gujer's comments on the manuscripts. At least for Mk and Pf, I wanted to continue to test their value. Ken Pennington drew my attention to Fs after some of his research indicated that it might be a very good vulgate manuscript.

Aa=Admont, SB 23 and 43; Bi=Biberach an der Riss, Spitalarchiv B 3515; Fd=Firenze, BN Centrale, Conv. Soppr. A.I.402; Fs=Firenze, Biblioteca Medicea Laurenziana, Plut. 1 sin. 1; Mk= München, BSB lat. 28161; Pf=Paris, BNF lat. 3884 II; Sb=Salzburg, SB St. Peter a.XI.9; Sg=Sankt Gallen, SB 673.

[12] I collated each of the seven in their entirety, but not every manuscript is complete. As will become clear below, Aa and Fd do not contain all the texts of the finalized *De penitentia*. Fs lost a few folios already by the second half of the thirteenth century. It breaks off on fol. 315v at De pen. D.4 c.8 'Cur ergo — ' and picks up again on fol. 320r at De pen. D.6 c.1 '…filium acquisierat uidue'. A hand similar to that which added to the manuscript the thirteenth-century *Glossa ordinaria* updated by Bartholomeus Brixiensis indicated that two folios were missing (probably this is an underestimate). He noted that these folios had contained D.5 and D.6 and the end of D.4 and therefore that the last words on the present folio do not continue to the next folio present.

Note on Terminology and Proposal for New Nomenclature

Before I present my findings, I should clarify the terminology employed and would like to suggest a new, modified nomenclature. In past publications, I have utilized the terms 'first recension' and 'second recension', as has become common in English- and in German-language scholarship on the *Decretum*. I have often put the terms in quotation marks in order to highlight my caveats, for I have not meant compositions that were completed, self-consciously produced and published, especially with reference to the 'second recension'. What I have meant by 'first recension' and 'second recension' falls much more in line with Larrainzar, Viejo-Ximénez, and Eichbauer's thinking about the development of Gratian's text. They do not adhere to Winroth's 'first-recension, second-recension' model of the text corresponding to Gratian 1 and Gratian 2 as author of the text. Rather, they maintain that Gratian's text reached a cogent stage of composition in the first recension. As indicated above, Larrainzar calls this stage the *Concordia*, and it is most clearly presented in the main bodies of Bc and Fd. This version was circulated. Then Gratian, one of his students or a group of scholars made additions to the 'first recension' in at least two, but probably three or more successive stages. The first was the largest, comprising the appendix or supplement in Fd, what Larrainzar has termed the *additiones bononienses*.[13] These consist of both *capitula* and *dicta*. Other texts were added later. Some of these appear in the margins of Fd; some do not. Some make an appearance in the appendix or margins of Aa; some do not. Eventually, all the additions to make a finalized 'second recension' found their way into the work. This is the stage that Larrainzar calls the *Decretum*. After this stage, only the *paleae* were left to be added. The 'second recension' plus the *paleae* make the vulgate *Decretum*.

The most important difference between Winroth's and Larrainzar's models for scholars' approach to editing the

[13] See articles referenced in n.7 above.

Decretum lies in the understanding of what took place between the first and second recensions, or between the *Concordia* and the *Decretum* — and the manuscripts mirroring this development. For Winroth, the finalized 'second recension' might have developed in stages, but these stages leave no trace in the manuscripts, and the 'second recension' achieved a state of completion in Bologna in a second recension archetype.[14] This archetype of a complete second recension was then copied and circulated throughout Christendom. All additions to 'first recension' manuscripts derive from completed copies of the 'second recension' descending from this archetype. For Larrainzar, the progression from the *Concordia* to the *Decretum* in successive stages is discernible in the extant manuscripts and above all in Fd, and no second recension archetype ever existed, at least not in the sense in which Winroth seems to understand it. For Larrainzar, Viejo-Ximénez, and Eichbauer, Gratian's text was a truly living text, and scholars today can see at least many of the stages of development in the surviving manuscripts from the third quarter of the twelfth century, but above all in Fd.[15] Many of my comments on the manuscripts below provide support for this viewpoint and add to it.

Just as a neat 'first-recension, second recension' model is not supported by the witnesses, it similarly cannot do justice to the categorization of the manuscripts. In the case of *De penitentia*, one cannot simply lump Fd and Aa into the category of 'first recension' manuscripts and label the remaining ones 'second recension' manuscripts. No categorization can adequately portray the textual history and complexities in evidence here, but I have decided to put my seven manuscripts (leaving Sg aside at the moment) into three categories: (1)

[14] Winroth, *The Making of Gratian's Decretum* 130-136; idem, 'Marital Consent in Gratian's *Decretum*', *Readers, Texts and Compilers in the Earlier Middle Ages: Studies in Medieval Canon Law in Honour of Linda Fowler-Magerl*, ed. Martin Brett and Kathleen G. Cushing (Burlington, Vt. 2009) 111. He has used the language of a second–recension archetype in his online 'Critical Notes on the Text of Gratian's *Decretum*', available at https://sites.google.com/a/yale.edu/decretumgratiani/

[15] See articles cited above in nn.6-8.

manuscripts of the 'first recension' plus *additiones* (Aa and Fd), (2) mixed or intermediate manuscripts (Fs, Pf, and Sb), and (3) manuscripts of a finalized 'second recension' (Bi and Mk).[16]

In light of the above considerations, I propose a new nomenclature for addressing the different stages of Gratian's text, namely 'R1', 'R2,' 'R2a', 'R2b', etc. This nomenclature follows the identification of a 'first' and a 'second recension' but allows for more flexibility where needed, viz. within the 'second recension'. It takes Larrainzar's basic ideas and superimposes them onto Winroth's terminology, thereby utilizing nomenclature that is more succinct and easier to conceptualize than Larrainzar's but more reflective of the textual evidence in the manuscripts than Winroth's. Winroth's terminology does not need to be discarded completely; a base concept of a first and a second recension retains some validity. The 'first recension' was the first stable textual version of the *Decretum* and one that circulated. The 'second recension' as we know it was the next somewhat stable text that circulated as a piece. This recension developed in stages but did this so rapidly that only one manuscript (Fd) reveals with some clarity those stages. There are no manuscripts that represent purely these intermediate stages; the closest thing is Fd with its main text and appendix minus its marginal additions. The nomenclature I propose and its particular relationship to Fd may be summarized as follows:

Label	**Meaning**
R1	'first recension'/*Concordia*; text as defined in main body of Fd
R2	'second recension'/*Decretum* in general; vulgate text minus *paleae*

[16] My discussion below follows this tripartite organization, but, as will soon become clear, the nature of the manuscripts precludes any neat and exclusive discussion of the relevant manuscripts in the section devoted to the category I have assigned them. Mention of the other manuscripts will necessarily come into play in every section, but I will focus my attention on the named manuscripts in each section.

R2a	*additiones bononienses*; first set of *additiones* to R1; text as defined by Fd appendix (FdB)
R2b, R2c, etc.	successive stages of *additiones* after R2a; marginal texts in Fd (FdG) plus texts present nowhere in Fd

If Sg does preserve in some sense an earlier version, it can still be referred to as an UrGratian or as a pre-R1 phase. The final stages are ill-defined and difficult to determine. For my edition of *De penitentia*, the manuscript evidence pointed to text belonging to R2b; I believe that certain texts were added after R2b, but it is nearly impossible to group such texts into definitive stages of R2c, R2d, etc. The nomenclature has enough flexibility, however, to allow future scholars to put various later *additiones* into such groupings. In what follows, I employ this nomenclature, especially when identifying to what stage of text a certain *capitulum* or *dictum* belongs; at certain times, when speaking generally, a written-out 'first recension' or 'second recension' seems more appropriate.

Manuscripts of the 'First Recension' (R1) Plus Additiones: Aa and Fd

For sections of the *Decretum* past C.12, the two most important manuscripts for establishing R1's text as it emerged from the pen of Gratian are Aa (Admont, Stiftsbibliothek 23 and 43) and Fd (Firenze, Biblioteca Nazionale Centrale, Conv. Soppr. A.I.402). These are the two manuscripts on which I have based my restoration of the original *Tractatus de penitentia*.[17] In their entirety, however, both manuscripts contain more than the 'first

[17] Regardless of the exact nature of Sg (see more below), it does not contain a *treatise* on penance. Its C.30 q.3, corresponding to C.33 q.3, or *De penitentia*, consists of a relatively short *quaestio* whose length and level of detail is similar to that of many of the other *quaestiones* in the manuscript.

recension'.[18] One must be clear, then, about which parts constitute *additiones*.

Aa does not contain a pure 'first recension' anywhere. In both codices, 23 and 43, a 'first recension' text is followed by an appendix or supplement of additional texts, but the first sections of each codex also contain interpolations, certain R2 *additiones* that either the Aa scribe himself or his exemplar incorporated into the main body of the text. Which texts belong to the 'first recension' and which are interpolations is determined by the content of the main body of Fd, which has no interpolations. In the sections of codex 23 and 43 labeled *Excerpta*, the Aa scribe later copied those *additiones* that he (or his exemplar) had not interpolated in the main body. The R1 *De penitentia* with some R2 interpolations appears on folios 145r-183v of Aa 43 (hereafter just 'Aa'), while the remaining *additiones* appear in the appendix on folios 329v-337r.[19] I refer to this appendix with the *siglum* 'AaB'.

Fd contains a pure copy of the 'first recension' of *De penitentia* in its main body on folios 88rb-99va. I refer to this section simply as 'Fd'. It then contains an appendix or supplement or set of *additiones* to *De penitentia* on folios 159va-162rb. These additional texts, mostly *auctoritates*, were written by a different scribe. This section I refer to with the *siglum* 'FdB'. Textually, these additions belong to stage R2a of *De*

[18] On the overall structure of Fd and Aa, their dates, and earlier *Decretum* scholarship taking note of these manuscripts, cf. Winroth, *The Making of Gratian's Decretum*, 28-32 and 23-26. The parts of Fd in question are dated variously to the second half of the twelfth century (Winroth based on the work of Adriana Di Domenico) or pre-1150 (Larrainzar and Pennington). Giuseppa Zanichelli has personally related to me her opinion that Di Domenico erred and that the script (though not the illuminations) is without a doubt mid-twelfth century, to be dated specifically to 1150-1160. Aa dates to the 1160s. Pennington would date Aa to the 1140s at the latest. On Aa, cf. also Gujer, *Concordia Discordantium Codicum Manuscriptorum?* 223-227. On the marginal additions and appendices, or supplements, in Fd and Aa, cf. especially Eichbauer, 'From the First to the Second Recension'.

[19] The interpolations from R2 *De penitentia* in Aa are: the second half of D.3 c.29 (In quibus Domini – qui displicebat), D.5 cc.2-8, D.6 d.p.c.1-c.2, D.6 c.3, and D.7 c.1.

penitentia and constitute the only pure manuscript witnesses to this stage. Yet another scribe made corrections, mostly to the original treatise. The earliest corrections were made in a dark black ink. Many of these corrections seem to bring a faulty R1 text in line with the original intentions of the author (the most obvious examples are marginal annotations filling in what was omitted by homeoteleuton), but some of them represent real changes to the text. Other scribes added more *auctoritates* in the margins of both the main body and the appendix in a variety of shades of lighter brown ink. I refer to any marginal addition, whether in the main body of Fd or in the appendix, with the *siglum* 'FdG'. Like Winroth, I doubt that all the marginal corrections and additions were made by a single scribe. Like Larrainzar, however, I believe the marginal corrections do not merely represent later additions *to this manuscript* (i.e., later than the additions in the appendix) but also, and far more significantly, represent a later stage of additions *in the textual history of the* Decretum *itself*. In other words, the *additiones* in the appendix mark a first and rather large set of additions to expand the 'first recension' (stage R2a). The *additiones* in the margins, both in the main body and in the appendix, as well as certain corrections within the text, represent a further effort to expand and revise the text (stages R2b, R2c, etc.).

The great value of Larrainzar's original study of Fd in 1998 inheres precisely in this point, namely that the physical manuscript of Fd reveals to scholars the successive progression from R1 to R2 (in Larrainzar's terminology, from the *Concordia* stage to the *Decretum* stage). He provided ten arguments to prove his point.[20] Larrainzar argued that Fd constitutes the original manuscript in which such a progression took place, thus making the totality of Fd, complete with all additions and corrections, the first and original manuscript of the *Decretum* or second recension.[21] Several reasons exist to doubt that Fd was

[20] Larrainzar, 'El Decreto de Graciano del codice Fd' 450-463.

[21] Note that Larrainzar never claimed Fd was Gratian's autograph or identified hand G with Gratian. He claimed that he could not conceive of the additions and changes to the manuscript made by hand G not proceeding from an

the original manuscript in which the *Decretum* (or R2) came about. Those reasons include numerous omissions of phrases (left uncorrected) as well as readings that put Fd's additions in closer relationship to some manuscripts but clearly not others. This suggests that at least one other early model existed from which some of our early extant manuscripts derive and that FdB itself derived from another copy of the *additiones bononienses*.[22]

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author's mind, the mind of a man who was shaping the text in Fd into what he wanted the full and correct text of the *Decretum* to be. On this, as on other points, Winroth, 'Le manuscrit florentin du Décret de Gratien: Une critique des travaux de Carlos Larrainzar sur Gratien I', RDC 51 (2001) 211-232, mischaracterized Larrainzar's arguments, about which Larrainzar justifiably complained (see his 'La investigación actual' 52 n.39). Viejo-Ximénez has pointed out that Winroth also seemed to misunderstand Larrainzar's thinking about the dating of the first two hands (A and B) in the manuscript ('La recepción del derecho romano en el derecho canónico' 148 n.12). The point is not that Hand C post-dates 1148 and therefore Hands A and B pre-date 1148. Rather, the argument has to do with the imposition of distinction divisions by Hand C. While I do not endorse completely Larrainzar's understanding of Fd, for the majority of Winroth's article, Winroth set up a straw man against which to argue. Larrainzar nowhere made the argument that 'the perfect correspondence between [ten instances of marginal corrections in Fd] and the second recension proves that only the author could have made them' (Winroth, *The Making of Gratian's Decretum* 31, which represents the same line of argumentation taken up in detail in his 'Le manuscrit florentin'). Winroth spent the second half of his article arguing that point, which was an argument never made by Larrainzar. Larrainzar's argumentation was far more subtle and far more rooted in the intricate paleographical details of the manuscript. His ten arguments did not attempt to prove that, in those ten places, the marginal corrector brought the first recension text in line with the second recension but rather that the corrections reveal the process whereby the first recension was turned into the second recension.

[22] In the first set of *additiones*, D.1 cc.6-30, the number of shared variants with the other manuscripts vary. FdB reads most frequently with AaB and/or Sb. It shares five (5) common variants with them both, two more with Sb alone, and an additional variant with AaB alone, making a total of seven (7) shared variants with Sb and six (6) shared variants with AaB. FdB also has five (5) total shared variants with Bi, three of which were later corrected in Bi. FdB has four (4) shared variants with Pf, but only one of these instances has another manuscript with the same reading; the other three are unique to Pf and FdB. FdB has three (3) shared variants with Fs and only one (1) shared variant in this group of texts with Mk. This data shows especially close affinities

The clearest indication that Fd did not constitute the original physical manuscript in which R1 text grew into R2 text comes from a curious omission from a late marginal addition combined with a scribal notation appended to it. The original *De penitentia* did not contain D.3 cc.36-39. Some, but not all, of this text appears in the bottom margin of FdB on folio 161v. Compared to the manuscript's other (even marginal) additions, this is a very late R2 addition, as is clear from the distinctly light color of the ink and the fact that it does not have a tie mark cued to it to reveal where it should be inserted in the original text.[23] The additional texts in the bottom margin are split between the two columns on the folio (see Figure 1). The text of c.38 and c.39 fall under column B. The text of c.36 and c.37 *should* fall under column A, but in fact what one finds is a large, open space under column A and then just over one line of text, beginning mid-

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between FdB on the one hand and AaB and Sb on the other, which is significant since Fd has the most shared readings with these two manuscripts in R1 texts as well. Likewise, FdB has several uniquely shared readings with Pf in R2 texts, which also aligns with what occurs in R1 texts. These uniquely shared variants with Pf suggest that Pf derives in some sense from an already expanded Fd (i.e., Fd + FdB), or a very similar sister manuscript of Fd.

The shared readings with Sb and AaB (and even Bi) indicate, however, a close common ancestor. One example in this grouping of 'additiones' makes this clear: the variants on *homicide esse* in D.1 c.24. FdB and Bi *ante correctionem* omit the phrase entirely in the following clause: 'quia et qui occidit, et qui odit fratrem suum, et qui ei detrahit pariter homicide esse demonstrantur'. One can make some sense of the clause in question without the phrase, although one would prefer at least to have the infinitive *esse* in order to make an equivalence between 'both he who hates his brother, and he who disparages him' and 'he who kills [his brother]'. Bi's corrector filled in just such an 'esse' above the line. Having Bi as a close ancestor, Mk had the 'esse' in text but added through correction the 'homicide' above the line (but after the 'esse'). Fs has the phrase, though inverted, like Mk's corrected form. Pf and Sb had the correct text, while AaB had something very close, namely 'homicida esse'. These variants show that FdB was not the ultimate exemplar of all R2 texts. Another closely related manuscript, X, existed that contained the 'homicide esse'. In this instance, Bi followed FdB (or made the same error); AaB, Pf, and Sb followed X.

[23] Many of the marginal additions in FdB do contain such letters. See, e.g., fol. 152r.

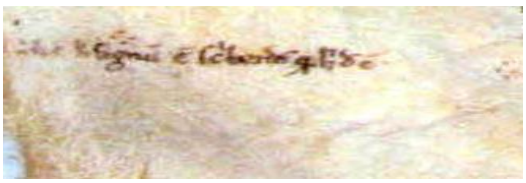
word: '<cogita>tiones habet elidat ad Christum, qui omnes irrationabiles motus sui reuerentia et discretione conminuat' — i.e., the concluding phrases of D.3 c.37, meant to lead into the full text of cc.38-39 under column B. In the bottom left-hand margin (not interfering with the open space under column A) is a scribal notation: 'hoc signum est scribendum quod hic deest'. Above the word 'signum' are four dots in the shape of a diamond. The same four dots in a diamond appear to the right of this line, just to the left of the open space directly under column A. These four dots do not appear in Fd at the close of D.3 c.35 where the text was intended to be inserted (fol. 96ra).[24] As a result, the references to 'here, at this sign' seem to be a reference self-contained, as it were, to the margins of fol. 161v, not a cross-reference to D.3 c.35. In other words, the scribe was not saying that the text in the margin (<c.36>-c.39) should be written after D.3 c.35. (After all, he did not make any such note elsewhere in relationship to marginal additions.) Instead, he was making a note to himself or a fellow scribe that the missing text ('quod hic deest' — viz. c.36 and most of c.37) should be filled in. Clearly his copy of these 'additiones' was defective and perhaps had sustained considerable physical damage, and yet it was in good enough condition to give him a rough idea of how much text was missing (though he seemed to underestimate it). Perhaps he considered that his notation would be erased when the task of 'writing in what is missing' was complete, but neither he nor another scribe ever got around to doing it. For this set of additions, clearly what is present in FdG (the marginal additions in Fd or FdB) does not represent the original addition in the production of the *Decretum*. The scribe was copying from

[24] Instead one finds there a tie-mark 'T', which in the appendix is cued to D.3 c.48. There are other incongruities between the letters or symbols in Fd and their corresponding letters or symbols in FdB. For instance, Fd assigns the letter 'U' to the De pen. 'additiones' D.5 cc.2-8, but FdB assigns no tie-mark to these texts and instead labels De pen. D.6 d.p.c.1-c.2 as 'U'. I have no good explanation for these incongruities except to reiterate the fact that FdB was copied separately and that the tie-mark post-dates an earlier and less error-ridden notation system for the original 'additiones' using incipits (cf. chapter 5 of my *Master of Penance*).

another manuscript of ‘additiones’; someone else other than this scribe had already decided that these four ‘auctoritates’ should be added after D.3 c.35. In sum, Fd is not the manuscript (or the sole manuscript) in which an author or redactors first made the various additions to the ‘first recension’.

Figure 1: Diagram of Incomplete Additions of D.3 cc.36-39 (Fd fol. 161v)

[left-hand margin]	……. …[Column A]…….. …….	…… ……[Column B]…… ……
[bottom margin]	❖	Item Ieronimus…… ……
❖ Hoc signum est scribendum quod hic deest	[open space; c.36 and most of c.37 missing]	……[c.38 complete]…… ……. ……. ……. …….
	-tiones habet elidat ad Christum, qui omnes irrationabiles motus sui reuerentia et discretione conminuat [end of c.37]	…..Item Leo papa…… ……. ……[c.39 complete]…… ……. …….



Fd fol. 161va in margin

Fd fol. 161va

Fd fol. 161vb

Nevertheless, Fd remains modern scholarship's only extant manuscript to bear witness in its form, *mise-en-page*, and *correctiones* to various successive stages of development between the 'first' and 'second' recensions, as the following two examples make clear. The first I have discussed in detail elsewhere; it is in fact a further study of Larrainzar's tenth example demonstrating that Fd reveals the process of the progressive formation from the 'first' to the 'second recension' and is not simply a 'first recension' manuscript that was brought

up-to-date using a second recension text.[25] This example consists of *De penitentia* D.7 cc.2-4, all of which derives from a sermon, 'Penitentes, penitentes', ascribed by Gratian to Augustine but probably composed by Caesarius of Arles. Part of D.7 c.2 appeared in the original treatise; Gratian might have extracted it from a fuller version of the text in the *Collectio canonum trium librorum* (3L), but that is impossible to prove.[26] It appears in the main body of Fd on fol. 99rb. The final version as it appears in Friedberg's edition represents a mangled mess both in comparison with the original material source and in comparison with two versions in two of Gratian's known formal sources, 3L and the *Collectio Tripartita* (Trip.), which John Wei first identified as the likely formal sources for D.7 cc.3-4 and the remainder of c.2, respectively.[27] Fd, and Fd alone, reveals how this mangled mess came about. It only makes sense as two stages of additions from two different formal sources; these two stages are visually portrayed in FdB. The additions of cc.3-4 are in the main column of the appendix (folio 162rb), thus constituting part of what Larrainzar has called the 'additiones bononienses', or, for this manuscript, FdB proper. The person responsible for this addition had a precise scheme in mind: he wanted the original c.2 to follow upon Friedberg's c.3 and to be followed by c.4. This sequence (c.3, c.2, c.4) matched the extended quotation in 3L 3.19.37, the likely formal source. He deliberately omitted (with an *et post pauca*) a certain section, which I label part [e]. A portion of this part [e] appears in the margin of Fd's appendix (right-hand margin of folio 162rb), thus constituting part of FdG. The person responsible for this addition intended his new addition to follow directly upon the original treatise's text

[25] Cf. my *Master of Penance* 229-230 and especially Appendix A, 501-506; Larrainzar, 'El Decreto de Graciano del codice Fd' 462-463.

[26] 3L 3.19.37. The edition is Joseph Motta, ed. *Collectio canonum trium librorum. Pars altera (Liber III et Appendix)* (MIC B 8.2; Vatican City 2008).

[27] J. Wei, 'A Reconsideration of St. Gall, Stiftsbibliothek 673 (Sg) in Light of the Sources of Distinctions 5-7 of the *De penitentia*', BMCL 27 (2007) 166-171. The relevant *Tripartita* text is Trip. 3.28.2. Edition: Martin Brett, Bruce Brasington, and Przemysław Nowak, ed. *Collectio Tripartita*, provisional edition available at http://project.knowledgeforge.net/ivo/tripartita.html

(Friedberg's c.2) and then to be followed by the first addition in the main column of the appendix (cc.3-4). Placing his addition after the original, shorter c.2 in the main body of Fd would make that whole text (the entirety of Friedberg's c.2) match the sequence of text in his formal source, Trip. 3.28.2 or something very much like it. The complete redacted sequence of text from the sermon, as determined by the second *additor*, became the vulgate version (c.2, c.3, and c.4), but it created disorder in the text in terms of the sequence of sentences in the original sermon and in 3L. Winroth believes FdB was merely a largely correct and complete effort to bring Fd up-to-date with a finalized, published 'second recension'.[28] He believes the marginal additions resulted from later scribes' attempts to fill in the missing R2 texts, omitted intentionally or by mistake by FdB's scribe. The example of *De penitentia* D.7 cc.2-4 proves that this is not so. In short, it is a sequence of text created in three distinct stages (R1, then R2a followed by R2b). That the final two stages are two, not one, is proven by the fact that they derive from two formal sources and that the third stage corrupted any known transmission of the text in question.[29] It is Fd alone that shows these three stages. Aa has the original D.7 c.2 in its main body and the completed c.2b and cc.3-4 in that sequence in AaB. Its scribe was working from a manuscript that had already integrated the second *additio* (the R2b text) with the first (the R2a text) in accord with the wishes of Fd's scribe G.

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[28] Winroth, *The Making of Gratian's Decretum* 131-133.

[29] Moreover, a movement in the other direction, which Winroth's theory would necessitate, could not conceivably have produced what is present in the Fd appendix. That is, no one could have cut out D.7 c.2b, alone derived from a source other than 3L, out of a full cc.2-4 and indicated to place the R1 c.2 between the R2 c.3 and c.4 when his completed R2 manuscript would have had the R1 c.2 preceding cc.3-4. In other words, the FdB scribe did not take c.2b out of a complete and sequential D.7 cc.2-4 and then rearrange the order to read c.3, c.2a, c.4; he was taking the original, R1 c.2a and adding text around it. And the FdG scribe was not filling in something (c.2b) that had been omitted or forgotten; he was adding something new to what was previously there.

The second, visually clear example from *De penitentia* demonstrating how Fd shows the progressive formation in the direction of a finalized 'second recension' comes not from the text of *De penitentia* itself but from the incipit of its governing case statement, C.33. On its own the example might not be fully convincing, but I mention it here because it is visually poignant. The changes are easy to see, whereas the previous example is much more complicated, both visually and conceptually. What is the incipit of C.33? According to Friedberg, it is 'Quidam uir maleficiis inpeditus' — this is the case of the man suffering from magic- or divination-induced impotence who lost his wife to another man. He then recovered his potency after confessing his sin to God and received his wife back (probably by ecclesiastical intervention) only to desire to live continently (at least for a time) in order to devote himself to prayer. 'Quidam uir maleficiis inpeditus' (sometimes 'Vir quidam maleficiis inpeditus') appears in many manuscripts.[30] The 'uir' is missing from many manuscripts from the twelfth century and even several from the thirteenth, leaving either 'Maleficiis quidam inpeditus' or 'Quidam maleficiis inpeditus'.[31]

[30] As observed in Anthony Melnikas, *The Corpus of the Miniatures in the Manuscripts of Decretum Gratiani* (SG 18; Roma 1975) 3.1033-1058: Troyes, BM 60, fol. 185; Firenze, Biblioteca Medicea Laurenziana Edil. 96, fol. 259, and Plut. IV sin. 1, fol. 246v; München, BSB lat. 17161, fol. 145v; Berlin, SB Preussischer Kulturbesitz lat. fol. 4, fol. 285, Ham. 279, fol. 195v, and lat. fol. 6, fol. 250; Escorial, Real Biblioteca del Escorial ç. I. 5, fol. 379v; Amiens, BM 355, fol. 331; Tours, BM 558, fol. 285v; Cesena, Biblioteca Malatestiana 3.207, fol. 258.

[31] For the twelfth century: Pf, fol. 96ra, has the former reading; besides in Aa, the latter reading may be found in Fs (Firenze, Biblioteca Medicea Laurenziana, Plut. 1 sin.1), fol. 291rb; Hk (Heiligenkreuz, SB 44), fol. 244vb; In (Innsbruck, BU 90), fol. 178rb; Ka (Köln, Dombibliothek 127), fol. 259va; Mk (München, BSB lat. 28161), fol. 232vb; Sb (Salzburg, SB St. Peter a.XI.9), fol. 255va. For the thirteenth century (as seen in Melnikas, *Corpus* 3.1033-1058): Città del Vaticano, BAV lat. 2491, fol. 495v, Ross. 308, fol. 330v; Escorial, Real Biblioteca del Escorial, ç. I. 7, fol. 315, Cambrai, BM C.623, fol. 280, and Paris, BNF lat. 16898, fol. 338..

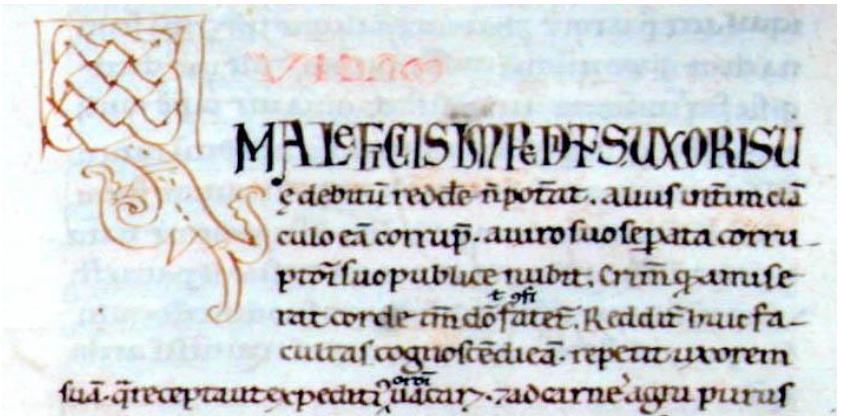

Figure 2: Incipit of C.33 in Fd fol. 87rb

Aa has this latter rendering (folio 141r), but with a 'uir' added above the line. The earliest manuscript I have found to include the 'uir', in this case as the first word, is Bi (fol. 290ra).[32] Given the omission of 'uir' from the majority of early manuscripts and the nature of Bi, as discussed further below, it is clear that the 'uir' was a late addition. Fd shows, however, that the 'quidam' was also an addition or that its placement as the first word of the causa was a later change to the original. The opening initials of causae in Fd were left for a later artist to fill in, as was common practice. Fd's scribe originally intended the incipit of C.33 to be 'Maleficiis inpeditus' (fol. 87rb) and left room for an artist to fill in a decorated 'M'. Perhaps he left out a 'quidam' following upon the 'inpeditus', but maybe there was not supposed to be any 'quidam' in this instance.[33] We cannot know for certain, but we do know that a 'quidam' was not originally the first word of the

[32] The Troyes manuscript mentioned in n.29 above is probably approximately contemporary to Bi.

[33] Sg has a 'quidam' following 'inpeditus'. It has the 'maleficiis' only interlineally: 'Inpeditus quidam <*add.* maleficiis *interlin.*>' (180b). Since the 'maleficium' is entirely incidental to the case statement (although it adds good color to the story), it is possible that Gratian did not originally specify that the man's impotence was due to magic. Sg puts forward 'maleficia' as one of the possible causes of impotence at C.33 q.1 c.4 after a long discussion of other causes in his dicta after c.1 and c.2. Brindisi, Biblioteca Pubblica Arcivescovile Anniibale De Leo A-1 (=Bm), fol. 191r has 'Vir quidam'.

causa. We know this from Gratian or a later redactor's cross-reference to *De penitentia* in C.11 q.3 d.p.c.24 (an R2 text), where he instructs the reader to find a text by Prosper of Aquitaine 'below in the causa *Maleficiis inpeditus* in the first question on penance'.[34] Only Fd, in its original form, has the incipit the way that Gratian or his successor referred to it in C.11 (see Figure 2). It also has a 'Quidam' added to it in a later hand. This word quickly (though not earlier than the addition of C.11 q.3 d.p.c.24) became the common first word of the *causa*. Although Fd has a full 'maleficiis' in black ink preceded by a faded red 'Quidam', the original scribe began the *causa* with only 'aleficiis', intending that the illuminator should fill in a decorative 'M' to make 'Maleficiis' the first word. An undecorated 'M' was later added. Upon close examination, this is clear from three facts: (1) the inks for the 'M' and the rest of 'maleficiis' are different, (2) likewise, the hand is different, (3) the left side of the 'A' was made completely vertical in order to create a straight line along with the left sides of the first letters on the next five lines, creating a straight border for a rectangle within which the decorated 'M' was to be formed (see Figure 2 above). The undecorated black 'M' invades the space originally intended solely for a decorated initial. The original corrector, hand Gα according to Larrainzar,[35] added this undecorated 'M' in his dark black ink. He was changing the incipit to include and begin with 'Quidam'. It was most likely he who added in a faint red ink (not the same ink used for the rubrics and rubricated initials in Fd) an 'VIDAM' in the open space above the original 'aleficiis'. A later scribe filled in a rough sketch of a decorated 'Q' to complete the 'Quidam'.[36] Taken in isolation, this example could be taken as a place where a later corrector made changes in

[34] 'Item illud Prosperi: "Facilius sibi Deum placabunt etc.," require infra causa "Maleficiis inpeditus", questione prima de penitentia'. Gratian was referring to De pen. D.1 c.32.

[35] See especially 'El Decreto de Graciano del codice Fd' 436-437.

[36] Note that this example demonstrates well Larrainzar's point that the dating of the illuminations and decorated initials cannot be used for dating the manuscript as a whole and that the corrector's hand pre-dates the decorated initials.

accord with a 'second recension' manuscript, one of the many that read 'Quidam maleficiis inpeditus', but the cross-reference in C.11 would speak against such an interpretation. Combined with the evidence of D.7 cc.2-4 and some of Larrainzar's other examples, I think scholars can safely take this as another example of Fd portraying Gratian's original text ('Maleficiis inpeditus' or possibly 'Maleficiis impeditus quidam') and a change to that text ('Quidam maleficiis inpeditus') on the way to, not the only, but a dominant version of a completed 'second recension' text ('Quidam uir maleficiis inpeditus').

When one turns to the textual value of Fd in comparison with Aa, one sees that, in general, Fd is superior to Aa. Fd contains numerous faulty readings resulting from scribal error, but when Fd and Aa differ, and Fd's reading is not evidently the result of scribal error, Fd tends to have the better reading. When the formal source is known with certainty, Fd more frequently matches the formal source.[37] A good test text is the pseudo-Augustinian *De uera et falsa penitentia*, simultaneously a formal and material source — i.e., Gratian drew on the work directly, not in the form of an intermediary compilation or 'florilegium'. The text was critically edited by Karen Wagner in her 1995 doctoral thesis.[38] A collation of Gratian's passages from *De uera* from the seven manuscripts discussed here with Wagner's critical edition make clear that Gratian's own copy of the text fell within the B-Vb family of extant *De uera* manuscripts.[39] Fd and Aa's readings follow the readings of this family, as is apparent from

[37] Many instances remain where the formal source is doubtful. Within *De penitentia*, *De uera et falsa penitentia* is a certain source (both formal and material, since Gratian worked directly from a complete manuscript of it). In some places, the *Collectio canonum trium librorum* (3L) or a very similar collection is almost certainly the formal source. In general, I restrict my methodology of comparing *De penitentia* text to the formal source to these two works (and at times to the *Collectio Tripartita*).

[38] Karen Wagner, '*De vera et falsa poenitentia*: An Edition and Study' (Ph.D. diss. University of Toronto, 1995); edition on 226-342. The text is also printed in PL 40:1113-1130.

[39] B=Bologna, BM dell'Archiginnasio A148, fol. 1-21r; Vb =Città del Vaticano, BAV Reg. lat. 135, fol. 43ra-49ra.

the start of Gratian's first extended quotation from Pseudo-Augustine at *De penitentia* D.1 c.88:

De uera 10 (ed. Wagner, ll.538-540)	Quem igitur penitent, omnino peniteat et dolorem lacrimis ostendat. Preueniat iudicium Dei per confessionem. Precepit Dominus mundatis, ut ostenderent ora sacerdotibus…
De uera 10 (text of B Vb)	Quem igitur penitent, omnino peniteat et dolorem lacrimis ostendat, *representet uitam suam Deo per sacerdotem*. Preueniat iudicium Dei per confessionem. Precepit *enim* Dominus *mundandis*, ut ostenderent ora sacerdotibus…
De pen. D.1 c.88 (Fd and Aa in agreement)	Quem penitent, omnino peniteat et dolorem lacrimis ostendat, *representet uitam suam Deo per sacerdotem*. Preueniat iudicium Dei per confessionem. Precepit *enim* Dominus *mundandis*, ut ostenderent ora sacerdotibus…

When Fd and Aa disagree, more often than not Fd has the reading of the critical text or the B-Vb family of *De uera et falsa penitentia*, while Aa has its own reading that does not match any manuscript of *De uera*. In the extended quotation of *De uera* chapter 12 in *De penitentia* D.6 c.1, Fd has some errors (e.g., a 'fuisset' instead of 'fugisset') where Aa has the correct reading, but this seems to be an early scribal error (repeated in the pre-corrected Bi, Mk, and Sb). The following example is more typical, namely that Aa has an aberrant reading while Fd follows the critical text and the B-Vb family:

De uera 12 (ed. Wagner, ll. 737-39)	Iudas enim penitens iuit ad phariseos, reliquit Apostolos...
De uera 12 (text of B Vb)	Iudas enim *qui* penitens iuit ad phariseos, *reliquens* Apostolos...
De pen. D.6 c.1 (Fd, fol. 99ra)	Iudas enim *qui* penitens iuit ad Phariseos, *reliquens* Apostolos...

De pen. D.6 c.1 (Aa, fol. 181v)	Iudas enim *qui* penitens iuit ad sacerdotes, *reliquens* Apostolos...

In sum, Fd reads with the formal and/or material source more frequently than Aa does.

In numerous instances, even when one cannot compare directly to a formal source, it is clear that Fd has earlier and better readings. *De penitentia* D.1 c.2 consists of a short text from Ambrose of Milan's commentary on Luke, although Gratian attributed it to John Chrysostom. When Gratian presented the proponents of the first and second position arguing back and forth in D.1 d.p.c.87, the text appeared again. In that latter place, both Fd and Aa omit the word 'delictum'; in the first instance, they both originally lacked it, but a later scribe added it interlineally in Aa.

D.1 c.2 (Aa_{ac} Fd Bi Pf Sb)	Lacrime lauant quod pudor est confiteri.
D.1 c.2 (Aa_{pc} EdF Fs Mk)	Lacrime lauant *delictum* <*interlin.* Aa> quod pudor est confiteri.
D.1 d.p.c.87 (Aa Fd Bi_{ac} Fs Mk)	Lacrime lauant <*tr.* Bi Fs Mk> quod pudor est confiteri.
D.1 d.p.c.87 (Bi_{pc} Pf EdF)	Lacrime lauant <*tr.* Bi EdF> *delictum* quod pudor est confiteri.

In this case, Aa was clearly subject to a later addition, and this shows that Aa's 'corrections' were often not corrections but rather later changes to the text (the 'uir' cited above in the case statement for C.33 is another example). Even within Aa's original uncorrected text, similar errors are found. An equivalent case is that of D.1 c.42, first cited by proponents of the second position and then discussed further in the lengthy d.p.c.87. The text reads (all manuscripts agree), 'Nullus debite grauioris pene accipit ueniam nisi qualemcumque…soluerit penam' — 'No one receives the pardon of a very serious punishment that is due him unless he suffers some kind of punishment'. The usage of 'penam' as the object of the verb 'soluere' is consistent. In

d.p.c.87, however, Fd and all the other manuscripts I collated repeat the 'penam', but Aa reads 'penitentiam', obviously a mistake.[40] Countless other examples could be enumerated, but the point is this: Fd has generally better readings, and, unless one has a good reason to prefer Aa's readings to Fd's, the editor should follow Fd when reproducing R1 text.

Good reasons for preferring Aa's reading would include instances where Aa follows a confirmed formal source while Fd does not; where Fd has a nonsensical reading while Aa has a similar but rational one; or where Fd and Aa have relatively similar readings but the Fd scribe has clearly made a mistake, perhaps later corrected. This last instance occurs, for instance, in the closing paragraph of *De penitentia* D.2 c.5, a text from Julianus Pomerius's *De uita contemplatiua*, attributed by Gratian to Prosper of Aquitaine.[41] In the seven manuscripts I collated, this text has a remarkable history, revealing scribal attempts to correct a grammatical problem based on an earlier scribal error. The example is telling, both for the often unique (and wrong) readings of Aa and for the occasional superiority of Aa over Fd, especially when the original Fd scribe (hand A) made an error. In this sentence, the most important variant between Aa and Fd is the presence or omission of 'est'. The 'malum' in this example proves the point of the previous paragraph, namely that Aa often has erroneous readings.

Fd^{ac} fol. 91rb	Quapropter carissime tota dilectio ut bonum…
Aa fol. 154v	Quapropter carissime tota proximi dilectio *est* ut *malum*…
Sb fol. 266va	Quapropter proximi tota dilectio *est* ut bonum…
Fd$_{pc}$ fol. 91rb	Quapropter carissime tota dilectio *est* <*add. in linea cum signo* ē> ut bonum
Bi fol. 300vb	Qua carissime propter tota *dilectione*

[40] Fd fol. 90rb, Aa fol. 151v.
[41] Printed by Migne with the works of Prosper in PL 59.415-520.

	satage ut bonum
Fs fol. 303va, Mk fol. 242ra, Pf fol. 109ra	Quapropter carissime tota *dilectione* satage ut bonum

Fd's scribe left out the 'proximi' and the 'est'. Sb left out the 'carissime'. Aa had the best text until it inexplicably exchanged a 'bonum' for a 'malum'. What of the 'dilectione' and the 'satage' in Bi, Fs, Mk, and Pf? Whether it was the original manuscript in which this mistake and later emendation took place or not, Fd explains how these later changes came about. The scribes of Bi, Mk, and Pf's exemplars read a 'dilectio' plus an ambiguous 'ē' (perhaps tightly squeezed between the 'dilectio' and the 'ut', just as appears in Fd) as a 'dilectione', not 'dilectio est'. They then needed a finite verb (and one that could take the ablative) to make sense of the sentence and filled in an imperative 'satage'. This example is one of many that show that Fd's scribe was far from perfect, and one should not always follow his text. It also, however, confirms Fd's general superiority to Aa; just when one thinks one should trust the Aa scribe, he makes an egregious mistake, giving the text not just a different but even an opposite meaning.

For determining R1 text, one needs to be wary of giving preference to a reading in Aa not just because it contains many errors but also because it contains later emendationes to the 'first recension'. Just as Aa has R2 'additiones' interpolated in R1 text (e.g., *De penitentia* D.5 cc.2-8), so also does Aa contain later readings on individual words and phrases within R1 texts. Later redactors of Gratian's text, whether Gratian himself or a student or a circle of students, revised R1 text even as they added to it. Aa retains most of the original, R1 readings in R1 texts, but it also contains some of these later revisions, or R2 readings in R1 texts. For instance, Aa reads with Fd in *De penitentia* D.2 d.a.c.1, speaking of the 'foreknowledge (prescientia) of him [God] to whom all future events are present (presentia)'.[42] My five other

[42] Aa fol. 154r, Fd fol. 91ra.

manuscripts, the *Editio Romana*, and Friedberg all speak of the 'presence (presentia) of him to whom all future events are present (presentia)'. Whether initiated by a scribal error, reading back into the 'prescientia' the similar word, 'presentia', at the end of the phrase, or whether intentionally altered, someone changed Gratian's original rendering and that change became the standard reading in the manuscripts. In this case, Aa had the R1 version. Sometimes a scribe later corrected Aa's text to fall in line with the later changes. This correction occurs, for example, in D.2 c.5, the extended text already referred to from Julianus Pomerius. In a certain section from *De vita contemplatiua* 3.15, Fd and Aa *ante correctionem* as well as Migne's edition of Pomerius's work read 'non propter sperata beneficia uel accepta'.[43] A change later occurred, turning 'sperata' into 'speranda', the reading of four of the five of my remaining manuscripts and all but one manuscript of the manuscripts and earlier editions collated by Friedberg.[44] At some point, the change also emerged in Aa as the work of a corrector.[45] Fd's corrector occasionally did the same thing, but only Aa contains some later, revised readings as part of its main text. For instance, in an argument a short time later (in D.2 d.p.c.14, which he would later refute), Gratian asked, 'Without love, how can someone have true contrition of the heart? How can he have remission of his transgressions?' Someone later added a 'therefore' (ergo) to the second part of the question. The 'ergo' became standard in the manuscript tradition, and Aa contains it.[46] Or consider the final 'auctoritas' in D.1. The text, attributed to Theodore of Canterbury's penitential but actually from c.33 of the Council of Chalôns (813), ends with a focus on 'purging sins'.[47] The final sentence in Gratian's text reads, 'For God, the author and bestower of salvation and holiness, very often offers

[43] PL 59.497A; Aa fol. 154v, Fd fol. 91rb.
[44] Bi, Fs, Mk, and Sb read 'speranda'; Pf and Friedberg's A (Köln, Dombibliothek 127) preserve the original 'sperata'.
[45] Aa fol. 154v
[46] Aa fol. 155v. Fd and Sb *ante correctionem* do not have the 'ergo'.
[47] The council's text is found in MGH Conc. 2.1, 280.

this by an invisible administration of his penance, and very often he does so by the operation of his doctors'.[48] That text, including the ambiguous, undefined pronoun 'this' (hanc), appears in this way in Fd *ante correctionem* and in the probable formal source of Trip. 3.28.12. Someone very quickly felt uneasy about the ambiguous pronoun and added a 'medicinam' to the 'hanc'. A corrector filled that in to Fd, but Aa included it from the start.[49] These examples show that, regardless of scribal errors, one cannot rely solely upon Aa for producing an R1 version of the R1 texts of the *Decretum*.

AaB is quite good, however, for producing 'second recension' text, but, contrary to common opinion, FdB, or the appendix of 'additiones' in Fd, is not necessarily any worse than some other twelfth-century manuscripts. On several occasions, readings in AaB or FdB clearly preserve the correct text, and, on rare occasion, FdB might be a lone or one of only two or three witnesses to the original version of the 'additio', if one can even speak of such an 'original version'. In general, Aa's 'additiones' are superior, and FdB's scribe made plenty of mistakes of omission.[50] The comparability of AaB and FdB to other heavily utilized early manuscripts of the *Decretum* (all containing all 'additiones' in order to create a full 'second recension') can be

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[48] D.1 c.90: 'Deus namque, salutis et sanctitatis auctor et largitor, plerumque prebet *hanc* sue penitentie inuisibili administratione, plerumque medicorum operatione'.

[49] Fd fol. 91ra, Aa fol. 153v. Such an early 'emendatio' can be contrasted with, for instance, the addition of a 'uir' in the incipit of the case statement for C.33, as discussed above. Such examples demonstrate that not all 'emendationes' occurred at the same time, and this variance in chronological 'correcting' of R1 text provides another reason for rejecting a flat and rigid 'second recension'. Just as the 'additiones' were added over time, so also were the 'emendationes' applied over time. Collectively they eventually formed a finalized 'second recension', or R2 text.

[50] This is one reason that Fd cannot be *the original* second-recension manuscript from which all other *Decretum* manuscripts are derived. Winroth was correct on this point in his criticisms of Larrainzar. An example is found within D.3 c.25 in which FdB's scribe omitted a phrase by 'homeoteleuton' and only a later (possibly quite a bit later) hand filled in the omitted text in the margin (fol. 161v).

shown by a random selection of two sections of 'additiones' of roughly similar length and counting the number of deviations from some set text, for instance, Friedberg's edition. For D.1 cc.74-75, in ascending order of number of deviations from Friedberg's text, Bi has three (3) deviations, Mk four (4), AaB six (6), Pf and Sb seven (7), FdB eight (8), and Fs ten (10). For D.3 c.25, again in ascending order of number of deviations from Friedberg's text, AaB and Bi have four (4), Sb has seven (7), Fs has eleven (11), Mk has twelve (12), FdB fourteen (14), and Pf fifteen (15). A few of FdB's deviations in this case are simply the omission of a horizontal line over an 'o' or 'e' at the end of a word in order to put it in the accusative case ending in an 'm'. The word is the same; the scribal execution is lacking. In both cases, AaB falls closer to the top of the list; FdB falls near the bottom, but it is not worse than Pf or significantly worse than Fs or Sb.

In several instances within the 'additiones' or R2 texts, AaB's reading is preferable because it falls in line with the text of the formal source 3L. In numerous instances, such readings in AaB are reiterated in Sb (occasionally in Fs) and sometimes also in FdB. A good section of text to illustrate this point are the 'additiones' D.1 cc.69-77. The second sentence of D.1 c.69 begins, 'Et ideo non in perpetuum tradidit delinquentes'. The very likely formal source of 3L 3.19.110 reads this way, as does AaB, FdB, Fs, and Sb. Nevertheless, Bi, Mk, Pf, and Friedberg's edition omit the opening 'Et ideo', although Mk included it *post correctionem* and Friedberg noted that the earlier editions he collated had it. Then, toward the end of D.1 c.75, when introducing Jeremiah 7:16, AaB, FdB, and Sb include an 'et': 'Vnde et Ieremie dicitur ob duritiam cordis'. Bi, Fs, Mk, Pf, and EdF (Friedberg) omit the 'et', but 3L 3.19.87 has it.

On occasion, FdB without a coordinating witness of AaB and Sb gives a correct reading while the other two manuscripts have errors. In one of the rare rubrics in *De penitentia* (always attached to a later 'additio' and never to an R1 'auctoritas'), FdB reads only with Mk, which is an unusual pairing for my manuscripts. This reading must be correct, however, based on the

text of the 'auctoritas' itself. The rubric for D.1 c.84 in FdB and Mk reads, 'Doloris mensura <*add.* pecuniis FdB> potius quam temporis in actione penitentie consideranda est'.[51] For 'in actione', AaB, Bi, Fs, and Sb read 'satisfactione'.[52] Friedberg made the same editorial decision I have, namely to prefer the former reading despite conflicting witnesses in his manuscripts.[53] That decision results from the first words of the 'auctoritas', namely 'In actione penitentie', not 'Satisfactione penitentie'. Here, FdB along with Mk has the better reading, not AaB.

In one instance, a *dictum* (D.1 d.p.c.18, the word 'exordio'), I believe FdB's unique reading is correct. In this case, my preference is based solely on the text's meaning and grammatical structure, and other scholars may disagree. The *dictum* appears in the only section of 'additiones' in *De penitentia* to contain Roman law texts. Functionally these Roman law texts serve to bolster the idea that intentions count, that someone's intention or will is taken to be the act itself, and this serves to support the argument that interior contrition, hypothetically separate from any external confession and satisfaction, can reconcile a sinner to God. The *dictum* explains why the Roman law texts have been added. By my reading, the author says,

> But the things which have been said about the rape of virgins, or advocates, or high treason, or murderers have been introduced [into this discussion] in support of religion and faith and because of the chief starting-point of murderers.[54]

The text remains somewhat opaque, especially the final phrase, which is the text in question. FdB reads 'atque principali exordio sicariorum introducta sunt'.[55] For 'exordio', AaB, Bi, Sb, and Pf

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[51] FdB fol. 161ra; Mk fol. 239vb.
[52] Pf has 'satisfactio' (fol. 106rb).
[53] EdF col. 1183. Either he chose not to reveal that earlier editions and some of his manuscripts had a different reading or they simply did not contain a different reading.
[54] 'Sed que de raptu uirginum, uel aduocatis, seu de crimine maiestatis, uel de sicariis dicta sunt, fauore religionis et fidei atque principali exordio sicariorum introducta sunt'.
[55] FdB fol. 159vb.

read ‘et odio’, while Fs, Mk, and EdF read simply ‘odio’. Friedberg gave no note on the ‘odio’.[56] The ‘odio’ (hatred) makes grammatical sense as a noun to which the adjective ‘principali’ could be attached. To make logical sense of the text, one would have to take the ‘sicariorum’ as a subjective genitive, meaning that the murderers themselves possess the hatred. This could make sense since Scripture repeatedly connects hatred and murder, noting that someone who hates his brother has committed murder.[57] Nevertheless, describing the hatred as ‘first’, ‘principal’, or ‘chief’ seems odd and superfluous. FdB offers a different, though somewhat vague, possibility. The sentence is discussing the rationale for drawing in these Roman law texts; it is discussing their function within the argument. The Roman law texts serve to support the truths of true religion and faith (namely that one is held responsible for one’s intentions, not just external actions) and have been introduced for this reason. And they have been introduced because any discussion of, or argument about, the will being taken for the work (D.1 c.5 and c.30b) must begin from this chief, main, key starting-point, namely the issue of murderers and, even more specifically, assassins. The example of murderers is particularly useful perhaps partly because hatred is biblically equivalent to murder but especially because it is above all those who plot or conspire to take another person’s life who are held responsible under Roman law as if they had carried out the crime itself (cf. the texts quoted in D.1 cc.9-11). The adjective ‘principalis’, used predominantly for offices and ranks but also frequently for arguments, questions, and points of discussion, makes far more sense as applied to ‘exordium’, as in FdB, than as applied to ‘odium’, as in the other manuscripts.[58] Meanwhile, ‘exordium’

[56] EdF col. 1162.

[57] E.g., Mt 6:21-22; 1 Jn 3:10-12 and especially 1 Jn 3:15.

[58] Cf. entry ‘principalis’ in Lewis and Short’s Latin dictionary: Charlton T. Lewis and Charles Short, *A Latin Dictionary Founded on Andrews’ Edition of Freund’s Latin Dictionary: Revised, Enlarged, and in Great Part Rewritten* (Oxford 1879; reprinted 1975) 1445b. There is the slight possibility that ‘principalis’ is being used in the sense of ‘belonging to the prince/emperor’, meaning that the emperor’s hatred for murderers is the rationale for quoting

often applies to discourse, whether written or spoken, and could easily be applied to a starting-point of an argument.[59] In sum, I suspect based on these considerations that FdB retains the correct reading in D.1 d.p.c.18. It is the only manuscript of mine (or apparently of Friedberg's) to do so. Most likely the 'exordio' was very early misread for 'et odio', as four of the manuscripts attest; the lack of conceptual clarity in the sentence was undoubtedly partly to blame. Then the Fs and Mk scribes and others down the transmission chain took out the 'et' for grammatical correctness.

This instance of a possible sole correct reading in *De penitentia* combined with many other instances in which FdB contains the correct reading, whether corroborated by a majority of other manuscript witnesses or by a minority of other manuscript witnesses combined with agreement with 3L, or confirmed in some other way (such as the correlation of a reading in both the rubric and 'auctoritas'), speaks in favor of continuing to collate Fd's 'additiones'. At the very least, FdB should be collated for other sections before deciding to keep or discard it for a critical edition of R2 text.

Intermediate or Mixed Manuscripts: Fs, Pf, and Sb

As Larrainzar has noted, echoing the many articles on the incorporation of Roman law texts into the *Decretum* by Viejo-Ximénez, working with the notion of a 'first recension' and applying that label to Aa, Bc, Fd, P, and Pfr has led Winroth to label all other manuscripts of the *Decretum* as 'second recension' manuscripts. The reality is far more complicated.[60] During his initial work on an edition of the entire first recension, Winroth has himself observed that some of the so-called 'second recension' manuscripts contain some 'first recension' readings

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these texts. There is no evidence within dictionaries for such a usage of 'principalis'. I have also searched the *Corpus iuris ciuilis*. Roman law texts likewise provide no support for such a usage; they never use 'principalis' to indicate that something is of the prince or emperor.

[59] Cf. entry 'exordium', especially section II.B. in ibid., 690c.

[60] Larrainzar, 'La investigación actual' 55.

and thus should be used in order to reconstruct the first recension text.[61] Some examples of this have already been indicated above in the discussion of Aa and Fd. These R1 remainders mean that not all corrections to certain portions of Gratian's R1 text got incorporated into all early copies of the *Decretum*. With a few 'missed' corrections here or there, one might attribute such phenomena to intermittent scribal errors, but the 'first recension' readings in several manuscripts (especially Sb of my collated manuscripts) are so extensive that an explanation of scribal error can hardly suffice. One is forced to admit that no one made a concerted effort to create a 'second recension', which is to say that no one made all these corrections and additions in a period of time, decided one day that his work was finished, and then set about to publish the text.[62] Of my remaining manuscripts, Fs, Pf, and Sb make this point the clearest.[63] They are invaluable for establishing R1 text and, for my specific purposes, Gratian's original treatise on penance.

In many instances, proof that Aa has a 'second recension' reading while Fd preserves the original comes from one or more of these manuscripts, more often than not Sb but sometimes Fs and/or Pf. In such instances, Sb, Fs, or Pf read with Fd while Aa reads with Bi and Mk plus one or more of the other three manuscripts. For instance, at the end of De pen. D.4 d.p.c.7, Gratian quotes a small text from Augustine commenting on 1 Corinthians 10:5; the text seems to be closest to a section of his *Enarrationes* on Psalm 77. Fd reads, 'Communia omnibus sacramenta, sed non communis gratia'. Sb (and the *Editio Romana*) also has the *omnibus*, but Aa, Bi, Mk, Pf, and EdF read

[61] Cf. Winroth, 'Critical Notes on the Text of Gratian's *Decretum* 1', '2', and '3' available at https://sites.google.com/a/yale.edu/decretumgratiani/

[62] Eichbauer, Larrainzar, and Viejo-Ximénez have correctly drawn attention to the added texts (mostly *capitula* but some *dicta*) in Bc, Fd, and Aa; I would encourage further attention to later changes and corrections to smaller phrases and words within the first recension.

[63] Cf. Gujer, *Concordia Discordantium Codicum Manuscriptorum?* 302-308 (on Pf) and 327-332 (on Sb).

either 'omnia' or 'est omnia'.[64] While in this particular instance one might question whether Fd and Sb have the better, original reading, a prevailing pattern of an Fd-Sb joint reading emerges in which one trusts that, unless some good reason exists for rejecting their reading, they have the superior or earlier version. The pattern emerges from the fact that Sb (and sometimes Fs and/or Pf) on numerous occasions read with both Fd and Aa against the other 'second recension' manuscripts and EdF, that Aa often proves problematic (as discussed above), and that, in some instances, the joint reading of Fd and Sb against the readings of the other manuscripts (including Aa) matches a formal source when it is known.[65] For example, in the final paragraph of De pen. D.1 c.88, a text from the pseudo-Augustinian *De uera et falsa penitentia*, Fd *ante correctionem* and Sb have the correct reading of 'in figura' where Bi, Fs, Mk, Pf and EdF read 'figuraliter'; Aa has a faulty reading of 'figurate'.[66] At times, even within dicta where there is no formal or material source with which to compare, the meaning makes clear that the combined reading of Fd, Pf and/or Sb was Gratian's original, while the reading of Aa, Bi, Mk, and often Pf and/or Fs represent a later change. Consider De pen. D.2 d.p.c.39, a place where Gratian discusses the 'caritas' held and then lost by various Old Testament saints. Who could be better to

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[64] Fs omits the 'omnibus', reading simply 'Communia sacramenta, sed non communis gratia' (fol. 315vb). Brindisi, Biblioteca Pubblica Arcivescovile Anniibale De Leo A-1 (=Bm), fol. 199v reads 'Communia omnibus sint sacramenta set non communis gratia'.

[65] A place where Sb and Fs read with Fd and Aa is in the first paragraph of D.2 c.45 in the sentence, 'Quid namque accipi in cedris, abietibus, et platanis possunt nisi illa uirtutum celestium procere celsitudinis agmina, in *eterna* letitie uiriditate plantata?' Bi, Mk, Pf, and EdF read 'eterne' instead of 'eterna', making the 'eternal' modify 'happiness' instead of 'verdure'. Sb and Pf read with Fd and Aa in, among other places, the final phrase of D.2 c.27. They (together with the *Editio Romana*) read, '…etiam hoc ipsum *faciat* eis proficere in bonum'. Bi, Fs, Mk, and EdF read 'faciet' instead of 'faciat'.

[66] The sentence (Fd_{ac} fol. 91ra, Sb fol. 265vb) reads, 'Intus resuscitauit quam intus inuenit, relictis solis Petro, et Iohanne et Iacobo, et patre et matre puelle, in quibus *in figura* continentur sacerdotes ecclesie'. Cf. *De uera* c.11 (ed. Wagner ll.602-605).

demonstrate a fall from grace by someone beloved of God than David? Gratian thus wrote, 'And nevertheless, how gravely [David] offended after so many and innumerous indications of *divine and fraternal love* no one does not know who has heard of the adultery with Bathsheba and the murder of Uriah'.[67] Where Fd, Pf, and Sb read 'diuine et fraterne dilectionis', Aa, Bi, Fs, Mk, and EdF read 'diuine et superne dilectione'. They changed 'fraternal' to 'supernal', but the context makes clear that Gratian had wanted to make a summarizing point about David possessing love for both God (divine 'dilectio', or love for the Divinity) and his fellow man (fraternal 'dilectio', or love for his brothers, among which he had given the examples of Saul, Jonathan, and the fighting men in his service). In short, Fd, Pf, and Sb have the correct reading of what Gratian originally wrote in *De penitentia*. Many such examples show the benefit of collating Fs, Pf, and Sb to confirm R1 readings, especially when Fd and Aa differ and one wants to make sure that Fd has a better text and not an error.

Thus, even though Fs, Pf, and Sb contain all the 'additiones' to form a completed, sequential R2 version of *De penitentia*, they do not incorporate all the individual changes to R1 text. Checking Friedberg's apparatus at many points, including several of the examples already discussed, makes clear that his manuscript A, now known in scholarship as Ka (Köln, Dombibliothek 127), is also a manuscript of this sort.[68] Their exemplars were mixed, probably looking something like Fd only with all the 'additiones'. Just as Fd's 'corrector(es)' made some of the later changes to individual words within the original text but not most, so Sb's exemplar included some but not all of these changes. Fs's and Pf's exemplar had more than Sb's, but still not all of them. Nevertheless, since Fs, Pf, and Sb do not lack any

[67] Fd fol. 92va, Pf fol. 111vb, Sb fol. 269ra: 'Et tamen post tot et innumera alia diuine et fraterne dilectionis indicia quam grauiter deliquerit nullus ignorant qui Bethsabee adulterium et Urie homicidium audiuit'.

[68] Gujer noted that Ka and Pf have many affinities (*Concordia Discordantium Codicum Manuscriptorum?* 306), and, since Ka served as Friedberg's base text, this explains why oftentimes, of my manuscripts, it is Pf alone that reads with EdF.

text of *De penitentia* as printed in Friedberg's edition, all three of their exemplars must have contained all the additional 'auctoritates' and 'dicta' to form a complete 'second recension', whether on additional folios or in the margins or already interpolated into the body of the manuscript.

These three manuscripts are undoubtedly valuable from this perspective of preserving added R2 text and intermediate stages in the editing of R1 text. From another perspective, Sb and Pf are decidedly bad manuscripts, but for different reasons, while Fs proves to be a fairly good manuscript, though far from perfect. One would hate to have to create an edition based on any of them individually, but Pf and Sb are especially problematic. Sb's scribe simply lacked the requisite skill to copy such a lengthy and complicated text.[69] Sb contains many unique variants, but the majority of these can only be attributed to the scribe's carelessness, his lack of skill or desire to follow the meaning of the text, or his inability to read the exemplar in front of him.[70] For *De penitentia*, Sb is also the least corrected of the manuscripts collated, so the original scribe's errors have been left

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[69] As Gujer stated in relationship to the Sb text for D.16, its textual quality leaves much to be desired (*Concordia Discordantium Codicum Manuscriptorum?* 327).

[70] For example, in De pen. D.4 d.p.c.11, within a very short space of text on fol. 278va-278vb, the Sb scribe uniquely (1) omitted five words ('iustificatus tandem eternaliter glorificetur. Secundum'), which could be described as an error by homeoteleuton, the eye-skip was between similar but not identical words (iustificatus . . . iustitiam), (2) transposed 'cum uel', (3) omitted an 'in futura', (4) committed a true error by homeoteleuton (omitting 'et, si consequitur uitam eternam, est ergo consecutus iustitiam'), (5) made another error by homeoteleuton (omitting 'ad quos secunda uel eius effectus'), (6) read 'diffinitionem' for 'distinctionem', (7) transposed 'auctoritas illa', (8) omitted an 'erant', (9) omitted a 'nobiscum', (10) read 'nunc' for a 'non', (11) read 'excessissent' for 'recessissent', (12) omitted an 'esse', and (13) omitted a 'non'. The major errors of homeoteleuton (numbers 4 and 5) were also committed by Bi, but a corrector later added the text in the margin, whereas no corrections were made to Sb. Sometimes Sb's mistakes are somewhat understandable from a paleographical point of view but not at all from a doctrinal point of view, e.g., an 'omni generali' for 'originali' in D.4 c.14 where the text is speaking of the very specific and well-known concept of *original* sin (fol. 279rb).

for all posterity to see.[71] Nevertheless, as just shown, Sb has incomparable value in corroborating R1 readings. On several occasions, as noted above, in R2 texts Sb reads with AaB and, to a lesser extent, with FdB or FdG (the marginal 'additiones'). It has a close relationship to both manuscripts in both their R1 content and in their 'additiones'. In one instance in an R2b text, the variant of 'diabolo' in the second half of D.7 c.2 is shared only by Sb and the marginal addition in Fd's appendix (FdG).[72] Even though it is an incorrect reading, the variant is important for demonstrating a textual link between Fd's marginal additions and other manuscripts. In short, despite its deficiencies, Sb must be collated for a critical edition of the *Decretum* unless another manuscript is proven to share all of Sb's valuable aspects but fewer of its problems.

Pf also contains numerous unique readings, but many of these unique readings make good sense and, sometimes in terms of pure logic and sometimes in terms of writing style, Pf's readings would be much preferred. Verb tenses are brought into line with grammar rules, conjunctions are added to aid the flow of argumentation, some phrases are rearranged or added to be more logically or stylistically pleasing.[73] Nevertheless, they

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[71] More corrections appear in other sections. Gujer noted numerous corrections in D.16 (*Concordia Discordantium Codicum Manuscriptorum?* 330).

[72] Fd fol. 162r right-hand margin, Sb fol. 281va.

[73] To cite just two examples, both from De pen. D.3, the introduction or inscription for D.3 c.6 is simply 'Item Gregorius in estiuum tempus'. The final three words make up an incipit to a sermon, not any title to a separate work by Gregory on the summer season. The Pf scribe helps the reader understand the source of the text by adding 'in omelia' after 'Gregorius' (fol. 115vb). In D.3 c.34, the Pf scribe added conjunctions, an 'enim' and an 'et', in two consecutive sentences (Pf fol. 118vb): 'Sed irrationabilis inpetus preuenit, et flamma celerrimi motus animam depascitur; exurit <add. enim Pf> eius innocentiam. Preponderant enim futuris presentia, <add. et Pf> seriis iocunda, et tristibus leta, et tardioribus prepropera'. The 'enim' makes what is logically implicit explicit, and the 'et' brings uniformity in parallelism with the final two clauses.

Gujer also found Pf to have numerous unique readings; a quarter of Pf's variants from her edition of D.16 were unique to Pf alone. The

cannot be the original readings. Some early scribe not only copied the *Decretum* but took it upon himself to improve its style. Pf was not one of the manuscripts recommended by Lenherr, but Gujer utilized it, and it ended up having the fewest deviations from her 'Arbeitstext'.[74] Methodologically, collating Pf can be useful. Among my manuscripts for *De penitentia*, Bi and Mk (see below) are the most closely related while Pf stands unto its own but sometimes reads in common with Fs or Sb. Therefore, for R2 texts and changes ('additiones' and 'emendationes'), if Pf corroborates Bi's, Mk's, and, in many instances, Fs's and Sb's reading, one can be sure the reading reflects a very early stage in the textual development and is in that sense correct, even if it differs from Friedberg's edition. Numerous times, Bi, Fs, Mk, and Sb read together while Pf matches Friedberg's edition, indicating a relationship between Pf and many of Friedberg's manuscripts.[75] On rare occasions in R2 texts, such as the end of the 'additio' De pen. D.1 c.75, only Pf

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manuscript is, however, very early, dated to the third quarter of the twelfth century (although copied in northern France, not in northern Italy), revealing early intervention by a confident scribe (*Concordia Discordantium Codicum Manuscriptorum?* 304, 307). The script is elegant, and the text is carefully copied. Gujer cautioned that her comments on Pf only applied to lat. 3884 I (*Concordia Discordantium Codicum Manuscriptorum?* 302); my findings on *De penitentia*, contained within lat. 3884 II, nevertheless confirm hers. The two parts of the manuscript would seem to have the same textual characteristics. Moreover, the manuscript's illuminations display unparalleled luxury and beauty for *Decretum* manuscripts of the time.

[74] Gujer, *Concordia Discordantium Codicum Manuscriptorum?* 304.

[75] In many instances, for my edition of *De penitentia*, I chose not to burden my *apparatus criticus* with such Pf EdF readings or with the unique Pf readings. I make fellow scholars aware of them, however, because such readings should receive more attention in the preparation of a critical edition of the vulgate *Decretum*. Pf's unique readings may have had wide reception and influence in twelfth-century transalpine manuscripts, as is evidenced by the numerous common readings with Friedberg's edition.

At times, the reading of Pf and EdF is also shared by Fs. A significant instance of this is the omission by homeoteleuton (jump from one 'caritatem' to the next) of the words 'habuit criminaliter peccare non potest. Qui ergo caritatem' in D.2 d.p.c.12. The phrase should follow the phrase 'Qui autem caritatem' in Friedberg's edition (col.1193).

and Sb seem to have the correct reading, a 'pareret' as the penultimate word.[76] This reading matches that of the formal source, 3L 3.19.87. This reading became corrupted early on, and the incorrect readings came to dominate the manuscript transmission.[77] Due to its preservation of numerous R1 readings, its testimony to early transalpine modifications to the text, its frequent close relationship to Friedberg's edition, and its occasional sole or near sole testimony to correct readings in R2 texts, I also believe that Pf should continue to be used.

Of my manuscripts, Fs has been the least utilized and studied, but my findings suggest it should receive more attention and should constitute an important witness for a future critical edition. It has been largely neglected because a thirteenth-century scribe added Bartholomaeus Brixiensis's updated *Glossa ordinaria* in the margins. The catalogue identifies the manuscript as deriving from the thirteenth century, but it originally contained twelfth-century glosses, many of which remain, and the script of the *Decretum* is clearly twelfth-century.[78] It contains some decorative penwork and was on the whole very nicely produced. The text contains several unique errors but in general it is far cleaner than Pf and Sb. In short, this is a very fine and early Italian manuscript of the *Decretum*, and it also holds considerable value for textual studies of the *Decretum*.

Fs is textually important because it both retains R1 readings and otherwise preserves an early stage of the textual development of the 'second recension'. Although not as frequently as Sb, Fs preserves several R1 readings in places where the finalized R2 made changes. On a few occasions in R1 text, Fs alone reads with Fd and Aa.[79] At times, Fs reads with Sb

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[76] Pf fol. 105va, Sb fol. 263ra.

[77] AaB (fol. 333v), Bm (fol. 197rb) read 'prepararet'; Bi (297va), Fs (fol. 300ra), Mk (fol. 239rb), and EdF (col. 1180) read 'preparet'; and FdB (fol. 160vb) reads 'appareret'.

[78] The manuscript is available online at: http://teca.bmlonline.it/TecaRicerca/index.jsp.

[79] E.g., D.2 c.19, where R1 (Aa *ante correctionem* and Fd *ante correctionem*) reads, 'Caritas in quibusdam perfecta…' but where R2 and Aa *post correctionem* and Fd *post correctionem* adds an 'est' to the clause. Of the

or Pf along with Fd and Aa and against the remaining manuscripts and EdF, which contain a later *emendatio*.[80] On account of these remnant R1 readings, Fs belongs in the category of intermediate manuscripts. Fs also shares several readings with each of my other manuscripts in a way that suggests its early placement in the textual transmission. Of my other manuscripts, Bi and Mk frequently read together and are most closely related (see below), Pf often has unique readings, and Sb has many unique readings but also reads frequently either with Fd and Aa or with Bi and Mk. Fs is different and seems to fill in the gaps, as it were. It has unique shared readings with all of my manuscripts. In other words, it reads on occasion just with Fs, sometimes just with Aa, sometimes just with Bi, sometimes just with Mk, sometimes just with Pf, and sometimes just with Sb.[81] Its fairly even relationship to all these manuscripts suggests that its text derives from an earlier stage in the textual transmission, having a fairly close relationship to the exemplars of Aa, Bi, Mk, Pf, and Sb, all of which are probably near-contemporary with it. Since several of the apparently unique readings in Pf are shared with Fs, one can deduce that Pf's exemplar derived from an Italian exemplar with a link to Fs. Fs makes Pf far more comprehensible textually by showing a link to an Italian tradition of manuscripts that is of a different branch than that which produced Bi and Mk.

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other manuscripts, Fs alone has the R1 reading without an 'est' (fol. 305ra). And at the end of a long quotation from Jerome's *Contra Iouinianum* in D.2 c.40, Fs (fol. 308rb) alone reads with Aa and Fd: 'non *quo* uniuersi peccauerint, set *quo* peccare possint'. All other manuscripts changed the two instances of 'quo' to 'quod', the R2 *emendatio*.

[80] E.g., in the lengthy D.2 d.p.c.39 in a quotation by David from 1 Kings, Fs (fol. 306rb) reads 'culicem' with Aa, Fd, Pf, Sb (and Friedberg col. 1201) while all other manuscripts read 'pulicem'.

[81] For instance, in the R2 'additiones' D.1 cc.6-30, Fs reads with Bi alone twice (2), Mk alone twice (2), Pf alone three times (3), and Sb alone three times (3). Not considering EdF, Fs reads with Aa alone six times (6) in all of De pen. D.1. In four other instances, Fs reads with Aa plus one of the other manuscripts (Mk once, Pf once, Sb twice). Fs reads with Fd perhaps the least. It has no shared unique readings with Fd in D.1; in D.2 it has three (3) plus one instance each where Fs reads with Fd and Mk or Pf and two instances where Fs reads with Fd and Bi.

Fs nevertheless also often reads with those two manuscripts, and sometimes the apparent lone readings of Sb also turn up in Fs. Fs constitutes, then, a formerly missing link in the early manuscript transmission.

Despite its apparently early textual stage in the manuscript transmission, Fs contains two late additions in De pen. D.1. One does not appear in any of my other manuscripts (except as a marginal addition in Mk and Pf) and did not appear in five of Friedberg's manuscripts. The addition appears in Fs in a confused way, however, showing up in two different places, the first of which is incorrect. Most likely the Fs scribe had before him a marginal text (or even a text on a separate slip of parchment) with an ambiguous cue for its proper location. He first misread the location and copied it in the wrong place. Then he realized its proper location when he reached it, copied the clause there as well, but neglected to expunge or cancel the clause from where he had first copied it. The text appears in the R2 Roman law additions in De pen. D.1 cc.6-22. It consists of a clause saying that the Greek orator Demosthenes said something about the given term or topic ('de qua [*tr.* Fs] re maximus apud Grecos orator Demosthenes sic ait'). The phrase is supposed to appear within D.1 c.19 at the end of the discussion of 'qualitas' as a category for considering aggravating or mitigating circumstances in a crime. The *Editio Romana* even then quoted the Greek text with Latin translation as present in the Digest. The Fs scribe first appended this phrase near the end of c.16 and then repeated it in the proper place in c.19.[82] The omission of this phrase from many twelfth-century manuscripts, its appearance in the margins of Mk and Pf, and its duplicate presence in Fs all point to the phrase being a very late addition by an individual who most likely was not responsible for the addition of these Roman law texts as a whole. In the previous sentence, Fs contains yet another phrase that appears only in EdF and interlineally or marginally in two other manuscripts (interlineally

[82] Fs fol. 294vb-295ra.

in Bi, marginally in Pf): 'emansorem a fugitiuo et effractorem'.[83] Fs's version is somewhat mangled, suggesting that his exemplar was faulty or that it was scribbled in an illegible fashion.[84] Somebody later corrected the original addition against a copy of the Digest. These corrections only made their way into some of the early manuscripts, suggesting perhaps that the manuscripts pre-correction or their exemplars had already left Bologna before these *emendationes* were made. Among my manuscripts, then, Fs stands alone as a witness both to an intermediate stage in the editing of R1 text and to a late stage in the editing of R2 text. For these reasons, and because of its generally very good textual quality, it should be used for the future critical edition.

Completed 'Second Recension' Manuscripts: Bi and Mk

The final two manuscripts I chose to use for my edition of *De penitentia*, Bi (Biberach-an-der-Riss, Spitalarchiv B 3515) and Mk (München, Bayerische Staatsbibliothek lat. 28161), in general constitute finalized 'second-recension' manuscripts.[85] That is to say, they contain all the 'additiones' to make up a full R2 text and also, for the most part, contain all the 'emendationes' or small revisions to R1 texts. In rare instances in *De penitentia*, Mk preserves an R1 reading. Mk preserves readings from the original treatise far less, however, than Fs, Pf, and Sb. Bi

[83] The sentence makes the point that considerations of time distinguish kinds of criminals. Consider a soldier who is not present for duty. Is the absence following a furlough, and he is simply late to return? He is an 'emansor'. Has he been on active duty and has now disappeared? He is a deserter, or 'furtiuus'. The final part of the phrase leads into the next distinction on types of thieves or burglars, depending on whether they commit their crime at night or during the day.

[84] EdF (col. 1162) reads, 'Tempus discernit emansorem a fugitiuo et effractorem' Fs (fol. 295ra) reads, 'Tempus discernit et manore a furtiuo uel effractorem'. EdRom chose 'furtiuo' over 'fugitiuo' because that was the reading taken in the *Glossa ordinaria*. EdF chose 'fugitiuo' (also the reading in the Bi and Pf additions), which also matches the original in Dig. 48.19.16.

[85] Cf. Gujer, *Concordia Discordantium Codicum Manuscriptorum?* 228-236 (on Bi) and 196-202, 281-290 (on Mk).

preserves no R1 readings.[86] For R1 texts and later R2 'additiones' in *De penitentia*, these manuscripts are closely related, more closely than any of the other manuscripts collated. More specifically, Mk seems to be a derivative or sister manuscript of the uncorrected Bi (Bi_{ac}).[87] These similarities, however, cannot overshadow the fact that the two manuscripts possess, according to my findings, differing amounts of value.

Given their close relationship and the premier position Lenherr gave to Mk, one would be tempted to take a Bi-Mk reading as definitive, at least for the texts added in the 'second recension'. He selected Mk as his 'Leithandschrift', or the manuscript that formed his base text, for his edition of C.24 q.1.[88] In her work on D.16, Gujer found several problems with Mk, even though she initially chose it as her 'Leithandschrift' as well, and she decided in the end that she could give no definitive preference to any of her eighteen manuscripts.[89] My findings are similar, and, at least in the case of 'additiones' ('second recension' texts) most likely taken from 3L, I have found several instances in which Sb and Aa or AaB (and sometimes FdB)

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[86] There is one possible exception, in D.5 c.1, where Bi_{ac} has the apparently original 'exspectat' while, surprisingly, Fd has the apparently later change of 'exspectet'. Since the example consists of merely a different verb mood and a single letter, it is not important unless other, more significant examples are found elsewhere in the *Decretum*.

[87] Gujer did not note a particularly close relationship of Bi and Mk. Why our results were so different in different sections of the *Decretum* is a question that deserves future consideration. My findings cross texts of both recensions. In four random samplings, two from each recension, Mk reads with Bi more than with any other manuscript. In terms of variants from my edition of D.3 cc.4-5 and c.42-d.p.c.42 ('first recension' text coming mostly from *De uera et falsa penitentia*), Mk shares the following number of deviations from my established text, in descending order: with Bi (8), Pf (4), Fs (3), Aa (2), Fd and Sb (1 each). In D.3 cc.25-26 ('second recension' text from an unidentified formal source): Bi and Pf (3 each), AaB and Fs (2 each), and FdB and Sb (none). In D.5 c.1 ('first recension' text from *De uera*; not present in Fs): Bi (10), Pf (8), Fd and Sb (7 each), and Aa (3). In D.5 cc.2-8 ('second recension' texts; not present in Fs): Bi (7), Aa (2), FdB and Sb (1 each), and Pf (none). In short, Mk is more closely related to Bi than to any other of my manuscripts.

[88] Lenherr, *Exkommunikationsgewalt* 13-14, 'Arbeiten' 157-158.

[89] Gujer, *Concordia Discordantium Codicum Manuscriptorum?* 200.

contain readings that match 3L while Mk does not. This would seem to bring into question Lenherr's assessment that Mk has readings generally closest to the formal source. In D.1 cc.69-77, a group of 'additiones' probably taken from 3L 3.19, Mk *ante correctionem* deviates from my established text with unique variants only three times (roughly equivalent to Bi, fewer times than Fs, and far fewer times than both Pf and Sb, which have many unique variants, as noted above). It shares variant readings departing from my established text eight times, only one of which is not shared with Bi. Five of the eight variant readings are shared by Fs, three by Pf, two by AaB, and none by FdB. What the data means is that (1) Mk has a generally clean text (in contrast to Pf and Sb), with few unique variants resulting from scribal error or revision, (2) it has the most commonality with Bi, as previously noted, and (3) Mk (usually with Bi, sometimes together with Fs) deviates from the formal source at times when FdB, Sb, AaB, and, less frequently, Pf preserve a better reading that matches the formal source. Because of the first point, however, Mk frequently does read with the formal source and has a relatively good text as a result of the scribe's abilities and consistency. In R1 texts, Mk on rare occasions does not have the R2 changes but rather preserves R1 readings; the vast majority of the time, however, it is apparent that his exemplar already contained the later 'emendationes'.[90] In short, the data on Mk is varied and inconsistent. It seems to have the opposite virtues and vices as compared to Sb, for it has a generally clean text but few testimonies to original R1 readings. It has good text for the complete set of later 'additiones', or the finalized 'second recension', but one must question and investigate further whether its textual quality in these sections is superior to that of Bi. If not, Mk perhaps has little independent value for the future critical edition. Even if one chooses to collate it, it does not merit serving as a base text.

[90] In the R1 texts of DD.2-4, Mk_{ac} contains only one R1 reading in each distinction where later changes were made. It has only two R1 readings in DD.5-7 combined. It has no R1 readings in D.1. In all of *De penitentia*, then, Mk contains all but five of the later 'emendationes' to R1 texts.

Bi, by contrast, has much value. The codex as a whole has received attention because of its early glosses, its low number of *paleae*, its relatively good textual quality, its proximity to the texts of the formal sources, and its *extrauagantes*.[91] It was heavily corrected and, in its corrected form, provides a good example — the best of my collated manuscripts — of an early text of the 'second recension'. Its pre-corrected form probably shared a common exemplar (a few steps back) with Sb, but clearly its immediate exemplar had already incorporated all 'additiones' as well as all minor changes or 'emendationes' to the original treatise, while Sb's immediate exemplar had not.[92] The same could be said for Fs and Pf, which share several readings with Bi. Fs's and Pf's immediate exemplar included more of the later corrections to the original treatise than Sb's, but still not all of them, as Bi's exemplar did. It would seem, then, that it is in Bi's exemplar, one or two steps back, that the final corrections to the R1 texts were made. Without a doubt, scholars should continue to work with this manuscript and collate it for the critical edition. It might be the earliest and best witness to the finalized 'second recension'.

In sum, the collation of these seven manuscripts confirms previous scholarship on Aa, Fd, Bi, Pf, and Sb identifying these manuscripts as among the best to be utilized for a critical edition,

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[91] Rudolf Weigand, 'Die Dekrethandschrift B 3515 des Spitalarchivs Biberach an der Riss', BMCL 2 (1972) 76-81; Lenherr, 'Arbeiten' 164, and idem, 'Summarien' 551; Stephan Kuttner, 'The "Extravagantes" of the Decretum in Biberach', BMCL 3 (1973) 61-71.

[92] De pen. D.6 c.1 contains the best examples in quick succession to show the relationship between Bi_{ac} and Sb. In the first paragraph of D.6 c.1, the penultimate sentence begins, 'Sed misericordia Dei est ubique'. For 'misericordia', Bi_{ac}, Mk, and Sb read 'in his ecclesia'. Paleographically, the mistake is understandable, but one finds it hard to believe that Sb and Bi/Mk's exemplars would independently make so gross an error. Two lines later, Bi_{ac} and Sb both read 'confiteatur' where all the other manuscripts read 'confitetur'. Almost immediately following that verb, both Bi and Sb omitted a five-word clause, 'sacerdoti meliori, quam potest, confiteatur', that no other manuscript of my six omitted. A 'corrector' later added the text in Bi's margin.

suggests that Mk could be discarded, and draws attention to Fs as a strong candidate for collation in a critical edition. Moreover, it supports Larrainzar's contention that Fd is of inestimable value for the textual history of the *Decretum*. It also lends credence to Larrainzar and Viejo-Ximénez's emphasis on an organic, diachronic development of the 'second recension' as opposed to a synchronic one.[93] Finally, it suggests further points of manuscript research, in particular identifying those manuscripts that retain 'first-recension' readings — and to what degree — and those that include all corrections and changes from a finalized 'second recension'. Such work would do much to assist scholars in seeing how the 'first recension' became the 'second recension' but also how, and perhaps when, the complete corpus of changes and corrections to the 'first recension' began to dominate the manuscript transmission. The process, I suspect, had many parallels with the *paleae* and might have overlapped chronologically with the addition of some of them (the presence of some *paleae* in Bi would suggest this), but, since *De penitentia* does not have any *paleae*, my research cannot lead to any conclusions on the development between the finalized 'second recension' and the vulgate text with the *paleae*. In short, Gratian's 'first recension' seems to have reached a set point, if only temporarily, and, because of Fd in particular, is relatively easy to delineate. Only with more manuscript studies will scholars decipher whether the various stages of R2 'additiones' as well as 'emendationes' on the path to a finalized 'second recension' and vulgate version can achieve greater clarity or whether they must be content with the somewhat muddled state of affairs outlined here.

Additional Thoughts on Sg

I have no intention of delving deep into the debate about the nature of the *Decretum* text in Sg (Sankt Gallen, Stiftsbibliothek 673) at this time. Nevertheless, work on my

[93] Cf. Larrainzar, 'La investigación actual' 55 and the various articles by Viejo-Ximénez cited in n.7.

edition has caused me to reflect further on the manuscript in light of my findings on the other manuscripts. In 2006, I published my first essay on *De penitentia*.[94] The essay was not meant as a definitive discussion of Sg; it was intended as a study of the development of *De penitentia*. As part of that study, I considered the relevant section of text in Sg (there labelled C.30 q.3) and whether that section provided any insight on the question of Sg, namely whether it constitutes an abbreviation or some earlier redaction. My general conclusion was that Sg C.30 q.3 seemed more like a less formal, less refined, earlier draft of a work rather than an abbreviation.[95] My arguments were based on (1) style and (2) structure. The structure of Sg C.30 q.3 is a highly abridged form in comparison with *De penitentia*, or *Decretum* C.33 q.3. It has a few 'auctoritates' pro and con the question at hand and relatively short dicta; all these fall within *De penitentia* D.1, the last text being a truncated D.1 c.44 (De pen. D.1 has 90 'capitula' in Friedberg's edition and many very lengthy 'dicta', especially d.p.c.60 and d.p.c.87). Sg C.30 q.3 then skips all the way to D.6 d.p.c.1 and contains the remainder of D.6 (c.2, d.p.c.2, and c.3) followed by D.7 d.a.c.1, c.1, and a truncated form of c.2. I found it hard to believe that an abbreviator would omit *so much* material. I also knew that I had to explain the presence of D.6 d.p.c.1-c.2, c.3, D.7 c.1, and c.2 'si securus hinc exierit — dum sanus es'. These texts do not appear in Fd; they were not part of the original *De penitentia*. If these were part of an earlier redaction of text, why did Gratian take them out of his full-fledged treatise, and why (and how) did they reappear at a later stage? The problem seemed not too difficult from the perspective of (1) the nature of a living text and (2) my continued assertion that Gratian conscientiously wrote *De penitentia* as a theological treatise; that the version in Sg did not constitute a treatise but merely a 'quaestio' just like any other among the 'causae'; that, in light of his goal to compose a theological

[94] A. Larson, 'The Evolution of Gratian's *Tractatus de penitentia*', BMCL 26 (2004/2006) 59-124. The text of C.30 q.3 (EdF C.33 q.3) appears in Sg on pp.183a-184b.
[95] Ibid. 93-113.

treatise, Gratian could have avoided especially D.6 c.2 and c.3 as too canonistic or legal; and that those working in Bologna after him could have added those texts back in at a later time when they also added other more purely canonical texts (e.g., D.5 cc.2-8). That was my argument at the time, and it seemed easier for me to explain how those texts could disappear and reappear than for Winroth or others to explain how 'second recension' texts could appear in an abbreviation of the 'first recension'.

Then John Wei made two key arguments against my own. First, he used his formal source analysis of every 'capitulum' of *De penitentia* in his dissertation to show the difficulty of D.7 c.2.[96] The version in Sg is longer than that in the 'first recension', but the 'first recension' version could not be a case of Gratian cutting down what he had written previously because the version in Sg in fact represents a mixed text from two different formal sources, and that mixed text only emerged at the stage of the 'second recension'. In short, Wei showed that Sg D.7 c.2 was an interpolation from the 'second recension', and he thus argued that Sg in general was a 'first recension' abbreviation with interpolations from the 'second recension'. Second, he highlighted the theory that Sg on the whole is an abbreviation with reference to D.6 d.p.c.2. He correctly noted that two parts of d.p.c.2, the phrases 'Quod autem dicitur, ut penitens eligat sacerdotem scientiam ligare et soluere' and what is shown 'by this authority' ('hac auctoritate'), refer back to D.6 c.1, which is not present in Sg.[97] This cross-reference to a missing text, he argued, was proof-positive that the Sg scribe was abbreviating. One could counter that Gratian refers elsewhere to texts without actually quoting them and that he could have simply filled in the text at a later time, but perhaps the specific reference to 'this authority' makes such a counter-argument unlikely.

I believe now, however, that there is a much better reply to Wei's argument about D.6 d.p.c.2, and it begins with his case about D.7 c.2 and my earlier observation on the structure of Sg C.30 q.3, namely that it contains nothing between D.1 c.44 and

[96] Highlighted in his 'Reconsideration' 148-151, 166-168, 173-174.
[97] Ibid. 172-173.

D.6 d.p.c.1 and that the texts from D.1 provide both sides of the answer to the original question posed and thus comprise a complete 'quaestio'. Wei's argument about D.7 c.2 propelled my investigation into that section (D.7 cc.2-4) in Fd. My inquiry, as explained above, confirmed Larrainzar's argument that Fd reveals different successive stages of development from the 'first recension'. My conclusion as applied to Sg means that the R2 interpolation of D.7 c.2 in Sg derives from a finalized or near-finalized 'second recension'. When one considers the fact that the D.1 material in Sg C.30 q.3 answers the question of q.3 both pro and con (and in that sense is internally complete) and that the D.6 and D.7 material, of which D.7 c.2 is a part, has no direct relationship to the question of q.3, one can raise the question, 'If D.7 c.2 in Sg is an interpolation from the "second recension", could not the entire section of which D.7 c.2 is a part, viz. all the texts from D.6 and D.7, comprise an interpolation from an R2 manuscript?'[98] If this is the case, then the allusion to D.6 c.1 in D.6 d.p.c.2 does not prove that Sg C.30 q.3 is an abbreviation of *De penitentia* and that the scribe chose to leave out D.6 c.1 but leave in the discussion about it in d.p.c.2. The presence of the cross-reference in d.p.c.2 merely means that, as the Sg scribe inserted his interpolations, he was working from a manuscript that included D.6 c.1 along with the other R1 texts in the section (D.6 d.p.c.2, D.7 d.a.c.1, and the first part of D.7 c.2) and the R2 texts in the section (D.6 d.p.c.1-c.2, D.6 c.3, D.7 c.1, and the second part of D.7 c.2). In short, the Sg scribe had in front of him a manuscript of a finalized or near-finalized R2 text, and he took the *De penitentia* D.6 and D.7 texts from it. Wei has thus shown that there are later interpolations in Sg, but he has not proven with his argument about D.6 d.p.c.2 that Sg is on the whole an abbreviation.

[98] It is important to note, then, that if Sg in the main does bear testimony to an earlier stage of Gratian's work, it is not just R2 texts that are interpolations; R1 texts could also be interpolations. The interpolations could have come from an expanded R1 manuscript that looked something like Fd or Aa, or they could have come from an early, integrated R2 manuscript that looked like Bi or Sb.

One other piece of evidence suggests that something different textually is going on in the texts from *De penitentia* D.6 and D.7 in Sg C.30 q.3 than in the texts from D.1, and this piece of evidence also suggests a further line of detailed inquiry into Sg, namely the textual relationship of Sg to other early *Decretum* manuscripts. Sg, as anyone who has studied it knows, has many unique readings. If it is some sort of abbreviation, one would even be tempted to term it an adaptation, not an abbreviation. Nevertheless, if the text derives from some manuscript of the 'first recension' stage, one would expect to find some linkage by common variants to known R1 manuscripts or those mixed or intermediate manuscripts retaining many R1 readings.[99] As Viejo-Ximénez has repeatedly noted in his textual studies, Sg is clearly not directly derived from Aa, Bc, Fd, or P and neither are any of these directly derived from Sg.[100] The latter point is one reason that Larrainzar and Viejo-Ximénez insist that Sg is not the Ur-Gratian itself but in some sense gives testimony to it. The former point is one reason that they contend that Sg is not an abbreviation of the 'first recension'. In the overlapping texts of Sg C.30 q.3 with D.1 texts, no significant shared variants between Sg and any of my seven manuscripts occur. In D.1 c.5, Sg, Aa, and Bi have a 'Dei' where Fd, Mk, Pf, and Sb have a 'Domini', but such a variant can hardly be deemed significant. There is, however, a variant of note in the latter section of Sg C.30 q.3, in the texts from D.6-7, all of which, it is my contention, were interpolated from an R2 manuscript of some

[99] For instance, as I show in my 'An *Abbreviatio* of the First Recension' 65-66, Mw might not be more closely affiliated with one R1 manuscript as compared to another, but it still shares significant variants with each of the R1 manuscripts Aa, Bc, and Fd.

[100] J. M. Viejo-Ximénez, '*An inter uouentes*' 77, 'La composición' 442, and '*Non omnis error consensum euacuat*: La C.26 de los *Exserpta* de Sankt Gallen (Sg),' in *'Iustitia et iudicium': Studi di diritto matrimoniale e processuale canonico in onore di Antoni Stankiewicz*, ed. Janusz Kowal e Joaquín Llobell (Vatican City 2010) 2.620. In this essay, he says that he cannot be sure whether the versions in Sg and in Fd/Bc/Aa are related linearly or laterally and floats the possibility of a common source. Nevertheless, he remains certain that there is no direct dependence in either direction.

sort. In the last sentence of D.6 d.p.c.2, Sg has the same reading as Friedberg's edition: 'si cecus ceco ducatum prestet, ambo in foueam cadant'. Friedberg gives no note of variants on the 'prestet', but all of my manuscripts read 'prebeat', with one exception: Pf. In short, Sg C.30 q.3 shares what I would consider a significant variant with one of my manuscripts in what I contend is its section of interpolated text, but it shares no significant variants with any of my manuscripts in its section of non-interpolated text. Such collations with other twelfth-century manuscripts and then comparisons between the texts considered to be later interpolations and the texts not considered to be later interpolations might serve as a different vantage point from which to approach the question of Sg. If others also find that the non-interpolations have no clear textual linkage to other extant manuscripts, that would support the idea that Sg is *sui generis*, a testimony to an earlier version of text, and not an abbreviation of the 'first recension'.[101]

[101] If nothing else, I hope my discussion on Sg here shows that the Sg issue has not been settled and that the issue is far more complex than a simple 'earlier redaction v. abbreviation' debate. Those who continue to investigate the manuscript note other anomalies. Ken Pennington, for instance, has observed that the 'second recension' interpolations only occur after Sg C.29 (EdF C.32). Wei has noted the same point ('Reconsideration' 175) but without wondering about the significance of the fact. It shows that the text post-C.29 is a redacted text. Pre-C.29 text might then be more useful in certain arguments. In his '*Non omnis error consensum euacuat*', Viejo-Ximénez has confirmed that Sg C.26 (EdF C.29) does not contain, in my terminology, R2 interpolations. His most convincing arguments about Sg C.26 in this essay pertain to the structure of the text, and this avenue of research also seems to merit more attention in other sections of the manuscript. Meanwhile, Eichbauer's work on the absence of rubrics perhaps deserves further consideration if more of the rubricated canons than not appear in possibly interpolated sections. Recently, Ken Pennington, 'The Biography of Gratian, the Father of Canon Law', *Villanova Law Review* 59 (2014) 679-706 at 689-697 raises other issues about the relationship of Sg to the later recensions of Gratian's Decretum.

Conclusion

Apart from the anomaly of Sg, the relationship of the other seven manuscripts seems quite different from one of different families of manuscripts deriving from an ultimate, original copy. While some manuscripts have more readings in common with certain other manuscripts, the early Gratian manuscripts do not fall neatly into families, and evidence abounds for much cross-contamination, or for scribes checking their copies of *De penitentia* against other copies of it and making changes or corrections as needed, resulting in copies that bear resemblances to various strands of a manuscript transmission. Cross-contamination certainly does not in and of itself point to the lack of a single, ultimate, deliberately-composed exemplar; when combined with the other evidence, however, I believe it does suggest a different scenario. In the *Decretum* as a whole, Fd, Aa, and Bc exhibit striking amounts of overlap in their 'additiones', but yet there are several 'capitula' that are commonly omitted from them or appear in the 'additiones' of one or two of the manuscripts but not in the other one or two.[102] The evidence strongly suggests, as Larrainzar and others have argued, that the 'additiones bononienses', clearly and separately copied in Fd, constituted a large and fixed initial set of additions to the first recension.[103] These circulated independently and could be added to an existing manuscript of the first recension. The simplest

[102] Cf. especially Eichbauer, 'From the First to the Second Recension', with her table of missing texts in Fd, Bc, and Aa on 153-67. The data is not perfect. For *De penitentia*, Fd does contain D.1 d.p.c.9 (appendix, or FdB, 159va), c.30 (FdB, 160rb), c.51 (*marginal* Hand G, or FdG, 89ra), D.2 pr./first part of d.a.c.1 (main body, 91ra), D.3 d.p.c.39 (main body, 96ra), d.p.c.43 and d.p.c.44 (main body, 96va). Aa's main body omits D.2 pr., but it is found in its appendix (AaB 335r).

[103] As Eichbauer, 'From the First to the Second Recension' 151, phrases it, 'The second recension was not compiled from start to finish and then published. Rather canons were added at different points over a period of time. A prevailing pattern emerges whereby the vast majority of the second recension additions were added early, copied in both the Florence supplement and in Admont' (this last sentence is a reference to what Larrainzar calls the 'additiones bononienses').

scenario of this is demonstrated in Fd itself. Then, Gratian, his successors in Bologna, or even possibly other scribes elsewhere made more additions and corrections. As scribes compared their texts against other copies of the *Decretum* at this stage, they added the 'additiones' and 'emendationes' into their own manuscripts, which is demonstrated by the different marginal additions in different inks (indicating at least some chronological differentiation) in Fd. Such additions would have been uneven at first. For *De penitentia*, this resulted in variations in the later 'additiones' in Aa and Fd. The process of making 'emendationes' extended chronologically past that of adding texts and was likewise uneven and probably not centrally directed, resulting in the variations in the 'emendationes' present in Aa and Fd and other early, mid-twelfth century manuscripts such as Fs, Mk, Pf, and Sb. This scenario means that what Winroth refers to as the 'second recension' was never conscientiously composed and put together in a single manuscript; the earliest manuscripts of a finalized 'second recension' (e.g., Bi) were the result of incorporating a series of additions and changes over the course of several years and across several manuscripts. Therefore, while creating an edition of the first recension is a realistic task, creating an edition of the second recension, if conceived as a set published text, in my opinion is not. A truly critical edition must not present a single, 'second recension' archetype but must instead portray the various developmental stages from R1 to R2.[104]

If what I suggest above lies in any proximity to the truth, the tedious details of 'additiones' and 'emendationes' in early manuscripts collectively bear weighty and multivalent significance, both for textual work on the *Decretum* for a critical edition and for the history of canon law more broadly. What of this work of addition and emendation can be attributed with confidence to one man, Gratian? Are two Gratians sufficient to account for these changes to the work? Did all of that work take place in Bologna? Can we pinpoint *De consecratione* as a whole

[104] J. M. Viejo-Ximénez, 'La composición del Decreto' 441.

or parts of it to a sub-stage of R2?[105] Can early 'abbreviationes' and 'summae', such as Paucapalea's, help us in identifying sub-stages prior to a finalized R2? What do the changes say about scribal practices and 'scriptoria' habits in the period? What do such changes indicate about the reception of Gratian's text? How does such reception compare to the reception of other teaching texts and collections of canon law at the time and in previous and subsequent periods? Such questions remind us that the detailed work of producing editions has the potential to yield much historical fruit; I hope I have planted a few new seeds or given some water to ones already sown.

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[105] Larrainzar noted that *De cons.* is present in much-reduced form in FdB ('El Decreto de Graciano del codice Fd' 427), and has since argued that the introduction *In prima parte agitur* developed in line with the progressive development of stages between R1 and R2 and originally did not contain a summary of or introduction to *De consecratione* (later it was identified as C.37; Larrainzar, 'Notas sobre las introducciones *In prima parte agitur* y *Hoc opus inscribitur*', *Medieval Church Law and the Origins of the Western Legal Tradition: A Tribute to Kenneth Pennington*, ed. Wolfgang P. Müller and Mary E. Sommar [Washington DC 2006] 140-146).

Gratian and the Jews

Kenneth Pennington

Since Anders Winroth and Carlos Larrainzar discovered earlier versions of Gratian's Decretum, legal historians have explored these manuscripts for evidence that they hoped would reveal how Gratian's changes and additions to his text could provide insights into how his thought and ideas developed.[1] Although there is still a vigorous debate about exactly how the manuscript tradition reflects the evolution of his Decretum, we know far more about Gratian now than we did before. Not everyone agrees on what we know. I think that Gratian began teaching in the 1120s, that the Saint Gall manuscript 673 is the earliest witness to his teaching, and that the other manuscripts discovered by Winroth and Larrainzar provide evidence that a version of his Decretum circulated widely in the 1130s. The final version of his Decretum ca. 1140 was compiled by gradually adding canons to various parts of the text over an extended period of time.[2] That is an outline of what I think we know.

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[1] Anders Winroth's book, *The Making of Gratian's Decretum* (Cambridge 2000), was responsible for opening wonderful new vistas for understanding the development of the Decretum. On the St. Gall manuscript see Carlos Larrainzar's essays, 'El borrador del la 'Concordia' de Graziano: Sankt Gallen, Stiftsbibliothek MS 673 (=Sg)', 9 (1999) *Ius ecclesiae: Rivista internazionale di diritto canonico* 593-666 and 'El decreto de Graciano del códice Fd (=Firenze, Biblioteca Nazionale Centrale, Conventi Soppressi A.I.402): In memoriam Rudolf Weigand', *Ius ecclesiae: Rivista internazionale di diritto canonico* 10 (1998) 421-489. I will limit my citations to the rather large literature that has been published since 1998. Almost all the relevant essays touching upon the issues that I mention in my first paragraphs are dealt with in essays printed in the BMCL between 1998 and 2013 and the ZRG, Kan. Abt. during the same period. See especially Melodie H. Eichbauer, 'Gratian's Decretum and the Changing Historiographical Landscape', *History Compass* 11/12 (2013): 1111-1125.

[2] Melodie H. Eichbauer, 'From the First to the Second Recension: The Progressive Evolution of the Decretum', BMCL 29 (2011-2012) 119-167.

The value of the Saint Gall manuscript is particularly controverted.[3] In my opinion no one has been able to prove conclusively that it is an abbreviation — or the contrary. The winnowing and sifting of the evidence proceeds apace. The status of Saint Gall is primarily important for understanding how Gratian began to teach canon law. My conviction that it represents how Gratian first began to teach canon law in the 1120's cannot be proven conclusively now and probably never will be unless we find other manuscript evidence. Still, the format of the manuscript contains a powerful clue. It only contains the causae. They were Gratian's remarkable contribution to twelfth-century education. He invented a system of teaching law that depended on introducing his students to hypothetical cases based on legal problems that could have easily been heard in the courts during the first half of the twelfth century. In addition Gratian employed the dialectical methodology created by the masters in northern France to legal problems. I think the great success of the Decretum and its immediate and enthusiastic adoption by teachers from Italy to Spain and from Austria to northern France (to rely on the manuscripts that have survived), can be attributed to his case-law methodology that reflected legal problems that Gratian and his students would have encountered when they had visited episcopal tribunals and heard about various cases.[4]

When Winroth and Larrainzar established the existence of different recensions of Gratian's Decretum in the manuscripts, scholars immediately realized that they might begin to see how Gratian's thought evolved on various subjects. Unfortunately, to date they have uncovered very little evidence about the development of Gratian's thought in any area of law. Winroth

[3] I discuss St. Gall at length in 'The Biography of Gratian: The Father of Canon Law', *University of Villanova Law Review* 59 (2014) 679-706.

[4] Not everyone agrees that Gratian drew upon real life for his examples; Anders Winroth argued that Gratian's hypothetical cases were not real court cases, 'The Teaching of Law in the Twelfth Century', *Law and Learning in the Middle Ages: Proceedings of the Second Carlsberg Academy Conference on Medieval Legal History, 2005*, edd. Helle Vogt and Mia Münster-Swendsen (Copenhagen 2006) 41-61 at 47.

has attempted to demonstrate that Gratian changed his opinion about the primacy of spousal consent in marriage law and about the validity of the marriage of slaves. [5] In both of these cases the evidence is not without ambiguity.

While preparing a talk on Gratian's treatment of the Jews, I noticed that the canons Gratian included in his Decretum to establish norms for the legal status of the Jews were not in St. Gall or in the other pre-vulgate manuscripts. He treated the legal status of Jews only in his last, vulgate version of the Decretum.[6] This fact raises the question why did Gratian become interested in the Jews ca. 1140, the date of Gratian's final recension?[7] I have yet to find a convincing explanation. There were notorious Jewish cases in the mid-twelfth century that might have attracted Gratian's notice, but he provided no clues in the dicta around these canons which events may have captured his attention. These additional canons are not, however, an example of the evolution of Gratian's thought; they are an example of Gratian's beginning to have thoughts on an issue rather late in the game.

Gratian introduced his students to the legal status of Jews in four significant clusters of texts that are not in St. Gall nor in the pre-vulgate manuscripts. He added them to two distinctions

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[5] Anders Winroth, 'Marital Consent in Gratian's Decretum', *Readers, Texts and Compilers in the Earlier Middle Ages: Studies in Medieval Canon Law in Honour of Linda Fowler-Magerl*, ed. Martin Brett and Kathleen G. Cushing (Farnham, Surrey and Burlington, CT: 2009) 111-121 at 115 n.29 and his essay 'Neither Slave nor Free: Theology and Law in Gratian's Thoughts on the Definition of Marriage and Unfree Persons', *Medieval Church Law and the Origins of the Western Legal Tradition*: *A Tribute to Kenneth Pennington*, edd. Wolfgang P. Müller and Mary E. Sommar (Washington, D.C. 2006) 97-109.

[6] They are in the margins or the appendices of Florence, Barcelona, and Admont. That means the canons came to Gratian's attention well before he stopped working on the Decretum, see Eichbauer, 'From the First to the Second Recension' 154, 156, 161, 164.

[7] For the evolution of Gratian's Decretum see Peter Landau, 'Gratian and the *Decretum Gratiani*', T*he History of Canon Law in the Classical Period, 1140-1234: From Gratian to the Decretals of Pope Gregory IX*, ed. Wilfried Hartmann and K. Pennington (History of Medieval Canon Law; Washington, D.C. 2008) 22-54.

and two causae. In Distinctio 45 canons 3, 4 and 5, Gratian raised the issue of the validity of coerced conversions of Jews and more generally how Christian rulers, especially ecclesiastical authorities, should treat them. Distinctio 54 canons 13, 14, 15 established that Jews cannot have or own Christian servants, they cannot hold public office, and Jewish slaves who convert to Christianity are freed. Further along in the Decretum he added C.17 q.4 c.31 and dicta p.c.30 and p.c.31, in which he repeated the norm that Jews cannot hold public office. In Causa 2 quaestio 7 canons 24-25, Gratian discussed procedure and noted that Jews could not bring suit against a Christian in court. Finally, in his treatise on marriage, Causa 28 quaestio 1 canons 10, 11, 12, 13, 14, he included canons that forbade interreligious marriages and mandated that Jews who marry Christian women must convert. Further, Christian children must be removed from Jewish parents and relatives, and Jewish converts must be separated from other Jews. Finally, Christians may not marry Jews under any circumstances. In this essay I will focus on the problems raised by the coerced conversion of Jews in Distinction 45.

The dictum at the beginning of D.45 is strange: 'Sequitur "non percussorem".' Friedberg's footnote explains that this is a reference to 1 Timothy c.3 verses 2-5, which reads:

> Oportet ergo episcopum irreprehensibilem esse, unius uxoris virum, sobrium prudentem, ornatum, pudicum, hospitalem, doctorem, non vinolentum, non percussorem, sed modestum, non litigiosum . . . non neophytum.

A little searching in the Decretum reveals that Gratian cited the first part of 1 Timothy at the beginning of D.36, and that he dealt with 'ornatus et hospitalis' in D.40 and D.41-D.42, 'pudicus' in D.43, a 'vinolentus' and clerical drunkeness in D.44, 'non percussorem' in D.45, 'non litigiosum' in D.46,[8] and 'neophyti' in D.48 as guidelines to episcopal rectitude.[9] After D.48 Gratian abandoned 1 Timothy as a framework for discussing clerical

[8] 1 Timothy 3.3.

[9] It was quite natural that Gratian would have used 1 Timothy as an outline for episcopal and clerical rectitude. I discuss Gratian's use of Timothy in 'Biography of Gratian' 696-697.

discipline. In Gratian's notation at the beginning of D.45 in all the recensions of Gratian, he seems to have assumed that the reader would remember from his reference to 1 Timothy in D.36 and, from his using words from 1 Timothy in D.40-44, that 'non percussorem' followed 'vinolentum' in the epistle of the Pseudo-Paul. The dictum in St. Gall was more helpful as a aide-mémoire than the dictum in in the later recensions:[10]

> Neque percussor iuxta eundem (i.e. the author of 1 Timothy) esse debet. Non enim oportet episcopum irascibilem et animi esse turbati ubi percutiat quia patiens debet esse et eum sequi qui dorsum posuit ad flagella.

This more extensive reminder to the reader was necessary there, perhaps, because St. Gall did not include the texts in D.44 on drunkeness nor did he include the texts from D.40-41-42-43. St. Gall did contain D.46. Do these omissions provide evidence that St. Gall is an abbreviation? I think not. In St. Gall, Gratian was discussing a particular case. In his later recensions he outlined the norms for proper clerical behavior using Timothy as a rough guide.

In St. Gall and the other pre-vulgate manuscripts, the texts contained in D.45 focused on irascible prelates who abused their subjects. Although the connection between cantankerous Christian prelates and Jews is not obvious, Gratian inserted three canons on the legal status of Jews in his vulgate recension at D.45. Pope Gregory I's letter provided the text for c.3, Pope Gregory IV's for c.4, and the Fourth Council of Toledo (A.D. 633) canon 57 was the final addition. Pope Gregory I's letter reminded Pascasius, the bishop of Naples, that the Jews of Naples should not be prevented from celebrating their festivities. Pope Gregory IV's letter emphasized that prelates should not correct their subjects harshly, including, he stated, the 'presumption of the Jews'.

The most important text in D.45 was the canon from the Council of Toledo that stipulated that that Jews should not be coerced to accept the Christian faith, but if they became Christians, they should be compelled to remain Christian. This

[10] St. Gall, Stiftsbibliothek 673 p.13a.

canon circulated widely in pre-Gratian canonical collections. Twenty-two extant collections contain it. Uncharacteristically, Gratian resolved the question without creating any distinctions. His reading of the conciliar canon was brutally simple: 'Jews should not be forced to convert to the faith, but if they were unwillingly converted, they must remain Christian'.[11] In short, if a Jew was baptized, he became a Christian. What if the baptism was coerced? All the later jurists talked about the forced conversion of Jews when they glossed D.45. Gratian's successors developed a flexible doctrine. They created a distinction between conditional and absolute coercion, which was determined by the Roman law principles but not by the language of Roman law.[12] They concluded that a forced conversion or baptism of a Jew was valid if bestowed under only moderate terror.

The text of the conciliar canon was not precise on what ceremony or step constituted a valid conversion. It did state that if Jews had been forcibly converted and received the major sacraments, they could be coerced to remain Christians (D.45 c.5):

> De Iudeis autem precepit sancta sinodus, nemini deinceps uim ad credendum inferre. 'Cui enim uult Deus miseretur, et quem uult indurat '. Non enim tales inviti salvandi sunt, sed volentes, ut integra sit forma iustitie. Sicut enim homo propria arbitrii voluntate serpenti obediens periit, sic vocante se gratia Dei proprie mentis conversione quisque credendo salvatur. Ergo non vi, sed libera arbitrii facultate ut convertantur suadendi sunt, non potius inpellendi. Qui autem iampridem ad Christianitatem coacti sunt, sicut factum est temporibus religiosissimi principis Sisebuti, quia iam constat eos sacramentis diuinis associatos, et baptismi gratiam suscepisse, et

[11] D.45 c.5; Gratian concluded in his dictum after c.4 that this conciliar canon meant that 'Iudei non sunt cogendi ad fidem, quam tamen si inviti susceperint, cogendi sunt retinere'. On the Jews in canon law see Walter Pakter, *Medieval Canon Law and the Jews* (Abhandlungen zur rechtwissenschaftlichen Grundlagenforschung 68; Ebelsbach 1988).

[12] For a detailed discussion of when fear invalidated an action, see Stephan Kuttner, *Kanonistische Schuldlehre von Gratian bis auf die Dekretalen Gregors IX: Systematisch auf Grund der handschriftlichen Quellen dargestellt*. (Studi e Testi 64; Città del Vaticano 1935, reprinted 1961) 299-314.

> crismate unctos esse, et corporis Domini extitisse participes, oportet, ut fidem, quam vi vel necessitate susceperint, tenere cogantur, ne nomen Domini blasphemetur, et fides, quam susceperunt, vilis ac contemptibilis, habeatur. (This holy synod commands that Jews not be forced to believe. Rather, God has mercy on those he chooses and punishes others he does not (Rom. 9:18). The unwilling must not be saved but only the willing, as an example of a complete model of justice. As man perished by willingly obeying the serpent, he is saved through the grace of God by believing. Therefore the Jews are not to be converted by force but by persuasion and through their free will. Those who have already been forced to convert to Christianity, as had occurred during the time of the most pious ruler Sisebut, since they have accepted the divine sacraments, received the grace of baptism, the anointed with holy oil, and taken the body of the Lord, they must remain in the faith that they received whether by force or by necessity so that the name of the Lord and the faith they hold not be considered vile and contemptible.)

Must a Jew have received all the appropriate sacraments to become a Christian? Christian thinkers had very early on concluded that a valid baptism was the key to becoming a Christian.[13] An anonymous glossator commented on the words 'willing, as an example of a complete model of justice,' 'Namely to come to the sacrament of baptism'.[14] From the early twelfth century on, baptism became the liturgical act and the sacrament that defined a Christian from a non-Christian and established 'citizenship' within the Christian church.

The most important canonist of the twelfth century, Huguccio established the jurisprudential ground rules for defining what constituted a forced valid conversion or baptism. In a gloss to the Toledo conciliar canon, Huguccio explored what constituted consent of a Jew to baptism. Rufinus had already defined coercion as either absolute or conditional when he

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[13] Jean Gaudemet, '"Baptisumus, ianua sacramentorum" CJC, c. 849: Baptême et droits de l'homme', *Rituels: Mélanges offerts au R.P. Pierre-Marie Gy*, edd. P. d Clerck and E. Palazzo (Paris 1990) 273-282, reprinted in *La doctrine canonique médiévale* (Collected Studies; Aldershot-Brookfield 1994).

[14] Köln, Erzbischöfliche Diözesan- und Dombibliothek 127, fol. 43v interlinear gloss to D.45 c.5 s.v. *volentes*: 'scilicet ad sacramentum salutis uenire'.

discussed the validity of oaths.[15] Huguccio applied the terminology to coerced baptisms:[16]

> I distinguish between absolute and conditional coercion: If anyone is baptized by absolute coercion, for example if one person tied him down and another poured water over him, unless he consents afterwards, he ought not to be forced to embrace the Christian faith.

Because he believed that baptism was valid whether willing or unwilling, awake or sleeping, he concluded posterior consent made a Jew a Christian.[17] Not all later jurists accepted Huguccio's reasoning. They held that invalid acts could never been validated by later consent. For example, invalid confessions extracted by torture were never valid ex post factum.[18] Huguccio specified in some detail exactly what constituted conditional coercion:[19]

> If someone is baptized under conditional coercion, for example if I say I will beat, rob, kill, or injure you, unless you are baptized, he can be forced to hold the faith, because from conditional coercion an unwilling person is made into a willing person, and as a willing person is baptized. A coerced choice is a choice, and makes consent.

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[15] Rufinus, *Summa decretorum* to C.22 q.5 c.1 s.v. *Qui compulus*, ed. Heinrich Singer (Paderborn 1902, reprinted Aalen 1963) 399-402.

[16] Huguccio, *Summa* to D. 45 c.5 s.v. *associatos unctos corporis Domini*, Lons-le-Saunier, Archives départementales du Jura 16, fol. 61v, Admont, Stiftsbibliothek 7, fol. 61v, Vat. lat. 2280, fol. 44r: 'De coactione autem distinquo, aut est absoluta aut est conditionalis. Si absoluta coactione quis baptizetur, puta unus tenet eum ligatum et alius superfundit aquam, nisi (ubi Lons-le-Saunier) postea consentiat, non debet cogi ad fidem Christianam tenendam'. Condorelli, *Libertà* 55-56 prints this text from Franz Gillmann, *Die Notwendigkeit der Intention auf Seiten des Spenders und des Empfängers der Sakramente nach der Anschauung der Frühscholastik* (Mainz 1916) 16.

[17] Ibid.: 'quia sive volens sive nolens, vigilans sive dormiens quis baptizetur in forma ecclesie sacramentum accipit'.

[18] See my essay 'Torture and Fear: Enemies of Justice', RIDC 19 (2008) 203-242.

[19] Huguccio, *Summa* to D. 45 c.5 s.v. *associatos unctos corporis Domini*, Lons-le-Saunier, Archives départementales du Jura 16, fol. 61v, Admont, Stiftsbibliothek 7, fol. 61v, Vat. lat. 2280, fol. 44r: 'Si vero coactione conditionali quis baptizetur, puta: te verberabo vel spoliabo bel interficiam vel leda, nisi baptizeris, debet cogi ut fiedm teneat, quia per talem coactionem de nolente efficitur quid volens, et volens baptizatur. Voluntas enim coacta voluntas est et volentem facit, ut xv. q.i. Merito (C.15 q.1 c.1)'.

Thirteenth-century jurists found Huguccio's definitions of conditional coercion persuasive. Raymond of Peñafort (ca. 1234) accepted conditional coercion conferred a valid baptism but did not accept Huguccio's conviction that absolute coercion could confer a valid sacrament. Pope Innocent III had issued the decretal *Maiores* in which almost the entire last part of *De Iudeis* was quoted. The pope declared that if a Jew had adamantly and steadfastly refused to accept baptism, the sacrament and the conversion were not valid.[20] Innocent's decretal was the last piece of papal canonical jurisdiction that directly touched upon the issue of coerced baptisms.

Maiores and *De Iudeis* left many questions open. A significant issue was the fate of Jewish children in families in which one of the parents became Christian or in which the parents did not convert, but in which a child had been baptized. A case decided in 1229 at the papal curia about the status of a Jewish child became a bench mark for deciding the rights of the father, mother and child for centuries. Raymond de Peñafort included the appellate decision in the *Decretales of Gregory IX*.[21] A Jew in Strasbourg had converted to Christianity and left a staunchly Jewish wife and four year old son behind. He had petitioned the bishop to grant him custody of his son. He wanted to baptize him and raise him as a Christian. The man made only one argument, at least only one argument was reported in the decision: his son should be given to him immediately to be raised a Catholic. Remarkably, the mother appeared before an episcopal synod which heard the case. She presented arguments that still resonate with maternal love. The boy was young. He needed the consolation of his mother more than his father. His gestation had been difficult, his birth painful, and his post partum strenuous. From these facts the court should understand that the legitimate conjoining of a man and a woman is called

[20] *Summa de penitentia* (Rome 1603) 33: 'quia corporaliter cum violentia traherentur et super infunderetur aqua, non conferretur character baptismi, extra de bapt. et eius effectu, Maiores, circa finem (3 Comp. 3.34.1 = X 3.42.3)'.

[21] X 3.33.2.

matrimony, not patrimony. A mother's rights should not be abrogated to appease a paternalistic jurisprudence. It was a strikingly clever argument that the jurists pondered for centuries afterwards. Her last argument was especially touching. The bishop had custody of the boy during the hearing, but his mother pleaded that the boy should remain with her since her husband had only recently converted. Failing that solution, neutral custodians should take care of the boy until he reached majority.[22] This mother's plea did not move the court.

After the mid-thirteenth century, the jurists used a new genre of literature, the consilium, to expand their discussion of the legal status of converted Jews and their children.[23] Two of the earliest consilia I know that deal with the legal status of Jews date from the second half of the thirteenth century. They treated the baptism of Jewish children and much more. A Dominican inquisitor, Florio da Vicenza, was particularly interested in relapsed baptized Jews who had 'Judaized'.[24] A similar problem was posed by Jews who persecuted other Jews who had converted to Christianity. The inquisitor's zeal led him into

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[22] X 3.33.2: 'Ad quod illa respondit, quod, cum puer adhuc infans exsistat, propter quod magis materno indiget solatio quam paterno, sibique ante partum onerosus, dolorosus in partu, [*ac*] post partum laboriosus fuisse noscatur, ac ex hoc legitima coniunctio maris et feminae magis matrimonium quam patrimonium nuncupetur, dictus puer apud eam debet convenientius remanere, [*quam apud patrem ad fidem Christianam de novo perductum transire debebat, aut saltem neutrius sequi, priusquam ad legitimam aetatem perveniat. Hinc inde multis aliis allegatis: tu autem praedicto puero medio tempore in tua potestate retento, quid tibi faciendum sit in hoc casu nos consulere voluisti* (pars decisa in the *Decretales*).]'.

[23] Mario Ascheri has devoted a lifetime of scholarship to the medieval and early modern consilia, e.g '"Consilium sapientis", perizia medica e "res iudicata": Diritto dei "dottori" e istituzioni comunali', *Proceedings Berkeley 1980* 532-579 and 'Legal Consulting in the Civil Law Tradition', *Legal Consulting in the Civil Law Tradition*, edd. Mario Ascheri, Ingrid Baumgärtner, and Julius Kirshner (Studies in Comparative Legal History; Berkeley 1999) 11-53.

[24] Riccardo Parmeggiani, *I consilia procedurali per l'inquisizione medievale (1235-1330)* (Bologna 2011) 121-122; Bolognese jurists repeated much of the consilium in their own that Parmeggiani prints on pp. 126-128. The jurists debated this question in consilia until the early modern period.

uncharted legal territory. A number of jurists from Padua or possibly Bologna responded to his questions about several cases on his docket that involved Jews. The questions posed by Brother Florio indicate that Jews were only recently coming to the attention of inquisitors and also reveal how little help the normative texts in the canonical collections were in solving more intricate problems. The jurists dealt with eight questions that Florio must have asked them to answer. The first was whether relapsed Jews should have the legal status of heretics and be subject to the inquisitor's court. The answer was simply yes, without any explanation of their reasoning.[25]

The second question was more ominous and threatening to the Jewish communities. Could Jews who aided and abetted relapsed Jews be tried in inquisitorial courts as 'supporters, receivers, and defenders of heretics?'[26] The jurists said yes. They also provided insight into their reasoning: the Jews held their legal rights in Christian society only as a privilege, not as a right. The jurists concluded by citing legal maxim that had long been embedded in canonical jurisprudence: those that abused their privileges lost them.[27]

The next two questions involved procedure. When and how could Jews be tortured? If the proofs contained 'presumptiones violentae', that is evidence that fell just short of complete proof, Jews could be tortured. This standard was common in the procedural literature of the *Ius commune* for

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[25] Ibid. 124.

[26] Ibid: 'dicunt eum posse et debere procedere contra eos sicut contra fautores, receptores et defensores hereticorum'. This language was taken from decretals and secular legislation; see my 'Pro peccatis patrum puniri: A Moral and Legal Problem of the Inquisition', *Church History* 47 (1978) 137-154, reprinted with additions in *Popes, Canonists and Texts, 1150-1550* (Aldershot 1993) XI pp. 3-16, especially at 11-12.

[27] Ibid. 124: 'Licet Iudei ab ecclesia in suis ritibus tollerentur, tamen ratione delicti quod in ecclesiam committunt, sunt severitate ecclesiastica coherecendi. Et privilegium meretur amittere qui permissa sibi abutitur potestate'. See D.74 c.6 and C.11 q.3 c.63 for the earliest appearance of this maxim in canon law. It did not have its roots in Roman law.

determining whether a person could be tortured.[28] It is striking that the jurists applied the same principles to Jews as they did to Christians. They also concluded that Jews could not be tortured in ways that would draw blood.[29] This limitation seems to imply that the jurists did not consider relapsed Jews to have committed a crime.

The other points in the 'consilium' covered Jews who used their synagogues to wash away baptisms of Christians or in which they circumcised Christians. These synagogues should be destroyed.[30] The seventh question in the 'consilium' was what should be done with a Jewish child of a baptized Jew (i.e. Christian), who was away or in regions unknown. Could the child remain with Jewish mother? The jurists did not hesitate to take the child away from his mother on the grounds of the 'favor fidei'. It had become the common opinion of the jurists, following the precedent of Pope Gregory IX's decretal (X 3.33.2) (discussed above) that a Jewish child of a mixed marriage should live with the Christian parent.[31] The Church, the local bishop, or the Christian prince should take the child to be raised by Christians who were not suspect and who were baptized. They granted an exception: unless the child had the 'impediment of a contrary will (obex contrariae voluntatis)'. This strange terminology dates back to a similar phrase of Saint Augustine and had been employed by Pope Innocent III, theologians and canonists to evaluate the intentions of those who received

[28] Pennington, 'Torture and Fear: Enemies of Justice', RIDC 19 (2008) 203-242.

[29] Parmeggiani, *I consilia procedurali* 124: 'potest et debet eam extorquere suppliciis citra effusionemm sanguinis per executorem vel iudicem secularem'.

[30] Ora Limor, 'Christians and Jews', *The Cambridge History of Christianity*, 4: *Christianity in Western Europe c. 1100-1500*, edd. Miri Rubin and Walter Simons (Cambridge 2009) 494-556, with bibliography; also R. Po-Chia Hsia, *The Myth of Ritual Murder: Jew and Magic in Reformation Germany* (New Haven 1988).

[31] Pakter, *Medieval Canon Law and the Jews* 318-321.

baptism in order to judge whether the baptism was validly bestowed.[32]

Pope Nichaolas III declared in a letter dated 1277 that Jews who converted under threats of death cannot return to Jewish practices because they were not 'absolutely and exactly coerced (absolute seu precise coacti)'. Gradually the 'praecisa coactio' replaced 'absoluta coactio' in the terminology of the jurists.[33] Pope Boniface VIII used that terminology in his decretal letter *Contra Christianos* that was later included in his *Liber Sextus*. The pope also confirmed the opinions of the jurist who advised Florio da Vicenza that relapsed Jews were to be equated with heretics and that any Jews who aided or abetted those Jews who had apostatized were subject to the jurisdiction of Christian courts and could be punished with the same penalties as those imposed upon relapsed Jews.[34]

Gratian inclusion of the Fourth Council of Toledo's fifty-seventh canon on Jews shaped the legal discussion of the legal status of baptized Jews for centuries. One puzzle must remain unresolved: why did Gratian not include canons on Jews in earlier recensions? An easy answer that I do not find convincing is that from the First Crusade on, Jews became a legal problem in the Latin West. Gratian was well aware that the major pre-Gratian canonical collections, which were all divided into books and titles, often had sections devoted to the Jews.[35] Jews had

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[32] Parmeggiani, *I consilia procedurali* 125: 'parvulus filius Iudei baptizati existens apud matrem que remansit in Iudaica cecitate patre absente in remotis partibus et ignotis, favore fidei est accipeindus ab eo per ecclesiam vel loci ordinarium seu principem Christianum, cuius subest dominio; et nutriendus apud fideles non suspectos et baptizandus, nisi obex in eo contrarie voluntatis'. On the phrase 'obex contrariae voluntatis' and issue of forced baptism, see Mario Condorelli, *I fondamenti giuridici della tolleranza religiosa nell'elaborazione canonistica dei secoli XII-XIX: Contributo storico-dogmatico* (2nd. ed. Università di Catania Pubblicazioni della Facoltà di Giurisprudenza 36; Milano 1960) 88-105.

[33] 'Praecisa coactio' is not a term of Roman law; the Roman jurists did use 'praecise' in several different contexts', e.g. Dig. 36.3.1.20.

[34] VI 5.2.13.

[35] E.g. Burchard of Worms, Decretum 4.81-88, Collection in Three Books 3.6, Polycarpus, Collectio canonum 7.13 and many others.

always presented legal problems. There were many earlier texts in canonical collections that treated Jews. Gratian knew them. It is possible that the idea slowly dawned on Gratian that he should consider Jews, perhaps for a number of different reasons. Unlike all earlier collections Gratian did not divide his collection into books and titles. None of Gratin's distinctiones and causae dealt with Jews in Christian society. When he decided to include canons on Jews, the structure of the Decretum limited the places where he could place Jewish material. Consequently, all the canons he included treating the legal status of Jews were awkwardly placed in causae that dealt with other issues. Perhaps that is a metaphor for the status of Jews and other non-Christians in medieval Christian society.

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Silentium perpetuum et *absolutio ab impetitione*: L'expression de la sentence définitive et de la requête irrecevable dans la procédure canonique des XII^e^ et XIII^e^ siècles[*]

Franck Roumy

Analysant le rôle du parlement de Paris dans la construction d'un État de droit au Moyen Âge central, Jean Hilaire, dans un livre paru en 2011, a mis au jour une technique procédurale jusqu'alors méconnue.[1] Le procédé apparaît au milieu du XIII^e^ siècle, tandis que le Parlement, se détachant progressivement de la 'curia regis', devient la plus haute juridiction d'appel du royaume de France.[2] À la demande d'une des parties en procès ou, parfois, de sa propre initiative, la cour 'impose silence' aux plaideurs. La formule 'silentium imponere' ou 'perpetuum silentium imponere' se rencontre ainsi une centaine de fois dans les sentences du Parlement, entre le milieu du XIII^e^ siècle et le début du XIV^e^; la seconde des deux expressions devient plus fréquente à la fin de cette période, sous le règne de Philippe le Bel.[3] Examinant minutieusement les décisions dans lesquelles ces formulations étaient employées, Jean Hilaire a pu relever que celles-ci étaient utilisées dans deux hypothèses: soit pour exprimer l'irrecevabilité d'une action intentée devant la cour; soit pour proclamer la force de la chose jugée prohibant tout recours sur la même cause.[4] Dans les deux cas, le 'silentium impositum' produisait alors le même effet, interdisant aux litigants d'agir en justice sur l'objet déjà présenté au tribunal. En imposant le silence, les juges formulaient aussi une injonction à l'égard des

[*] Cette contribution reprend une conférence plénière prononcée au XIV^e^ congrès international de droit canonique médiéval, à Toronto, en août 2012.

[1] Jean Hilaire, *La construction de l'État de droit dans les archives judiciaires de la Cour de France au XIII^e^ siècle* (Paris 2011).

[2] Cf. Charles-Victor Langlois, 'Les origines du parlement de Paris', *Revue historique* 42 (1890) 74-114.

[3] Hilaire, *La construction* 170.

[4] Ibid. 171-179.

procéduriers. Ceux qui abusaient des voies de recours offertes par le droit pour multiplier les actions en justice ou retarder le règlement des litiges se voyaient écartés du prétoire.

Au XIII[e] siècle, le personnel du parlement de Paris était presque exclusivement clérical. Jean Hilaire a donc émis l'hypothèse que le système consistant à imposer silence à des justiciables pouvait avoir été emprunté par la cour royale à la procédure canonique. L'historien a effectivement relevé l'expression 'imponere silentium' un siècle avant que les juges séculiers français n'en fassent usage, dans une décrétale de Clément III.[5] Le même auteur a aussi noté l'emploi de la formule, dans le *Speculum juris* de Guillaume Durand († 1296).[6] Ce court passage, qui constitue l'un des très rares textes doctrinaux du Moyen Âge central abordant la question du silence imposé, fournit de précieux renseignements sur cet outil processuel. 'Si B. a exprimé plusieurs demandes dans son libelle', explique le Spéculateur, 'et qu'il a obtenu satisfaction pour l'une mais non pour les autres, le juge doit alors ajouter: "absolvant judiciairement ledit C. des autres demandes dudit B., il convient d'imposer le silence perpétuel sur celles-ci dudit B".'[7] Le juge auquel était présenté simultanément plusieurs requêtes était en effet tenu de répondre à chacune d'entre elles. S'il accédait à l'une mais rejetait les autres, il devait donc expressément interdire d'intenter de nouvelles actions sur ces dernières. La règle formulée par le commentateur visait, entre autres, à éviter le déni de justice. Pour asseoir ses dires, Guillaume Durand citait les décrétales *Raynutius* et *Raynaldus* relatives à la conservation d'une 'pars legitima' au profit de l'héritier légal, en cas de substitution

[5] *Michael* (1187-1191) JL 16616, 2 Comp. 1.9.4 (X 1.17.13).
[6] Hilaire, *La construction* 169.
[7] Guilelmus Durandis, *Speculum juris* 2.3, *De sententia* 6 no. 8: 'Si vero B. plura petiit in libello et in uno obtineat et in aliis non, tunc judex in fine sententie sic adiciat: "in aliis vero petitionibus ipsius B. dictum C. sententialiter absolventes, ipsi B. super eis perpetuum silentium imponendo",' extra de testamentis, Raynutius (X 3.26.16) et c. Raynaldus (X 3.26.18, Paris, BNF lat. 4245, fol. 173rb; éd. Straßburg 1473, fol. 146va; Basilae 1574, 786).

fideicommissaire.[8] Dans la première affaire, le pape Innocent III avait en effet confirmé la sentence d'un cardinal auditeur restituant à une héritière substituée un fideicommis, mais rejetant, en revanche, la demande des ayants droits de la première bénéficiaire du fideicommis, qui prétendaient recueillir du chef de celle-ci une part successorale excédant la quarte par ailleurs due à la substituée.[9] Dans la seconde, le pape avait encore une fois confirmé le jugement d'un légat qui, dans une espèce similaire, avait accueilli la revendication portant sur une part successorale légale et rejeté les demandes excédant celle-ci. Cependant, les décrétales *Raynutius* et *Raynaldus* n'employaient à aucun moment l'expression 'imponere silentium' pour éteindre toute action future sur les prétentions rejetées. Guillaume Durand ajoutait donc que 'le fait que l'une et l'autre formules, à savoir 'silentium perpetuum' et 'absolutio ab impetitione', dussent être employées dans les sentences est prouvé dans le *Liber extra*', citant à l'appui de cette affirmation sept décrétales de la compilation de Grégoire IX.[10]

Dans chacune des décrétales en question, en effet, le rejet d'une demande est exprimé par le silence imposé, qui interdit désormais une nouvelle action au litigant. Dans six d'entre elles,

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[8] *Rainutius* (12.9.1207) Po. 3173, *Die Register Innocenz' III.: 10. Pontifikatsjahr, 1207/1208: Texte und Indices*, éd. Rainer Murauer, Andrea Sommerlechner (Wien 2007) 209-212 = 3 Comp. 3.18.13 (X 2.26.16), *Raynaldus* (1227-1234) Po. 9645 Reg. deest (X 3.26.18).

[9] Sur le *casus* de cette décrétale, voir Franck Roumy, *L'adoption dans le droit savant du XII^e^ au XVI^e^ siècle* (Bibliothèque de droit privé 279; Paris 1998) 305, et, surtout, Patrick Arabeyre, *Les idées politiques à Toulouse à la veille de la Réforme. Recherches autour de l'œuvre de Guillaume Benoît* (Études d'histoire du droit et des idées politiques 7; Toulouse 2003) 158-160.

[10] Guilelmus Durandis, *Speculum juris* II.3, *De sententia* 6 no. 9: 'Quod autem utrumque verbum proponendum sit in sententiis, scilicet silentium perpetuum et absolutio ab impetitione, probatur extra de causa possessionis et proprietatis, Cum ecclesia in fine [X 2.12.3], et de conversione conjugatorum, Dudum in fine [X 3.32.20], extra de transactionibus, Ex litteris in fine [X 1.36.6], extra de electione, Cum ecclesia [X 1.6.31], extra de religiosis domibus, Constitutus in fine [X 3.36.6], extra de officio archidiaconi c. finali [X 1.23.10], extra de prescriptionibus, Auditis [X 2.26.15]' (Paris, BNF lat. 4245, fol. 173rb; éd. Straßburg 1473, fol. 146va; Basilae 1574, 786).

en outre, la chancellerie pontificale parle d'‘absolutio' ou d'‘absolvere ab impetitione'.[11] L'usage de ces formules dans la législation pontificale ne semble avoir retenu ni l'attention des juristes modernes, ni celles des historiens ou des diplomatistes. Un sondage dans les ‘ordines judiciarii' révèle que les processualistes médiévaux ne leur ont pas accordé plus d'attention. Les rares renseignements relatifs au silence imposé figurent dans les grands dictionnaires juridiques de la fin du Moyen Âge. Albéric de Rosate († 1360) explique ainsi que le silence est imposé généralement au demandeur, rarement au défendeur.[12] Giovanni Bertachini précise de son côté qu'il peut l'être avant même la ‘litis contestatio', peut faire l'objet d'une demande d'une des parties ou être le fait du juge, mais doit nécessairement être précédé d'une double monition.[13] La question de savoir si le défendeur pouvait directement requérir du juge que celui-ci imposât silence à son adversaire semble aussi avoir fait l'objet de quelques débats. Balde soulève la question et répond positivement en évoquant l'exemple du débiteur qui peut exhiber une quittance instrumentée en forme publique pour écarter d'emblée la prétention de son adversaire.[14]

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[11] X 1.6.31; 1.23.10; 2.12.3; 2.26.15; 3.32.20; 3.36.6.

[12] Albericus de Rosate, *Dictionarium juris tam civilis quam canonici*, V° *Silentium*: ‘Silentium actori non reo imponitur, extra de causa possessionis et proprietatis c. penultimo [X 2.12.7]. Aliquando imponitur reo, extra de probationibus, In presentia [X 2.19.8]' (éd. Tridini 1519, s. p.).

[13] Johannes Bertachinus, *Repertorium juris utriusque*, v° *Silentium*: ‘Silentium imponi potest etiam lite non contestata. Baldus in titulo de pace Constantia § Si quis autem. Silentium imponi potest petitione, supra Libellorum forme, v. LXXXI. Silentium actori potest imponi per judicem, Baldus in l. Peremptorias, penultima columna, in principio, versiculis Quero utrum ejus C. sententiam rescindi non posse [C. 7.50.2], scilicet quando absolvit reum et si non expresse tamen tacite utrum impositum, Baldus in l. Quid tamen, § Si arbiter in iii. no., ff. de arbitriis [D. 4.8.21.1]. Silentium imponi non potest nisi precedat duplex monitio in auth. de heredibus et falcidia § Si quis autem [Auth. 1.1.1.1], cum glossa in versiculo “admonitus” et ibi vide Angelum in i. col. de ecclesiasticis titulis § Si quis autem [Auth. 9.6.9.1]' (éd. Lugduni 1499, III, fol. CCVII).

[14] Baldus, *Commmentaria* ad C. 7.50.2, *Peremptorias*, no. 36: ‘Quero utrum reus possit petere ut actori imponatur silentium. Respondeo: considera, utrum haec petitio respiciat agere an excipere. Reorum autem non est agere l. Pure § finali, ff. de exceptione doli l. Quod ergo, § Contrarium [D. 44.4.5.6], ff. de contraria judicia tutele [D. 27.4.3.1]. Tu dic quod non potest, nisi sit tractus ad causam per actorem, sicut enim reo fit preceptum de solvendo, ita potest fieri

Mais ces maigres notations ne renseignent ni sur l'origine (I), ni sur la portée exacte (II) d'une telle procédure.

I. *L'Origine de la Procedure*

Le système qui consiste, pour le détenteur de la juridiction, à imposer silence à l'un ou l'autre des plaideurs semble être répandu dès la deuxième moitié du XII^e^ siècle. Un sondage dans les décrétales compilées en 1234 dans le *Liber extra* de Grégoire IX suffit pour s'en convaincre.[15] La formule 'imponere silentium' apparaît en effet dans cinquante-huit d'entre elles.[16] Une très large majorité de celles-ci — quarante-trois exactement — émanent d'Innocent III (1198-1216).[17] Les plus anciennes, au

actori de silentio, puta si reus per publicum instrumentum docet se solvisse, ut infra de apochis publicis l. 2, lib. x. [C. 10.22.2]' (*In VII, VIII, IX, X et XI Codicis libros commentaria*, Venetiis 1599, réimpr. Goldbach 2004, fol. 64vb-65ra).

[15] L'enquête a été réalisée à partir de la version numérisée du *Liber extra* mis à disposition par la *Bibliotheca Augustana*: www.hs-augsburg.de/~harsch/augustana.html.

[16] X 1.3.25; 1.6.22; 1.6.24; 1.6.32; 1.6.47; 1.9.6; 1.10.3; 1.17.9; 1.17.13; 1.23.10; 1.29.23; 1.36.6; 1.40.6; 2.12.3; 2.13.3; 2.13.4; 2.19.8; 2.19.9; 2.22.4; 2.22.10; 2.23.16; 2.25.3; 2.26.15; 2.26.18; 2.27.12; 2.27.17; 2.27.18; 2.27.20; 2.27.21; 2.28.45; 2.30.4; 3.4.6; 3.5.18; 3.5.25; 3.7.6; 3.8.7; 3.8.13; 3.11.3; 3.27.3; 3.32.20; 3.36.6; 3.36.7; 3.37.2; 3.38.28; 4.11.8; 4.17.8; 4.18.4; 4.18.5; 5.1.12; 5.1.14; 5.1.15; 5.1.23; 5.3.12; 5.16.6; 5.20.9; 5.33.14; 5.33.15; 5.34.15.

[17] *Cum ecclesiasticae* (3.3.1198) Po. 41 Reg. I.39 [3 Comp. 2.16.2 = X 2.25.3]; *Cum dilectus* (2.6.1198) Po. 252 Reg. I.247 [3 Comp. 3.20.1 = X 3.27.3]; *Cum olim* (8.6.1198) Po. 267 Reg. I.267 [3 Comp. 2.18.2 = X 2.27.12]; *Licet in beato* (10.6.1198) Po. 273 Reg. I.277 [3 Comp. 5.1.1 = X 5.1.14]; *Ex ore* (22.6.1198) Po. 302 Reg. I.290 [3 Comp. 3.12.1 = X 3.11.3]; *Ex continentia* (20.10.1198) Po. 395 Reg. I.404 [4 Comp. 5.8.2 = X 5.20.9]; *Cum super* (13.4.1199) Po. 665 Reg. II.38 [3 Comp. 1.18.2 = X 1.29.23]; *Inter monasterium* (3.6.1199) Po. 730 Reg. II.78(81) [3 Comp. 2.18.10 = X 2.27.20]; *Cum dilectus* (10.6.1199) Po. 733 Reg. II.84(91) [3 Comp. 1.23.3 = X 1.40.6]; *Cum ecclesia* (7.2.1200) Po. 947 Reg. II.271(283) [3 Comp. 2.5.1 = X 2.12.3]; *Cum super* (1200) Po. 1091 Reg. deest [3 Comp. 2.18.7 = X 2.27.17]; *Cum jam dudum* (1200) Po. 1186 Reg. III.41 [3 Comp. 3.5.4 = X 3.5.18]; *Cum venissent* (1201) Po. 1285 Reg. deest [3 Comp. 3.7.3 = X 3.7.6]; *Constitutus in* (1201) Po. 1480 Reg. deest [3 Comp. 3.28.2 = X 3.36.6]; *Dilectus filius* (1201) Po. 1523 Reg. deest [3 Comp. 3.29.1 = X 3.37.2]; *In praesentia* (1201) Po. 1547 Reg. deest [3 Comp. 2.11.2 = X 2.19.8]; *Veniens olim* (5.5.1202) Po. 1672 Reg. V.28(29)

nombre de huit, sont d'Alexandre III (1159-1181).[18] À cet ensemble s'ajoute un rescrit de Clément III (1187-1191), deux de Célestin III (1191-1198), deux d'Honorius III (1216-1227) et enfin deux de Grégoire IX (1227-1241).[19] Dans dix-neuf de ces

[3 Comp. 5.1.2 = X 5.1.15]; *Post electionem* (1/3.6.1202) Po. 1692, 1694 Reg. V.53(54,55) [3 Comp. 3.8.4 = X 3.8.7]; *In praesentia* (4.6.1202) Po. 1695 Reg. V.55(57) [2 Comp. 1.5.4 = X 1.9.6]; *Dudum ad* [ex *In causis*] (9.4.1203) Po. 1877 Reg. VI.36 [3 Comp. 1.6.7 = X 1.6.22]; *Cum olim* (26.6.1203) Po. 1951 Reg. VI.109 [3 Comp. 5.16.4 = X 5.33.14]; *Significante N.* (15.6.1204) Po. 2241 Reg. VII.92 [3 Comp. 4.13.3 = X 4.18.5]; *Cum Bertholdus* (15.3.1205) Po. 2446 Reg. VIII.8 [3 Comp. 2.18.8 = X 2.27.18]; *Querelam quam* (4.6.1205) Po. 2531 Reg. VIII.87(86) [3 Comp. 1.6.9 = X 1.6.24]; *Auditis et intellectis* (3.2.1205) Po. 2681 Reg. VIII.206(205) [3 Comp. 2.17.5 = X 2.26.15]; *Cum dilecti* (24.3.1206) Po. 2725 Reg. IX.40 [3 Comp. 3.30.3 = X 3.38.28]; *Cum dilecte* (17.6.1206) Po. 2813 Reg. IX.108 [3 Comp. 2.20.1 = X 2.30.4]; *Accedentibus* (1.7.1206) Po. 2834 Reg. IX.111 [3 Comp. 5.16.5 = X 5.33.15]; *Dudum bonae* (27.4.1207) Po. 3093 Reg. X.57 [3 Comp. 5.23.9 = X 2.23.16]; *Suborta dudum* (15.6.1207) Po. 3119 Reg. X.96 [3 Comp. 2.18.11 = X 2.27.21]; *Licet causam* (1.9.1207) Po. 3170 Reg. X.116 [3 Comp. 2.11.4 = X 2.19.9]; *Cum dilectis* (10.1.1208) Po. 3268 Reg. X.188 [3 Comp. 5.17.6 = X 5.34.15]; *Cum dilectus* (2.4.1208) Po. 3362 Reg. XI.40(43) [3 Comp. 1.6.17 = X 1.6.32]; *Intelleximus* (26.4.1208) Po. 3387 Reg. XI.66(70) [3 Comp. 5.8.1 = X 5.16.6]; *Dum olim* (31.10.1208) Po. 3526 Reg. XI.162(167) [3 Comp. 2.17.8 = X 2.26.18]; *Ex tenore* (12.12.1208) Po. 3563 Reg. XI.183(188) [3 Comp. 3.8.10 = X 3.8.13]; *Cum venerabilis* (4.8.1209) Po. 3792 Reg. XII.93 [4 Comp. 3.13.1 = X 3.36.7]; *Cum Johannes* (1206-1209) Po. 3872 Reg. deest [4 Comp. 2.8.1 = X 2.22.10]; *Dilecto filio* (1.5.1210) Po. 3989 Reg. XIII.72 [4 Comp. 3.2.1 = X 3.5.25]; *Olim ex litteris* (1212) Po. 4400 Reg. XV.6 [4 Comp. 1.2.2 = X 1.3.25]; *Accedens ad* (12.1215) Po. 5018 Reg. deest [4 Comp. 3.3.3 = X 5.1.23]; *Licet dilecti* (1198-1215) Po. 5035 [4 Comp. 1.6.1 = X 1.10.3]; *Constitutus in praesentia* Po. – [3 Comp. 2.19.3 = X 2.28.45].

[18] Alexander III, *Perlatum est* (1170-1171) JL 11871 [1 Comp. 4.18.8 = X 4.17.8]; *Ex literis vestris* (1163-1179) JL 13159 [1 Comp. 1.27.6 = X 1.36.6]; *Ex tua* (1159-1181) JL 13881 [1 Comp. 1.9.11 = X 1.17.9]; *Cum essent* (1159-1181) JL 13883 (1 Comp. 5.2.11 = X 5.3.12]; *Accepta conquestione* (1159-1181) JL 13984 [1 Comp. 2.9.2 = X 2.13.3]; *Conquerente nobis* (1159-1181) JL 13986 [2 Comp. 3.3.2 = X 3.4.6]; *Audita querela* (1159-1181) JL 14143 [1 Comp.2.9.4 = X 2.13.4]; *Accepimus litteras* (23.1.1181) JL 14365 [2 Comp. 2.14.2 = X 2.22.4].

[19] Clemens III, *Michael* (1187-1191) JL 16616 [2 Comp. 1.9.4 = X 1.17.13]. Celestinus III, *Insuper adiecisti* (1191-1198) JL 17649 [2 Comp. 4.12.3 = X 4.18.4]; *Si constiterit* (1191-1198) JL 17670 [2 Comp. 5.1.1 = X 5.1.12]. Honorius III, *Constitutis* (1216-1227) Po. 7717 (5 Comp. 1.5.5 = X 1.6.47); *Dilecto filio* (1216-1227) Po. 7723 [5 Comp. 1.13.1 = X 1.23.10]. Gregorius IX,

cinquante-huit décrétales, l'expression 'imponere silentium' se trouve associée à celle d''absolvere ab impetitione'.[20] Cette dernière formule est par ailleurs employée seule dans vingt-deux décrétales du *Liber extra*.[21] Parmi celles-ci, les plus nombreuses, au nombre de huit, émanent encore d'Innocent III[22] et les plus anciennes — six — d'Alexandre III.[23] On trouve en outre une décrétale d'Urbain III (1185-1187), deux de Clément III et d'Honorius III et, pour finir, trois de Grégoire IX.[24] Au vu de cet échantillon, la procédure visant à imposer silence à un litigant, lorsque le juge voulait définitivement clore une cause, était donc courante, devant les juges du pape, dans les années 1160-1200. Mais une enquête dans la législation pontificale de la première

Dudum a C. (4.10.1230) Po. 9653 Reg. I.500 [X 3.32.20]; *Ex litteris vestris* (1227-1234) Po. 9666 Reg. deest [X 4.11.8].

[20] X 1.3.25; 1.6.24; 1.6.32; 1.23.10; 1.29.23; 2.12.3; 2.26.15; 2.26.18; 2.27.18; 3.5.18; 3.8.13; 3.27.3; 3.32.20; 3.36.6; 3.36.7; 3.37.2; 4.11.8; 5.1.12; 5.33.15.

[21] X 1.3.19; 1.3.31; 1.6.31; 2.1.7; 2.10.1; 2.12.8; 2.13.12; 2.22.6; 2.24.34; 2.25.6; 2.25.11; 2.26.4; 2.27.8; 2.27.10; 3.5.27; 3.8.8; 3.26.18; 3.31.8; 3.36.8; 4.2.10; 4.14.2; 5.23.2.

[22] Innocentius III, *Cum dilecti* (26.3.1198) Po. 66 Reg. I.60 [4 Comp. 3.13.2 = X 3.36.8]; *Constitutus* (22.8.1198) Po. 353 Reg. I.338 [3 Comp. 1.2.9 = X 1.3.19]; *Inter dilectos* (16.4.1199) Po. 666 Reg. II.37 [3 Comp. 2.6.1 = X 2.22.6]; *Olim causam* (12.1200) Po. 1195 Reg. deest [3 Comp. 2.6.2 = X 2.13.12]; *Cum pro* (9.7.1202) Po. 1714 Reg V.71(73) [3 Comp. 3.8.5 = X 3.8.8]; *Cum ecclesias* (17.10.1206) Po. 2895 Reg. IX.170(171) [3 Comp. 1.6.16 = X 1.6.31]; *Cum venerabilis* (4.8.1206) Po. 3791 Reg. XII.92 [4 Comp. 2.5.1 = X 2.25.6]; *Dilectus filius* (1198-1215) Po. 5020 [4 Comp. 3.3.4 = X 3.5.27].

[23] Alexander III, *Super eo* (1159-1181) JL 13790 [2 Comp. 4.8.1 = X 4.14.2]; *Ad nostram* (1159-1181) JL 13854 [1 Comp. 3.27.8 = X 3.31.8]; *Intelleximus* (1159-1181) JL 14054 [1 Comp. 2.1.9 = X 2.1.7]; *De quarto* (1159-1181) JL 14091 [1 Comp. 2.18.6 = X 2.26.4]; *Cum causa* (1170-1173) JL 12175 [1 Comp. 2.19.10 = X 2.27.8]; *Referente* (1159-1181) JL 13957 [1 Comp. 5.20.2 = X 5.23.2].

[24] Urbanus III, *Attestationes* (1185-1187) JL 9870 [1 Comp. 4.2.14 = X 4.2.10]. Clemens III, *Intelleximus* (1187-1191) JL 16550 [1 Comp. 2.5.1 = X 2.10.1]; *Tenor litterarum* (1190-1191) JL 16648 [2 Comp. 2.18.5 = X 2.27.10]. Honorius III, *In causa* (1224) Po. 7239 [5 Comp. 2.6.1 = X 2.12.8]; *Si habens* (1216-1227) Po. 7789 [5 Comp. 3.4.4 = X 1.3.31]. Gregorius IX, *Mulieri* (20.12.1232) Po. 9609 Reg. I.1010 [X 2.24.34]; *Significaverunt* (28.8.1230) Po. 9613 Reg. I.487 [X 2.25.11]; *Raynaldus* (1227-1234) Po. 9645 Reg. deest [X 3.26.18].

moitié du XII^e^ siècle révèle qu'en réalité, elle était déjà utilisée de façon sporadique beaucoup plus tôt. On la trouve ainsi dans deux décrétales de Calixte II (1119-1124), datée de 1122 et 1123, puis, un peu plus tard, dans trois autres d'Innocent II (1130-1143) et dans trois, enfin, d'Eugène III (1145-1153).[25]

Le plus ancien témoignage de l'utilisation du procédé figure dans un jugement, rendu en consistoire le 16 mai 1122 par Calixte II, en faveur de l'abbaye Saint-Remi de Reims, mettant terme à une très longue procédure. Un conflit s'était élevé entre le monastère champenois et la puissance abbaye de Montmajour, au diocèse d'Arles, à propos de la possession du domaine de Saint-Remy de Provence et d'une église située sur celui-ci. Une sentence des papes Pascal II et Gélase II était intervenue pour mettre fin à la controverse, partageant entre les deux établissements le territoire en question et les droits de juridiction qui lui étaient attachés et attribuant l'église à l'abbaye rémoise. Mais cette décision n'avait pas été respectée par Montmajour, qui avait accaparé la part dévolue à Saint-Remi. Calixte II avait alors envoyé des lettres de restitution puis, considérant les dépenses engagés par les deux monastères, de nouvelles lettres fixant un terme pour qu'eût lieu un procès en bonne et due forme. Lors de celui-ci, cependant, l'abbé de Montmajour s'était dérobé, sans se faire correctement représenter.[26] Le pape ordonne donc finalement

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[25] Calixtus II, *Quae judicii veritate* (16.5.1122) JL 6974 (Ep. 179, PL 162.1246D; Ulysse Robert, *Bullaire du pape Calixte II*, Paris 1891, réimpr. Hildesheim-New York 1979, II, no. 301, 46); *Quot mutationes* (6.4.1123) JL 7056 (Ep. 227, PL 163.1289A; Robert, *Bullaire*, II no. 389, 179). Innocentius II, *Quae ad pacem* 20.4.1139 JL 8009 (Ep. 394, PL 179.452D); *Jurgantium controversias* (1.5.1139) JL 8001 (Ep. 408, PL 179.471D); Innocentius II, *Testante Apostolo* (16.6.1141) JL 8148 (Ep. 447, PL 179.517A).

[26] Calixtus II, *Quae judicii veritate* (16.5.1122) JL 6974: 'Ceterum Montis majoris monachis renitentibus et obedire omnino nolentibus, post multas dilationum fugas, a nobis quoque de restitutione litterę missę sunt. Postremo utriusque monasterii labores et dispendia paternę pietatis oculo intuentes, post aliquantum temporis alia rursum scripta direximus ad agendam causam utrique parti terminum prefigentes. Et vos quidem parati atque muniti statuto termino accessistis; abbas vero Montis majoris absens fuit, neque pro se vel pro toto negotio, nisi quendam Rodulfum clericum delegavit' (Robert, *Bullaire* [n. 26], II, no. 301, 45-46).

que le jugement rendu par ses prédécesseurs soit respecté et impose à l'abbé et aux moines de Montmajour 'silence perpétuel dans cette cause'.[27]

Un an plus tard, le pontife a recours à la même procédure, pour mettre fin au très long conflit qui opposait les Génois aux Pisans, à propos de la consécration des évêques de Corse. Élevant, en 1092, au rang archiépiscopal l'évêque Pise, Urbain II lui avait en effet octroyé le droit de consacrer les évêques de l'île. Ce privilège, qui avait engendré de nombreux troubles, avait ensuite été retiré puis rendu à deux reprises, jusqu'à ce que les Génois obtinssent finalement son retrait moyennant finances, en 1120.[28] Suite aux protestations de l'archevêque de Pise, qui menaçait d'abandonner sa charge, le pape, lors du concile de Latran I, avait finalement nommé une commission spéciale pour examiner l'affaire. La décision de retirer définitivement le privilège est finalement signifiée dans une bulle solennelle signée de trente-quatre cardinaux, promulguée le 6 avril 1123, dans laquelle Calixte II 'impose silence' aux Pisans, sous peine d'anathème.[29]

Bien que la sentence rendue en 1122 et la bulle de 1123 soient les premiers cas repérés d'utilisation d'une telle procédure par la juridiction pontificale, il est possible d'en déceler des prémisses dans des textes antérieurs. Le traité consacré au temps de l'Avent attribué à Bernon de Reichenau († 1048) rapporte une

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[27] Calixtus II, *Quae judicii veritate* (16.5.1122) JL 6974: 'Hanc itaque definitionis sententiam nos auctoritate apostolica confirmamus et inconcussam omnino atque inviolabilem decernimus conservari, Montis Majoris abbati et fratribus perpetuum in causa hac silentium imponentes' (Robert, *Bullaire* [n. 26], II, no. 301, 46). Sur l'affaire: Maximin Deloche, 'Saint-Remy de Provence au Moyen Âge', *Mémoires de l'Institut national de France. Académie des Inscriptions et Belles-Lettres* 34 (1892) 53-143, ici 70-78.

[28] Sur les détails de l'affaire, voir Ulysse Robert, *Histoire du pape Calixte II* (Paris-Besançon 1891) 113-114 et 171-171, et, plus récemment, Mary Stroll, *Calixtus II (1119-1124). A Pope Born to Rule* (Studies in the History of Christian Traditions 116; Leiden-Boston 2004) 309-311.

[29] Calixtus II, *Quot mutationes* (6.4.1123) JL 7056: 'scripta de vestra consecratione Pisane Ecclesie collata damnavimus et quod a nobis de vestra libertate statutum fuerat, eadem auctoritate firmavimus, Pisanis perpetuum super hoc silentium sub anathematis vinculo imponentes' (éd. Robert, *Bullaire* [n. 26], II, no. 389, 179).

anecdote significative à ce sujet.[30] L'ouvrage, rédigé avant 1027, relate qu'un concile, tenu à Orléans vers l'an mil, avait réduit l'Avent à trois semaines, donnant ainsi satisfaction aux moines de l'abbaye de Fleury-sur-Loire contre les chanoines de la cité ligérienne.[31] La question avait été débattue lors de l'assemblée, explique l'auteur, 'de telle manière que nous avions convaincu en tout point nos contradicteurs, en sorte de leur imposer un silence éternel sur cette affaire'. 'De ce jour', ajoutait-il pour conclure, 'il ne s'est du reste plus trouvé personne ni chez les Français, ni chez les Allemands pour avoir l'audace d'aller contre une aussi bonne définition'.[32] Une lettre de Grégoire VII du 5 mars 1075, enjoignant au clergé et au peuple de Fiesole de ne pas poursuivre un procès engagé contre leur évêque, afin de ne pas mener leur Église à la ruine, emploie également la formule de façon rhétorique, observant que la plainte formulée aurait dû dissuader l'adversaire en lui imposant silence.[33] Un canon du second concile de Séville de 619, ultérieurement passé dans le Décret de Gratien, proclamait surtout que la prescription trentenaire imposait silence à celui qui voulait former un appel.[34]

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[30] La paternité de l'ouvrage, naguère contestée, semble authentique: Dieter Bluhme, *Bern von Reichenau (1008-1048): Abt, Gelehrter, Biograph: Ein Lebensbild mit Werkverzeichnis, sowie Edition und Übersetzung von Berns Vita S. Uodalrici* (Vorträge und Forschungen. Sonderband 52; Ostfildern 2008) 63-68 et 86.

[31] Odette Pontal, *Les conciles de la France capétienne jusqu'en 1215* (Paris 1995) 106.

[32] Berno Augiensis, *Ratio generalis de initio adventu Domini*: 'placuit sine mora omnibus Francigenis episcopis apud jam dictam urbem concilium super Adventu Domini agere. Ibi nos quippe Floriacenses Patrum auctoritate armati et ingladiabiliter perarmati adfuimus, et ita contradicentes in omnibus convicimus, ut in aeternum eis silentium super hoc negotio imponeremus. Ex illo die et deinceps non est apud Gallos vel Germanos praesumptor inventus, qui huic tam sanae diffinitioni vellet contraire'(PL 142.1088B).

[33] Gregorius VII, *Miramur satis* (5.3.1075) JL 4938, *Registrum* II.57: 'Deceret etiam ut, quos miserabilis paupertas et ruinę ecclesię vestrę compatiendo non tangit, verecundia seculi et infirmata et omnino contemptui habita questio vestra silentium imponere debuisset', éd. Erich Caspar (MGH, Epp. sel. 2.2; Hannover 1923, réimpr. 1990) 210.32-211.1).

[34] *Concilium Hispalense* II (619) c. 2, *Inter memoratos*: 'appellatio repetentis episcopi non valebit, quia illi tricennalis obiectio silentium <im>ponit' (éd. José Vives, *Concilios Visigóticos e Hispano-Romanos* [España cristiana 1;

Les premiers témoignages certains de l'utilisation du silence imposé par un juge comme moyen de clore une procédure ne remontent cependant pas au-delà du début du XII^e^ siècle. Le droit canonique du premier millénaire n'ignorait pourtant pas le procédé consistant à imposer silence. Mais il en usait à d'autres fins, lorsqu'il s'agissait de faire cesser un délit ou un crime commis par la parole. Le silence imposé visait primitivement à faire taire les hérétiques ou les calomniateurs. L'exemple le plus ancien paraît en être la célèbre lettre de Célestin I^er^ adressée en 431 à Vénérius de Marseille et aux autres évêques de Gaule à l'occasion de la controverse dite semi-pélagienne.[35] Il s'agissait, pour le pape, de faire taire ceux qui avaient calomnié Augustin en déformant ses propos sur la grâce. 'Nous ferons cesser la controverse dans l'avenir, écrivait-il, si nous imposons silence aux méchants.'[36] L'expression utilisée par la chancellerie pontificale naissante s'inspirait très probablement de la formulation, par la Vulgate, d'un proverbe, qui proclamait: 'Le jugement tranche les litiges, et celui qui impose silence à l'insensé contient les désordres.'[37]

En pareil cas, cependant, faire taire l'insensé équivalait plus à une peine qu'à une mesure de procédure. Force est de

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Barcelona-Madrid] 1963, 164) = C.16 q.3 c.6. Figurant dans la première version du Décret mise au jour par Anders Winroth, le canon paraît avoir été repris par son auteur à la *Collectio III librorum* 2.31.10, éd. Giuseppe Motta (MIC, B.8 ; Città del Vaticano 2005) 429-430, dans la mesure où il s'inscrit dans la suite les quatre premiers canons de la *quaestio*, qui forment une série numérique provenant manifestement de ce recueil : C.16 q.3 c.1-4 = *Collectio III librorum* 2.31.1-4 (éd. Motta 425-426); le c. 4 a été augmenté dans la deuxième version du Décret.

[35] La lettre avait été obtenue du pape par Prosper d'Aquitaine, voir Charles Pietri, 'La première hérésie d'Occident: Pélage et le refus rigoriste', *Histoire du christianisme*, éd. Jean-Marie Mayeur et alii, *Naissance d'une chrétienté (250-230)* (Paris 1995) 2.477; Otto Wermelinger, *Rom und Pelagius: Die theologische Position der römischen Bischöfe im pelagianischen Streit in den Jahren 411-432* (Päpste und Papsttum 7; Stuttgart 1975) 244-249.

[36] Coelestinus I, *Apostolici verba* (a. 431) JK 38: 'Quod ita demum probare poterimus, si imposito improbis silentio, de tali re in posterum querela cessabit' (Ep. 21, PL 50.530B = *Dionysiana*, PL 67.269D-270A).

[37] Prov. 26, 10: 'Judicium determinat causas et qui imponit stulto silentium, iras mitigat'.

constater que, jusqu'au XII^e siècle, le silence semble n'être utilisé que comme une sanction imposée à ceux qui ont troublé l'ordre ecclésial par leurs prises de position. Tel est le cas, par exemple, au synode de Quierzy, en 849, dans la sentence condamnant Gottschalk en raison de ses opinions sur la prédestination.[38] 'Afin que tu ne puisses, dans l'avenir, te prévaloir d'usurper la fonction d'enseignement (officium doctrinale), nous imposons à ta bouche silence perpétuel par la force du Verbe éternel' proclame la décision.[39] Une telle sanction continuait encore à être appliquée au milieu du XII^e siècle, comme le montre l'exemple de la condamnation d'Abélard. En juin 1141, la sentence d'Innocent II le proclamant hérétique l'enjoint pour cette raison à observer un silence perpétuel.[40] Le but du silence imposé n'était pas alors de clore le procès, mais de punir celui qui avait été reconnu coupable d'une faute verbale, en s'assurant qu'il ne pourrait plus commettre le crime dont il avait été convaincu.

Dans la seconde moitié du XII^e siècle, certains décrétistes interprètent encore en ce sens un fragment des capitules d'Angilramne passé dans le Décret de Gratien qui condamnait les délateurs. Ce texte, façonné par les faussaires de l'atelier isidorien à partir d'un épitomé du Bréviaire d'Alaric, énonçait comme peine l'ablation de la langue.[41] Dans les années 1160, Rufin de Bologne

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[38] Cf. Pierre Riché, 'Le christianisme dans l'Occident carolingien (milieu VIII^e-fin IX^e siècle)', *Histoire du christianisme*, éd. Jean-Marie Mayeur et alii, *Évêques, moines et empereurs (610-1054)* (Paris 1993) 4.752. Sur sa doctrine: Jean Jolivet, *Godescalc d'Orbais et la Trinité: La méthode de la théologie à l'époque carolingienne* (Études de philosophie médiévale 47; Paris 1958).

[39] *Sententia contra Gottescalcum* (Quierzy, 849): 'et, ut de cetero doctrinale tibi officium usurpare non praesumas, perpetuum silentium ori tuo virtute aeterni verbi imponimus' (éd. Wilfried Hartmann, MGH, Concilia 3, 199.2-4).

[40] Innocentius II, Ep. 447, *Testante apostolo* (16.7.1141) JL 8148: 'et universa ipsius Petri dogmata, sanctorum canonum auctoritate, cum suo auctore damnavimus, eique tanquam haeretico perpetuum silentium imposuimus' (PL 179.517A). Sur cette affaire: Jurgen Miethke, 'Theologenprozesse in der ersten Phase ihrer institutionellen Ausbildung: Die Verfahren gegen Peter Abaelard und Gilbert von Poitiers', *Viator* 6 (1975) 87-116, réimpr. dans Id., *Studieren an mittelalterlichen Universitäten. Gesammelte Aufsätze* (Education and Society in the Middle Ages and Renaissance 19; Leiden 2004) 275-311.

[41] C.5 q.6 c.5: 'Delatori autem lingua capuletur aut convicto caput amputetur' = *Capitula Angilramni* 44b [éd. Karl Georg Schon, MGH, Studien und

rapportait que ses prédécesseurs avaient considéré qu'il fallait entendre une telle sanction de façon allégorique. Lorsqu'on parlait d'amputer la langue, il convenait donc selon eux de comprendre simplement qu'il fallait lui imposer silence en lui interdisant d'être accusateur ou témoin dans un procès.[42] Moins de dix ans plus tard, l'auteur de la *Summa Coloniensis* ajoutait que celui qui subissait une telle sentence ne pouvait pas non plus enseigner.[43] À l'époque où écrivaient ces décrétistes, pourtant, la formule 'imponere silentium' était désormais utilisé la plupart du temps dans un tout autre contexte, cette fois-ci exclusivement procédural.

II. *La Portée du Silence Imposé*

L'usage procédural du silence imposé transparaît de façon significative à travers la présence des expressions 'imponere silentium' ou 'absolvere ab impetitione' dans sept décrétales compilées sous le titre relatif au prononcé de la sentence et à la force de la chose jugée (De sententia et de re judicata) du *Liber extra*.[44] Le plus souvent, ces formules sont présentes dans le

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Texte 39, 144.2-3). *Epitome Parisiensis Breviarii Alarici*, Int. ad C. Th. 10.5.1: 'Delatori non furtorum sed bonorum aut lingua capuletur aut convicto caput amputetur' (éd. Gustav Haenel, *Lex Romana Visigothorum*, Lipsiae 1849) 214.

[42] Rufinus, *Summa Decretorum ad* C.5 q.6 c.5, s.v. *delatori*: 'Quidam tamen de predecessoribus nostris allegorice exponebat, ut diceret *delatori*, id est calumpniatori, *linguam amputandam*, id est perpetuum accusationis et testificationis silentium imponendum' (éd. Heinrich Singer, Paderborn 1902) 281.

[43] *Summa Coloniensis* 6.50: '"Lingua ergo delatori capulatur" cum huius criminis accepta sub iudice confessione, perpetuum sacerdoti silentium, ut nec doctoris nec testis nec accusatoris officio fungi possit indicitur' (éd. Gérard Fransen, Stephan Kuttner (MIC A 1.2 ; Città del Vaticano 1978) 127.23-25.

[44] X 2.27.8 (Alexander III, *Cum causa*, 1170-1173, JL 12175) s.v. 'vos ab impetitione absolventes'. X 2.27.10 (Clemens III, *Tenor litterarum* (1190-1191) JL 16648) s.v. 'ab impetione ipsius absolvit'. X 2.27.12 (Innocentius III, *Cum olim* (1198) Po. 267) s.v. 'perpetuum silentium imponi petebat', 'perpetuum silentium imponentes'. X 2.27.17 (Innocentius III, *Cum super* (1200) Po. 1091) s.v. 'sibi perpetuum hac in parte silentium imponentes'. X 2.27.18 (Innocentius III, *Cum Bertholdus* (1205) Po. 2446) s.v. 'ipsum ab impetitione saepe dicti T. sententialiter reddidit absolutum, eidem T. imponens

dispositif des rescrits pontificaux. Et lorsqu'elles sont utilisées dans l'exposé des motifs, il s'agit généralement de rappeler la teneur d'une sentence antérieure. La plupart du temps, l'injonction consistant à imposer le silence s'adresse au demandeur dont la prétention est écartée. En faisant droit à son adversaire, le pape interdit pour l'avenir tout recours à celui qui avait engagé l'action. Très tôt, cependant, le législateur pontifical use aussi du procédé de façon plus large, pour paralyser toute procédure future sur une cause déterminée, quelle qu'en soit l'origine. Le premier témoignage en ce sens figure dans une bulle d'Innocent II (1130-1143), adressée en 1139 à l'abbé de Saint-Pierre de Joncels, au diocèse de Béziers. La lettre pontificale vient confirmer un accord qui était intervenu au Latran en présence de plusieurs prélats français, entre l'abbaye bénédictine de Joncels et le monastère de Psalmody, fondé par les moines de Saint-Victor de Marseille, dont elle dépendait depuis au moins 909.[45] Pour que l'accord soit respecté dans l'avenir, le pape interdit toute action aux moines de Psalmody, mais aussi à n'importe quelle autre personne susceptible de troubler les possessions de Joncels. 'Par la présente décision', proclame Innocent II, 'nous imposons silence au susdit abbé et à ses frères ou à tous ceux qui viendraient revendiquer quelque chose dans votre monastère'.[46] Le but de la clause, introduite dans le dispositif de la sentence, est donc de rendre celle-ci insusceptible de toute voie de recours, quel qu'en soit l'auteur. Le préambule du privilège proclame d'ailleurs très expressément l'effet recherché en déclarant: 'Il convient à la Dignité apostolique de clore les controverses entre plaideurs par

silentium'. X 2.27.20 (Innocentius III, *Inter monasterium* (1199) Po. 730) s.v. 'perpetuum abbati et monachis sancti Audoeni silentium imponentes'. X 2.27.21 (Innocentius III, *Suborta dudum* (1207) Po. 3120) s.v. 'perpetuum sibi silentium sublato appellationis obstaculo imponere procurarent'.

[45] Laurent-Henri Cottineau, *Répertoire topo-bibliographique des abbayes et prieurés* I (Mâcon 1935) col. 1186.

[46] Innocentius II, Ep. 408, *Jurgantium controversias* (16.4.1139) JL 8001: 'praesentis scripti pagina confirmamus, et ratam atque inconcussam manere futuris temporibus decernentes, praefato abbati ejusque fratribus de subjectione, vel aliis, quae sibi in vestro monasterio vindicabant, perpetuum silentium praesenti sanctione imponimus' (PL 179.471D).

une sentence définitive ou un accord et, pour que les litiges ne s'étendent pas à l'infini mais s'apaisent plutôt, de faire preuve d'une vigilance attentive'.[47]

Cette manière d'imposer silence autant au demandeur qu'à tout autre se retrouve en 1146 dans une sentence d'Eugène III tranchant définitivement un très long conflit qui avait opposé les chanoines des deux cathédrales concurrentes Saint-Alexandre et Saint-Vincent de Bergame. 'Nous imposons aux susdits chanoines de Saint-Vincent et à tout autre silence perpétuel sur cette affaire' proclame le dispositif du texte.[48] En confirmant la sentence en question, en 1154, Anastase IV précise que le silence est imposé à l'une et l'autre partie 'selon l'ordre judiciaire' (ordine judiciario), ayant soin d'ajouter par ailleurs que personne d'autre ne pourra non plus contester ladite sentence, afin d'éviter que les litigants ne s'épuisent en procès inutiles et coûteux.[49] Cette justification, qui allait être reprise mot pour mot pour deux ans plus tard dans une nouvelle confirmation de la décision par Adrien IV,[50] révèle que le procédé était donc déjà devenu un outil ordinaire de la procédure canonique, considéré comme partie intégrante de l'ensemble de règles désignées par les canonistes sous le nom d''ordo judiciarius'.[51] Le mode ordinaire de procéder offrait donc au juge ecclésiastique, dès le milieu du XII[e] siècle, la possibilité – au

[47] *Ibid*.: 'Jurgantium controversias definitiva sententia vel per concordiam terminare apostolicae convenit dignitati, et ne lites extendantur in infinitum, sed potius conquiescant, attenta vigilantia providere' (PL 179.471C).

[48] Eugenius III, Ep. 76, *Ex injuncto nobis* (30.1.1146) JL 8852: 'Et praefatis canonicis Sancti Vincentii seu quibuslibet aliis perpetuum super hoc silentium imponimus' (PL 180.1101D).

[49] Anastasius IV, Ep. 65, *Sicut aequum est* (21.4.1154) JL 9870: 'Ne igitur super his, quae inter vos judicio sedis apostolicae decisa sunt, recidivo denuo litigio fatigemini, et inde alterutra partium alteram in expensas, et labores adducat, unde judiciario ordine perpetuum silentium utrique parti constat impositum, auctoritate apostolica interdicimus, ut nullus omnino hominum contra praefati antecessoris nostri sententiam venire praesumat' (PL 188.1059D-1060A).

[50] Adrianus IV, Ep. 101 (9.6.1156) JL 10188 (PL 188.1468D).

[51] Voir Franck Roumy, 'Les origines pénales et canoniques de l'idée moderne d'ordre judiciaire', *Der Einfluss der Kanonistik auf die europäische Rechtskultur*, 3: *Straf- und Stafprozessrecht*, éd. Mathias Schmoeckel, Orazio Condorelli, Franck Roumy (Norm und Struktur 37; Köln-Weimar-Wien 2012) 313-349, spéc. 339.

moins sur le plan théorique, si l'on en juge par la réitération constante de la mesure, dans le cas qui précède – de paralyser définitivement toute action, quel que soit celui qui l'engageait, sur une affaire déterminée.

Dans la plupart des sentences pontificales, cependant, seul l'adversaire de celui qui obtient gain de cause est directement visé. Le silence lui est imposé car sa requête est jugée irrecevable par la chancellerie. Pour cette raison, le jugement précise que le défendeur se trouve 'absout' de la demande ou de la plainte de son adversaire. Le terme utilisé dans la formule absolutoire pour désigner cette dernière est celui d''impetitio'. Ce vocable, inconnu du latin classique, semble apparaître pour la première fois dans la littérature patristique, dans un texte pseudo-augustinien.[52] Il paraît avoir d'abord constitué un simple synonyme de 'petitio' et se trouve très tôt utilisé, dans la langue canonique, pour désigner une revendication portée devant une instance judiciaire.[53] Bien que longtemps demeuré d'un emploi rare, son usage a été promu par son utilisation dans les textes compilés dans le recueil du Pseudo-Isidore.[54] Dès le XIII^{e} siècle, il est en outre reçu dans la langue juridique séculière comme en atteste, par exemple, le *Liber Augustalis*.[55] Il allait ainsi être à l'origine, en moyen français, du substantif 'empeschement', lui-même à l'origine du terme

[52] Ps.-Augustinus, *Quaestiones Veteris et Novi Testamenti* 51 (Luc. 1.34-35): 'obumbratio virtutis Dei impetitio aliqua intelligitur' (PL 35.2251), cf. *Thesaurus linguae latinae, I-Intervulsus* (Lipsiae 1934-1964) vol. 7.1 col. 596.
[53] À titre d'exemple, la lettre envoyée en 535 par les évêques siégeant au concile de Clermont, en Auvergne, au roi Théodebert I^{er}: 'ut adsolet, inpetitione non amitteret facultatem' (éd. Carlo de Clercq, *Concilia Galliae, a. 511-a. 695* [CCSL 148A; Turnholti 1963], 112.16-17).
[54] Ps. Marcellus, Ep. 2.8: 'aut de suis impetitionibus, si se viderit praegravari, reddere rationem' (Paul Hinschius, *Decretales pseudo-isidorianae et capitula Angilramni* [Lipsiae 1863] 227); Symmachus, Synodus Romana (505) Ep. Ruffio et Fausto: 'quia eum ob impugnatorum quorum impetitionem propter superius designatas causas, obligari non potuisse cognovimus' (Hinschius, 664). La *Patrologia latina* ne recèle que quarante-quatre occurrences du mot.
[55] *Liber Augustalis* 2.18: 'in causis civilibus, que coram bajulis vel locorum dominis aguntur, pridie antea futurus reus citari debeat et in ipsa citatione contineatur expressim a quo et de qua re et quo etiam impetitionis genere impetratur' (éd. Wolfgang Stürner, *Die Konstitutionen Friedrichs II. für das Königreich Sizilien* [MGH, Const. 2, Supp. Hannover 1996] 321.19-24).

impeachment, aujourd'hui encore utilisé en anglais pour désigner une plainte ou une demande formulée en justice.[56]

La formule 'absolvere ab impetitione' semble cependant avoir été inventée par la chancellerie pontificale au milieu du XII^e^ siècle. Elle apparaît pour la première fois dans une lettre d'Eugène III, dans la correspondance duquel le terme 'impetitio' est par ailleurs utilisé à plusieurs reprises.[57] L'expression nouvelle figure dans un privilège de 1145, confirmant des possessions à l'évêque de Huesca, en Aragon. Après avoir énuméré les biens dont il lui concède perpétuellement la propriété, le pape absout le prélat de la demande formulée par son adversaire, l'évêque de Roda, et de celle qui pourrait encore être soutenue par ses successeurs, de quelque façon que ce soit.[58] Moins de quinze ans plus tard, la jurisprudence pontificale en vient à user de la formule en combinaison avec la clause consistant à imposer silence. Le premier témoignage de cette pratique est contenu dans un mandement judiciaire adressé en 1159 par Adrien IV à l'évêque du Mans. Celui-ci enjoint le prélat de mettre fin à un conflit opposant les moines de Cluny aux chanoines de Périgueux à propos de la possession d'une église. En tant que juge, il est sommé d'attribuer aux religieux l'établissement, de les dégager de

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[56] Voir Frédéric Godedroy, *Dictionnaire de l'ancienne langue française et de tous ses dialectes du IX^e^ au XV^e^ siècle* (Paris 1891-1902, réimpr. Genève-Paris 1982) 4.552-553; Walther von Wartburg, *Französisches etymologisches Wörterbuch* IV (1974) 579, et 8 (1981) 313; Bryan A. Garner, *Black's law dictionary* (8^e^ éd., Saint-Paul 2004) 768-769.

[57] Il apparaît en effet à au moins quatre reprises : Eugenius III, Ep. 147, *Quanta devotione* (1145-1147) JL 8984: 'Quod si ab impetitione tua cessare nolueris' (PL 180.1179D); Ep. 148, *Summum in regibus* (1145-1147) JL 8985, même formulation (PL 180.1180D); Ep. 222, *Quae ab Ecclesiae* (24.8.1147) JL 9124: 'et ab omni impetitione libera conservetur' (PL 180.1273B); Ep. 387, *Sacerdos ille R.* (26.5.1150) JL 9391: 'ipsum quoque ab impetitione praefati presbyteri absolutum remittas' (PL 180.1419A); cette dernière occurrence constitue chronologiquement le second cas d''absolutio ab impetitione'.

[58] Eugenius III, Ep. 2, *Quae judicii veritate* (14.3.1145) JL 8717: 'Possessionem itaque praefati Barbastri et aliarum ecclesiarum videlicet de Belsa et de Gestau, et de Alquezar cum comnibus suis pertinentiis, et proprietatem tibi tuisque successoribus in perpetuum adjudicamus, et ab ejusdem Rotensis et successorum suorum impetitione super hoc omnino absolvimus' (PL 180.1015B; *España Sagrada*, 46, *Tratado*, 84, Madrid 1836, p. 290).

l'action engagé contre eux et d'en interdire de nouvelles dans l'avenir: 'Tu absoudras par l'autorité apostolique et sans possibilité d'appel les susdits moines de la plainte de [leurs adversaires], tu leur attribueras cette église, tu intimeras silence perpétuel [à leurs adversaires] et tu placeras ces moines en possession paisible.'[59]

Dans la seconde moitié du XII[e] siècle, les formules 'silentium imponere et absolvere ab impetitione' sont ensuite régulièrement utilisées ensemble. Le but de la combinaison est toujours de signifier la fin définitive d'un litige en éteignant le droit d'agir du demandeur et, parfois même, de tout autre, sur l'objet en procès. Six exemples au moins de ce type se trouvent dans la correspondance d'Alexandre III. Les lettres en question mettent fin à des conflits variés ou enjoignent des juges, auxquels est renvoyée l'affaire, à le faire. La plupart du temps, la juridiction pontificale intervient pour trancher des litiges concernant la possession d'églises ou de prérogatives fiscales et juridictionnelles qui leur sont attachées, comme la dîme ou les droits paroissiaux.[60]

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[59] Adrianus IV, Ep. 244, *Super causa* (27.2.1159) JL 10548: 'praedictos monachos ab eorum impetitione, sine appellationis obstaculo, auctoritate apostolicae sedis absolvas, et eis ecclesiam ipsam adjudices et illis perpetuum silentium indicas et ipsos monachos quiete facias possidere' (PL 188.1619C). La sentence, qui portait sur l'église de La Rochebeaucourt (commune, canton de Mareuil, arrondissement de Nontron, Dordogne), est signalée aux religieux par une autre lettre: Ep. 245, *Super causa* (27.2.1159) JL 10549 (PL 188.1621A).

[60] Alexander III, Ep. 478, *Dignum est* (21.3.1168) JL 11386, attribuant le droit paroissial sur Saint-Valery-sur-Somme à l'abbaye du lieu et imposant à l'évêque d'Amiens et à son église qui le revendiquaient silence perpétuel: 'et omni alio jure parochiali in praedicto castro, a memorati episcopi et ecclesiae suae impetitione absolvimus, et eisdem perpetuum super hoc silentium auctoritate apostolica imposuimus' (PL 200.478C); Ep. 514, *Venerabiles fratres* (8.11.1167-1169) JL 11446, conférant à l'abbaye normande d'Ivry, au diocèse d'Évreux, les dîmes de Docking, dans le Norfolk, et imposant silence au clerc qui les revendiquait: 'vos a praedicti Herlewini de communi fratrum nostrorum consilio impetitione absolvimus. Et ei perpetuum super hoc silentium imponentes praetaxatas vobis decimas' (PL 200.512C); Ep. 532, *Suggerente olim* (19.12.1167-1169) JL 11475, mandant l'archevêque de Reims d'imposer silence à un prêtre et d'absoude de sa demande portant sur une église son adversaire: 'praedicto Uldredo super causa ipsa silentium imponas, et ab ejus impetitione praenominatum Joannem prorsus absolvas' (PL 200.524A);

Dès le pontificat d'Alexandre III, des légats du pape mandatés par lui pour régler des procès dans diverses provinces de la chrétienté commencent aussi à faire usage de cette procédure. Vers 1161, un certain Gautier de Vladsloo dépose ainsi plainte auprès du cardinal-diacre Otton de Saint-Nicolas in Carcere, accusant l'abbaye de Saint-Pierre de Gand se s'être injustement emparé d'un autel et d'un personat. En réalité, le plaignant en question avait reçu quarante-quatre marcs d'argent de l'institution pour l'abandon de ses droits sur lesdits bénéfices, et cela en présence du comte de Flandre en personne qui, à la demande de l'abbaye, se porte témoin.[61] Le légat déboute donc le nommé Gautier et absout pour l'avenir tous les titulaires de l'autel en litige de ses éventuelles plaintes futures, le condamnant au silence perpétuel.[62]

Ep. 556, *Cum dilectus* (31.3.1168-1169) JL 11511, imposant silence à un prêtre à propos de ses revendications sur une chapelle appartenant à l'abbaye de Bourbourg, au diocèse de Thérouanne, et absolvant les religieuses de celle-ci de sa demande: 'jam dicto M. perpetuum inde silentium auctoritate apostolica imposuimus, et vos ab ejus super hoc impetitione omnino absolvimus' (PL 200.537B); Ep. 978, *Cum olim Daniel* (9.9.1171-1172) JL 12116, ordonnant à l'évêque d'Amiens et l'abbé de Saint-Remi de Reims de juger le cas d'une église revendiquée par un prêtre, dont l'évêque de Tournai l'aurait privé pour la confier à un autre, à cause de sa mauvaise conduite, avec, si celle-ci est prouvée, mission de lui imposer silence et de le contraindre à se désister de sa demande: 'ei, nullius appellatione obstante, super eadem ecclesia perpetuum silentium imponatis, et ipsum a Walteri impetitione desistere compellatis' (PL 200.854C); *Cum Hugo* (1159-1181) JL 14098, absolvant le doyen et le chapitre de Salisbury de la demande d'un chanoine qui revendiquait une prébende et imposant silence perpétuel à celui-ci: 'super hoc impetitione absolvimus, et eidem in perpetuum silentium imposuimus' (PL 200.897C).

[61] Odo de Sancto Nicola in Carcere, Ep. ad Samsonem archiepiscopum Remensem, 1161: 'Venit quoque ad aliam diem et scriptum nobilis viri comitis Flandrie nobis presentavit, in quo relegitur quod Walterius et quidam alii petitioni illi renunciaverunt et litem illam abjuraverunt, acceptis ab abbate XLV marcis argenti, in presentia predicti comitis et multorum testium' (Auguste van Lokeren, *Chartes et documents de l'abbaye de Saint-Pierre au Mont Blandin à Gand depuis sa fondation jusqu'à sa suppression*, Gand 1868, no. 240, 143). La datation retenue ici est celle proposée par le *Thesaurus diplomaticus*.

[62] Odo de Sancto Nicola (n. 62): 'et predictum abbatem seu aliam quamlibet personam ea occasione nullatenus vexetis presbyteros autem illos qui altaria illa tenent quibus propter interpellationem illius Walteri officia interdixeratis absolvimus et tam improbe peticioni perpetuum silentium imposuimus' (ibid.).

Que des juges délégués par le pontife romain et rendant la justice en ses lieu et place aient utilisé un outil procédural dont commençait alors à user régulièrement la chancellerie à cette époque n'a en soi rien d'étonnant. Leur pratique a cependant sans aucun doute contribué à diffuser auprès des cours ecclésiastiques inférieures le système de l''imponere silentium'. Dans la province ecclésiastique de Reims où, comme on sait, des légats-juges ont été très actifs dans la seconde moitié du XII[e] siècle, la clause est très tôt reprise dans des sentences rendues par la juridiction épiscopale.[63] En 1182, les officiaux de Reims adjugent ainsi à l'abbaye d'Orval des biens qui avaient été donnés à celle-ci par un chevalier, dont les héritiers avaient conservé la possession. Pour paralyser toute nouvelle tentative de récupération de la part de ces prétendus ayants droit, ils leur imposent silence perpétuel.[64] Des exemples du même ordre paraissent se multiplier dans les décennies suivantes, de sorte qu'à l'aube du XIII[e] siècle, le système consistant à imposer silence pour interdire tout nouveau procès semble être devenu une pratique courante à tous les échelons de la hiérarchie judiciaire ecclésiastique.[65]

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[63] Sur l'activité des légats dans la province rémoise, voir notamment les études classiques de Wacław Uruszcak, 'Les juges délégués du pape et la procédure romano-canonique à Reims dans la seconde moitié du XII[e] siècle', TRG 53 (1985) 27-41, et de Ludwig Falkenstein, 'Appellationen an den Papst und Delegationsgerichtsbarkeit am Beispiel Alexanders III. und Heinrichs von Frankreich', *Zeitschrift für Kirchengeschichte* 97 (1986) 36-65.

[64] *Sententia officialium Remensium* [a. 1182]: 'Unde nos habito cum viris discretis consilio eidem ecclesiae totam illam haereditatem contra Audam et haeredes eius adjudicavimus in perpetuum possidendam et ipsi Audae et haeredibus ejus perpetuum imposuimus silentium' (éd. Hippolyte Goffinet, *Cartulaire de l'abbaye d'Orval depuis l'origine de ce monastère jusqu'à l'année 1365 inclusivement*, Bruxelles 1879, no. 51, 84-85).

[65] On peut évoquer ici comme ultime exemple une charte délivrée le 28 novembre 1189 par l'abbé d'Afflighem et l'archidiacre de Cambrai réglant un conflit survenu entre l'abbaye et un chevalier à propos de biens situés à Essene, en Flandre, imposant silence à ce dernier, car il avait reçu une compensation financière pour renoncer à ceux-ci; voir Edgar de Marneffe, 'Cartulaire de l'abbaye d'Afflighem et des monastères qui en dépendaient', *Analectes pour servir à l'histoire ecclésiastique de la Belgique*, 2[e] section 1-5 (1894-1900) no. 204, 280-283.

Conclusion

'Imponere silentium' et, consécutivement, 'absolvere ab impetitione' constitue donc un procédé susceptible d'être utilisé à deux degrés différents, selon qu'il s'agisse d'affirmer ce qu'un juriste nommerait aujourd'hui l'irrecevabilité d'une action ou d'affirmer de façon plus générale la force de la chose jugée. Lorsque le silence est imposé uniquement au demandeur, la clause 'imponere silentium' exprime le rejet de sa plainte par le juge. Quand il est imposé aux deux parties ou à tout futur demandeur sur le même objet, la formule proclame plutôt le caractère irrémissible de la 'res judicata'. Dans les deux cas, les sentences émises par les juridictions ecclésiastiques emploient indifféremment les expressions 'silentium imponere' ou 'silentium perpetuum imponere'. L'utilisation avérée de cette procédure, même si celle-ci plonge sans doute ses racines dans des pratiques plus anciennes, ne remonte par au-delà du pontificat de Calixte II. Durant le premier millénaire, en effet, les cours d'Église font plutôt usage du silence comme d'une peine, frappant les auteurs de crimes verbaux en sorte d'éviter que ceux-ci puissent se perpétuer. Si une telle sanction se rencontre encore par la suite, à partir du début du XII^{e} siècle, cependant, le silence devient surtout un outil procédural visant à clore définitivement les litiges. Devenu usuel à partir du pontificat d'Innocent III, le silence imposé n'a pourtant guère retenu l'attention des canonistes de l'âge classique. Le succès de la clause a peut-être été la raison même de ce peu d'intérêt. Celle-ci a en effet probablement fini par devenir, dans les cas où sa présence s'imposait, un élément quasi-automatique du formulaire de la sentence judiciaire. La présentation qu'en fait Guillaume Durand dans son *Speculum juris* paraît conforter ce constat. Reprise dès le milieu du XIII^{e} siècle par le parlement royal français, elle constitue en tout cas un des exemples remarquables de l'influence exercée par les cours ecclésiastiques médiévales sur les juridictions séculières.

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Ockham, the Sanctity of Rights, and the Canonists*

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Sixty years ago, Brian Tierney addressed the subject of William of Ockham's political thought vis-à-vis the teachings of earlier canonists. It was a subject that he has returned to several times, and Ockham has remained a focal point in many other articles and books, especially in the last few decades — too many, in fact, to list here conveniently. In that first article, the focus was on the degree to which Ockham's ecclesiological views, particularly those regarding the deposition of a heretical pope and the "location of unerring authority" in the Church,[1] could be considered novel. Tied to this question was the status of Ockham's relationship to and understanding of canon law.

It is the second issue that interests me. Professor Tierney has attracted enough controversy with his publications: I do not mean to add to the list.[2] One point that has not been challenged, however, was the conclusion Tierney reached regarding Ockham's

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[1] Brian Tierney, 'Ockham, the Conciliar Theory, and the Canonists', *Journal of the History of Ideas* 15 (1954) 47.

[2] I refer here to his three most important books: *Foundations of the Conciliar Theory: The Contribution of the Medieval Canonists from Gratian to the Great Schism* (Cambridge 2010 [1955]), which was re-issued in an 'enlarged new edition' by Brill in 1998; *Origins of Papal Infallibility, 1150-1350: A Study on the Concept of Infallibility, Sovereignty and Tradition in the Middle Ages* (Studies in the History of Christian Thought 6; Leiden 1972); and *The Idea of Natural Rights: Studies on Natural Rights, Natural Law, and Church Law 1150-1625* (Emory University Studies in Law and Religion 5; Grand Rapids 1997). The list of cranks and critics alike is again too large to include here, and, in the case of the last book, still ongoing. His most recent book, *Liberty and Law: The Idea of Permissive Natural Law, 1100-1800* (Studies in Medieval and Early Modern Canon Law 12; Washington 2014), which also includes a perceptive discussion of Ockham's theory of natural law, is too new to have made any waves yet.

use of the sources. Contrary to previous scholarship,[3] Tierney's own extensive research into the works of the decretists and decretalists made him skeptical of Ockham's originality.[4] In particular, Tierney thought that Ockham probably at least relied on Guido de Baysio's well-known compilation of earlier canonistic thought in his *Rosarium* (circa 1300);[5] and he implied that Ockham was familiar with the *Summa* of the great decretist Huguccio.[6] The textual evidence is certainly suggestive but hardly clinching. Partly the problem is, as Tierney said, due to the need for a critical edition of Ockham's *Dialogus*; but the same could be said for the *Glossa ordinaria* itself. Had Tierney relied on a different edition of the Gloss, there would be no need to suggest that Ockham bypassed it in favor of Huguccio's own work.[7] Ultimately, the argument boils down to the fact that the *Glossa ordinaria* lacks the word 'romana' when it describes the Church as being wherever good people are, whereas Huguccio did make the case that wherever the good people are is where the *Roman* Church is.[8] However, the best manuscripts of Johannes

[3] See Tierney, 'Ockham, the Conciliar Theory' 41-43, for a review of earlier conclusions.

[4] Cf. the later remarks in Tierney, *Origins* 226.

[5] Tierney, 'Ockham, the Conciliar Theory' 43, 45-46. Sometimes the implication was that Ockham had the opportunity 'to select from the works of previous expositors [i.e., canonists]' (45); cf. Brian Tierney, 'Natural Law and Canon Law in Ockham's Dialogus', *Aspects of Late Medieval Government and Society. Essays Presented to J. R. Lander*, ed. J. G. Rowe (Toronto 1986) 7.

[6] Tierney, 'Ockham, the Conciliar Theory' 60: Ockham 'neglected' much earlier decretist thought regarding nascent conciliarism, preferring instead 'to restate in detail the old arguments of Huguccio. Ockham, indeed, reproduced Huguccio's arguments more accurately than did any of the canonists whose views have been mentioned'.

[7] It is not clear from the article which edition he used.

[8] Tierney, 'Ockham, the Conciliar Theory' 64-67. Huguccio, Lons Le Saunier, Archives départementales du Jura 16 (=Jura 16) fol. 24va-24vb; Admont, SB 7 fol. ; Pembroke MS 72 fol. 130rb, to D.21 c. 3 s.v. *ut [sic] rugam*: 'Et est argumentum quod non [*om.* Jura 16] nisi boni sunt romana ecclesia; ergo ubicunque sunt boni fideles ibi est romana ecclesia. Aliter non inuenies romanam ecclesiam in qua non sint multe macule et multe ruge'.

Teutonicus' *Glossa ordinaria* have 'romana ecclesia' as do the best manuscripts of the additions to Johannes' *Glossa* by Bartholomaeus Brixiensis.[9] It is true that some printings of the *Glossa ordinaria* lack the word 'romana', but this is by no means universally true. In an edition from Mainz (1472), for example, the gloss does contain the phrase Ockham claimed.[10]

But these are mere quibbles. The fact remains that Ockham's debts to and influence on the medieval canonists requires further study.[11] It has long been known that canon law served as one of his principal sources in his political writings.[12] Sadly, not much

[9] Johannes Teutonicus, *Glos. ord.* to D.21 c.3 s.v. *nec aliquid* Admont, SB 45, fol. 27ra): 'Argumentum quod ubicumque sunt boni ibi est romana ecclesia'. The augmented Gloss by Bartholomaeus also preserved Johannes' text: Munich, BSB Clm 14005, fol. 17vb, and Munich, BSB Clm 14024 unfol.

[10] Cf. 1 *Dial.* 5.12 (fol. 39vb): 'Ubi dicit glossa ordinaria, "quod ubicumque sunt boni est Romana ecclesia". Ex quibus uerbis datur intelligi quod tota congregatio bonorum ubicumque sunt, potest Romana ecclesia appellari; et per consequens tota congregatio fidelium potest Romana ecclesia appellari'. The draft critical edition by Kilcullen et al. has a slightly different text (though not with respect to the inclusion of 'Romana'):
see http://www.britac.ac.uk/pubs/dialogus/t1d53.html.
For abbreviations pertaining to Ockham's works, see n. 131.

[11] *Foundations*, enlarged ed. xiii-xiv. Arthur S. McGrade, *The Political Thought of William of Ockham: Personal and Institutional Principles* (Cambridge Studies in Medieval Life & Thought. Third Series, 7; Cambridge 2002 [1974]) 213, who thought Ockham was often a novel interpreter of legal texts (214), repeated the call to study this aspect of Ockham's thought in the conclusion of his classic study.

[12] Georges de Lagarde, *La naissance de l'ésprit laïque au déclin du moyen âge:* 4: *Guillaume d'Ockham Défense de l'Empire* (5 vols. Louvain 1956-1970^2) 4.51-53. The legal background and implications of the poverty controversy before Ockham has fared better. See, for instance, Paolo Grossi, 'Usus facti: La nozione di proprietà nell'inaugurazione dell'età nuova', *Quaderni Fiorentini per la storia del pensiero giuridico moderno* 1 (1972), 287-355 and Giovanni Tarello, 'Profili giuridici della questionedella povertà nel francescanesimo prima di Ockham', *Scritti in memoria di Antonio Falchi* (Milan 1964) 338-448; Andrea Bartocci, *Ereditare in povertà: Le successioni a favore dei Frati Minori e la scienza giuridica nell'età avignonese (1309-1376)* (Pubblicazioni del Diparti-mento di Scienze Giuridiche Università degli Studi di Roma 'La Sapienza', 32; Naples 2009), has provided a detailed legal-historical analysis for the fourteenth century.

progress has been made on this front since Tierney concluded that where Ockham's influence on later Conciliar thought was most evident, 'he was restating, and sometimes verbally repeating, arguments which had first appeared in earlier canonistic glosses'.[13] The pendulum has swung far from the view that Ockham's 'manipulation of the texts and concepts of canon and Roman law' was 'almost terrifying[ly] efficient'.[14] Today the climate is much different. It is often still correctly stressed that Ockham's main sources were the Bible and canon law,[15] but there is still a tendency to question how well Ockham knew his sources.[16]

Takashi Shogimen has recently approached the topic from another direction. While he admitted in the end that Ockham relied extensively on canon law, he framed Ockham's writings on evangelical poverty in terms of the medieval debates over the relationship of canon law and theology.[17] Unlike his fellow dissident Franciscan and superior, Michael of Cesena, the heart of Ockham's defence of Franciscan poverty was grounded in theological considerations of charity. According to Shogimen,

[13] Tierney, 'Ockham, the Conciliar Theory' 70.

[14] Charles C. Bayley, 'Pivotal Concepts in the Political Philosophy of William of Ockham', *Journal of the History of Ideas* 10 (1949) 199.

[15] E.g., Joseph Canning, *Ideas of Power in the Late Middle Ages*, *1296-1417* (Cambridge 2011) 132.

[16] Janet Coleman, 'Ockham's Right Reason and the Genesis of the Political as "Absolutist",' *History of Political Thought* 20 (1999) 36; and restated in her *A History of Political Thought: From the Middle Ages to the Renaissance* (Oxford 2000) 169. Cf. the more measured view of Jürgen Miethke, 'Ockham und die Kanonisten: Ein Beispiel des Streits der Fakultäten um politiktheoretische Kompetenz im 14. Jahrhundert', ZRG Kan. Abt. 97 (2011) 399, who wrote of his increased familiarity over time.

[17] Takashi Shogimen, 'The Relationship between Theology and Canon Law: Another Context of Political Thought in the Early Fourteenth Century', *Journal of the History of Ideas* 60 (1999) 430; see also the first chapter to his book *Ockham and Political Discourse in the Late Middle Ages* (Cambridge Studies in Medieval Life & Thought. Fourth Series, 69; Cambridge 2007). Cf. de Lagarde, *La naissance* 4.54. There is a rich historiography on the problem of the relationship between these two spheres; Shogimen's article contains several references, especially as regards the theological 'side' of the debate (418-421).

Ockham was not so much a good or bad expositor of legal texts as dismissive of its creators. He quoted from the concluding chapter of the fifth book of the *Breviloquium* (1341-1342) to illustrate his case. Ockham's discussion focused on whether Jeremias 1:10[18] indicated that the source of empire was the pope. Here Ockham was attacking a decretal of Innocent III, who had erred, argued the Franciscan, if he had used the verse (in X 1.33.6 § 3) to prove anything beyond that pontifical power is nobler than imperial power.[19] Several chapters later Ockham apparently concluded that he had, stating that decretal letters are often written by various people who, being ignorant of Scripture, often include fables contrary to it, and yet who believe everything they say must be believed.[20] The magister of the *Dialogus* made a similar point, but made it clear that it was the 'modern' canonists who were the problem, not the authors of the sacred canons.[21]

What, then, are we to make of the fact that Ockham relied

[18] 'Ecce constitui te hodie super gentes et super regna, ut evellas, et destruas, et disperdas, et dissipes, et aedifices, et plantes'. See Yves M.-J. Congar, 'Ecce constitui te super gentes et regna (Jer. 1:10) in Geschichte und Gegenwart', *Theologie in Geschichte und Gegenwart: Michael Schmaus zum 60. Geburtstag*, edd. Johann Auer and Hermann Volk (Munich 1957) 671-696.

[19] *Brev*. 5.6.25 (4:232): 'Et ideo, si Innocentius III, Extra, de maioritate et obedientia, c. Solitae [X 1.33.6] intenderet per similitudinem illam probare imperium esse a papa, erraret et sophistice procedere probaretur. Si autem intendit probare solummodo quod potestas pontificalis nobilior est quam potestas imperialis, verum probat'. See de Lagarde, *La naissance* 4:176-81, for the wider context.

[20] *Brev*. 5.10.47-52 (4:245): 'Advertant igitur eruditi quanta maturitate et quibuslibet manibus saepe decretales epistolae decoquuntur, in quibus contra scripturam sacram tales fabulae inseruntur. Nec mirum, quia dictatores earum et conditor[es] saepe sunt Scripturarum ignari; qui tamen temere reputant approbandum omne, quod dicunt'. De Lagarde, *La naissance* 5:142-43, and n. 72, documented Ockham's criticism of the thirteenth-century pontiffs. See also Shogimen, 'Relationship' 426 for a related discussion.

[21] 1 *Dial*. 1.3 (2ra). See Tierney, Origins 226; Alberto Melloni, 'William of Ockham's Critique of Innocent IV', *Franciscan Studies* 46 (1986) 184; and John Scott, 'William of Ockham and the Lawyers Revisited', *Rhetoric and Renewal in the Latin West 1100-1540: Essays in Honour of John O. Ward*, edd. Constant J. Mews, C. J. Nederman, R. M. Thomson (Turnhout 2003) 169-182. Cf. also *OQ* 1.17.206-207 (1:65).

so extensively on legal sources for his arguments? And what can we say about Ockham as a reader of these texts? As a point of contrast, Marsilius of Padua shared Ockham's view on this score, calling the *Decretales* 'nothing other than certain oligarchical ordinations that the faithful of Christ are in no way bound to obey', and his works correspondingly betray very little familiarity with the texts of the *Ius commune*.[22] In order to provide at least a partial answer to that question, I propose we look at one aspect of his political thought and compare how several canonists used similar ideas and texts in their own writings. The idea I shall examine is a very simple one, but one that played a fundamental role in Ockham's political writings. This is the idea that one's right or rights (ius or iura) should not be taken away without fault or cause — sine culpa or sine causa (henceforth, *'sine culpa et sine causa'*).[23] It is a well-known fixture in Ockham's political writings, but, to my knowledge, no one has attempted a systematic exploration of how he applied the principle.[24]

I shall proceed in the following way. First, I shall examine briefly the origins of this belief in the general inviolability — or 'sanctity' — of an individual's rights; then trace how the concept was used by two of the most influential of the medieval canonists, and with whom Ockham demonstrated some limited familiarity: Pope Innocent IV (1243-1254) and Cardinal Hostiensis (†1271);[25] and finally look at how Ockham deployed the same concept in his political writings. The conclusion will consider the differences between Ockham and the lawyers, and suggest that it is not so

[22] *Defensor* pacis 2.5.5, in R. Scholz, ed. *Marsilii de Padua Defensor Pacis* (Fontes iuris Germanici antiqui; Hannover 1932-1933) 1:189.

[23] Ockham did not always use precisely the same terminology in every instance, but the principle of *s.c.-s.c.* is always evident.

[24] G. Knysh, *Political Ockhamism* (Winnipeg 1996) 106, was the first to draw my attention to the significance of 'sine culpa et sine causa' in Ockham's writings. Tierney, too, was well aware of how frequently Ockham repeated this notion; see Tierney, *Liberty and Law* 111-12, and n. 39, below.

[25] In what follows, I have largely sidestepped the sizable historiography regarding these two canonists' contributions to medieval political thought. Linking studies of medieval reflection on individual rights and that body of research remains a desideratum.

much a case of Ockham being either 'expers' or 'expertus scientiae iuristarum' as it is of a theologian constructing explicit political arguments — 'theory' might be too grandiose a term — out of canon law. This differs from what the jurists were doing in two important ways: first, that they were not constructing political arguments out of legal texts as much as they were extracting and then explaining legal arguments from legal texts; and, second, even canonists did not so limit their material as to work only with the texts of canon law. Ockham's whole method of focusing almost exclusively on canon law to the exclusion of Roman law, whether born of need or choice, would have been foreign to their outlook, and inapplicable in practice.

The origin of the idea that one's 'ius' should not be taken away or interfered with arbitrarily has roots in the *Corpus iuris civilis*, and in Ulpian before that. The canonistic origins of this idea, however, do not seem to owe anything to Roman law. A brief examination of an important passage in the civilian tradition should help illustrate the lack of interdependence on the textual level. The text to which I refer is a quotation from a rescript regarding the mistreatment of slaves, which may not seem like the most promising place to start looking for rights. The text of the rescript, which can be found in both the *Digest* and *Institutes*, reads: [26]

> Indeed, it is right that the power of lords over their slaves remain undiminished, and that one's right be taken away from no man. But it is in the interest of lords that assistance against cruelty, hunger, or

[26] Dig. 1.6.2: 'cuius rescripti verba haec sunt: "dominorum quidem potestatem in suos servos illibatam esse oportet nec cuiquam hominum ius suum detrahi: sed dominorum interest, ne auxilium contra saevitiam vel famem vel intolerabilem iniuriam denegetur his qui iuste deprecantur. ideoque cognosce de querellis eorum, qui ex familia iulii sabini ad statuam confugerunt, et si vel durius habitos quam aequum est vel infami iniuria affectos cognoveris, veniri iube ita, ut in potestate domini non revertantur. qui si meae constitutioni fraudem fecerit, sciet me admissum severius exsecuturum".' Inst. 1.8.2 contains a more helpful preamble before providing the same quotation. The jurists who compiled King Roger II of Sicily's *Constitutiones* ca. 1140 used these two Roman law texts to protect the rights of slaves from mistreatment; see K. Pennington, 'The Birth of the Ius commune: King Roger II's Legislation', RIDC 17 (2006) 23-60 at 43-47.

> intolerable injury not be denied to those who justly beg it. For this reason, be aware of the grievances of those who fled from the family of Julius Sabinus to the [imperial] statue; and if you find them kept harder than is equitable or afflicted by notorious injury, order them to be sold such that they may not be returned to the power of their lord, who, if he should break my decree, should know that I shall punish the offence more severely.

Here, perhaps, we are closer to the later history of ideas about natural subsistence rights, which might trump a lord's normal 'ius',[27] or perhaps with concerns of human dignity, which are often thought to form the foundation for human rights.[28] The passage did not attract much attention among the commentators. Regarding the notion that one's 'ius' should not be taken away, the *Glossa ordinaria* added tersely, 'unless custom introduces another [ius]'.[29] Bartolus of Saxoferrato, for one, found the explanation of the gloss wanting. He added that 'by just cause' should be understood, otherwise it is simply not true, even for the prince.[30]

It would indeed be worthwhile to trace the arguments of

[27] Scott G. Swanson, 'The Medieval Foundations of John Locke's Theory of Natural Rights: Rights of Subsistence and the Principle of Extreme Necessity', *History of Political Thought* 18.3 (1997), 399-459; S. G. Swanson, 'Rights of Subsistence in the Twelfth and Thirteenth Centuries: The Case of Abandoned Children and Servants', *Proceedings Syracuse 1996* 676-691.

[28] Tony Honoré, *Ulpian: Pioneer of Human Rights* (2nd ed. Oxford 2002) 86-87. For a modern defence of dignity as a useful foundation, see Jeremy Waldron, *Dignity, Rank, and Rights*, ed. with an introd., by M. Dan-Cohen, in collab. with W. C. Dimock, D. Herzog, M. Rosen (The Berkeley Tanner Lectures; Oxford 2012) 13-19.

[29] Accursius, *Glos. ord*. to Dig. 1.6.2 (Perugia 1476) s.v. *detrahi*: 'nisi consuetudo aliud inducat, ut infra communia prediorum ⟨tam urbanorum quam rusticorum⟩, Uenditor § finali [Dig. 8.4.13.1]; et facit C. de pactis l. finali, in fine [Cod. 2.3.30.4]; et in autentico de nuptiis §. Set hoc quidem [Nov. 22.26 (=Auth. 4.1) (=Sed hic quidam)]'.

[30] Bartolus to Dig. 1.6.1 (Milan 1490) (unfol.): 'Oppositio: dicitur hic quod ius suum non debet alicui auferri. Contra l. Si uenditor [recte: uenditor] § Si constat [Dig. 8.4.13.1], infra, communia prediorum. Solutio: quod hic dicitur est uerum "nisi consuetudo aliud inducat", quod est ualde notatum. Ex quo habetis quod consuetudo potest auferre de iure alterius quod intelligitur ex iusta causa, aliter non: quia nec princeps hoc posset, ut dixi in lege prima supra de constitutionibus principum [to Dig. 1.4.1 n. 3], quod notatur per glossam et docetur in l. Quotiens, de precibus imperatori offerendis [Cod. 1.19.2]'.

Bartolus here, but such an essay would lead us far from the texts Ockham claimed for his own; nor, in fact, did these ideas seem to play a role in any of the key canonistic texts that I have examined.

Individual Rights in Medieval Thought?

Currently medievalists, at least, are usually content to accept Tierney's opinion that medieval canonists played a formative role in the history of individual rights.[31] Non-medievalists are free to ignore, dismiss, or dispute this view as they wish, but let me add one reason for considering the 'iura' in this essay as being understood as individual rights by those who wrote about them. It is true that, if we take as a basic starting point that all 'ius' discussed herein is an instance of *ius* as it is found in Ulpian's famous description of justice as being 'the constant and perpetual will of alloting each person 'ius suum' (Dig. 1.1.10 pr.), when one considers that one's 'ius' might well be to suffer some punishment rather than to acquire some kind of right in a Hohfeldian sense,[32] it becomes hard to believe we should understand this 'ius' in individual, subjective terms. But this is because we today tend to assume individual rights are essentially individual interests or benefits,[33] which might float free of any

[31] Charles Reid, Jr, a former student of Tierney, also wrote two important, if neglected, articles on this topic; see 'The Canonistic Contribution to the Western Rights Tradition: An Historical Inquiry', *Boston College Law Review* 33 (1991), 37-92; 'Thirteenth-Century Canon Law and Rights: The Word *ius* and its Range of Subjective Meanings', *Studia canonica* 30 (1996), 295-342. Also useful are his 'Toward an Understanding of Medieval Universal Rights', *Ave Maria Law Review* 3 (2005), 95-122; 'The Rights of Self-Defense and Justified Warfare in the Writings of the Twelfth- and Thirteenth-Century Canonists', *Law as Profession and Practice in Medieval Europe: Essays in Honor of James A. Brundage*, eds. K. Pennington, M. H. Eichbauer (Farnham 2011) 73-91.

[32] See Tierney, *Idea of Natural Rights* 13-42, for an enlightening discussion of this strand of historiography.

[33] By interests or benefits, I am trying to capture the prevalent (I think) modern viewpoint that having a right is somehow an unmitigated 'good' which we may choose to exercise or not. Cf. Ronald Dworkin, *Justice for Hedgehogs* (Cambridge, MA 2011) 327-328, who wrote that, 'Politicians often say that

normative legal frameworks — despite their being understood on the model of ownership, which is often today considered the 'paradigm[atic] subjective right[34] — and that they can and should be claimed *against* such a framework if they are not recognized.[35] But the medieval view was much different in that notions of *ius* were often closely coupled with more or less objectively conceived normative frameworks.[36] However, that does not mean that a medieval author could not conceive of 'iura' as being individually possessed and able to be exercized 'ad placitum'. That is, individual 'iura' did not exist independently of a normative body of 'ius' or law, be it natural or positive, divine or human. It may seem remarkable for people to defend the existence of human rights today and yet deny they have a basis in some kind of objective, moral 'law' but medieval authors certainly did no such thing. Natural rights are natural not only because they are 'natural' to humankind, but also because they are grounded in natural law.[37] The same goes for civil rights: one can only have

people have a "right" to something — a more restrictive immigration policy, for instance — when they mean only that the public wants that policy or that, in the politicians' view, the public would be better off having it'.

[34] G. Samuel, 'Epistemology, Propoganda and Roman Law: Some Reflections on the History of the Subjective Right', *The Journal of Legal History* 10 (1989) 172; cf. H. L. A. Hart, 'Are There Any Natural Rights?' *Theories of Rights*, ed. J. Waldron (Oxford Readings in Philosophy; Oxford 1984) 84.

[35] Ronald Dworkin, *Taking Rights Seriously*, with a New Appendix, [and] a Response to Critics (Cambridge 1978) xi-xiii, is a famous example of this view.

[36] See the interesting discussion in Kenneth Pennington, '*Lex naturalis* and *Ius naturale*', *Crossing Boundaries at Medieval Universities*, ed. S. E. Young (Education and Society in the Middle Ages and Renaissance, 36; Leiden 2011) 227-253, which includes an important discussion of Aquinas lacking in an earlier version printed in *The Jurist* (2008). In Ockham's case, even the apparently worrisome danger of his voluntaristic tendencies (much overstated in earlier historiography) does not shake these foundations from the perspective of the human being. See Lucan Freppert, *The Basis of Morality According to William Ockham* (Chicago 1988) 176-79, and Arthur S. McGrade, 'Natural Law and Moral Omnipotence', *The Cambridge Companion to Ockham*, ed. P. V. Spade (Cambridge 1999) 273-301.

[37] Richard H. Helmholz, 'Natural Human Rights: The Perspective of the *Ius commune*', *Catholic University Law Review* 52 (2003) 324.

the civil rights civil law recognizes.[38]

In other words, the intuitions Ockham and the canonists had regarding these 'iura' were similar to modern concepts of rights as individually (or collectively) held benefits or claims (which might, nevertheless, entail various duties and obligations). This is clear simply because the canonists and Ockham were writing about a *ius* being taken away for fault or cause, with the implication being that the person in question did not want to lose the *ius*. An important difference between medieval and modern conceptions of rights, then, lies not in whether rights are 'subjectively' possessed, but in the medieval belief that rights were *from* 'ius' rather than *against* it. One is tempted to add that modern conceptions of rights have lost sight of this connection to 'ius', or confused it with 'lex', but that is a subject for another time.[39]

Decretist Origins

Medieval canon law made the point that rights should only be limited or removed due to fault or cause, or some combination thereof.[40] There are two reasons why we do not need to be so terribly surprised that medieval lawyers arrived at this legal principle. First, I suspect it was fairly uncommon — in medieval

[38] It was approximately this view that motivated Bartolus of Saxoferrato's concern with tyranny. Can it be, he wondered, that the actions of some kinds of tyrants could continue to be just and binding upon their subjects? See espcially his *De tyranno*, questions 7 and 11, in Diego Quaglioni, ed. *Politica e diritto nel Trecento italiano: Il 'De tyranno' di Bartolo da Sassoferrato (1314-1357) con l'edizione critica dei trattati 'De guelphis et gebellinis', 'De regimine civitatis' e 'De tyranno'* (Il pensiero politico, Biblioteca, 11; Florence 1983) 188-196 and 205-207. See C. N. S. Woolf, *Bartolus of Sassoferrato: His Position in the History of Medieval Political Thought* (Cambridge 1913) 163-172, and Jules Kirshner, 'Bartolo of Sassoferrato's *De tyranno* and Sallustio Buonguglielmi's *Consilium* on Niccolò Fortebracci's Tyrranny in Città di Castello', *Mediaeval Studies* 68 (2006) 303-312, for comment.

[39] See, however, Pennington, '*Lex naturalis*'.

[40] Brian Tierney, 'Origins of Natural Rights Language: Texts and Contexts, 1150-1250', *History of Political Thought* 10.4 (1989), 628, and *Idea of Natural Rights* 57-58, 188 n. 60, and 202, noted the canonisitic pedigree of this ideal, but did not develop it.

Europe and elsewhere — for people (if asked) to suppose that their things could be taken away for no reason at all without their consent. Second, 'fault or cause' left unqualified, could still cover all manner of trivial justifications.[41] What matters is how the principle is applied, and that is where medieval jurists excelled.

The evolution of this principle is interesting to observe. As long as the texts of the decretists remain largely unedited, the exact path cannot be reconstructed before its emergence in the *Glossa ordinaria*, but the following observations may be made.[42] Early decretists, notably Paucapalea, Rufinus, Rolandus, Stephen of Tournai, do not seem to have made any explicit use of this principle in their commentaries. The author of the *Summa parisiensis* (circa late 1160's) did point in the direction of future developments in his comment to C.16 q.7 c.38, a canon from the Council of Chalon-sur-Saône (813) that prohibited people from giving churches to priests or taking them away without the consent of their bishop.[43] Not everyone thought that there was a lesson to be drawn here. Rolandus (circa late 1150's), for example, understood that laymen should neither appoint priests nor overturn

[41] For ideas about culpability in the *Ius commune*, see now O. Descamps, 'L'influence du droit canonique médiéval sur la formation d'un droit de la responsabilité', *Der Einfluss der Kanonistik auf die europäische Rechtskultur*, vol. 1: *Zivil- und Zivilprozessrecht*, eds. O. Condorelli, F. Roumy, M. Schmoeckel (Norm und Struktur. Studien zum socialen Wandel in Mittelalter und Früher Neuzeit, 37.1; Vienna 2009) 137-167, esp. 146-152.

[42] For the biographical details of the canonists, I have relied especially on the relevant essays of W. Hartmann, K. Pennington, eds., *The History of Medieval Canon Law in the Classical Period, 1140-1234: From Gratian to the Decretals of Pope Gregory IX* (History of Medieval Canon Law, 6; Washington, DC 2008), and the 'Bio-Bibliographical' listing available online: http://faculty.cua.edu/pennington/biobiblio.htm.

[43] C.16 q.7 c.38: 'Inuentum est, quod multi arbitrii sui temeritate, et (quod est grauius) ducti cupiditate, presbiteris quibuslibet absque consensu suorum episcoporum ecclesias dant uel auferunt. Unde oportet, ut canonica regula seruata nullus absque consensu episcopi sui cuilibet presbitero ecclesiam det; quam si iuste adeptus fuerit, hanc non nisi graui culpa coram episcopo canonica seueritate amittat'. See Wilfried Hartmann, *Die Synoden der Karolingerzeit im Frankenreich und in Italien* (Konziliengeschichte, Darstellungen; Paderborn-München-Wien-Zürich 1989) 128-140.

their appointment on their own authority.[44] The *Summa parisiensis*, in contrast, glosses Gratian to put the stress on 'grauis culpa':[45]

The *Summa parisiensis* took as significant the point that one should not lose his church except through fault and by due process. Simon of Bisignano, a Bolognese canonist, took a similar stance in his *Summa in Decretum* (1177-1179).[46] Commenting on a canon extracted from the letters Gregory the Great, which taught that one should lose office for one's own fault rather than the faults of another,[47] Simon remarked,[48]

> Conclude, then, that sons cannot be punished for the sins of their parents by losing a church, as below in C.1 q.4 c.5, with the exception of simony, below in C.1 q.5 c.1 and c.2. Hence, it is concluded from this that someone should not be deprived of his benefice of a church due to the sin of treason that his father has committed — even if sons are sometimes are made infamous by the law itself, as below, in C.6 q.1 d.p.c.21.

The phrase *beneficium ecclesiae* could be understood as a right by

[44] Rolandus, *Summa*, in F. Thaner, ed., *Papst Alexander III. Summa Magistri Rolandi* (Aalen 1962) 58: C.16 q.7: 'Presbyteros ab ecclesiis per laicos abiiciendos vel in eis statuendos absque voluntate episcopi Magociensi atque Cabilonensi concilio constat fore prohibitum: Laici prebyteros [C.16 q.7 c.37] etc., Inventum est [C.16 q.7 c.38] etc'.

[45] *Summa parisiensis*, ed. T. P. McLaughlin, *The Summa Parisiensis on the Decretum Gratiani* (Toronto 1952) 187-188 to C.16 q.7 c.38 s.v. *Inventum est*: 'In hoc decreto habetur quod, si forte aliquis sacerdos seu clericus juste fuerit ecclesiam adeptus et consensu episcopi, non nisi gravi culpa et coram episcopo canonica etiam severitate eam amittere debet'.

[46] See Pierre V. Aimone, ed., *Summa in Decretum Simonis Bisinianensis* (MIC Series A: Corpus glossatorum 8; Città del Vaticano 2014) ix.

[47] D.56 c.7: 'Satis peruersum et contra ecclesiasticam probatur esse censuram, ut frustra quorundam, uoluptatibus quis priuetur, quem sua culpa uel facinus ab offitiis, quo fungitur, gradu non deicit'.

[48] Simon of Bisignano, Summa 49-50 to D.56 c.7: 'Hinc collige pro peccatis parentum filios non posse puniri ecclesiam amittendo, ut infra C.i. q.iiii. Quia presulatus [C.1 q.4 c.5], excepto eo quod de simonia dicitur, infra C.i. q.v. c.i. [C.1 q.5 c.1] et ii. [c.2]. Vnde ex hoc colligitur quod non debet quis priuari beneficio ecclesie propter peccatum maiestatis quod pater commisit, etsi quandoque filii tales afficiantur ipso iure infames, ut infra C.vi. q.i. § Verum [C.6 q. 1 d.p.c. 21]'.

medieval jurists.[49] This is most easily seen in the frequent decretalist discussion about whether an individual might renounce his *ius* or his benefice: the terms were often interchangeable in this context. The point Simon was making was a simple one: punishment in terms of the loss of a right should occur only through one's own fault.[50]

As is so often the case, Huguccio sharpened the juridical principles at stake.[51] Huguccio's discussion was limited, due to the nature of the material he was treating, to ecclesiastical rights. On *Inuentum est*, Huguccio made his point in general terms. Answering his own question about whether it mattered if a church was acquired justly or unjustly, he argued that a person should not be ejected from the church simply on the authority of the bishop or anyone else; but it does matter in terms of fault. The argument was based on the principle that 'no one ought to be deprived of his right without fault' which he drew from D.56 c.7.[52] When commenting on this earlier chapter, this basic point is given a little

[49] E.g., Johannes Teutonicus, *Glos. ord*. to C.16 q.7 c.38, v. 'Inuentum est', see n. 64, below, for the text.

[50] Cf. Honorius *Magistri Honorii summa 'De iure canonico tractaturus'*, edd. Rudolf Weigand, P. Landau, W. Kozur, in collab. with S. Haering, K. Miethaner-Vent, M. Petzolt (3 vols. MIC, Series A: Corpus glossatorum, 5; Città del Vaticano 2004-2010) 1.186 to D.56 c.7 s.v. *Satis voluptatibus*: 'idest criminibus a parentibus commisi. Hinc arg. canone tunc habito neminem debere priuari sine culpa, simile xvi. Q.vii. Inuentum [C.16 q.7 c.38], di.lxxiiii. Gesta [D.74 c.2], xxiiii. Q.iii. § i.ii [C.24 q.3 d.a.c. 1 §. 1-3]. Et hoc est regulare, nam secus contingit causaliter, ut infra contra arg. i. Q.v. c.i. [C.1 q.5 c.1] et ult. [C.1 q.5 c.3], xvi. Q.vii. Decernimus [C.16 q.7 c.32]'.

[51] On his life and thought, see Wolfgang P. Müller, *Huguccio, the Life, Works, and Thought of a Twelfth-Century Jurist* (Studies in Medieval and Early Modern Canon Law, 3; Washington, DC 1994) and his up-dated conclusions in *History of Medieval Canon Law* 142-160

[52] Huguccio, Jura 16, to C.16 q.7 c.38, v. 'Iuste' (277rb-va): 'Et nonne idem esset si iniuste? Sic quantum ad episcopum: quia non auctoritate iudicis, scilicet episcopi uel alicuius, deberet eici. Set non quantum ad culpam: quia sine omnia alia culpa eiceretur, etc. Arguitur quod nullus debet priuari iure suo sine culpa, ut di. lui, satis [D.56 c.7]'. Unfortunately, the scan I possess of Admont 7 is missing a several folios, including the page that includes this portion of his commentary.

more precision:[53]

> *fault.* [That is,] a grave one. For he is not deposed or ejected for a full, though mortal one, as in D.68 c.1. It is argued that he should not be punished, nor deprived of his own right — which he acquired canonically — for the sin of his father or that of someone else.

The point Huguccio made, then, was that legitimately acquired rights should not be taken away for the faults of others. This is unexceptional. Yet, he did not think that rights should never be taken away. His concluding remarks spell it out more clearly: 'it is normal that someone should not be deprived of his ecclesiastical right without his fault; yet, 'casualiter', it sometimes happens otherwise, as in D.22 c.6'.[54] Huguccio's remarks on that chapter, in turn, suggest a large number of reasons where one might lose his right without fault. This list would become fairly standard thanks to its largely wholesale incorporation into the gloss to *Priusquam* (D.22 c.6). According to Huguccio, one is occasionally (quandoque) deprived of his right through no fault of his own for any of the following reasons: for favor of another thing, as D.22 c.6 itself demonstrates; due to the prerogatives of order (D.54 cc. 9,10); due to the prerogative and force of consecration (C.14 q.6 c.2); due to a strong disapproval of another (D.70 c.1; C.16 q.7 c.32[55]); due to a fault or failing of the thing itself (C.1 q.5 c.1); due to poverty or a diminished population (C.10 q.3 c.3; C.16 q.1 c.48); or due to the replacement of one person for someone more

[53] Huguccio, *Summa* Jura 16 fol. 78ra, Admont SB 7 fol. 82va-82vb,to D.56 c.7 s.v. *culpa*: 'culpa grauis. Nam pro[a] pleni licet mortali non deponitur uel deicitur, ut di. lxviii.[b] Sicut [D.68 c.1] et est argumentum quem non debeat puniri uel priuari iure proprio[c] quod canonice adeptus est[d] pro peccato patris uel alterius'.
[a] pro *om.* Admont 7 [b] lxxiii Admont 7 [c] proprio] primo Admont 7 [d] est *om.* Admont 7

[54] Huguccio, *Summa* Jura 16 fol. 78ra, Admont 7 fol. 82vb to D.56 c.7 s.v. *culpa*: 'est ergo regulare quem non debere priuari suo ecclesiastico iure sine sua culpa; casualiter tamen quandoque aliter contingit, ut di. xxii.[a] Renouantes [D.22 c.6]'.
[a] xxii.] xxi. Jura 16

[55] For odium as 'strong disapproval', see C.16 q.7 c.32: 'Quod si spretis eisdem eisdem fundatoribus . . . '

upright or learned.[56]

Huguccio's contribution to the jurisprudence of 'sine culpa et sine causa' seems to have been the following. What he made explicit was that one's rights are not normally (regulare) to be tampered with, but that there are cases (casualiter) where the normally inviolate nature of individual rights stops short. Huguccio could agree, in other words, with today's commonplace sentiment 'that no political right is absolute'.[57] The other point to note is that Huguccio provided a list of reasons — 'causae', in essence — for why rights might be taken away. In all but word, then, Huguccio endorsed the sine culpa and sine causa principle.

The idea caught on quickly, too. Shortly after Huguccio was writing, the maxim shows up in a decretal of Innocent III (1203; X 4.13.16). In a case where a married man became involved in an incestuous relationship with his wife's sister, one of the questions to be resolved was what to do with the wife. The ideal

[56] Huguccio, *Summa* Jura 16 fol. 26va, Admont 7 fol. 28rb to D.22 c.6 s.v. *prius . . . numeretur*: 'Et est argumentum quod nulla culpa superueniente uel preeunte priuatur quis suo iure, et hoc fit multis de causis: scilicet propter fauorem alterius rei, ut hic factum est propter fauorem constantinopolitane ecclesie; quandoque propter prerogatiuam ordinis, ut di. liiii. Ex antiquis [D.54 c.9], Frequens [D.54 c.10]; quandoque propter prerogatiuam et uim consecrationis, ut xiiii. q.vi. Conperimus [C.14 q.6 c.2]; quandoque propter odium alterius, ut di. lxx. Neminem [D.70 c.1] et xvi.[a] q.vii. Decreuimus [C.16 q.7 c.32]; quandoque propter uitium rei habite, ut i. q.v.[b] c.i. [C.1 q.5 c.1]; quandoque propter paupertatem uel defectum populi, ut x. q.iii. Vnio [C.10 q.3 c.3] et xvi. q.i. Et temporis [C.16 q.1 c.48]; quandoque propter maiorem honestatem uel scientiam alterius, quod cotidie sit in ecclesia dei: scilicet[c] quis primum optinet locum, et postea alius ei preponitur qui honestate[d] uel scientia preminet; nec tamen ille locum suum culpa sua amittit'.

[a]q.vi. conperimus — neminem et xvi. *om.* Jura 16 [b]v.] vi. Jura 16 [c]scilicet] cum *add.* Admont 7 [d] honestate] honeste Jura 16

[57] Dworkin, *Justice for Hedgehogs* 373. Alan Gewirth, 'Are There Any Absolute Rights?', *Theories of Rights*, ed. Jeremy Waldron (Oxford Readings in Philosophy; Oxford 1984) 91-109, provided a robust analysis of what is at stake for would-be absolute rights. See John Finnis, *Natural Law and Natural Rights* (Clarendon Law Series; Oxford 2011[2]) 223-226, 455-456, 467, for a discussion of the role of absolute natural rights.

solution would be for her to remain chaste while her husband remained alive, but Innocent conceded that this might prove too difficult. In this case, the husband was bound to pay the *debitum coniugale*: because the wife was not a *iniquitatis particeps*, she should not be deprived of her right. Innocent added a significant considerandum; the text reads:[58]

> Hence, she should not be deprived of her right without her own fault, even though it is said by some of our predecessors in a similar case that there was a distinction whether in fact the adultery or incest was manifest or hidden, with others asserting instead that one must distinguish between a proximate and remote grade [of consanguinity].

Is this concession an indication that earlier pontiffs were less concerned about depriving people of their rights without fault? It is certainly a topic worth of further investigation, especially given the full use of the concept in the *Glossa ordinaria* just a few decades later.[59]

Let me note in conclusion one related avenue of study, namely the distinctly canonistic 'ius ad rem', a term coined to capture the 'aliquid iuris' — to use Innocent III's phrase (3 Comp. 3.30.4 [= X 3.38.29]) — that one seems to acquire through presentation by a lay patron. Peter Landau has already written an excellent article on the early history of this term, but I wish to note a significant discussion by the canonist Tancred. In his *Apparatus* to 3 Comp. 1.19.4, he reviewed the problems associated with lay presentation. Tancred denied that a person so presented gained any 'ius in re' (scilicet in ecclesia), limiting what is acquired to a 'ius

[58] Innocent III, *Die Register Innocenz' III*, vol. 6: *Pontifikatsjahr, 1203/1204, Texte und Indices*, eds. O. Hageneder, J. C. Moore, A. Sommerlechner, in collab. with C. Egger, H. Weigl (Publikationen des Historischen Instituts beim Österreichischen Kulturinstitut in Rom; Vienna 1995), no. 5 (5-6): 'Unde iure suo sine sua non debet culpa privari, quamquam a quodam predecessorum nostrorum dicatur in simili casu fuisse distinctum, utrum videlicet adulterium vel incestus manifestum fuerit vel occultum; aliis asserentibus inter gradum proximum et remotum esse potius distinguendum'. I wish to thank Ken Pennington for drawing my attention to this passage.

[59] The pertinent gloss in this case, v. 'sine culpa' only refers the reader to the fuller discussion on X 4.13.11: 'Hoc generale est. Simile, eodem, c. ult.; si qua contraria sunt casualia sunt'. See the discussion in n. 71 and accompanying text below.

sibi ad rem ipsam, scilicet petendam, ut confirmetur'. So far, this is unsurprising, but his rationale is of interest to us. The reason he has a right to seek confirmation 'contra episcopum', he explained, was because the bishop had repelled him 'sine causa'.[60] Clearly the 'ius ad rem petendam' in this formulation will remind one of Celsus' definition of 'actio', that is, 'nothing other than a right to seek in court what one is due',[61] but there is ample evidence that the decretalists denied such was the case.[62] What is significant, though, is that the 'ius' in Tancred's view arises due to a 'sine causa' exclusion. As Tancred composed his *Apparatus* around the same time (circa 1216-1220) that Johannes Teutonicus was working on what would become the Ordinary Gloss, and who held a very similar position,[63] it is clear that the decades around the turn of the century clearly deserve far greater scrutiny for understanding the origins and evolution of 'sine culpa et sine causa'.

The Texts in the Glossa Ordinaria

Of the four glosses that incorporate the 'sine culpa et sine causa' principle, two are found in *Glossa ordinaria* to the

[60] 3 Comp. 1.19.4 s.v. 'Cum igitur plus iuris habeat', ed. F. Gillmann, 'Zum Problem vom Ursprung des *ius ad rem*', AKKR 113 (1933) 483-484: 'quia licet ex presentatione laici patroni non acquiritur ius presentato in re ipsa, acquiritur ius sibi ad rem ipsam, scilicet petendam, ut confirmetur, et contra episcopum, qui eum sine causa repellit, ut in decretali Pastoralis [3 Comp. 3.30.4 (= X 3.38.29)]. t.' See Peter Landau, 'Zum Ursprung des 'Ius ad rem' in der Kanonistik', *Proceedings Strasbourg 1968* 81-102 89-92 and 97-98, for discussion of *Pastoralis* and Tancred's gloss.

[61] Dig. 44.7.51 (1:768): 'Nihil aliud est actio quam ius quod sibi debeatur, iudicio persequendi'. Cf. Inst. 4.6 pr. (1:47).

[62] See especially Harry Dondorp, 'Zum Begriff *Ius ad rem* bei Innocenz IV', *Proceedings Munich 1992* 555-559.

[63] Johannes Teutonicus to 3 Comp. 1.4.3, v. 'tanta divisione', K. Pennington ed., *Johannis Teutonici Apparatus glossarum* (MIC, Series A: Corpus glossatorum, 3; Vatican City 1981) 36: 'item et indirecte cogitur dare postulatum quia si eum repellat sine causa, providebit ei alias, ut infra de iure patronatus, Pastoralis [3 Comp. 3.30.4 (= X 3.38.29)]'. See also Dondorp, 'Zum Begriff *Ius ad rem*' 555.

Decretum,[64] while two others are found among the glosses to the *Liber extra*. A closely related idea was eventually codified in the *Liber sextus* as one of the *Regulae iuris*, which stated that one should not be punished without fault, unless there is an underlying cause.[65] Ockham referred on occasion to all but one of these passages. The first, *Priusquam* (D.22 c.6), makes explicit Huguccio's point that although neither a person's nor a church's right or privilege is taken away without fault — such as excessive damages, abuse of authority,[66] delict, negligence, or inaction (contrarium factum)[67] — it may well be if there is cause. The causes it mentions will largely be familiar to readers of Huguccio: favor or disapproval, the force of consecration, scandal, a failure to attain the priesthood (defectum sacramenti), poverty, clerical order (ordines).[68]

[64] See also Johannes Teutonicus, *Glos. ord*. to C.16 q.7 c.38 s.v. *Inuentum est*: 'Item arguitur quod nullus debet priuari suo beneficio sine culpa sua, ut lvi. di. Satis peruersum [D.56 c.7] et extra. de constitutionibus, Cognoscentes [X 1.2.2]; arguitur contra de clerico egrotante c. ultimo [X 3.6.6]. Set illud propter scandalum, pro quo multa omittuntur, ut di. l. Vt constituerentur [D.50 c.25], extra de noui operis nunciatione, Cum ex iniuncto [X 5.32.2]'. The text has changed from Huguccio's 'ius' to 'beneficium', though the latter was treated as the proper object of a 'ius', if not a 'ius' itself.

[65] VI 5.13, *Regula iuris*, 23: 'Sine culpa, nisi subsit causa, non est aliquis puniendus'. The *Glossa ordinaria* sums up the received wisdom of the earlier glosses; see Johannes Andreae, *Glos. ord*. to VI 5.13 reg. 23 s.v. *sine culpa*, see also X 2.6.5 § 4: '. . . in quibus coniuges sine culpa, set non sine causa continere coguntur'; this passage was often cited as proof that a 'causa' subsists where no fault is present. Ockham made no explicit use of this decretal.

[66] C.11 q.3 c.63: ' . . . qui permissa sibi abutitur potestate'.

[67] See Bernardus Parmensis, *Glos. ord*. to X 5.33.6 s.v. *tempore*: the passage to which the gloss refers, which explains that a privilege is lost if one does not make use of it.

[68] Johannes Teutonicus, *Glos. ord*. to D.22 c.6 s.v. *Priusquam*: 'Sic ergo aliqua ecclesia priuatur iure suo sine culpa sua, et hoc fit quandoque propter fauorem, quandoque odium. Propter fauorem multipliciter. Uno modo ut hic. Alio modo fauore sacerdotii, ut liv. di. Frequens [D.54 c.10]. Et alio modo propter uim consecrationis, ut xiv. q.vi. Conperimus [C.14 q.6 c.2]. Quandoque propter fauorem religionis, ut extra, de ecclesiis edificandis, Ad audientiam 2 [X 3.48.5]. Quandoque propter scandalum, ut extra. de clerico egrotante Tua [X 3.6.4]. Quandoque propter defectum sacramenti, ut xxxiv. di. Si cuius [D.34 c.11]. Item propter odium alterius, ut lxx. di. Neminem [D.70 c.1]; xvi.

The second, *Perversum*, which Ockham either did not know or simply never cited, again emphasized that rights may be taken away without a serious fault (grauissimo delicto), but not without cause; the point is repeated about punishment.[69] In the *Decretales*, the essence of earlier teaching was distilled. Rights are not normally (regulariter) taken away without fault, but they may be taken away by cause. And the list of causes was narrowed to a handy, if badly versified list of six: poverty, strong disapproval, vice, favor, crime, and (clerical) order.[70] The second gloss in the

q.vii. Decernimus [C.16 q.7 c.32]. Propter paupertatem, x. q.iii. c. Vnio [C.10 q.3 c.3]. Item propter ordines, ut dicto Frequens [D.54 c.10]. Alias regulare est, quod nemo sine culpa sua priuandus est iure suo, ut xvi. q.vii. Inuentum [C.16 q.7 c.38], et lvi. di. Satis peruersum [D.56 c.7]. Hic potest habere locum distinctio, quod quandoque perditur priuilegium propter fauorem, ut hic. Quandoque propter enorme damnum, ut extra. de decimis, Suggestum [X 3.30.9]. Quandoque propter abusum, ut xi. q.iii. Priuilegium [C.11 q.3 c.63]. Quandoque propter delictum, xxv. q.ii. Ita nos [C.25 q.2 c.25]. Quandoque propter negligentiam, ut ff. de Nundinis, l. 1 [Dig. 50.11.1]. Quandoque propter contrarium factum, extra. de priuilegiis, Si de terra [X 5.33.6], et c. Accedentibus [X 5.33.15]. Et nota quod licet quis sine culpa perdat priuilegium, numquam tamen sine causa, ut extra, ut lite non contestata ⟨non procedatur ad testium receptionem uel ad sententiam diffinitiuam⟩, quoniam frequenter [X 2.6.5]'.

[69] Johannes Teutonicus, *Glos. ord*. to D.56 c.7 s.v. *Satis perversum*: 'Istud capitulum intelligitur de iam promoto; talis enim propter delictum alterius non priuatur iure suo. Non est enim priuandus quis iure suo nisi pro grauissimo delicto, ut xvi. q.vii. Inuentum [C.16 q.7 c.38] et lxxiv. di. Gesta [D.74 c.2]. Excipiunt quidam casum in eo qui ignoranter est adeptus beneficium pecunia patris: ut i. q.v. c.i. Set illud ideo perdit quia furtiuum est. Set quid si pater commisit crimen lese maistatis? Nonne filius priuandus est beneficio cum sit infamis factus, ut vi. q.i. § Si quis cum [C.6 q.1 c.22]; et infames promoti etiam deiiciuntur; ut vi. q.i. Infames? [C.6 q.1 c.17]. Non: quia cum sit clericus est exemptus a iurisdictione principis. vic. di. Duo [D.96 c.10]; i. q.iv. § Contra in fine [C.1 q.4 d.p.c.9]. Item fallit illud, extra. de ecclesiis edificandis, Ad audientiam ii. [X 3.48.5]; et extra. de clerico egrotante c.ii. [X 3.6.2]: ubi quis sine culpa priuatur iure suo. Hoc tamen scias quod multotiens punitur quis sine culpa sua, set non sine causa, ut extra. ut lite non contestata, Quoniam [X 2.6.5]; supra, xxxiv. di. Si cuius uxorem [D.34 c.11]'.

[70] Bernardus Parmensis, *Glos. ord.* to X 1.2.2 s.v. *culpa*: 'Quia quod legitime factum est penam non meretur, C. de adulteriis, Gracchus [Cod. 9.9.4pr.]; et peccata suos debent tenere auctores, C. de penis l. Sancimus [Cod. 9.47.22];

Decretales is the most succinct. Simply put, rights should not be removed 'sine culpa'; but in the counter-counter-example (namely, D.22 c.6), it is noted that people may be punished *sine culpa* where there is an underlying cause.[71]

It is clear that the *Glossa ordinaria* defended the view that rights were normally to be safe-guarded, not ignored or taken away in the normal course of events.[72] It would be interesting to trace how this doctrine was received by the leading canonists, and indeed the civilians as well as medieval theologians, but I cannot provide such a total history here. Instead, I shall confine myself to a consideration of the writings of Pope Innocent IV and Cardinal Hostiensis.

Pope Innocent IV

Among the decretalists, few can match Sinibaldo dei

et infra de his que fiunt, Quesiuit [X 3.11.2]; et infra de sententia excommunicationis, Romana, in fine [VI 5.11.5]. Et ita est hic argumentum expressum quod nemo priuatur iure suo sine culpa, lvi. di. Satis peruersum [D.56 c.7]; xvi/ q. ulti. Inuentum [C.16 q.7 c.38]; de restitutione spoliatorum, Conquerente [X 2.13.7]. Argumentum contra: xxii. di. Renouantes [D.22 c.6]; et xxxiv. di. Si cuius uxorem [D.34 c.11] et c. sequenti [D.34 c.12]; et xxvii. q.ii. Multorum [C.27 q.2 c.20]; infra de clericis coniugatis, Sane [X 3.3.2]. Solutio: prima rubrica regulariter uera est, contraria casualia sunt; uel dicas quod licet quandoque quis priuetur iure suo sine culpa: non tamen fit istud sine causa: infra ut lite non contestata, Quoniam frequenter § Si uero [X 2.6.5 §. 2]. Et causam facile est uidere in contrariis signatis. In vi. casibus priuatur aliquis iure suo sine culpa sua. Unde uersus:

Paupertas, odium, uitium, fauor et scelus,
Ordo personas spoliant et loca iure suo.

Ista notantur in c. Renouantes [D.22 c.6]; et infra de priuilegiis, Antiqua [X 5.33.23], ubi de hoc'.

[71] Bernardus Parmensis, *Glos. ord.* to X 4.13.11 s.v. *sine propria culpa*: 'Nullus sine culpa sua iure suo debet priuari, similiter supra, eodem, Discretionem [X 4.13.6]; lvi. di. Satis peruersum [D.56 c.7]; xvi. q.ultima Inuentum [C.16 q.7 c.38]. Argu-mentum contra: supra ut lite non contestata, Quoniam frequenter § Si in fine [uero [X 2.6.5 § 2, i.e. § 4]; et infra, de priuilegiis ⟨et excessibus priuilegiatorum⟩, antiqua [X 5.33.23]. Contra: 22 di., renouantes [D.22 c.6]. Set ibi causa subest quare puniuntur sine culpa'.

[72] Cf. X 3.36.2: 'Nam sic huius loci ordinationem disponimus, ut tamen iura sua singulis episcopis inviolata servemus'. The point is repeated in the gloss s.v. *cuius est diocesis*. See also the texts cited on n. 114, below.

Fieschi, later Pope Innocent IV, for his influence on later jurisprudence.[73] For Innocent, our problem is that he did not provide much insightful discussion on either of the two decretals of the *Liber extra*. The comment to *Iordanae* (X 4.13.11), for instance, is empty. We only have slightly more in *Cognoscentes*, where Innocent explained that the *sine culpa* principle fails in some cases, or where a cause is present.[74] In other words, Innocent adhered to the consensus view, citing several of the same references as the Gloss.

Yet Innocent was hardly unconcerned with rights. His commentary betrays a keen interest in the rights and right order for churches and churchmen alike.[75] One of Innocent's concerns was whether it was even possible for one to possess a 'ius'.[76] The discussion is most pronounced in the titles dealing with possession and ownership (X 2.12) and the restitution of spoils (X 2.13). Given the subject matter one might think Innocent would discuss standard matters of property ownership, but this is not the case. The rights Innocent listed as possible candidates for being possessed in his commentary to *Susceptis* (X 2.12.1) were 'iura episcopalia', 'ius eligendi', and 'ius iudicandi', along with a 'ius seruitutis'. Initially drawing on classical Roman law ideas, Innocent started his comments by noting that such 'iura' are not, properly speaking possessed, nor even 'quasi possessed'.[77] What

[73] See Alberto Melloni, 'Sinibaldo Fieschi (Innocenzo IV, papa)', DGI 2.1872-1874.

[74] Innocent IV, *Commentaria* (Frankfurt am Main 1570) fol. 2va to X 1.2.2 s.v. *culpa*:: 'Fallit in casibus: 22 di. Renouantes [D.22 c.6]; 27 q.2 Qui multorum [C.27 q.2 c.20]; infra, de clericis coniugatis, Sane [X 3.3.2]. Uel etiam ibi causa suberat et sine culpa, infra, ut lite non contestata, Quoniam frequenter [X 2.6.5]'.

[75] John A. Kemp, 'A New Concept of the Christian Commonwealth in Innocent IV', *Proceedings Boston 1963* 155-159 at 157.

[76] See Dondorp, 'Zum Begriff *Ius ad rem*' 562-565, for a parallel discussion.

[77] Innocent IV op. cit. fol. 219va to X 2.12.1 s.v. *momenti*: 'id est, possessionis que parata est per momentum durare. Nota quod iura proprie non dicuntur possideri, nec quasi possideri, nec ab his qui ea in ueritate habent, puta, ut iura episcopalia, uel huiusmodi, uel ius seruitutis, uel huiusmodi. Quod sic probo, quia non sunt, nec quasi possideri possunt ab his, qui ea non habent'.

actually mattered, he went on to explain in an allusion to a Roman law perspective, was the actual exercise (exercitium or usus) of the 'iura'.[78] But even this answer proved somewhat unsatisfactory, and he concluded his comment with the following consideration:[79]

> Some say, and perhaps better, that it is more properly said that someone is 'in possession' of a right of electing, or of advancing (eundi), than that someone is 'in possession of exercising' these rights; for one can well have possession of some right though he may not 'have' that right: because, although he himself may not have [it], another nevertheless does have [it]; or even if no one has [it], it still exists in reality, either in act or in habit.

Innocent seems to have thought the benefits of using, a more easily understood way of speaking, outweighed the value of sticking to the terminology of the classical jurists, who preferred to speak about 'usus iuris' than the possession of 'ius'.[80] This view can also be seen where he wrote that possession of 'iura' is acquired in much the same way as corporeal things are insofar as it remains a question of 'animus' and 'corpus'. In fact, some rights are acquired through the introduction of a corporeal thing. For example, if someone wants to give the possession of tithes, what would be given is a tithal estate (fundum decimale). Regarding other incorporeal rights, however, such as the 'ius canonicum', possession is said to be acquired generally: for example, if someone be given a place in the church choir (stallum in choro).[81]

If it was difficult for Innocent to specify the mechanisms of acquisition without analogy to how 'possessio' worked for corporeal things, he found it easier to argue that they should not

[78] See A. Berger, 'Encyclopedic Dictionary of Roman Law', *Transactions of the American Philosophical Society* 43(1953), 333-809, v. 'Possessio iuris' (637) and 'usus iuris' (755).

[79] Innocent IV ed. cit. fol. 219va-219vb to X 2.12.1: 'Alii dicunt et forte melius, quod proprius dicitur, quod aliquis est in possessione iuris eligendi, uel eundi, quam quod aliquis est in possessione exercendi hec iura; bene enim quis potest habere possessionem alicuius iuris, licet ipse non habeat illud ius, quia licet ipse non habeat, alius tamen habet, uel etiam si nullus habet, est tamen in re, uel actu, uel habitu'.

[80] Cf. Innocent IV ed. cit. fol. 388rb to X 3.14.4 s.v. *ad ius ecclesie*, where he defended the claim that both 'possessio' and 'proprietas' could be said to be alienated 'in larga significatione'.

[81] Ibid. fol. 227va-227vb to X 2.13.5 n. 6.

be interfered with arbitrarily. In a decretal which defends religious houses from lay interference (X 3.49.1), Innocent posed a hypothetical question, which he then answered:[82]

> But what if he be denied hospitality? Can he enter the house under his own authority, and receive necessities for hospitality — even violently — since he has the right of receiving this and since he is also in quasi possession? It seems that it is so because everyone is allowed to defend his right and possession, and to repel force with force: Cod. 8.4.1; above, X 2.13.12.

But it is not that simple. After noting that all these goods are the holy things of the saints and consecrated to the Lord, Innocent turned the tables. Such a person cannot violently take necessities for hospice or violently enter the house because no religious house owes such servitude. His conclusion was that a bishop or someone else who has jurisdiction over some church can break into the house and violently expel a person who entered that church iniquitously, even though he may have jurisdiction as well.[83]

In terms of the actual deprivation of rights, Innocent did not make explicit use of the 'sine culpa' principle, but he did discuss the loss of rights 'ex causa'. At one point, he suggested that the exspoliation of incorporeal rights requires deceit (dolus), just as it does for the exspoliation of corporeal things.[84] In another comment he argued that legal possession should not be taken away without investigation of the case (causa).[85] Perhaps the most significant usage of an 'ex causa' loss of rights is when he

[82] Ibid. fol. 458vb to X 3.49.1 n. 2: 'Set quid si negaretur hospitium? Potestne sua authoritate intrare domum, et necessaria in hospitio recipere, etiam uiolenter, cum ius habeat hoc recipiendi, et etiam sit in quasi possessione? Uidetur quod sic: quia licet cuique ius suum et possessionem defendere, et uim ui repellere: C. unde ui l. 1 [Cod. 8.4.1]; supra, de restitutione spoliatorum, olim [X 2.13.12]'.

[83] Ibid. fol. 458vb-459ra to X 3.49.1 n.2.

[84] Ibid. fol. 54va-54vb to X 1.6.24 n.4 s.v. *subtractus*. Note that the word 'subtractus' does not occur in the decretal; it should probably be changed to 'subtractam'.

[85] Ibid. fol. 157rb to X 1.33.8 n.2 s.v. *subiecte*: 'et sunt in possessione earum: possessio enim sine cause cognitione nemini est auferenda: 12 quaestio 5 c.1 [C.12 q.5 c.1]; 16 questio 6 c. Placuit [C.16 q.6 c.1(2)]; C. unde ui, Si quis in [Cod. 8.4.7]; C. si per vim l. ultima [Cod. 8.5.2]'.

discussed a transfer of 'dominium' in a decretal originating from the Fourth Lateran Council (X 3.49.8; can. 34), which prohibited prelates from extorting more from their subjects than is due, and which demanded restitution (and an equal donation to the poor). Towards the end of his commentary, Innocent raised the following question: could restitution be impeded if a prince were to make a decree against *Ius naturale*, say, that 'dominia' were to be transferred from one to another 'sine causa'? Innocent denied that the decree should be considered valid in either the 'forum animae' or the 'forum iudiciale'. In fact, he argued, even if the decree was due to a just cause, when the cause ceases, the decree should be limited to the particular case where the decree was just.[86] In other words, a just cause might justify an otherwise untenable action such as the removal of the rights of ownership, but such a decree does not retain its force when the just cause no longer applies. Innocent in fact seems quite unwilling to endorse (quidam tamen alii dicunt) the more extreme view that a decree made contrary to *Ius naturale*, yet from just cause, should continue to be observed even after the just cause ceases to be.[87] On this latter point, Innocent belongs to the mainstream tradition.[88]

[86] Ibid. fol. 461rb-461va to X 3.49.8 n.5 s.v. *restituat*: 'uel alius princeps faceret aliquam constitutionem contra ius naturale, puta quod dominia de uno in alium transferrentur sine causa, si constitutio in foro anime esset seruanda? Et uidetur nobis quod non: imo nec in foro iudiciali quod plus est: ut notatur supra de constitutionibus, Que in [X 1.2.7]. Imo plus uidetur quod etiam si constitutio iusta fuerit ex causa, scilicet iusta, set illa causa iusta cessat in casu de quo modo agitur, uel in foro anime uel communi, tamen constitutio tantum restringenda est ad eum casum ubi fuit iusta constitutio: ut uerbi gratia, iusta constitutio quod dat exceptionem macedoniani propter iustam causam [Cod. 4.28 and 4.29; Dig. 14.6] Set si certum esset quod illa causa non subesset, ut, si in necessitate mutuasset, peccaret qui exceptione se defenderet'.

[87] Ibid. fol. 461va n. 6: 'Quidam tamen alii dicunt quod ex quo facta est constitutio, licet contra ius naturale, dummodo iusta causa fuerit constitutionem illam faciendi, licet postea eueniat casus, ubi cessat causa iusta, tamen constitutio est seruanda, que generaliter fuit facta. Non potuit enim nec fuit etiam expediens *omnes* articulos *sigillatim comprehend*ere, ff. de legibus ásenatusque consultis et longa consuetudineñ, non possunt [Dig. 1.3.12], nisi talis casus, qui a iure excipiatur'.

[88] See André Gouron, '*Cessante causa, cessat effectus*: À la naissance de l'adage', *Académie des Inscriptions et Belles-Lettres. Comptes rendus des*

One place where Innocent especially discussed taking away rights was in the title 'On election and the power of the elect' (X 1.6). Here as elsewhere, Innocent wrote interchangeably of the right of electing (ius eligendi) and the power of electing (potestas eligendi), doubtlessly influenced by the terminology found in this title.[89] At any rate, Innocent took the opportunity to discuss occasions when this power or right might be taken away. One example comes from a well known decretal about elections knowingly made of less than worthy candidates or by less than a numerical majority (X 1.6.22). Innocent spent some time considering what happens when people elect an unworthy candidate. If the electors acted with knowledge, Innocent explained, regardless of their numbers they are deprived of their power of electing by virtue of the law itself (ipso iure). The situation is different if the majority unknowingly elects an unworthy candidate. According to Innocent, since they did not sin by acting in ignorance, they do not lose their right of electing.[90] In a comment to a later decretal (X 1.6.40), writing about an election that has been rejected, Innocent made a similar point, even referring back to the previous decision. This time, while explaining the phrase 'maior pars', he again pointed out that a majority who elect an unworthy candidate lose their power of electing and those who remain thereby become the new majority.[91]

séances de l'année 1999, janvier-mars (Paris 1999) 305-309, for the earlier canonistic history. On the relationship between property rights and natural law see Tierney, *Liberty and Law* passim.

[89] E.g., the following all discuss someone being deprived of their 'potestas eligendi': X 1.6.7 § 3); X 1.6.20; X 1.6.23; X 1.6.25; X 1.6.43; and X 1.6.53.

[90] Innocent IV op. cit. fol. 51rb to X 1.6.22(23) n.3 s.v. *numerus*: 'Et est huius diuersitatis ratio, quia quando eligitur indignus, quotquot scienter eum eligunt, ipso iure priuati sunt potestate eligendi; supra, eodem, cum in cunctis [X 1.6.7]. Unde tunc etiam in unum recidit ius capituli: 65 di. c. ult. [D. 65 c. 9]. Quando autem ignoranter eligit indignum maior pars, tenet electio facta a maiori parte, et hoc ideo, quia est sanior: infra, eodem, Congregato [X 1.6.53]. Et hic non autem ea ratione diximus tenere eam, quod in minorem partem reciderit ius eligendi, nam cum non peccauerunt, quia indignum ignorabant ius eligendi non amittunt: supra, eodem, Innotuit [X 1.6.20]'.

[91] Ibid. fol. 69vb to X 1.6.40 n.6 s.v. *maior pars*: 'non intelligas quod, licet maior pars postulantium uel eligentium eligendo indignum scienter priuata sit

What both these texts show us is a practical example of a case where people could be deprived of their right or power of electing if they elect someone they know to be unsuitable. It is, in other words, an example of a right being taken away through fault. That those who unknowingly elect an unworthy candidate are not so deprived suggests an implicit example of the 'sine culpa' clause.

Perhaps a more interesting decretal in this connection is the decretal *Grandi*. He commented on it as part of *De supplenda negligentia praelatorum* at X 1.10.7, but it was not officially included in a canonical collection until the promulgation of the *Liber sextus* (VI 1.8.2). Here the problem was a case of succession and a negligent king of Portugal. In the portion of his commentary that concerns us, Innocent noted that a king cannot deprive relatives of a kingdom by will alone, although the pope or someone superior to the king in question can so deprive 'ex causa', at least in a case where the kings are made through succession.[92]

In places where Innocent could have explained his thought by reference to 'sine culpa et sine causa', he never seems to have done so. Yet, it is also fair to suggest that he, like his predecessor of the same name, wished to keep the rights of his bishops (and others) inviolate.[93] Sometimes this meant that Innocent defended

potestate eligendi, quod propter hoc alii, qui ignorantes eum indignum ipsum eligerent, eodem modo priuati sunt potestate eligendi. Set hoc ideo fuit, quia maior pars postulantium archiepiscopum indignum priuati sunt potestate eligendi, reliqui qui elegerunt plebanum sunt maior pars'.

[92] Ibid. fol. 96vb to X 1.10.17 [= VI 1.8.2] n.1 s.v. *regni*: 'speciale est in regno, quod reges non possunt priuare, nedum filios, set nec fratres, uel alios consanguineos ex stirpe paterna descendentes, a regno sola voluntate, licet ex causa Papa, uel alius superior rege, possit eum priuare, infra, de uoto, Licet [X 3.34.6]. Et hoc est uerum, ubi reges deferuntur per successionem, set si per electionem defertur, secus est: supra, de electione, enerabilem [X 1.6.34]'. See also Innocent IV fol. 197va-198ra to X 2.2.10 n. 1-3; discussed in Brian Tierney, 'The Continuity of Papal Political Theory in the Thirteenth Century: Some Methodological Considerations', *Mediaeval Studies* 27 (1965) 233-234.

[93] Thus, Ibid. fol. 436ra to X 3.36.2 n.2 s.v. *terminis*: 'Ideo seruantur omnibus iura sua, quia locus unitus alii non mutat naturam suam, set si locus mutaret naturam suam, tunc acciperet iura annexa a iure uel consuetudine nature mutate, sicut est uidere in monasterio facto a capella, quod assumit iura

greater rights (e.g., possessio) at the cost of lesser ones;[94] sometimes, considerations of utility meant public law (ius) had to bend to custom.[95]

Cardinal Hostiensis

Cardinal Hostiensis, born Henry of Susa, despite his stronger hierocratic views,[96] was a more vocal champion of individual rights than Pope Innocent IV.[97] Perhaps this is yet further evidence of Cardinal Giovanni Panciroli's (1587-1651) observation that Hostiensis, 'aequitatis amator', was unafraid to challenge Innocent's opinions.[98] There are two versions of his *Lectura*. The first was written ca. 1260. He finished his final version ca. 1270. For purposes of his thought about 'ius' I did not find his thought

competentia capelle, et cum suo preiudicio'. Innocent's gloss s.v. *terminis* is probably an additional gloss to the same word in X 3.36.1 that got added to the following canon in the course of the manuscript tradition. Innocent's *Commentary* developed in stages and he added many 'additiones'; see Martin Bertram, 'Zwei vorläufige Textstufen des Dekretalenapparats Papst Innozenz' IV.' *Kanonisten und ihre Texte (1234 bis Mitte 14. Jh.): 18 Aufsätze und 14 Exkurse* (Education and Society in the Middle Ages and Renaissance 43; Leiden-Boston 2013) 272-317 and Exkurse 528-530. Bertram prints a number of Innocent's 'additiones'.

[94] Ibid. fol. 538ra to X 5.33.3 n.4 s.v. *moniales*: 'Nec mireris si per priuilegium faciliter tollitur ius, cuius possessio non habetur, quam possessio'. Cf. Inst. 4.15.4.

[95] Ibid. fol. 451ra to X 3.39.24 n.6 s.v.*iteratione* in glossa *visitatiionem*: 'imo plus uidetur quod etiam consuetudo illa que est contra ius publicum utilitate ex causa aliquando ualet, licet tunc tantum quando uel expresso consensu populi, uel tacito ex certa causa, 12 di. nos [D.12 c.8]'. The 'sometimes' is significant here, for the pope also pointed out that 'consuetudo' should not to be extended against 'ius', or if it is burdensome; see Ibid. fol. 117ra to X 1.23.10 n.6 s.v. *predicto*.

[96] For biographical details, see K. Pennington, 'Enrico da Susa, cardinale Ostiense', DGI 1.795-798.

[97] In order to keep the discussion to a reasonable minimum, I have focused less on his *Summa aurea*. When I have cited the *Summa* I have used the Venice 1574 edition. For his *Lectura* I have used the Stasbourg 1512 edition that is superior to the Venice 1581 printing.

[98] Panciroli, *De claris legum interpretibus*: 'Aequitatis amator, duras Innocentii opiniones libenter damnat . . .'; quoted in Tierney, *Foundations* 107.

evolved perceptively from his earlier to his later *Lectura*.[99]

In what follows, it is worth bearing in mind that the 'iura' we are talking about are, except where noted, 'iura positiua', particularly those of *Ius ciuile*, which did not have the power to change *Iura naturalia*.[100] In the case of (ecclesiastical) canons, what this means in practice is that the 'lator canonum', thinking terms of 'the truth of the justice' of I*us positiuum* and *Ius naturale*, might need to forsake (deserere) the first, or even 'to temper and relax it from a just cause in order to avoid scandal'; alternatively, he might need to establish the contrary in certain cases.[101] Given this view, it will not be surprising if we note that Hostiensis also believed that 'iura' have been, and continue to be, changed according to the times.[102]

One might be tempted to translate the use of 'ius' in the previous paragraph as 'law' rather than 'right'. In truth, either translation may well be appropriate; the point I am trying stress is

[99] See K. Pennington, 'An Earlier Recension of Hostiensis's Lectura on the Decretals', BMCL 17 (1987) 77-90. For a striking example how Hostiensis' thought evolved see Roberto Grison, 'Il problema del cardinalate nell'Ostiense', AHP 30 (1992) 125-157. For an edition of his *Lectura* on a decretal that illustrates the additions that Hostiensis made to his earlier recension, see Uta-Renate Blumenthal, 'A Gloss of Hostiensis to X 5.6.17 (*Ad liberandam*)', BMCL 30 (2013) 89-122.

[100] Hostiensis, *Lectura* to X 3.23.4 (Strasbourg 1512) fol. 74ra s.v. *probandi*: 'Nimirum ciuilia quidem iura, ciuilia tollere possunt, non utique naturalia, que nec tolluntur, nec mutantur per aliquod ius positiuum, instit. de iure naturali § Set naturalia [Inst. 2.2.11]; et instit. de legitima adgnatorum tutela, § fin. [Inst. 1.15.3]; C. de veteri iure enucleando l.ii. § Set quia diuine [Cod. 1.17.2.18]'.

[101] Hostiensis, *Lectura* ed. cit. fol. 94vb to X 1.9.10 s.v. *deserere*: 'Nam distinguendum est inter ueritatem iustitie iuris naturalis, *quod in lege et in euangelio continetur* [cf. D. 1 d.a.c. 1], et hec propter uitandum scandalum non est deserenda, ut ibi [X 1.9.10] et ueritatem iustitie iuris positiui, quam quidem lator canonum potest et debet deserere, ut scandalum uitet, et ex iusta causa alia temeperare, et relaxare, et in certis casibus contrarium statuere, ut patet in eo quod legitur et notatur, infra, de concessione prebende, Proposuit [X 3.8.4]; infra de voto c.i. [X 3.34.1]; infra de statu monachorum, Cum ad monasterium § finali' [X 3.35.6].

[102] See ibid. fol. 419ra to X 2.28.46 s.v. *set in modum denunciationis*: 'et sicut variantur tempora variantur et iura'. Also fol. 57rb to X 1.6.29 s.v. *a nominatione dicti archidiaconi recedentes*.

that positive 'ius' is mutable. However, that does not mean that Hostiensis thought that 'ius' should be interfered with arbitrarily. Hostiensis's take on positive rights might be said to begin with the Roman law maxim that pursuing one's 'ius' cannot cause injury.[103] Usually, when Hostiensis used this argument, he referred the reader back to his comments to the decretal *Cum ecclesia Vulterana* (X 1.6.31). This decretal presents a case where a bishop elected some canons in a church where the resident canons did not want to accept the bishop's new canons. In his decision, Pope Innocent III sided with the canons, quoting fairly accurately from the *Digest* (Dig. 50.17.55): 'because, (just as a 'regula iuris' says,) "he who uses his own right does not seem to cause injury".'[104] The relevant gloss here provides a list of references making a distinction based on whether one acts with or without an intention of causing harm (animus nocendi), but it does not make any reference to the question of rights.[105] Hostiensis connected these

[103] See, e.g. ibid. fol. 133v to X 2.2.17 s.v. *respondere*: 'Ergo si iurisdictionem suam comittit alii nemini facit iniuriam'. Cf. fol. 432r to X 2.28.62 s.v. *errorem*: 'quia iuris ignorantia non obest suum ius prosequenti'. for the point that even 'ignorantia iuris' should not prevent one from prosecuting his or her ius. The relevant Roman texts are: Dig. 50.17.55: 'Nullus videtur dolo facere, qui suo iure utitur'; and Dig. 50.17.155.1: 'Non videtur vim facere, qui iure suo utitur et ordinaria actione experitur'.

[104] X 1.6.31: 'quia, *sicut iuris regula dicit*, non videtur iniuriam facere qui utitur iure suo'. Note that words set it italics were not part of the medieval vulgate edition of the *Liber extra* because Raymond de Peñafort omitted them from the text of the decretal in 3 Comp. 1.6.16. On Raymond's editing of the decretals, see Edward Reno III, *The Authoritative Text: Raymond of Penyafort's editing of the Decretals of Gregory IX (1234)* (Ph.D. dissertation, Columbia University 2011).

[105] Bernardus Parmensis (Ordinary Gloss) to X 1.6.31 s.v. *iniuriam*: 'Simile ff. de iniuriis, Iniuriarum § i. [Dig. 47.10.13.1]; et ff. de petitione hereditatis, Illud i. responso in fine [Dig. 5.3.40(43)]; et infra de appellationibus, Bone [X 2.28.51]; et xiv. q.i. Quod debetur [C.14 q.1 c.2]; et q.v. Non sane [C.14 q.5 c.15]; quia etiam si noceat alii: ita ut auferat ei consueta commoda: dum tamen non faciat animo nocendi: non dicitur facere iniuriam; ff. de aqua pluvie arcende, Si in meo [Dig. 39.3.21] et ff. de damno infecto, Proculus [Dig. 39.2.26]; et xv. q.i. Illud [C.15 q.1 c.2], ff. de servitutibus urbanorum prediorum, Cum eo [Dig. 8.2.9(8)]; et xxiii. q.ii. c. ultimo [C.23 q.2 c.3]; secus si faceret animo nocendi; ff. de regulis iuris, Domum [Dig. 50.17.61(62)], ff. de

two considerations in his commentary. According to Hostiensis, 'anyone can use his own right without the intention of causing harm, even if if he takes away the accustomed advantages of another'.[106] Hostiensis agreed with Innocent III: it pertained to the residing canons to create new ones, not the bishop; in acting as they did they were merely using their own right.[107] There is a clear sense that to have a *ius* in this case was to have the freedom to act, not an obligation to do so.[108] It would have been possible for the canons to have let the bishop create new ones.

Hostiensis not only thought that rights can be used, which hardly seems a novel position to take — he also thought they should not be taken away too easily: *iura* should be preserved where possible. Hostiensis mentioned it in passing as a general obligation all people have,[109] but it is clearest in the decretal *Ad haec sumus* (X 1.3.10), where Pope Lucius III stripped some circulating letters of their authority. A gloss suggested that it was due to letters being directed to uncertain judges, which Hostiensis

damno infecto, Qui uias [Dig. 39.2.31]; ff. si servitus vindicetur, Sicut § Aristo [Dig. 8.5.8.5]'.

[106] Hostiensis, *Lectura* to X 1.6.31 fol. 59r s.v. *iniuriam facere*: 'Similiter ff. de iniuriis, Iniuriarum § 1 [Dig. 47.10.13.1] et de regulis iuris, Nemo damnum, penultima columna [Dig. 50.17.151] et de petitione hereditatis, Illud [Dig. 5.3.40 pr.] et infra, de appellationibus, Bone [X 2.28.51], xiv. q.i. Quod debetur [C.14 q.1 c.2] et q.v. Non sane [C.14 q.5 c.15], lxiiii. di. Quia per ambitiones [D.64 c.6]. Nam suo iure uti potest quis sine nocendi animo, etiam si alii auferat commoda consueta, ut ff. deseruitutibus urbanorum prediorum, Cum eo [Dig. 8.2.9(8)], xxiii. q.ii. c.ult. [C.23 q.2 c.3]; C. de servitutibus, Altius [Cod. 3.34.8]. Secus si hoc faceret animo nocendi, non sibi prouidendi, ut ff. de regulis iuris, Domum [Dig. 50.17.61(62)] et de damno infecto, Qui uias [Dig. 39.2.31]'. Cf. the more objective claims: *Lectura* to X 2.28.2, fol. 401v s.v. *redarguimus*: 'Notatur illum, qui contra ius facit, redarguendum esse ut hic et supra de usu pal. Nisi [X 1.8.3]'; and *Lectura* to X 1.9.10, fol. 94r s.v. *remanerent* quoting C. 23 q. 4 c. 40 'nemo peccat legis autoritate'.

[107] Hostiensis, *Lectura* to X 1.6.31 fol. 59r s.v. *iure suo*.

[108] Cf. the parallel discussion in Reid, 'Thirteenth-Century Canon Law and Rights' 311-312, 314.

[109] Hostiensis, *Lectura* to X 3.31.18, fol. 120r s.v. *iusto*: 'in hoc casu. Alias enim non est etiam iudex nisi sit in eo iusticia, infra de verb. sign. Forus [X 5.40.10] et quilibet astrictus est seruare iura, supra de constitutionibus c.i. [X 1.2.1] et c. Ne innitaris [X 1.2.5] et c. finali [X 1.2.13]'.

was happy to entertain as well.[110] Had he had a fuller version of the letter, he would have learned that the pope thought the letters either did not emanate from the papal chancery, or were sent before he had had time to consider them more carefully.[111] Hostiensis was clearly not aware of this problem, but he thought the basic idea that 'rights of an ordinary authority (*ordinariae potestatis*) ought to be safe-guarded' need not apply here for two possible reasons: either because the action was done with certain or sure knowledge, or because he, i.e., the pope, had entrusted a general embassy.[112] The second exception is rather opaque, but the reference points to the decretal *Sane si a nobis* (X 1.29.2), which sets down that when conflicting letters are submitted to judges, they are to be left alone until the pope has been consulted.

Generally speaking, however, rights are to be safe-guarded rather than corrected where possible. In a discussion about the restitution of a church in a case of an enormous loss (X 3.13.11), Hostiensis argued that while restitution might not be given for small things, this is not true when there is an enormous injury (*enormen laesionem*). More interesting to us, perhaps, is the point he made about correcting rights. It is, he wrote, against the law (*lex*; viz, Cod. 3.30.1) for *iura* to be corrected instead of safe-guarded.[113] Elsewhere, again in relation to the *Code* (via Gregory

[110] Bernardus Parmensis, *Glos. ord*. to X 1.3.10 s.v. e*ligerint*; Hostiensis, *Lectura* to X 1.3.10 fol. 12r s.v. *eligerint*.

[111] X 1.3.10.

[112] Hostiensis, *Lectura* to X 1.3.10, fol. 12r s.v. *nostra auctoritate*: 'Hec tamen litera contradicit, et quia seruanda sunt iura ordinarie potestatis, infra de appellationibus, Ut debitus cum suis concordantibus [X 2.28.59] et xi. q.i. Peruenit [C.11 q.1 c.39] nisi appareret quod ex certa scientia hoc fieret, ix. q.iii. Nunc uero [C.9 q.3 c.20]; uel nisi generalem legationem committeret, infra de officio delegati c.ii. [X 1.29.2]'.

[113] Idem. to X 3.13.11, fol. 59r s.v. *enorme*: 'Alii autem intelligunt quod hic tenuit contractus, quia legitimus consensus illorum, qui in talibus requirendi sunt, scilicet abbatis, et conuentus interuenit, set restituitur propter enormem lesionem, et huic concordat dominus noster; et secundum hunc intellectum hec littera planius sonare uidetur. Set si sic intelligas, corriguntur iura, que in talibus requirunt consensum diocesani, ut nota supra c.i. [X 3.13.1] et fulcitur opinione G. Na. [Guillelmi Naso] que communiter reprobatur. Nam certi sumus, (qui et factum nouimus) quod plusquam per decem annos post

IX) - namely, that the pope should not be thought to want to overturn all the *iura* he oversees (*tuetur*)[114] — Hostiensis noted that there is a reason for this: because we should be prompt to safe-guard rights, rather than to correct them.[115]

Yet, while Hostiensis deserves recognition for defending the sanctity of rights, we should note what normative force he applied in these passages. His point was that rights should not normally be taken away, and that we should be readier to defend than to correct a person's or a corporation's rights. But the exercise of one's rights is not always something that deserves to be defended. To take one example, Hostiensis noted that it would be better for a person to desist from his right in order to avoid a scandal. In this case, however, Hostiensis was quoting almost verbatim from a gloss, which suggests that he agreed with what was probably the consensus view.[116]

This brings us finally to the question of the 'sine culpa et sine causa' principle. Given his seemingly robust support of the basic sancity of rights, it is natural that Hostiensis generally defended the idea that rights should not be taken away without fault. In his *Summa aurea,* for example, we find him echoing what Innocent III had written regarding the marital debt: a wife's right

tempus contractus numerandos tenuit iste laicus uillam istam, nec placet, quod iura, que saluari possunt, corrigantur, quia est contra legem, C. de inoffic. dotibus l.unica [Cod. 3.30.1]'.

[114] Cf. Cod. 3.28.35 pr.: 'neque enim credendum est romanum principem qui iura tuetur huiusmodi verbo totam observationem testamentorum multis vigiliis excogitatam atque inventam velle everti'; and X 1.6.57: 'Neque enim credendum est, Romanum Pontificem, qui iura tuetur, quod alias excogitatum est multis vigiliis et inventum, uno verbo subvertere voluisse'. Hostiensis noted that the text was different in the *Codex* his commentary on the decretal ('alias neque') by reference to this passage in the Code.

[115] Hostiensis, *Lectura* to X 1.6.57, fol. 83v s.v. *nec enim*: 'alias 'neque'; et sumuntur hec uerba ex lege C. de inofficioso testamento, Si quando [Cod. 3.28.35 pr.] et est argumentum quod non debemus esse prompti ad iura corrigenda set potius saluanda, C. de inofficiosis dotibus, l. unica [Cod. 3.30.1]'. See also Hostiensis, *Lectura* to X 3.49.2 for the point that the privileges of emperors should be safe-guarded as well.

[116] Cf. Hostiensis, *Lectura* to X 2.26.2, fol. 377r s.v. *Nihil cum scandalo*: and Bernardus Parmensis, *Glos. ord*. to X 2.26.2 s.v. *Nihil cum scandalo*.

should not be taken away when she was not at fault.[117] It was a different matter, however, when there was a reasonable or just cause.[118]

When he treated the idea of 'sine culpa' and 'ius', Hostiensis first took it up in the then-standard place in his Commentary on the decretal *Cognoscentes*. Hostiensis opened his commentary at this point with the plea that one who lacks fault should lack the penalty 'with me as the judge', which was a point repeated by Johannes Andreae in the next century.[119] Yet, as this may not be always possible, although it may be serious to deprive someone of their right 'sine culpa',[120] there may nevertheless be reasons to do so. Bernardus Parmensis listed six cases when a person might be deprived of a 'ius' 'sine culpa'. Hostiensis provided what Bernardus had not: a legal justification for each. At the end of his analysis, he made the expected point:[121]

[117] Hostiensis, *Summa aurea* to X 4.13, col. 1346: ' . . . nec uxor priuabitur iure suo sine culpa sua'.

[118] E.g., Hostiensis, *Lectura* to X 4.9.1, fol. 217v s.v. *neque liber* defended the point that a servant should not be compelled to pay since it would be the lord who paid, and 'non debet dominus priuari iure suo sine culpa sua'. See also *Lectura* to X 2.27.3, fol. 386v s.v. *concors* (bis) which denied 'sine culpa' when there is a just cause.

[119] Hostiensis, *Lectura* to X 1.2.2, fol. 16r s.v. *culpa*: 'qui caruit culpa, careat me iudice poena: quia "quod legitime factum est, penam" non 'meretur': C. de adulteriis et de stupro l. Graccus [Cod. 9.9.4]'. Johannes Andreae, *In quinque Decretalium libros*, with an intro. by S. Kuttner (4 vols. Venice 1581, reprinted Turin 1963) to X 1.2.2, fol. 12va s.v. *meretur*.

[120] Hostiensis, *Lectura* to X 3.38.20, fol. 155r s.v. *facta*: 'Set et quia graue est aliquem priuare iure suo sine culpa sua, lvi. di. Satis peruersum [D.56 c.7], requiritur consensus patroni ad hoc, ut ecclesia collegiata fiat, ut supra, de consuetudine, Cum dilectus § Dictus [X 1.4.8]'.

[121] Hostiensis, *Lectura* to X 1.2.2, fol. 16r s.v. *culpa*: 'Set nec priuatur aliquis iure suo sine culpa, lvi. di. Satis peruersum [D.56 c.7], xvi. q.ult. Inuentum [C.16 q.7 c.38]; set contra: xxxiiii. di. Si cuius [D.34 c.11], et capitulo sequenti [D.34 c.12]; xxvii. q.finali Multorum [C.27 q.2 c.20]. Solutio in uersibus sequentibus: *paupertas*: xvi. q.i. Et temporis qualitas [C.16 q.1 c.48]; *odium*: xxv. q.ii. Ita nos [C.25 q.2 c.25]; *uicium*: infra de clerico debilitato, Tua nos [X 3.6.4]; *fauor*: xxii. di. Renouantes [D.22 c.6]; et scelus: ut in contrariis et xxiiii. q.iii. Si habes [C.24 q.3 c.1], infra de sponsalibus, Non est [X 4.1.11]; *ordo*: liiii. di. Frequens [D.54 c.10] ⟨et⟩ Generalis [D.54 c.12]; ff. de operis

> Or, more briefly: he is not deprived, etc., without fault — *or* without cause, as below, X 2.6.5 § 2. On all this, it is noted in my *Summa*, De poenis § In quibus sub § Est autem poena imponenda.

For Hostiensis, it was the 'sine causa' principle that played a more important role. For instance, in a comment to *Ex literis* (X 2.4.1), a decretal which allows the judge delegate to terminate a lawsuit and its counter-suit (causa reconventionis) with a single judgment, Hostiensis agreed with the ruling.[122] But in the ensuing commentary, he suggested another possibility: that the second case be suspended for a time 'ex causa'; nor, Hostiensis continued, 'do I think this absurd: for a petition is not only suspended in other situations 'ex causa', but someone is even deprived of his right without his fault'.[123]

Another example can be found in his commentary on *Ut debitus honor* (X 2.28.59), a decretal which limited appeals to higher courts while a case was still pending. Hostiensis employed

libertorum, Interdum [Dig. 38.1.51]; *Personas spoliant, et loca iure suo*: uel breuius non priuatur, etc. sine culpa, uel sine causa, ut infra, ut lite non contestata, Quoniam frequenter § Si vero [X 2.6.5 § 2]. De hoc notatur in Summa, de poenis, § In quibus, sub § Est autem pona imponenda'. See Hostiensis, *Summa aurea* to X 5.37 col. 1738-1739 n. 8 s.v. *Que et quibus*, where he quoted the same verse and used many of the same references, albeit in the context of a discussion about how one is usually not punished for the offence (*delictum*) of another.

[122] Hostiensis, *Lectura* to X 2.4.1, fol. 238r s.v. *incontinenti*.

[123] Ibid.: 'Set nec absurdum reputo, si de actione de nouo orta non agatur, set ad tempus ex causa suspendatur, ut maior absurditas euitetur, que contingeret, si coram diuersis iudicibus eodem tempore ageretur, ut patet in eo quod legitur. Et notatur supra, de rescriptis, Quia nonnulli [X 1.3.43]. Set nec insaniam reputo huic reo iudices ordinarios actoris ad tempus subtrahere. Imputandum est enim ei quia non conuenit eum antequam conueniretur ab eo et subueniendum illi, qui uigilauit et sibi prouidit, argumentum infra, de appellationibus, Ut debitus [X 2.28.59] et ff. de his que in fraudem creditorum, Pupillus ad finem [Dig. 42.8(9).24]. Cum ergo natura iudicii non patiatur, quod talis reconuentio fiat, set ex causa suspenditur petitio. Non reputo hoc absurdum: nam et alias ex causa non solum suspenditur, set et priuatur quis iure suo sine culpa sua, ut patet in eo, quod legitur, et notatur infra ut lite non contestata, Quoniam § Si uero aliter uersu fimali [X 2.6.5 § 2]. Nec dicas quod in lege allegata, cuius in agendo, non fiat mentio de lite contestata. Sit enim ibi de hoc mentio quando dicitur in eodem negocio, quod expone: i.e. iudicio siue instantia iudicii: argumentum infra, de uerborum significatione, Forus § Negocium' [X 5.40.10].

the 'sine culpa' principle to defend the idea that rescripts would be valid if they had already been assigned to a (judge) delegate:[124]

> For it would be absurd that a requested rescript should lose its force where there was no deceit by the person who made the request, or where negligence cannot be imputed, above X 1.3.23; for no one is to be deprived of his right without his fault, D. 56 c. 7 — unless something be established in favor of an ordinary authority, as noted and argued above in what is read and noted above X 1.2.2. above X 2.6.5 § 2, at the end.

Hostiensis applied in this passage the teaching of Bernardus Parmensis' verse in his *Glossa ordinaria*, 'fauor', which perhaps would be best translated as 'preference for'. It was one of the six general causal exceptions to the 'sine culpa' proviso. If it seems a tenuous reason nowadays, for Hostiensis it was reasonable to think that ecclesiastical favor might necessarily result in a loss of rights for others.

Another important discussion can be found in the comment to *Ex transmissa* (X 1.17.7), one of the decretals to deal with the problem of hereditary succession to a church. At the end of his commentary, Hostiensis posed a series of hypothetical questions. One of them supposed two churches that were led by relatives and united due to their poverty (propter ipsarum tenuitatem): if one of the two related rectors should die, would the other succeed? Here, Hostiensis stressed the importance of just cause:[125]

[124] Hostiensis, *Lectura* to X 2.28.59(58), fol. 428v s.v. *delegato fuerint*: 'Absurdum enim esset, quod rescriptum impetratum amittat uires suas, ubi non potest impetranti dolus, uel negligentia imputari, supra de rescriptis, Plerumque [X 1.3.23]. Cum nemo iure suo priuandus sit sine culpa sua, lvi. di. Satis peruersum [D. 56 c. 7], nisi in fauorem potestatis ordinarie aliud statuatur, ut supra notatur et arguitur in eo quod legitur et notatur supra de constitutionibus, Cognoscentes [X 1.2.2], supra, ut lite non contestata, Quoniam § Si uero in fine' [X 2.6.5 § 2].

[125] Hostiensis, *Lectura* to X 1.17.7, fol. 120v s.v. *successionem*: 'Nec obstat si dicas quod non est quis priuandus iure suo sine culpa sua, ut supra, de constitutionibus, Cognoscentes [X 1.2.2], lvi. di. Satis peruersum [D.56 c.7]: quia subaudiendum est, uel sine iusta causa, infra ut lite non contestata, Quoniam frequenter § Si uero aliter [X 2.6.5 § 2]. Hic autem subest hec, scilicet quia unus non debet alteri immediate succedere, ut dictum est supra'. In fact, Hostiensis went on to deny that one had the 'ius' as claimed, but his contra

> Nor does it oppose [scil. that the survivor should not succeed automatically] if you say that someone is not to be deprived of his right without his fault, as above, X 1.2.2; D.56 c.7: because 'or without just cause' is to be supplied: below, as in X 2.6.5 § 2, at the end. Here, moreover, this [cause] is present: namely, because one ought not immediately succeed the other, as was said above.

Here again we see Hostiensis' willingness to explain that although there was an apparent lack of fault in the decision, it was not made 'sine causa'. In another case, Hostiensis argued that a vassal of a fief could lose it, albeit temporarily, without fault if the fief is left by the lord to a church. The vassal would need to be to be re-invested in this situation.[126]

We can sum up, I think, Hostiensis's position in the following way. While rights should not be taken away without fault lightly, they are not to be taken away without cause. Two final examples bear out this statement. One comes from *Suggestum est* (X 3.38.20), which deals with the case where a second concession for a church, which is made by both bishop and patron, can supersede an earlier one made by the patron alone.[127] It is clear that in such a case, the patron loses his 'ius patronatus', that is, the right of presentation to a vacant ecclesiastical office. Hostiensis did not see any problem:[128]

> And so the 'ius patronatus' is lost even without fault, but not without cause: e.g., for favor of the church and for favor of ecclesiastical liberty, above X 2.6.5 § 2, at the end; and because it is tolerated from grace rather than owed from justice, as is clear in that which is noted

argument does not affect the conclusion of this argument, which he seems to have believed was valid enough.

[126] Hostiensis, *Lectura* to X 3.13.12, fol. 59v s.v. *destitutionibus*: 'Intantum etiam in tali casu potest relinqui feudum ecclesiis ab illo, a quo tenetur ut uasallus ipsum retinere non possit, nisi ab ecclesia, cui relictum est, de nouo inuestiatur, et hic est casus, in quo quis amittit feudum sine culpa sua, in Libro feudorum, de pace iuramento firmanda l. unica § penultimo [L.F. 2.53.1].

[127] X 3.38.20.

[128] Hostiensis, *Lectura* to X 3.38.20, fol. 155r s.v. *facta*: 'Et sic ius patronatus amittitur et si sine culpa, non tamen sine causa, puta fauore ecclesie et ecclesiastice liberatis: supra, ut lite non contestata c. finali § Si uero aliter [X 2.6.5 §. 2], uersu finali et quia potius toleratur de gratia quam de iustitia debeatur, ut patet in eo quod notatur supra, eodem Quoniam responsione i. in principio [X 3.38.3]'.

above X 3.38.3, first response, at the beginning.

Hostiensis again applied the 'fauor' exception. A 'ius patronatus' may well be lost if it might interfere with the need for ecclesiastical liberty. Related to this is Hostiensis's comment to *Nisi cum pridem* (X 1.9.10). On a section where Innocent III wrote that sometimes a prelate is compelled to cease the government of his church due to the malice of the populace,[129] Hostiensis agreed. His reference to three 'capitula' of the *Decretum*, which deal with the changing of bishops in cases of necessity (C.7 q.1 c.34-36), make it clear what 'cause' he had in mind when he said, 'for someone is deprived of his right with cause'.[130]

William of Ockham

If we turn to Ockham's political writings, we see a different use of the 'sine culpa et sine causa' principle. For the most part, both 'without fault' and 'without cause' are used in tandem and seem to carry approximately the same importance.[131] Ockham employed

[129] X 1.9.10 § 5: 'Propter malitiam autem plebis cogitur interdum prelatus ab ipsius regimine declinare, [et] quando plebs adeo dure cervicis exsistit, et in rebellione sua ita pertinax invenitur, ut proficere nequeat apud ipsam, set propter eius duritiam, quo magis *proficere* satagit, eo magis iusto iudicio deficere permittatur, dicente Domino per Prophetam: "Linguam tuam adherere faciam palato tuo, quia domus exasperans est", ⟨*Ezech*. 3:26⟩ et Apostoli leguntur dixisse Iudeis: "Ecce convertimur ad gentes, quia verbi Dei vos indignos fecistis" [Act. 13:46]'.

[130] Hostiensis, *Lectura* to X 1.9.10, fol. 94 s.v. *interdum*: 'Hoc ideo dicit, quia non semper, ut infra eodem, uerso 'non tamen pro qualibet' [X 1.9.10 § 5] et quod dicit cogitur, intelligitur causatiue. Similiter notatur supra, de electione et electi potestate, Cum inter R. seniorem [X 1.6.16]; uel forte precise, cum magis prouidendum sit ecclesie quam persone. Unde saltem est ad aliam in qua proficere possit ecclesiam transferendus: quia non mutat sedem, qui non mutat mentem, vii. q.i. Scias [C.7 q.1 c.35], et c. sequenti [C.7 q.1 c.36] et precedenti [C.7 q.1 c.34] nam et ex causa priuatur quis iure suo, infra ut lite non contesta, Quoniam frequenter § Si autem de carnali [X 2.6.5 §. 4]. Ad hoc, infra de rerum permutatione, Quesitum § finali [X 3.19.5]'.

[131] Abbreviations for Ockham's works follow the de facto standard provided in P. V. Spade, 'Introduction', *The Cambridge Companion to Ockham*, ed. P. V. Spade (Cambridge 1999) 5-11. All but parts of the *Dialogus* are now edited in H. S. Offler et al. ed. *Guillemi de Ockham opera politica*, 9 (projected) vols.

this principle throughout his political thought: it governed, he thought, basic property relations, the limits of secular and ecclesiastical interference in the affairs of their subjects, the relationship of pope and emperor, even the nature of the pope's fullness of power. It first surfaced in his defence of poverty, but then was applied throughout his *Opera politica*.

As one of several Franciscans involved in defending (as they saw it) their traditional vow of evangelical poverty from Pope John XXII's attempt to overturn the ideal, Ockham and his fellow Michaelists developed a cogent theory of property rights.[132] In doing so, he relied on *'sine culpa et sine causa'* in a crucial discussion about the term *ius utendi*, which was one of a few terms on which the later stages of the poverty controversy turned. The text reads as follows:[133]

> It is also clear that no one unwilling ought to be deprived of such a *ius utendi* without fault and without reasonable cause. For every *ius utendi* is a *ius*; but no one ought to be deprived of his own *ius* without fault and without reasonable cause, as the Gloss notes in X 1.2.2, X 4.13.11, and D. 22 c. 6 — as it is also clearly gathered from the sacred canons.

At this point in the treatise, Ockham was defending what he called a "positive right of using," and it was a key characteristic of such rights that their possessor could take legal action if wrongly

(Manchester & Oxford 1956-); for the unedited portions, I have relied primarily upon William of Ockham, *Opera plurima*, 1: *Dialogus de imperio et pontificia potestate* (1494, reprinted Farnborough 1962), but I have also often consulted John Kilcullen et al. eds., *William of Ockham: Dialogus* (The British Academy 1995-), http://www.britac.ac.uk/pubS/ dialogus/ockdial.html.

[132] See most recently, Jonathan Robinson, *William of Ockham's Early Theory of Property Rights in Context* (Studies in Medieval and Reformation Traditions, 166; Leiden 2012).

[133] *OND* 61.55-59 (2:559-60): 'Quod etiam tali iure utendi nullus sine culpa et absque causa rationabili debeat privari invitus, patet. Nam omne ius utendi est ius. Nullus autem sine culpa et absque causa rationabili debet suo iure privari, ut notat glossa, Extra, *de constitutionibus*, c. ii, et Extra, *de eo, qui cognovit consanguineam uxoris suae*, c. ultimo, et di. xxii, c. *Renovantes*, et ex sacris canonibus colligiur evidenter'. For the text of the relevant glosses, see nn. 70, 71, and 68, above.

deprived of them.[134] Ockham was in effect linking the *ius utendi* and the *ius agendi*, which John XXII had claimed were fundamentally and conceptually separate.[135]

It should perhaps be mentioned briefly that this emphasis on the basic inviolability of rights was somewhat novel from the Michaelist perspective. The closest analogue we have comes from Michael of Cesena's Munich appeal, likely ghost-written in large part by the legally trained Bonagratia of Bergamo.[136] In the appeal, we read at one point that, 'no one is to be deprived of his own thing and the power of doing what he likes with it without his fault'. But Michael here was making an argument about monks lacking *proprietas*, since an abbot does decide when and how monks use things, and thus only accidentally defending the sanctity of individual property rights.[137] It is interesting, too, that Michael's argument relies on *Satis peruersum* (D.56 c.7) and *Inuentum est* (C.16 q.7 c.38), which were important in the decretalist tradition, but were never cited in Ockham's political works. Conversely, none of the other Michaelists ever referred to the other three glosses, let alone the texts that they were glossing.

In subsequent writings, Ockham did not always list his canonistic sources. On one occasion, however, he added to the list.

[134] *OND* 61.34-69 (2:559-560); cf. 3.397-400 (321).

[135] *Quia vir reprobus*, in G. Gál and D. Flood ed. *Nicolaus Minorita: Chronica: Documentation on Pope John XXII, Michael of Cesena and The Poverty of Christ with Summaries in English. A Source Book* (St. Bonaventure, NY 1996) 581; cf. *Quia quorundam mentes*, in Jacqueline Tarrant, ed. *Extravagantes Iohannis XXII* (MIC, Series B: Corpus collectionum, 6; Rome 1983) 264-267.

[136] Eva Luise Wittneben, *Bonagratia von Bergamo: Franziskanerjurist und Wortführer seines Ordens im Streit mit Papst Johannes XXII* (Studies in Medieval and Reformation Thought, 90; Leiden 2003).

[137] *Appellatio monacensis*, in Gál, Flood eds., *Nicolaus Minorita*: Chronica 815-816: 'Et per consequens [sc. if Benedictine monks had things *quoad proprietatem*] abbates non possent prohibere monachis ne de talibus rebus ad vitam necessariis facerent quod videretur eisdem, quia re propria et potestate faciendi de ea quod placet nullus privandus est sine culpa sua, 56 D. c. [7] *Satis perversum*; et 16 q. [7] ultima, c. [38] *Inventum*, quod dicere vel sentire est omnem religionem voventem vivere sine proprio destruere et annullare, cum vivere sine proprio sit ea quae ad vitam pertinent, non habere propria'.

In *An princeps* (1338-1339), he referred to the decretal *Novit* (X 2.1.13), while discussing the limitations of papal power;[138] and in the *Octo quaestiones* (1340/41), he seemingly quoted from the *De regulis iuris* appended to the *Liber sextus* (VI 5.13. reg. 23) in a similar discussion of the pope's supposed fullness of power.[139] It is clear that Ockham fully inculcated 'sine culpa et sine causa' and made it a distinctive cornerstone of his political philosophy.

Ockham usually cited 'sine culpa et sine causa' when he was trying to highlight the limits to the political power wielded by spiritual and temporal rulers. The poverty controversy provided the context for considering interpersonal relations: among equals it was fairly self-evident that one person should not be able to deprive another of his or her *ius* arbitrarily. It was precisely this idea that leveraged individual Franciscan rightlessness, since it was taken as axiomatic that friars were not legal persons. The interpersonal relationship of a Franciscan and someone else was, a priori, not a meeting of equals.

In the *Breviloquium*, Ockham had the occasion to consider the nature of individual rights between persons not normally subject to another's authority. The discussion takes place in the context of considering the distinction between exercising some form of political authority *casualiter* or *regulariter*, especially as related to the decretal *Per uenerabilem* (X 4.17.13), where Innocent III famously claimed he exercised temporal jurisdiction *casualiter*.[140] Ockham wrote often about the *regulariter* - *casualiter* distinction, which other scholars have treated at length.[141] Here, Ockham employed the *sine culpa* principle to help

[138] *AP* 5.57-59 (1:244).
[139] *OQ* 2.2.13-21 (1:70).
[140] See Kenneth Pennington, 'Pope Innocent III's Views on Church and State: A Gloss to Per Venerabilem', *Law, Church, and Society: Essays in Honour of Stephan Kuttner: Essays in Honour of Stephan Kuttner,* edd. K. Pennington and R. Somerville (Philadelphia 1977) 49-67, reprinted with corrections, K. Pennington, *Popes, Canonists, and Texts 1150-1550* (Variorum Collected Series Studies, CS412; Aldershot 1993) IV.
[141] Bayley, 'Pivotal Concepts'; de Lagarde, *La naissance* 4:184-189; McGrade, *Political Thought* 78-80, 92-95, 139-40; J. Miethke, *De potestate papae: Die päpstliche Amtskompetenz im Widerstreit der politischen Theorie von Thomas*

explain what these two adverbs mean:[142]

> Likewise, no one is to be deprived of his right without fault regularly; and yet he can be deprived on occasion; therefore, someone can have the power of depriving another person of his right without his fault on occasion, though he does not regularly have the power of depriving him of his right without his fault.

Ockham went on to say that this is much like the case of a servant or slave not regularly being able to detain his lord physically or otherwise bring force to bear, even though they might do so — according to Augustine — 'casualiter'. That is, in certain cases, it is possible that someone would have a reason (causa) to infringe upon the rights of other people, but that should only occur in extraordinary situations.

Perhaps it is only natural to imagine that equals should respect each other's rights, but Ockham's preoccupation with separating the spheres of Church and empire meant he spent no less time analyzing unequal power relationships, and he frequently demonstrated the limits of political authority by reference to 'sine culpa et sine causa' This is especially true with regard to the question of the papacy and whether the pope should be thought to have a fullness of power.

Discussions of a pope's fullness of power invariably need to engage with Christ's promise to Peter in Matthew 16:19 regarding the power of loosing and binding.[143] Ockham twice used 'sine culpa et sine causa' to limit the unmitigated fullness of power the biblical verse might seem to convey. In the *Breviloquium*, for instance, the principle is deployed as part of an argument that 'the legitimate rights of emperors, kings, and all the others, believers

von Aquin bis Wilhelm von Ockham (Spätmittelalter und Reformation. Neue Reihe, 16; Tübigen 2000) 187-188; and Shogimen, *Ockham and Political Discourse* 235-242.

[142] *Brev*. 4.4.11-14 (4:201): 'Item, regulariter nullus privandus est iure suo sine culpa, et tamen casualiter potest [privari]; ergo potest quis casualiter habere potestatem privandi alium iure suo sine culpa sua, quamvis non habeat regulariter potestatem privandi ipsum iure suo sine culpa sua'. Cf. *OQ* 1.17.113-126 (1:62)

[143] 'Et tibi dabo claves regni caelorum et quodcumque ligaveris super terram erit ligatum et in caelis et quodcumque solveris super terram erit solutum et in caelis'.

and unbelievers', that is, at least those 'which do not oppose good customs, the honor of God, or the observance of the evangelical law', should be exempted from the 'whatsoever' of Matthew 16:19. Thus the conclusion that 'the pope cannot regularly or ordinarily disturb or lessen in any way such rights by the power immediately given to him by Christ without cause and without fault'. Moreover, any such de facto action against those rights is to be considered invalid.[144]

The account given here is largely negative: it amounts to a conclusion about what the pope cannot do. Other examples he used were meant to show the practical and uncontentious limits to his power. In the normal course of affairs, he argued, the pope could not do any of the following: forcibly divorce a consumated marriage;[145] force sexual abstinence or fasting;[146] or impose further burdensome obligations related to religious practice.[147] The flip side of the Matthean verse is that when the situation warrants it, the pope does have a non-regular power to interfere with the 'liberties and temporal rights' of rulers, laymen, and clerics alike, which belong to them by natural law, the law of

[144] *Brev*. 2.16.6-19 (4:142-143): 'videtur michi dicendum quod a regulari et ordinaria potestate concessa vel promissa beato Petro et cuicumque successorum eius per illia verba Christi excipienda sunt iura legitima imperatorum, regum et ceterorum fidelium et infidelium, quae minime obviant bonis moribus, honori Dei et obervationi evangelicae legis, prout in aliis quam in illis verbis Christi: Quodcumque ligaveris etc. a Christo, Evangelistis et Apostolis est plenius tradita et clarius explanata, quae scilicet iura ante institutionem explicitam legis evangelicae habuerunt et uti licite potuerunt: ut huiusmodi iura regulariter et ordinarie absque causa et sine culpa papa de quamcumque potestate sibi data a Christo immediate turbare vel minuere non valeat quoquomodo. Et si de facto aliquid contra ipsa attemptaverit, ipso facto et iure illud, quod facit, nullum est; et si sententiam ferret in tali casu, ipsa tamquam a non suo iudice lata nulla esset ipso iure divino, quod omni iure canonico et civili praeeminere dignoscitur'. The phrase a' non suo iure' is a fairly common phrase in the *Decretum* and *Decretales*, and invariably denotes a decision made by someone without the appropriate jurisdiction. See, e.g., C.2 q.1 c.7 § 9; X 1.4.3; X 1.30.5; X 2.1.4; X 5.38.4 and cf. C.3 q.8 c.1; C.11 q.1 c.49.

[145] *AP* 5.23-25 (1:243); cf. 1 *Dial*. 7.67 (160ra).

[146] 3.2 *Dial*. 1.23 (242ra-rb); cf. 3.2 *Dial*. 1.23 (242va).

[147] 3.1 *Dial*. 1.6.29-35 (8:156).

nations, or civil law. When the situation is dire enough — 'in casu summae utilitatis vel vicinae aut extremae necessitatis vel propinquae' — it is reasonable that papal 'potestas' be extended so that the community of the faithful not be exposed to the dangers that might arise from the ignorance, idleness, impotence, cowardice, lust, or malice of others.[148] The ensuing argument was predicated on an assumption of evangelical liberty, another cornerstone of Ockham's political philosophy, and a powerful motivating belief in medieval social and political thought,[149] which meant for Ockham that the pope did not have the 'potestas' to despoil others of their 'liberties, rights, and things', nor indeed any other 'potestas' by which he could endanger the faithful.[150] The pope, in short, lacks the power to impose new

[148] *AP* 5.50-64 (1:244): 'Quemadmodum igitur a praedicta generalitate, qua dicitur: Quodcunque ligaveris, etc. excipi debent illa, secundum omnes catholicas sententias, quae sunt contra legem divinam et ius naturae, ita etiam excipi debent illa, quae essent in notabile et enorme detrimentum et dispendium libertatum et iurium temporalium imperatorum, regum, principum et aliorum laicorum et etiam clericorum, quae eis iure naturali, gentium vel civili ante vel post institutionem legis evangelicae competebant. Ad illa enim potestas papalis regulariter minime se extendit, cum absque causa et sine culpa iura turbare non debeat aliorum, Extra, de iudiciis, Novit [X 2.1.13]. Ad quae tamen casualiter, puta in casu summae utilitatis vel vicinae aut extremae necessitatis vel propinquae, rationabile sit ut se possit extendere, quatenus communitati fidelium in omnibus necessariis per Christum provisum erat, ne extremo exponatur periculo propter ignorantiam, ignaviam, impotentiam, pusillanimitatem, quamcunque libidinem vel malitiam quorumcunque'.

[149] Shogimen, *Ockham and Political Discourse* 170-175; Tierney, *Idea of Natural Rights* 187.

[150] *AP* 5.64-75 (1:244): 'Non enim Christus voluit omnes homines servituti summi pontificis subiugare nec vult ipsum praeesse aliis propter propriam, sed propter communem utilitatem. Et ideo non habet pontifex summus a Christo potestatem pro suae arbitrio voluntatis spoliandi alios libertatibus, iuribus et rebus; nec aliquam potestatem, ex qua leviter possent [*read:* posset] periclitari fideles temporaliter vel spiritualiter, concessit Christus summo pontifici, sed ut prodesset ipsum praetulit universis, nullam ei tribuens potestatem, per quam ad placitum [posset turbare] aliorum iura, quae ante promulgationem evangelicae legis in se vel in suis parentibus aut praedecssoribus habuerunt, vel etiam post tali iure et modo legitimo adepti fuerunt, quali antea priores acquirere potuerunt'.

burdens upon Christians where there is no fault to remedy or cause to do so.[151] After all, as Ockham noted at the start of a long rebuttal of the arguments adduced in *Octo quaestiones* 1.2, one reason Matthew 16:19 should not be understood to mean an unrestricted fullness of power was that, besides being dangerous for the pope himself, it would also be dangerous for his subjects, among which there were many spiritually weak individuals who would not be able to endure (sufferre) the burdens the pope would be able to impose upon them 'de iure' without justification (absque culpa sua et sine causa).[152] Ockham's position was of course that the pope did not have such a fullness of power, only 'all power necessary for the government of the faithful in terms of acquiring eternal life, with all reasonable, honest or even licit rights and liberties preserved'.[153] Ockham then explained:[154]

> They say, moreover, 'with the *iura* and liberties' etc. 'preserved' in order to note that, as long as they are unwilling, the pope can remove the *iura* or liberties of emperors, kings, or any others, clerics or laymen, by no *potestas* given to him by Christ, without fault or cause, beyond the case of necessity and utility (which can be made the equivalent of necessity),[155] provided only that such liberties and *iura* are not against divine *lex* (to which all Christians were bound).

The guiding principle for Ockham would seem to be that the pope was entrusted with such power as he has to work for the benefit of

[151] *Brev*. 2.5.104-107 (4:119-20): 'Propter quod non expedit communitati fidelium, ut papa habeat potestatem gravia imponendi fidelibus sine culpa eorum et absque causa manifesta, ad quae nec per ius divinum nec per ius naturale nec per propriam obligationem spontaneam constringuntur'.

[152] *OQ* 1.7.5-16 (1:34).

[153] *OQ* 1.7.33-35 (1:35).

[154] *OQ* 1.7.52-63 (1:35): 'Dicunt autem 'salvis iuribus et libertatibus', ad notandum quod papa per nullam potestatem sibi datam a Christo potest tollere iura et libertates imperatorum, regum et aliorum quorumcunque, clericorum vel laicorum, ipsis invitis, sine culpa et absque causa, extra casum necessitatis et utilitatis, quae valeat parificari necessitati, dummodo libertates et iura huiusmodi non sint contra legem divinam, ad quam Christiani tenentur'.

[155] Ockham often pointed out that 'utilitas' could (or ought to) be considered equivalent to necessity; see *OQ* 1.7.56-57 (1:35), 2.8.10-11 (1:82), 3.4.46-47 (1:104); 3.12.115-116 (1:116), 8.6.49-50 (1:200); *Brev*. 3.8.13-14 (4:181); and *IPP* 5.12-13 (4:289), 10.12-13 (4:301). In 3.1 *Dial*. 2.20.141-143 (8:208) the *Magister* links the idea to X 1.14.6 (2:127).

the entire community of believers, rather than for his own benefit. In one of his last works (1346/47), he argued that papal rule was ministrative rather than dominative in part *because* 'it is agreed that the pope . . . cannot take away the liberties and things of his subjects according to the aforesaid "without fault and without reasonable cause" and manifest laws (*iura*)'.[156]

Ockham also used 'sine culpa et sine causa' as a way of ordering the hierarchical relationship between papacy and the political authority of secular rulers. As before, this question turns on understanding the limits of papal fullness of power. And, as before, 'sine culpa et sine causa' is treated as a generally evident rule that demonstrates why the pope cannot be said to have a fullness of power with respect to the political authority of secular rulers.

There are five places where Ockham applies this principle to demonstrate the independent legitimacy of secular rule; four of them are largely negative in nature. Twice in *An princeps*, Ockham wrote that a papal fullness of power would mean that the pope would be able to strip kings of their kingdoms without their fault or without good cause and hand them over to commoners.[157] A

[156] *IPP* 6.11-18 (4:291): 'Cum igitur constet quod papa, cui dixit Christus in beato Petro: Pasce oves meas [Io. 21:17], de fidelibus sollicitam curam gerere teneatur, et iuxta praedicta sine culpa et absque causa rationabili et manifesta iura, libertates et res sibi subiectorum auferre non valeat, [nisi] inquantum valeat ab eis suas necessitates exigere: relinquitur quod principatus papalis institutus est propter utilitatem subiectorum et non propter utilitatem propriam vel honorem, et per consequens non dominativus, sed ministrativus est digne vocandus'. Cf. *IPP* 7.24-30 (4:293), and 8.1-7 (4:298-99), which both repeat the same basic point.

[157] *AP* 2.84-92 (1:232): 'Posset ergo papa, si haberet talem plenitudiem potestatis, sine culpa et absque causa reges et principes ac alios clericos et laicos universos de dignitatibus suis deponere ipsosque privare omnibus rebus suis et iuribus, ac etiam reges potestati rusticorum et vilium personarum subicere ac ipsos constituere aratores agrorum, et quibuscunque vilibus operibus et artibus deputare; quae absurdissima sunt et libertati evangelicae legis, quae ex divinis scripturis habetur, derogantia manifeste. Quare non solum est falsum papam habere huiusmodi plenitudinem potestatis, sed etiam est haereticum, perniciosum et periculosum mortalibus universis'. And *AP* 5.20-21 (1:243): 'Tertia est quod papa, sicut deductum est prius, posset de plenitudine

similar point is made in the *Dialogus*, though the fullness of power is there connected with 'a most complete lordship of temporal things' (plenissimum dominium).[158] The *Breviloquium*, by contrast, connects the stripping of rulers of their realms — in this case, the king of France is singled out in particular — much like lords do with their servants' goods, with the imposing of further religious obligations. Ockham once more invoked the idea that the advent of Christ inaugerated a new evangelical 'law of liberty'.[159]

In the *Octo quaestiones* a similar point is made, but at much greater length. The argument is attributed to an unspecified 'some people', but it fits in its general dimensions with the other arguments we have considered thus far.[160] The argument, which is attributed to people who have a less full idea of what papal *plenitudo potestatis* entails, runs as follows. We can say that *imperium* is from the pope even though he cannot command supererogatory acts nor deprive people without fault unless there is an underlying cause.[161] Thus it is that the pope is also unable to

potestatis absque culpa et sine causa privare reges regnis suis et dare ea rusticis quibuscunque obedire'.

[158] 3.1 *Dial*. 1.12.15-22 (8:150): 'Si igitur papa haberet super omnes Christianos talem plenitudinem potestatis, papa haberet plenissimum dominium in temporalibus super omnes reges et principes ac alios universos, et omnes essent servi eius, et posset de plenitudine potestatis, sine omni culpa et absque omni causa, privare quemcumque regem regno et dare illud cuicumque pagano; posset regem subicere cuicumque rustico ad sue arbitrium voluntatis, et, si faceret, de facto teneret, nec posset rex quicumque in talibus vel consimilibus sibi licite resistere - quod isti falsum reputant et absurdum'.

[159] *Brev*. 2.3.51-54 (4:115): 'Posset ergo papa de iure privare regem Franciae et omnem alium sine culpa et absque causa regno suo, quemadmodum dominus absque causa et sine culpa potest tollere a servo suo rem, quam sibi concessit: quod est absurdum. Posset etiam papa, si talem haberet tam in temporalibus quam in spiritualibus plenitudinem potestatis, multo plures et graviores caerimonias imponere Christianis quam fuerint caerimoniae veteris legis; quare nullo modo lex evangelica esset lex libertatis, sed intolerabilis servitutis'. Cf. *IPP* 5.42-47 (4:290).

[160] Cf. *OQ* 2.10.14-33 (1:86-87); *IPP* 5.8-19 (4:289).

[161] Offler identified the phrase 'sine culpa nisi subsit causa' as from VI 5.13. reg. 23 in the places marked in the text of the next footnote (see n. 65 for the text). This is plausible insofar as he quoted other specific *regulae* explicitly in the *Octo quaestiones*. However, the phrase is also used directly in the gloss *Sine*

deprive individuals who justly possess kingdoms and other political domains (*principatus*) without fault, again except where there is an underlying cause. But when the cause is great enough, depriving an emperor of an empire can be done; similarly, he might even insist that no one be elected to a kingdom or empire if it is necessary for the common good.[162] Ockham tied, in other words, 'sine culpa et sine causa' to other powerful maxims of medieval political thought, namely that concern for the common

sua (see n. 71, above), and it is perhaps significant that he never directly referred to this *regula* elsewhere; cf., e.g., n. 165, below.

[162] *OQ* 2.2.13-43 (1:70-71): 'Alii autem, quamvis putent opinionem praedicta[m] sapere haeresim manifestam, tamen dicunt imperium esse a papa propter hoc, quod secundum eos papa habet quandam aliam plenitudinem potestatis; quia, licet, ut dicunt, papa non possit omnia sine exceptione, quae non sunt prohibita neque per ius divinum neque per ius naturale, quia illa, quae supererogationis sunt, non potest praecipere, nec potest aliquem privare iure suo *sine culpa, nisi subsit causa* [VI 5.13. reg. 23], nec potest illa, quae ad regendum mortales minime necessaria dignoscuntur, licet valeant expedire: tamen per seipsum vel institutos officiales ab ipso omnia sine exceptione potest, quae constat esse necessaria regimini subiectorum. Unde licet reges et principes iam iuste regna et principatus habentes absque culpa, nisi subsit causa, nequaquam possit regnis suis et principatibus privare etiam de plenitudine potestatis suae, tamen si esset aliquis populus, qui regem, principem aut caput in temporalibus non haberet, cum non solum expediens sed etiam necessarium sit cuilibet populo etiam in temporalibus caput, a quo immediate regatur, habere, posset papa de plenitudine potestatis absque electione, nominatione vel consensu eorum ipsis caput praeficere, maiorem vel minorem dignitatem et potestatem tribuendo eidem; et in similibus circa potestatem eius similiter est dicendum. Et ex ista plenitudine potestatis, ut dicit ista opinio, habet papa potestatem super imperatorem et imperium, non quidem ut possit imperatorem *sine culpa, nisi subsit* [VI 5.13. reg. 23] causa necessaria privare imperio, nec quod possit ad libitum suum imperium transferre de gente in gentem, sed quia pro culpa et ex causa necessaria potest imperatorem, quibuscunque aliis minime requisitis, deponere, si hoc sit necessarium utilitati communi, et non solum expediens, potest de plenitudine potestatis, non requisitis aliis quibuscunque, de gente in gentem vel de domo in domum aut de persona in personam transferre imperium; si etiam ex causa aliqua evidenti necessarium fuerit bono communi, ut nullus ad regnum vel imperium eligatur, potest ordinare, et praecipere ut nullus ad regnum vel imperium eligatur, potest ordinare et praecipere ut, quamdiu necessarium fuerit, huiusmodi electio differatur'.

good and the demands of necessity take precedence over the rights of any one individual, even one so important as the emperor.[163]

Ockham's interest in describing the proper scope of authority of the papacy far exceeded a similar concern for that of the imperial office, but 'sine culpa et sine causa' nonetheless played a role in this latter case as well. According to the principle that a government is better to the degree it rules for the common good,[164] Ockham thought it clear that an independent king or emperor in the greatest of realms would not be able to deprive his subjects of 'their goods, liberties, or rights without their fault, unless manifest cause should be present'. Significantly, what people acquire for themselves, are not (also) acquired for their ruler; that is, what is acquired remains free from his arbitrary control.[165]

Conlusions

The 'sine culpa et sine causa' principle had a variable history in the middle ages. If the maxim itself seems unexceptionable — after all, taking away rights for reasons other than fault or cause seems to be the height of injustice — it was one mechanism by which jurists could meet the expectations of justice

[163] Cf. the general comments in Antony Black, 'The Individual and Society', *The Cambridge History of Medieval Political Thought, c. 350-c.1450*, J. H. Burns ed. (Cambridge 2005 [1988]) 595-597. See also the provocative Janet Coleman, 'Are There Any Individual Rights or Only Duties?' *Transformations in Medieval and Early-Modern Rights Discourse*, eds., V. Mäkinen and P. Korkman (The new synthese historical library, 59; Dordrecht 2006) 3-36. Shogimen, *Ockham and Political Discourse* 250-256, related Ockham's concern for the common good to his ethical and epistemological commitments (primarily as expressed in his political writings).

[164] *OQ* 8.5.36-42 (1:197-98).

[165] *OQ* 8.5.42-46 (1:198): 'Unde imperator vel rex optimo praeeminens principatu, qui sit omni alii principatui impermixtus, habet subiectos tam liberos, ut ipsos de iure absque culpa eorum, nisi causa subfuerit manifesta, non possit privare rebus, libertatibus suis vel iuribus: nec quicquid acquirunt regi vel imperatori acquirunt, ut pro libitu suo de iure possit taliter acquisitum sibi accipere et retinere vel dare cui sibi placuerit: quae tamen et alia multa potest dominus super eos, qui sibi sunt conditione servili subiecti'.

even as they knew positive rights could not be absolute.[166] As is so often the case in legal history, the importance lies not in the maxim itself, but the context and way in which it was applied. This is clear with Innocent, who seems not to have relied on 'sine culpa et sine causa' as an explicit principle that should guide his interpretation of the *Decretales*. Yet, this does not mean that the pope was not a defender of individual rights. Far from it: Innocent is well known for his support of the idea that non-Christians normally held lands and properties (dominia et iurisdictiones) legitimately.[167] In that same commentary, Innocent went on to give reasons why non-Christians might be punished, which usually involved acting against the 'lex' of nature, deduced by Innocent in this case from the Bible.[168] And in one telling passage, he even suggested that the Pope 'could, if they treated Christians badly, deprive them by [judicial] sentence of the jurisdiction and lordship, which they hold over those Christians'. Even so, he added 'the 'causa' ought to be great'.[169]

Hostiensis did not quite share Innocent's opinion regarding non-Christian domains.[170] In some ways this is surprising since he seems to be a more vocal proponent of the sanctity of individual rights, and certainly a stronger proponent of 'sine culpa et sine causa'. In other ways it may not be, for it is by no means clear that medieval jurists applied their principles consistently outside Christendom. Regardless, Hostiensis was more inclined to the idea that prosecuting one's right does not normally cause harm, though of course he clearly did not believe that one has a 'right to do wrong' or anything of the sort. Avoiding scandal takes precedence over exercising one's right. Hostiensis, like the texts of the Gloss, privileged cause over fault as the chief reason for taking away

[166] Helmholz, 'Natural Human Rights' 304.
[167] Innocent IV to X 3.34.8, n. 3, v. 'compensato' (430ra). J. Muldoon, 'Extra ecclesiam non est imperium: The Canonists and the Legitimacy of Secular Power', *Studia Gratiana* 9 (1966), 553-580, is a classic analysis of this topic.
[168] Innocent IV, Commentaria to X 3.34.8, fol. 430rb s.v. *compensato*.
[169] Ibid. fol. 430va.
[170] Federick H. Russell, *The Just War in the Middle Ages* (Cambridge Studies in Medieval Life & Thought, Third Series 8; Cambridge 1975) 200-201.

one's rights. As fault pertains to the individual, while cause is an external reason, what Hostiensis (and the Gloss) were in fact privileging was the idea that a competent authority with the requisite iurisdictio had the power to decide when there were legitimate grounds for interfering with another person's rights. This seems consistent with another powerful legal principle, namely the special exemption to the law (lex) that necessity can provide — a point Hostiensis also defended.[171] In a related manner Hostiensis wrote that 'a just and necessary cause should be exempt from every "ius".'[172] If rights are not absolute, thought Hostiensis, neither is (positive) law (ius).

Ockham's reading of the canonistic texts was much different.[173] It is clear that he was uninfluenced by the leading decretalists of the thirteenth century; and the same must be said, on this score at least, of Guido de Baysio, who is sometimes thought to have been one of Ockham's entry points into canonistic thought. I have not discussed him above because the Archdeacon simply did not have much of interest to say about 'sine culpa et sine causa' in the passages that Ockham relied on. There is, for instance, no mention of the principle in his comments to either D.22 c.6 or D.56 c.7, although his commentary to the former passage demonstrates that Guido was aware of some of the (by

[171] E.g., Hostiensis, *Lectura* to X 1.6.42, fol. 67r.

[172] Hostiensis, *Lectura* to X 3.12.1, fol. 56vb s.v. *necessaria*: 'Nota quod ab omni iure semper iustam causam et necessariam intelligi debere exceptam, et de hoc notatur supra titulo i. c. finali [X 3.1.16] et de his quae fiunt a prelat. Nouit et c. finali [X 3.10.4 and 10] et supra, de concessione praebende, Cum nostris § finali [X 3.8.6] et infra de accusationibus, Cum dilecti [X 5.1.18], infra de uerborum significatione, Intelligentia [X 5.40.6], xxix. di. c.i. [D.29 c.1], infra, de sponsalibus, Ex literis Siluani ad finem [X 4.1.10], supra de clericis non residentibus, Inter quatuor [X 3.4.10], ubi de hoc. Set que potest hec esse causa? Guerra, litigium, magna emptio, longa peregrinatio, et quaelibet iusta paupertas. Argumentum, infra de donationibus, Ad apostolice [X 3.24.9], infra de religiosis domibus c.ii. [X 3.36.2], xvi. q.i. Et temporis qualitas [C.16 q.1 c.48]; infra, de censibus, Cum apostolus [X 3.39.6] ubi de hoc'. It is significant that the examples Hostiensis chose pertained to ecclesiastical matters.

[173] Cf. Pennington, '*Lex naturalis*' 243-244 who recently analyzed Aquinas's reading of Gratian.

then) standard 'causae'.[174] There is an acknowledgement that 'iura' are to be preserved at *Inuentum est* (C. 16 q. 7 c. 38), but this would not have been enough for Ockham to make the references to the *Glossa ordinaria* that he did.[175] Moreover, as far as I can tell, Ockham never referred to this canon in his own writings.

In any event, Ockham's reading of the import of the glosses differed markedly from the earlier canonists. His application has its own mix of strengths and weaknesses. The downside of his analysis is that Ockham seems to have ignored the glosses' casuistry in favor of treating 'sine culpa et sine causa' as if it were meant only to limit the power of individuals rather than being a principle that allowed one to analyze whether there was any reason to limit or take away someone's rights. This came at the cost of turning 'sine culpa et sine causa' into something of a blunt instrument, the main value of which was, first, to defend individual rights, liberties, and possessions against arbitrary seizure; and, second, to demarcate the proper, and properly limited spheres of political influence for secular and especially ecclesiastical rulers. In Ockham's hands the maxim was used primarily to end arguments about the reach of political authority rather than being used as the starting point for an analysis of where specific rights in specific situations should prevail or give way to the rights and duties of others. While there is good reason to applaud his effort to curb arguments for absolutistic political authority, it is worth pausing to consider that, at the most fundamental level, the only valid cause Ockham invoked is the necessity of the common good. And yet necessity did not need any further support to justify extraordinary interventionism. It was not just Hostiensis, but medieval theologians and jurists alike who

[174] See Guido de Baisio, *Rosarium super Decreto*, mit Brief an Petrus Albignanus von Paulus Pisanus und dessen Erwiderung, Juni 1480 (Venice 1480), http://daten.digitale-sammlungen.de/~db/0004/bsb00048042/image_1, to D. 22 c. 6 (unfol.), which discussed the text in terms of privileges.

[175] *Rosarium* to C.16 q.7 c.38 (unfol.): 'Episcopi autem et alii debent iura seruare, extra de accusationibus, Ad petitionem in fine [X 5.1.22] et sic non contradicet, extra de statu monachorum [X 3.35.2]. Guillelmus Naso'.

appealed to the idea that necessity is not subject to the law.[176]

Still, perhaps it is a little unfair to expect of Ockham the same degree of analysis of 'sine culpa et sine causa' as the canonists provide us. His goals after all were much different. Moreover, if the value of a legal maxim lies in its application rather than its (usually) self-evident nature, then there is nothing wrong prima facie with Ockham applying it to a sphere rather far removed from the concerns of juristic commentaries. The jurists remain among the most important sources for medieval political thought, but they were not political philosophers or theorists as we understand the term today.[177] Thus, unlike Ockham, when Innocent IV and Hostiensis had occasion to write about the supposed sanctity or inviolability of individual rights, they were usually concerned with why someone's right had in fact been limited or taken away. In such cases, 'sine culpa et sine causa' could be invoked only to explain the loss of right, and it is usually understood as the exception that proves the rule.

Ockham came much closer to theoretical system-building, though he was motivated primarily by the burning concern that, since the time of John XXII, the leadership of the Church had fallen into heresy. This concern with heresy led to a reconsideration of the nature of and normal limits to political authority, especially for the pope, but also for emperors and even non-Christian rulers. And it was the limits that most interested Ockham. This is where 'sine culpa et sine causa' was to play so great a role in his political worldview. It is of course true that medieval conceptions of government were not absolutistic. Popes knew they should not normally interfere with the rights and prerogatives of lay rulers without their consent.[178] And when Bulgarus famously (so one story goes) lost a horse for denying that

[176] See, above all, Franck Roumy, 'L'origine et la diffusion de l'adage canonique *Necessitas non habet legem* (VIII^{e}-XIII^{e} s.)', *Medieval Church Law and the Origins of the Western Legal Tradition: A Tribute to Kenneth Pennington*, W. P. Müller, M. E. Sommar edd. (Washinton, DC 2006) 301-319.
[177] Cf. Tierney, 'Ockham, the Conciliar Theory' 65; and C. Morris, *The Papal Monarchy: The Western Church from 1050 to 1250* (Oxford History of the Christian Church; Oxford 1989) 568-569.
[178] Tierney, 'Continuity of Papal Political Theory' 243.

the emperor was 'dominus mundi' 'with respect to ownership' (quantum ad proprietatem),[179] we might reasonably wonder if Frederick Barbarossa himself wondered if the law books taught that he could expropriate or otherwise dispose of his subjects' property without their consent.[180] Bulgarus was not alone in his answer, but his appeal to equity — 'dixi equum' — operated at a different level than Ockham, even though he too denied the emperor (and pope) similar powers:[181]

> Hence, neither the pope nor the emperor ought to have such a power over the community of the faithful, because none of them is able to remove the rights and liberties of their inferiors without fault and without cause — except in a case of necessity.

Surely it is a belief in the principle of equity that underwrites Ockham's repeated application of 'sine culpa et sine causa', here and elsewhere, yet he left the connection unstated. One might be inclined to believe he thought 'sine culpa et sine causa' was merely a self-evident principle, unconnected to deeper considerations.

But it is not just 'because it is wrong' that Ockham utilized — and, indeed, universalized — 'sine culpa et sine causa'. Ockham of course cared very deeply about the ethics of right and wrong, but the reason for the strong emphasis on this principle is connected to another deeply held belief of his, namely a belief in the importance of, and indeed promise of, individual freedom through the new evangelical law of liberty. The starting point of 'sine culpa et sine causa' may have been due to his discovery of this canonistic idea, and in his belief in how private property first arose — and it is significant that he loosely referred

[179] F. Güterbock, ed., *Das Geschichtswerk des Otto Morena und seiner Fortsetzer über die Taten Friedrichs I. in der Lombardei* (Scriptores rerum Germanicarum, Nova series, 7; Berlin 1930) 59.

[180] Kenneth Pennington, *The Prince and the Law, 1200-1600: Sovereignty and Rights in the Western Legal Tradition* (Berkeley 1993) 8-37, analyzed the story and considered its fate at the hands of subsequent jurists.

[181] *OQ* 1.11.16-18 (1:45): 'Unde talem potestatem nec papa nec imperator habere debet super communitatem fidelium, quia nullus eorum valet tollere iura et libertates inferiorum sine culpa et absque causa, nisi in casu necessitatis'.

to 'sine culpa et sine causa' when he argued against John that Adam would not have lost his 'dominium proprium' without any fault of his own simply because Eve was brought into being[182] — but it quickly became integrated into a larger defence of humankind's freedom to acquire property and create governments in our fallen state. As Tierney has most recently emphasized, these activities occur within the framework of a (belief in a) permissive natural law. In our post-lapsarian world, it is expedient and useful, and indeed even necessary for living well. But it is not, strictly speaking, necessary that there be private property;[183] nor is it necessary that governments and various regimes of private or communal ownership be such as they now happen to be.

It is his strong emphasis on our freedom, Christian and non-Christian alike, to arrange many aspects of our affairs that made one commentator label Ockham a defender of "human freedom."[184] Ockham was not unique in this regard, for medieval canonists were no less able defenders as well. Like Ockham, they operated on the assumption that people were 'capable of deliberating and of choosing to the good and to avoid the evil'.[185] Rufinus's well-worn description of *ius naturale* as 'a certain force implanted in human being(s) by nature for doing good and avoiding its opposite' is by no means out of place here.[186] It is a power, individually 'had', which we might — lamentably —

[182] *OND* 27.85-96 (2:488). Ockham did not believe Adam had exclusive lordship prior to the Fall; he was simply giving another reason why the pope's belief that Adam had had such lordship was incoherent.

[183] *Brev*. 3.7.47-77 (4:179-180); see Tierney, *Liberty and Law* 100-116.

[184] Shogimen, *Ockham and Political Discourse* 232-262.

[185] Reid, 'Thirteenth-Century Canon Law and Rights' 330-331, 340-341. Or, to approach the matter from a different perspective, consider the rich medieval jurisprudence devoted to the problem of proving insanity: what seemed much less debatable was that wrongful actions could be imputed to a *furiosus*; e.g., Dig. 47.10.3.1 (1:830). As Gratian noted once, insanity is punishment enough: 'cum non sit peccatum, est tamen pena peccati', C.15 q.1 d.p.c.2 § 1 (1:746). Regarding the burden of proof, see Brandon T. Parlopiano, 'The Burden of Proving Insanity in the Medieval *Ius commune*', *The Jurist* 72 (2012) 515-543.

[186] Rufinus, in H. Singer ed., *Summa decretorum magistri Rufini* (Paderborn 1963 [1902]), to D.1 d.a.c.1 (6).

misuse, but that is not its purpose. It is tied to an objective moral order.

Ockham has lately been described as 'liberal or constitutionalist' for his belief that the natural rights and liberties of individuals put constraints on rulers;[187] this same stress on inalienable rights and liberties has led others to consider Ockham a proponent of a form of republicanism.[188] What is good about both these analyses is that they recognize the rights and liberties as existing within a larger commitment to the ideal of government existing and working for the common good. Thus, a concern for rights and liberties, which rulers were to allot and preserve alongside necessary and just laws,[189] might well need curtailing or revoking in the name of the common good, necessity, or utility.[190] As Hostiensis once explained: 'public utility is preferred to private utility . . . a greater good is to be preferred to a lesser . . . [and] common utility is to be preferred to private utility'.[191] Similarly, while canonists all agreed that most 'iura' could be renounced,[192] for his part, Innocent pointed out that a 'ius publicum' could not.[193] At another point in his commentary, he noted that things introduced for public utility were also not renounceable.[194] Utility and the common good often trump an individual's 'ius'. Or, as Ockham would often later say, utility can be made equal or

[187] Tierney, *Idea of Natural Rights* 183.

[188] Shogimen, *Ockham and Political Discourse* 256-261.

[189] Cf. *OQ* 3.8.4-7 (1:109-110): '. . . ad principantem, de quo est sermo, multa pertineant, videlicet iura sua unicuique tribuere et servare, leges condere necessarias atque iustas, iudices inferiores et alios officiales constituere . . .'.

[190] Such a concern is often evident in Ockham's writings; many are noted by Tierney, *Idea of Natural Rights* 189-191.

[191] Hostiensis, *Lectura* to X 1.9.10, fol. 94vb, 95ra, 97ra): 'Nam publica utilitas prefertur priuate . . . ; quia maius bonum minori est preferendum . . . ; Sic ergo habes hic argumentum quod communis utilitas preferenda est priuate ...' Cf. Dig. 1.1.11, one of the stronger classical statements to connect 'ius' and the interests of a people.

[192] X 2.2.12.

[193] Innocent IV to X 2.2.12, fol. 198rb, n.1; Innocent IV to X 2.26.16, fol. 300vb, n.1.

[194] Innocent IV to X 1.29.43, fol. 144rb, n. 1.

compared to necessity.[195]

However, Shogimen's insistence on inalienable rights and Tierney's on natural ones distort the picture: most rights, then and now, are 'temporal', that is, the products of human positive law. Some rights and liberties Ockham imagined surely were natural, and therefore inalienable; but many were not.[196] I would argue that Ockham thought most were not. That is, it is not because they were natural or God-given that rendered them exempt from arbitrary despoliation. To take the example of property, it is surely incorrect to imagine that Ockham was more worried about a ruler taking away an individual's 'right' to acquire property than arbitrary interference with one's actual property. But only the former is (normally) God-given: it is, in Miethke's words, a 'potestas acquirendi dominium', which one may (or may not) choose to exercise.[197] Actual property ownership is historically contingent, based in human law, and fundamentally (according to the Franciscan perspective, at least) alienable and renounceable. In fact, many rights and liberties can be voluntarily restricted, 'by vow, promise, or some such other way', by their possessor; and this too is due to the promise of the law of evangelical liberty.[198]

[195] Cf. Gaines Post, 'Theory of Public Law', *Seminar* 6 (1948) 51-55. For Ockham, see n. 155, above.

[196] Ockham could have been more helpful here. Sometimes the rights and liberties are described as given by God (and nature), sometimes there is no further specification. The *Breviloquium* is a good illustration of the problem. Brev. prol. 6-11 (4:97), 2.17.3-6 (4:146), and 2.20.18-28 (4:154), clearly speak of the former; whereas Brev. 2.21.30-33 (4:156), is uncertain; and *Brev*. 4.1.40-46 (4:194-195) and 5.1.11-14 (4:221) seem clear descriptions of human law-based rights and liberties. Cf. *AP* 6.148-181 (1:250-51).

[197] Jürgen Miethke, '*Dominium*, *ius* und *lex* in der politischen Theorie Wilhelms von Ockham', Lex *und* Ius*: Beiträge zur Grundlegung des Rechts in der Philosophie des Mittelalters und der Frühen Neuzeit*, eds. A. Fidora, M. Lutz-Bachmann, A. Wagner (Politische Philosophie und Rechtstheorie des Mittelalters und der Neuzeit, Texte und Untersuchungen, II.1; Stuttgart-Bad Cannstatt 2010) 250-51; cf. J. Miethke, 'The Power of Rulers and Violent Resistance Against an Unlawful Rule in the Political Theory of William of Ockham', *Revista de ciencia política* 24.1 (2004) 214.

[198] *IPP* 9.26-34 (4:300-301): 'Ut autem generaliter explicetur, quae spectant ad iura et libertates aliorum laicorum et clericorum, religiosorum et saecularium, puto quod huiusmodi sunt omnia illa, quae nec bonis moribus, nec hiis, quae in

But despite their mundane origins and justification, they are no less inviolable outside cases of necessity or where no fault or cause attaches for their restriction or removal. Any government which could interfere with any non-natural rights without fault or cause was unlikely to be one aiming for the common good — neither for Ockham, nor for the canonists, nor for many others besides.

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Novo Testamento docentur, inveniuntur adversa, ut ab huiusmodi nullus Christianus sine culpa et absque causa rationabili et manifesta per papam valeat coerceri, nisi ad abstinendum ab aliquo tali per votum promissionem vel alium quemvis modum sponte obligaverit semetipsum, vel per alium superiorem suum, cui debeat obedire, astringatur. Et haec est libertas evangelicae legis, quae in sacris litteris commendatur'.

‘May a Man Marry a Man?’: Medieval Canon Lawyers and Theologians Analyze Same-Sex Unions

Charles J. Reid, Jr.

The Medieval Debate: Pre-History

The possibility of same-sex marriage was raised for the first time in the ancient world. The Emperor Nero, the ancient historians agreed, entered into a same-sex union with a galley slave during an elaborate public festival.[1] The ancient writers, who were stern moralists, were highly critical of this action.[2] The historian Tacitus went so far as to connect, by implication, Nero's marriage with the great fire in Rome and with his eventual overthrow.[3]

It is possible that Nero's action briefly occasioned imitators. If the satirists Juvenal and Martial are to be believed, some men at least chose to follow Nero's example and enter into unions with other men.[4] Again, however, Juvenal and Martial do not record this conduct approvingly. Rather, they make these actions a target for their biting acidic humor.[5]

Other examples from the ancient world are more problematic. John Boswell discusses the paired saints Serge and Bacchus. Two soldiers in service of the Roman Army, they were close

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[1] Accounts of this marriage can be found in Tacitus, *Annales*, 15.37; Cassius Dio, *Historia Romana*, 61.28, 62.12; and Suetonius, *Vitae Caesarum, Nero*, 28-29.

[2] Michael J. Mordine, ‘Domus Neroniana: The Imperial Household in the Age of Nero’, *A Companion to the Neronian Age* (West Sussex 2013) 102-117, here 114-115.

[3] Tacitus’s Latin was harsh in its condemnation. He spoke of Nero’s action as ‘leaving no outrage undone’ (nihil flagitii reliquerat). Tacitus, *Annales* 15.37.

[4] Karen K. Hersch, *The Roman Wedding: Ritual and Meaning in Antiquity* (Cambridge, 2010) 34-39.

[5] James Neill, *The Origins and Role of Same-sex Relations in Human Societies* (Jefferson NC 2009) 204.

companions during one of the last persecutions of the Church.[6] Revealed to be Christian, they suffered a joint martyrdom and still share the same feast day.[7] Boswell looks to the evidence of art history to suggest that they were depicted in early Christian iconography as a married couple,[8] but even he concedes that the evidence is not free of ambiguity.[9] It is safe to say that the explicit question of same-sex marriage did not arise again until the thirteenth century, when it was brought up by one of the most virtuosic lawyers of his or any age, the remarkable Hostiensis.

Hostiensis: Biography

Born in the year 1200 in a small town in the Piedmont region of present-day northern Italy, Henry of Segusio (who later became known as Hostiensis) entered the service of the Church as a young man and proved to be precocious.[10] He trained as a lawyer, earning doctorates in both canon law and Roman law.[11] He must have been hugely impressive to his contemporaries. He was well-versed in classical literature and Salimbene 'praised [him] for his

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[6] John Boswell, *Same-Sex Unions in Pre-Modern Europe* (New York 1994).
[7] Boswell, *Same-Sex Unions* 155.
[8] Discussed in the illustrations to Boswell's book.
[9] Boswell, *Same-Sex Unions* 147-161 (discussing the martyrdom of the two military saints, while also providing a close textual analysis of the Greek hagiography). Cf., Boswell, *Same-Sex Unions* 375-390 (providing a translation of 'The Passion of Serge and Bacchus' from the original Greek). Many contemporary commentators have abandoned nuance and see in this account unambiguous evidence of same-sex marriage.
[10] For Hostiensis' biography, see the important articles by Noel Didier, 'Henri de Suse en Angleterre (1236?-1244)', *Studi in onore di Vincenzo Arangio-Ruiz nel XLV anno del suo insegnamento* (Napoli 1953) 2.333-351; 'Henri de Suse, Éveque de Sisteron (1244-1250)', RHD 31 (1953) 244-270, 409-429; and 'Henri de Suse, prieur d'Antibes, prevot de Grasse (1235-1245)', SG 2 (1954) 595-617. Cf. Charles Lefebvre, 'Hostiensis', DDC 5 (1953), 1211-1227 (authored by one of the most insightful and learned canonists of the twentieth century).
[11] John W. Baldwin, *The Scholastic Culture of the Middle Ages, 1000-1300* (Prospect Heights IL 1997) 76.

learning, his singing, and his playing of the viol'.[12] By his middle thirties, he had already advanced far in the ecclesiastical hierarchy. Around the year 1235, he was named Prior of Antibes, in the south of France.

For Hostiensis, however, Antibes was merely the first step on an ascent into the upper reaches of church governance. In the late 1230s and early 1240s, Hostiensis journeyed more than once across the English Channel on diplomatic missions involving King Henry III.[13] He mediated a disputed episcopal election that featured as one of the contestants one of the greatest English legal minds of the age — William Raleigh.[14]

Nor was Henry III the only crowned head of Europe with whom Hostiensis was on familiar terms. He knew and consulted with Louis IX of France, the famous St. Louis.[15] And he had a close, ongoing relationship with the royal family of Savoy, at the time a powerful principality nestled between northern Italy and modern-day France.[16]

He found time in all of this statecraft to lecture briefly on law at the University of Paris. He also climbed steadily the ladder of ecclesiastical preferment. In 1244, he was elected Bishop of Sisteron, located in Provence, where he would have presided in the Église de Notre-Dame des Pommiers.[17] In 1250, it was off to the bishopric of Embrun, in the border area between modern France and Switzerland, and finally, in 1262, he was named

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[12] Ken Pennington, 'Henricus de Segusio (Hostiensis)', *Popes, Canonists, and Texts, 1150-1550* (Aldershot 1993) and idem, 'Enrico da Susa (cardinale Ostiense)', DGI 1.795-798.

[13] Frederick Maurice Powicke, *King Henry III and the Lord Edward: The Community of the Realm in the Thirteenth Century* (Oxford 1947) 272-273.

[14] Clarence Gallagher, *Canon Law and the Christian Community: The Role of Law in the Church According to the Summa Aurea of Hostiensis* (Rome 1978) 30-33. On Raleigh's significance as a jurist, see Thomas J. McSweeney, 'Between England and France: A Cross-Channel Legal Culture in the Late Thirteenth Century', *Law, Governance, and Justice: New Views on Medieval Constitutionalism*, Richard W. Kaeuper, ed. (Boston 2013) 75 nn.6-7.

[15] Didier, 'Henri de Suse, Eveque de Sisteron' 252.

[16] Frederick Maurice Powicke, *Ways of Medieval Life and Thought: Essays and Addresses* (New York 1964) 208.

[17] See generally, Didier, 'Henri de Suse, Eveque de Sisteron'.

Cardinal-Archbishop of Ostia, one of the most powerful positions in Christendom next to the papacy itself. He was a serious candidate for the Throne of St. Peter in the conclave of 1271 and might have been elected Pope had he not taken ill at Rome and died.

Hostiensis was among the most virtuosic of jurists — of his time and ours. Although he spent little time in the classroom and devoted himself almost entirely to the executive-level responsibilities of diplomacy and Church governance, he wrote constantly, continuously, voluminously. He produced three major works in the course of his career — a *Summa* or 'summary', of the law, which much later acquired the nickname 'the Golden Summa'; a *Lectura*, or 'reading' of the law, which is found in two recensions, the first completed sometime in the early to mid-1260s, and the second at the very end of his life. In its completed form it fills two very large printed volumes; and a commentary on the Letters of Pope Innocent IV.[18] In his will, Hostiensis ensured a sort of academic immortality by stipulating that copies of his *Lectura* be forwarded to the universities at Bologna and Paris.[19]

His writing style glistens with cross-references (the medieval equivalent of footnotes), coruscating, cascading cross-references — to Roman law, to canon law, to the ancient Church fathers, to the Bible, to philosophers, ancient and medieval, pagan and Christian alike. To enter his writing is in a sense to travel to a parallel universe, in which much of the reasoning process takes place between the lines, in the cross-references that are heaped on top of one another, each them reflecting the many associations and avenues of thought even seemingly minor questions of canon law prompted in his endlessly curious mind.[20]

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[18] James A. Brundage, *Medieval Canon Law* (New York 1995) 214; Wim Decock, *Theologians and Contract Law: The Moral Transformation of the Ius Commune (ca. 1500-1650)* (Legal History Library 9; Leiden-Boston 2013) 94-96.

[19] Pennington, 'Henricus de Segusio' 5 and 8.

[20] The sophisticated use of cross-references was a significant feature of high and late medieval legal reasoning. See Mario Ascheri, *The Laws of Late Medieval Italy (1000-1500): Foundations For a European Legal System* (Boston 2013) 196-198.

His work is well-respected today by medieval historians for its creativity and its comprehensive scope. He proposed a series of legal fictions on the subject of usury which had the effect of transforming the field and thereby ushering in modern commercial credit practices. Early canon lawyers were biblical literalists who argued that Jesus' admonition to 'lend freely asking nothing in return' must mean that Christians could not charge interest on loans.[21] Hostiensis, however, overturned this way of thinking by proposing that money had a natural profitability and that a lender gave this up when he loaned money out. Hence, Hostiensis argued, lenders were free to charge moderate interest on the theory that only by doing so could they recapture the profit they might otherwise realize. 'Lucrum cessans' and 'damnum emergens' — 'the cessation of profit' and 'prospective loss' — were the concepts he used to frame the doctrine.[22]

He proposed a theory of international relations and the papacy in the final recension of his *Lectura* which had the effect of elevating the pope to a position of headship over the entire world. On the one hand, he asserted that non-Christians lost all rights to self-governance with the coming of Christ. To be sure, as a factual matter, many non-Christian societies of his time still governed themselves — the Muslims of the Arab world, the Mongols who threatened Europe's periphery and to whom Pope Innocent IV had sent diplomatic missions.[23] Hostiensis, however, favored instead grand theory utterly divorced from the messy details of the here and now, arguing that it belonged properly to

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[21] James Davis, *Medieval Market Morality: Life, Law, and Ethics in the English Marketplace, 1200-1500* (Cambridge 2012) 65.

[22] John T. Noonan, Jr., *The Scholastic Analysis of Usury* (Cambridge MA 1957) 118; Joel Kaye, *Economy and Nature in the Fourteenth Century: Money, Market Exchange, and The Emergence of Scientific Thought* (Cambridge 1998) 84-85.

[23] Jill N. Claster, *Sacred Violence: The European Crusades in the Middle East, 1095-1396* (Toronto 2009) 246-247; William D. Phillips, 'Voluntary Strangers: European Merchants and Missionaries in Asia During the Late Middle Ages', *The Stranger in Medieval Society*, edd. F.R.P. Akehurst and Stephanie Van D'Elden (Minneapolis 1997) 17-18.

the pope to claim all of these lands for Christ.[24] And in a move that closed the circle of this reasoning, he asserted that the pope alone should enjoy a monopoly over war-making power, arguing that the secular rulers of Europe had no right to engage in war except at papal command.[25] In all of this theorizing, Hostiensis differed notably from his contemporary Pope Innocent IV and his own earlier views.[26]

Hostiensis, in other words, might be seen today as a kind of Christian imperialist, seeking through powerful logical reasoning to leave little room for an independent secular order, whether Christian or non-Christian. We do not share this worldview today. Indeed, its breadth and totality would be frightening on the contemporary landscape. But even so, Hostiensis remains a powerful juristic mind whose intelligence and command of the sources allowed him to frame arguments which, for good or ill, continue to exert influence upon us today.

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[24] James Muldoon, *Popes, Lawyers, and Infidels: The Church and the Non-Christian World, 1250-1550* (Philadelphia, PA, 1979), 16-18. Cf. James Muldoon, 'A Canonistic Contribution to the Formation of International Law', *The Jurist* 28 (1968) 265-272; and James Muldoon, 'The Contribution of the Medieval Canon Lawyers to the Formation of International Law', *Traditio* 28 (1972) 483-497 (further developing and elaborating upon these points). Cf. Charles J. Reid, Jr., 'Paulus Vladimiri, the Tractatus, Opinio Hostiensis, and the Rights of Infidels', *Sacri Canones Servandi Sunt: Ius Canonicum et Status Ecclesiae Saeculis XIII-XV*, ed. Pavel Krafl (Prague 2008) 419-423 (exploring a fifteenth-century canonistic refutation of Hostiensis' bold claims).

[25] I review this claim in Charles J. Reid, Jr., 'The Rights of Self-Defence and Justified Warfare in the Writings of the Twelfth- and Thirteenth-Century Canonists', *Law as Profession and Practice: Essays in Honor of James A. Brundage*, edd. Kenneth Pennington and Melodie Harris Eichbauer (Burlington VT 2011) 87-88.

[26] On Innocent IV, see Alberto Melloni, 'Sinibaldo Fieschi (Innocenzo IV, papa)', DGI 2.1872-1874. James Muldoon, 'Papal Responsibility for the Infidel: Another Look at Alexander VI's Inter Caetera', CHR 64 (1978) 170-172. Cf. Carlo Focarelli, *International Law as Social Construct: The Struggle for Global Justice* (Oxford 2012) 97-99 (developing and elaborating upon the received historiography).

Hostiensis Analyzes Same-Sex Marriage

Hostiensis wrote extensively about marriage and at times he could propose highly creative turns of phrase. He seems, for instance, to have coined the expression 'rights of women', even if it was to deny that women had rights equal to men.[27]

But even to suggest that a thirteenth-century canon lawyer conceived of the possibility of same-sex marriage is to sound the alarm of anachronism. And, for sure, Hostiensis did not — could not — have the modern debate in mind. Rather, it seems that Hostiensis first raised this provocative question as a way of showing off. He was a virtuoso of the law and he wanted his readers to understand that. So he would moot a question no one had ever thought to ask.

Hostiensis raised the question laconically in his *Summa*. He began by noting what he believed marriage to be 'A joining of male and female that keeps a single way of life and that constitutes a communion of humankind and the divine'. [28] Hostiensis followed this definition with a series of cross-references, a survey of which reveals that he was borrowing and synthesizing a pair of complementary definitions drawn from Roman law.[29]

In other words, Hostiensis had yet to say anything remarkable. What is of interest, however, is what came next. Hostiensis wished to address the male/female duality of marriage: 'And so let us suppose a male and a female; because it cannot happen with the same sex'. [30] In a single, terse utterance,

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[27] Charles J. Reid, Jr., ''So It Will Be Found that the Right of Women in Many Cases is of Diminished Condition': Rights and the Legal Equality of Men and Women in Twelfth- and Thirteenth-Century Canon Law', 35 *Loyola (Los Angeles) Law Review* (2002) 476-477. Cf. Charles J. Reid, Jr., *Power Over the Body, Equality in the Family: Rights and Domestic Relations in Medieval Canon Law* (Grand Rapids, MI 2004), 99-151 (exploring areas of equal and disparate treatment of women's rights in medieval canon law).

[28] Hostiensis, *Summa*, 4.1 (*De Matrimonio*): 'Coniunctio maris et femine individuam vite consuetudinem retinens divini et humani generis communicatio'.

[29] See *Institutes* 1.9; and *Digest* 23.2.1. Hostiensis' Latin closely tracks the language of these two definitions.

[30] Hostiensis, *Summa* 4.1.

Hostiensis had broached the subject of same-sex marriage if only to deny its possibility.

What was the basis for this denial? This question can only be answered by studying the pattern of cross-references that Hostiensis used to support his assertion. His argument, after all, was embedded within a larger universe of citations and so requires proper excavation.

His very first reference was to one of the more notoriously extreme passages of Justinian's *Codex*. Reprinting a decree of his fourth-century Christian predecessors, the Emperors Constantius and Constans, the Emperor Justinian repeated:[31]

> When a man marries a woman and this woman has become pregnant, what does he desire? Men? Where he has destroyed the proper place of sex, where what he desires is a crime that confers no advantage, where passion (Venus) assumes another form, where love is sought but remains unseen, there we command the law to arise and arm itself with vengeful right and subject to the full measure of the law all who have or will commit such disgraceful acts.

Hostiensis, in other words, had effectively though tacitly, through use of cross-references, possibly endorsed the infliction of the death penalty for men who abandoned their wives for gay lovers,[32] an extreme position at variance with the great bulk of Roman law.[33]

Hostiensis, however, was not content with this declaration of enmity by two early Christian emperors.[34] He sought more recent

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[31] Cod. 9.9.30: 'Cum vir nubit in feminam, femina viros proiectura quid cupiat? Ubi sexus perdidit locum, ubi scelus est id quod non proficit scire, ubi Venus mutatur in alteram formam, ubi Amor queritur nec videtur: iubemus insurgere leges, armari iura gladio ultore, ut exquisitis poenis subdantur infames, qui sunt vel qui futuri sunt rei'.

[32] On the infliction of the death penalty under this statute, see James A. Brundage, *Law, Sex, and Christian Society in Medieval Europe* (Chicago 1987) 108 n.151.

[33] See Byrne R.S. Fone, *Columbia Anthology of Gay Literature: Readings from Western Antiquity to the Present Day* (New York 1998) 61, 100 (stressing how this text is unrepresentative of the Roman tradition). But see also John J. McNeill, *The Church and the Homosexual* (London 1993) 77 (emphasizing the literal horror of the condemnation).

[34] Hostiensis also referenced a second, extremely harsh text of Roman law in his cross-references. This was a decree of the Emperor Justinian found in the

confirmation of his own hostility in a decree of the Third Lateran Council (1179). This decree was excerpted in the *Liber Extra* promulgated by Pope Gregory IX in 1234, condemned the 'sin against nature' whether committed by clerics or laity.[35] It mandated harsh punishment for both classes of persons though not as extreme as the Roman legal text Hostiensis had just cited. Clerics were to be removed from office and confined to a monastery; lay persons were to be excommunicated.[36] It further instructed ecclesiastical officials to be vigilant in their investigations of this crime since its very commission aroused the wrath of God as witnessed in the Old Testament.[37] The reference was plainly to the destruction of Sodom and Gomorrah.[38]

By supplying this cross-reference, Hostiensis had effectively inserted into the marriage law of the Church the developing theological enmity to same-sex relations. This theology was grounded on a belief that only sexual intercourse open to procreation was natural — a view that began to coalesce in canonistic commentaries in the eleventh and twelfth centuries.[39]

Authenticum, a medieval collection of legal texts many of which dated to the Byzantium of Justinian and his immediate successors. The text to which Hostiensis referred spoke of men who had given themselves over to the 'gravest wantonness' (gravissimis luxuriis). Justinian appealed to 'the right reason apparent to all' (qui recte sapient … manifestum) and to the Biblical condemnation of Sodom and Gomorrah. He proposed that such men must have been instigated by the Devil (diabolica instigatio). If they did not reacquire a healthy fear of God (dei timorem) and seek forgiveness, Justinian decreed that they should be subjected to the full force of the Roman State's wrath. See *Authenticum: Novellarum Constitutionum Iustianiani Versio Vulgata*, ed. Gustav Ernst Heimbach (Amsterdam 1974) 640-643.

[35] X.5.31.4.

[36] Ibid.

[37] Ibid.

[38] The allusion is to the cities of Sodom and Gomorrah, as recounted in chapters eighteen and nineteen of the Book of Genesis. This text should be read not as a condemnation of same-sex relations but as a violation of the custom of hospitality. The tradition that Sodom and Gomorrah were destroyed for their refusal to offer kindness to visitors and not for any sexual offense is especially strong in Judaism. See Harvey J. Fields, *A Torah Commentary for Our Times: Genesis* (New York 1990) 44-51.

[39] John T. Noonan, Jr., *Contraception: A History of Its Treatment by the*

Thus 'coitus interruptus' was a violation of the natural order as was masturbation.[40] So also was the taking of potions — we would call them contraceptives — by one of the parties.[41] Even unusual coital positions could come in for condemnation as yet one more example of unnatural acts.[42] What was occurring, in other words, was the triumph of a 'horror of bodily defilement and the narrowly construed reproductive function of sexual relations'.[43]

By the close of the twelfth century, this collection of highly restrictive principles, derived from a vision of the 'natural' which had room for only one model of sexual relations, came to be applied to same-sex relations. One can take Alain of Lille (c. 1116-c.1203) as an example of the way this migration of principles occurred. Alain's *De Planctu Naturae* became a means by which Alain transported into medieval philosophy some very crude images of same-sex relations. The work stretched the boundaries of conventional Latin style, blending together prose and metered poetry. Alain's word choice, his grammatical experimentation, and the contrasts and juxtapositions he set up were so jarring Alain's modern translator has sighed that he 'at times tortures the Latin language to such an extent that one is reminded of some of Joyce's English'.[44]

Allegorical and allusive in his writing, Alain meant in this essay to summon humankind back to a way of living in conformity

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Catholic Theologians and Canonists (Cambridge MA 1965), 172-173.

[40] Noonan, *Contraception* 172-173.

[41] Ibid. 187-188 and 223-226.

[42] James A. Brundage, 'Let Me Count the Ways: Canonists and Theologians Contemplate Coital Positions', *Journal of Medieval History* 10 (1984) 81-93.

[43] David Levine, *At the Dawn of Modernity: Biology, Culture, and Material Life in Europe after the Year 1000* (Los Angeles 2001), 76. Cf. James A. Brundage, '"Allas That Evere Love Was Synne": Sex and Medieval Canon Law', CHR 72 (1983), 11-12 (exploring the intellectual foundations of the 'primacy of reproduction' as a canonistic doctrine in the twelfth and thirteenth centuries).

[44] Alain of Lille, *The Plaint of Nature: Translation and Commentary*, ed. and trans. James J. Sheridan, (Toronto 1988) 33. Alain was fond of allusions to the work of Juvenal. See, Mecthilde O'Mara, 'Curuca and Juvenal, Satire Six', *Classical Philology* 74 (1979), 242-244.

with nature. Nature, he feared, had abandoned her governing role over God's creation and humankind, left to its own devices, is making a mess of things.[45]

He wished to make this point in particular by what he saw as the unnaturalness of male-on-male sexual relations.[46] Venus is the goddess of love, the great classical metaphor for sexual attraction,[47] and Alain proposed that there were then two great 'Venuses' contending for control of human sexual impulses. In combination, they attack Nature,[48] the great creative force who had made the world and all its inhabitants in her image and likeness.[49]

Alain attentively dwelt on Nature, describing her in intimate, intricate detail — we study her cloak, her visage, her decrees, her disappointments in man's failings.[50] In Alain's opening verses, we see Nature weep as she withdraws her favor, banishing her laws from the world, the modesty she prescribes for humankind subsisting as a lonely orphan.[51] The two Venuses, on the other

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[45] The Latin text of the De Planctu Naturae has been edited and is found as Nikolaus M. Häring, 'Alain of Lille, De Planctu Naturae', *Studi Medievali* 19 (1978) 806-879.

[46] A plausible case has been made that Alain's novel grammatical usages were intended for polemical purposes. 'Many of the grammatical metaphors in the De Planctu Naturae', it has been observed, are used '[in association] with a sexual orientation of which Alain disapproved'. Jan M. Ziolkowski, *Alain of Lille's Grammar of Sex: The Meaning of Grammar to a Twelfth-Century Intellectual* (Cambridge MA 1985) 16-21.

[47] Theresa Lynn Tinkle, *Medieval Venuses and Cupids: Sexuality, Hermeneutics, and English Poetry* (Redwood City CA 1986) 5-6.

[48] Barbara Newman, *God and the Goddesses: Vision Poetry and Belief in the Middle Ages* (Philadelphia 2003) 87.

[49] Alain of Lille, *The Plaint of Nature*, trans. Douglas M. Moffat (Yale Studies in English 36; New York 1908) Prose III, 23-32 (describing Nature's creative powers, acting at the direction of a remote creator God). Cf., Newman, *God and the Goddesses* 87 (making the point Alain actually sees the feminine 'Nature' as the creative force in the universe with 'God' added as a necessary afterthought).

[50] Alain of Lille, *The Plaint of Nature* Prose I, 6-17.

[51] Ibid. Meter I, 1-5. Repeated invocations of natural law characterize the poem. Thus in four lines, in Prose 4, as found in Häring's edition, we find variants of the word 'lex' used twice; 'ius' also used twice; and the terms 'statutum' and

hand, fill the stage: they fight one another and their combat transforms one of them into a monster. This monstrous Venus 'reverses the rules of sexuality',[52] thereby turning 'hes into shes' (illos facit illas).[53] 'Through magical arts [she] de-mans man'.[54]

While Alain's poem is not exclusively preoccupied with same-sex attraction (avarice is also roundly and repeatedly condemned), Alain did make deep and extensive use of sexual orientation as a metaphor for moral decay.[55] Sounding much like the passage of Roman law cited by Hostiensis, Alain even hoped that 'the laws might arm themselves with justice in order to gain recompense with their avenger's sword for their injuries'.[56]

For our purposes, of course, this work stands as stark evidence of the degree to which same-sex attraction had come to be seen in the medieval mind as contrary to the natural order of which humanity was a part.[57] Homosexual acts, in the medieval mind, constituted an offense against the natural order.[58] And Hostiensis, through his cross-references, had now encoded this homophobic interpretation of human sexuality into the law of marriage.

But, the objection might be raised at this point, Hostiensis' reference to same-sex marriage seemed extremely brief and indirect — too brief, perhaps, to justify an excursion of some length into a large body of material and ideas he merely cross-referenced and did not discuss directly.

In truth, Hostiensis was merely warming up. He was about to

'edictum' used once each. See Häring ed., 'Alain of Lille, De Planctu Naturae', 833 lines 10-13, Prose 4.

[52] Ibid. 834.

[53] Alain of Lille, *The Plaint of Nature*, Meter I.

[54] Ibid.

[55] Richard Hamilton Green, 'Alain of Lille's De Planctu Naturae', *Speculum* 31 (1956), 673.

[56] 'Contra hos omnes conqueruntur iura, leges armantur, et ultore gladio suas affectant iniurias vindicare' (quoted in Häring 'Alain of Lille, De Planctu Naturae' 836).

[57] Louis Crompton, *Homosexuality and Civilization* (Cambridge MA 2003) 205-206.

[58] Joseph Pequigney, 'Sodomy in Dante's Inferno and Purgatorio', *Representations* 36 (1991) 23.

embark upon an extended legal and scriptural discussion of same-sex marriage — the earliest instance of such a discussion, so far as I can tell, in the entire Western legal tradition. The outcome of this discussion was foreshadowed with what we have discussed so far — making use of Scripture and the writings of early popes, Hostiensis was now prepared to launch upon the most detailed set of objections to same-sex marriage found in any medieval source.

At the beginning, Hostiensis asserted, looking to the Creation account in *Genesis*, God did not create two men or two women.[59] Rather, he created the human race in a precise sequence, first the man, then the woman.[60] This act of divine intervention was held up by Hostiensis, without further reasoning, as the archetype of all legitimate human sexual and familial relations. Marriage, to conform to this divinely-mandated *exemplum*, could therefore only be between a man and a woman.[61]

Other canonists had declared that marriage could only occur between a man and a woman. Paucapalea had said as much in the 1150s.[62] The anonymous author of the *Summa, Induent sancti* stated that marriage could only take place between a man and a woman because men and women were bound by a 'correlatio'.[63] 'Correlatio' is a difficult word to translate but it must mean something like complementarity between male and female.[64] But

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[59] Hostiensis, *Summa* 4 *De Matrimoniis*, 1.

[60] Ibid.

[61] Hostiensis did not cite the Book of Genesis directly. Rather, he cited a letter of St. Ambrose found in an older canonical collection, the Decretum of Gratian. In this letter, St. Ambrose decreed on biblical grounds that a married woman must always be subject to the rule of her husband and so may not hold any position of authority, or teach, or serve as a witness or a judge, or pledge security on a commercial contract. Cf. C.33 q.5 c.17 (the passage in question). In a single argument, Hostiensis laid the groundwork both for a homophobic defense of marriage and for male patriarchy.

[62] Paucapalea, Johann F. von Schulte ed. *Summa über das Decretum Gratiani* (Giessen 1890, reprinted Aalen 1965) 111.

[63] Richard M. Fraher, *Summa, Induent Sancti: A Critical Edition of a Twelfth-Century Canonical Treatise* (Ph.D. dissertation, Cornell University 1978) 300.

[64] This mode of thinking persists within ecclesiastical circles. See, for instance, John Paul II, 'Man Is a Subject of Knowledge and Freedom', General Audience, April 23, 1986. It is also the unspoken premise of Sherif Girgis, Ryan T.

even though these authors discussed the sex and gender differences of married partners, none of Hostiensis's predecessors had thought to ask whether a man might marry a man.

Hostiensis continued by looking to the sacramental theology of the Church. A sacrament, in the medieval mind, was a grace-conferring sign and symbol of God's active presence in the world.[65] And Hostiensis now sought to identify what it was about marriage that made it an effective sign of God's presence.

He found that symbolism in the sexual differences of the parties. Nuptials could only come into being as a co-mingling of the sexes.[66] And it was this co-mingling that reflected Christ's marriage with the Church, as he co-mingled his own male essence with the feminine *Ecclesia*.[67] A marriage of two males or two females could not effectuate this representation since one sex, on its own (in se), could never symbolize both Christ and the Church.[68] As support, Hostiensis cited a text of Pope Leo I's (reigned 440-460),[69] but he moved far beyond Leo with his discussion of same-sex unions.

The Emperor Nero partook of a same-sex marriage ritual during one of his spectacular feasts. The poets Juvenal and Martial lampooned men who imitated that Emperor by engaging in such ceremonies themselves. But all of this had taken place in the world of stage and theater, or in the biting verses of the satirists. No lawyer had ever raised the question of same-sex unions — until

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Anderson, and Robert P. George, *What Is Marriage? Man and Woman: A Defense* (Jackson TN 2012) 23-36 (a traditionalist account of heterosexual marriage).

[65] For the general understanding of 'sacrament' at the time Hostiensis wrote, see Seamus P. Heaney, *The Development of the Sacramentality of Marriage from Anselm of Laon to Thomas Aquinas* (Washington DC 1963) 73-136.

[66] Hostiensis, *Summa*, 4, *De Matrimoniis*, 1.

[67] Ibid.

[68] Ibid.

[69] Ibid. See C.27 q.2 c.17 (excerpting Pope Leo). 'There is no doubt', Pope Leo wrote, 'that the society of marriage was so instituted from the beginning that there can be no sacrament of Christ and the Church except in the commingling of the sexes'. ('Cum societas nuptiarum ita a principio sit instituta, ut preter conmixtionem sexuum non habeant in se nuptiae Christi et ecclesiae sacramentum, non dubium est'). Ibid.

Hostiensis.

Antoninus of Florence

Florence, in the mid-fifteenth century, was governed by two large and impressive figures: Cosimo de' Medici ruled the city-state's secular affairs; while his exact contemporary Bishop Antoninus, governed Florence's ecclesiastical affairs.

The two men were born a few months apart in the same year, 1389. Cosimo, however, would outlive Antoninus by five years, dying in 1464 (Antoninus passed away in 1459). If not precisely friends — can one really conceive of Cosimo de' Medici being genuinely close with anyone? — the two men could be called tactical allies, although they certainly had their contentious moments.[70]

Antoninus was born in Florence, the only child of a notary.[71] His family, while financially secure, was hardly prosperous.[72] As an adolescent, he felt called to the religious life.[73] At the age of fifteen, when he approached the Dominican Order about a vocation, he was advised to read heavily in canon law.[74] He immersed himself in Gratian's *Decretum*, a principal text of

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[70] Antoninus was a supporter of Florence's republican form of government and even approved of the state's taxation of clerics. See Gene A. Brucker, *Renaissance Florence* (New Dimensions in History; New York 1969) 201. On the other hand, when in 1458 Cosimo de' Medici sought to abolish the secret ballot in order to consolidate his power within Florence, he was opposed and eventually defeated by Antoninus of Florence. See David S. Peterson, 'State Building, Church Reform, and the Politics of Legitimacy in Florence, 1375-1460', edd. William J. Connell and Andrea Zorzi *Florentine Tuscany: Structures and Practices of Power* (Cambridge Studies in Italian History and Culture; Cambridge-New York 2000) 122-143 at 142.

[71] Arnaldo D'Addario, 'Antonino Pierozzi, santo', DBI 3 (1961) 524-532; Maria Pia Paoli, 'S. Antonino "vere pastor ac bonus postor": Storia e mito di un modelo', *Verso Savonarola: Misticismo, profezia, empiti riformistici fra Medioevo ed Età moderna*, edd. G. Garfagnini, G. Picone (Florence 1999) 83-139, especially 83 n.1.

[72] David Farmer, *Oxford Dictionary of the Saints* (5th ed. rev. Oxford, 2011) 23.

[73] Ibid.

[74] Ronald C. Finucane, *Contested Canonizations: The Last Medieval Saints, 1482-1523* (Washington DC 2011) 169.

medieval canon law;[75] and while Antoninus never formally took a degree in canon law, his work reveals a significant degree of legal sophistication.[76]

Pious, if not austere, Antoninus was especially attracted to a new movement within the Dominicans called the Observants.[77] His master was Giovanni Dominici,[78] a leading Dominican theologian, a cardinal, and a force to be reckoned with at the Council of Constance (1414-1418).[79] Antoninus, however, was not drawn to the grand theatrics and high politics of the conciliar movement as it played itself out over the middle fifteenth century.[80] He preferred instead to focus on the reform of the

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[75] Ibid.

[76] For an example of Antoninus' fluency in a densely technical area of canon law — the law of patronage — see Jill Burke, *Changing Patrons: Social Identity and the Visual Arts in Renaissance Florence* (University Park PA 2004) 102.

[77] The 'Observant Dominicans' was a loosely-connected movement that was itself part of a larger campaign for reform that swept through the fifteenth-century religious orders. These 'observantine' movements sought stricter obedience to the rules of the order and the steady adherence to spiritual practices. See Euan Cameron, *The European Reformation* (2nd ed. Oxford 2012), 47-49. Within the Dominican Order, Observants generally sought a more practically-grounded theology. See Michael David Bailey, *Battling Demons: Witchcraft, Heresy, and Reform in the Late Middle Ages* (Magic in History; University Park PA 2003) 18-19. Observant Dominicans tended to take the lead in the Inquisition. See generally, Michael Tavuzzi, *Renaissance Inquisitors: Dominican Inquisitors and Inquisitorial Districts in Northern Italy, 1474-1527* (Studies in the History of Christian Traditions 134; Leiden-Boston 2007). The zealot Savonarola, who sought to reform Florence at the end of the fifteenth century and ended up being executed by the City Fathers, was also associated with the Observant Dominicans. See Lauro Martines, *Fire in the City: Savonarola and the Struggle for the Soul of Renaissance Florence* (Oxford-New York 2006) 1-6.

[78] Finucane, *Contested Canonizations* 169.

[79] On Dominici's leading political role, see Thomas A. Fudge, *The Trial of Jan Hus: Medieval Heresy and Criminal Procedure* (Oxford 2013) 276; and Carol M. Richardson, *Reclaiming Rome: Cardinals in the Fifteenth Century* (Brill's Studies in Intellectual History 173; Leiden-Boston 2009) 48.

[80] To be sure, however, Antoninus did participate as a theological consultant in the Council of Florence, in the 1430s. See Mandell Creighton, *A History of the Papacy during the Period of the Reformation*, 2: *The Council of Basel to the Papal Restoration* 1418-1464 (London 1882) 504; and Sally J. Cornelison, 'Tales of Two Bishop Saints: Zenobious and Antoninus in Florentine

Church especially in and around Florence.

And he soon proved that he was exquisitely gifted at reform. He became prior of the abbey at Cortona in his twenties; not yet thirty, he moved, in 1418 to Fiesole, where he also served as prior. Then it was on to Naples and Rome. In Rome, he was made a prior of a Dominican abbey and, in acknowledgement of his legal acumen, also nominated to a seat on the Roman Rota, the rough Catholic equivalent of the Supreme Court. He became Vicar General of the Observant Dominicans in 1432 and returned to Florence in 1436, where he established a new Dominican abbey known as San Marco, under the patronage of Cosimo de' Medici.[81]

In 1446, the episcopal see of Florence became vacant. Although there is no reason to believe that Cosimo disliked Antoninus — indeed, he had done favors for the rising young churchman — he did not want to see him made bishop. He had his own candidates. He hoped his cousin would be named bishop, or at least another candidate from his inner circle whom he might trust implicitly.[82] Pope Eugenius IV, however, sensed the need for an independent-minded bishop, if only to preserve the church's integrity in a delicate political atmosphere.[83] Antoninus was that man and he was elevated to the episcopal office in 1446 (his reputation was such that he even received votes for pope when Eugenius died in 1447).[84]

Antoninus threw himself into the life of the city. He became

Renaissance Art and History', *The Sixteenth Century Journal* 38 (2007) 635.

[81] For these biographical details, see Thomas C. McGonigle and Phyllis Zagano, *The Dominican Tradition* (Collegeville MN 2006) 54-55; Maria Grazia Pernis and Laurie Adams, *Lucrezia Tornabuoni de'Medici and the Medici Family in the Fifteenth Century* (New York 2006) 30-31; Gene A. Brucker, *Giovanni and Lusanna: Love and Marriage in Renaissance Florence* (Berkeley 1986), 11-12; Manfredo Tafuri, *Interpreting the Renaissance: Princes, Cities, Architects* (Harvard University Graduate School of Design; New Haven-Cambridge 2006) 152; and Farmer, *Oxford Dictionary of the Saints* 23.

[82] John M. Najemy, *A History of Florence, 1200-1575* (Maiden MA 2006), 290.

[83] Ibid. Cf. James Henderson Burns, ed. *The Cambridge History of Political Thought 1459-1700* (Cambridge 1991) 658-659 (providing further detail).

[84] David S. Peterson, 'Religion and the Church', *Italy in the Age of the Renaissance: 1300-1550*, ed. John M. Najemy (Oxford-New York 2004) 63, 73.

a great supporter of lay confraternities and the diversity of religious and social experiences they represented.[85] He encouraged charity, proclaiming a special solicitude for the poor.[86] He was a great patron of the arts.[87] One of his closest friends was the famous Renaissance painter Fra Angelico, whom he helped to recruit for the Dominican Order as a young man. Antoninus, finally, was also sure to back Cosimo's political program of Florentine greatness by being among the first to celebrate 'magnificence' as a special Florentine (and Medicean) attribute.[88]

Through all of this, much like his predecessor Hostiensis, Antoninus wrote incessantly on legal and moral themes. Indeed, he understood law and morals to be closely connected, law serving as a gateway to right conduct and virtuous living.[89] To an even greater extent than Hostiensis, Antoninus was a preeminent economic thinker, proposing important advances in areas such as monetary theory, foreign exchange, and even business ethics.[90] In his private life and public persona, he practiced a real poverty and humility, attempting to show by example how wealth and fortune should be regarded.[91] He was an important figure in the

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[85] John Henderson, *Piety and Charity in Late Medieval Florence* (Oxford-New York 1994), 58-59; and Konrad Eisenbichler, 'Italian Youth Confraternities in an Age of Reform', *Confraternities and Catholic Reform in Italy, France, and Spain*, edd. John Patrick Donnelly and Michael W. Maher (Sixteenth Century Essays & Studies 44; Kirksville MO 1999) 27-44 at 31-32 and 34-35.

[86] See, for instance, Marvin B. Becker, 'Aspects of Lay Piety in Early Renaissance Florence', *The Pursuit of Holiness*, edd. Charles Trinkaus and Heiko A. Oberman (Studies in Medieval and Reformation Thought 10; Leiden 1974) 187; and Francis W. Kent, '"Be Rather Loved Than Feared": Class Relations in Quattrocento Florence', *Society and Individual in Renaissance Florence*, ed. William J. Connell (Berkeley-London 2002) 13-50 at 32.

[87] Gilbert Creighton, 'The Archbishop on the Painters of Florence', *The Art Bulletin* 41 (1959), 75-87.

[88] Peter Howard, 'Preaching Magnificence in Renaissance Florence', *Renaissance Quarterly* 61 (2008) 340-356.

[89] Elizabeth McDonough, *The Concept of Law in the Summa Theologica of Antoninus of Florence* (J.C.L. dissertation, Catholic University 1980), 24.

[90] See generally Raymond de Roover, *San Bernardino of Siena and Sant'Antonio of Florence: Two Great Economic Thinkers of the Middle Ages* (Kress Library of Business and Economics; Boston 1967).

[91] Richard Finn, 'Justice, Peace and Dominicans, 1216-1999: Recovering the

development of the modern vocabulary of individual rights.[92] And as it was part of what any reforming bishop of the age did, he stressed a program of moral[93] and, more specifically, sexual reform.[94]

Antoninus Analyzes Same-Sex Marriage

Florence, at the time of Antoninus' arrival, had acquired a reputation throughout Western Europe for its gay underground. Michael Rocke, the preeminent historian of the subject, cautions that we should not thereby read into this statement our contemporary understandings of what a gay subculture should look like.[95] Still, the fame of this Florentine subculture had become well known to distant corners of Europe. Thus the Germanicized verb 'to Florence' (*florenzen*, past participle *geflorentz*) appears in German court records as a regular substitute for the verb 'to sodomize'.[96]

Florence had taken regular legal recourse against this subculture,[97] although it seems that in the 1430s the city fathers

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Apostolic Life: Antoninus of Florence', *New Blackfriars* 79 (2007) 416-427 at 417-419.

[92] Jussi Varkemaa, *Conrad Summenhart's Theory of Individual Rights* (Studies in Medieval and Reformation Traditions 159; Leiden-Boston 2012) 55-60.

[93] Miri Rubin, 'Europe Remade: Purity and Danger in Late Medieval Europe', *Transactions of the Royal Historical Society* 11 (6th series; Cambridge 2001) 101-124 at 109-110.

[94] Antoninus was especially severe in prosecuting the sexual offenses of his own clergy and apparently resorted to torture to obtain a confession from one cleric accused of pedophilia. See Finucane, *Contested Canonizations*, 175.

[95] 'Here it should be said … that if indeed the practice of sodomy was becoming more open and assuming new and characteristic collective features [in the mid-fifteenth century], this probably did not resemble anything like the highly visible, organized subcultures of the modern world populated by a consciously distinct and coherent category of persons who today might be called 'homosexuals,' an anachronistic model that hardly applies to these traditional societies'. Michael Rocke, *Forbidden Friendships: Homosexuality and Male Culture in Renaissance Florence* (Oxford 1996) 26-27.

[96] Helmut Puff, *Sodomy in Reformation Germany and Switzerland*, 1400-1600 (Chicago Series on Sexuality, History and Society; Chicago 2003) 13, 25.

[97] The City's condemnations were sometimes steeped in apocalyptic language.

had relaxed somewhat their crushing sanctions against same-sex activity.[98] Even as the City established a regular group of law-enforcement officials to enforce its anti-sodomy legislation, it also reduced the size of the financial punishments that attended conviction.[99] Utilizing court records, Rocke has shown that '[i]n this small city of around only 40,000 inhabitants, every year during roughly the last four decades of the fifteenth century an average of some 400 people were implicated and 55 to 60 condemned for homosexual relations'.[100]

If the City fathers opposed this gay subculture, so too did the ecclesiastical authorities. Bernardino of Siena, one of the most famous popular preachers of the day, was invited to Florence to deliver a series of sermons for the Lenten seasons of 1424 and 1425.[101] Although a large quantity of these sermons survive, one might take as typical a small Latin treatise he authored and entitled *De horrendo peccato contra naturam*.[102]

Writing a century and a half after Hostiensis, Bernardino's vocabulary was even more steeped in homophobia. It is helpful to review it, however, because it sheds light on Antoninus' subsequent discussion of same-sex unions and the ways in which

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Thus one Florentine statute, enacted in 1418, denounced sodomy as arousing 'the anger of the omnipotent God . . . in terrible judgment not only against the sons of men but also against the fatherland and inanimate objects'. Michael Rocke, 'The Ambivalence of Policing Sexual Margins', *At the Margins: Minority Groups in Pre-Modern Italy*, ed. Stephen J. Milner (Medieval Cultures 39; Minneapolis 2005) 53-70.

98 Rocke, 'Ambivalence of Policing Sexual Margins' 52-53.

99 Ibid. 47-54. It seems that penalties were reduced, at least in part, in order to promote more widespread enforcement. Ibid. 50-51.

100 Ibid. 4.

101 Franco Mormondo, *The Preacher's Demons: Bernardino of Siena and the Social Underworld of Early Renaissance Florence* (Chicago-London 1999) 5, 159.

102 Bernard of Siena, *Opera Omnia* (9 vols. Florence 1950-1965) 3.267-284, Mormondo indicates that the appearance in this title of 'the sin against nature' is one of the few instances of this word choice in Bernardino's works. He much more frequently used the term 'sodomia' but was here writing 'for an audience of fellow preachers and clerics' and apparently wished to address them in a more classically technical vocabulary. Mormondo, *The Preacher's Demons* 114.

he imported into his analysis of marriage deeply-ingrained homophobic stereotypes.[103]

Bernardino identified a threefold horror in the sin against nature. It was corrupting (horror corruptionis); it was abominable (horror abominationis), and it was worthy of condemnation (horror reprobationis).[104] The sin against nature corrupted the person because it constituted a kind of madness (prima enim corruptio rabies seu insania nominata est) which deprived him of reason.[105] Bernardino suggested further that such men have committed the sin of pride by setting themselves up as laws unto themselves. They are blind and ignorant, Bernardino asserted, because in choosing to place their will above God's design for the world, they have turned away from the natural law which has been implanted in their hearts.[106] Natural law instinctively impels them to reproduce, it ordains reproduction, it has fixed it as a mandate and a rule, but they nevertheless seek to frustrate the process (id est contra naturalis legis instinctum, ordinationem, ac determinationem).[107]

The sin against nature was an abomination, Bernardino continued, because it represented a war against human nature — if all men followed this practice, the human race would cease.[108] Thus the sin against nature might be called a form of 'filicide' — the murder of the next generation.[109]

Finally, Bernardino explained that the sin against nature must be worthy of condemnation (reprobatio) because it constituted a kind of idol-worship. The worship of idols, after all, was nothing

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[103] Bernard's comments on same-sex attraction, one historian has observed, were 'among the most vehement' of the age. See Ruth Mazo Karras, *Sexuality in Medieval Europe: Doing Unto Others* (New York-London 2005) 138.
[104] Bernardino of Siena, 'De horrendo peccato' 267.
[105] Ibid., 268.
[106] Ibid.
[107] Ibid.
[108] Ibid., 275: '[I]n quantum potest et quantum in se est, humanum genus perimere nititur. Nam si omnes homines essent gomorrhaei, quis homo generaretur? Nempe non masculus, neque femina, et sic humanum genus periret'.
[109] Ibid.

other than a turning away from God and nature and the lessons they impart and toward a kind of zealous, self-destructive willfulness.[110] Bernardino cited Hostiensis near the close of this treatment — not for what he says on marriage but for the proposition that, although it was difficult, it always remained possible for even the most grievous sinner, even the greatest offender against nature, to return to God's grace and thereby merit salvation.[111]

Antoninus fit seamlessly within this homophobic culture. One historian of his thought has described him as an unusually blunt man capable of 'express[ing] himself with a directness, even violence of language' that 'was most unusual among prelates of the day'.[112]

His capacity for invective and intemperate speech was on full display in his major work on moral philosophy, which was entitled the *Summa Theologica*.[113] In that work, Antoninus sought to prove that sodomy was the greatest of the sexual offenses.[114] It arises from effeminacy, which is the death of kings. Adopting a creative reading of the Book of *Judges* that was entirely unjustified by the biblical text, Antoninus declared that the Israelites were able to conquer the land of Canaan because of the woman-like character of Canaanite kings.[115] They were effeminate, he asserted, and effeminacy, Antoninus solemnly assured his readers, was the gateway to more serious sins — sodomy and bestiality.[116]

Keeping this slippery-slope in mind made it possible for Antoninus to disregard an absence of biblical authority and to

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[110] Ibid. 279.

[111] Ibid., 283. As for the causes of such conduct, Bernardino blamed permissive parenting. See Michael J. Rocke, 'Sodomites in Fifteenth-Century Tuscany: The Views of Bernardino of Siena', *The Pursuit of Sodomy: Male Homosexuality in Renaissance and Enlightenment Europe*, edd. Kent Gerard and Gert Hekma (New York 1989) 7-31 at 9-13.

[112] Richard C. Trexler, 'Episcopal Constitutions of Antoninus of Florence', QF 59 (1979) 244-272 at 253.

[113] Antoninus of Florence, *Summa Theologica* (4 vols. Verona 1740, reprinted Graz 1959).

[114] Ibid. 2 cols. 667-674.

[115] Ibid. col. 668.

[116] Ibid. col. 668.

claim that these Canaanite kings ceased natural intercourse with women, 'trading instead the foulness of man-on-man intercourse' (*masculi in masculos turpitudinem operantes*).[117] The Bible never said this. But Antoninus was willing to impute this language to the Bible nonetheless so long as it helped him make his larger point, which was the condemnation of all individuals who harbored same-sex attractions.

Shifting his attention to the present, and indirectly criticizing the literary revival going on all around him, Antoninus reminded his learned readers (he was writing in the midst of the Florentine Renaissance) that they must remember that the poet Virgil was a 'great sodomite' (*magnum sodomitam*) and that even the Roman military leader Julius Caesar suffered from this vice.[118]

Again, however, this was merely prelude to much more hostile, much more aggressive rhetoric. Same-sex attraction, he asserted, shared the same wicked quality as the sorcery of the witch of Endor as described in the First Book of Samuel[119] or the practice of bestiality, and that was a denial of God's final just judgment at the end of days.[120] In each instance, the sinners lost sight of the final end of humankind, which is to live life according to God's beneficent commands, preferring instead to rejoice in their own fallenness. Their obstinacy, however, will prove costly when God brings to bear his sure and implacable justice.[121]

God will not forget their sins. Recall the events of Sodom and Gomorrah, Antoninus wrote, and pay heed. The sin of Sodom was so great that God descended from the heavens in visible form to inspect that city's evil (Genesis 19:21).[122] And the City's evil,

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[117] Ibid.

[118] Ibid. Cf. David Scott Wilson-Okamura, *Virgil in the Renaissance* (Cambridge 2010) 112-116 (describing the Renaissance tradition on Virgil's sexuality); cf. James Neill, *The Origins and Role of Same-Sex Relations in Human Societies* (Jefferson NC 2009) 198 (analyzing what we know of Virgil's sexuality).

[119] Ibid. 2 col. 669. Cf. 1 *Samuel* 28 (describing Saul's visit to the witch of Endor).

[120] Ibid. col. 669.

[121] Ibid.

[122] Ibid. col. 670.

God discovered, lay in its denial that sexual relations were meant to be generative.[123] Hence, God destroyed that city with a powerful curse, and is prepared to do the same with those who misuse their sexuality today.[124]

Mark Jordan has shown that the word 'sodomy' (sodomia) was invented by Catholic theologians like Peter Damian in the eleventh century.[125] Sodomy, in early Christian writing, in the fourth and fifth centuries, had once carried broad significations — meaning, for instance, a lack of hospitality, over-indulgence, greed, viciousness.[126] References to particular types of sex act were infrequent, generally vague, and were subordinate to these other meanings.[127]

Peter Damian, however, narrowed and focused this term on several non-procreative types of sexual encounter — including such acts as mutual rubbing and stimulation and anal intercourse.[128] Alain of Lille, then, added a theological gloss, condemning these sex acts by reference to a wounded, violated nature.[129] Such acts, Alain was convinced, were not only personally sinful but stood as crimes that harmed the whole natural, created order.

Antoninus hardened the analysis and extended it by applying the developed theological vocabulary of sodomy to marriage.[130] This was a step which Hostiensis had not taken, notwithstanding the harsh invective he heaped on the very suggestion that a man might marry a man. Also unlike Hostiensis, Antoninus situated his discussion of same-sex unions not within his definition of what constituted a marriage, but among the impediments to marriage.

In seeking to address impediments to marriage, Antoninus

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123 Ibid.
124 Ibid.
125 Mark D. Jordan, *The Invention of Sodomy in Christian Theology* (Chicago Series on Sexuality, History, and Society; Chicago-London 1997) 29.
126 Ibid. 29-37.
127 Thus Jordan gives the example of fourth-century St. Jerome, whose work 'preserves the widest range of meanings', Ibid. 33.
128 Ibid. 46.
129 Ibid. 67-91.
130 Antoninus, *Summa* 3 col. 21.

took as his starting point the passage from the Gospel of Matthew which has Jesus declare, 'For this reason a man shall leave his father and mother and be joined to his wife, and the two shall become one flesh'.[131]

The formation of marriage, Antoninus asserted, might be impeded wherever one or another of the clauses of this Gospel passage is violated. Thus Antoninus began by noting that incest violated the Bible teaching that a man was supposed to leave his mother and father.[132] If a man sought marriage within his family, he broke Jesus' commandment.[133] Similarly, marriage had to be contracted in the present tense, since Jesus commanded that a husband and wife be joined together.[134] This admonition was a present, not future-oriented mandate, and so marriage might never be contracted by a verbal formula that used the future tense. Why? Because such parties are not bound to one another, but merely anticipate being bound at some future point in time.[135]

Finally, Antoninus noted, through marriage husband and wife became one flesh.[136] Again, he made clear that he had derived this law from the Bible, but he went on from there to indicate that the command was also well-grounded in canon law. 'Marriage', Antoninus borrowed his definition from Gratian whom he quoted: 'is the coming together of a man and a woman in a common way of life'.[137]

'Sodomites' (sodomitarum) Antoninus insisted, cannot make a marriage because their relationships violate the command both of Scripture and of Roman law.[138] Their 'coming together' (conjunctionis) is of a different quality (ad differentiam).[139] 'Male

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131 Ibid. Cf. Matthew 19:5.
132 Ibid. Cf. Matthew 19:5 (the text Antoninus had in mind).
133 Ibid.
134 Ibid. Cf. Matthew 19:5 (Antoninus' text).
135 Ibid..
136 Ibid. Cf. Matthew 19:5 (Antoninus' text).
137 Ibid.: 'Matrimonium est viri mulierisque conjunctio individuam vitae consuetudinem retinens'. Antoninus' quoted Gratian, C.29 q.1, who had paraphrased the Roman jurist Modestinus. Cf. Dig. 23.2.1.
138 Ibid.
139 Ibid.

on male' (masculi in masculos) and 'female on female' (feminae in feminas)[140] sexual relations can lead only to turpitudinem[141] — defined variously as 'indecency' or 'disgrace'. Turpitudo, 'turpitude', was the equivalent of 'pollution' or 'depravity' and was even a form of obscenity in some types of early Christian Latin literature.[142] Antoninus thus harshly condemned even the mention of same-sex unions, branding it with language which, in some quarters at least, passed as borderline indecent.

There were other dimensions to Antoninus' teaching on marriage than his condemnation of sodomy. He declared that marriage was an institution brought into being by God for the purposes of the procreation and education of children.[143] It was called 'matrimonium', after all, because it was derived, Antoninus surmised, from 'matris munium', the 'duty of mothers'.[144] It was a joining not only of bodies but of 'souls'.[145] Additionally, it served as an outlet for the natural sexual impulses of men and women: in Antoninus' very traditional phraseology, marriage served to prevent the commission of 'fornication' (ad vitationem fornicationem).[146]

But if marriage had these affirmative goods, it also existed in contrast to the life of sodomy. Such unions violated the natural order, Antoninus insisted; and were forbidden by Bible, and by canon and Roman law alike. Marriage was thus a shield, protecting individuals from these temptations.[147]

It is highly unlikely that Antoninus encountered same-sex

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[140] Antoninus clearly has in mind lesbian relations. The study of lesbianism in medieval sources remains under-examined. See Sahar Amer, *Crossing Borders: Love Between Women in Medieval French and Arabic Literatures* (Middle Ages; Philadelphia 2008) 3.

[141] Antoninus, *Summa* 3 col. 21.

[142] Danuta Schanzer, 'Latin Literature, Christianity, and Obscenity in the Later Roman West', *Medieval Obscenities*, ed. Nicola McDonald (Woodbridge 2006) 179-201 at 201.

[143] Antoninus, *Summa* 3 col. 23.

[144] Antoninus was engaging in speculative etymology. 'Munium' was a neologism Antoninus coined from the Latin 'munus', 'duty'.

[145] Antoninus, *Summa* 3 col. 22.

[146] Ibid. col. 23.

[147] Ibid. col. 21.

unions as an actual social reality, even in Florence. Had same-sex marital unions actually been attempted, undoubtedly they would have attracted the vociferous attention of many writers. There would be some larger record of their occurrence. No, much better to see Antoninus making a jurisprudential point by proposing boundary lines to marriage, describing what fell within and outside of its ambit. He used same-sex relations to illustrate what did not belong to marriage. He then passed from this discussion almost immediately to review what he understood to be proper to heterosexual marriage. In the final analysis, Antoninus was a legally-inclined moralist who believed that he might, through comparison and contrast, praise and condemnation, lead his flock to follow his teaching.

Johannes Brunellus

At the dawn of the sixteenth century, the topic of same-sex marriage arose once again in a treatise by Johannes Brunellus (Jean Bruneau, circa 1480-1534 or 1535). A doctor of Roman and canon law and a professor of canon law at the University of Orléans, Brunellus published a short treatise on marriage in 1521 entitled *Tractatus insignis de sponsalibus et matrimoniis*.[148] The

[148] Johannes Brunellus, *Tractatus insignis de sponsalibus et matrimoniis*, *Tractatus Universi Iuris* (Venice 1584-1586) vol. 9 (originally published 1521). This treatise is now the subject of two important studies. See Jonathan López-Estévez, 'La potestad de establecer los impedimentos matrimoniales en el tratado *De Sponsalibus et Matrimoniales*', *Ius Canonicum* 44 (2004) 113-140 (examining the power Brunellus ascribed to the Church to create impediments to marriage, an argument that proved particularly significant at the sixteenth-century Council of Trent; and Jonathan López-Estévez, 'La Estructura Sistemática del Tratado de Jean Bruneau (ca. 1480-1534) sobre le Matrimonio', REDC 61 (2004) 695-730 (on the structure and argument of Brunellus' treatise). López-Estévez makes the point that a principal source for Brunellus' thought was the canonist Hostiensis, ibid. 703-704. Brunellus' career is reviewed in *Les livres des procurateurs de la nation germanique de l'ancienne Université d'Orléans: 1442-1602*, edd. Cornelia M. Ridderikhoff et alii (2 vols. Leiden-Boston 1971<1981>) 1.326 (described as 'a more than outstanding professor of canon law', juris canonici professor eximius). He began his teaching career at Orléans and also served as canon in the cathedral church and at the Collegial

first section of this treatise, entitled *Matrimonii diffinitio examinatur*, reviewed the standard definitions of marriage discussed above.[149]

Brunellus then chose to place, directly following this definitional section, a second heading bearing the title *Sodomitarum scelus nefandum*, which he opened with an explicit nod of gratitude to Antoninus of Florence.[150] Thus Brunellus wrote that when Antoninus spoke of marriage as between a man and a woman he meant to exclude male-male and female-female sexual relations.[151]

In making this allusion, Brunellus opened the door to his own treatment of same-sex relationships and marriage. And that amounted to a synthesis of the medieval tradition that we have been reviewing. Paraphrasing Antoninus, Brunellus condemned the pairing of male and male as immoral and foul.[152] For added support, he turned to Hostiensis and his use of that fourth-century imperial decree we have already reviewed, which authorized the death penalty for same-sex relations.[153]

Brunellus next referred to Venus. By the early sixteenth century, Venus had become a standard symbol of sexual, romantic love and was used as such by poets like Dante[154] and Geoffrey Chaucer.[155] This general acceptance lent greater force to

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Church of Saint-Aignan. He also participated in preparatory sessions for the conciliabulum held at Pisa which sought to discipline Pope Julius II in 1511, but he did not take a direct part in that schismatic gathering. Ibid. 166-167, n.34.

[149] Brunellus, *Tractatus insignis* 4A.

[150] Ibid.

[151] Ibid. '[When] Antoninus spoke, he added to his definition [the claim] that male/male and female/female [sexual activity] promoted the foulness of bestiality or sodomy'. ('[D]icit Antoninus . . . haec adiecta fuisse ad diffinitionem brutorum sodomitarum, ubi masculi in masculos et mulieres suam operantur . . . turpitudinem').

[152] Ibid.

[153] Ibid.

[154] Amilcare A. Iannucci, 'Forbidden Love: Metaphor and History (Inferno 5)', *Dante: Contemporary Perspectives*, ed. Amilcare A. Ianucci (Toronto-Buffalo-London 1997) 94-112 at 96-97.

[155] Theresa Lynn Tinkle, *Medieval Venuses and Cupids: Sexuality, Hermeneutics, and English Poetry* (Stanford 1996) 198-202.

Brunellus' invocation of the Venus who, changing into another form, leads men astray.[156] In his language and imagery he surely must also have been thinking of Alain of Lille.

Brunellus then moved quickly from these poetic references to the matter of divine judgment. He dwelt upon the adverse consequences that will befall a society that loses sight of God's law. 'Often', Brunellus wrote, 'God is so provoked that he will attack with famine, earthquake, and pestilence'.[157] Divine disruption of the natural world itself, Brunellus suggested, is a consequence of a given society's rejection of heterosexuality as the single normative form of intercourse.

Brunellus thus represents a kind of capstone, a synthesis and summary, of the main lines of the case Hostiensis first stated against same-sex unions. They violated the common understanding of marriage. They were sacrilegious and immoral. They overturned nature. And, finally, they courted the wrath of God.

Conclusion

It should be reiterated, first, that this essay is not intended to demonstrate the existence of same-sex unions in the Middle Ages. It is meant, rather, to sketch the parameters of an intellectual exercise engaged in by medieval lawyers and theologians between the thirteenth and sixteenth centuries. Typical of that period, they sought to find the most extreme positions they could, in order to test the boundaries of the legal concepts under examination.[158]

That said, the arguments they proposed against same-sex unions are still repeated in religious and politically conservative

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[156] Brunellus, *Tractatus insignis* 4A: 'Venus has been changed into another form, and because of this accursed crime the wrath of God has moved against these disloyal sons'. ('Venus mutatur in alteram formam, propter excecrandum scelus ira Dei venit in filios diffidentiae').

[157] Ibid.: 'Et saepe provocatur Deus ut immitant fames, terraemontes, et pestes'.

[158] The goal was the application of reason to the seeming incongruities of life in order to make compatible the demands of the intellect and revelation. See Edward Grant, *God and Reason in the Middle Ages* (Cambridge 2001) 74-82 (exploring the evolution of legal reasoning in the high and later middle ages).

circles. Consider, for instance, Hostiensis' grounding of marriage in the Genesis creation account. Joseph Ratzinger (the future Pope Benedict XVI) relied on the same argument in a decree he issued against same-sex marriage in his capacity as Prefect of the Congregation for the Doctrine of the Faith: 'In the first place, man, the image of God, was created male and female'.[159] Secular conservatives have made much the same claim, substituting for God a supposed universality of human experience — the sum of all civilizational thought, on this view, teaches that heterosexual marriage must mean now and for all time 'a male-female union'.[160]

The closely related claim, advanced by Hostiensis and other medieval canonists, that marriage entails a complementary relationship between male and female and that this complementariness excludes the possibility of same-sex unions, also has contemporary analogues in ecclesiastical and secular sources. Thus Pope John Paul II addressed the Roman Rota in 1999: Marriage between a man and a man or a woman and a woman, he asserted, was 'incongruous' because of 'the absence of the conditions for that interpersonal complementarity between male and female willed by the Creator at both the physical-biological and the eminently psychological levels'.[161] The so-called 'new natural law school' has advanced claims intended to confer on this argument secular acceptance, but these efforts seem to have collapsed under the weight of their own inconsistencies.[162]

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[159] Congregation for the Doctrine of the Faith, 'Considerations Regarding Proposals to Give Legal Recognition to Unions Between Homosexual Persons', June 3, 2003.

[160] Kathleen Hull, *Same Sex Marriage: The Cultural Politics of Love and Law* (Cambridge 2006) 184. Cf. Constance R. Sullivan-Blum, '"The Natural Order of Creation": Naturalizing Discourses in the Christian Same-Sex Marriage Debate', *Anthropologica* 48 (2006) 203-215 (reviewing conservative and progressive perspectives on this debate).

[161] Address of Pope John Paul II to the Tribunal of the Roman Rota, January 21, 1999.

[162] See, for instance, the devastating critique proposed by Elizabeth Brake, *Minimizing Marriage: Marriage, Morality, and the Law* (Oxford 2012) 71-75. Cf. Charles J. Reid, Jr., 'Why Love Prevails: What Is Marriage?' *The Huffington Post* (November 16, 2013).

If these arguments remain current today, nearly eight hundred years after they were first proposed, then the homophobic stereotypes first unleashed in the twelfth and thirteenth centuries also remain very much alive and continue to blight and haunt legal and political contemporary discourse.[163] Indeed, this has been so for most of American history.

We find in late-colonial America the 'unnatural' offense of sodomy routinely denounced by public figures, secular and ecclesiastical alike.[164] William Eskridge, Professor of Law at Yale University, has brought this story up to our own day in an important legal and historical account of the many ways in which legislators, judges, and policy-makers associated sodomy with unnaturalness in order to impose harsh penalties upon transgressors.[165] 'From colonial days up until the nineteenth century', Eskridge has written, 'American law decreed sodomy, buggery, or the 'crime against nature' a capital crime'.[166] And while the penalties were relaxed, 'unnatural' forms of sexual intercourse remained criminalized in many jurisdictions right up to the 2003 Supreme Court decision of *Lawrence v. Texas*.[167]

Even as recently as the 1980s and 1990s, judicial opinions continued to repeat these medieval categories of thought.[168]

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[163] See, for instance, Austin Ruse, 'The Real Lives of Gay Men', *Crisis Magazine* November 22, 2013 (one recent example of the ways these homophobic stereotypes perpetuate themselves).

[164] Thomas A. Foster, 'Transgressive Male Sex in Early America', *American Sexual Histories*, ed. Elizabeth Reis (2nd ed. Chichester-Malden 2012) 34-55 at 39-42.

[165] William Eskridge, *Dishonorable Passions: Sodomy Laws in America, 1861-2003* (New York 2008).

[166] Ibid. 16.

[167] *Lawrence v. Texas*, 539 U.S. 558 (2003).

[168] See, for instance, *State v. Smith*, 766 So. 501 (La. 2000) (describing Louisiana's sodomy statute as establishing the 'crime against nature' and upholding it against constitutional challenge on right-of-privacy grounds, ibid. at 506); *People v. Coulter*, 288 N.W. 2d 448 (Ct. App., Mich. 1980) (upholding Michigan's sodomy challenge against constitutional challenge which asserted that the statutory description of sodomy as 'the abominable and detestable crime against nature' was not too vague, ibid. at 450); *State v. Lopes*, 660 A. 2d 707 (R.I. 1995) (describing Rhode Island's sodomy statute as criminalizing 'the abominable and detestable crime against nature' and holding that '[c]onsent is

Right-wing politicians, even right-wing politicians who once sought the presidential nomination of the Republican Party, continue even today to speak in apocalyptic tones about same-sex marriage and the wrath of God.[169]

This mode of thinking first crystalized eight hundred years ago in the disputations and deliberations of canon lawyers like Hostiensis. For two hundred years, it constituted a deeply embedded, barely questioned feature of American law. Only in the last two or three decades have scientists, sociologists, lawyers, and others come to question the premises upon which this hostility to same-sex marriage is built. It is hoped that this essay has served to clarify the origins of this hostility, so that the way forward might be clearer.

University of St. Thomas.

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not a defense to a charge of a crime against nature', ibid. at 708); *State v. Goodrick*, 102 Idaho 811, 641 P. 2d 998 (1982) (describing sodomy as the 'infamous crime against nature', ibid. 641 P. 2d at 1000); *Evans v. State*, 571 S.W. 2d 283 (Tenn. 1978) ('At trial, the judge instructed the jury to the effect that 'crime against nature' and 'sodomy' were synonymous', ibid. at 287); *State v. Wallace*, 664 S.W. 2d 301 (Ct. App. Tenn. 1983) ('sodomy per anus' was the 'crime against nature', ibid. at 304); *Bowen v. Bowen*, 688 So. 1374 (Miss. 1997) (allegation that 'lesbianism' was 'unnatural', ibid. at 1380). Cf. *Pawlisch v. Barry*, 376 N.W. 2d 368 (Wis. 1985) (ordering the reinstatement of a member of a board of public health who had been discharged for stating that 'Homosexual sex is immoral and unnatural. Even animals know better than to do that'. Ibid. at 370 (quoting the discharged-and-reinstated public-health advisor)).

[169] For some examples, see Alan Keyes, 'Scalia's *Windsor* Dissent: Deficient in Principle?', www.renewamerica.com/keyes/13074 (July 4, 2013); 'Keyes: Satan Using Gays on TV to Destroy America', *Right Wing Watch* (April 12, 2013); 'Keyes: Marriage Equality is the Archetype of all Crimes Against Humanity', *Right Wing Watch* (April 2, 2013); 'Huckabee Claims Gay Unions Twist Marriage into 'Perversion' and an 'Unholy Pretzel,'' *Right Wing Watch* (June 12, 2013) (summarizing speech made by 2008 presidential candidate Mike Huckabee); 'Bauer: Supreme Court's 'Judicial Terrorism' on Gay Marriage Puts America on 'The Verge of Criminalizing the Book of Genesis'', *Right Wing Watch* (August 16, 2013) (reviewing a television interview given by 1996 presidential candidate Gary Bauer).

Una raccolta di minute autografe di *consilia* di Alessandro Tartagni (1423/24-1477)

Giovanna Murano

I due volumi che attualmente formano il manoscritto Camerino, Biblioteca Comunale Valentiniana, 99a-b[1] contengono una raccolta di minute, per lo più autografe, di consilia del giurista Alessandro Tartagni da Imola.[2]

Autore di commentari sul *Digestum vetus*,[3] sull'*Infortiatum*,[4] sul *Digestum novum*,[5] sul *Codex*[6] e di corpose

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[1] Ringrazio il sig. Erio Dolciotti e la dott.ssa Catia Santoni della Biblioteca Comunale Valentiniana di Camerino per aver agevolato la consultazione dei due volumi di consilia e per la concessione delle immagini qui riprodotte.

[2] Notizie sul giurista in: DDC 1 (1935) 364; Mario Ascheri, *Saggi sul Diplovatazio* (Milano 1971) 74-95 e 121-122; Aurelius Sabattani, *De vita et operibus Alexandri Tartagni de Imola* (Milano 1972); Annalisa Belloni, *Professori giuristi a Padova nel secolo XV. Profili bio-bibliografici e cattedre* (Frankfurt am Main 1986) 110-118; Paola Maffei, 'L'effigie di Alessandro Tartagni nelle medaglie di Sperandio da Mantova', RIDC 14 (2003) 215-221; Andrea Padovani, 'Tartagni, Alessandro', DGI 2.1942-1944.

[3] *Super prima parte Digesti veteris cum apostillis*. Bologna: [Stampatore di Barbatia, 'Johannina' (H 2429*)], I) 24 IV 1477; II) s.d. ISTC it00026200. *Super secunda parte Digesti veteris cum apostillis*. Bologna: Andreas Portilia, I) s.d.; II) 21 XII 1473. ISTC it00026600.

[4] *Super prima parte Infortiati*. Milano: Leonardus Pachel et Uldericus Scinzenzeler, 18 X 1482. ISTC it00028300; *Super prima et secunda parte Infortiati cum apostillis*. Venezia: Iohannes Herbort, de Seligenstadt, 1485. ISTC it00026900: 1. 28 X 1485; 2. 12 XI 1485; 3. 9 IX 1485; 4. 3 XI 1485.

[5] *Super prima parte Digesti novi* [*et apostille ad Bartolum*]. Ferrara: Andreas Belfortis, Gallus, 28 IX 1479. ISTC it00023950; *Super secunda parte Digesti novi*. Bologna: Henricus de Colonia, *per* Sigismundus de Libris, 13 XI 1477. ISTC it00024700; Ferrara: Andreas Belfortis, Gallus, 18 VIII 1481. ISTC it00024800.

[6] *Super sexto libro Codicis*. Venezia: Johannes de Colonia et Johannes Manthen, 1476. ISTC it00020800. *Super prima et secunda parte Codicis, cum apostillis*. Venezia: Iohannes Herbort, de Seligenstadt, 1485. ISTC it00019700. 1. 8 VI 1485**.** 2. 12 VII 1485**.** 3. 30 X 1485. 4. 1485.

'additiones' alle letture di Bartolo da Sassoferrato[7] e Baldo,[8] le opere del Tartagni hanno goduto di uno straordinario successo editoriale e di una scarsa diffusione manoscritta.[9]

Anche la sua raccolta di consilia è stata imponente per quantità e diffusione. A partire dal 1477 ed in poco più di un decennio (fino al 1490) ne furono pubblicati oltre ottocento. L'edizione veneziana del 1477 è priva della numerazione dei consilia;[10] a Bologna nel 1480 e nel 1481 furono stampati i vol. 2[11] e 3;[12] seguì pochi mesi dopo il vol. 4 con una *Tabula* attribuita a Ludovico Bolognini.[13] La ristampa del vol. 1 a cura di Enrico di Colonia è preceduta da una intestazione che dichiara la presenza di materiale inedito, si tratta, in realtà, della stessa raccolta stampata nel 1477, arricchita della sola numerazione progressiva dei consilia [= 142].[14] Nel 1484-1485 la raccolta è ristampata a Milano,[15] nel 1488 è ristampata a Venezia da Bernardino Stagnino

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[7] *Apostillae ad Bartolum super secunda parte Digesti novi*. Bologna: Henricus de Colonia, *per* Sigismundus de Libris, 15 III 1478. ISTC it00018970; *Apostillae ad Bartolum super prima parte Codicis*. [Venezia: Iohannes de Colonia et Iohannes Manthen, 1475 *ca*]. ISTC it00018650. *Apostillae ad Bartolum super tribus libris Codicis*. Mantova: Paulus de Butzbach, 12 XII 1476. ISTC it00018600.

[8] *Apostillae ad Baldum super VI parte Codicis*. Bologna: Dominicus de Lapis, *per* Sigismundus de Libris, V 1477. ISTC it00018550.

[9] Ai testimoni segnalati da Sabattani, *De vita*, 122-123 e Belloni, *Professori giuristi*, da aggiungere almeno il ms. Bergamo, BM MA547, fol. 1r-140v con un commento *Super I parte Codicis*.

[10] *Consilia* [vol. 1]. Venezia: Jacobus Rubeus, 23 XII 1477. ISTC it00021000.

[11] *Consilia* [vol. 2]. Bologna: Henricus de Colonia, 31 X 1480. ISTC it00023200.

[12] *Consilia* [vol. 3]. Bologna: Henricus de Colonia, 22 I 1481. ISTC it00023400.

[13] *Consilia* [vol. 4], cum Tabula Ludovici Bolognini. Bologna: Henricus de Colonia, 24 III 1481. ISTC it00023500.

[14] *Consilia* [vol. I]. Bologna: Henricus de Colonia, 14 VI 1483. ISTC it00023100.

[15] *Consilia* [I-IV]. Milano: Antonius Zarotus, *per* Iohannes de Legnano, I) 21 II 1484: II) 13 X 1485; III) 2 VIII 1485; IV) 4 VIII 1485. ISTC it00021500.

e comprende 142 consilia nel vol. I, 224 nel vol. II, 121 nel vol. III e 135 nel vol. IV.[16] Nel 1490, a Bologna, è stampato il vol. V [= 189 cons.].[17] Al fine di consentirne l'utilizzo e la consultazione Ludovico Bolognini, Oliverius de Querguien 'dolensis dyocesis de Britania' e Hieronymus Clarius approntarono repertoria alfabetici pubblicati sia come opera a sé che insieme ai consilia.

I due volumi del manoscritto Camerino, Biblioteca Comunale Valentiniana, 99 a-b, oggetto di questa segnalazione, conservano una parte delle minute autografe dei consilia del Tartagni.[18] Preziose informazioni sul contenuto sono fornite da due annotazioni (sec. XVI-XVII) registrate sui fogli di guardia anteriori, ovvero, nel Camerino 99a: [19]

> Consilia huius voluminis, quod sint Alexandri Tartagnę Imolensis, apparent ex consilio a se scripto, subscripto, et proprio sigillo roborato, et ideo dicendum est idem de altero volumine, eodem charactere conscripto.

La stessa mano ha annotato:

> Consilia ista videntur esse Alexandri Tartagnę Imolensis, cuius subscriptio legitur duobus in locis: et indicat vetustum voluminis

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[16] *Consilia*. Venezia: Bernardinus Stagninus, de Tridino. [vol. 1 = 1488 ca]. ISTC it00023000. [vol. 2]; [vol.3 = 8 VIII 1488]; ISTC it00023300; [vol. 4: 23 VII 1488]; Per altre edd. vd. Vincenzo Colli, 'Consilia dei giuristi medievali e produzione libraria', *Legal Consulting in the Civil Law Tradition*, edd. Mario Ascheri, I. Baumgärtner, J. Kirshner (Berkeley 1999) 173-225, ristampta in *Giuristi medievali e produzione libraria* (Stockstadt am Main 2005) 449*-501*: 485*-487*.

[17] *Consilia* [vol. 5]. Add: Oliverius de Querguien, *Repertorium*. Bologna: Franciscus (Plato) de Benedictis, 8 VIII 1490. ISTC it00023600.

[18] Descritto in *Inventari dei manoscritti delle biblioteche d'Italia*, vol. 107: *Camerino, Biblioteca comunale Valentiniana*, inventario redatto da G. Boccanera-B. Branciani (Firenze 1993) 72. Il manoscritto non è stato censito da Sabattani, *De vita*, mentre Belloni, *Professori giuristi*, 117 lo segnala (senza precisarne il contenuto) con il n. 28 che corrisponde al numero del catalogo di Mazzatinti (1887). Ho dato notizia del manoscritto in Giovanna Murano, 'I consilia giuridici dalla tradizione manoscritta alla stampa', *Reti Medievali Rivista* 15 (2014) ‹http://rivista.retimedievali.it›.

[19] Segue, d'altra mano il n. 200, probabilmente una antica segnatura.

> tegumentum; ideoque propter antiquitatem non spernenda. Alexander autem obiit anno Salutis MCCCCLXXVII.

I due volumi contengono una raccolta di minute, quasi tutte autografe,[20] con correzioni e integrazioni, numerate progressivamente (con poche eccezioni) e nella maggior parte dei casi corredate di un thema, in vista, evidentemente, della loro pubblicazione. Alcuni, pochi, consilia sono preceduti dal casus, non di mano del Tartagni. Al momento della rilegatura i consilia furono assemblati senza seguire la numerazione registrata nel margine superiore. Il consilium segnato 41 (fol. 184r-186v), lo stesso a cui fa riferimento la nota sul foglio di guardia, non era destinato alla raccolta di minute, ma in quanto munito di subscriptio e sigillo doveva essere inviato a colui che aveva richiesto il parere. Forse a causa degli interventi correttori sul testo, l'originale rimase tra le carte del giurista. Anche il consilium 44 'Alfonsus condam civis' è munito di subscriptio, ma è privo del sigillo. La scrittura posata impiegata nei margini indica che probabilmente era destinato ad essere inviato al richiedente. In ogni caso, è soprattutto grazie a queste presenze fortuite che la raccolta si è preservata, come ben evidenziano le note sui fogli di guardia.

Ciascun consilium è stato trascritto su un fascicolo formato da un numero variabile di fogli, corredato di una numerazione propria. In qualche caso alla fine del consilium seguono uno o più

[20] La mano di Alessandro Tartagni è nota grazie alla lettera autografa pubblicata da Sabattani, *De vita* 216 n. 13, tav. III, ma si può esaminare online (http://www.archiviodistato.firenze.it/rMap/index.html) in quattro lettere che il giurista indirizzò a Lorenzo il Magnifico per segnalargli uno dei figli che intendeva indirizzare all'arte della mercatura, ora custodite nell'Archivio di Stato di Firenze, *Mediceo avanti il Principato* XXVII, doc. 217 (1471, 6 aprile), doc. 243 (1471, 21 aprile), doc. 311 (1471, 3 giugno), doc. 384 (1471, 11 luglio). Per una analisi e l'edizione delle lettere si rinvia a Giovanna Murano, 'Quattro lettere autografe di Alessandro Tartagni a Lorenzo de' Medici (a. 1471)', *Archivio Storico Italiano*, in c.d.s.

fogli bianchi che non sono stati eliminati per evitare la perdita del testo dei fogli corrispondenti.[21]

Nel Camerino 99a nell'estremo margine superiore sinistro è annotato un numero d'ordine in caratteri arabi, preceduto da una barra con un punto o da altro segno distintivo; in un solo caso l'indicazione è: 'cons^{m} xxxiiij' (fol. 176r). Il testo vero e proprio del consilium è sovente preceduto da una più o meno breve descrizione del contenuto (thema), anch'essa di mano del Tartagni. Le variazioni del colore dell'inchiostro provano che il thema in qualche caso è stato eseguito in un secondo tempo, probabilmente al momento del riordino del materiale. In corrispondenza dell'incipit del consilium troviamo una crux.

I due volumi non sono esattamente identici, mentre i consilia del **C**amerino 99a sono contrassegnati da un numero ed un segno, quelli del Camerino 99b recano annotazioni (sempre nell'estremo margine superiore sinistro) quali 'In 4° 55' (fol. 1r) e f^{o} in corrispondenza dell'incipit, talvolta ripetuta due volte. 'In P°', 'In 3°', 'In 4°' segnalano il volume della raccolta passata alle stampe, mentre il numero che segue indica il consilium. A parte queste variazioni, i due volumi presentano identiche caratteristiche codicologiche e paleografiche.

Mentre erano in uso presso il Tartagni ed i suoi eredi, i fascicoli non furono rilegati e l'assenza di una rilegatura spiega il disordine e le rilevanti perdite. Lo stato di conservazione è tuttavia buono ed è probabile che le minute siano state copiate in un 'liber consiliorum'. A fol. 56vb del Camerino 99b è annotato in margine **'**h' incipe**'** mentre nel testo troviamo il segno #. Questo genere di

[21] Sotto l'aspetto strettamente codicologico la raccolta si configura come un insieme di unità codicologiche diverse (un consilium = una unità codicologica), a differenza delle raccolte di Lorenzo Ridolfi († 1443), Bartolomeo Cipolla († 1475) e Martino Garati († 1453) copiate su registro, sul modello notarile, dove ciascuna minuta segue l'altra senza cesure ed interruzioni. Per una analisi delle diverse tipologie di minutari e registri vd. Murano, 'Consilia giuridici' 10-13.

indicazione serviva al copista per ritrovare il punto esatto in cui era stato interrotto il lavoro di trascrizione. La crux, che non appartiene alla mano del Tartagni, potrebbe essere stata annotata per segnalare l'avvenuta trascrizione nel 'liber consiliorum', egualmente il corrispondente f^{o} (una abbrevi-azione per f(att)o?) nel Camerino 99b potrebbe essere dovuto alla mano di colui che ha copiato la minuta nel 'liber consiliorum'. Non sono visibili segni dovuti a tipografi ed è escluso che la raccolta di Camerino sia stata utilizzata direttamente per la stampa[22]. Oltre all'assenza di prove materiali di un utilizzo da parte di tipografi, nei consilia pubblicati sono talvolta presenti formule di chiusura che mancano nelle minute conservate a Camerino (ad eccezione, ovviamente, del consilium originale) e provano quanto affermato dagli editori, ovvero che la raccolta derivava non da un solo esemplare ma fu 'ex varis diversique locis congesta' (così Bernardino Tridino nel vol. 2).[23]

Di seguito sono elencati i consilia presenti nei due volumi secondo l'ordine numerico progressivo registrato nelle minute. Tra parentesi sono indicati i fogli in cui è trascritto ciascun consilium. La sequenza numerica evidenzia le numerose lacune, mentre l'indicazione dei fogli prova lo stato di disordine in cui si trovavano le minute quando furono rilegate.

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[22] Per le caratteristiche dei manoscritti di tipografia, vd. Lotte Hellinga, 'Compositors and Editors: Preparing Texts for Printing in the Fifteenth Century', *Gutenberg Jahrbuch* (2000) 152-159; Paolo Trovato, 'Per un censimento dei manoscritti di tipografia in volgare (1470-1600)', in *Il libro di poesia dal copista al tipografo*, a cura di A. Quondam-M. Santagata (Modena 1989) 43-81.

[23] Ad es., alla fine del cons. 1.3 'Viso instrumento concessionis facte de anno millesimo: Alexander de Tartagni de Imola utriusque iuris doctor cui consilio se subscripsit excellens doc. utri. iuris et miles et comes Do. Bartholomeus Cepola concurrens dicti domini Alexandri Padue'. La nota di chiusura e l'assenza del thema indicano che probabilmente non fu esemplato dalle minute o dal 'liber consiliorum' ma da un diverso testimone, forse l' originale.

Secondo le annotazioni registrate nel marg. sup., nel vol. 99b sono presenti consilia confluiti nei volumi 1, 3 e 4 della raccolta (nel solo consilium riferito al vol. 2 l'annotazione è stata espunta e sono assenti il thema e la nota f°).[24]

Nel Camerino 99a mancano invece rinvii ai volumi, ma il primo consilium 'Sunt anni cc. vel circa' copiato ai fol. 2r-6v è numerato '3' e coincide con il numero 3 del vol. 5; anche l'ultimo numero registrato nelle minute ovvero 189, ora ai fol. 133r-134v, coincide con il n. 189 del vol. 5, che corrisponde anche all'ultimo pubblicato. Considerato ciò, il volume ora Camerino 99a contiene parte delle minute dei consilia stampati nel 1490 nel vol. 5:[25]

> nuper per nobiles et pientissimos eiusdem filios . . . Nec non ex originalibus propriis penes eos existentibus fideliter transcripta.

Camerino, Biblioteca Comunale Valentiniana, 99a

Alexander Tartagni, *Consilia LVIII* [*postea impressa in volumine V consiliorum*]

[Vol. V]: 3 (2r-6v, preceduto dal casus); 4 (135r-136r); 5 (85r-90v); 6 (111r-111v); 7 (107r-110r); 8 (113r-115r); 9 (102r-106v); 10 (117r-120v); 11 (121r-122r); 12 (123r-123v); 13 (52r-56r)[26]; 14 (58r-60v); 15 (14r-16v); 16 (20r-26v); 17 (44r-47r); 18 (48r-51v); 19 (34r-38v); 20 (41r-43r); 21 (28r-31v); 22 (149r-154r); 23 (161r-163r); 24 (8r-12r); 25 (93r-100r); 26 (62r-65v); 27 (74r: casus, 75r-77r); 28 (68r-73v); 29 (79r-84v); 30 (155r-159r); 32 (167r-169r); 33 (171r-174r); cons(iliu)m xxxiiij (176r-178v); 35[27] (210r-212r); 36 (213r-216r); 40

[24] Il consilium contrassegnato *In P° 54* (221r-v), ad esempio, è preceduto dal thema 'Quidam in uxorem duxit mulierem' che coincide con quello attestato nell'edizione per il consilium 54 del vol. I: 'Quidam in uxorem duxit mulierem que ut dicitur erat tunc ac postea fuit non sane mentis et querit ab ea separari tamquam inter eos non fuerit nec sit matrimonium queritur an possit'.

[25] I numeri mancanti risultano essere: 1-2, 31, 37-39, 48-50, 54, 56, 63, 65, 67-186. Considerata l'ampiezza è probabile che i soli consilia stampati nel vol. V fossero stati riuniti in tre diversi volumi.

[26] Trascritto su un fascicolo di dimensioni più piccole rispetto ai restanti.

[27] *ante corr*. 36.

(179r-180v); 41 (184r-186v, con sigillo; è privo del thema); 42 (187r-188v); 43 (189r-v); 44 (191r-196r, con subscriptio, senza sigillo; è privo del thema); 45 (198r-200r); 46 (201r-202v); 47 (205r-206v, 208r-v); 51 (217r-220v); 52 (221r-222v); 53 (223r-228r); 55[28] (230r-232v); 57 (233r-234r); 58 (235r-236r, copia di un consilium sottoscritto da Giovanni d'Anagni); 59 (237r-238v, non di mano di Alessandro Tartagni); 60 (241r-243v, non di mano di Alessandro Tartagni); 62(?) (245r-248r); 64[29] (249r-251r); 66[30] (253r-254v); 187 (126r-132r); 188 (137r-140v); 189 (133r-134v); n.n. (142r-148r, in luogo della crux in corrispondenza dell'incipit è annotato f°); n.n. (255r-258v, preceduto dal casus); n. rifilato (165r-166r).

Camerino, Biblioteca Comunale Valentiniana, 99b

Alexander Tartagni, *Consilia LV [postea impressa in volumine 1, 3 et 4 consiliorum]*

[Vol. 1] P° 50 (209r-212v); In P° 51 (213r, 214r-216v); In P° 52 (217r-218v); In P° 53 (235r-236v, mancano il thema e l'annotazione f°); In P° 54 (221r-221v); P° 57 (223r-225r); In P° 58 (226r-228r); In P° 60 (231r-232r); In P° 65 (170r-173v); P° 66 (174r-175v); P° 68 (205-208r); P° 70 (176r-181r); P° 72 (183r-187r); In P(rim)a P(ar)te 74 (189r-192v); In P° 77 (197r-199v); In P° 80 (242r, 244r-249v); In P° 84 (153r-154v); In P° 85 (202r); In P° 87 (59r-63v); In P° 90 (37r, 39r-48r); In P° 94 (82r-86r); In P° 95 (156r-158r); P° 97 (136r-139v); In P° 102 (102r-105v); In P° 103 (163r-169r); In P° 104 (96r-101v, casus d'altra mano; numero annotato in corrispondenza dell'incipit del consilium); In P° 108 (66r-68v); In P° 110 (!) (238r: casus, 239r-241r); P° 114 (116r-117v); P° 120 (120r-122v); In P° 123 (53r-58r); In P° 124 (30r-31v); In P° 125 (144r-151v); P° 127 (124r-125r); P° 129 (126r-128r); P° 131 (110r-111v); P° 132 (112r-114r); In P° 133 (250r-255v); In P° 136 (33r-35v, di mano di un segretario); P° 137 (108r-109v); In P° 138 (71r, 72r-81v); In P° 139 (94r-95v); In P° 140 (49r-51v); In P° 141 (88r-93v).
[Vol. 2] ~~In Secundo 96~~ (261r-263, l'annotazione è stata espunta, mancano il thema e la nota f°, indicante verosimilmente l'avvenuta trascrizione).

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[28] *ante corr*. 56.
[29] *ante corr*. 65.
[30] *ante corr*. 67.

[Vol. 3] In 3° 13 (19r-23v); In 3° 35 (15r-18r); In 3° 92 (25r-27v).
[Vol. 4] In 4° 55 (1r-13r, in parte di mano del Tartagni, in parte di altra mano); 4° 87 (140r-142v); In 4° 99 (130r-135v).
n.n. (256r-258v); n.n. (264r-265r); n.n. (266r, 267r-268v, non di mano del Tartagni); n.n. (271r-275r, non di mano del Tartagni).

L'identificazione di un così gran numero di autografi offre la rara opportunità non sono di ricostruire genesi e formazione di un'opera particolarmente complessa quale è una raccolta di consilia, ma anche quella di farci entrare nello studiolo dell'autore. Tartagni nella stesura delle minute dei suoi consilia si rivela metodico e ordinato. Pur senza rigare il foglio lascia ampi margini intorno al testo del consilium. Quello superiore è destinato ad accogliere il thema, mentre il margine interno oltre alle note di servizio (crux, f^{o}) è sufficientemente ampio da accogliere integrazioni e aggiunte oltre alla grande iniziale (in genere la 'R' di 'Redemptoris') che contrassegna l'incipit del consilium vero e proprio[Illus. 2].

Tartagni non detta il testo, lo scrive di persona e solo in sporadiche occasioni incontriamo le mani di suoi collaboratori, uno dei quali destinato a divenire giurista di grande fama.

Il consilium segnato 60 trascritto ai fol. 241r-243v del Camerino 99a non è di mano del Tartagni, ma del suo allievo Ludovico Bolognini.[31] La collaborazione tra docente e allievo è particolarmente evidente nel consilium copiato ai fol. 1r-13r (= In 4° 55) del Camerino 99b. Qui Bolognini interviene a fol. 7r, lin. 12 immediatamente di seguito al Tartagni [Illus. 1] che riprende a trascrivere il testo sul verso. Dei problemi emersi durante la stesura del consilium sono testimoni i fogli bianchi o con parti

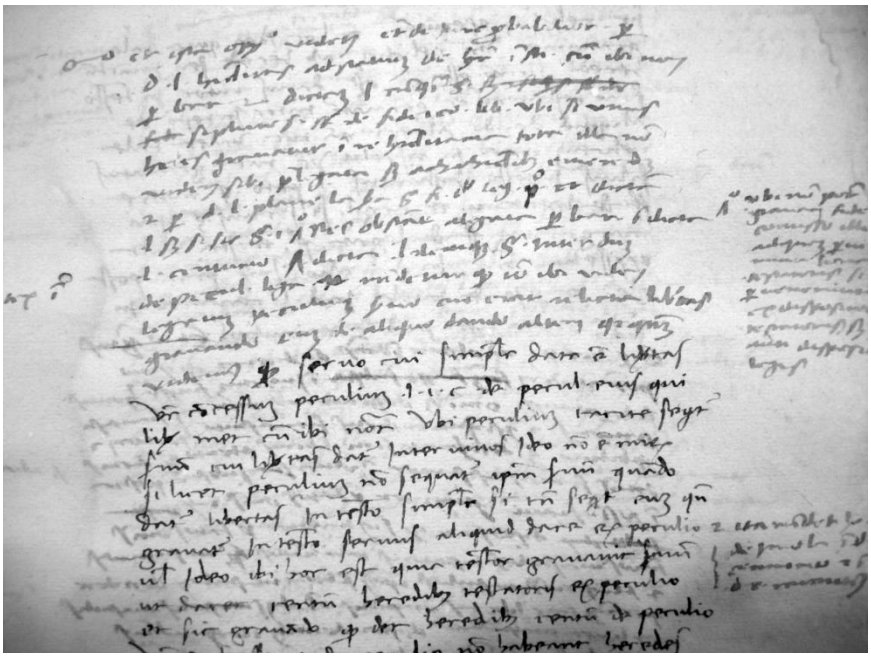
[31] Per la mano del Bolognini vd. *Autographa: 1.1 giuristi, giudici e notai* a cura di G. Murano con la coll. di G. Morelli (Bologna 2012) fig. 83 (da Firenze, Archivio di Stato, *Mediceo avanti il Principato*, XLI, 432, consultabile anche online) e fig. 84.

bianche presenti nel fascicolo, contrassegnati dalla nota ‘nil deficit’.

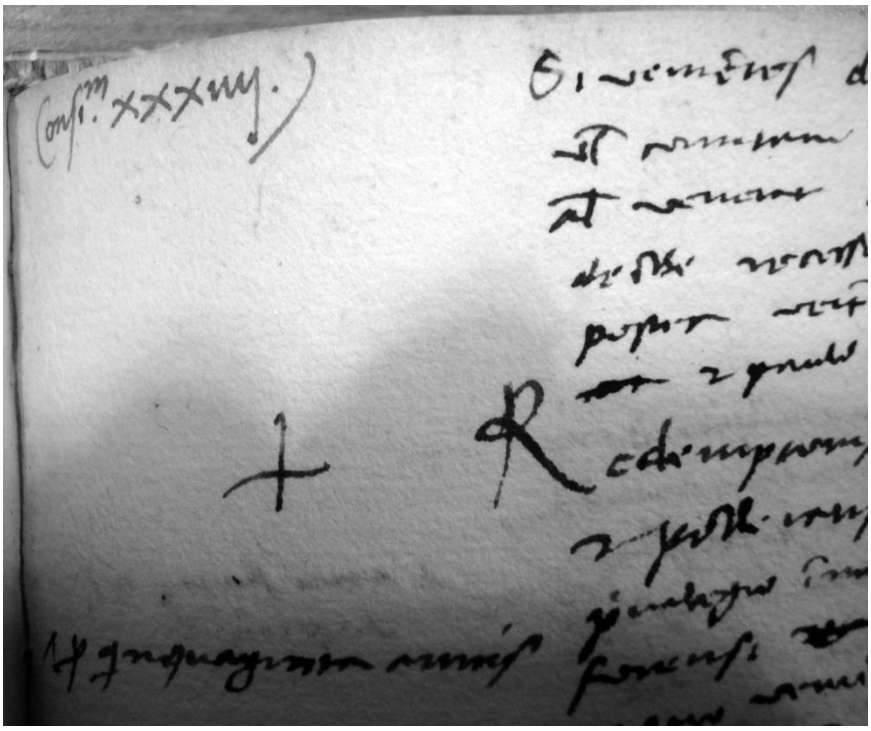
Bolognini, forse non estraneo alla trascrizione delle minute nel ‘liber consiliorum’, ha contribuito alla diffusione dei consilia del Tartagni grazie al suo *Repertorium aureum* e nella premessa datata ‘Mcccclxxxiiii die prima martii’ che leggiamo nell'edizione veneziana del 1488 scrive: [32]

> § Que quidem omnia ante presentis repertorii compositionem magna cum difficultate et non levi labore adipiscebant. Nunc vero quantum celerrime absque longa chartarum revolutione per modum inferius annotatum omnia reperiuntur ubi et volumen et numerus et columne et etiam cuius sunt aliqua consilia in his inserta seriose annotantur. § Alia igitur omnia repertoria hucusque ad dicta consilia nihil valent et inter alia illud quod est in quarto volumine dictorum consiliorum quod fuit descriptum sub nomine prefati domini Lodovici et non bene quia licet vere eius ipse auctor fuerit et ab eo compositum nihilominus vicio impressorum male collocatum et incuria eorumdem viciarum fuit iuxta illud Martialis. 'Si qua videbuntur chartis tibi, lector, in istis Sive obscura nimis sive latina parum Non meus est error: nocuit librarius illis, Dum properat versus adnumerare meos' [*Martialis Epig*. II 8] § Sileant ergo omnia repertoria hoc excepto . . .

[32] Ludovicus Bolognini, *Repertorium aureum in Consilia Alexandri Tartagni*. [Venezia]: Bernardinus Stagninus [1488]. ISTC ib00840000.



Illus. 1: Camerino, Biblioteca Comunale Valentiniana 99b, fol. 7r.



Illus. 2: Camerino, Biblioteca Comunale Valentiniana 99a, fol. 176r.

NOTE

Gratian and Compurgation: An Interpolation

Kenneth Pennington

The search for the earliest manuscripts of the Vulgate text of Gratian's *Decretum* can be aided by two textual variants that are important guides to deciding which manuscripts are the earliest versions of his text. Undoubtedly with more research others will be found. The first was discovered more than 25 years ago. Gratian had included a small section of Justinian's *Institutes* in his Tractatus de legibus, D.12 c.6:

> Diuturni mores consensu utentium approbati legem imitantur.

In the earliest manuscripts of the Vulgate, the text remained intact. Early on, however, the canonist interpolated the phrase, 'nisi legi sunt adversi', after 'mores'. Brendan McManus examined this textual addition in a short essay in 1988.[1] It has proven to be a secure guide to dating the earliest manuscript texts.

A second piece of textual evidence that is also a significant guide to establishing the earliest Vulgate text occurs at the end of Causa 6 where Gratian discussed the use of compurgation after a decision had been rendered in court. He had begun his treatment of compurgation in C.2 q.5 with an introductory dictum taken from Roman law. This reference to Roman law is present in the earliest version of Gratian's *Decretum*.[2] Gratian returned to the issue at the end of C.6 q.5

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[1] Brendan J. McManus, 'An interpolation at D.12 c.6', BMCL 18 (1988) 55-57. In Barcelona, Arxiu de la Corona d'Aragó, Santa Maria de Ripoll 78, fol. 20r, the phrase is added as an interlinear gloss.

[2] Orazio Condorelli alerted me to this text in an email: 'A proposito di Graziano e il diritto romano: La settimana scorsa sono stato a Roma, per presentare il libro di Antonia Fiori sulla' "purgatio canonica" (insieme a Cortese, Chiodi e Roumy). Nel libro, fra l'altro, è messo in evidenza che Graziano fa un riferimento implicito (ma certo) alla lege Cogi (Cod.3.31.11) nel dictum che apre C.2 q.5. Ho appena verificato che il riferimento è presente anche in Sg, p.50a: 'Deficientibus vero accusatoribus, non videtur esse cogendus ad purgationem. Nam sicut possessor actore deficiente sue

and posited an exception to the general rule that compurgation should not be imposed on a defendant who has been exonerated: Must a defendant prove his innocence if his accuser's proof fail? His conclusion was one that did not change from what may be his earliest version of the text until his final pen stroke. Gratian noted that normally a defendant was completely exonerated when his accusers could not prove his case. However, if the question before the court were an issue of public notoriety (infamia), then the defendant had to prove his innocence through oaths of compurgation.[3]

The jurists did not like Gratian's conclusion, and the early manuscripts of his text reflect their objections. They interpolated a sentence in a dictum that purported to be Gratian's words in which he explained that a defendant had only to prove exceptions and not his innocence:

> Accusatus non negationem sed exceptionem probare debet.

Anonymous canonist(s) also added a text from Justinian's *Codex* that made the same point:[4]

> Actor quod asseuerat profitendo se probare non posse, reum necessitate monstrandi contrarium non astringit, cum per rerum naturam factum negantis probatio nulla sit.

The text, 'Accusatus non negationem sed exceptionem probare debet', began life as a marginal gloss, as in Durham Dean and Chapter Library C.III.1, fol. 137r, after which it was placed into Gratian's text as a dictum of Gratian in early manuscripts. Friedberg was guided by the early manuscripts he used, which were early but not the earliest, to add the passage to his edition as a dictum of Gratian after C.6 q.5 c.1. The very earliest manuscripts, however, omit it, e.g. Biberach an der Riss, Spitalarchiv B 3515, fol. 159v, Bremen, Universitätsbibl. a.142, fol. 90r (French),[5] Brindisi, Biblioteca Annibale de Leo A/1, fol. 188v,

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possessionis titulum probare non cogitur (cfr. Cod.3.31.11), sic qui inpetitur ad innocentiam suam purgandam cogendus esse non conceditur. . .'.

[3] Antonia Fiori, *Il giuramento di innocenza nel processo canonico medievale: Storia e disciplina della 'purgatio canonica'* (Studien zur Europäischen Rechtsgeschichte 277; Frankfurt am Main 2013) 229-236.

[4] Cod. 4.19.23. The text 'wandered' a bit in later manuscripts.

[5] Codex text added to margin by a later hand; the dictum is entirely missing.

Florence, Bibl. Laur. Santa Croce 1 sin.1, fol. 143r (Italian), Munich, BSB Clm 28161, fol. 114r (Italian), Mainz, Stadtbibl. II.204, fol. 100v (Italian),[6] Paris, BNF, nouv. acq. lat. 1761, fol. 132va (Italian) and the two other manuscripts of the earlier, pre-Vulgate recension (Florence and Admont). As with the additional phrase in D.12 c.6, Barcelona, Arxiu de la Corona d'Aragó, Ripoll 78, fol. 149v added both texts to the margin, which is an indication how early these two additions to Gratian's text began to circulate.

The text of Justinian's *Codex* made it clear that a defendant was not encumbered if a plaintiff had not proven his case.[7] This example is a good piece of evidence that shows Gratian did not understand the full ramifications of replacing Germanic modes of proofs, like compurgation, with the *ordo iudiciarius.* He still found older ideas of justice attractive and did not fully accept the Roman jurisprudence that regulated procedure. In Gratian's defense, the jurisprudence of procedure was still in its infancy, and the ordeal was far from dead.[8]

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[6] Both texts added to margin by later hand.

[7] C.6 q.4 attached to the end of c.7. Friedberg noted that Johann Wilhelm Bickell, *De Paleis quae in Gratiani decreto inveniuntur: Disquisitio historico-critica* (Marburg 1827) 12 erred because he thought the Codex text was a palea. Bickell was not wrong. If we define 'palea' as a text added to the Decretum after Gratian finished his work, he was right. It was not a part of Gratian's original text, see the edition below.

[8] Franck Roumy, 'Les origines pénales et canoniques de l'idée moderne d'ordre judiciaire', edd. Orazio Condorelli, Franck Roumy, and Mathias Schmoeckel, *Der Einfluss der Kanonistik auf die europäische Rechtskultur,* 1*: Zivil- und Zivilprozessrecht (*Norm und Struktur: Studien zum sozialen Wandel in Mittelalter und Früher Neuzeit 37.1; Köln-Weimar-Wien 2009) 313-349 at 335-342, where he lists a number of papal letters in which the term 'ordo iudiciarius' indicated the procedure used in the case or the idea that the norms of the 'ordo' should be followed, i.e due process of law in English. For more examples, see my 'Due Process, Community, and the Prince in the Evolution of the Ordo iudiciarius', RIDC 9 (1998) 9-47 at 12-15.

Following Friedberg's use of fonts to distinguish between Gratian's words (Italics) and the wording of the texts (Roman), the end of Causa 6 as it left Gratian's desk read:[9]

<C.6 q.4>

In renouatione iudicii beati Petri memoria est habenda,

Item ex concilio Sardicensi

<c.7> Osius episcopus dixit: quod si aliquis episcopus adiudicatus fuerit in aliqua causa et putat se bonam causam habere, alterum iudicium renouetur, si uobis placet. Sancti Petri apostolicam memoriam honoremus ut scribatur uel ab his qui examinauerunt uel etiam ab aliis episcopis[a] qui in prouincia proxima morantur romano episcopo. Et si adiudicauerit[b] renouandum esse iudicium renouetur et det iudices. Si autem probauerit talem causam, ut ea non refringantur[c] que acta sunt que decreuit romanus episcopus confirmata erit. Si hoc ergo[d] omnibus placet statuatur. Sinodus respondit: Placet.

[a] uel etiam ab aliis episcopis BmBrMkMz: uel ab aliis etiam episcopis BiFs
[b] iudicauerit FsMkMz [c] refricentur BrMkMz [d] ergo hoc tr. BiBrFs

Questio V

§ *Quod autem deficiente accusatore reus non sit cogendus ad probationem auctoritate Gregorii probatur, qui scribens Maximo ait: Honus probationis reo non incumbit.*

<c.1> Quod autem postulas ut illuc personam dirigere debeamus qua[a] de his que dicuntur, possit esse probatio, esset utcumque excusabile, si umquam ratio ei qui accusatur necessitatem probationis imponeret. At postquam non tibi set accusantibus hoc honus imcumbit, ad nos sicut prefati sumus dilatione cessante uenire non desinas. § *Hoc autem seruandum est: quando reum publica fama non uexat. Tunc enim auctoritate eiusdem Gregorii propter scandalum remouendum famam reum purgare oportet.*[10]

[a] qua BiBrFsMkMz : quo Bm Cf. Johannes Teutonicus, *Glossa ordinaria* s.v. *qua*: 'id est, per quam'.

The Catholic University of America.

[9] The text is based on Brindisi = Bm, with readings from the Biberach = Bi, Bremen = Br, Florence = Fs, Mainz, Stadtbibl. II.204 = Mz and Munich 28161 = Mk manuscripts. These five manuscripts are very good witnesses to the earliest tradition of Gratian's Vulgate text and, with the exception of Mz, to the earliest layer of glosses that circulated with the Decretum.

[10] Gratian refers to C.2 q.5 c.5 of Pope Gregory II and seems not to know that the pope of C.2 q.5 c.5 was not Gregory I, the author of C.6 q.5 c.1.

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