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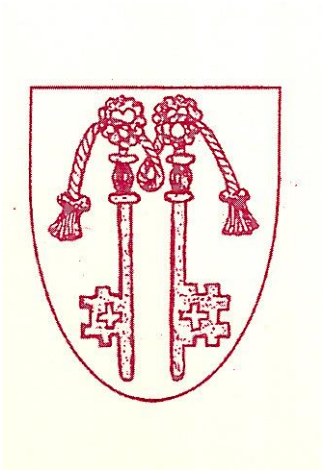
AN ANNUAL REVIEW



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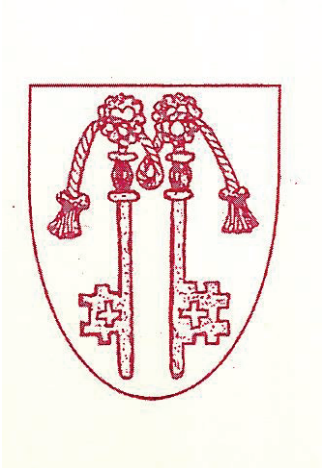

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Abbreviations

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, Stadtbibliothek, 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)
CC/CCL	*Corpus Christianorum/Corpus Christianorum, Series latina*
CCCM	*Corpus Christianorum, Continuatio mediaevalis*
CHR	*Catholic Historical Review*
Clavis	E. Dekkers, *Clavis patrum latinorum*, ed. 2
Clm	Codices latini monacenses-Bayerische Staatsbibliothek Munich
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*
DGDC	*Diccionario general del derecho canónico*, edd. Javier Otaduy, Antonio Viana, Joaquín Sedano (7 Volumes; Pamplona 2012)
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*
Du Cange	Du Cange, Favre, Henschel, *Glossarium mediae et infimae latinitatis*
EHR	*English Historical Review*
GC	*Gallia christiana*
HLF	*Histoire littéraire de la France*
HMCL 2	*The History of Medieval Canon Law in the Classical Period, 1140-1234*: *From Gratian to the Decretals of Pope Greogry IX*, edd. Wilfried Hartmann and Kenneth Pennington (Washington DC 2008)
HMCL 3	*The History of Courts and Procedure in Medieval Canon Law*, edd. Wilfried Hartmann and Kenneth Pennington (Washington DC 2016)
HQLR 1-2	*Handbuch der Quellen und Literatur der Neueren Europäische Rechtsgeschichte*, 1: *Mittelalter (1100-1500)*: *Die Gelehrten Rechte und die Gesetzgebung*, ed. Helmut Coing (Veröffentlichungen des Max-Planck-Instituts für Europäische Rechtsgeschichte, München 1973-1977)
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)
Kéry	Lotte Kéry, *Canonical Collections of the Early Middle Ages (ca. 400-1140): A Bibliographical Guide to the Manuscripts and Literature* (Washington DC 1999)
JTS	*Journal of Theological Studies*
LMA	*Lexikon des Mittelalters*
Mansi	Mansi, *Sacrorum conciliorum nova et amplissima collectio*
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
• 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
• SS	Scriptores
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*
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	Schulte, *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*
SMCL	*Studies in Medieval and Early Modern Canon Law*
TRG	*Tijdschrift voor Rechtsgeschiedenis*
TUI	*Tractatus universi iuris* (18 vols. Venice 1584-1586)
Vat.	Biblioteca Apostolica Vaticana
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*. Older standard works will be cited only as short titles, e.g. Maassen, *Quellen*, Schulte, *Quellen*, Savigny, *Geschichte*, Kuttner, *Repertorium*.

For the serial publications of the great academies:

Abh. Akad. … followed by name of city, e.g. *Berlin*, *München*, etc. = *Abhandlungen der … preussischen, bayerischen*, etc. *Akademie der Wissenschaften, philosophisch-historische Klasse*.

Similarly for *Mémoires, Memorie, Proceedings, Rendiconti, Sitzungsberichte*, etc. the abridged form is always understood as referring to the series covering philosophy and the humanities where several classes or sections exist in a single academy; e.g.

Mém. Acad. Inscr.	*Rendic. Istit. Lombardo*
Proceed. Brit. Acad.	*Sb. Akad. Wien*

CONTENTS

REVIEWS

Roman Law Sources and Canonical Collections in the Early Middle Ages

Antonia Fiori

Canonical 'preservation' of Roman Law

It is well known that, being a part of the Roman Empire, the Church lived under Roman law from its earliest organization, and that canon law was one of the most important means for the preservation of Roman law in the early medieval period.

But 'preservation' can be understood in two different ways: first, as a preservation of the spirit and the rules of Roman law *through* canon law; secondly, as a preservation of the original texts themselves. The first is a general problem of legal culture, the second a specific philological matter. But these different points of view are not completely independent of one other, but rather two faces of the same process.

In this paper, I shall attempt to analyze the Italian canon law collections up to the year 900 together with some almost contemporary ecclesiastical quotations of Roman law. Yet we must remember the caveat that what happened in the ninth and tenth centuries is only a stage, and not the final one, in the process just mentioned, which would be completed with the Gregorian Reform. At that time almost every part of Justinian's compilation, including some which have since disappeared, were rediscovered by canon lawyers (the only exception being the *Tres Libri*). The philological passion of the Gregorian supporters—even if not technically well-founded—was an important instrument that helped and sustained the formation of a legal order of the Church in the age of the so-called 'Papal Revolution'.[1]

In fact, canon law was not an organized body of laws in the early Middle Ages, and it is also hard to see it as the unified legal

[1] Harold J. Berman, *Law and Revolution: the Formation of the Western Legal Tradition* (Cambridge, MA 1983).

order of the Church. There were several canonical traditions greatly influenced by local customs and often strongly devoted to them. Up to the Gregorian Reform these local or 'national' churches, with their canonical councils and canonical customs, were in a dialectical relationship with the Roman Church, which entailed a wide autonomy.[2]

It was the Roman Church, representing the 'Römische Zentrum', which tried to maintain the spirit of Roman law in this period, and sometimes imposed it on the 'Kirchliche Peripherie' (to use the terminology of a relatively recent congress held at the Deutsches Historisches Institut in Rom).[3]

In most of Europe during the early Middle Ages Roman law was still represented by the Theodosian tradition, mainly known through the *Breviarium Alaricianum*, but not so in Italy, where—leaving aside the difficult matter of surviving elements of Theodosian law[4]—Justinian's compilation was promulgated in 554 after the Gothic Wars. Thus the *Pragmatica sanctio* introduced the *Corpus iuris civilis* into Italy less than 15 years before the arrival of the Lombards (568). As he had died three years before, Justinian did not see how vain had been his great effort to reconquer Italy. His *Corpus* did not have enough time to become known and studied. Along with Radding and Ciaralli, we can say that 'the Justinianic codification simply fell from sight and from use, in Italy and everywhere else, between the end of the sixth century and the end of the eighth'.[5]

The Church saved the spirit of Roman law, even influencing through it some developments in Lombard law. But there is no

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[2] An effective synthesis of the subject is provided by Carlo Fantappiè, *Storia del diritto canonico e delle istituzioni della Chiesa* (Bologna 2011) 66-69.

[3] *Römisches Zentrum und kirchliche Peripherie: Das universale Papsttum als Bezugspunkt der Kirchen von den Reformpäpsten bis zu Innozenz III.* edd. Jochen Johrendt and Harald Müller (Neue Abhandlungen der Akademie der Wissenschaften zu Göttingen 2; Berlin 2008).

[4] Ennio Cortese, *Il diritto nella storia medievale*, 1: *L'Alto medioevo* (2 vols. Roma 1995) 1.112-117.

[5] Charles Radding and Antonio Ciaralli, *The Corpus Iuris Civilis in the Middle Ages: Manuscripts and transmission from the Sixth Century to the Juristic Revival* (Brill's Studies in Intellectual History 147; Leiden 2007) 47.

evidence at all of a textual knowledge in ecclesiastical contexts until the Carolingian period, when many Roman law fragments reappeared in a few canonical collections.

Two questions are open. First, why did they reappear in the Carolingian period and not before? Secondly, what kind of knowledge did these canon lawyers have or, better, which kinds of texts did they know?

The cultural Renaissance which occurred with the birth of the Carolingian empire is obviously one good answer to the first question. But even more significant was the papal idea, or papal hope, that the Western Empire, reborn under Charles the Great, should in its second life still be Roman and, furthermore, holy. While general attention was fixed on Charles and his Frankish kingdom, and Frankish customs were obviously ready to break out into the legal scene in a starring role (which indeed happened, even in canon law), the 'kingmaker's' plan was simply different.[6] The Italian church, or part of it, had a political and cultural interest in reinventing the Roman Empire, with the same universal dimension as the Church itself, and with the same universal ambitions and universal law of the original Empire. Little changed in this political perspective when the Carolingian dynasty fell into crisis.[7]

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[6] An exemplary case is that of the ordeals, as illustrated by Robert Bartlett, *Trial by Fire and Water: The Medieval Judicial Ordeal* (Oxford 1986).

[7] Giovanni Tabacco, *Sperimentazione del potere nell'alto Medioevo* (Piccola Biblioteca Einaudi 594; Torino 1993) 204-206 and idem, *La relazione fra i concetti di potere temporale e di potere spirituale nella tradizione cristiana fino al secolo XIV* (Torino 1950) 156-158 in the reprint edited by Laura Gaffurri for *Reti Medievali* (Firenze 2010) available on the web at the following address:
http://www.rm.unina.it/rmebook/index.php?mod=none_Tabacco_Concetti

Roman law in the early Middle Ages

During the ninth century, three canonical collections gathered together many fragments of Roman law. They were compiled somewhere in Northern Italy. These well-known canonical works are the *Lex romana canonice compta*, the *Excerpta Bobiensia* and the *Collectio Anselmo dedicata*.

The choice of the Roman law texts, which they contain, deserves some discussion and a short, if not exhaustive, 'excursus'. In fact, not every part of Justinian's compilation was available in the early Middle Ages, and even the texts available were not at all common.

The only part really known was the *Novellae*, in the summary version of the *Epitome Iuliani,* which was usually used in an ecclesiastical milieu.[8]

By constrast, and contrary to what one might think, the *Institutiones* were scarcely copied and had little circulation before the eleventh century, much less than the *Epitome Iuliani*. It is quite surprising, considering the nature of the work: a students' textbook with the clear and simple structure of a manual, not at all comparable with the complexity of the *Digest*. Nevertheless, the collections we mentioned—to be more precise, only the *Lex Romana Canonice Compta* and the *Anselmo dedicata*—represent one of the few exceptions. The rediscovery of the *Institutes* fully took place during the Gregorian Reform.[9]

Justinian's *Codex* had the most complicated textual tradition in the early Middle Ages. On the one hand, we have a famous witness to its circulation, the *Summa Perusina* or *Adnotationes Codicum domini Justiniani*, probably compiled in the tenth

[8] See Wolfgang Kaiser, *Die Epitome Iuliani: Beiträge zum römischen Recht im frühen Mittelalter und zum byzantinischen Rechtsunterricht* (Studien zur europäischen Rechtsgeschichte 175; Frankfurt a.M. 2004).

[9] On the diffusion of the *Institutes* in Italy, Radding and Ciaralli, *Corpus Iuris Civilis* 38 and 111-118; Francesca Macino, *Sulle tracce delle Istituzioni di Giustiniano nell'alto Medioevo: I manoscritti dal VI al XII secolo* (Studi e testi 446; Città del Vaticano 2008) 42-53.

century. The work—surviving in a unique manuscript now in Perugia,[10] dateable to the first half of the eleventh century—summarized some constitutions from the first eight books of the *Codex*, in many ways mirroring the juridical practice of its times. It circulated and had judicial application around Rome, towards the end of the tenth century but remains unrelated to the rest of the manuscript tradition of the *Codex*.[11]

On the other hand, Paul Krüger, the modern editor of this part of the *Corpus iuris*, suggested that the whole medieval tradition of the *Codex* did not arise from the rediscovery of an unabridged text, but instead from a patient work of reconstruction and addition based on an *Epitome* of the first nine books. The *Epitome Codicis* probably discarded the Greek constitutions and was severely shortened, compared to the original.[12] We have unfortunately no witnesses of this first hypothetical redaction, because the oldest manuscript of the *Epitome Codicis* we know—the Pistoia manuscript—was already an enlarged version (*Epitome aucta*).[13] The last part of the C*odex*, the *Tres Libri*, simply did not circulate, and reappeared separately in the twelfth century.[14]

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[10] Perugia, BC 32.

[11] *Adnotationes Codicum domini Justiniani (Summa Perusina)*, reprint of the critical edition of Federico Patetta (BIDR 12 [1900]), accompanied by a photographic facsimile of the manuscript (Firenze 2008). See Detlef Liebs, *Die Jurisprudenz im spätantiken Italien (260-640 n.Chr.)* (Freiburger Rechtsgeschichtliche Abhandlungen 8; Berlin 1987) 276-180, Kaiser, *Epitome Iuliani* 335-340, Antonio Ciaralli and Valentina Longo, 'Due contributi a un riesame della Summa Perusina (Perugia, Bibl. Cap. ms. 32)', *Scrittura e civiltà* 25 (2001) 1-62; Radding and Ciaralli, *Corpus Iuris Civilis* 42-43 and 69-70; Ciaralli, 'Per le Adnotationes Codicum Domini Iustiniani (Summa Perusina), Perugia, Bibl. dell'Archivio Capitolare, MS. 32', SDHI 76 (2010) 861-870.

[12] Paul Krüger dealt with the matter for the first time in his *Kritik des Justinianischen Codex* (Berlin 1867). For a synthesis of the 'status quaestionis', Cortese, *Diritto nella storia medievale* 1.239-140.

[13] Pistoia, BC C 106.

[14] See Emanuele Conte, *Tres Libri Codicis: La ricomparsa del testo e l'esegesi scolastica prima di Accursio* (Studien zur europäischen Rechtsgeschichte 46; Frankfurt am Main 1990).

Finally, about 50 years after its Italian promulgation, the *Digest* was apparently lost.[15] Pope Gregory the Great referred to it in a famous decretal to his legate, who was leaving for Spain in 603.[16] This was the last verifiable citation before it disappeared for five centuries. Then the *Digest* came back to light in 1076, in the renowned Tuscan plea of Marturi, where a citation of Ulpian unexpectedly succeeded in determining the court's judgment.[17] Some years later, 93 excerpts from the *Digest* (together with several fragments of the *Institutiones*) would be copied into a large section of the *Collectio Britannica*, a 'Gregorian' canonical collection compiled in Rome at the end of the eleventh century during the pontificate of Urban II.[18] Other attempts to find papal knowledge or papal citations of the *Digest* in the early Middle Ages have been unpersuasive.

Canonical collections

Coming back to our canonical collections, their authors made a selection of texts, taken from the *Institutiones*, the first 9 books of the *Codex*, and the *Novellae* in the *Epitome Iuliani* version; nothing from the *Digest* nor from the *Tres Libri*.

In fact, the excerpts came from the most easily intelligible parts of Justinian's compilation, perhaps the only ones available at the time. A few other contemporary works used almost the same kinds of sources. The *Collectio Gaudenziana*, for example, which curiously mixed Justinianic with Visigothic material.[19]

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[15] Radding and Ciaralli, *Corpus Iuris Civilis* 169-171.

[16] *Gregorii I. Registrum epistolarum* 13.50, MGH Ep. 2, 417.

[17] Cesare Manaresi, *I placiti del Regnum Italiae* (Fonti per la storia d'Italia 3.1; Roma 1960) 333-335 n.437.

[18] See my article 'La "Collectio Britannica" e la riemersione del Digesto', RIDC 9 (1998) 81-121, and the bibliography there cited.

[19] Kaiser, *Epitome Iuliani* 655-660.

The Lex Romana Canonice Compta and the Excerpta Bobiensia

As the name suggests, the *Lex Romana Canonice Compta* is a systematically ordered collection of Roman law fragments gathered for ecclesiastical use.[20] It is quite unusual for a canonical work, although, in the only manuscript we have (Paris BNF lat. 12448), it is inserted within a typical canonical context.[21] A large part of the Parisian manuscript was dedicated to canons and decretals taken from the *Collectio Dionysio-Hadriana*, or from Roman councils, and one section was specifically devoted to the Register of Gregory the Great. The manuscript, probably Italian, was written towards the end of the ninth century.

The *Lex Romana* itself was compiled earlier, between 836 and 882, in Northern Italy.[22] Bobbio or Pavia are possible places of origin.[23] It joined together as many as 211 chapters from the *Epitome Iuliani* 123 from the *Codex*, and 22 from the *Institutes*, with the addition of a few other legal texts and some simple glosses here and there. The fragments from the *Institutes* seem to be few, but they are nevertheless long excerpts, consisting of entire titles.[24] An important point, never sufficiently emphasized, is that the Greek sentences are neither omitted nor indeed altogether badly transcribed.[25]

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[20] Kaiser, *Epitome Iuliani* 501 prefers the denomination 'Capitula legis Romanae', according to the incipit.

[21] It has been edited by Carlo Guido Mor, *Lex romana canonice compta: Testo di leggi romano-canoniche del secolo IX pubblicato sul ms. parigino Bibl. Nat. 12448* (Pavia 1927). For the bibliography see Kéry 161-162.

[22] Kaiser, *Die Epitome Iuliani* 581.

[23] Mor, *Lex Romana canonice compta* (=LRCC) 12-13; Giuseppe Russo, *Tradizione manoscritta di Leges romanae nei codici dei secoli IX e X della Biblioteca Capitolare di Modena* (Modena 1980) 65.

[24] Only two titles are shortened: Inst. 2.14 and 3.6 = LRCC cap. 230 and cap. 221 (ed. Mor, *Lex romana* respectively at pages 171-172 and 165-167).

[25] As an example, see cap. 170 (= Inst. 1.2), or cap. 193 (= Inst. 4.18) in LRCC, ed. Mor 115 and 131, in Paris BNF lat. 12448 fol. 97va and 101vb.

As we have already pointed out, Krüger based his dating of the *Epitome Codicis aucta* upon the *Lex Romana Canonice Compta*, believing the former to be a source of the latter. Radding and Ciaralli have questioned this assumption and claimed that the author could have consulted a full *Codex* manuscript and not necessarily an abridged version.[26]

The *Excerpta Bobiensia*[27] are similar in some respects: a collection of Roman law, probably compiled in Bobbio at an uncertain date, and inserted into a canonical context in both the manuscripts we have.[28] But they differ from the *Lex Romana Canonice Compta* in their sources and in their shorter length: about four fifths of their 86 chapters come from the *Epitome Iuliani*, the rest from the *Codex*, and nothing from the *Institutes*. These variations have been interpreted as indicating the intention to compile a proper canonical collection and not a civil law collection for churchmen. In fact, in addition to the fragments from the *Epitome Iuliani*—traditionally in Church use—the *Excerpta* also gathered many texts from the first book of the *Codex*: a book especially dealing with bishops, clergy, *episcopalis audientia* and other ecclesiastical matters, which are otherwise neglected in the *Lex Romana Canonice Compta*.[29]

The Collectio Anselmo dedicata

The third work, the *Collectio Anselmo Dedicata*, is an 'extraordinarily rich and well organized' canonical collection: about 2000 canons arranged in 12 parts, each part divided into

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[26] Radding and Ciaralli, *Corpus Iuris Civilis* 139-140.

[27] Edited by Carlo Guido Mor in *Bobbio, Pavia e gli "Excerpta Bobiensia"*, (*Contributi alla storia dell'Università di Pavia: Pubblicati nell'XI centenario dell'Ateneo* (Pavia 1925) 45-114. Bibliography in Kéry 162.

[28] About 870 according to G. Nicolaj, 'Ambiti di copia e copisti di codici giuridici in Italia (secoli V-XII in.)', *A Ennio Cortese*, ed. Italo Birocchi, Mario Caravale, Emanuele Conte and Ugo Petronio (3 vols. Roma 2001) 2.478-496 at p.487. Other possible datings in Kaiser, *Epitome Iuliani* 524.

[29] Cortese, *Diritto nella storia* 1.245 n.102.

three sections.[30] The first section of each part gathered decretals, canons and patristic texts, with a high incidence of Pseudo-Isidorian decretals.[31] In the second section were located excerpts from the Register of Gregory the Great.[32] The third section contained secular law and, with the exception of a capitulary of Lothar I, it is concerned with Roman law: that is, 238 chapters apparently taken from the *Lex Romana Canonice Compta*.[33] Most of them are concentrated in the seventh part, dealing with laity. In addition, its canonical sources are in many ways similar to those collected in the Parisian manuscript containing the *Lex Romana canonice compta*. The whole collection has still not

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[30] Linda Fowler-Magerl, *Clavis canonum: Selected Canon Law Collections before 1140* (Hannover 2005) 70. In addition to the bibliography cited by Kéry, 126-128, see Irene Scaravelli, 'La collezione canonica 'Anselmo dedicata': Lo status quaestionis nella prospettiva di un'edizione critica', *Le storie e la memoria: In onore di Arnold Esch*, edd. Roberto delle Donne and Andrea Zorzi (Reti Medievali. E-book 2, Firenze 2002) 33-52, available on the website:
http://www.rm.unina.it/rmebook/index.php?mod=none_Delle_Donne_Zorzi
Kaiser, *Epitome Iuliani* 550-561; Klaus Zechiel-Eckes, 'Quellenkritische Anmerkungen zur *Collectio Anselmo dedicata*', *Recht und Gericht in Kirche und Welt um 900*, ed. Wilfried Hartmann (Schriften des Historischen Kollegs. Kolloquien 69; München 2007) 49-65; W. Hartmann, *Kirche und Kirchenrecht um 900: Die Bedeutung der spätkarolingischen Zeit für Tradition und Innovation im kirchlichen Recht* (MGH Schriften, 58; Hannover 2008) 143-149.

[31] Horst Fuhrmann, *Einfluß und Verbreitung der pseudoisidorischen Fälschungen* (3 vols. MGH Schriften 24; Stuttgart 1973) 2.430: 'Von insgesamt 1980 Kapiteln stammen mindestens gegen 500 aus den pseudoisidorischen Dekretalen; keine andere Einzelquelle hat der Anselmo dedicata so viele Kapitel gestellt wie die Fälschung'. Most chapters came from the short form of the Pseudo-Isidorian forgeries. On the acceptance of Pseudo-Isidore in Italy, idem, 'The Pseudo-Isidorian Forgeries', *Papal Letters in the Early Middle Ages* (HMCL; Washington D.C. 2001) 182.

[32] On the extensive use of Gregory the Great's Register in the *Collectio Anselmo dedicata*, Detlev Jasper, 'The Beginning of the Decretal Tradition', *Papal Letters in the Early Middle Ages* 77.

[33] On the third section see Russo, *Tradizione manoscritta*, 32. Except books 8, 9, 10 were not taken from LRCC, see Paul Fournier and Gabriel Le Bras, *Histoire des collections canoniques 2*.236.

been edited, while the Roman law fragments were published separately by Giuseppe Russo in 1980.[34]

The 'Anselmus' to whom the work was dedicated was Anselm II, bishop of Milan between 882 and 896, which years provide the likely temporal limits for the redaction. It is uncertain where it was written. Possible places of origin are Ravenna, Vercelli, Bobbio, Pavia, and Milan itself.[35]

Unlike the other two works, the *Collectio Anselmo Dedicata* has been preserved in several copies, which Fournier divided into two groups, an 'Italian' and a 'Cisalpine'.[36]

Such a rich handwritten tradition shows the large diffusion of a collection that Carlo Guido Mor considered the 'typical collection' ('la collezione tipica') in Northern Italy, and that, at the turn of the tenth century, was certainly known also in Southern Germany as well as the area of Reims.[37] It was a source for Burchard of Worms and for the *Collectio XII partium*.[38] Friedrich Maassen detected that it was still being quoted by

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[34] Russo, *Tradizione manoscritta*. Severe criticism of the edition in J. C. Besse, *Histoire des textes du droit de l'église au Moyen Age de Deny*s *à Gratien: Collectio Anselmo dedicata: Etude et textes (extraits)* (Paris 1957) was expressed by G. Le Bras, 'Le droit classique de l'Église au service de l'homme', *Congrès de droit canonique médiéval (Louvain-Bruxelles, 22-26 Juillet 1958)* (Bibliothèque de la RHE 33; Louvain 1959) 104-111 at 104 and also in 'Miettes pour une nouvelle édition de l'histoire des collections canoniques: A propos de l'Anselmo dedicata', RHD 38 (1960) 309-312 and by John J. Ryan, 'Observations on the pre-Gratian Canonical Collections: Some Recent work and Present Problems', *Congrès de droit canonique médiéval (Louvain-Bruxelles, 22-26 Juillet 1958)* (Bibliothèque de la RHE 33; Louvain 1959) 94.

[35] See the 'status quaestionis' as summarized by Fuhrmann, *Einfluß und Verbreitung* 2.427-428.

[36] Paul Fournier, 'L'origine de la collection 'Anselmo dedicata', *Mélanges P.F. Girard* (Paris 1912) 1.477-480 (reprinted *Mélanges de droit canonique*, ed. Theo Kölzer [Aalen 1983] II). See also Scaravelli, *La collezione canonica Anselmo dedicata* 41.

[37] C.G. Mor, 'La reazione al 'Decretum Burchardi' in Italia avanti la Riforma Gregoriana', *Studi Gregoriani* 1 (1947) 200-203. See also Susan F. Wemple, 'The Canonical Resources of Atto of Vercelli (926-960)', *Traditio* 26 (1970) 343-344.

[38] See below n.44.

Bernard of Pavia in the twelfth century.[39] Outside an ecclesiastical environment, it has been thought that it could have been consulted in the eleventh century for the redaction of the famous forgeries connected to the Investiture Controversy,[40] and in the composition of some Veronese documents, detected in the last century by Guiscardo Moschetti.[41]

Despite its wide circulation as a canonical work, it seems to have been only moderately successful as a material source of Roman law texts for later canonical collections. If we consider those which drew material out of it, like Burchard's *Decretum*, we find just a few citations to Justinian's codification, almost all from the *Epitome Iuliani*,[42] plus one—partially rearranged—from the *Codex*[43], and none from the *Institutes*. Burchard perhaps disliked this kind of source, and simply excluded them, but we may observe the same omission in the *Collectio XII partium,* without any perceptible aversion to Roman law.[44]

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[39] See Peter Landau, 'Vorgratianische Kanonessammlungen bei Dekretisten', *Proceedings San Diego 1988* 94 and 100-104.

[40] *Die falschen Investiturprivilegien*, ed. Claudia Märtl (MGH Fontes iuris 13; Hannover 1986) 49.

[41] Guiscardo Moschetti, 'Tre documenti veronesi dei secoli XI e XII e la *Lex Romana canonice compta*', *Atti e memorie della R. Accademia di Scienze, Lettere ed Arti in Padova* 48 (1931-1932) 401-455. But see also Kaiser's critique, *Die Epitome Iuliani* 607 and the decisive refutation by Antonio Ciaralli, '*Universalis lex*: Il *Codex Iustinianus* nei documenti veronesi tra XI e XII secolo', *Medioevo: Studi e documenti* 1 (2005) 111-160 (also available on the website www.biblioteca.retimedievali.it).

[42] Hartmut Hoffmann and Rudolf Pokorny, *Das Dekret des Bischofs Burchard von Worms: Textstufen, Frühe Verbreitung, Vorlagen* (MGH Hilfsmittel 12; München 1991) 258.

[43] Cod. 5.4.26 = Burchard 9.18, Hoffmann and Pokorny, *Dekret* 213; Giorgio Picasso, 'I fondamenti del matrimonio nelle collezioni canoniche', *Il matrimonio nella società altomedievale* (Spoleto 1977) reprinted *Sacri canones et monastica regula: Disciplina canonica e vita monastica nella società medievale* (Biblioteca erudita 27; Milano 2006) 229-262 at 248.

[44] Greta Austin, 'Secular law in the *Collectio Duodecim Partium* and Burchard's *Decretum*', *Bishops, Texts and the Use of Canon Law around 1100: Essays in Honour of Martin Brett*, ed. Bruce C. Brasington and Kathleen G. Cushing (Church, Faith and Culture in the Medieval West; Aldershot 2008) 29-44 at 29-31, and her *Shaping Church Law around the year*

What Irene Scaravelli recently remarked about the *Anselmo dedicata* is probably true. She said it was not an easy book to handle, it was too big, the chapters were numbered inaccurately, and the chapter division was irregular. It was, therefore, unsuitable for everyday use in legal practice.[45] Its manuscripts were adorned and calligraphic, and its contents precious and learned, of a kind probably required by bishops to give prestige to their cathedral libraries and to lend authoritative support to their judicial power.

Was there a Lex Romana?

All things considered, the *Lex Romana Canonice Compta*, the *Collectio Anselmo Dedicata* and the *Excerpta Bobiensia* collected material uncommon at the time, certainly precious and rare. They also represent an important stage in the rediscovery of the texts involved, so that Krüger—perhaps wrongly—considered the *Lex Romana Canonice Compta* the first witness of the *Epitome Codicis Aucta*, one or two centuries earlier than the Pistoia manuscript.[46]

The *Lex Romana* may be judged relevant also in regard to the tradition of the *Institutes*. Although these never disappeared completely like the *Digest*, they are wrongly thought to have been commonly used and consulted in the early Middle Ages. In absolute terms the *Institutes* were not a 'popular' law text. We have from this period just a few fragments (like those from Verona, or the famous Berlin fragment). [47] The first complete

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1000: The Decretum of Burchard of Worms (Church, Faith and Culture in the Medieval West; Aldershot 2009) 130. About the *Collectio XII Partium* (compiled in Freising in the early eleventh century and closely related to Burchard's *Decretum*) see Jörg Müller, *Untersuchungen zur Collectio Duodecim Partium* (Abhandlungen zur Rechtswissenschaftlichen Grundlagenforschung 73; Ebelsbach am Main 1989) in particular 316-325.

[45] Scaravelli, *La collezione canonica Anselmo dedicata* 40.

[46] Paul Krüger, *Praefatio* in *Codex Iustinianus* (Berlin 1977) XVIIII.

[47] Verona BC CLXXXA, Verona BM 3035 (*olim* 163.3), Yale University, Beinecke Rare Book and Manuscript Library 744; see Guiscardo Moschetti, 'I frammenti veronesi del secolo IX delle Istituzioni di Giustiniano', *Atti del*

surviving manuscript is dated to the eleventh century (Bamberg SB jur. 1), with all the others being at least a century later. In this context, a canonical collection gathering almost a quarter of the titles, in an unabridged version, is indeed a considerable witness to the *Institutes*' tradition.

The real point at issue has always been the relationship between the three canonical works. The *Collectio Anselmo Dedicata* shares with the *Lex Romana Canonice Compta* all the Roman law fragments, and the structure of the work also reflects the textual sequence of the latter. But there are also some variants, which allowed Paul Fournier to dismiss the idea of a direct dependence and to suggest both depended on a common source.[48]

Carlo Guido Mor brought the *Excerpta Bobiensia* into this question. He hypothesized, as a shared source of all three collections, a vanished *Lex Romana*: a larger compilation of Roman law texts, perhaps for ecclesiastical use, known and consulted in the Carolingian period.[49] If we take this possibility into account, the expression 'lex Romana' could deserve rather more care each time we find it in the ninth or tenth century sources. Ennio Cortese has pointed out that Charles the Great himself once advised a 'missus' to find the answer to his question in the 'lex Romana' ('lege Romanam legem', he said).[50] The law specifically involved, a chapter of the *Epitome Iuliani*,[51]

Congresso internazionale di diritto romano e di storia del diritto, Verona 27-28-29 novembre 1948 (Milano 1953) 439-509, now in *Frammenti veronesi del secolo IX delle Istituzioni di Giustiniano* (Roma 2006). Berlin SB lat. fol. 269.

[48] Fournier, *L'origine de la collection* 491 (in his *Mélanges* 204).

[49] C.G. Mor, 'Di una perduta compilazione di diritto romano, fonte degli *excerpta Bobiensia* e della *Lex Romana canonice compta*', *Archivio Giuridico* 95 (1926), 20-26, now in his *Scritti di storia giuridica altomedievale* (Pisa 1977) 271-278. See on the subject Ennio Cortese, 'Mor e il recupero del diritto romano nel Medioevo', *Carlo Guido Mor e la storiografia giuridico-istituzionale italiana del Novecento* (Udine 2003) (41-47) 46-51, now in Ennio Cortese, *Scritti*, edd. Alessandro e Federico Cortese (Roma 2013) 3.(209-227) 215-219

[50] MGH Capit. I, 145.

[51] *Epitome Iuliani* 76.9 (de solaciis iudicum).

was included in the *Lex Romana Canonice Compta*, which was compiled later.[52] That is, Charles possibly referred to a collection called *Lex Romana*, source of the *Lex Romana Canonice Compta*, and not generically to Roman law.[53] Yet, the expression is too general and vague to allow us to identify with certainty a specific collection: Hincmar of Rheims used for instance the term 'lex Romana', having the 'Lex Dei' as a source.[54]

Wolfgang Kaiser has recently disproved the myth of a *Lex Romana* as the common source of our canonical works. He demonstrated that the *Excerpta Bobiensia* simply do not belong to the same family as the others. This is not only because they do not draw texts from the *Institutiones* nor because they do not share the same fragments of the *Codex* with the other two collections. But because the copious excerpts of the *Epitome Iuliani* come from a different textual tradition of the *Epitome*.[55]

What remains unexplained is the evident relationship between the *Lex Romana Canonice Compta* and the *Collectio Anselmo Dedicata*. Now Kaiser seems to believe in a direct dependence, not in a common source.[56] Radding and Ciaralli suggest that both works were produced in the same center, so that

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[52] Cap. 249, ed. Mor, LRCC 180.

[53] Cortese, *Diritto nella storia* 1.245-247. On the usage of the expression 'lex romana' in Carolingian sources see also Jean Imbert, 'Les références au droit romain sous les Carolingiens', RHD 73 (1995) 163-174 at 166-167.

[54] Hinkmar von Reims, *De divortio Lotharii regis et Theutbergae reginae, Responsio 12*, ed. Letha Boehringer (MGH Conc. 4 Suppl. 1; Hannover 1992) 178 and 185; *The Divorce of King Lothar and Queen Theutberga: Hincmar of Rheims's De divortio*, edd. and trans. Rachel Stone and Charles West (Manchester Medieval Sources; Mancester 2016). See Max Sdralek, *Hinkmars von Rheims kanonistisches Gutachten über die Ehescheidung des Königs Lothar II: Ein Beitrag zur Kirchen-, Staats- und Rechts-Geschichte des IX. Jahrhunderts* (Freiburg im Breisgau 1881) 106 and, on the subject, Jean Devisse, *Hincmar et la loi* (Publications de la Section d'histoire 5; Dackar 1962) 76 and Simon Corcoran, 'Hincmar and his Roman Legal Sources', *Hincmar of Rheims: Life and Work*, edd. Rachel Stone and Charles West (Manchester 2015) 141.

[55] Group D, instead of the group A of the other two collections: Kaiser, *Die Epitome Iuliani* 567-570.

[56] Ibid.

the author of the *Collectio Anselmo Dedicata* could read not only the *Lex Romana Canonice Compta*, but its sources as well.[57] According to Linda Fowler-Magerl the author of the *Collectio Anselmo dedicata* could simply have drawn the missing texts from a better copy of the *Lex Romana canonice compta*.[58]

Ecclesiastical Quotations of Roman Law in the Ninth and Tenth Centuries

Let us recapitulate. At least since the end of the ninth century, one of the most important canonical collections circulating in Northern Italy, the *Collectio Anselmo dedicata*, gathered hundreds of Roman law texts, selected in accordance with ecclesiastical interests. Despite that, and with the exception of the *Epitome Iuliani*, up until the eleventh century we find just a few citations, on a few topics, coming from a few extraordinarily learned popes or canonists, and expressed in a handful of letters. Were these citations founded on our canonical collections?

We need to take a look at the rare early medieval quotations we have. Most of them concern family law. Indeed, at that time the Church was beginning to assert its pre-eminent, but not yet exclusive, jurisdiction over marriage. As Esmein pointed out, it is difficult to say exactly when marriage came under the jurisdiction of Canon law,[59] but some historians have placed the basis of this claim in a famous letter addressed from Nicholas I to Charles the Bald in 867,[60] concerning the divorce of King Lothar II. in which the pope maintained that ecclesiastical jurisdiction,

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[57] Radding and Ciaralli, *Corpus Iuris Civilis* 59.
[58] Fowler-Magerl, *Clavis canonum* 73.
[59] Adhémar Esmein, *Le mariage en droit canonique*, edd. R. Genestal and Jean Dauvillier (2 vols. 2nd ed. Paris 1929-1935) 1.27.
[60] Ep. 48, MGH Ep. 5.329-332. See Jean Gaudemet, *Le mariage en Occident: les moeurs et le droit* (Paris 1987) 111-112.

once involved, could not afterwards be bypassed.[61] The ninth was the century of the 'famous' Carolingian divorces,[62] which involved papal intervention: first of all the attempts of Lothar II, king of Lotharingia, to divorce his wife, Theutberga, in order to marry his mistress, Waldrada; then, less important but closely related, the separation between Theutberga's brother Boso and his wife Engeltrud, who eloped with a vassal of her husband.

There is much about marriage and kinship in our canonical collections also. In the *Collectio Anselmo Dedicata* the relevant fragments were gathered in the VIIth part, which dealt with laity. So—without following any chronological sequence—I will begin with a quotation taken from the *Anselmo Dedicata*.

Atto of Vercelli and the Spiritual Kinship as Bar to Marriage

The quotation is in a letter that Atto, bishop of Vercelli, wrote to his 'colleague' Azo of Como, at some time during the episcopacy of the latter, between 922 and 945.[63] We are now in the tenth century, and Atto is a prelate of the Italian Kingdom and living under Lombard law. As Atto wrote in his will: 'professus sum ex natione mea lege vivere Langobardorum'.[64]

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[61] See Antonia Fiori, 'La prima condanna canonica del duello e il suo contesto storico: Niccolò I e il divorzio di Lotario e Teutberga', *Panta rei: Studi dedicati a Manlio Bellomo*, ed. Orazio Condorelli (5 vols. Roma 2004) 3.353-374 and now my *Il giuramento di innocenza nel processo canonico medievale: Storia e disciplina della purgatio canonica* (Frankfurt am Main 2013) 167-170. On the divorce also Karl J. Heidecker, *The Divorce of Lothar II: Christian Marriage and Political Power in the Carolingian World*, trans. from Dutch Tanis M. Guest (Ithaca-London 2010).

[62] Jean Imbert, 'L'indissolubilité du mariage à l'époque carolingienne', RDC 38 (1988), 41-56.

[63] PL 134, *Epistola V ad Azonem episcopum*, col. 106-111. See on the letter Savigny, *Geschichte* 2.270; Conrat, *Geschichte* 1.26; Susan F. Wemple, *Atto of Vercelli: Church State and Christian Society in Tenth Century Italy* (Temi e Testi 27; Roma 1979) 40; François Bougard, *La Justice dans le Royaume d'Italie: De la fin du VIII^e siècle au début du XI^e siècle* (Bibliothèque des écoles françaises d'Athénes et de Rome 291; Roma 1995) 45.

[64] Arsenio Frugoni, 'Attone di Vercelli', DBI 4 (1962), 567-568. See also Renato Bordone, '*Vescovi giudici e critici della giustizia: Attone di Vercelli'*,

He was definitely not an ordinary bishop, but one of the most learned theologians and canonists of his time.

We certainly know that he was acquainted with the *Collectio Anselmo Dedicata*. One of the oldest manuscripts of the collection we have is preserved in the Vercelli Chapter Library,[65] and it may have been there from the time it was copied by order of Atto himself.[66] A verse inscription on the codex indicates that he may have brought it from Milan.[67] The *Collectio Anselmo Dedicata* was, moreover, one of his favorite sources when he compiled his canonical work, the *Capitulare*.[68] In it, as in his other work, *De pressuris ecclesiasticis*, he seldom made reference to secular law, but it is not surprising that, when he sometimes did so, this was because he could access Roman law from the *Collectio Anselmo Dedicata*.

This, in fact, is the case in his letter to Azo. The bishop of Vercelli answered a question about the prohibition of marriage

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La giustizia nell'alto Medioevo (secoli IX-XI) (2 vols. Settimane di studio del Centro italiano di Studi sull'alto Medioevo, 44; Spoleto 1997) 1.457-490 at 457-459 and Germana Gandino, 'L'imperfezione della società in due lettere di Attone di Vercelli', *Bollettino storico-bibliografico subalpino* 82 (1984) 479-510 and her *Contemplare l'ordine: Intellettuali e potenti dell'alto Medioevo* (Nuovo Medioevo 73; Napoli 2004) 83-85. On Atto see also Emiliano Pasteris, *Attone di Vercelli: Ossia il piu grande vescovo et scrittore italiano del secolo X: Vita ed opere con uno studio sulle sue prose ritmiche* (Milano 1925), Rosaldo Ordano, *Un vescovo italiano del secolo di ferro: Attone di Vercelli* (Vercelli 1948); Rob M.J. Meens, 'In the Mirror of Eusebius: The Episcopal Identity of Atto of Vercelli', *Ego trouble: Authors and their identities in the early Middle Ages*, edd. Richard Corradini, Matthew B. Gillis, Rosamond McKitterick, and Irene van Reenswoude (Forschungen zur Geschichte des Mittelalters 15; Wien 2010) 243-248.

[65] Cod. 15.

[66] Wemple, 'Canonical Resources' 339 and her *Atto of Vercelli* 206; see also Philip Levine, 'Historical Evidence for Calligraphic Activity in Vercelli from St. Eusebius to Atto', *Speculum* 30 (1955) 561-581 at 576.

[67] The verse is printed in PL 134.11. See Costanzo Gazzera, 'Delle iscrizioni cristiane antiche del Piemonte', *Memorie della R. Accademia delle Scienze di Torino* 11 (1851) 249. See also Russo, *Tradizione manoscritta* 48; Scaravelli, *La collezione canonica Anselmo dedicata* 48.

[68] Wemple, 'Canonical Resources' 340. For the *Capitulare* see Kéry 191-193. and Fowler-Magerl, *Clavis canonum* 74-75.

between a godfather and a godchild.[69] Azo's query also included a request for details, if possible, of any legal texts to which he could refer.

The answer is a masterpiece of erudition, in which Atto cites Scripture, the Church Fathers and papal decretals. However, what we are interested in is the first part of the letter, where the requested legal texts are provided.

During Atto's time, marriage was still considered a secular institution, subject to secular rules, even if these rules should be consonant with divine law. From this typically Carolingian perspective, Atto underlines how important it is to observe 'quod religionis causa saeculares leges custodire contendunt'.

In fact, he writes, in the matter of marriage it is better to enquire about secular law. He indicates two different kinds of secular law.

First, Lombard and Frankish law. He quotes chapter 34 of Liutprand[70], 'catholicus rex'[71], which forbade marriage in the case of a godparent relationship, and then a legal text indicated as 'lex Salica'.[72] This latter was, to be precise, a Merovingian text, the *Decretio Childeberti secundi* of the year 596[73], which, in fact,

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[69] On spiritual kinship see Joseph Freisen, *Geschichte des canonischen Ehe-rechts bis zum Verfall der Glossenliteratur* (Paderborn 1893) 507-510; John H. Lynch, 'Spiritual Kinship and Sexual Prohibitions in Early Medieval Europe', *Proceedings Berkeley 1980* 271-288 and his *Godparents and Kinship in Early Medieval Europe* (Princeton 1986); Enrico De León, *La "cognatio spiritualis" según Graciano* (Pontificio Ateneo della Santa Croce, Monografie giuridiche 11; Milano 1996); Rudolf Weigand, 'Die Ausdehnung der Ehehindernisse der Verwandtschaft', ZRG Kan. Abt. 80 (1994) 8-17. See also Jean Imbert, 'L'indissolubilité du mariage' 48-49.

[70] Ch. 34, MGH LL 4.124: 'Item hoc censemus adque precipimus, ut nullus presumat cum matrem suam uxorem ducere, sed nec filiam, quam de sacro fonte levavit; neque filius eius presumat filiam illius uxorem ducere, qui eum de fonte suscepit, quia spiritualis germani esse noscuntur. . .'

[71] MGH LL 4.403-404: 'Ego in Dei nomine Liutprand excellentissimus christianus et catholicus Deo dilectae gentis Langobardorum rex'.

[72] PL 134.106D: 'Lex etiam, quae Salica dicitur, hoc continet'.

[73] Ibid. see MGH Capit. 1.15-17, MGH LL nat. Germ. 4.2, 174-178: '. . decrevimus ut nullus incestuosum sibi societ coniugio, hoc est de fratris sui uxorem, nec uxoris suae sororem, nec uxorem patruo aut parentis consanguinei. Uxorem patris si quis acceperit, mortis periculum incurrat. De

circulated together with the *Lex Salica*[74] and had ever since been considered a fundamental reference in the matter of incest[75], to which the marriage between a godfather and a godchild was compared. Atto's use of such a text might seem surprising, but some Salic texts circulated with Italian capitularies and they could perhaps have been evaluated as part of the legal order of the Italian kingdom[76]. In other words, he was probably speaking of the secular law (Lombard-Frankish Law) he considered to be in force in his kingdom.

He then switches to Roman law for a reason he clearly explains: 'In many cases it is proper for us churchmen to comply with the law of the Roman emperors' (Romani principes… quorum legem etiam nobis sacerdotibus in multis convenit observare). It is a fitting thing, he says, every time secular law preserves a religious value; and it would be unseemly for the ministers of God not to observe such a law. He cites many canonical references supporting this assumption: every one, with the exception of a letter of Gregory the Great which Atto mentions, came from the most famous forgery of the time, the *Pseudo-Isidorian Decretals*.[77] Almost all these texts came also from the *Collectio Anselmo Dedicata* (=CAD).[78]

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praeteritis vero coniunctionibus, quae incestae esse videntur, per praedicationem episcoporum iussimus emendare. Qui vero episcopo suo noluerit audire et excommunicatus fuerit, perenni condemnatione apud Deum sustineat et de palatio nostro sit omnino extraneus, et omnes res suas parentibus legitimis amittat qui noluit sacerdotis sui medicamenta sustinere'.

[74] MGH LL nat. Germ. 4.1, 267 (*Capitula Legi Salicae addita*). On its transmission see Wilhelm A. Eckhardt, 'Die Decretio Childeberti und ihre Überlieferung', ZRG Germ. Abt. 84 (1967) 1-71.

[75] Karl Ubl, *Inzestverbot und Gesetzgebung*: *Die Konstruktion eines Verbrechens (300-1100)* (Millennium Studien, 20; Berlin-New York 2008) 182-191.

[76] Cortese, *Diritto nella storia medievale* 1.235; Bougard, *Justice dans le Royaume d'Italie* 30-32 and 45.

[77] PL 134.109A: 'Et nos quidem iuxta seriem relationis vestrae consuetudinem, quae tamen contra fidem catholicam nihil usurpari dignoscitur, immotam permanere concedimus, sive de primatibus constituendis, ceterisque capitulis, exceptis his, qui ex Donatistis ad

Thus, even if both Lombard and Roman law were 'consonant' with the Church's principles, they were not on the same plane. The first was cited because it was in force in the Italian kingdom, but the second also had the special reverence owed to a law, with which it was proper for churchmen to be in compliance.

The Roman law texts Atto cites are: 1. two near-adjacent passages from the title *De nuptiis* of the *Institutiones* (first book, title 10);[79] 2. one from the same title of the *Codex Iustinianus*;[80] and 3. a Novel from the *Epitome Iuliani* about a similar matter (de nefariis et incestis nuptiis).[81]

The first two fragments deal with adoption as a bar to marriage: an adoptive parent cannot marry his adoptive child, or the marriage is void. The same happened, according to Atto's

episcopatum perveniunt', see *Gregorii I. Registrum epistolarum* 1.75, MGH Ep. 1.95.

[78] PL 134.108A, Dionysii ep. 2.4 (ed. Paul Hinschius, *Decretales pseudo-Isidorianae et Capitula Angilramni* [Leipzig 1863] 196)=CAD 3.109; Euticiani ep. 2.9 (Hinschius, 212)=CAD 3.108; ep. Calixti 2.16 (Hinschius 140), related to Vercelli Bibl. Cap. LXXX according to Wemple, *Atto of Vercelli* 208 n.35 and 217, and Wemple, 'Canonical Resources' 349-350. See also Clementis ep. 4.77 (Hinschius 62) and Iulii decr. cap. 12 (Hinschius 469), not literally quoted.

[79] PL 134.107A: 'Sed si qua per adoptionem soror tibi esse coeperit, quamdiu quidem constat adoptio, sane inter te et eam nuptiae consistere non possunt'(Inst. 1.10.2); 'Si adversus ea quae diximus aliqui coierint, nec vir, nec uxor, nec nuptiae, nec matrimonium, nec dos intellegitur. Itaque ii qui ex tali coitu nascuntur in potestate patris non sunt, sed tales sunt, quantum ad patriam potestatem pertinet, quales sunt ii quos mater vulgo concepit. Sequitur ergo, ut et dissoluto coitu, nec dotis exactioni locus sit, et alias poenas patiantur, quae sacris constitutionibus continentur' (Inst. 1.10.12).

[80] PL 134.107C: 'Ea videlicet persona omnimodo ad nuptias venire prohibenda, quam aliquis, sive alumna sit sive non, a sacrosancto suscepit baptismate, cum nihil aliud sic inducere potest paternam adfectionem et iustam nuptiarum prohibitionem, quam huiusmodi nexus, per quem deo mediante animae eorum copulatae sunt' (Cod. 5.4.26.2).

[81] PL 134.107D: 'Si qui nefarium atque damnatum matrimonium contraxerit, et ex priori matrimonio liberos non habuerint, statim suis facultatibus careant, et dos fisci vindicetur. . . Quod si non fuerint separati, sed perseveraverint in toto biennio, poenis in primo capite dictis subiiciantur' (Ep. Iul. 32.1-2, ed. G. Haenel, *Iuliani Epitome Latina Novellarum Iustiniani* [Leipzig 1873] 52-53).

opinion, with the spiritual adoption made through baptism, which differs from legal adoption only because it does not allow any emancipation.[82] Such a carnal union between a godfather and a godchild may be considered as incest.

The second fragment, from the fifth book of the *Codex*, is particularly relevant, because it expressly referred to the relationship arising from baptism as a 'nuptiarum prohibitio'[83].

All the legal texts, as stated above, come from the *Collectio Anselmo Dedicata*, a work that Atto knew well, where all three passages he cited were included quite close together.[84]

The prohibition on marriage based on spiritual kinship, although already provided by the *Codex Iustinianus*, was introduced into the western canonical tradition[85] only two centuries before Atto's letter, in the Roman council of 721,[86] and renewed 22 years later, in the council of 743, under Pope

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[82] PL 134.107A: 'Nulla denique adoptio talis esse poterit, quam haec per quam homines filli Dei efficiuntur. Haec est enim adoptio, quae emancipari non potest'.

[83] It is the first legal prohibition of marriage based on spiritual kinship, Enrico De León, *La "cognatio spiritualis" según Graciano* 16-18 (see bibliography in footnotes).

[84] Inst. 1.10.2 = CAD 7.18 n.3 and n.8-9, ed. Russo 142-143; Cod. 5.4.26.2 = CAD 7.7 n.3, p. 136; Ep. Iul. 32.1-2 = CAD 7.13 n.1 and 7.14 n.2 and 5 p.139-140.

[85] In 692 the Constantinopolitan council in Trullo (c.53) introduced the prohibition of marriage between godparents, or better between a godfather and the mother of his godchild: 'Quod patrini cum viduatis matribus matrimonium contrahere non debeant. Quoniam spiritalis affinitas corporum coniunctione maior est, in nonnullis autem locis cognovimus quosdam qui ex sancto et salutari baptismate infantes suscipiunt, postea quoque cum matribus illorum viduis matrimonium contrahere, statuimus, ut in posterum nihil fiat eiusmodi. Si qui autem post praesentem canonem hoc facere deprehensi fuerint, ii quidem primo ab hoc illicito matrimonio desistant, deinde et fornicatorum poenis subiiciantur', ed. Perikles-Petros Joannou, *Discipline generale antique* (II^{e} – IX^{e} s.) (Pontificia Commissione per la redazione del codice di diritto canonico orientale; Fonti, 9.1; Grottaferrata 1962) 189-190.

[86] Mansi 12.263, ch. 4: 'Si quis commatrem spiritalem duxerit in coniugium anathema sit'.

Zacharias.[87] Having a special interest in the subject, both popes exercised their authority to obtain secular legislation consonant with the conciliar decrees. Chapter 34 of Liutprand, quoted by Atto, belongs to the year 723, in the period between the two Roman councils. We may suppose that it could be a consequence of the request of Pope Gregory II to the Lombard king, to legislate on this matter in compliance with the canons:[88] an invitation that Liutprand himself recalled the previous chapter 33 (dealing with the prohibition of marrying one's cousin's widow).[89] In 747, in a letter to Pepin and the Frankish bishops, Pope Zacharias once more brought the influence of the Church to bear on the secular authorities, demanding the observance of the rules about spiritual kinship.[90] In their abridged version, the decrees of 743 were included both in the Parisian manuscript preserving the *Lex Romana Canonice Compta,*[91] and in the *Collectio Anselmo dedicata*.[92]

Repeated at the synod of Mainz of 813[93], the prohibition of marriage based on spiritual kinship was enunciated again by

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[87] MGH Conc. 2.1, 13f., ch. 5: 'Ut presbyteram, diaconam, nonnam aut monacham vel etiam spiritalem commatrem nullus praesumat nefario coniugio copulari Nam qui huiusmodi opus perpetravit, sciat se anathematis vinculo esse obligatum et Dei iudicio condemnatum atque a sacro corpore et sanguine Domini nostri Iesu Christi alienum, statuente apostolica censura, ut quicumque sacerdotum eos communicare praesumpserit eorum consortio condemnatus sacerdotii sui honore privetur. Si autem hi, qui coniuncti sunt, ammoniti declinaverint et ab alterutrum fuerint divisi, paenitentiae summittantur, ut sacerdos loci providerit'.

[88] Lynch, *Spiritual Kinship* 283-284.

[89] On c.33, see Francesco Calasso, *Medioevo del diritto*, 1: *Le fonti* (Milano 1954) 86 and most recently Cortese, *Diritto nella storia* 1.112-113.

[90] JL 2277 n.22, Mansi 12.333: 'Sed nec spiritualem, id est commatrem, aut filiam, quod absit, quis ducat temerario ausu uxorem. Est namque nefas, et perniciosum peccatum coram Deo et angelis eius'. See Esmein, *Le mariage* 408.

[91] Kaiser, *Epitome Iuliani* 495.

[92] Ibid. 553.

[93] MGH Conc. 2.1, 273, ch. 55: 'Nullus igitur proprium filium vel filiam de fonte baptismatis suscipiat nec filiolam nec commatrem ducat uxorem nec illam, cuius filium aut filiam ad confirmationem duxerit. Ubi autem factum fuerit, separentur'.

Hrabanus Maurus in his *Penitential*.[94] It is clear that the Church attached a great deal of importance to the subject.

Nicholas I, Responsa ad consulta Bulgarorum

A few years after Hrabanus, the topic was taken up again by Nicholas I, a pope of unquestionable legal background,[95] in his *Responsa ad consulta Bulgarorum*. This is a famous decretal addressed in 866 to Boris I, king of the Bulgarians, in reply to several questions about the discipline and teaching of the Church. The second chapter of the long letter dealt with precisely the same matter as Atto's text: the bar upon marriage between godparents and godchildren. This chapter would later become a fundamental reference on marriage between 'spiritual' relatives (cognatio spiritualis). Here the pope defined the relationship arising from baptism as a kind of fatherhood, based not on consanguinity but on 'spiritual proximity'. It is a form of adoption, Nicholas says, an adoption 'secundum Deum'; the 'venerable Roman laws' do not admit a marriage between an adoptive parent and an adoptive child, as is written in the first book of the *Institutiones*, dealing with marriages (de nuptiis) .[96]

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[94] Chapter 20, PL 110.485-487.

[95] See Mathias Schmoeckel, 'Nicolaus I. und das Beweisrecht im 9. Jahrhundert', *Grundlagen des Rechts: Festschrift für Peter Landau zum 65. Geburtstag*, edd. Richard Helmholz, Paul Mikat, Jörg Müller, Michael Stolleis (Rechts- und Staatswissenschaftliche Veröffentlichungen der Görres-Gesellschaft, NF 91; Paderborn 2000) 53-76.

[96] MGH Ep. 6, n.99, 569: 'Capitulum secundum. Ita diligere debet homo eum, qui se suscipit ex sacro fonte, sicut patrem; quin immo quanto praestantior est spiritus carne, quod illud spiritale sit patrocinium et secundum Deum adoptio, tanto magis spiritalis pater in omnibus est a spiritali filio diligendus. . .Unde inter eos non arbitramur esse quodlibet posse coniugale conubium; quandoquidem nec inter eos, qui natura, et eos, qui adoptione filii sunt, venerandae Romanae leges matrimonium contrahi permittunt. Siquidem primus Institutionum liber, cum de nuptiis loqueretur, venerandae Romanae leges matrimonium contrahi permittunt: *Siquidem primus Institutionum liber, cum de nuptiis loqueretur*, inter caetera: 'Inter eas, inquit, personas, quae parentum liberorumve locum inter se obtinent, nuptiae contrahi non possunt, veluti inter patrem et filiam, vel avum et neptem, vel matrem et filium, vel

This passage would be quoted again in the chapter on consanguinity.[97]

Some decades later, Atto seems to have followed the same reasoning as Nicholas I. But the decretal to the Bulgars was not yet included in the canonical tradition at this time, and Atto did not quote it expressly.[98] Even if he possibly knew the letter, it was not his textual source, or at least not the only one. First, Nicholas had cited Inst. 1.10.1-2, while Atto cited paragraph 2 together with 1.10.12. In other words, they took passages from the same title, with the intention of asserting the same principle, but presented just one passage in common. Secondly— as we have seen — Atto added two more Justinian's texts to these citations, one from the *Novels* and another particularly suitable one on the topic taken from the *Codex*.

Atto's source was the *Collectio Anselmo Dedicata*. But what were Nicholas' sources? In 866, when the *Responsa ad consulta Bulgarorum* were written, the *Collectio Anselmo Dedicata* had not yet been compiled. But if Nicholas did not read a manuscript of the *Institutes* directly—and we have no evidence whatever that he did so—he might instead, just hypothetically, have read the text in the *Lex Romana Canonice Compta*. It is chronologically possible, but, in my opinion, unlikely. With the *Lex Romana Canonice Compta* in his hands, he would hardly have omitted the Justinian's constitution cited by Atto. That law, taken from the title *De nuptiis* of the *Codex*, expressly forbade marriage in the

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aviam et nepotem, et usque ad infinitum: et si tales personae inter se coierint, nefarias atque incestas nuptias contraxisse dicantur: et haec adeo sunt, ut quamvis per adoptionem parentum liberorumve loco sibi esse coeperint, non possint inter se matrimonio iungi. Itaque eam quae mihi per adoptionem filia, aut neptis esse coeperit, non potero uxorem ducere' (Inst. 1.10.1); et infra: 'Si quis per adoptionem soror esse coeperit, quandiu quidem constat adoptio, sane inter me et eam nuptiae consistere non possunt' (Inst. 1.10.2). Si ergo inter eos non contrahitur matrimonium, quos adoptio jungit, quanto potius a carnali oportet inter se contubernio cessare, quos per coeleste sacramentum regeneratio sancti Spiritus vincit?'.

[97] Ibid. 582.

[98] On the slow penetration of Nicholas' I letters in canonical literature, see Jasper, 'Beginning of the Decretal Tradition*'* 116.

case of spiritual kinship. The *Institutes* fragment that Nicholas cited was in c.186 of the *Lex Romana Canonice Compta*, while the Justinian's law was in c.175: too near not to be read, and too pertinent to the topic to be consciously left out.[99]

Benedict VI and another supposed mention of the title De nuptiis of the Institutes.

If we think how seldom the *Institutes* were cited before the eleventh century, this case may be considered a strange coincidence. It is hard to find other quotations, and those two curiously refer to the same title. A third possible mention belongs to a text later inserted as 'palea' in Gratian's *Decretum* (C.27 q.2 c.18), which Conrat assigned to Pope Benedict VI, in the second half of the tenth century (972-974)[100], but which now is suspected to be a forgery.[101] The letter deals with a man, whose fiancée was dead, and who wished to marry her sister. Benedict (*if* he really was Benedict) answered that there was no prohibition on such a marriage in the secular laws.[102] According to Conrat's opinion, he also was referring to the title *De nuptiis* of the *Institutes*: if we think what an important role the matter of marriage played in the Church at that time, we may find the frequent recourse to the same Roman sources hardly surprising.

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[99] Max. Conrat (Cohn), 'Römisches Recht bei Papst Nikolaus I.' NA 36 (1911) 719-727, at 723 underlined that Cod. 5.4.26.2 was 'unbekannt' to Nicholas, as to Pope Zacharias in 747 (n.90 above).

[100] JL 3773, Conrat, *Geschichte der Quellen* 25.

[101] Rudolf Weigand, 'Fälschungen als Paleae im Dekret Gratians', *Fälschungen im Mittelalter*, 2: *Gefälschte Rechtstexte: Der bestrafte Fälscher* (MGH Schriften 33; Hannover 1988) 301-318 at 313; Jürgen Buchner, *Die Paleae im Dekret Gratians: Untersuchung ihrer Echtheit* (Pontificium Athenaeum Antonianum, Theses ad Lauream in Iure Canonico, 127; Roma 2000) 284-285.

[102] C.27 q.2 c.18: '. . . Sed neque mundanae leges connumeratis personis, quae inter se nuptias non contrahunt, de huiusmodi aliquid dicunt'.

John VIII

Concerning the Engeltrud *affair*, in 878 John VIII wrote to Louis III, king of Western Francia, in support of the hereditary rights of the daughters of Boso and Engeltrud, and against the claim of some of her relatives, including her illegitimate son Gottfried.[103] John read from the *Epitome Iuliani* that in the matter of inheritance, children had priority over all other kinds of relatives,[104] and read from the *Codex* that 'spurious' children were *'indigni'*, unworthy, and could not inherit.[105] The real issue was again an urgent canonical (and political) problem: that is, respect for a legitimate marriage, and the definition of what a 'legitimate' marriage should be.[106]

The texts involved were neither in the *Lex Romana Canonice Compta*, nor in the *Collectio Anselmo Dedicata*, even if the latter work seems, in general, close to John's policy.[107] This is perhaps because the legal material for them was collected before these events took place.

Possible sources of the papal citations

If we look at papal citations of the *Codex* in the ninth century, and consider Nicholas' omission described above, they do not seem to be related to any of our three canonical

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[103] MGH Ep. 7, ep. 111, 103.

[104] Ep. Iul. 21.10 (ed. Haenel 44). The text, 'Capitali crimine damnatorum bona non ad lucrum praesidis referri, sed cognatis punitorum reddi oportet', circulated also in the Lombard enviroment, see Giovanni Diurni, L'Expositio ad Librum Papiensem e la scienza giuridica preirneriana', RSDI 49 (1976) 1-277 at 270 (published also as a monograph Rome 1976), and was inserted into Ivo of Chartres' *Decretum* (5.55, PL 161.1222). John's quotation was already reported by Savigny, *Geschichte* 2.226 n.15.

[105] MGH Ep. 7, ep. 111, 103: 'Spurios satis iniuriosos satisque acerbos ac nostris temporibus semper indignos deiudicamus' (Cod. 6.57.5.1). We find the same quotation, together with Ep. Iul. 109.1 (ed. Haenel 134), in another letter written by John VIII about Engeltrud's *affair*, ep. 129, 115.

[106] Susan F. Wemple, *Women in Frankish Society: Marriage and the Cloister, 500 to 900* (Philadelphia 1981) 80.

[107] Fournier, *L'origine de la collection* 20-23.

collections. In a letter to the Byzantine emperor Michael III of the year 865, Nicholas quotes two *Codex* constitutions,[108] and neither of them comes from the *Lex Romana canonice compta*, the *Collectio Anselmo dedicata*, or the *Excerpta Bobiensia*.

There are at least two possible explanations. First, the papal curia may have had an *Epitome Codicis*, in a version that later disappeared, or that, according to Krüger, may in due course have been used as a source directly or indirectly for the *Lex Romana Canonice Compta*. But the new assignment of the Pistoia manuscript to the eleventh century,[109] together with the recent criticism of Krüger's remarks about the *Lex Romana Canonice Compta*,[110] makes this *Epitome* something of a ghost in the ninth century—since it probably did not exist, despite the supposed 'sightings' of scholars.[111]

The second possibility is that, at least in Rome, in the Lateran Library, there was 'in theory' an opportunity of having direct access to the Justinian's books. It is not as unlikely a solution as might seem, especially if one is not thinking of everyday use. The Roman See had received copies of the Justinian's compilation at the time when it was promulgated—Gregory I still had one— and it is hard to imagine that such books would have then been discarded at any time. This is confirmed by the later 'Roman' rediscovery of the *Digest*, during the Gregorian Reform.[112] Even if the *Digest* was never consulted before the eleventh century, the easier *Institutes* or the *Codex* (in its unabridged or possibly abridged version) may well have been.

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[108] MGH Ep. 6, n.88, 458 and 461: Cod. 1.1.8.22 and Cod. 3.1.16. See Conrat, 'Römisches Recht bei Papst Nikolaus I.' 721.

[109] *I manoscritti medievali della provincia di Pistoia*, ed. Giovanna Murano, G. Savino, S. Zamponi, (Biblioteche e Archivi, 3, Manoscritti medievali della Toscana, 1; Firenze 1998) n.46 p. 43 and tav. LV.

[110] Radding and Ciaralli, *Corpus Iuris Civilis* 139-140.

[111] Nicolaj, 'Ambiti di copia e copisti' 489.

[112] Ennio Cortese, 'Théologie, droit canonique et droit romain: Aux origines du droit savant (XIe – XIIe s.)', *Comptes rendus des séances de l'Académie des Inscriptions et Belles-Lettres* 146 (2002) 59.

Purpose of the citations

In any case, verbatim citations were not the only way to 'take possession' of Roman law. As we said at the beginning, the Roman Church had an interest in the rebirth of a Western Empire, and everything 'Roman'—the Empire, the law, even the Senate in a letter of John VIII—was understood as evocative, authoritative, and strengthening of the papal position.[113] But what the Church was really looking for was not a foreign secular law to which to refer. What it wanted was an authoritative support for its own law. The canonical collections were able to lend support to this political purpose. Even if gathered for ecclesiastical use, the Roman law texts seem to be a good means to impose *outwards* the principles of canon law.

When Nicholas I wrote to the king of the Bulgarians about the bar to marriage between 'spiritual' relatives, he cited some Roman law, even if, as we have seen, such a marriage was already banned by canon law. Marriage is a good example, because it is a matter typically involving laymen; but we could say the same about another citation in the letter written in 865 by Nicholas to the Byzantine emperor. Here the 'recusatio' of a suspected judge was sustained through a quotation of the *Codex*, and stressed by many patristic and biblical references, which even on their own would be convincing enough among churchmen or canonists.

The rule which forbade the inheritance of spurious or illegitimate children, whose observance John VIII enjoined on Louis the Younger, was once again a Roman rule, recognized by the Church since the time of Pope Leo the Great, in the fifth century.[114]

If we look again to Atto's work, we will find in his canonical collection, the *Capitulare*, the same prohibition against marriage between spiritual relatives that he asserted in his letter to Azo. But here the recipients of his writing are priests of a low cultural level, and not prominent bishops looking for learned citations, as

[113] Radding and Ciaralli, *Corpus Iuris Civilis* 60-61.
[114] C.32 q.2 c.12.

Azo was. He needed to persuade noble parishioners with affable and mellifluous words: 'verbis affabilibus et mellifluis, sicut bene nostis', as Atto wrote to Azo. The *Capitulare* belongs to the genre of the 'capitula episcoporum', episcopal decrees addressed to local churches, and was 'a handbook of basic guidelines for the parish priest',[115] without any space for Roman law. Here, although retaining the same meaning, the prohibition is expressed by an adaptation (arranged by himself) of some chapters of the Roman Council of 743. The recourse to Roman law would be in this case completely superfluous.[116]

What I mean, finally, is that in every single legal quotation we have seen until now, the Roman law texts added little or nothing to canons in terms of prescriptive content, but much in terms of authority.

At the beginning I said that the 'preservation' of Roman law may be seen in the 'preservation' of its original texts—which only literal citations may reveal—or in the 'preservation' of its spirit and its rules. In some matters, like marriage but not only marriage, the genuine canonical tradition was so long and so intimately related to Roman law, that every reference to the latter takes on the role of a reinforcement of the first.

In these few ecclesiastical citations, we may see what Paul Fournier called 'l'esprit romain', the Roman tradition of the Church.[117] 'L'esprit romain' is exactly what our three canonical collections — and their various formal sources (like the *Collectio Dionysio-Hadriana*, or the *Pseudo-Isidorian Decretals*)—had in common with Nicholas I, John VIII, and Atto of Vercelli. The

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[115] Greta Austin, 'Bishops and religious Law, 900-1050', *The Bishop Reformed. Studies on Episcopal Power and Culture in the Central Middle Ages*, edd. John S. Ott and Anna Trumbore Jones (Church, Faith, and Culture in the Medieval West; Aldershot 2007) 40-57 at 51.

[116] C.95, MGH Capit. episc. 3, 299: 'Ut nullus praesummat deo dicatam feminam aut commatrem suam vel novercam seu matrem aut sororem aut filiam spiritalem vel de propria cognatione vel quam cognatus habuit sibi in coniugio copulare. . .Si quis vero vel si qua in aliquo praedictorum nefario coniugio convenerit et in eo permanserit, sciat se auctoritate canonica anathematis vinculo esse innodatum'.

[117] Fournier and Le Bras, *Histoire des collections canoniques* 1.240.

same 'esprit' would later be shared by the Gregorian Reformers, but in a stronger and more intense way. Such a spirit is not always or not necessarily connected with the assertion of papal and Church supremacy over secular rulers. Rather, it means a return to the genuine canonical tradition, from the perspective of the reformation of the Church.

As Suzanne Wemple convincingly demonstrated, Atto of Vercelli was not a Gregorian precursor in terms of political thought. On the contrary, he was a 'Carolingian' bishop and had a 'Carolingian' vision about power and society, although critical in many respects. What he had in common with the Gregorian reformers was his high regard for the ancient legal tradition of the Church, which he showed in many ways, such as defending the canonical 'ordo iudiciarius' from some other methods of proof prevailing in Frankish canonical customs.[118]

Conclusions: Carolingian works and Gregorian collections

There are evident lines of continuity between our three collections and the Gregorian works. They both represent a selected rediscovery of Roman law, centered on subjects of the highest interest for the Church, which would indeed increase over time.

Indeed, if we compare the texts of the *Institutes* in the *Lex Romana canonice compta* with the similar gathering made by the author of the 'Gregorian' *Collectio Britannica*, we will see:

1. the same kind of citations, suggesting contact with the original source (book and title, while for the other parts of Justinian compilation book, title and fragment);

2. a deeper selection in the *Britannica*, or rather a critical choice of paragraphs, not just a copy of the whole title;

3. an interest in the same subjects. Almost four-fifths of the 61 fragments in the *Britannica*, were already in the *Lex Romana canonice compta*. The *Britannica* added a few texts, concerning new topical matters, like wills, legal actions, and judges' duties.

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[118] Wemple, *Atto of Vercelli* 118-120; Fiori, *Il giuramento di innocenza* 133-136.

The big difference between our three works, and the later Gregorian collections gathering Roman law texts, consists not only in the underlying ideology, and in the cultural context, but also, more technically, in the consistency of the result. The Carolingian collections succeeded only partially in shedding new light on the *Codex* and the *Institutes*—the *Epitome Iuliani* being already well-known. They made these law books potentially available to the inner circle of learned prelates, so that a bishop could also—as the popes did—support canonical doctrines in the most authoritative way, that is through Roman law. Curiously, apart from Atto's letter, we have no evidence that the collections achieved their goal, if that was indeed their intent. We may wonder why the canonical sections of the *Collectio Anselmo dedicata* had more success than the Roman law sections, and I think we could find the answers in a lack of legal culture, or in a conscious lack of interest, as in Burchard's case. That is: in the preference for different canonical traditions.

The Gregorian collections were more successful. Times had changed, and the linkage of secular and ecclesiastical Reform was over, together with the Carolingian political ideology and its poetical vision of the compliance of secular legislation with canonical principles. The Roman Church was now trying on its own, and more vigorously, to reinforce its legal order: through a strict selection of canons, giving preference to the decretals—the older the better—and, finally, turning to Roman law. Such a return to Roman law was realized through an intense search for the original texts in the archives and libraries of the Roman curia, and it brought to an end the process mentioned at the very beginning of my paper. Indeed, every part of the Justinian's compilation was finally rediscovered, with the *Digest* above all opening the door to the legal Renaissance.

La Sapienza, Rome.

Neue Erkenntnisse aus der Arbeit an der Edition des Sendhandbuchs Reginos von Prüm

Wilfried Hartmann

Einleitung

Warum muss eigentlich Reginos Sendhandbuch neu ediert werden? Heute, wo wenigstens ein kleiner Teil der Handschriften, die Reginos Werk überliefern, direkt im Internet oder als Transkription zu benutzen sind[1], ist es da notwendig, eine kritische Edition, also eine die noch vorhandene Überlieferung vollständig dokumentierende Ausgabe zu schaffen und in Buchform vorzulegen?

Anscheinend bin ich bereit, diese Frage mit „Ja“ zu beantworten, sonst würde ich mir die große Arbeit nicht aufgeladen haben.

Zwei Voraussetzungen müssen jedoch gegeben sein:

1. die bisherigen Ausgaben sind ungenügend wegen ihrer allzu schmalen Handschriftengrundlage und wegen zahlreicher Fehler beim Kollationieren der handschriftlichen Überlieferungsträger und bei der Darbietung von Text und Apparat, und
2. es können Ergebnisse vorgelegt werden, die aus den bisher vorliegenden Ausgaben nicht zu entnehmen waren.

Bisherige Editionen

Die erste gedruckte Ausgabe von Reginos Sendhandbuch legte 1659 Joachim Hildebrand vor.[2] Seine Ausgabe beruht vor allem auf dem Wolfenbütteler Codex 32 Helmst. (W_3), den er entdeckt hatte. Er zog aber auch eine zweite Handschrift aus der Wolfenbütteler Bibliothek heran, den Codex Guelf. 83.21 Aug. 2°

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[1] Im Internet steht z. B. Düsseldorf BU E 3 (Adresse: digital.ub.uni-duesseldorf.de/ms/content/titleinfo/6832677).

[2] Genaue Angaben über die bisherigen Editionen und über die einzelnen Handschriften, die Reginos Werk überliefern, finden sich im Anhang, unten S. 57.

(W_2), und er hatte eine Abschrift der Handschrift Wien, ÖNB lat. 694 (W_1) zur Verfügung (heute: Wolfenbüttel, Aug. 32.13[3]). Die Rubriken hat Hildebrand, soweit er sie nicht seinen Handschriften entnehmen konnte, selbst formuliert.

Wasserschleben kritisierte im Vorwort zu seiner Edition, Hildebrands Ausgabe als ʻfutilis, planeque inutilis',[4], also ʻvergeblich, geradezu unnütz', denn Hildebrand habe den Text an zahlreichen Stellen ganz willkürlich verändert, er habe da etwas hinzugefügt und dort etwas weggelassen, kurz: den eigentlichen Regino habe man nirgends.

Daher glaubte Etienne Baluze, dass es notwendig sei, Reginos *Sendhandbuch* nochmals neu zu edieren. Seine Ausgabe erschien zuerst 1671 in Paris. Er legte die Pariser Handschrift (P) von Reginos Werk zugrunde, zog aber auch (wahrscheinlich aus Hildebrands Ausgabe) die Wolfenbütteler Überlieferung und die Wiener Handschrift heran. Die Rubriken, die in der Vorlage von Baluze vielfach fehlen, hat der Editor oft (aber nicht immer!) aus der *Capitulatio* ergänzt. Die Leistung von Baluze bestand vor allem darin, die Quellen und Vorlagen Reginos an vielen Stellen richtig eruiert und die zum Teil falschen Inskriptionen, also die Quellenangaben Reginos, richtig gestellt zu haben. Außerdem gelang es ihm, den Zusammenhang zwischen Regino und Burchard aufzuhellen. Nicht bekannt war ihm, dass Reginos Kapitel zu großen Teilen aus der so genannten *Collectio Vaticana* (= Quadripartitus, 4. Buch) und aus der *Collectio Dacheriana* übernommen worden waren.[5]

Die Ausgaben von Hildebrand und von Baluze sind jedoch unzureichend; sie greifen nämlich nur auf Handschriften der

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[3] Die Handschrift enthält verschiedene Abschriften des 16. und 17. Jh., vgl. Otto von Heinemann, *Die Handschriften der Herzoglichen Bibliothek zu Wolfenbüttel* (Bd. 3.2; Wolfenbüttel 1898) 13.

[4] *Reginonis abbatis Prumiensis Libri duo de synodalibus causis et disciplinis ecclesiasticis*, ed. Friedrich Wilhelm August Hermann Wasserschleben (Leipzig 1840) XVIII.

[5] Diese Vorlagen hat erstmals Hermann Wasserschleben, *Beiträge zur Geschichte der vorgratianischen Kirchenrechtsquellen* (Leipzig 1839) 3-10 genauer bestimmt.

jüngeren Version des Sendhandbuchs, die so genannte interpolierte Fassung, zurück.

Die bis heute zu benutzende Ausgabe von Reginos Sammlung hat F.G.A. Wasserschleben (1812–1893) vorgelegt, sie ist 1840 in Leipzig erschienen.

Wasserschleben behauptet in seinem Vorwort, er habe sechs Handschriften des Sendhandbuchs benutzt, nämlich (in dieser Reihenfolge) Trier (T), Gotha (G), Wolfenbüttel 32 Helmst. (W_3) und Wolfenbüttel, Aug. 83.21 (W_2), Wien (W_1) und Paris (P)[6]. In Wahrheit dürfte er aber nur die Codices T und W_3 gründlich kollationiert haben; ob er die zweite Wolfenbütteler Handschrift, Aug. 83.21, überhaupt selbst gesehen hat, scheint mir nicht gesichert. Für den Wiener Codex begnügte sich Wasserschleben mit der bis heute in Wolfenbüttel liegenden Abschrift, die auch schon Hildebrand hatte benutzen können.[7] Die Pariser Handschrift hat Wasserschleben ganz sicher nicht selbst gesehen, sondern er hat nur die Kollationen einiger Kapitel herangezogen, die ihm vom Präfekten der königlichen Bibliothek in Paris, M. Letronne, zugänglich gemacht wurden.[8]

Wasserschleben wollte den ursprünglichen Text Reginos wieder herstellen und legte daher die beiden Codices T und G seiner Ausgabe zugrunde, die die genuine Version des *Sendhandbuchs* enthalten. Die Abfolge der Kapitel und auch die Inskriptionen hat Wasserschleben daher auch weitgehend nach diesen Handschriften eingerichtet; woher er die Rubriken bezog, hat er aber nicht verraten. Desgleichen sucht man vergeblich nach einer Auskunft über die Basis seines Textes für die *Capitulatio*.

Viel Arbeit hat sich Wasserschleben damit gemacht, dass er auch Textvarianten der Vorlagen Reginos (vor allem dem *Quadripartitus* und der *Dacheriana*, aber auch der *Kapitulariensammlung* des Ansegis und der Bußbücher des Halitgar von Cambrai und des Hrabanus Maurus) und solche aus der Rezeption (nicht nur aus Burchard, sondern auch aus Anselm von Lucca, Ivo und Gratian) in seinen Apparat aufgenommen hat.

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[6] Wasserschleben, *Edition* XX-XXI.
[7] Siehe oben bei Anm. 3.
[8] So Wasserschleben, *Edition* XXI.

Für die Textvarianten gilt jedoch, dass Wasserschleben nur ganz willkürlich ausgewählte Varianten bietet und zudem nicht selten fehlerhafte Angaben macht.

Wasserschleben hat auch Varianten der Drucke von Hildebrand und Baluze in seine Edition aufgenommen und er hat die Benutzung seiner Ausgabe dadurch erleichtert, dass er die Zählung der Ausgabe von Etienne Baluze an den Rand der jeweiligen Kapitel gesetzt hat.

Stand der Arbeit an der neuen Edition

Die Kollation aller 11 vollständigen Handschriften, von denen vier die genuine und sieben die interpolierte Version des Sendhandbuchs überliefern, ist abgeschlossen. Ganz neu im Vergleich zur Edition von Wasserschleben ist also die Kenntnis und die Berücksichtigung und Kollation von fünf weiteren Handschriften: zwei der genuinen Version, Arras BM 723 und Luxembourg BN 29, und drei der interpolierten Version, Düsseldorf BU E.3 und die beiden Stuttgarter Codices BM HB VI 108 und HB VI 114. Die Kollation der vorhandenen Fragmente steht noch aus.[9] Text und Variantenapparat für die 909 Kapitel der beiden Bücher von Reginos Werk und auch für die (nach Wasserschleben) drei Appendices (mit insgesamt 169 Kapiteln) sind erstellt. Im Text und im Apparat dürften nur noch kleinere Veränderungen erforderlich werden.

Um den Text endgültig zu sichern, wird es noch nötig sein, den Wortlaut jedes einzelnen Kapitels genau mit seinen Vorlagen zu vergleichen. Für einige wichtige Vorlagen sind ja in den letzten Jahren kritische Editionen erschienen, auf die zurückgegriffen werden kann, so vor allem für die bei Regino reichlich benutzten Beschlüsse der karolingischen Konzilien (vor allem Meaux-Paris 845-846, Mainz 847 und 852, Worms 868 und Tribur 895),[10]

[9] Zu den Fragmenten von ehemals vollständigen Regino-Handschriften vgl. vorläufig Kéry 129-130.

[10] MGH Conc. 3: *Die Konzilien der karolingischen Teilreiche 843-859*, ed. Wilfried Hartmann (Hannover 1984), MGH Conc. 4: *Die Konzilien der karolingischen Teilreiche 860-874*, ed. Wilfried Hartmann (Hannover 1998)

sowie für die Kapitularien aus der Sammlung des Ansegis.[11] Leider nicht erschienen sind die durch Raymund Kottje vorbereiteten Editionen der Bußbücher des Halitgar von Cambrai und des Hrabanus Maurus,[12] und auch von weiteren Bußbüchern—wie etwa dem so genannten Doppelpaenitentiale Beda-Egbert—fehlen kritische Ausgaben,[13]

Auch die beiden systematisch geordneten Sammlungen, die Regino reichlich benutzt hat, der *Quadripartitus* und die *Dacheriana*, müssen noch in den alten Ausgaben von Luc d'Achery bzw. Aemilius Ludwig Richter,[14] die schon Wasserschleben herangezogen hatte, benutzt werden.[15] Es sollen aber—

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und MGH Conc. 5: *Die Konzilien der karolingischen Teilreiche 875-911*, ed. Wilfried Hartmann, Isolde Schröder und Gerhard Schmitz (Hannover 2012-Wiesbaden 2013).

[11] *Die Kapitulariensammlung des Ansegis*, ed. Gerhard Schmitz (MGH Capit. NS 1; Hannover 1996).

[12] Vgl. Raymund Kottje, *Die Bußbücher Halitgars von Cambrai und des Hrabanus Maurus: Ihre Überlieferung und ihre Quellen* (Beiträge zur Geschichte und Quellenkunde des Mittelalters 8; Berlin-New York 1980).

[13] Von den geplanten Bänden einer kritischen Edition aller frühmittelalterlichen kontinentalen Bußbücher sind bisher nur zwei Bände erschienen: 1. *Paenitentialia minora Franciae et Italiae saeculi VIII-IX*, ed. Raymund Kottje unter Mitarbeit von Ludger Körntgen und Ulrike Spengler-Reffgen (CCL 156; Turnhout 1994) und 2. *Penitentiale Pseudo-Theodori*, ed. Carine van Rhijn (CCL 156B; Turnhout 2009). Ansonsten müssen noch die alten Drucke von Friedrich Wilhelm Hermann Wasserschleben, *Die Bussordnungen der abendländischen Kirche* (Halle 1851) und von Hermann Josef Schmitz, *Die Bussbücher und die Bussdisciplin der Kirche* (Düsseldorf 1883) und ders., *Die Bussbücher und das kanonische Bussverfahren* (Düsseldorf 1898) benutzt werden. Leider wurde auch die vor Jahren in Tübingen begonnene Dissertation von Dieter Waldmann über die von Regino benutzten Bußbücher nicht abgeschlossen.

[14] Luc d'Achery and Louis-Francois-Joseph de La Barre, edd. *Spicilegium sive collectio veterum aliquot scriptorum qui in Galliae Bibliothecis delituerant* 1 (Paris 1723) 509-564 und Emil Ludwig Richter, *Antiqua canonum collectio* (Marburg 1844).

[15] Die Edition des Quadripartitus, die Franz Kerff vorbereitet hatte (vgl. ders., *Der Quadripartitus: Ein Handbuch der karolingischen Kirchenreform* (Quellen und Forschungen zum Recht im Mittelalter 1; Sigmaringen 1982) 15 mit Anm. 2), ist nicht erschienen.

mindestens ergänzend—auch wichtige Handschriften dieser beiden Werke herangezogen werden.

Darunter kommt besondere Bedeutung zu dem Codex Vat. lat. 1347, der in Reims geschrieben wurde und der außer dem Buch IV des *Quadripartitus* auch die Form B der *Collectio Dacheriana* enthält[16]. Diese Form der *Dacheriana* hat Regino benutzt.

Für den *Quadripartitus* von Bedeutung könnte auch die Handschrift Stuttgart, Württembergische Landesbibliothek, HB VII 62, sein; sie bietet einen *Quadripartitus* mit allen vier Büchern, der Codex (Format: 28 x 23,5 cm) und ist im Internet zugänglich[17].

Neue Erkenntnisse

Bei der Arbeit an der neuen Edition konnten bereits eine ganze Reihe von neuen Erkenntnissen gewonnen werden, von denen die wichtigsten auf den folgenden Seiten kurz präsentiert werden sollen.

Text

Generell gilt, dass der Text Wasserschlebens nicht sehr stark zu verändern sein wird. Es gibt jedoch eine ganze Reihe von Fällen, in denen Wasserschleben gegen alle Handschriften den Wortlaut der Vorlage oder auch den der Helmstedter Handschrift in seinen Obertext gesetzt hatte. An diesen Stellen wird die neue Ausgabe einen an der Überlieferung orientierten Text bieten. Obwohl Wasserschleben erstmals auf Handschriften der genuinen

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[16] Vgl. zu dieser Handschrift: Stephan Kuttner and Reinhard Elze, *A Catalogue of Canon and Roman Law Manuscripts in the Vatican Library*, Bd. 1: *Codices Vaticani latini 541-2299* (Studi e Testi 322; Città del Vaticano 1986) 103-106. Diese Handschrift bildete die Vorlage für den Druck des 4. Buchs des *Quadripartitus* durch Richter, *Antiqua canonum collectio*.

[17] In der digitalen Sammlung der Württembergischen Landesbibliothek Stuttgart findet sich das Digitalisat unter der Adresse ʻquadripartitus – hb vii 62'. Vgl. zu dieser Handschrift: *Die Handschriften der Württembergischen Landesbibliothek Stuttgart*, Bd. 2.3: *Codices iuridici et politici: Patres*, beschrieben von Johanne Autenrieth (Wiesbaden 1963) 219-220.

Version zurückgreifen konnte, hat er meist den Wortlaut der Ausgabe von Baluze beibehalten; dies wird ebenfalls zu ändern sein. Andererseits wird an vielen Stellen, wo Wasserschlebens Text von dem bei Baluze abweicht, der Wortlaut bei Baluze wieder aufgegriffen werden müssen, vor allem dann, wenn der Text bei Baluze mit dem aller Handschriften übereinstimmt, während Wasserschleben auf den Text von Reginos Vorlage zurückgegriffen hat.

Zum Beispiel: in Reg. 1.24 fehlt nach ʻdebitumʼ bei Wass.: ʻservitiumʼ. Bei Bal. und in allen Handschriften ist ʻservitiumʼ vorhanden.

Wenn man die von Wasserschleben mit Vorrang benutzte Handschrift nennen möchte, dann ist es nicht eine der genuinen Version (also G oder T), sondern Wolfenbüttel, 32 Helmst. (W_3). Dieser Handschrift ist Wasserschleben immer wieder gegen alle anderen Handschriften gefolgt.

Hierfür ein Beispiel: in Reg. 2.240 und 241 steht bei W_3 und Wasserschleben: ʻSicʼ, alle übrigen Handschriften haben ʻSiʼ.
Wasserschleben hatte die Varianten der von ihm benutzten Handschriften nur in Auswahl verzeichnet. Über die Kriterien bei seiner Auswahl gibt er keine Auskunft. Die neue Edition wird dagegen alle Abweichungen der Handschriften verzeichnen; sie wird allerdings darauf verzichten, orthographische Varianten aufzunehmen.

Gliederungselemente

Eine Betrachtung der Gliederungselemente in den Handschriften von Reginos Werk, also der Kapitelnummern, der Rubriken, der Inskriptionen und der Verweise ist für uns besonders aufschlussreich, weil sie etwas über die Benutzbarkeit der einzelnen Überlieferungsträger für die Praxis aussagen können.

Man wird sich etwa fragen müssen: Konnte man tatsächlich einen Codex in der Praxis des bischöflichen Sendgerichts verwenden, wenn die Kapitelnummern nur sehr sporadisch angegeben sind und wenn fast ganz auf Rubriken verzichtet wird?

Kapitelnummern

In manchen Handschriften fehlen die Kapitelnummern an vielen Stellen, oder sie werden nur in großen Abständen angegeben: erstaunlicherweise sind sie zwar dann doch meistens zutreffend. Dem Benutzer wird aber zugemutet, dass er über viele Seiten hinweg die Kapitel zählen muss, wenn er zu einer bestimmten Nummer gelangen will.

Die Kapitelzählung bei Wasserschleben hat keine handschriftliche Grundlage. Es gibt bei ihm nicht nur deshalb Unterschiede zur Edition von Baluze bzw. zur Zählung der interpolierten Version, weil er als erster Editor überhaupt die Handschriften der genuinen Version benutzt hat, sondern weil er eine Mischform zwischen den beiden Versionen und den älteren Drucken hergestellt hat.

In der Edition von Wasserschleben finden sich vier Kapitel mit dünner Überlieferung: 1.44b, 1.61, 1.137 und 2.179.[18] Von diesen ist 1.44b nur in D und W_3 (bei Wass. aus Hild. übernommen), 1.61 nur in der interpolierten Version, 1.137 nur in der genuinen Version und 2.179 nur im Codex W_3 vorhanden. Eine Edition, die der genuinen Version folgt, dürfte von diesen Kapiteln nur 1.137 enthalten; die anderen drei Kapitel müssten eindeutig als Nachträge gekennzeichnet sein und dürften in der Kapitelabfolge nicht mitgezählt werden.

Rubriken

In den Handschriften gibt es nur sporadisch Rubriken, am ehesten finden sie sich noch im Anfangsteil des 1. Buches. In manchen Codices sind einzelne Rubriken nachgetragen, woher diese Nachträge bezogen wurden, ist mir bis jetzt nicht klar.

Dagegen weisen fast alle Kapitel in Wasserschlebens Edition eine Rubrik auf. Wasserschleben sagt zwar nicht, woher er seine Rubriken bezogen hat, aber ein genauer Vergleich macht deutlich, dass sie fast immer mit dem Wortlaut in der *Capitulatio*

[18] Wasserschleben, *Edition* 45, 52, 84 und 283.

übereinstimmen. Vielfach sind Wasserschlebens Rubriken mit denen bei Baluze identisch; auf Baluze geht also die äußere Gestalt des *Sendhandbuchs* zurück, in dem (fast) jedes Kapitel mit einer Rubrik und einer Inskription ausgestattet ist. Es war wohl schon Baluze, der viele Rubriken aus der *Capitulatio* entnommen und an die Spitze eines jeden Kapitels platziert hat.

Die Rubriken, die bei Wasserschleben (und auch schon bei Baluze) 'De eadem re' lauten[19], die also weitere Belege aus der kirchenrechtlichen Tradition zu einem bereits genannten Thema einleiten, fehlen in den Handschriften besonders häufig. Das Fehlen der Rubriken in diesen Kapiteln musste den praktischen Gebrauch eines Codex nicht beeinträchtigen.

Vermutlich hat Baluze seine Rubriken aus der *Capitulatio* der Pariser Handschrift bezogen, in einigen Fällen hat er eine Rubrik aber auch aufgrund des Inhalts des Kapitels unter Verwendung der Anfangsworte selbst formuliert.

Jedenfalls ist festzuhalten: für die Untersuchungen zur Rezeption von Reginos Sammlung, etwa für die hoffentlich bald beginnende Arbeit an einer neuen Edition des Dekrets Burchards von Worms, dürften die Erkenntnisse über die handschriftliche Überlieferung der Rubriken von einiger Bedeutung sein.

Inskriptionen

Im Gegensatz zu den Rubriken sind die meisten Inskriptionen in den meisten Handschriften vorhanden. Es gibt allerdings auch Codices, in denen die Inskription immer wieder fehlt. Besonders häufig ist das in der Handschrift P der Fall, und zwar vor allem im ersten Buch (besonders von c. 1.106-1.220 mit wenigen Ausnahmen).[20] Im 2. Buch fehlt die Inskription sehr oft im Codex T, aber auch in der Handschrift D (ab 2.52 und wieder ab 2.305). Dieser Codex bietet als einziger Inskriptionen (anstelle von Rubriken) in der *Capitulatio*, besonders zu Buch 2.

[19] Das gilt bereits für die Rubrik zu Kapitel 1.3.

[20] Es ist ziemlich sicher, woher Baluze seine Inskriptionen bezogen hat: er hat sie aus dem Druck von Hildebrand übernommen.

Wasserschleben hat an einigen Stellen auch dann Inskriptionen eingefügt, wenn sie in den von ihm benutzten Handschriften fehlen. Bei Kapitel 1.196, für das auch Baluze keine Inskription bot, sagt Wasserschleben, dass nur die Handschrift G eine Inskription habe.[21] Dass auch zu den Kapiteln 1.91 und 1.96 allein G eine Inskription bietet, wird von Wasserschleben dagegen nicht mitgeteilt. Die Inskription zu Kapitel 2.14 lautet bei Wasserschleben ʻEx eodem'; sie findet sich so nur in der Handschrift A (über der Zeile nachgetragen), einer Handschrift, die Wasserschleben nicht gekannt hat.

Verweise ('Require retro' oder ähnlich)

Da die Angaben von Wasserschleben in seinen ʻBeiträgen' über die Verweise und über die umgestellten Kapitel in der so genannten interpolierten Version missverständlich oder sogar falsch sind[22] und auch die Angaben bei Kerner nicht immer zutreffen,[23] müssen hier einige Bemerkungen zu diesem Thema gemacht werden:

Verweise gibt es nicht in allen Handschriften der genuinen Version, und auch dort stehen sie vielfach nicht an der Stelle, an der sie bei Wasserschleben verzeichnet sind. Die meisten Verweise finden sich in der Handschrift A, die Wasserschleben gar nicht gekannt hat.

Wasserschlebens Edition bietet insgesamt 16 Verweise in Buch 1 und 6 Verweise in Buch 2.

Nur bei drei Verweisen in Buch 1 sagt Wasserschleben etwas über seine handschriftliche Grundlage, und er behauptet dabei, dass die Verweise in den Handschriften G und T (also in den beiden Textzeugen der genuinen Version, die ihm bekannt waren)

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[21] Vgl. Wasserschleben, *Edition* 100. Tatsächlich ist die Inskription (Ex concilio Antiocheno) in der Handschrift. G am Rand nachgetragen.

[22] Vgl. Wasserschleben, *Beiträge* 19-20.

[23] Max Kerner, Franz Kerff, Rudolf Pokorny, Karl Georg Schon, Hubert Tills, ʻTextidentifikation und Provenienzanalyse im Decretum Burchardi', SG 20 (1976) 17-63, hier 45 Anm. 112-114.

vorhanden seien. Das ist bei den Verweisen nach 1.62, 1.183 und 1.348 der Fall.

Die Angaben Wasserschlebens sind aber nicht korrekt: Der Verweis nach 1.62 findet sich nur in den Handschriften G (und A) und der nach 1.183 in T (und L); nur der Verweis nach 1.348 ist tatsächlich in den Handschriften GT (sowie in AL), also in allen Codices der genuinen Version, vorhanden.

Die weiteren Verweise in Wasserschlebens Edition finden sich an folgenden Stellen:

In Buch 1: nach c. 67, 212, 215, 237, 242, 247, 251, 254, 275, 277, 350, 405 und 419.
in Buch 2: nach c. 61, 157, 282, 390, 391 und 411.
Für diese Verweise gibt es Belege in folgenden Handschriften:
Zuerst zu Buch 1:
Nur in A: nach 1.275 (am Rand), 277 (am Rand) und 350.
Nur in AL: 1.243 (in der Inskription A, am Rand L) und 251 und 276.
Nur in GT: nach 1.247.
nur LT: nach 1.212, 215 und 419.
Nur in T: nach 1.183, 247 (nach der Kap.nr.), 254 und 405.
Nur in L: 1.237.
In AGT: 1.67.
In ALT: 1.242 (am Rand in AL)
In AGLT: 1.348 (mehrere Verweise)

Die Verweise in Buch 2 finden sich in folgenden Handschriften:

in allen Handschriften der genuinen Version: 2.61, 157 (ohne Kapitelangaben GT), 282 (Kapitelangaben nur GL) und 391 (in ALT ohne Kapitelangabe),
in ALT und in einigen Handschriften der interpolierten Gruppe: 2.390,
nur in einigen Handschriften der interpolierten Gruppe: 2.411.
In den Handschriften gibt es weitere sieben Verweise innerhalb des 2. Buches, die bei Wasserschleben nicht vorkommen:
5 in der Handschrift L: 2.170, 178, 197, 299 und 304 (jeweils am Rand).
2 in der Handschrift G: 2.202 und 294 (jeweils am Rand).

Die Verweise haben den (oder die) Bearbeiter der interpolierten Version zu Kapitelumstellungen veranlasst. Insgesamt gibt es 22 Stellen, an denen Kapitel umgestellt wurden; von diesen Umstellungen sind 29 Kapitel betroffen. Dabei wurden

aus dem 1. Buch 18 Kapitel umgestellt und aus dem 2. Buch 11 Kapitel. Diese Umstellungen folgen jedoch nicht immer den handschriftlich bezeugten Verweisen.

Umstellungen der interpolierten Version in Buch 1:

nach 1.61: folgt 2.421 (Verweis in AG in der Inskription von 1.62)
vor 1.67: 1.348 (Verweis vorhanden in AGT)
nach 1.134: folgt 1.351 (kein Verweis)
nach 1.183: folgt 2.393 (Verweis in T und L (am Rand))
nach 1.196: folgen 1.329-334 (kein Verweis)
nach 1.212: folgt 2.428 (Verweis am Rand T)
nach 1.215: folgt 2.422 (kein Verweis)
nach 1.239: folgt 1.405 (Verweis am Rand von I, 237 in L)
nach 1.242: folgt 1.276 (Verweis nach der Kap.nr. in T, am Rand AL)
nach 1.243: folgt 1.350 (Verweis in der Inskription in A, am Rand L)
vor 1.247: folgt 1.277 (Verweis nach der Kap.nr. in T)
nach 1.254: folgen 2.304 und 305 (Verweis nach der Kap.nr. in T)
nach 1.275: folgen 2.430 und 431 (Verweis am Rand in A)
nach 1.379: folgt 1.377 (kein Verweis)
nach 1.387: folgt 1.396 (kein Verweis)
nach 1.392: folgt 1.388 (kein Verweis)
nach 1.394: folgt 1.420 (Verweis in LT)
nach 1.404: folgt 1.431 (Verweis am Rand T)

Umstellungen in Buch 2:

nach 2.161: folgt 2.164 (kein Verweis)
nach 2.275: folgt 2.281 (kein Verweis)
nach 2.334: folgt 2.343 (kein Verweis)

Von den insgesamt 22 Kapitelumstellungen sind nur 12 auch durch Verweise in den uns erhaltenen Handschriften der genuinen Version bezeugt. Darüber hinaus gibt es in Buch 1 sieben Umstellungen, ohne dass sich in den erhaltenen Handschriften der genuinen Version Verweise finden, nämlich nach 1.134, 1.196, 1.215, 1.379, 1.387, 1.392 und 1.405.

Im 2. Buch gibt es drei Umstellungen ohne Verweise, nämlich nach 2.161, 2.275 und 2.334.

Außerdem gibt es fünf Verweise in Buch 1 in den Handschriften der genuinen Version, ohne dass die interpolierte

Version Kapitel umgestellt hat (1.251, 1.277, 1.348, 1.350 und 1.419).

Was Reginos Buch 2 angeht, so stimmen die Verweise in keinem Fall mit den Umstellungen in der interpolierten Version überein.

Welche Schlüsse sind aus diesem Ergebnis zu ziehen? Die Vermutung von Max Kerner u.a., dass die interpolierte Fassung des Sendhandbuchs von einer Handschrift der genuinen Version der Form B (Handschriften Arras und Gotha) abzuleiten ist[24], kann nicht zutreffen.

Wenn der Verfasser der interpolierten Version einigermaßen sorgfältig gearbeitet hat, dann lag seiner Arbeit eine Handschrift der genuinen Version zugrunde, die nicht mehr erhalten ist, sondern nur noch erschlossen werden kann. Oder muss man annehmen, dass der Verfasser der interpolierten Version in manchen Fällen ganz selbständig, d. h. ohne Vorbild eines Verweises, nur aufgrund einer von ihm festgestellten sachlichen Parallele, gearbeitet hat?

Capitulatio

Anscheinend hat Wasserschleben die *Capitulatio* aus Baluze übernommen, dort, wo die genuine Version eine andere Reihenfolge der Kapitel bietet, hat er das auch in der *Capitulatio* korrigiert. Dass die *Capitulatio* von Buch 1 bei Wasserschleben 455 Kapitel und die von Buch 2 454 Kapitel mit Rubriken aufweist, entspricht nicht den Handschriften, sondern zeigt, dass er die Capitulationes aufgrund der Kapitelfolge in seiner Edition ‘verbessert’ hat.

Die *Capitulatio* in D weist Besonderheiten auf: Nur in dieser Handschrift werden in der *Capitulatio* zusätzlich zu den Rubriken auch die Inskriptionen angegeben. Im weiteren Verlauf der *Capitulatio*, vor allem in Buch 2, nennt D überhaupt nur die Inskription und lässt die Rubriken ganz weg.

[24] So Kerner u.a., ‘Textidentifikation’ 45 Anm.114 (auf 46).

Dass Baluze die Capitulationes und auch die Rubriken sehr eigenständig behandelt hat, ist besonders klar an den Kapitelverzeichnissen und den Rubriken zu den Appendices festzustellen: Für diese Kapitelreihen gibt es nämlich in der Überlieferung gar keine *Capitulatio*; Baluze hat eine solche erst hergestellt.

Appendices

Wie die Überlieferung der Appendices in den Handschriften aussieht, geht aus den bisherigen Ausgaben nicht klar hervor.

Die Edition von Hildebrand enthält folgende Appendices:

1. Sie bietet nach dem Ende von Regino 2.454 die Kapitel, die bei Wasserschleben als ʻApp. I' erscheinen, aus den Handschriften Wolfenbüttel, 32 Helmst. (W_3) und Wien (W_1). Dabei wird die Kapitelnummerierung fortgeschrieben.
2. Es folgen die Kapitel, die bei Wass. als ʻApp. III' erscheinen, sie sind der Wiener Handschrift (W_1) entnommen. Hildebrand hat die einzelnen Kapitel mit Rubriken versehen. Er bietet jedoch nur 71 (statt 74) Kapitel und er hat nicht wenige Eingriffe in den Text vorgenommen.
3. Erst danach folgt Wasserschlebens ʻApp. II', die Hildebrand wohl aus der Abschrift des Codex W_1 und nicht aus Codex W_3 übernommen haben dürfte. Denn Hildebrand sagt, dass sich diese Appendix nicht im Cod. Helmst. finde. Auch diese Kapitel versah er mit Rubriken. Wieder fehlen einige Kapitel (es sind nur 31 von 37 Kapiteln vorhanden).

Wieder anders sieht es bei Baluze aus:

App. 1 bei Baluze ist: App. I, 1-28, dann folgt App. II, 1-37 (aus P).
App. 2 bei Baluze ist App. I, 29-58 (aus Hild. übernommen, einschließlich der Rubriken)
Wasserschlebens ʻApp. III' fehlt bei Baluze.

Wasserschleben richtet sich bei seiner Anordnung der Appendices eher nach Hildebrand als nach Baluze. Die Rubriken und die Inskriptionen für die einzelnen Kapitel in den Appendices hat er aber anscheinend aus Baluze übernommen. Für ʻApp. III' bietet Wass. keine Rubriken.

Eine genaue Kollation aller Handschriften zeigt, dass die Kapitel 1-26 der Appendix I bei Wasserschleben in allen Handschriften beider Versionen vorhanden sind (bzw. waren, denn die Handschriften G und L sind am Ende verstümmelt; Handschrift L hat die App. I noch bis c.20 einschließlich)

App. I, 1-20 = Appendix A.[25]
App. I, 21-26 = App. B.
App. I, 27 und 28 ist in allen Handschriften der Gruppe II (interpolierte Version) vorhanden = App. C.
App. I, 29-36 ist vorhanden in den Handschriften D und W_3 = App. D.
App. I, 37-58 gibt es nur in Handschrift W_3 = App. E.
In den Handschriften D und W_3 folgen noch 6 zusätzliche Kapitel, die Pokorny als App. F bezeichnet.
In den Handschriften S_1 und S_2 folgen auf App. C (also App. I,28) noch 16 Kapitel = App. G.
Appendix II (Wass.) = App. H. Diese Appendix wird in den Handschriften $PW_1W_2W_3$ und (unvollständig) in S_1 und S_2 überliefert.
Appendix III (Wass.) = App. K. Diese Appendix findet sich allein in der Handschrift W_1.

Dazu schreibt Wasserschleben vor der Edition der Appendix III,[26] er habe die Wolfenbütteler Abschrift des Wiener Codex[27] nochmals kollationiert, aber das Ergebnis ist wenig zuverlässig: er hat—wohl aus der alten Ausgabe von Hildebrand—eine ganze Reihe von Zusätzen in seinen Text aufgenommen bzw. dort belassen, die keine Grundlage in der Wiener Handschrift haben. Dazu kommen viele Kollations- oder Abschreibefehler. Erst die neue Ausgabe wird hier einen zuverlässigen, handschriftengetreuen Text bieten.

Wie soll mit den Appendices in der neuen Edition verfahren werden? Fraglich ist, ob die Kapitel App. I, 1-26 (= App. A und B) oder nur die Kapitel App. I, 1-20 (= App. A) noch zum originalen Text Reginos gehören. Bis zum Kapitel App. I, 20 sind

[25] Diese neue Zählung der Appendices hat Rudolf Pokorny in seinem Beitrag für die History of Medieval Canon Law erstmals vorgeschlagen, der bisher unpubliziert ist.
[26] Wasserschleben, *Edition* 449 Anm. *.
[27] Siehe oben bei Anm. 3.

jedenfalls dieselben Vorlagen verwendet wie in den beiden originären Büchern, nämlich der *Quadripartitus* und die *Dacheriana*, ab c. App. I,21 ist ein Wechsel der Vorlagen zu konstatieren. Das könnte bedeuten, dass nur die ersten 20 Kapitel von Appendix I (=App. A) zum ursprünglichen Werk Reginos gehört haben dürften. Aber auch die übrigen Appendices (einschließlich der Kapitel der Appendices F und G, die Wasserschleben nicht ediert hat), sollen in einem Anhang in kritischer Edition mit genauem Nachweis der jeweiligen Vorlagen dargeboten werden.

Quellen und Vorlagen

Im folgenden Abschnitt werden sowohl die Quellen Reginos als auch seine direkten Vorlagen, also die Sammlungen, aus denen Regino seine Texte bezogen hat, behandelt. Außerdem werden für die einzelnen Quellengruppen und Vorlagesammlungen Zahlen genannt, damit die Größenordnungen deutlich werden.

Insgesamt enthält Reginos Sendhandbuch 455+454=909 Kapitel, wobei aber Reg. 2.5 die Inquisitionsfragen für das 2. Buch bietet, während die Inquisitionsfragen für Buch 1 vor Reg. 1.1 stehen.

Altkirchliche Texte (Konzilskanones und Papstdekretalen)

Fast alle derartigen Texte hat Regino der *Collectio Dacheriana* und/oder dem *Quadripartitus* entnommen. 56 Kapitel bei Regino stammen aus den echten Dekretalen; nur bei einem Kapitel davon ist die Vorlage nicht geklärt. 11 Kapitel kommen ursprünglich aus den gefälschten Dekretalen; die meisten dieser Kapitel finden sich auch in der *Sammlung des Ps.-Remedius*, die wahrscheinlich für diese Texte Reginos Vorlage war.[28]

[28] Edition der Sammlung: *Collectio canonum Remedio Curiensi episcopo perperam ascripta*, ed. Herwig John (MIC, Series B: Corpus Collectionum 2; Città del Vaticano 1976). Ebd. 106-108 hat John sich mit der Rezeption der Sammlung durch Regino beschäftigt.

Ob Regino einige der 17 bei ihm rezipierten *Canones apostolorum* aus *Dacheriana* oder *Quadripartitus* entnommen hat, ist nicht sicher. Jedenfalls hat die *Sammlung* des Cresconius, die Regino ebenfalls benutzt hat, sämtliche *Canones apostolorum* aufgenommen.
48 Kapitel sind Kanones aus den griechischen Konzilien; die meisten stammen wieder aus der *Dacheriana* oder dem *Quadripartitus*, nur bei drei Kapiteln ist die Vorlage nicht geklärt. 28 Kapitel kommen aus den afrikanischen Konzilien; bei nur einem Kanon ist die direkte Vorlage nicht geklärt. Woher Regino die 6 Kapitel aus römischen Konzilien übernommen hat, ist bis jetzt noch unklar.

Kirchenväter

18 Kapitel stammen aus Werken oder Briefen der Kirchenväter Augustin, Hieronymus, Gregor I. und Beda. Dazu kommen 10 Kapitel aus den *Capitula* des Martin von Braga. Bis auf zwei Texte wurden sie allesamt durch die Dacheriana oder den *Quadripartitus* an Regino vermittelt.

Mönchsregeln

Aus dieser Quellengruppe kommen insgesamt 42 Kapitel, davon finden sich 27 in Buch 1 und 15 in Buch 2. Bis auf ein Kapitel hat Regino alle diese Texte aus der *Dacheriana* oder aus dem *Quadripartitus* bezogen.

Synodalkanones aus Spanien und Gallien

Offen bleibt die direkte Vorlage für einige spanische und gallische sowie merowingische Synodalkanones. Aus spanischen Synoden hat Regino 49 Kapitel übernommen, 43 davon kommen aus der Dacheriana und/oder dem *Quadripartitus*. Aus gallischen Synoden wurden 58 Kapitel übernommen (8 davon sind als Agde inskribierte Kanones von Epao); 54 davon stammen aus der Dacheriana und/oder dem *Quadripartitus*. Aus merowingischen

Synoden kommen 12 Kapitel (dazu kommen 8 als Agde inskribierte Kanones von Epao); 9 davon kommen aus der *Dacheriana* und/oder dem *Quadripartitus*. Die Herkunft von 13 Kapiteln aus gallischen und merowingischen sowie aus spanischen Konzilien konnte also bisher nicht geklärt werden. Was die Kapitel aus den Konzilien von Agde (506) bzw. von Epao (517) angeht, so ist festzustellen, dass bei Regino kein einziges Kapitel als Kanon von Epao inskribiert ist; 25 Kapitel tragen entweder die Inskription Agathense oder sind ohne Inskription.[29]

Konzilskanones aus karolingischen Konzilien

Im Buch 1 stammen 57 Kapitel, in Buch 2 sogar 100, also insgesamt 157 Kapitel aus diesen Vorlagen, wobei vor allem die Kanones der Konzilien von Verberie 756 (12 Kapitel bei Regino), Compiègne 757 (11 Kapitel), Meaux-Paris 845/46 (41 Reginokapitel); von Mainz 813 (11 Kapitel), Mainz 847 (12 Kapitel), Worms 868 (16 Kapitel) und von Tribur 895 (39 Kapitel) rezipiert wurden.

Welche Vorlagen Regino für diese Kanones benutzt hat, ist noch nicht geklärt. Während für die meisten von Regino herangezogenen Synodalkanones der Karolingerzeit eine ganze Reihe von Handschriften erhalten sind, ist für die beiden von Regino benutzten Versionen der Kanones von Tribur (Versio Catalaunensis und Versio Diessensis-Coloniensis) die erhaltene Überlieferung eher klein.[30]

Regino 2.295 rezipiert c.6 des Konzils von Mainz 847 und erweitert dessen Text stark. Woher diese Erweiterungen stammen, konnte ich bisher nicht eruieren.

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[29] Regino 2.346 ist zwar bei Wasserschleben, *Edition* 346 Anm. l als Kapitel 9 des Konzils von Epao identifiziert, aber die Inskription bei Regino lautet ‘Ex concilio Hispalense’. In Reginos vermutlicher Vorlage, *Quadripartitus* c. 329, lautet die Inskription ‘Ex conc. Epaonense’.

[30] Vgl. MGH Conc. 5 329 und 332.

Bußbücher

Ein eigener Fall sind die Kapitel, die Regino aus Bußbüchern übernommen hat; insgesamt sind es 94 Kapitel. Die Rezeption der Bußbücher war in den beiden Teilen von Reginos Sammlung sehr unterschiedlich:

In Buch 1 finden sich 21 Kapitel aus Bußbüchern (vor allem aus dem *Paenitentiale mixtum* und aus Halitgars *Paenitentiale*). In Buch 2 finden sich 73 Kapitel. Hier fallen etwa die Regino-Kapitel 2.248 (=Paen. mixtum c.2,2 und 2,3) oder Reg. 2.447-454 (= Paen. mixtum c. 42 und 46) auf.

Das Doppelpaenitentiale (Paen. mixtum) und die Briefe Hrabans an Reginbald und an Humbert sowie der Excarpsus Cummeani finden sich allesamt in der Handschrift München, BSB lat. 3851, die Regino benutzt haben könnte.

Unklar bleibt bisher, woher die Kapitel kommen, die Regino aus Hrabans *Paenitentiale* an Heribald und aus Halitgars *Paenitentiale* bezogen hat.

Was den bei Regino gebotenen Text dieser Bußbuchkapitel angeht, so sind die Abweichungen manchmal so stark, dass man fast den Eindruck gewinnen könnte, dass Regino vielleicht ein ganz anderes *Paenitentiale* vor sich gehabt hat als wir heute annehmen. Oder scheute Regino bei dieser Quellengattung noch weniger als sonst Veränderungen des Textes, weil die Autorität der Bußbücher so gering war und auch in der ihm zur Verfügung stehenden Texttradition die Sicherheit der Texte so unterschiedlich zu sein schien?

Dacheriana und *Quadripartitus*

Dass diese beiden Sammlungen, die beide am Anfang bzw. in der Mitte des 9. Jahrhunderts entstanden sind, zu den wichtigsten

Vorlagen gehören, die Regino verarbeitet hat, wurde bereits von Wasserschleben hervorgehoben.[31]

Insgesamt hat Regino ca. 265 Kapitel aus diesen Sammlungen in sein Werk aufgenommen, und zwar ins erste Buch: direkt 80 Kapitel aus der *Dacheriana*, 49 Kapitel aus dem *Quadripartitus* (ein Kapitel davon vielleicht aus Cresconius) und 35 aus der einen oder der andern Sammlung (fünf Kapitel davon könnten auch aus Cresconius stammen). Für das 2. Buch lauten die Zahlen: 25 aus der *Dacheriana* (davon 2 vielleicht aus Cresconius), 45 aus dem Quadripartitus und 38 aus der einen oder der andern Sammlung (ein Kapitel könnte aus Cresconius gekommen sein).

Auch bei diesen Entnahmen zeigt sich, dass Regino die einzelnen Kapitel ganz unterschiedlich behandelte: So hat er etwa in Reg. 2.182, wo Kapitel 1.64 aus der *Dacheriana* übernommen ist, seine Vorlage stark redigiert, während das direkt darauf folgende Kapitel Reg. 2.183, das sogar drei weitere *Dacheriana*-Kapitel (Dach. 1.65-67) rezipiert, keinerlei Abweichungen gegenüber seiner Vorlage aufweist.

Zum Teil hat Regino auch die Rubriken aus seiner Vorlage, der Dacheriana oder dem *Quadripartitus*, unverändert übernommen. Dies gilt vor allem für das erste Buch; dort finden sich 32 unveränderte Rubriken aus dem *Quadripartitus* und 13 Rubriken aus der *Dacheriana*.

Die Zahlen für Buch 2 sind sehr viel geringer: nur insgesamt 10 Rubriken stimmen wörtlich mit der Vorlage überein: davon wurden 7 aus dem *Quadripartitus* und drei aus der *Dacheriana* übernommen.

[31] Vgl. Wasserschleben, *Beiträge* 3, der darauf hinwies, dass es die Brüder Ballerini waren, die als erste die von Wasserschleben so genannte *Collectio Vaticana* (also den *Quadripartitus*) als Quelle Reginos erkannten.

Cresconius

Wahrscheinlich hat Regino auch die systematische Sammlung des Cresconius benutzt[32]. An zehn Stellen von Reginos Sammlung dürften nämlich zwischen zwei und acht aufeinander folgende Kapitel aus direkt benachbarten Kapiteln des Cresconius übernommen worden sein; insgesamt wären das 38 Kapitel[33]. Besonders auffallend ist, dass die Erweiterungen im Text von Regino 1.195, die Wasserschleben in seiner Edition zwischen Sternchen gesetzt hat,[34] sich allein in einer Handschrift des Cresconius (12.1) finden (bei Zechiel-Eckes ist das die Handschrift Kr, also Krakau, Biblioteka Jagiellonska, Inv.-Nr. 1894).[35] Diese Handschrift wurde im 2. Drittel des 9. Jahrhunderts in Nordostfrankreich geschrieben; über ihre genaue Herkunft gibt es keine Sicherheit.[36] Gelegentlich besitzt Regino auch mit den Cresconius-Handschriften Köln 120 (geschrieben am Anfang 10. Jh.) und Salzburg, St. Peter a.IX.32 (aus der ersten Hälfte des 11. Jh.) gemeinsame Varianten.[37] Ob auch einige Einzelkapitel, die ursprünglich aus alten Konzilien oder Papstdekretalen stammen, aus Cresconiuus übernommen wurden,

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[32] Edition: Klaus Zechiel-Eckes, *Die Concordia canonum des Cresconius. Studien und Edition*, (2 Teilbände; Freiburger Beiträge zur mittelalterlichen Geschichte: Studien und Texte 5, Frankfurt u.a. 1992).

[33] Regino 1.64-1.66 zitieren die Canones apostolorum 3-5 und diese finden sich bei Cresconius 5.1, 6 und 7 (Zechiel-Eckes 489-490). Regino 1.91-1.94 und 1.97 entsprechen Cresconius 110.1; 110.2, 109.3; 27.3 und 109.2. Regino 1.194-1.196 entsprechen Cresconius 11, 12.1 und 12.2. Regino 1.224-1.228 entsprechen Cresconius 44.1; 44.2; 44.3; 44.4 und 44.5. Regino 1.236-1.238 entsprechen Cresconius 31.1; 31.2 und 31.3, 2. Teil. Regino 1.430-1.433 entsprechen Cresconius 18.1; 18,4 und 18,5. Regino 1.436-1.437 entsprechen Cresconius 15,1 und 15,2. Regino 1.442 – 1.445 entsprechen Cresconius 34.2, 1. Teil; 34.3, 1. Teil; 35.1, 1. Teil und 35.2. Regino 2.153 – 2.154 entsprechen Cresconius 105.2 und 105.1. Regino 2.403-2.410 entsprechen Cresconius 13.1; 13.2; 13.3; 14.1; 14.2; 30.2; 18.3 und 30.1.

[34] Wasserschleben, Edition 100.

[35] Vgl. Zechiel-Eckes, *Cresconius* 2 493.

[36] Vgl. ebd. 321.

[37] Vgl. z.B. die Varianten der Handschriften K und S in Cresconius 105.2 (ed. Zechiel-Eckes 614) mit Regino 2.153.

bleibt zu beweisen. Es finden sich nämlich zwei derartige Kapitel Reginos auch in der Sammlung des Cresconius:

Reg. 1.146 (= Can apost. 42 + 43): Cresconius 43,1+2
Reg. 1.175 (= Can. apost. 28): Cresconius 29 (wo es einen anderen Schluss gibt).

Kapitularien

Die Kapitulariensammlung des Ansegis war eine wichtige Vorlage Reginos;[38] insgesamt kommen 104 Kapitel aus dieser Vorlage. Im Buch 1 stammen 71 Kapitel aus dieser Sammlung, im Buch 2 sind es 33 Kapitel. Was andere Kapitularien angeht, die sich nicht in der Sammlung des Ansegis finden, so lauten die Zahlen: insgesamt: 43 Kapitel, davon im 1. Buch 16 und im 2. Buch 27 Kapitel. Gerhard Schmitz hat am Beispiel der Kapitulariensammlung des Ansegis gezeigt, dass Regino seine Vorlagen ganz unterschiedlich behandelt hat: während er ein Kapitel fast (oder gar ganz) wörtlich übernimmt, wurden andere Kapitel stark gekürzt oder umformuliert.[39] Schmitz hat in seinem Aufsatz nur einige Beispiele gegeben;[40] weitere könnten angeführt werden, so etwa Regino 1.388 (= Ans. 2.33) oder Regino 2.340 (= Ans. 4.22).

Auch andere Texte aus Kapitularien, die Regino wahrscheinlich aus einer Handschrift bezog, die mit den heutigen Codices Vat. Pal. lat. 582[41] oder Paris, lat. 9654[42] eng verwandt war, wurden von Regino stark bearbeitet. Einige von diesen hatte auch Schmitz schon behandelt, so Regino 2.291, in dem c.6 des

[38] Die neue Edition ist oben in Anm. 11 genannt.
[39] Vgl. Gerhard Schmitz, 'Ansegis und Regino. Die Rezeption der Kapitularien in den Libri duo de synodalibus causis', ZRG Kan. Abt. 74 (1988) 95-132.
[40] Vgl. Ibid. 126-127, wo die Verarbeitung von Ansegis 1.75 durch Regino in den Kapiteln 1.383-385 behandelt ist.
[41] Vgl. zu dieser Handschrift aus der ersten Hälfte des 10. Jh. Schmitz, 'Ansegis und Regino' 111 und Hubert Mordek, *Bibliotheca capitularium regum Francorum manuscripta: Überlieferung und Traditionszusammenhang der fränkischen Herrschererlasse* (MGH Hilfsmittel 15; Hannover 1995) 780-797.
[42] Vgl. zu dieser Handschrift, die im ausgehenden 10. Jh. entstanden ist, Schmitz, 'Ansegis und Regino' 110 und Mordek, *Bibliotheca* 562-578.

Kapitulars von Ver (884) aufgegriffen, aber stark verändert wurde[43]. Hierher gehören die Reginokapitel 2.309 (verarbeitet c.6 des Kapitulars von Koblenz 860) oder 2.279 (verkürzt stark c.3 des Kapitulars von Quierzy 857). Oder Reg. 2.435, in dem die Vorlage, c.20 von Pitres 864, gründlich redigiert wurde.

Weltliches Recht

Die Texte, die Regino aus dem römischen Recht entnommen hat, sind ganz unterschiedlich auf die beiden Bücher verteilt: In Buch 1 finden sich nur drei Kapitel dieser Herkunft, dagegen enthält das 2. Buch 31 Kapitel. Aus welcher Vorlage Regino diese 34 Texte aus dem römischen Recht bezogen hat, bleibt noch zu untersuchen.

Einige dieser Kapitel weisen erhebliche Veränderungen gegenüber ihrer vermutlichen Quelle auf; besonders deutlich ist das im Kapitel Reg. 2.173.[44] Weitere drei Kapitel, die sich allesamt im ersten Buch Reginos finden, kommen aus den *Leges*, zwei Kapitel davon aus der *Lex Burgundionum*, eines aus der *Lex Ribvaria*.

Bischofskapitularien

Obwohl Regino die Herkunft seiner Texte aus dieser Quellengattung verschleiert und in seinen Inskriptionen nirgends Hinkmars Bischofskapitularien als Ursprung eines Textes zugibt, konnten inzwischen insgesamt 28 Kapitel (20 im 1. Buch, 8 im 2. Buch) mit dieser Vorlage identifiziert werden. Einige dieser Kapitel sind in unserer Aufstellung doppelt erfasst, weil sie sowohl unter die Bischofskapitularien als auch unter die Capita incerta eingereiht sind.

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[43] Vgl. Schmitz, 'Ansegis und Regino' 122-124.

[44] Vgl. Karl Ubl, 'Doppelmoral im karolingischen Kirchenrecht? Ehe und Inzest bei Regino von Prüm', in: *Recht und Gericht in Kirche und Welt um 900*, hg. von Wilfried Hartmann und Annette Grabowsky (Schriften des Historischen Kollegs. Kolloquien 69, München 2007) 91-124, hier bes. 108.

Capita incerta[45]

Von den bei Wasserschleben so genannten ‘Capita incerta’, also Kapiteln unbekannter Herkunft, gibt es in den zwei Büchern Reginos 43 in Buch 1 und 55 in Buch 2. Das sind insgesamt 98 Kapitel, also über ein Zehntel des gesamten Werks. 39 davon sind als Synodalkanones inskribiert, 7 als Kapitel von Kapitularien, 3 als Texte aus Bußbüchern, einer soll aus einem Papstbrief stammen. Weiter finden sich: 12 Kapitel mit Eidformeln, 6 Exkommunikationsformulare, 4 Formulare für Freilassungen sowie drei Formbriefe (Reg. 1.449-451). 23 Kapitel geben keine oder unklare Vorlagen an.

Veränderungen der rezipierten Kapitel

Stark redigiert gegenüber der Vorlage sind 42 Kapitel in Buch 1 und 112 Kapitel in Buch 2. Davon sind manche so sehr verändert, dass man den Eindruck hat, dass Regino seine Vorlage nur als Ausgangspunkt für eigene Formulierungen benutzte. Das gilt für 17 Kapitel im ersten und für 21 im zweiten Buch. Keine Abweichungen gegenüber der Vorlage weisen 109 Kapitel in Buch 1 und 54 Kapitel in Buch 2 auf.

Einen Schwerpunkt unter den veränderten Kapiteln bilden einmal die Texte aus Bußbüchern (z. B. die Kapitel 2.422, 2.443 und 2.447-2.454 aus dem *Paenitentiale mixtum*) und zum andern die aus den Synoden von Verberie 756 und Compiègne 757. Etwas zufällig hat G. Schmitz auf die Kapitel Regino 2.127 und 2.426 verwiesen.[46] Aber auch die Kapitel Regino 2.117, 2.118, 2.121, 2.123 und 2.126 sowie 2.216, 2.217, 2.218 und 2.220 weisen beträchtliche Unterschiede gegenüber ihrer Vorlage auf.

Wenn wir eine Antwort auf die Frage suchen, warum gerade diese Kapitel so stark bearbeitet wurden, so könnte für die

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[45] Vgl. zu diesen Kapiteln Wilfried Hartmann, ‘Die Capita incerta im Sendhandbuch Reginos von Prüm’, *Scientia veritatis: Festschrift für Hubert Mordek zum 65. Geburtstag*, hg. von Oliver Münsch und Thomas Zotz (Ostfildern 2004) 207-226, bes. 225-226.

[46] Schmitz, ‘Ansegis und Regino’ 129 mit Anm. 102.

Bußbuchtexte ein Grund darin liegen, dass diese Texte keine sehr hohe Autorität besaßen. Die Bußbücher wurden schon in Kanon 38 des Konzils von Chalon (813) und noch deutlicher in Kapitel 32 und 34 des Konzils von Paris (829) als Texte voller Irrtümer, aber von unklarer Herkunft bezeichnet.[47]

Umgekehrt wird dann vielleicht auch besser verständlich, warum Regino zahlreiche Übernahmen im 1. Buch nicht veränderte: hier rezipierte er in großem Ausmaß Texte aus den alten Konzilien und aus Papstdekretalen, die er wegen ihrer hohen Autorität nicht so ohne weiteres zu verändern wagte.

Es dürfte deutlich geworden sein, dass bei der Arbeit an der neuen Edition schon einige wichtige Ergebnisse erzielt wurden; weitere werden hoffentlich noch folgen.

München.

Anhang

Handschriften

Genuine Version:

A Arras, Bibliothèque Municipale 723 (675), 11. Jh., aus St-Vaast in Arras: *Capitulatio* fehlt, Text reicht bis App. I 26.

G Gotha, Forschungs- und Landesbibliothek Memb. II.131, 10. Jh., aus St-Symphorien in Metz: *Capitulatio* fehlt, Text bricht in II, 340 ab.

L Luxemburg, Bibliothèque Nationale 29, Anfang 12. Jh., aus Kloster Orval: *Capitulatio* vorhanden, Text reicht bis App. I 20, dann bricht die Handschrift ab.

T Trier, Stadtbibliothek 927 (1882), 2. Hälfte 10. Jh., geschrieben in St. Maximin in Trier: *Capitulatio* vorhanden, Text reicht bis App. I 26.

Interpolierte Version:

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[47] Vgl. Wilfried Hartmann, *Die Synoden der Karolingerzeit im Frankenreich und in Italien* (Konziliengeschichte. Reihe A: Darstellungen, Paderborn-München-Wien-Zürich 1989) 183.

D Düsseldorf, Universitätsbibliothek E.3, 10. Jh., aus Kloster Werden: Sonderform der *Capitulatio*, Text mit App. I 1-36

P Paris, Bibliothèque Nationale de France lat. 17527, 1. Hälfte 11 Jh., aus der Kirchenprovinz Reims: *Capitulatio*, Text mit App. I 1-28 und App. II.

S_1 Stuttgart, Württembergische Landesbibliothek HB VI 108, 2. Hälfte 11. Jh., aus Konstanz: *Capitulatio* am Anfang defekt, Text mit App. I, 1-28 und einzelne Kapitel von App. II.

S_2 Stuttgart, Württembergische Landesbibliothek HB VI 114, Ende 10. Jh., geschrieben im Kloster Hersfeld: *Capitulatio* am Anfang defekt, Text mit App. I 1-28 und einzelne Kapitel aus App. II.

W_1 Wien, Österreichische Nationalbibliothek lat. 694, um 1000, aus Mainz: *Capitulatio*, Text mit App. I, 1-28, App. II und App. III. (eine Abschrift dieser Handschrift aus dem 17. Jh. findet sich in Wolfenbüttel, Aug. 32.13)

W_2 Wolfenbüttel, Herzog August Bibliothek 83.21 Aug. 2°, um 1000, aus St. Jakob in Mainz: *Capitulatio*, Text mit App. I 1-28 und App. II.

W_3 Wolfenbüttel, Herzog August Bibliothek 32 Helmst., um 1000, Region Hildesheim: *Capitulatio*, Text mit App. I 1-58 und App. II.

Bisherige Ausgaben

Joachim Hildebrand, *Reginonis Prumiensis de disciplina ecclesiastica presertim Germanorum libri duo* (Helmstedt 1659), basiert auf der Handschrift Wolfenbüttel, 32 Helmst. und einer Abschrift von Wien 694 (Wolfenbüttel 32.13), die vor allem für App. III benutzt wurde, und vielleicht auch Wolfenbüttel, 83.21 Aug.

Etienne Baluze, *Reginonis abbatis Prumiensis de ecclesiasticis disciplinis et religione christiana libri duo* (Paris 1671 und

öfter), basiert auf der Handschrift Paris, lat.17527 und zieht auch den Druck von Hildebrand heran.

F. G. A. Wasserschleben, *Reginonis abbatis Prumiensis libri duo de synodalibus causis et disciplinis ecclesiasticis* (Leipzig 1840) basiert auf den Handschriften Wolfenbüttel, 32 Helmst., Gotha und Trier, zieht auch manchmal die Handschrift Paris sowie die Abschrift der Wiener Handschrift aus Wolfenbüttel heran. Er kennt auch die Handschrift Wolfenbüttel, Aug. 83.21 und übernimmt die Rubriken und die Inskriptionen häufig aus Baluze.

Sull'uso del metodo questionante nel Decretum: Un contributo

Andrea Padovani

È cosa ben nota agli studiosi che fin dal 1996, quando Anders Winroth tenne la sua comunicazione all'International Congress of Medieval Canon Law a Syracuse, si è sviluppata una estesa e complessa discussione sui tempi e le fasi di redazione della *Concordia discordantium canonum*. In breve, a parere dello studioso svedese-statunitense si darebbero due recensioni del testo—poi divulgato come *Decretum*—da lui indicate come Graziano I e II. Esse sarebbero attribuibili a due diversi autori che lavorarono su due distinti corpi di fonti: sicché, mentre Graziano I avrebbe sostanzialmente trascurato il diritto romano, Graziano II l'avrebbe, viceversa, conosciuto ed utilizzato.[1]

A questa tesi si sono opposti, in varie occasioni, Carlos Larrainzar, José M. Viejo-Ximénez, Enrique De León, Luis Pablo Tarín,[2] Kenneth Pennington ed altri studiosi cui accennerò più

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[1] Anders Winroth, *The Making of Gratian's Decretum* (Cambridge 2002). Sugli studi fondamentali di Peter Landau e Rudolf Weigand, che prepararono la formulazione della tesi di Winroth, si v. la bibliografia indicata da Carlos Larrainzar, 'La ricerca attuale sul *Decretum Gratiani'*, *La cultura giuridico-canonica medievale. Premesse per un dialogo ecumenico*, curr. Enrique De León e Nicolás Álvarez de las Asturias (Pontificia Università della Santa Croce. Monografie giuridiche 22; Milano 2003) 45-88 a 72-80.

[2] Carlos Larrainzar, 'El borrador de la *Concordia* de Graciano: Sankt Gallen Stiftsbibliothek Ms 673 (= Sg)', *Ius Ecclesiae* 11 (1999) 593-666; idem, 'Metodos para el anàlisis de la formación literaria del *Decretum Gratiani*: "etapas" y "esquemas" de redacción', *Proceedings Esztergom 2008* 85-116; idem, 'La edición crítica del Decreto de Graciano', BMCL 27 (2007) 71-104 a 79-84; Enrique De León, '*Collectio Sangallensis*', BMCL 27 (2007) 57-70 a 58; José Miguel Viejo-Ximénez, '*An inter voventes possit esse matrimonium*: El texto de C. 27, q. 1 en los manuscritos antiguos del Decreto de Graciano', *Initium* 9 (2004) 73-126; idem, 'Variantes textuales y variantes doctrinales en C. 2 q. 8', *Proceedings Washington 2004* 161-190 ; idem, 'La composición del Decreto de Graciano', *Ius Canonicum* 45 (2005) 438-442; idem, '"Costuras" y "Descosidos" en la version divulgada del Decreto de Graciano', *Ius Ecclesiae* 21 (2009) 133-154; idem, '*Non omnis error consensum evacuat*: La C. 26 de

avanti. Secondo Larrainzar,[3] il Decreto sarebbe rappresentato, nella sua redazione più antica, dagli *Excerpta ex decretis Sanctorum Patrum* tráditi da Stiftsbibliothek, St. Gallen 673—viceversa ritenuti, da Winroth ed altri, una semplice abbreviazione di Graziano I. La seconda e la terza fase dovrebbero essere testimoniate dal Firenze, Biblioteca Nazionale, Conventi soppressi, A.I 402 che rivelerebbe due interventi successivi (1148, *Concordia* e 1150, *Decretum*) operati sotto la direzione dello stesso Graziano: sicché il manoscritto rappresenterebbe 'la fonte diretta e immediata della tradizione manoscritta del Decreto divulgato, il manoscritto in cui l'antica *Concordia* breve. . . si trasforma in un Decreto esteso'.[4] La quarta ed ultima tappa raggiunta dalla evoluzione di questo 'testo vivo' dovrebbe, infine, cogliersi nella edizione di Emil Friedberg. In essa si rinvengono tre parti. La prima è ripartita in 101 'distinctiones'; la seconda—che contiene 36 'causae', ognuna divisa in 'quaestiones'—comprende, alla C.33 q.3, il *Tractatus de poenitentia*; la terza, intitolata *De consecratione*, è a sua volta strutturata in cinque 'distinctiones'[5].

A fronte di un panorama così complesso il problema di fondo si riduce a questo: quali furono le scelte originali di Graziano nel

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los *Excerpta* de St. Gallen (Sg)', *Iustitia et iudicium*: *Studi di diritto matrimoniale e processuale canonico in onore di Antoni Stankiewicz*, curr. Janusz Kowal e Joaquin Llobell, II (Città del Vaticano 2010) 617-641 a 620; Luis Pablo Tarín, '*An secularibus litteris oporteat eos esse eruditos*? El texto de D. 37 en las etapas antiguas del Decreto de Graciano', *La cultura giuridico-canonica medievale* 469-511.

[3] Carlos Larrainzar, 'La formación del decreto de Graciano por etapas', ZRG, Kan. Abt. 18 (2001) 67-83 a 80. Di questo saggio esiste anche la versione in italiano: 'La formazione del Decreto di Graziano per tappe', *Proceedings Catania 2000* 103-117 .

[4] Larrainzar, 'La ricerca' 79. Su questa base, ma con schema più articolato, Atria Larson, 'Gratian's *De penitentia* in Twelfth-Century Manuscripts', BMCL 31 (2014) 57-109 a 63-64; cf. anche idem *Gratian's Tractatus de penitentia: A New Latin Edition with English Translation* (Studies in Medieval and Early Modern Canon Law 14; Washington, DC 2016).

[5] Una sintetica esposizione delle problematiche relative alla composizione del *Decreto* in Orazio Condorelli, 'Graziano (XI sec. *exeunte*-XII sec. *ca. me.*)', DGI 1058-1060 con bibliografia.

comporre e ordinare la sua opera? Per un verso abbiamo a che fare con 'distinctiones' che strutturano la *Prima pars* e il *De consecratione*; per altro verso ci troviamo dinanzi alle 'quaestiones' che caratterizzano la *Secunda pars*. Per tentare di rispondere all'interrogativo è necessario prendere posizione davanti al blocco delle argomentazioni di Winroth (e di quanti le condividono),[6] da un lato, e le tesi contrapposte, avanzate dallo schieramento—diciamo così—'spagnolo'. Schieramento cui si sono sostanzialmente allineati studiosi statunitensi—Ken Pennington, Atria Larson, Melodie Harris Eichbauer[7]—e l'italiana Giovanna Murano.[8] Tutti costoro, in base a considerazioni diverse ma infine convergenti, sono oggi d'accordo nel ritenere che St. Gallen, Stiftsbibliothek 673 sia non già una 'abbreviazione' di Graziano I (per esprimerci con la designazione di Winroth) ma—esclusa la possibilità che esso rappresenti l'Urtext redatto da Graziano—almeno la 'copia a buono' di un archetipo rimaneggiato e impreziosito da miniature in ambiente modenese.[9] Pennington ha inoltre ipotizzato che il manoscritto sangallese rifletta una prima fase di insegnamento, da parte di Graziano,

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[6] Cf. Anders Winroth, 'Recent Works on the Making of Gratian's *Decretum'*, BMCL 26 (2004-2006) 1-29 a 11; John Wei, 'A Reconsideration of St. Gall Stiftsbibliothek 673 (Sg) in the Light of the Sources of Distinctions 5-7 of the *De penitentia'*, BMCL 27 (2007) 141-188. In parte allineate alle posizioni di Winroth quelle di Mary E. Sommar, 'Gratian's *Causa VII* and the Multiple Recension Theories', BMCL 24 (2000) 78-96 a 88.

[7] Kenneth Pennington, '"The 'Big Bang": Roman Law in the Early Twelfth Century', RIDC 18 (2007) 43-70 a 25; idem, 'La biografia di Graziano, il Padre del diritto canonico', RIDC 25 (2014) 25-60 a 37-47; Atria Larson, 'The Evolution of Gratian's *Tractatus de penitentia'*, BMCL 26 (2004-2006) 98-113; idem, 'Early stages of Gratian's *Decretum* and the Second Lateran Council: A Reconsideration', BMCL 27 (2007) 21-56 a 53; idem, *Master of Penance. Gratian and the Development of Penitential Thought and Law in the Twelfth Century* (Studies in Medieval and Early Modern Canon Law 11; Washington D.C. 2014) 18-19; Melodie Harris Eichbauer, 'St. Gall Stiftsbibliothek 673 and the Early Redaction of Gratian's *Decretum*', BMCL 27 (2007) 105-139 a 107.

[8] Giovanna Murano, 'Graziano e il *Decretum* nel secolo XII', RIDC 26 (2015) 61-139 a 83-87.

[9] Ibid. 83 per la quale proprio l'eleganza della fattura esclude trattarsi di un 'borrador', come suggerito da Larrainzar.

databile intorno agli anni 1125-1130:[10] ciò che—aggiungo io—potrebbe essere provato dalla testimonianza, a lungo trascurata, di Roberto di Torigni che si sofferma sull'opera del 'magister' bolognese, nella sua *Cronaca*, sotto l'anno 1130.[11] Se dunque il manoscritto St. Gallen 673 ci riporta, almeno indirettamente, ad una fase primitiva della didattica di Graziano, non può sfuggire—anzi, deve essere sottolineato—il fatto che lo scritto sia strutturato unicamente per 'causae'.[12]

Termine, questo, che allude ad un processo (fittizio) su casi scelti dal maestro allo scopo di educare gli studenti alla dialettica processuale nella quale si scontrano posizioni contrapposte, in fatto e in diritto. A giusta ragione Harris Eichbauer[13] ha parlato di una 'courtroom procedure': come, del resto, aveva già scritto Stefano di Tournai, riguardo alla C.13:[14]

> Et notandum, Gratianum in hac causa alium modum tractandi observasse (servasse ed.), quam in aliis, forte rogatu sodalium in causarum exercitio per allegationes informari volentium. In hac enim causa ponit duas litigantium partes sibi invicem adversas et alternatim modo pro hac, modo pro illa, officio advocationis fungens ex utroque latere congruas allegationes format. Ponit thema quod in libro patet, inde duas elicit quaestiones.

In realtà, a parziale correzione di quanto affermato da Stefano, alla

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[10] Pennington, 'Big Bang' 53; idem, 'La biografia' 58. Sulla sua scia Larson, 'Early stages' 21-56; idem, *Master of Penance* 26-28. Degli anni '20 del secolo parla Charles Donahue Jr. nella recensione a Winroth, *The Making of Gratian's Decretum*, a *Law and History Review* (2007) 401-403.

[11] Cf. Andrea Padovani, 'Roberto di Torigni, Lanfranco, Irnerio e la scienza giuridica anglo-normanna nell'età di Vacario', RIDC 18 (2007) 71-140 a 128.

[12] Frederik S. Paxton, 'Gratian's Thirteenth Case and the Composition of the Decretum', *Proceedings Catania 2000* 119-129 a 127; John N. Dillon, 'Case Statement (*Themata*) and the Composition of Gratian's Cases', ZRG, Kan. Abt. 92 (2006) 306-339 a 307: 'cases . . . are the outstanding feature of the *Decretum*'; Kenneth Pennington, 'Gratian and the Jews', BMCL 31 (2014) 111-124 a 112: 'the format of the manuscript contains a powerful clue. It only contains the "causae".'

[13] Harris Eichbauer, 'St. Gall Stiftsbibliothek 673' 118.

[14] Stephen of Tournai, *Summa* a C.13 s.v. *Diocesiani*, München, BSB lat. 14403, fol. 68v-69r e München BSB 17162, fol. 101ra-101rb, ed. Schulte (Giessen 1891) 217; Quasi negli stessi termini il *casus ad dictum ante* c.13: 'Et ut [Gratianus] competentius agat, proponit thema, de quo duas elicit quaestiones'.

C.13 Graziano non introduce un 'alium modum tractandi . . . quam in aliis', perché la medesima struttura dialettica appare anche nelle 'causae' precedenti. Qui, affinché la cosa appaia con la maggiore evidenza possibile, si introducono 'actores' che—come afferma il 'dictum' introduttivo—'his argumentis probare contendunt': ma, per il resto, non si notano novità rispetto ad un metodo sperimentato cui Graziano intende restare fedele. Se le cose stanno realmente così, non si può dare torto a Pennington laddove afferma che non già le 'distinctiones', ma le 'causae' costituirono, fin dagli inizi, il tratto caratteristico—e destinato a maggior fortuna—dell'impresa grazianea.[15]

Quando poi si analizzi l'impianto del St. Gallen si noterà che la *Causa prima* anticipa—nelle 'quaestiones' 1-3—materiale destinato a figurare, di lì a non molto, nelle 'distinctiones' della *Pars prima.*[16] E tuttavia quel materiale, anche quando entra a fare parte della nuova collocazione sotto una diversa etichetta (distinctio), mantiene, in non pochi casi, la forma di una 'quaestio'. Così è per la Q.2, p.11a (= D.37 pr.): 'Sed queritur an secularibus. . . '[17]; Q.2, p.12a (= D.37 d.p.c.8): 'Quare igitur vetantur. . . '[18]; Q.2, p.12a (= D.37 d.p.c.15): 'Sic igitur ex predictis apparet. . . '; Q.2, p. 20b (= D.54 d.p.c.21): 'Queritur utrum clericatui. . . '; Q.3, p.25b (= D.63 d.p.c.34): 'Queritur quorum sit electio. . . '; Q.3 p.26a (= D.63 d.p.c.35): 'Queritur ergo si vota. . . '; Q.3, p.26a (= D.68 pr.): 'Queritur de illis qui ordinantur. . . '; Q.3, p. 27a (= D. 74 pr.): 'De hiis qui ab episcopis suis ordinari contempnunt dubitatur an inviti sint sublimandi. . . '; Q.3 p.28a (= D.79 d.p.c.7): 'Queritur autem si. . . '.

Nella *Prima pars*, d'altronde, nonostante la (posteriore) struttura per 'distinctiones', è facile trovare, qua e là, un procedimento ermeneutico per 'quaestiones'. Bastino pochi esempi: D.6 d.a.c.1, da correlare a D.6 d.p.c.3 ('Quaeritur. . . His itaque respondetur. . . '); D.24 d.p.c.12, da correlare a D.24 d.p.c.13 ('Sed quaeritur. . . probantur. . . '); D.27 d.a.c.1 ('Quaeritur. . . Hac

[15] Pennington, 'La biografia di Graziano' 38.
[16] Cf. Larrainzar, 'El borrador' 653-654.
[17] Cf. Tarín, '*An secularibus*' 504.
[18] Cf. Ibid. 505.

auctoritate datur intelligi. . . '); D. 50 d.a.c.1 da correlare a D.50 d.p.c.12 ('Nunc autem de eisdem quaeritur. . . Econtra exemplis et auctoritatibus probatur. . .'); D.63 d.p.c.35 ('Nunc ergo quaeritur. . .De his ita scribit. . .'); D.65 d.p.c.8 ('His auctoritatibus datur intelligi, quod episcopi a comprovincialibus suis debeant ordinari. Sed quaeritur. . . quid faciendum sit, in Sardicensi concilio definitur in quo cap. quinto sic statutum legitur. . .'). Lo stesso accade, nonostante la formale (e certo posteriore) organizzazione per 'distinctiones'.[19] Così a C.33 q.3 d.a.c.1 (*De poenitentia*):[20]

> His breviter decursis, in quibus extra negotii finem (fidem Fd) aliquantulum evagati sumus, ad prepositae (propositum, Fd) causae tertiam quaestionem pertractandam (*add*. qua Fd) quaeritur. Utrum sola cordis contritione et secreta satisfactione, absque oris confessione quisque possit Deo satisfacere redeamus.

Alla 'quaestio' è data risposta a De pen. D.1 d.p.c.60 e 87.

Quanto qui rilevato rivela la stretta connessione esistente tra i due strumenti esegetici di cui Graziano si serve. 'Distinctio' e 'quaestio', lontano dal costituire metodi di indagine e di esposizione reciprocamente inassimilabili, si completano a vicenda: 'diversa', insomma, 'sed non adversa'.[21] Proposta una distinzione, ogni membro di essa può originare una 'quaestio'. Si veda, ad esempio, C.27, q.2 d.p.c.29: 'Iuxta hanc distinctionem intelligenda est illa auctoritas Augustini. . . Sed obicitur illud Augustini. . . Potest et aliter distingui. . . '; C.2 q.7 d.p.c.22: 'Opponitur huic distinctioni. . . Huic oppositioni respondetur sic. . .' La 'distinctio' con la quale si conclude C.1 q.1 d.p.c.106 implica una questione cui si risponde poco dopo, d.p.c.107; lo stesso accade a C.2 q.6 d.p.c.10 e d.p.c.14. A C.16 q.7 d.p.c.30 la 'distinctio' trae con sé, immediatamente, domanda e risposta:

> Hic autem distinguendum est, quid iuris fundatores ecclesiarum in eis habeant, vel quid non. Habent ius providendi et consulendi et sacerdotem inveniendi: sed non habent ius vendendi, vel donandi, vel utendi, tamquam propriis.

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[19] Larson, *Master of Penance* 24: probabilmente ad opera di Paucapalea.

[20] Più breve la versione esibita dal St. Gallen: Larson, 'The evolution' 97.

[21] Cf. Cristoph H.F. Meyer, *Die Distinktionstechnik in der Kanonistik des 12. Jahrhunderts: Ein Beitrag zur Wissenschaftsgeschichte des Hochmittelalters* (Mediaevalia Lovaniensia. Series 1. Studia 29; Leuven 2000).

Per altro verso le 'quaestiones' si articolano, spesso, secondo 'distinctiones'. Per esempio, in rapida rassegna, a C.2 q.6 d.p.c.10; a C.16 q.2 d.p.c.7, q.3 d.p.c.7; C.11 q.3 d.p.c.24; C.16 q.3 d.p.c.7; C.23 q.4 d.p.c.11; C.28 q.2 d.p.c.2.
Questo intreccio si osserva anche in altri scritti, di poco posteriori a Graziano.[22]

Nel concepire la sua opera, Graziano tiene dunque costantemente presente uno strumento—la *quaestio*—che ritiene privilegiato fin dagli esordi della sua attività, riproponendolo ovunque egli ritiene che esso sia utile. Guido da Baisio, accingendosi a commentare la C.1, scrive, sulla scia di Stefano di Tournai:[23]

> Secunda pars huius operis in qua tractatur de negociis, expedito tractatu de ministris. Et sicut magister mutat materiam ita et modum tractandi, proponendo thema et questiones. . . Ideo non immerito aliis duabus partibus pertractatis, ubi de sacramentis et ministeriis agitur ab omnibus questionum iurgiis sevocatis, istam solam mediam que negociorum diffinitiva est multis thematibus et questionibus agitat.

Insomma: proprio la materia trattata nella *Secunda pars*—i 'negotia'—impone la scelta di trattarla per 'causae', col loro corredo di opposizioni 'pro et contra' e gli inevitabili clamori (iurgia) di interessi contrastanti.[24] Al confronto, le due parti che precedono e seguono consentono una discussione più pacata, perché illuminata dal certo riferimento al dogma. Si torna, così, a

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[22] Cf., ad esempio, *Antiquissimorum glossatorum Distinctiones: Collectio Senensis ex cod. ms. senensi I.H.13*, cur. Joanne Baptista Palmerio, *Biblioteca Iuridica Medii Aevi, Scripta Anecdota Glossatorum* (= B.I.M.Ae) II (Bononiae 1892) 150-51, XXV: 'Obicitur tamen adhuc talis contrarietas. . . Solutio. . . Si opponatur quidem. . . Respondetur sic. . .'; 164, LXII: 'Vel forte, ut quidam dicunt. . . Vel forte melius et probabilius obicitur. . .'; 169, LXXIIII: 'Si promisi Stichum aut Pamphilium et Stichum occidisti qui vilioris pretii erat, quia iam periisse et ad Pamphilium teneor? Teneris. . .'.

[23] Guido de Baisio, *Rosarium* (Strasbourg?: Johann Mantelin, ca. 1473) ISTC ib00285000, C.1 a.d.c.1.

[24] Osserva Peter Landau, 'Kanonistische Quaestionenforschung', *Die Kunst der Disputation: Probleme der Rechtsauslegung und Rechtsanwendung im 13. und 14. Jahrhundert* hrsg. von Manlio Bellomo (Schriften des Historisches Kollegs herausgegeben von der Stiftung Historisches Kolleg, Kolloquien 38; München 1997) 73-84 a 75 che la seconda parte del Decreto può essere detta una monumentale *Quaestionensammlung*.

quanto già segnalato da altri studiosi: le 'causae', strutturate per 'quaestiones', costituiscono il tratto distintivo del metodo grazianeo, fin da principio.

Sulle quaestiones: Loro origine e sviluppo

A questo punto si aprono due problemi, reciprocamente collegati, la cui soluzione richiede una approfondita discussione: se Graziano fu il primo a fare uso della 'quaestio' in diritto canonico, fu anche l'inventore di questa tecnica ermeneutica?[25] Quali rapporti, poi, si possono istituire tra Graziano e le scuole di diritto civile, esse pure capaci di ricorrere, all'occorrenza, a quel medesimo strumento?

Sulla origine e sul terreno scientifico nel quale fiorirono le 'quaestiones' non v'è identità di vedute. Kantorowicz sostenne che 'the historical origin of the questions cannot be indicated with one word: classical, Iustinian and contemporary influences were at work, but all of them were of juristic nature'.[26] Da questo giudizio non si distacca, sostanzialmente, Weimar, che esclude ogni dipendenza, nei glossatori civilisti, da modelli tratti dalla scuola pavese, dalla prima canonistica e dalla teologia;[27] il primo

[25] Si ricordi, qui, quanto afferma Simone da Bisignano, *Summa in Decretum Simonis Bisinianensis*, ed. Pietro V. Aimone Braida (MIC, Series A: Corpus Glossatorum 8; Città del Vaticano 2014) 260 ad C.13 q.1: 'Cum ante constitutionem huius operis materia de iure canonico esset incognita et eius exercitium paucis esset accomodatum, eueniebat aliquando ut illi soli hac uia, licet claudicando, incederent qui erant forensibus disputationibus eruditi. Vnde nec ad priuatum traherentur commodum uniuersalem. Magister et presentis operis auctor inspiciens et attendens ut disputandi daret nobis materiam et dando nos instrueret et doceret, quasi sub iudice constitutos introducit clericos disputantes de prediis. Et primo allegat pro actoribus probans multipliciter eis esse decimas dandas et hoc facit et prosequitur usque ad illud'.

[26] Hermann Kantorowicz, 'The *Questiones disputatae* of the Glossators', TRG 16 (1939) 1-67 a 59, ora in *Rechtshistorische Schriften* (Freiburger Rechts-und Staatswissenschaftliche Abhandlungen herausg. von der Rechts-und Staats-wissenschaftlichen Facultät Freiburg 30; Karlsruhe 1969) 137-185 a 179.

[27] Peter Weimar, 'Die legistische Literatur der Glossatorenzeit', *Handbuch der Quellen und Literatur der neueren Europäischen Privatrechtsgeschichte*, 1: *Mittelalter (1100-1500): Die gelehrten Rechte und die Gesetzgebung* (Veröf-

ad averne imposto l'uso fu Bulgaro. Lange, pur concordando sul fatto che la più antica raccolta di 'quaestiones' è dovuta a Bulgaro, nello *Stemma*, e ai suoi allievi, sostiene che 'die Literaturform der *Quaestio* ist aller Wahrscheinlicheit nach bereit Irnerius bekannt gewesen'.[28]

Di tutt'altro avviso fu Grabmann, che vide nelle 'Sententiae' e 'Quaestiones' collegabili alla scuola di Anselmo di Laon e di Guglielmo di Champeaux l'originario contatto tra la scuola teologica e la dialettica[29]. Più di recente Bazan ha sostenuto che la quaestio si sarebbe affermata come 'prolungamento' della prima forma di insegnamento medievale, la 'lectio', quando agli studenti non basta più l'appello magistrale ad una qualche 'auctoritas', ma insistono a volerne valutare l'interpretazione, cercando, tra tutte, la più vera. A questo punto interveniva il maestro offrendo il proprio personale contributo. Solo, però, con Simone di Tournai (1201 ca.) si sarebbe compiuto il definitivo distacco della 'quaestio' dalla lezione scolastica, emergendo infine come genere letterario a sé stante[30].

Ora, che la 'quaestio' si risolva in una discussione, è fuori di dubbio: ma è certamente vero che non ogni 'disputatio' sia risolvibile in una 'quaestio', cui si riconosce una certa struttura fondamentale: proposizione del 'casus' o 'thema', argomenti 'pro' e 'contra', 'solutio' (o dictum) finale del docente. Di 'disputationes' abbiamo testimonianze e memorie almeno dai primi anni

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fentlichung des Max-Planck-Instituts für Europäische Rechtsgeschichte hrsg. von Helmut Coing (München 1973) 145. In particolare, Gerhard Otte, *Dialektik und Jurisprudenz* (Ius commune, Texte und Monographien 1; Frankfurt am Main 1971) 182, nega (come, del resto, Kantorowicz) che le 'quaestiones' dei glossatori debbano alcunché al *Sic et non* di Abelardo.

[28] Hermann Lange, *Römisches Recht im Mittelalter, I. Die Glossatoren* (München 1997) 145. Su Irnerio mi soffermerò oltre.

[29] Martin Grabmann, *Storia del metodo dialettico*, II (Firenze 1980) 266.

[30] Bernardo C. Bazan, 'La *Quaestio disputata'*, *Les genres littéraires dans les sources théologiques et philosophiques médiévales: Définition, critique et exploitation: Actes du colloque international de Louvain-la-Neuve 25-27 mai 1981* (Publications de l'Institut d'Études Médiévales, 2nd sér. Textes, Études, Congrés 5; Turnhout 1982) 31-49; cf. Olga Weijers, *Le maniement du savoir: Pratiques intellectuelles à l'époque des premières universités (XIII^{e}-XIV^{e} siècles)* (Studia artistarum, Subsidia 3; Turnhout 1996) 61-74, in particolare 66.

del secolo XII: resta celebre, ad esempio, quella tra Ruperto di Deutz, gli allievi di Anselmo di Laon (1117) e Guglielmo di Champeaux.[31] Il monaco tedesco è aggredito dagli avversari 'inaudita violentia'; lo accusano, tra l'altro, 'me absente, me interdum praesente' di essersi dedicato tardi alla dialettica.[32] Sebbene Ruperto sostenga di affidarsi piuttosto ai 'verba simplicia pastorum, cum quibus locutus est Deus, quam argumenta philosophorum vel sapientium, quos in reprobum sensum tradidit Deus', dimostra pure di saper usare un lessico che richiama la tecnica questionante;[33] ma sono appena balbettii a fronte di quanto mostrano di saper fare gli agguerriti avversari. I testi di Anselmo di Laon e della sua scuola—diretta, dopo la di lui morte, dal fratello Raoul (†1133)—al pari di quelli composti da Guglielmo di Champeaux (†1122), abbondano di 'quaestiones':[34]

> 'Quaeritur. . . Potest non irrationabiliter dici. . . '; 'Primam igitur quaestionem discutiamus, deinde ad secundam veniamus. . . Sed hec solutio non perfecte videtur. . . '; 'Quaestio saepe ventilata est. . . Sed illud profecto affirmare possumus. . . '; 'Quaeritur. . . Respondetur. . . '; 'Sed quaeritur. . . Cui quaestioni taliter respondetur. . . '; 'Creavit Deus hominem natura quidem mortali et passibili. . . Quaeritur tamen. . . Ad quod dicendum. . . ', ecc.

Sono solo pochi esempi che, se letti con attenzione, rivelano già l'esposizione di ragioni 'pro' e 'contra' confortate da 'auctoritates'.[35] Una struttura analoga si rinviene nelle collezioni di

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[31] Ruperto, però, incontra Anselmo ormai morente.

[32] 'Qui nescirem contrariorum quaedam mediata, quaedam immediata': R.D.D. Ruperti Abbatis Tuitiensis *De omnipotentia Dei*, PL 170.473, cap. 23. Cf. Loris Sturlese, *Storia della filosofia tedesca nel Medioevo: Dagli inizi alla fine del XII secolo* (Accademia toscana di scienze e lettere 'La Colombaria', Studi 105; Firenze 1990) 82; Marie Dominique Chenu, *La teologia nel XII secolo*, cur. Paolo Vian, introd. Inos Biffi (Milano 1986) 59-62.

[33] Cf., ad esempio, Ruperti Tuitiensis *De voluntate Dei*, PL 170.437 etc.: 'Quaerimus. . . Si quaeritur. . . Sed dicitur nobis. . . Dicunt. . . Aliqua respondeamus. . .' con citazioni tratte dalla Sacra Scrittura e dai Padri.

[34] Odon Lottin, *Psychologie et morale aux XII^e^ et XIII^e^ siècles. V: Problèmes d'histoire littéraire: L'école d'Anselme de Laon et de Guillaume de Champeaux* (Gembloux 1959) 38 n.43; 42, n.46; 205 n.252; 209 n.259; 203 n.246.

[35] 'Auctoritates' rintracciate da Giraud: cf. Cédric Giraud and Constant J. Mews, 'Le *Liber Pancrisis*, un florilège des Pères et des maîtres modernes du XII^e^ siècle', *Archivum Latinitatis Medii Aevi* 64 (2006) 145-191 a 149-150. Il

sentenze *Deus non habet initium vel terminum* (ca. 1120) e *Deus itaque summe atque irrefragabiliter bonus* (di poco posteriore, *ante* 1138-1141).[36]

Quanto ad Abelardo, Mews ritiene che egli, pur traendo materiale, per il *Sic et non* (1121), da Ivo di Chartres, adottasse invece il metodo questionante da Anselmo di Laon, seppur maestro da lui disprezzato almeno quanto Guglielmo di Champeaux.[37] L'uso di questo strumento si rivela nel più tardo commento all'epistola di s. Paolo ai Romani, dunque in uno scritto teologico.[38] Qui le 'auctoritates' sono per lo più tratte dalla Bibbia, meno dai Padri. Le domande incalzano, ma la contrapposizione dei 'pro' e dei 'contra' è scarsamente evidente: né mancano casi nei quali, al quesito, è data subito risposta. Risposta che Abelardo, talora, non enuncia direttamente, preferendo rinviare a quanto da lui scritto in altre opere.[39] Meno frequenti le 'quaestiones' che si rintracciano nelle *Sententiae* di Ermanno, a quanto pare redatte su materiale abelardiano.[40] Anche qui si notano questioni risolte

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Liber Pancrisis (1130-1140), opera attribuibile a Walter de Mortagne nel suo insegnamento a Laon (1120-1140), costituisce la fonte più completa per documentare in maniera unitaria le dottrine professate in precedenza, nella scuola, da Anselmo, Raoul e Guglielmo di Champeaux già edite, ma 'disiunctim', da Lottin.

[36] John C. Wei, 'Gratian and the School of Laon', *Traditio* 64 (2009) 279-322; idem, 'The Sentence Collection *Deus non habet initium vel terminum* and its Reworking *Deus itaque summe atque irrefragabiliter bonus'*, *Mediaeval Studies* 73 (2011) 1-88. La prima opera (probabilmente francese) e la seconda (forse tedesca o italiana) presentano molti punti di contatto col *Liber Pancrisis* nella esposizione del pensiero di Anselmo di Laon e Guglielmo di Champeaux.

[37] Cf. supra, n.35. Si veda, in quel testo, 174.

[38] Petrus Abaelardus *Opera theologica*, 1: *Commentaria in Epistolam Pauli ad Romanos. Apologia contra Bernardum*, cur. Éloi Marie Buytaert O.F.M. (CCCM 11; Turnholti 1969) 75b (1.32). Un buon numero di 'quaestiones' si trovano fin dall'inizio del l. II, 113, 117 (III.26); 127 (IV.9); 131 (IV.11); 163-164 (IV.19); 167-168. Cf. anche l. IV, 307-310 (XIV.23).

[39] Ad esempio: l. III (VIII.11) 115: alla domanda perché Cristo si sia incarnato 'ex Anthropologia nostra petatur'; sulla predestinazione, l. IV (XIII.10) 292: 'sed hanc Ethicae nostrae reservamus discussionem'. Allo stesso scritto Abelardo rinvia anche altrove, XIV.23 307 e prima ancora, l. II (IV, 8-9) 126.

[40] Mews, *Liber Pancrisis* 181-182. Si v. *Sententie magistri Petri Abelardi (Sententie Hermanni)*. Edizione critica e nota al testo a cura di Sandro Buzzetti

brevemente, senza menzione di argomenti *pro* e *contra*.

Meglio strutturato, nella alternanza di tesi ed antitesi, è il *Liber XII quaestionum* di Onorio Augustodunense, che riferisce una controversia tra un monaco ed un canonico. Sfuggenti—come, del resto, molti aspetti della vita di Onorio—sono la collocazione cronologica dello scritto (1106-1125?), l'ambiente nel quale matura—forse, la Germania—e gli imprestiti intellettuali.[41] L'opera più importante di Onorio—la *Clavis Physicae*—propone, fin dall'inizio, un 'discipulus' che si rivolge al 'magister' ricordandogli 'quedam questiones' di cui chiede la 'solutio'.[42] Tutto l'impianto dello scritto è poi intessuto sotto forma di dialogo, in maniera non dissimile da quelle problematiche *Questiones de iuris subtilitatibus* ben note agli storici del diritto.[43]

Da quanto esposto—seppur per sommi capi—ritengo che sia possibile trarre almeno un paio di conclusioni. La prima è che la 'quaestio' pare proprio essersi affermata in terra francese e sul terreno teologico. La seconda, è che la 'quaestio' scaturisce dalla 'disputatio' sollecitata dal maestro o dagli uditori nel corso della lezione, oppure instaurata tra docenti già di gran nome. In questo stadio iniziale 'la disputatio revêt encore un caractère spontané, on

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(Firenze 1983) 27: 'De his [que ad humane salutis summam pertinere videntur] precipue que maioribus questionibus implicita esse videntur'; 117-118: 'Queritur etiam utrum eandem scientiam habuerit anima. . . Sed opponitur quod dominus ait ad Moysen. . . Sed opponitur. . . Sed dicimus. . .'; 120-121: 'Dicunt quidam. . . Sed nos dicimus. . .'; 128-130: 'Ambigi potest. . . Sed dicimus. . . Ad quod equidem respondendum videtur. . . Solet quoque queri. . . Ad quod dicimus. . .'; 'De specie quoque illa panis et vini dubitatur cuius sit. . . Si opponatur. . .'; 141-142: 'Hic queri solet an Deus aliquem diligat modo quem non semper dilexerit, sed dicimus minime. Queritur etiam si Deus omnes diligat qui eum diligunt; non. Si opponatur. . . dicimus. . . Sed notandum. . .'.

[41] Robert D. Crouse, '*Hic sensilis mundus*: Calcidius and Eriugena in Honorius Augustodunensis', *From Athens to Chartres: Neoplatonism and Medieval Thought: Studies in honor of Edouard Jeauneau*, ed. Haijo Jan Westra (Leiden-New-York-Köln 1992) 283-288 a 286.

[42] Honorius Augustodunensis, *Clavis Physicae*, cur. Paolo Lucentini (Temi e testi 21; Roma 1974) 3.

[43] *Questiones de iuris subtilitatibus*, Testo, introduzione ed apparato critico a cura di Ginevra Zanetti (Firenze 1958) 7: 'Talem ergo contradictionem cuius utraque pars auctoritate legis seu rationis nititur, dico materiam questionis. Precipue tamen illa me movet in qua leges utrimque confligunt'.

pourrait presque dire sauvage'[44] (come non ricordare, qui, l''inaudita violentia' che travolge Ruperto?) simile ad una battaglia—come attestano passi notissimi di Abelardo nell'*Historia calamitatum*—con poche regole, certo ancora lontana dalla 'quaestio', 'exercice régulier', quale si verrà componendo in progresso di tempo grazie—sostiene Giovanni di Salisbury—alla conoscenza, prima trascurata (1156 ca.), dell'ottavo libro della *Topica* di Aristotele[45].

Il cammino che conduce a questo esito—alla matura espressione della 'quaestio' quale troviamo nella seconda metà del Duecento—non è lineare: si trovano (spero di averlo mostrato) tentativi difformi, abbozzi variamente delineati dai primi autori che si cimentano in questo genere letterario. Rispetto al *Sic et non* abelardiano—ove la 'solutio' è lasciata all'intelligenza degli uditori (o dei lettori)—Algero di Liegi, nel quasi contemporaneo *Liber de misericordia et iustitia* (ca. 1121) prospetta già un modello dialettico più avanzato che—fornendo una guida alla comprensione e armonizzazione delle fonti—anticipa quello usato da Graziano nel testo trádito nel St. Gallen e ancor più estesamente dal fiorentino (nonché da quelli ad esso collegabili). Che Graziano prendesse dal *Liber* una serie di canoni e, in minor numero, di 'dicta' (talvolta assemblati 'a mosaico' da quelli di Algero, talaltra ripresi alla lettera o con parole diverse) è già stato rilevato da diversi studiosi e in ultimo da Kretzschmar e da Viejo-Ximénez.[46]

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[44] Jean Châtillon, 'Abélard et les écoles', *Abélard en son temps: Actes du Colloque international organisé à l'occasion du 9e centenaire de la naissance de Pierre Abélard (14-19 mai 1979)* (Paris 1981) 133-160 a 136, ora anche in *D'Isidore de Séville à saint Thomas d'Aquin: Etudes d'histoire et de théologie* (London 1985) IV.

[45] Ioannis Saresberiensis *Metalogicon* ed. J.B. Hall auxiliata K.S.B. Keats-Rohan (CCCM 98; Turnholti 1991) 3.10, 131: 'Nam sine eo non disputatur arte, sed casu'. È probabile che Giovanni facesse ancora riferimento alla traduzione di Boezio, anziché a quella condotta, in quegli anni, da Giacomo Veneto.

[46] Robert Kretzschmar, *Alger von Lüttichs Traktat De misericordia et iustitia*: *Ein kanonistischer Konkordanzversuch aus der Zeit des Investiturstreits: Untersuchungen und Edition* (Quellen und Forschungen zum Recht im Mittelalter 2*;* Sigmaringen 1985) 142-151; José Miguel Viejo-Ximénez, 'La relación del *Liber Divinarum Sententiarum* con la *Concordia Discordantium Canonum*', *Panta Rei: Studi dedicati a Manlio. Bellomo*, cur. Orazio Condorelli

Qui, però, interessa porre a confronto il metodo espositivo adottato dal maestro di Liegi e da Graziano. A me pare che esso sia, sostanzialmente, il medesimo, nella catena delle autorità riferite per esteso, col nome proprio e il titolo delle opere, spesso introdotte—per mostrarne la sequenza logica—dagli avverbi 'item' e 'unde'. I '*dicta'*, brevi o lunghi che siano, compongono poi le posizioni poste a confronto in precedenza: se necessario, proponendo citazioni ulteriori che precisano il punto di vista degli autori invocati.[47]

Non mancano, certo, le differenze, perché in Graziano il 'thema' è proposto regolarmente e con maggiore chiarezza; da esso dipende poi una sequenza di 'quaestiones' esplicitamente annunciate che saranno poi discusse di seguito. Così, ad es., nei 'dicta' posti ad apertura delle *Causae* 1, 2, 3:

> Hic primum quaeritur an sit peccatum emere spiritualia. . . Secundo. . . Tertio. . . Quarto. . . Quinto. . . Sexto. . . Septimo. . . ;
> Hic primum quaeritur an in manifestis iudiciarius ordo sit requirendus. . . Secundo. . . Tertio. . . Quarto. . . Quinto. . . Sexto. . . Septimo. . . Octavo. . . ;
> Hic primum quaeritur an restitutio danda sit quibuslibet expoliatis. . . Secundo. . . Tertio. . . Quarto. . . Quinto. . . Sexto. . . Septimo. . . Octavo. . . Nono. . . Decimo. . . Undecimo. . .

e si potrebbe procedere oltre, per più di venti casi analoghi, perché questo, precisamente, è lo stile maturo di Graziano, davvero senza precedenti. L'impianto che egli ha in mente è sorretto dall'idea dell''ordo': un 'ordo' ben articolato che la glossa non fatica a rintracciare e a porre in evidenza: 'Haec quaestio dividitur in 15 partes. . . '; 'Haec quaestio dividitur in octo partes. . . '; 'Haec quaestio dividitur in 7 partes. . . ' e così via.[48] Se, come oggi pare, Graziano può avere appreso le tecniche questionanti nel corso di un soggiorno in terra francese, forse a Laon, non v'è dubbio che egli le portò a perfezione in forza della sua genialità. Quei paradigmi, già sperimentati sul terreno teologico, sono ora posti al

(5 vols. Roma 2004) 5.435-471 a 436.

[47] Valga, ad evidenziare le affinità strutturali e il procedimento espositivo, il confronto – almeno – tra il 'dictum' di cui a Kretzschmar, *Alger*, 1.82, 248 e C.23 q. 4 d.p.c.15.

[48] Così, ad esempio, in sequenza, le glosse *quod autem* ad C.1 q.1 d.a.c.1; *nunc ergo* ad C.1 q.4 d.a.c.1; *quod vero* ad C.1 q.5 d.a.c.1, ecc.

servizio di un nuovo progetto di carattere giuridico.[49]

Graziano e Bulgaro

Una volta attribuito il merito indiscutibile da riconoscere al magister bolognese, si può tentare di risolvere l'altro problema: quello relativo al rapporto corrente tra Graziano e Bulgaro. Winroth ha sostenuto che Graziano precedette quest'ultimo non solo nell'uso della 'quaestio', ma anche nella attività scientifica.[50] Tale affermazione dev'essere attentamente ricontrollata.

Procediamo con ordine. Lo studioso americano confuta l'opinione di Kantorowicz secondo la quale Bulgaro fu più giovane di Graziano, dato che a C.1 q.4 d.p.c.12 egli cita quasi alla lettera la *Summula de iuris et facti ignorantia* attribuita, appunto, al civilista.[51] In realtà, obietta Winroth, il rapporto procede in direzione inversa: è la *Summula* a dipendere dal canonista (anzi, precisamente, da Graziano II), dato che—come osservò già Rota[52]—è verosimile che un canonista, piuttosto che un civilista, ritenesse l'ignoranza del diritto naturale più grave di quella del

[49] O, altrimenti, alla scuola di qualche maestro già istruito a Laon: Atria Larson, 'The Influence of the School of Laon on Gratian: The Usage of the Glossa ordinaria and Anselmian Sententiae in De penitentia (Decretum C. 33, q. 3)' *Mediaeval Studies* 72 (2010) 197-244; ma si v., oggi, più estesamente, idem, *Master of Penance* 57, 60-61, 63, n. 87, 85, 273-300. Contatti col mondo intellettuale francese, da parte di Graziano, erano già stati prospettati da David Edward Luscombe, *The School of Peter Abelard: The Influence of Abelard's Thought in the Early Scholastic Period* (Cambridge 1970) 221 e più di recente da Titus Lenherr, 'Die *Glossa ordinaria* zur Bibel als Quelle von Gratians Dekret: Ein (neuer) Anfang', BMCL 24 (2000) 97-129 a 118 e da Larrainzar, 'La edición crítica' 100.

[50] Winroth, *The Making* 159-162.

[51] Hermann Kantorowicz, *Studies in the Glossators of the Roman Law: Newly Discovered Writings of the Twelfth Century edited and explained*, with the collaboration of William Warwick Buckland, with addenda et corrigenda by Peter Weimar (Aalen 1969) 80 §§ 6, 3, 4.

[52] Antonio Rota, 'Il *tractatus de equitate* come *pars tertia* delle *Quaestiones de iuris subtilitatibus* e il suo valore storico e politico, 1: Premessa storico-critica', *Archivio Giuridico* 96 (1954) 75-119 a 95.

diritto civile.[53]

Sebbene Irnerio avesse già affermato che 'in iuris errore eodem loco est naturale ius et civile',[54] la sua posizione non ebbe seguito tra i giuristi posteriori. Non, però—a quanto mi pare—per effetto diretto del Decreto: Piacentino giustifica la maggiore responsabilità di chi ignora il diritto naturale in base al diritto giustinianeo e lo stesso farà la gl. *regula est* ad D. 22.6.9 a segno, evidentemente, che la conclusione di Bulgaro poteva essere fondata sul diritto romano, senza necessariamente invocare il diritto canonico.[55] Né, sul punto, scaturirono incertezze o dibattiti tra i glossatori: senza dire che, per quanto ne sappiamo di lui, la posizione adottata dalla *Summula* poteva ben essere condivisa da Martino.[56]

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[53] C.1 q.4 d.p.c.12: 'Item ignorantia iuris alia naturalis, alia civilis. Naturalis omnibus adultis dampnabilis est; ius vero civile aliis permittitur ignorare, aliis non. Iuris civilis ignorantia nemini obest in dampno vitando'; *Summula*, § 6: 'In iuris errore distinguitur naturale et civile ius, quia plus est culpe, naturale ius ignorare quam civile'; § 3: 'Cum enim facti ignorantia in lucro captando prosit, multo fortius in evitando dampno non nocet'.

[54] Enrico Besta, *L'opera di Irnerio (contributo alla storia del diritto italiano)* (Torino 1896) 2.232 ad Dig. 22.6.8. In parallelo si può affiancare la gl. edita da Luca Loschiavo, *Summa Codicis Berolinensis*: *Studio ed edizione di una composizione 'a mosaico'* (Ius commune, Sonderhefte, 89; Frankfurt am Main 1996) 220: 'In bono igitur et equo quidam ignari, ut uel errent uel querant, quidam reperiuntur contumaces, ut contempnant. In iure quoque, similiter laborat ignorantia sicut contumacia set licet hec magis iudiciali coercenda sit uigore. In aliquibus tamen etiam uis ita ignorantia constitutionis interminatione frenatur. Hanc igitur ad finem referuntur, ut ignaros instruant, rebelles cohibeant et sic utilitati societatique communi consulant'.

[55] Frank Roumy, 'Les distinctions et les sommes des glossateurs relatives à l'ignorance du droit', RIDC 14 (2003) 119-154 a 148.

[56] E qui mi sia consentito esprimere qualche dubbio sulla paternità bulgariana del *Tractatus de equitate*, assunta da Rota (87-90) per provare l'identica paternità della *Summa de iuris et facti ignorantia* (da lui riferita secondo il testo del Vaticano Chigi E VII 218, edito da Palmieri, che però è da attribuire ad Ugo, Roumy, 'Les distinctions' 139-140). Si prenda ciò che afferma il *Tractatus de equitate* (Rota, 'Il *Tractatus*' 117, IX.2): 'Dolum igitur omni modo prestare cogor, item culpam tam latam quam levem, sed hoc regulariter'. Questo è il pensiero di Martino. Cf. *Dissensiones Dominorum sive Controversiae Veterum Iuris Romani Interpretum qui Glossatores vocantur*, edidit et adnotationibus illustravit Gustav Haenel (Leipzig 1834) 9 § 9: 'Bulgarus dicit, a procuratore

La corrispondenza riscontrata tra i passi di Graziano e del *Tractatus*, sebbene di grande interesse, non può essere decisiva, al momento, intorno alla precedenza di un testo sull'altro. Che Bulgaro citi, almeno una volta, il Decreto, è cosa nota, rilevante e comunque possibile, dato che egli visse abbastanza a lungo (†1166) per conoscerlo.[57] Oltre, però, non si può andare.

Per confermare la sua tesi, Winroth afferma che il trattato sulla procedura dedicato al cardinale Aimerico non proverebbe nulla, dato che il prelato, già dal 1125, sarebbe stato abbastanza istruito nel diritto romano per giudicare di un caso intricato a lui affidatogli. Questa osservazione non scalfisce il dato più rilevante: che, cioè, ben prima del 1141 (data della morte di Aimerico)—forse già *ante* 1130[58]—Bulgaro era considerato un affermato docente di diritto. Con ciò cade la pretesa di Winroth che Bulgaro sarebbe stato preceduto da Graziano nella conoscenza dei testi giustinianei.[59] Di più: anche nell'uso del metodo questionante.

Ora, che Bulgaro si cimenti, nei suoi scritti, nelle 'quaestiones', è fuori di dubbio. Nel trattatello *De regulis iuris* che conclude la ricordata lettera ad Aimerico, se ne riscontrano già alcune:[60]

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praestandam levissimam culpam (Cod. 4.35.13). Martinus contra dicit (Dig. 50.17.23[24])'; 106 § 58: 'Dissentiunt in hoc verbo, scilicet procuratorem levissimam culpam praestare Bulgarus dicit, a procuratore praestandam levissimam. . . Martinus contra'. Più dettagliato il tenore delle gll. acc. *contractus* e *omnem culpam* ad Cod. 4.35.13, *ex acto* ad Cod. 4.35.21.

[57] Savigny, *Geschichte* 4.475-476. Per l'interesse di Bulgaro e Martino verso il diritto canonico Bruno Paradisi, 'Diritto canonico e tendenze di scuola nei glossatori da Irnerio ad Accursio', *Studi medievali*, 6 (1965), ora in *Studi sul Medioevo giuridico* (Istituto Storico Italiano per il Medio Evo, Studi Storici, 163-173; Roma 1987) 2.525-656 a 569-597 .

[58] Data di presumibile composizione della lettera, secondo Pennington, *'Big Bang'* 52.

[59] Non mi addentro nella questione relativa al magistero di Irnerio. Rinvio al mio 'Matilde e Irnerio: Note su un dibattito attuale', *Matilde di Canossa e il suo tempo. Atti del XXI Congresso internazionale di studio sull'alto medioevo, San Benedetto Po – Revere – Mantova – Quattro Castella, 20-24 ottobre 2015* (Atti dei congressi XXI, 1; Spoleto 2016) 299-242 a 201-202.

[60] *Excerpta legum edita a Bulgarino causidico*, hrsg. Ludwig Wahrmund (Quellen zur Geschichte des Römisch-Kanonischen Prozesses im Mittelalter,

> Si dixeris, hereditarias res. . . Quid ergo de homine libero? Non(ne) conceditur occupanti, quia nullius in bonis est? Sed de his enim regula loquitur. . . ;
> Concilia vim legum optinent eademque usuras prohibent. . . Respondeo. . . Sed homicidium, furtum, contra leges fiunt. . . Respondeo. . . Attamen non ipso iure irrita sunt, sed exceptione elidenda. Respondeo. . . ;
>
> His contrarium invenitur in alienatione praediorum minorum. . . Respondeo. . . Quaeritur: per eam traditionem dominus esse desino? Respondeo. . .

Se davvero il testo, di cui ci occupiamo, è da assegnare ad anni precedenti il 1130 (comunque prima del 1141) bisogna concludere che l'adozione della tecnica questionante, da parte di Bulgaro, avviene pressoché in contemporanea con Graziano. Ma procediamo oltre.

'Quaestiones' di Bulgaro sono riferite nello *Stemma*, nelle collezioni di Parigi e Grenoble, nonché nel Vaticano Ottoboniano latino 1492, ma la loro struttura è concepita in maniera non uniforme. Nelle raccolte *Parisiensis* e *Gratianopolitana* si inizia di solito con la 'positio casus'[61] cui seguono le contrapposte istanze delle parti. Infine si trova la risposta: breve, talvolta brevissima (esempio: 'reus obtinet'). La peculiarità più evidente di entrambe le collezioni—al pari di quella di Aschaffenburg—consiste nella esibizione dei luoghi del *Corpus Iuris* invocati a proprio sostegno da *A(ctor)* e *R(eus)* in lunghe colonne al margine del manoscritto.[62]

Non così avviene per le 'quaestiones' contenute nello *Stemma*, ove le allegazioni delle parti (quando sono indicate: ciò che non sempre accade) sono intessute nel testo.[63] Rispetto alle

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4.1-2; Aalen 1962) 12-1.

[61] Raramente si esordisce con le parole: 'Quaestio est. . .'.

[62] Hans Van de Wouw, 'Notes on the Aschaffenburg Manuscript Perg. 26', BMCL 3 (1973) 97-107 a 99; Gérard Fransen, 'Quaestiones Aschaffenburgenses', BMCL 16 (1986) 71-86.

[63] Cf. Kantorowicz-Buckland, *Studies* 246-253; *Questiones in schola Bulgari disputate* (ex cod. Vaticano Ottoboniano saec. XIII, n. 1492) cur. Federico Patetta (IRMAe; Bononiae 1892) 2.192-209. Avverte Kantorowicz, 'The *Quaestiones disputatae*' 153, che 'sometimes the argumenta of the *reus* are the only to follow, because those of the *actor* have been inserted in the *casus* of the problem'.

altre raccolte, sopra riferite, la posizione del problema è, in generale, un poco più estesa.[64] In un paio di casi, almeno, la successiva esposizione delle ragioni delle parti è strutturata in forma di contraddittorio, con istanze seguite da repliche e controrepliche.[65] La risposta del maestro si contiene nel giro di poche parole.

Le differenze riscontrabili tra le 'quaestiones' attibuite a Bulgaro non sono, dunque, di poco conto né di semplice spiegazione. Si può ritenere che quelle contenute nello *Stemma* siano state 'disputatae' a lezione, come si legge qua e là:[66]

> In scholis Bulgari tale negotium apparuit. . . ; Hoc negotio apud B. a scolaribus agitato, huiusmodi processit talis decisio ut apparebit inferius. . .; Negotium tale apud Bulgarum agitatum est. . . ; Talis quaestio (est relata) [in scolis Bulgari] a scolaribus eius. . . ; decisio processit in scolis Bulgari. . .

Kantorowicz ritenne che la raccolta sia da assegnare verso l'anno 1150, perché 'L C 15 V 8 regards a war between Bologna and Imola. . . maybe the one waged in 1153'.[67] Poiché, però, la guerra tra le due città fu combattuta fin dal 1131, per poi concludersi con due paci (la prima, il 30 marzo 1153, la seconda il 18 luglio dello stesso anno), si potrebbe datare la discussione di tale 'quaestio' uno o due decenni prima della metà del secolo.[68]

Per quanto riguarda le collezioni di Grenoble, Parigi e Aschaffenburg, resta ancora da decifrare l'ambito nel quale le

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[64] Cf. Annalisa Belloni, *Le questioni civilistiche del secolo XII: Da Bulgaro a Pillio da Medicina e Azzone* (*Ius commune*. Veröffentlichungen des Max-Planck-Instituts für Europäische Rechtsgeschichte, Frankfurt am Main. Sonderhefte. Studien zur Europäischen Rechtsgeschichte, 43; Frankfurt am Main 1989) 72-77.

[65] Kantorowicz-Buckland, *Studies* 249-51, q. LVIII; 251-253, q. LXI.

[66] Belloni, *Le questioni* 72, CL 1; CL 2; p. 75, CL 56; *Quaestiones in schola Bulgari* 204, q. XXVIIII; 207, q. XXXIIII.

[67] Kantorowicz, '*Quaestiones*' 144, 185 e *Quaestiones in schola Bulgari* 201, VIII.

[68] *Magistri Tolosani Chronicon Faventinum* [aa. 20 av. C.-1236] cur. Giuseppe Rossini (RIS^2 28.1; Bologna 1939) 33-52. Vedo che anche André Gouron, 'Observations sur le *Stemma Bulgaricum*', *Cristianità ed Europa: Miscellanea di studi in onore di Luigi Prosdocimi*, cur. Cesare Alzati (3 vol. Roma-Freiburg-Wien 1994-2000) 1.1.485-509 a 493 era già arrivato, per altre vie, alle mie stesse conclusioni.

'quaestiones' furono concepite. Al momento non vi sono elementi in grado di decidere il problema. Si può, tuttavia, ricavare almeno un dato cronologico dalla 'quaestio' LXXIII della *Gratianopolitana*, ove si legge che 'Samuel, cum esset episcopus electus a populo Bononiensi, absente clero et presente populo, clerum convocavit, ut eius confirmaret electionem'.[69] Di questo fatto non abbiamo altre notizie: ma si sa che l'intruso Samuele operò lo scisma nella Chiesa bolognese tra gli anni 1161 e 1164.[70] Un segnale, questo, di più tarda redazione della raccolta e pertanto delle tecniche questionanti ivi usate (con elencazione delle fonti normative a margine) rispetto alle altre?

Potrebbe darsi. Ma qui va anche prospettato un interrogativo di notevole importanza: a quali modelli si ispirò Bulgaro nel concepire le sue—variamente organizzate, s'è visto—'quaestiones'? Che il paradigma gli venisse da Graziano mi pare da escludere. Sia che si pensi alle tecniche adottate nella lettera ad Aimerico, oppure a quelle dello *Stemma* e infine a quelle delle collezioni di Parigi, Grenoble e Aschaffenburg, il confronto segnala differenze notevoli.

A questo punto si deve aprire una considerazione di carattere generale che non può essere ulteriormente differita: che, insomma, la storiografia (giuridica e non) ha fino ad oggi raccolto sotto una medesima etichetta—'quaestiones'—procedimenti in realtà vari e strutturalmente non uniformi. Ha ragione Kantorowicz—lo dico, qui, forzando un poco il significato delle sue parole—nel rilevare che niente 'is more erroneous than the current opinion of their [quaestiones, scilicet.] uniformity'.[71] Al di là delle classificazioni, senz'altro utili e giustificate, fino ad ora prospettate (quaestiones disputabiles-non disputabiles, finitae-infinitae, de iure civili-

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[69] *Quaestiones Dominorum Bononiensium: Collectio Gratianopolitana (ex codice manuscripto Bibliothecae Publicae Gratianopolitanae n. 626)*, (IRMAe 1; Bononiae 1914) LXXIII 223; *Primi voluminis additiones* 491.

[70] Lorenzo Paolini, 'I vescovi e gli arcivescovi di Bologna', *Domus Episcopi: Il palazzo arcivescovile di Bologna*, cur. Roberto Terra (San Giorgio in Piano 2002) 175-198 a 185.

[71] Kantorowicz, '*Quaestiones*' 159. Cf. anche Andrea Errera, 'La *quaestio* medievale e i glossatori bolognesi', *Studi senesi* 108 (Ser.[3] v.45; 1996) 490-530 a 501.

canonico, de facto-iuris, reportatae-redactae, ecc.), si dovrà pure tener conto della loro interna organizzazione, del modo col quale sono costruite. Da Bulgaro a Pillio, ad Azzone—tra i civilisti—il progresso verso forme più complesse è evidente nella sua linearità; più varia—addirittura caotica—è la linea seguita dai canonisti, come si può rilevare dalla moltitudine di collezioni che sono giunte fino a noi. A ragion veduta Gérard Fransen, specialista in questo tipo di letteratura, propose in studi ormai lontani nel tempo ma tuttora insuperati, di raccogliere i tipi di 'quaestiones' in quattro serie distinte in base alla presenza o assenza del 'thema' (casus), delle 'allegationes pro e contra', della 'solutio'.[72] Tutto questo nelle grandi linee, perché a ben vedere vi sono maestri che si limitano a riprodurre la parte tecnica dell'esercizio omettendo il 'casus' (sicchè il 'thema' si confonde con la 'quaestio'); altri non citano affatto la norma sulla quale si fondano le ragioni delle parti o sostengono la propria decisione; alcuni, pur riferendola, la collocano a margine. A fronte di chi propone una struttura assai complessa[73] la maggioranza sembra contentarsi di esposizioni brevissime, quasi scheletriche, mentre altri si soffermano su 'distinctiones' o 'subquaestiones'[74].

Questa impressionante varietà di stili e di metodi, che

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[72] Gérard Fransen, 'Les *Questiones* des Canonistes: Essai de dépouillement et de classement', *Traditio* 12 (1956) 568-87; idem, 'Les *Questiones* des Canonistes (II)', *Traditio* 13 (1957) 481-95; idem, 'Les *Questiones* des Canonistes (III)', *Traditio* 19 (1963) 516-31; idem, 'Les *Questiones* des Canonistes (IV)', *Traditio* 20 (1964) 495-502; idem, 'Les canonistes médiévaux et les problèmes de leur temps: Quelques *Quaestiones disputatae*', *Mélanges offerts à Jean Dauvillier* (Toulouse 1979) 307-316 a 308. La varietà si avverte già nelle prime raccolte: Rudolf Weigand, 'Quaestionen aus der Schule des Rolandus und Metellus', AKKR 138 (1969) 82-94 a 83.

[73] Vede ad esempio, Gérard Fransen, 'Les *Quaestiones Neapolitanae*', BMCL 6 (1976) 32-40, laddove emerge con evidenza la differenza, in estensione, con le 'quaestiones' che seguono nel manoscritto. Piuttosto brevi quelle, più tarde, di Giovanni Semeka: Gérard Fransen, 'A propos des Questions de Jean le Teutonique', BMCL 13 (1983) 39-47.

[74] Gérard Fransen, 'Les Questiones des Canonistes: Bilan provisoire et plan de travail', *Actes du Congrès de Droit canonique médiéval, Louvain et Bruxelles, 22-26 juillet 1958* (Bibliothèque de la RHE 33; Louvain 1959) 129-134 a 133.

caratterizza gli esordi del genere scientifico,[75] può ben essere racchiusa—di necessità o per comodità—entro la generica dizione 'quaestio': purché, però, il '*nomen*'[76] non impedisca di riconoscere le obiettive differenze che, di fatto, si riscontrano nella letteratura prodotta entro il secolo XII. Lo storico ha il dovere di accertare e distinguere caso per caso.

Se questa premessa è valida ed accettabile, se ne debbono trarre le logiche conseguenze. In primo luogo per respingere la supposizione che Bulgaro si ispirasse a Graziano nel redigere le sue 'quaestiones', diversamente concepite e costruite. Se l'etichetta è la medesima, le tecniche divergono. Per altro verso, ma sulla stessa linea, ritengo che non fosse nel giusto Kantorowicz sostenendo che Bulgaro trovò nel Digesto e nelle Novelle il modello delle proprie 'quaestiones'.[77] Le differenze, anche in questo caso, ci sono e non possono essere trascurate. A mio parere le domande di Claudio Trifonino e le risposte di Scevola non furono, da sole, stimolo sufficiente ad avviare un metodo ermeneutico destinato a tanto vasta e difforme fortuna. Quegli accenni potevano essere lasciati cadere, potevano essere trascurati se, da qualche parte e in tempi più vicini a Bulgaro, non si fosse affermato un indirizzo scientifico che ne rinnovava l'attualità, spingendo a riproporlo sotto nuove vesti. Tanto varrebbe, allora, credere che le 'causae' fittizie escogitate da Graziano fossero ispirate dalla lettura del Vangelo (per es., Luca 20:27-38) o dalle 'quaestiones' di s. Agostino (per non dire d'altri Padri antichi). Ma le cose andarono diversamente, come ho tentato di dimostrare in precedenza.

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[75] Si veda il quadro di insieme offerto da Orazio Condorelli, 'Note su formazione e diffusione delle raccolte di *quaestiones disputate* in diritto canonico (secoli XII-XIV), *Juristische Buchproduktion im Mittelalter*, hrsg. Vincenzo Colli (Studien zur europäischen Rechtsgeschichte 155; Frankfurt am Main 2002) 395-430.

[76] E qui si potrebbe evocare – sostituendo 'quaestiones' a 'negotia' – il celebre detto di Ulpiano (Dig. 19.5.4): 'Natura enim rerum conditum est, ut plura sint negotia quam vocabula'.

[77] Kantorowicz, '*Quaestiones*' 178. Ma lui stesso ammetteva che la struttura normale di quegli antichi precedenti 'was far less rich than that of the glossators'.

Da dove, allora, Bulgaro trovò ispirazione per le sue 'quaestiones'? Nessuno può negargli—sia chiaro—il merito di aver messo del proprio: ma nulla nasce dal nulla. Una grande pianta si sviluppa sempre da un piccolo seme. Nel caso di Bulgaro l'avvio potrebbe essere stato dato da Irnerio, suo maestro,[78] che in un paio di glosse, almeno, abbozza una 'quaestio':[79]

> Y. Manumissio et libertinitas quo modo ad invicem se habeant queritur. Respondeo: ut a causa et effectus;
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> Ergo in nichilum remanet obligatus; contra tamen ff. Quando de peculio actio, l. i. § Si precepto (Dig. 15.2.1.8). Solutio refert. . . y.

Nella loro formulazione asciutta questi passi possono essere accostati a quelli che si rintracciano nello scritto di Bulgaro al cardinale Aimerico. L'evoluzione verso forme obiettivamente più

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[78] Che i quattro dottori non fossero allievi di Irnerio è convinzione oggi diffusa da certa storiografia, infine ripresa da Winroth (*The Making* 162), per il quale il passo di Ottone Morena (*Das Geschichtswerk des Otto Morena und seiner Fortsetzer über die Taten Friedrichs I. in der Lombardei*, neu herausg. von Ferdinand Güterbock (MGH SS rer. Germ. 8; Berlin 1930) 58: 'Istorum autem quatuor doctorum et quamplurium aliorum fuit dominus et magister dominus Guarnerius doctor antiquus') sarebbe una aggiunta duecentesca. Ferdinand Güterbock ('Zur Edition des Geschichtswerks Otto Morenas und seiner Forsetzer', NA 48 (1930) 116-147; idem, 'Zur Edition Otto Morenas. II. Das Lodeser und das Mailänder Werk', NA 49 [1932] 126-149) non dice questo, limitandosi a indicare le ragioni che lo indussero a privilegiare, per l'edizione del testo, il manoscritto duecentesco M(ilano) anziché il manoscritto L(odi) usato da Jaffé per i MGH, XVIII. Entrambi i manoscritti, come osserva Lidia Capo, 'Ottone Morena', DBI 76 (2012) 671, 'discendono da uno stesso ms., testo di lavoro degli autori': Ottone e il figlio Acerbo, della cui conoscenza di cose giuridiche (entrambi furono 'iudices' e legati a Corrado III come al Barbarossa, nonché prossimi ai fatti esposti) non pare lecito dubitare. Per la tradizione testuale della Cronaca si veda, da ultimo, Franz-Josef Schmale, 'Überlieferung und Text des *Libellus* des Otto Morena und seiner Forsetzer', DA 41 (1985) 438-459. Che Irnerio, poi, fosse docente, è attestato da una glossa edita già da Besta, *L'opera di Irnerio* 2.VI: 'Hic est casus ubi dicit dominus meus Guar<nerius> quo mulieri ius ignoranti subvenitur' (Torino, BN F.II.14 ad Dig. 2.8.8 s.v. *mulieri*).

[79] Pietro Torelli, *Scritti di storia del diritto italiano* (Milano 1959) 72 e 78. Kantorowicz, '*Quaestiones*' 179 affermò viceversa che 'nor anyone else has found a single Irnerian quaestio'. Andrebbe rimeditato quanto asserito da Errera, 'La *quaestio'* 528-29, per il quale uno stimolo alla formazione della *quaestio* venne dalle glosse nelle quali sono segnalati i passi legali 'pro e contra', originariamente privi di 'solutio'.

articolate potrebbe essere stato suggerito—il condizionale, in tali cose, è d'obbligo—da studenti francesi che, come Guglielmo di Tiro, Eraclio o Stefano di Tournai, frequentarono le scuole di Bulgaro a Bologna dopo aver ascoltato, in Francia, i maestri della teologia e delle arti. Perché non supporre uno scambio di esperienze intellettuali tra discepoli e docente? Oltre questo punto, tuttavia, non è dato di procedere.

Le distinctiones della prima pars

L'attenzione fin qui dedicata alla S*ecunda pars* restringe lo spazio disponibile per la *Prima*, strutturata per 'distinctiones' (talvolta, come s'è visto, pur integrate da alcune 'quaestiones'): dunque, ad un metodo espositivo che meglio si adattava alle finalità propedeutiche delle materie trattate: le leggi nella loro varietà, innanzitutto (*Tractatus de legibus*, D.1-20) e poi altri temi, in sequenza non perfettamente ordinata.[80] Tant'è vero, che gli interpreti posteriori si mostrarono incerti nel designare il soggetto unificante di questa prima parte. L'introduzione *Volens Gratianus formam*, in prefazione alla *Summa* di Paucapalea,[81] afferma che essa tratta 'de celebratione conciliorum et de ordine clericorum et de promotione eorum et qualiter ab ordine sunt removendi', così trascurando di far menzione del *Tractatus de legibus* cui accennano, viceversa, Paucapalea[82] e la *Summa Antiquitate et tempore.*[83] Proprio quest'opera, dopo aver elencato analiticamente

[80] Così Kenneth Pennington, 'Gratian*, Causa 19,* and the Birth of Canonical Jurisprudence', *Panta Rei* 4:339-355 a 352. Ma già Paolo de' Liazari: 'Usque ad XV distinctionem ponit [Gratianus] de iure naturali et hic turbavit ordinem' (Guido Rossi, 'Per la storia della divisione del *Decretum Gratiani* e delle sue parti: Note e questioni con la edizione critica della inedita *Divisio Decreti* di Paulus de Liazariis', *Il Diritto Ecclesiastico* 3 (1956), 201-311, ora in *Studi e testi di storia giuridica medievale*, curr. Giovanni Gualandi e Nicoletta Sarti (Milano 1997) 376.

[81] Kuttner, *Repertorium* 141.

[82] Paucapalea, *Summa über das Decretum Gratiani*, hrsg. von Johann Friedrich von Schulte (Giessen 1890) 3: 'compositurus hoc opus a principali parte incipit, a divisione scilicet iuris et consuetudinis'.

[83] Franz Gillmann, 'Einteilung und System des Gratianischen Dekrets nach den alten Dekretglossatoren bis Iohannes Teutonikus einschliesslich: Unter

le materie contenute nella prima parte:

> De origine iuris humani et origine iuris divini agitur et tam hoc quam illud per species dividitur ac inter genera et species et convenientia et differentia multipliciter assignatur. Postea gradus et officia et dignitates distinguuntur et quis gradus cui per quem conferri debeat, ubi etiam et quando et quis cui per quem pro quo crimine qualiter auferri possit et quid et ad quod officium pertineat. Similiter que dignitates cui quibus electoribus quo conferente quo loco quibus conferri debeant, quis a qua ad quam conscendere possit, ostendit,

poco oltre riassume il tutto, affermando che 'in prima parte. . . agit de personis'. Per la *Summa Coloniensis*, invece, quella stessa parte tratta 'de officiis'[84] mentre la *Monacensis* parla, piuttosto, di 'ecclesiastica ministeria'.[85]

Che si tratti di persone, uffici o ministeri non v'è dubbio—per l'autore della *Summa Antiquitate et tempore*—che la prima parte 'pertineat. . . ad moralem, in qua ostenditur quomodo vivendum, quis quo ordine dignus sit'.[86]

La varietà di designazioni, fin qui riscontrata, contrasta con la sicurezza con la quale i decretisti indicarono la materia della seconda e della terza parte (de negotiis, de sacramentis). E non è

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besonderer Rücksicht auf Rudolf Sohm', AKKR 116 (1926) 472-574 a 543-544. Allo stesso modo si esprime una *Summula* processuale edita dallo stesso Gillmann, 'Romanus Pontifex iura omnia in scrinio pectoris sui censetur habere', AKKR 106 (1926) 156-179 a 165 n.1.

[84] Gillmann, 'Einteilung' 532-33. La seconda parte, invece, si occupa 'de negociis' e la terza 'de sacramentis', così proponendo le tre virtù teologali: 'spes, caritas, fides'. Cf., per altre opere in senso identico, 540 e 571. 'De officiis et ordinibus' parla Simone da Bisignano, *Summa in Decretum*, in apertura della C.1, 91.

[85] Gillmann, 'Einteilung' 545. Cf. anche 550. Medesima la conclusione di Rufino (*Die Summa decretorum des Magister Rufinus*, hrsg. von Heinrich Singer [Giessen 1892] 5), di Stefano di Tournai (*Die Summa* 121), di Uguccione (Huguccio Pisanus (*male*), *Summa Decretorum*, I, ed. Oldřich Přerovský adlaborante Istituto Storico della Facoltà di Diritto Canonico della Pontificia Università Salesiana, [MCI Series A, Corpus Glossatorum 6; Città del Vaticano 2006] 6), di Sicardo (Gillmann, 'Einteilung' 554 n.4, 6), di Pierre de Salins e Guido da Baisio (Rossi, 'Per la storia' 314-315).

[86] Gillmann, 'Einteilung' 544. Analoga, in qualche modo, la posizione della *Summa Parisiensis* (*The Summa Parisiensis on the Decretum*, ed. Terence Patrick Mc Laughlin [Toronto 1952] 78) e di Sicardo (Gillmann, 'Einteilung' 554 n.7).

tutto: perché alcuni di essi denunciarono, per tempo, l'infelice organizzazione delle 'distinctiones' incolpando, di ciò, Paucapalea.[87] In effetti, nel manoscritto fiorentino è la mano indicata da Larrainzar con la sigla C (seconda metà sec.XII)[88] ad apporre le 'distinctiones' nella prima parte e a segnalare le 'causae' nella seconda. Chiunque fu ad inserire, formalmente, le 'distinctiones' lo fece, a giudizio di Sicardo in maniera piuttosto maldestra.[89] D'altronde, é ben noto che il magister bolognese, quando si riferisce, in corso d'opera, alla *Prima pars*, non parla mai di 'distinctiones', sia che si tratti (per usare le espressioni di Winroth) di Graziano I come di Graziano II, ma solo di *Tractatus ordinandorum*, *Tractatus de promotione clericorum* o anche di

[87] *Summa de Antiquitate et tempore*: 'Nichilominus est sciendum, quod hoc opere scripto quidam alius nomine Paucapalea non minorem adhibens diligentiam ad decretorum intelligentiam, quatenus certior posset fieri assignatio contrarietatum et concordantia, partem primam in centum et unam sive duas distinctiones divisit. Secundam partem non distinxit, quia a magistro gratiano sufficienter distincta est per causas, themata, quaestiones. Tertiam in V distinctiones divisit. Nichilominus etiam quaedam decreta apposuit, quae, licet non sint minoris auctoritatis, quam alia hic posita, tamen, quia a principali auctore huius libri non sint posita, non leguntur' (Friedrich Maassen, 'Paucapalea: Ein Beitrag zur Literaturgeschichte der canonischen Rechts im Mittelalter', *Sb. Akad. Wien,* 31 [1859] 450-516 a 455-456; Adam Vetulani, 'Über die Distinctioneneinteilung und die Paleae im Dekret Gratians', ZRG, Kan. Abt. 22 (1933) 346-370 a 350 n.1, ora in *Sur Gratien et les Décrétales,* éd. Wacław Uruszczak [Aldershot 1990] I); *Summa Parisiensis*: 'Distinctiones apposuit in prima parte et ultima paucapalea, et concordantias atque contrarietates notavit in margine sic: infra, supra, tali causa vel distinctione' (Maassen, '*Paucapalea*' 465; Vetulani, 'Über die Distinctioneneinteilung' 350 n.2); Sicardo: 'Distinguitur liber iste in tres partes. Prima est usque ad primam causam. Secunda usque ad consecrationem. Tertia usque ad finem. Primam divisit, ut quidam aiunt, pauca palea in C et I dist. Secundam gratianus in XXXVI causas et harum quamlibet in quaestiones. Eas tamen non a numeris, sed more hebraico a principiis denominavit. Tertiam, ut aiunt, paucapalea in V d. Sed quisquis fuit ille deorum, meo iudicio minus sufficienter et discrete divisit, ut evidenter apparet in d. IIII et XXV et XLVIII et in pluribus aliis. Causa divisionum fuit, ut fastidium tolleretur et ut invenienda citius invenirentur' (Maassen, 'Paucapalea' 470; Gillmann, 'Einteilung' 560 n.4-7).

[88] Larrainzar, 'El decreto' 431 e 441.

[89] Cf. Rossi, 'Per la storia' 334-35.

Capitulum de ordinatione clericorum.[90]

Che dire? Se davvero, come credo, Graziano compose dapprima quella che viene designata come *Pars secunda* (nella forma breve attestata dal St. Gallen 673), si potrebbe ritenere che, in un secondo tempo, egli—per dare al suo lavoro carattere di organicità e compiutezza—premettesse una estesa trattazione intorno alle varie specie di diritto, agli uffici ecclesiastici e ai loro titolari al fine di rendere più facilmente comprensibile la *Pars de negotiis.* La *Prima pars*, così, sarebbe stata pensata da Graziano come una lunga introduzione—articolata per 'tractatus', ciascuno riguardante una determinata materia—al testo redatto in precedenza.

Ciò che gli riuscì—lo si è già notato—in maniera non del tutto felice. Così come accadde per la terza parte che, redatta per fasi successive, dovette restare, infine, sostanzialmente incompiuta.[91]

Il mio discorso può concludersi qui, ben consapevole che, a fronte di una problematica tanto complessa e sottoposta a continue revisioni da parte degli studiosi, restano ancora molti dubbi e interrogativi ancora da risolvere: ma nella speranza—se non mi inganno—di aver pur acceso almeno qualche flebile luce.

Bologna-Venezia.

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[90] Come già notato da von Schulte, *Geschichte* 49-50; Franz Gillmann, 'Rührt die Distinktioneneinteilung des ersten und des dritten Dekretteils von Gratian selbst her?' AKKR 112 (1932) 504-533 a 506; Vetulani, 'Über die Distinctioneneinteilung' 353-354, Rossi, 'Per la storia' 321-323.

[91] Larrainzar, 'El decreto' 426-428.

Gratian North of the Alps: New Evidence of the First Recension in the Archdiocese of Salzburg

John Burden[1]

Since the discovery of an earlier recension of Gratian's *Decretum* more than twenty years ago, scholars have identified a steadily increasing number of manuscripts which bear witness to it.[2] Anders Winroth's initial study on this "first recension" focused on four copies preserved in Admont (Aa), Barcelona (Bc), Florence (Fd), and Paris (P).[3] Soon after, Carlos Larrainzar found

[1] I would like to thank Anders Winroth and John Wei for reading drafts of this paper and Professor Winroth especially for providing access to his digital copies of several of the manuscripts discussed here. I would also like to thank Michael Schonhardt for recommending literature on the archdiocese of Salzburg.

[2] Anders Winroth, *The Making of Gratian's Decretum* (Cambridge Studies in Medieval Life and Thought, 4th Series, 49; Cambridge 2000); Anders Winroth, 'Recent Work on the Making of Gratian's Decretum', BMCL 26 (2008) 1-29. Winroth's discovery was first presented at the Tenth International Congress of Medieval Canon Law in Syracuse in August 1996 and was published as: Anders Winroth, 'The Two Recensions of Gratian's *Decretum*', ZRG Kan. Abt. 93 (1997) 22-31.

[3] This first recension pre-dates the form of the *Decretum* known in most twelfth-century manuscripts and in the editions of the *Correctores Romani* (1582) and Emil Friedberg (1879). According to Winroth, whose terminology I adopt in this paper, the early *Decretum* developed primarily in two discrete stages, which he calls the first (common features of Fd, Bc, Aa, P, Pfr, Sg, Mw, and now Gw1) and the second (represented by Friedberg's edition minus the *paleae*) recensions. According to this view, early *Decretum* manuscripts derive from either the first or second recensions, or some combination of the two. Although Winroth's terminology has been accepted by many scholars, some opt for alternative labels, arguing that the *Decretum* grew in more organic stages both pre-first recension and between the first and second recensions. Chief among these scholars are Carlos Larrainzar, Atria Larson, José Miguel Viejo-Ximénez, Melodie Eichbauer, and Kenneth Pennington. This group tends to refer to the first recension as the *Concordia* and the second recension as the *Decretum* while intermediate stages are represented by the canons added into the margins and appendices of Fd (additiones Bononienses), Bc, and Aa. Winroth, while open to the possibility, observes that there are no current manuscript witnesses for intervening stages. He thinks that the additions in Fd, Bc, and Aa represent the selective application of texts from the second recension. John Wei believes that

an abbreviated version in St. Gall (Sg) and a fragment in Paris (Pfr).[4] More recently, Atria Larson has identified several folios of

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the *Decretum* was probably enlarged in stages (the second-recension additions to the *Distinctiones* and *Causae*, for example, occurred before the addition of the *De consecratione*), but agrees with Winroth that the manuscript evidence does not witness these stages. Atria Larson has recently suggested a terminological compromise whereby the first recension/*Concordia* is called R1, the second recension/*Decretum* is called R2, and the various additions in Fd, Bc, and Aa are called R2a, R2b, etc. Although I have not adopted it here (mainly because this essay does not engage with the additions), I think there is much wisdom to this system. On these debates, see most recently: John C. Wei, *Gratian the Theologian* (SMCL 13; Washington, D.C. 2016) 5-9, 24-26; Atria A. Larson, *Master of Penance: Gratian and the Development of Penitential Thought and Law in the Twelfth Century* (SMCL 11; Washington, D.C. 2014) 17-20; Atria A. Larson, 'Gratian's *De penitentia* in Twelfth-Century Manuscripts', BMCL 31 (2014) 57-110. 57-64; Giovanna Murano, 'Graziano e il *Decretum* nel secolo XII', RIDC 26 (2015) 61-139. 85-91; M. H. Eichbauer, 'From the First to the Second Recension: The Progressive Evolution of the Decretum', BMCL 29 (2011-2012) 119-167; José Miguel Viejo-Ximénez, 'La Composición del Decreto de Graciano', *Ius canonicum* 45 (2005) 431-485; Carlos Larrainzar, 'Métodos para el anàlisis de la formación literaria del Decretum Gratiani: "Etapas" y "esquemas" de redacción', *Proceedings Esztergom 2008* 85-116.

[4] The precise nature of the heavily abbreviated Sg remains up for debate. Carlos Larrainzar, Kenneth Pennington, and others argue that it partially records an Urform of the *Decretum* which predates Winroth's first recension. Winroth, John Wei, Titus Lenherr, and others counter that Sg is an abbreviation of the first recension interpolated with canons from the second recension. On this debate, see: Wei, *Gratian the Theologian*, 27-33; Murano, 'Graziano', 86-87; Larson, *Master of Penance*, 228-235; Kenneth Pennington, 'The Biography of Gratian, the Father of Canon Law', *Villanova Law Review* 59 (2014) 679-706 at 689-698; Jean Werckmeister, 'Le manuscrit 673 de Saint-Gall: Un Décret de Gratien primitif?' RDC 60 (2010) 155–170; John C. 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) 141-180; Atria A. Larson, 'The Evolution of Gratian's *De Penitentia*', BMCL 26 (2004-6) 21-56; Titus Lenherr, 'Die vier Fassungen von C.3 q.1 d.p.c.6 im Decretum Gratiani. Zugleich ein Einblick in die neueste Diskussion um das Werden von Gratians Dekret', AKKR 169 (2000) 353-381; Carlos Larrainzar, 'El borrador de la "Concordia" de Graciano: Sankt Gallen, Stiftsbibliothek MS 673 (=Sg)', *Ius ecclesiae* 11 (1999) 593-666.

another abbreviation in Munich (Mw).[5] While editing the first recension, Winroth also came to the exciting (but for the purposes of the edition, troubling) conclusion that several twelfth-century manuscripts which appear to contain later versions of the *Decretum* actually preserve the 'first recension in disguise'.[6] To this list of first-recension witnesses can now be added Göttweig, SB 181 (88) (henceforth Gw), which contains an abbreviated 'capitulatio' consisting of first-recension rubrics and inscriptions. Although Gw was known to scholars as early as the 1860s, it is only now, under closer scrutiny, that its true nature is revealed. This paper will analyze Gw and its first-recension 'capitulatio', compare it to other early manuscripts of the *Decretum*, and, in the process, provide new insights into the early history of the *Decretum* in the archdiocese of Salzburg.[7]

Göttweig, SB 181 (88) (Gw) dates to the latter half of the twelfth century and has resided as long as anyone knows in Göttweig Abbey, which lies about 60 kilometers up the Danube to the west of Vienna.[8] Gw contains several texts including two

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[5] Atria A. Larson, 'An *Abbreviatio* of the First Recension of Gratian's *Decretum* in Munich?', BMCL 29 (2011–2012) 51-118.

[6] The 'first recension in disguise' refers to manuscripts of the *Decretum* which contain most or all of the canons associated with the second recension, but preserve first-recension readings in canons of the first recension. Such manuscripts probably came into being when a first-recension manuscript was supplemented by second-recension canons in the margins or in an appendix, and then subsequent copies combined the two into in the main text. See Anders Winroth, 'New Editions of Gratian's Decretum', which will appear in *Proceedings Paris 2016*.

[7] The manuscripts and sigla discussed in this paper include: Admont, SB 23 and 43 (Aa), Admont, SB 48 (Ad), Admont, SB 389, Bamberg,SB Msc. Can. 35 (P. II. 29), Barcelona, Arxiu de la Corona d'Aragó, Santa Maria de Ripoll 78 (Bc), Florence, BN Centrale, Conventi Soppressi A 1.401 (Fd), Göttweig, SB 181 (88) (Gw), Munich, BSB, Clm 13004 (Me), Munich, BSB, Clm 22272 (Mw), Paris, BNF, nouv. acq. lat. 1761 (P), Paris, BNF, lat. 3884, fol. 1 (Pfr), St. Gall, SB 673 (Sg), Vorau, SB 376 (Vu).

[8] Göttweig Abbey was founded in 1072 under the jurisdiction of the bishop of Passau. After embracing the Hirsau reforms in the 1090s, Göttweig became an important regional center of intellectual life in the twelfth century. Adalbert Fuchs, *Urkunden und Regesten zur Geschichte des Benedictinerstiftes Göttweig* (Vienna 1901).

abbreviated versions of the *Decretum,* the *Tractatus de sacrilegiis et immunitatibus*, and a short treatise on marriage.[9] The two *Decretum* abbreviations first received scholarly attention from Johann F. von Schulte, who noted that they excerpt the *Decretum* in strange ways.[10] The second abbreviation (fol. 25ra-95ra, henceforth Gw2) is missing all the 'paleae' and only partially divides the first part (Distinctiones) and third part (De consecratione) into distinctions.[11] The first abbreviation (fol. 2ra-23vb, henceforth Gw1) is even more interesting. Not only does it lack the 'paleae', it has no distinction divisions in the first part and the *De consecratione* is entirely absent.[12] Because of these oddities, Schulte suspected that both abbreviations were important for the early history of the *Decretum*. He wrote that Gw1 'was made not long at all after Gratian's *Decretum* itself' and that Gw2 was 'younger but still reaching deep into the twelfth century'.[13]

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[9] For a description of the manuscript, see: Rudolf Weigand, 'Die *Dekret-abbreviatio* "Exceptiones ecclesiasticarum regularum" und ihre Glossen', *Christianità ed Europa: Miscellanea di studi in onore di Luigi Prosdocimi*, ed. C. Alzati (Rome 1994) 1.511-529 at 513; Johann F. von Schulte, *Decretistarum jurisprudentiae specimen: E libro Gottwicensi 88 (181) saeculo XII. manuscripto* (Giessen 1868) 7. See also Schulte, *Zur Geschichte der Literatur über das Dekret Gratians* (Vienna 1870) 3.10-11 [30-31]; Schulte, *Die Rechtshandschriften der Stiftsbibliotheken von Göttweig. . .* (Vienna 1868) 569. Kuttner, *Repertorium* 263. On the *Tractatus de sacrilegiis et immunitatibus*, which was composed in the later eleventh century and was widespread in southern Germany and Austria, see: Kéry 194-197; Hubert Mordek, *Bibliotheca capitularium regum Francorum manuscripta* (MGH Hilfsmittel 15; Munich 1995) 1035-1037; Hubert Mordek, 'Auf der Suche nach einem verschollenen Manuskript. . .', *Aus Kirche und Reich: Festschrift für Friedrich Kempf*, ed. H. Mordek (Sigmaringen 1983) 187-200.

[10] Gw1 and Gw2 seem to be written in similar hands, but since Gw2 appears after a blank folio and in a new quire, I suspect that they were not copied at the same time.

[11] Schulte, *Decretistarum jurisprudentiae* 12; Schulte, *Zur Geschichte* 3.11-13 [31-33].

[12] Schulte, *Decretistarum jurisprudentiae* 11-12; Schulte, *Zur Geschichte* 3.11-12 [31-32].

[13] 'Factus est. . . haud multo post ipsum Gratiani Decretum'. Schulte, *Decretistarum jurisprudentiae*, 12; 'Jünger jedoch noch ziemlich tief ins XII. Jahrhundert hineinreichend'. Schulte, *Zur Geschichte* 10-11.

Since Schulte, Gw2 has received significant scholarly attention under the title *Exceptiones ecclesiasticarum regularum*. Rudolf Weigand studied its contents and its glosses, revealing its presence in a total of ten manuscripts from Germany and Austria.[14] Weigand also showed that its glosses rely on the *Summa* of Rufinus.[15] Gw1, however, has received little scholarly attention since Schulte. Weigand touched on it only briefly, correcting Schulte's claim that Bamberg, SB Msc. Can. 35 (P. II. 29) contains the same abbreviation as Gw1.[16] The Bamberg manuscript does indeed contain an early *Decretum* abbreviation, but it is unrelated to either of the Göttweig texts.[17] Schulte may have been wrong on this count, but as the following analysis will show, he was right to suspect that Gw1 reflects an early form of the *Decretum*.

A First Recension Capitulatio

Gw1 consists of twenty-two folios and bears the title *Liber aureus decretorum concordatorum*. It is written in two columns of thirty lines and records the *Decretum* in a peculiar form: it contains only the rubrics and inscriptions to the canons without their actual texts.[18] The rubrics form the main body while the inscriptions

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[14] Most recently, see: Rudolf Weigand, 'The Transmontane Decretists', *The History of Medieval Canon Law in the Classical Period, 1140-1234: From Gratian to the Decretals of Pope Gregory IX*, edd. W. Hartmann and K. Pennington (Washington, D.C. 2008) 174-210 at 187. The fuller study is: Weigand, 'Die *Dekretabbreviatio* "Exceptiones ecclesiasticarum regularum".' Though I have not been able to consult it, see also: Bruce Brasington, 'The *Abbreviatio* "Exceptiones evangelicarum": A Distinctive Regional Reception of Gratian's *Decretum*', *Codices manuscripti* 17 (1994) 95-99; Kuttner, *Repertorium* 260-261.

[15] Weigand, 'Die Dekretabbreviatio' 524.

[16] Ibid. 528.

[17] Bamberg, SB Msc. Can. 35, sometimes referred to by its incipit, *Omnes leges aut divine*, is edited and studied in: Alfred Beyer, *Lokale Abbreviationen des Decretum Gratiani: Analyse und Vergleich der Dekretabbreviationen 'Omnes leges aut divine' (Bamberg), 'Humanum genus duobus regitur' (Pommersfelden) und 'De his qui intra claustra monasterii consistunt' (Lichtenthal, Baden-Baden)* (Frankfurt 1998) 27-214.

[18] Minor errors and variations occur throughout. In some cases, two rubrics are combined into a single sentence. In other cases, the inscription is paraphrased.

appear in the margins. Although Schulte called it a *Summa*, and Kuttner and Weigand an *Abbreviatio*, Gw1 does not fit neatly into either category. The term which probably describes it best is a 'capitulatio'. As others have noted, it was common in the twelfth and thirteenth centuries to excerpt only the rubrics and inscriptions of canon law collections into a 'capitulatio'.[19] Rubrics summarize the canons while inscriptions provide authoritative source attributions. A 'capitulatio', therefore, allowed the reader to ascertain the scope and main ideas of the collection in an extremely condensed format.

A quick survey of Gw1 reveals characteristics of the first recension. The *De consecratione* is missing and the rubrics to the *Distinctiones* are not divided up in any way. The only textual division is that each new *causa* begins with a large initial. When one compares the rubrics of Gw1 to the list of canons in the first recension (as reported in Winroth's appendix), one finds an extremely close correspondence.[20] In fact, Gw1 does not contain a single canon not found in the first recension. Thus, it records a 'pure' version of the first recension uncontaminated by texts of the second recension. By way of illustration, the following table compares the rubrics of C.2 (fol. 10rb-11rb) in Gw1 to those in the first recension:

Gw1	First Recension rubrics	Gw1	First Recension rubrics
C.2 q.1 c.1	2.1.1		2.6.17 De eodem
	2.1.2 De eodem	C.2 q.6 c.20	2.6.20
	2.1.3 De eodem	C.2 q.6 c.21	2.6.21
	2.1.4 De eodem	C.2 q.6 c.22	2.6.22
	2.1.5 De eodem	C.2 q.6 c.24	2.6.24
C.2 q.1 c.7	2.1.7	C.2 q.6 c.25	2.6.25
C.2 q.1 c.11	2.1.11	C.2 q.6 c.26	2.6.26

In a few cases, the compiler includes the first line of the canon rather than the inscription. A major error occurs on fol. 10ra, the entire column of which is crossed out because it repeats text already copied into fol. 9vab.

[19] J. Rambaud-Buhot, 'Les divers types d'abrégés du Décret de Gratien: De la table au commentaire', *Recueil de travaux offert à Clovis Brunel: Par ses amis, collègues, amis et élèves* (2 vols. Mémoires et documents de l'École des Chartes 12; Paris 1955) 2.397-411 at 398-399.

[20] Winroth, *Making* 197-227.

C.2 q.1 c.12	2.1.12	C.2 q.6 c.27	2.6.27
C.2 q.1 c.15	2.1.15	C.2 q.6 c.28	2.6.28
C.2 q.1 c.18	2.1.18	C.2 q.6 c.33	2.6.33
C.2 q.1 c.19	2.1.19	C.2 q.6 c.37*	2.6.34
C.2 q.1 c.20	2.1.20	C.2 q.6 c.34*	2.6.37
		C.2 q.6 c.38	2.6.38
C.2 q.2 c.1	2.2.1	C.2 q.6 c.39	2.6.39
	2.2.2 De eodem	C.2 q.6 c.40	2.6.40
C.2 q.2 c.3	2.2.3		
	2.2.5 De eodem	C.2 q.7 c.1	2.7.1
	2.2.6 De eodem	C.2 q.7 c.2	2.7.2
			2.7.3 De eodem
C.2 q.3 c.1	2.3.1		2.7.5 De eodem
C.2 q.3 c.2	2.3.2	C.2 q.7 c.10	2.7.10
	2.3.3 De eodem		2.7.11 De eodem
C.2 q.3 c.4	2.3.4		2.7.12 De eodem
	2.3.4a De eodem	C.2 q.7 c.13	2.7.13
C.2 q.3 c.6	2.3.6	C.2 q.7 c.14	2.7.14
C.2 q.3 c.7	2.3.7	C.2 q.7 c.21	2.7.21
C.2 q.3 c.8	2.3.8	C.2 q.7 c.22	2.7.22
		C.2 q.7 c.23	2.7.23
C.2 q.4 c.1	2.4.1	C.2 q.7 c.27	2.7.27
C.2 q.4 c.2	2.4.2	C.2 q.7 c.28	2.7.28
		C.2 q.7 c.29	2.7.29
C.2 q.5 c.1	2.5.1	C.2 q.7 c.30	2.7.30
	2.5.2 Item	C.2 q.7 c.32	2.7.32
	2.5.3 Item	C.2 q.7 c.33	2.7.33
C.2 q.5 c.4	2.5.4	C.2 q.7 c.34	2.7.34
C.2 q.5 c.5	2.5.5	C.2 q.7 c.38	2.7.38
C.2 q.5 c.6	2.5.6	C.2 q.7 c.40	2.7.40
C.2 q.5 c.7	2.5.7	C.2 q.7 c.42	2.7.42
C.2 q.5 c.8	2.5.8		2.7.43 Item
	2.5.9 De eodem	C.2 q.7 c.44	2.7.44
C.2 q.5 c.10	2.5.10	C.2 q.7 c.45	2.7.45
C.2 q.5 c.11	2.5.11	C.2 q.7 c.46	2.7.46
C.2 q.5 c.12	2.5.12	C.2 q.7 c.47	2.7.47
	2.5.13 De eodem		2.7.48 De eodem
	2.5.16 De eodem	C.2 q.7 c.49	2.7.49
C.2 q.5 c.18	2.5.18	C.2 q.7 c.50	2.7.50
C.2 q.5 c.19	2.5.19	C.2 q.7 c.51	2.7.51
		C.2 q.7 c.53	2.7.53
C.2 q.6 c.1	2.6.1	C.2 q.7 c.54	2.7.54
	2.6.3 De eodem	C.2 q.7 c.55	2.7.55
C.2 q.6 c.4	2.6.4	C.2 q.7 c.56	2.7.56
C.2 q.6 c.5	2.6.5	C.2 q.7 c.57	2.7.57
C.2 q.6 c.6	2.6.6	C.2 q.7 c.58	2.7.58

C.2 q.6 c.7	2.6.7		
C.2 q.6 c.8	2.6.8	C.2 q.8 c.1	2.8.1
C.2 q.6 c.9	2.6.9		2.8.3 Repetitive
C.2 q.6 c.11	2.6.11		2.8.4 De eodem
C.2 q.6 c.12	2.6.12		2.8.5 De eodem
C.2 q.6 c.13	2.6.13		
C.2 q.6 c.15	2.6.15		

As can be seen, Gw1 charts the first recension very closely, omitting only those rubrics which read *De eodem* or are similarly repetitive. The same pattern continues throughout Gw1.

Comparison To Other Decretum Manuscripts

To better understand Gw1, it will help to consider it in relation to other early *Decretum* manuscripts from Austria and the archdiocese of Salzburg.[21] Fortunately, the groundwork in this area has already been laid by Fritz Eheim and Winfried Stelzer. In the 1950s, Eheim compiled a list of all known Austrian *Decretum* manuscripts with descriptions.[22] Based on close study of these manuscripts, Stelzer was then able to piece together much of the early history of the *Decretum* in Austria.[23] According to Stelzer, the *Decretum* first appeared in the region during the 1160s or 1170s in the form of two manuscripts, Admont, SB 23/43 (Aa) and Munich, BSB lat. 13004 (Me). Next, a second, larger wave of manuscripts appeared in the 1180s and 1190s.[24] As will be seen,

[21] For descriptions of twelfth-century *Decretum* manuscripts, see in general: Rudolf Weigand, *Die Glossen zum Dekret Gratians* (SG 25-26; Rome 1991). Giovanna Murano has studied extensively slightly later Austrian manuscripts produced through the 'pecia' system. G. Murano, *Manoscritti prodotti per* exemplar *e pecia conservati nelle biblioteche austriache. Admont, Graz, Innsbruck, Klosterneuburg, Kremsmünster, Lilienfeld, Linz, Melk, Salzburg, Schlägl, St. Florian, Vorau, Wien e Zwettl* (Abh. Akad. Vienna, Sitzungberichte 702; Vienna 2003).

[22] Fritz Eheim, 'Die Handschriften des Decretum Gratiani in Österreich', SG 7 (1959) 125-173.

[23] Winfried Stelzer, *Gelehrtes Recht in Österreich von den Anfängen bis zum frühen 14. Jahrhundert* (MIÖG Erg. Bd. 26; Vienna 1982).

[24] On other Austrian *Decretum* manuscripts from the last two decades of the twelfth century, see: Weigand, *Die Glossen*.

Gw1 has much in common with Aa and Me, as well as two later manuscripts.

The closest parallel to Gw1 is Admont, SB 23/43 (Aa), which was copied in Admont in the 1160s and contains the first-recension text of the *Decretum*.[25] Unlike Gw1, however, the first-recension text in Aa is interpolated with canons from the second recension. In Aa, the main text is prefaced by two introductions: the *In prima parte agitur* and the *Hoc opus inscribitur*.[26] The *Hoc opus inscribitur* is only found in one other manuscript, Munich, BSB lat. 13004 (Me). The *In prima parte agitur* is commonly found in twelfth-century *Decretum* manuscripts and is also in Me. In Aa and Me, however, the *In prima parte agitur* bears the otherwise unattested title *Claves titulorum*.[27] Aa also contains a group of canonical texts known as the *Collectio Admontensis*.[28] Among these texts is the same *Tractatus de sacrilegiis et immunitatibus* which appears in Gw. Further connections between Aa and Gw1 are revealed by the collation of rubrics. Both share peculiar readings which are not recorded in any of the other manuscripts of the first (my collations) or second (Friedberg=Fr; my collation of Me) recensions.[29]

C.2 q.6 c.8 (rubric)
Fr: Ad Romanam ecclesiam **appelletur** ab omnibus quasi ad matrem.
Fd: Ad Romanam ecclesiam quasi ad matrem **appelletur** ab omnibus.
Bc Sg Aa^{pc} Gw2: Ad Romanam ecclesiam quasi ad matrem ab omnibus **appelletur**.
Me: Quasi ad matrem ab omnibus **appelletur** ad Romanam ecclesiam.
Aa^{ac} Gw1: Ad Romanam ecclesiam quasi ad matrem ab omnibus **confluant**.

[25] On Aa, see: Winroth, *Making* 23-26; Weigand, *Die Glossen* 2.662-663; Stelzer, *Gelehrtes Recht* 22-25.

[26] On both introductions, see: Carlos Larrainzar, 'Notas sobre las introducciones *In prima parte agitur* y *Hoc opus inscribitur*', *Medieval Church Law and the Origins of the Western Legal Tradition: Festschrift Kenneth Pennington*, eds. Wolfgang P. Müller and Mary Sommar (Washington, D.C. 2009) 134-153.

[27] According to Carlos Larrainzar, the text of the *In prima parte agitur* in early *Decretum* manuscripts is not static and reflects developments between the first and second recensions. Larrainzar suggests that the *Claves titulorum* title to the *In prima parte* in Aa and Me witnesses an early stage of the *Decretum* when it was divided up into *tituli*. Larrainzar, 'Notas' 140-141.

[28] Stelzer, *Gelehrtes Recht* 25-44; Murano, 'Graziano' 105-106.

[29] Emil Friedberg, *Decretum*.

Aa[ac] and Gw1 share the distinct reading ‘confluant’ against both the first and second recensions, which read ‘appelletur’.

C.2 q.5 c.6 (rubric)
Fr Bc Sg: De Leone episcopo, quem beatus Gregorius **fecit purgationem prebere**.
Fd Me: De Leone episcopo, quem beatus Gregorius **purgationem fecit prestare**.
Aa Gw1: De Leone episcopo, quem beatus Gregorius purgationem **facit prebere vel prestare**.

Aa and Gw1 recognize dissenting readings of ‘prebere’ and ‘prestare’, and so—unlike other manuscripts of the first recension or Friedberg—include both.

C.2 q.1 c.12 (rubric)
Fr Fd Bc Sg Me Gw2: Incerta et **dubia** iudicari non possunt.
Aa Gw1: Incerta et **occulta** iudicari non possunt.

Aa and Gw1 read *occulta* against *dubia* in both the first and second recensions.

C.2 q.7 c.44 (rubric)
Fr Fd Bc Me: Paulus **Deacline** civitatis episcopus subditorum accusatione convictus deponitur.
Aa Gw1: Paulus **Reatine** civitatis episcopus subditorum accusatione convictus deponitur.

Aa and Gw1 read *Reatine* as opposed to *Deacline* in the first and second recensions. As Friedberg notes, second-recension manuscripts also present various readings (though never *Reatine*) while the formal source, a letter of Pope Gregory I, reads *Docleatine*.[30]

These shared variants suggest that Aa and Gw1 are very closely related. It is impossible, however, that one was directly copied from the other. Quite obviously, Gw1 could not have been used to create Aa because Gw1 lacks the actual texts of the canons. Likewise, because Aa is interpolated with second-recension canons, Aa could not have been used to create Gw1. The compiler of Gw1 would not have been able to systematically exclude only second-recension rubrics from Aa. But it is possible, and indeed very likely, that Aa and Gw1 share a common exemplar. This

[30] Friedberg 498. Doclea was a city in Roman Illyria.

exemplar probably contained a pure first-recension main text with second-recension additions in the margins or in an appendix.[31] The scribe of Gw1 copied only the first-recension rubrics from the main text, perhaps at a stage before the addition of second-recension canons. The scribe of Aa, however, copied into its main text *both* the first-recension canons of the exemplar and (some of?) the second-recension canons from the margins or the appendix.

A second manuscript that shares similar features with Gw1 is Munich, BSB, Clm 13004 (Me), which was compiled in the 1160s or 1170s in the archdiocese of Salzburg.[32] Me is particularly deluxe and contains what appears to be a second-recension text of the *Decretum*. Scholars have already noted a close affinity between Aa and Me. Both contain the otherwise unattested *Decretum* introduction *Hoc opus inscribitur* and the introduction *In prima parte agitur* under the peculiar title *Claves titulorum*. Prefacing the main text in Me is also a 'capitulatio' of rubrics similar to Gw1, but based on the second recension. Like Aa and Gw, Me contains the *Tractatus de sacrilegiis et immunitatibus*. Spurred on by these many similarities, Anders Winroth and Rudolf Weigand have concluded that Me was copied from Aa.[33] Winroth identified first-recension readings in Me, making it a strong candidate for preserving the first recension 'in disguise'. But, as Regula Gujer has noticed, unexplainable differences between the two suggest that the relationship is more complicated.[34] My

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[31] Winroth and Eichbauer have also considered the possibility that Aa's main text derives from a first-recension exemplar that was already interpolated with second-recension canons. The existence of Gw1, however, makes it much more likely that both Gw1 and Aa were copied from a pure first-recension manuscript with second-recension canons in the margins. Eichbauer, 'From the First'129-132; Winroth, *Making* 131-132.

[32] Weigand, *Die Glossen* 2.848-850; Stelzer, *Gelehrtes Recht* 22-25. At some point Me made it to the cathedral library of Regensburg, which is where it resided before coming to the Bayerische Staatsbibliothek. Claudia Märtl has suggested an intermediate stop at Prüfening Abbey, whose library catalog from 1165 cites a *Decretum* manuscript. Claudia Märtl, 'Regensburg in den geistigen Auseinandersetzungen des Investiturstreits', DA 42 (1986) 145-191. 172.

[33] Winroth, *Making*, 134; Weigand, *Die Glossen*, 2.849.

[34] Regula Gujer, *Concordia discordantium codicum manuscriptorum? Die Textentwicklung von 18 Handschriften anhand der D.16 des Decretum Gratiani*

collation of rubrics confirms Gujer's suspicions: Me does not share the peculiar readings of Aa and Gw1 in C.2 (see collations above), so Aa alone is not enough to explain Me. To explain these discrepancies, Gujer has suggested that Aa and Me share a common exemplar. But as I will argue below, an alternative explanation of these discrepancies is that Me was indeed copied from Aa, but in the process readings from Aa were corrected using a second manuscript.

A third manuscript with affinity to this group is, Admont, SB 48 (Ad), which was written in northern Italy just before the year 1200.[35] Although I have not consulted it personally, its Italian composition suggests that its *Decretum* text is probably not related to Aa or Gw1. After arriving at Admont, Ad was rebound and a dossier of canonical texts was added before the main text of the *Decretum*. This dossier contains the *Collectio Admontensis* (as in Aa), including the *Tractatus de sacrilegiis* (as in Aa, Gw, and Me), as well as a *capitulatio* of second-recension *Decretum* rubrics similar to the one found in Me.

A fourth manuscript with similarities to this group is Vorau, SB 376 (henceforth Vu), which was composed sometime before 1200, probably in Austria.[36] Similar to the aforementioned manuscripts, Vu contains the *Tractatus de sacrilegiis* and a *capitulatio* of *Decretum* rubrics. In this case, they preface a second-recension *Decretum* abbreviation.[37] As far as I can tell, this abbreviation is unrelated to Aa, Gw1, or any other known *Decretum* abbreviation.[38]

(Forschungen zur kirchlichen Rechtsgeschichte und zum Kirchenrecht 23; Cologne 2004) 343-350.

[35] Weigand, *Die Glossen* 2.665-666 Stelzer, *Gelehrtes Recht* 24-25;

[36] Stelzer, *Gelehrtes Recht* 27-28; Kuttner, *Repertorium* 266; Pius Fank, *Catalogus Voraviensis seu codices manuscripti Bibliothecae canoniae in Vorau* (Graz 1936) 217.

[37] The rubrics in the preface cover the *Distinctiones* in Vu, but not the *Causae* or the *De consecratione*.

[38] Canons from C.2 (second recension canons are italicized) include: **C.2 q.1**: cc.1a, 1, 2, 3, 4, 11, *13*, 15, 16, 16p; **C.2 q.2**: cc.1a, 1, 2, 3, 5; **C.2 q.3**: cc.1a, 1, 2, 3, 4, 4a, 5p; **C.2 q.4**: cc.1a, 1, 1p, 2, *3*; **C.2 q.5**: cc.1, 2, 3, 4, 4p, 5, 12, 18, 18p, *23*, 24, *25*; **C.2 q.6**: cc.1a, 3, 4, 5, 6, 7, 8, 9, *10*, 15, *16, 18, 18p, 19*, 20, 21, 21p, 22, 27, 27p, *30*, 31, 31p, *32*, 32p, 33, 33p, 34, 38, 38p; **C.2 q.7**: cc.1, 2, 3,

Even if the main *Decretum* texts of Ad and Vu are unrelated to Aa, Gw1, and Me, the similarities between these five manuscripts in terms of included texts point to a shared intellectual program. All five manuscripts contain the *Tractatus de sacrilegiis et immunitatibus*, four contain rubric *capitulationes* as prefaces, and two share the otherwise unattested introduction *Hoc opus inscribitur* and the peculiar title *Claves titulorum* for the introduction *In prima parte agitur*. The following table should help clarify these similarities:

	Introductions	Rubric *capitulationes*	Main *Decretum* text	Additional texts
Aa	*Claves titulorum* (*In prima parte agitur*) + *Hoc opus inscribitur* (Aa 23: fol. 1v-8v; Aa 43: 1r-12v)	--	First-recension *Decretum* interpolated with second-recension canons (Aa 23: fol. 9r-199v; Aa 43: 13r-198r)	*Tractatus de sacrilegiis* (Aa 43: fol. 198r-204r) in *Collectio Admontensis*
Gw	--	Gw1: first-recension rubrics + inscriptions (fol. 2ra-23vb)	Gw2: second-recension *Decretum* abbreviation (fol. 25ra-95ra)	*Tractatus de sacrilegiis* (fol. 96va-102ra)
Me	*Claves titulorum* (*In prima parte agitur*) + *Hoc opus inscribitur* (fol. 2ra-9va)	Second-recension rubrics (fol. 9vb-29vb)	Second-recension (first recension 'in disguise') *Decretum* (fol. 30ra-340ra)	*Tractatus de sacrilegiis* (fol. 340ra-343vb)
Ad	*In prima parte agitur*	Second-recension rubrics (fol. 20va-23rb)	Second-recension *Decretum* (fol. 25r-315v)	*Tractatus de sacrilegiis* (fol. 6r-8v) in *Collectio Admontensis*
Vu	--	Second-recension rubrics to the *Distinctiones* (6ra-7ra)	Second-recension *Decretum* abbreviation (53r-61v)	*Tractatus de sacrilegiis* (1r-5v)

7, 9p, 10, 13, 13p, *14, 16, 17, 18, 20*, 21, 21p, 22, 22p, *24*, 28, 30, 31p, *36*, 38, 39p, 42, 42p, 45, 46p, 47, 54, 54p, *60*, 60p; **C.2 q.8**: 1a, 1, 4, 5, 5p.

The rest of the paper will attempt to discern as much as possible about this shared intellectual program, including the personnel and motives behind it.

The Two Recensions In The Archdiocese Of Salzburg

By considering these manuscripts together, it becomes clear that different forms of the *Decretum* accompanied by additional texts arrived in the archdiocese of Salzburg at different times. To explain all the complex features of Gw, Aa, and Me, I see a plausible—but at this stage, tentative—scenario involving three stages. As demonstrated by Aa and Gw1, first contact with the *Decretum* probably occurred sometime before the mid-1160s with the arrival of a first-recension manuscript. This manuscript likely contained a pure first-recension *Decretum* text (parent of Gw1 Aa) which was divided into 37 *libri* and marked the *Distinctiones* as Book 1. The introduction *Hoc opus inscribitur* (Aa Me) was likely written for this manuscript since, as José M. Viejo-Ximénez has shown, it shares this divisional schema.[39] It is possible that Gw1 was copied at this first stage.

A second stage probably began with the arrival of a second-recension manuscript which was used to bring the first-recension exemplar up to date by adding second-recension canons in the margins or in an appendix (as copied into Aa). This second-recension manuscript must have had glosses (Aa).[40] It may also have contained the *In prima parte agitur* with the title *Claves titulorum* (Aa Me) and the *Tractatus de sacrilegiis et immunitatibus* (Gw Aa Me) as part of the *Collectio Admontensis*. All these texts were likely copied into the original first-recension exemplar, which was then used to create Aa. At this stage, Gw2 and the *Tractatus de sacrilegiis* may also have been added to Gw1. But it is also possible, however, that the entirety of Gw was copied at this stage and that the scribe of Gw1 simply ignored the second-

[39] José Miguel Viejo-Ximénez, 'La redacción original de C.29 del Decreto de Graciano', *Ius Ecclesiae* 10 (1998) 149-185 at 175-178.

[40] As detailed in the Appendix, several non-*Decretum* texts—mostly glosses—made their way into the body of Aa.

recension additions. It seems likely that some or all of this work occurred at Admont (Aa), but this cannot be known for sure without paleographical analysis of Gw.

A few years later, possibly around 1170, a third stage saw the creation of Me.[41] As mentioned earlier, Me and Aa are closely related, but Aa alone cannot account for certain readings in Me. Regula Gujer has proposed one solution to this problem: Me and Aa share a common exemplar, but Me was copied after the exemplar was corrected using a different manuscript.[42] Taking into account what we now know about Gw1 and the creation of Aa, a slightly different scenario might also be considered. In this scenario, Me was copied from two manuscripts, Aa and a second-recension manuscript, perhaps even the same one that had earlier supplied second-recension canons to Aa's exemplar. In the process, this second-recension manuscript was occasionally employed to correct Aa's first-recension text. As a result, Me acquired a mixture of first- and second-recension readings. This would explain why Winroth detected first-recension readings whereas Gujer and I did not. To determine precisely which scenario occurred (mine or Gujer's), further collation of Aa and Me is necessary.

From Me onwards into the 1180s and 1190s, new manuscripts created in the archdiocese of Salzburg tend to follow the second recension. The influence of the first recension and its study, however, would live on. The first-recension-derived *Hoc opus inscribitur* was included (awkwardly) in Me and even as newer second-recension manuscripts were copied (Ad and Vu), scribes continued to include in them the *Tractatus de sacrilegiis* and rubric *capitulationes*. A minor trace of first-recension study can also be found in Admont, SB 389, a twelfth-century copy of Paucapalea's *Summa*.[43] At the beginning of the commentary on C. 1 (fol. 32r) appear two rubrics: *Causa Prima* and *Liber Secundus*. While *Causa Prima* is standard for Paucapalea and the second

[41] If Claudia Märtl is correct that Me was already in Prüfening Abbey by 1165, we can place its creation in the years before then. Märtl, 'Regensburg' 172.
[42] Gujer, *Concordia* 348.
[43] Stelzer, *Gelehrtes Recht* 21.

recension, *Liber Secundus* almost certainly refers back to the earlier division of the *Decretum* into 37 *libri* which is witnessed in Gw1, Aa, and the *Hoc opus inscribitur*.

Transalpine Connections

For the other first-recension manuscripts of the *Decretum*, we know very little of their history beyond what can be established from paleographical insights. Their dates of creation and provenances are fuzzy, and little can be discerned about their twelfth-century owners.[44] In the case of Gw1, Aa, and Me, however, it may be possible to do slightly better. As the following will argue, these three manuscripts point to a coordinated program in the archdiocese of Salzburg, one which involved both monasteries and bishops.

Giovanna Murano has shown that early manuscripts of the *Decretum* were often spread through Benedictine monastic networks.[45] Aa and Gw do seem to fit this pattern. The copying of Aa at Admont was almost certainly overseen by Abbot Gottfried (r.1137-1165), under whom Admont acquired a reputation as a center of learning and reform.[46] Admont's monks were highly sought after by other monasteries and under Gottfried thirteen Admont monks went on to become abbots elsewhere.[47] Most famous among these was Gottfried's brother Irimbert, who was elected abbot of Michelsberg (1160-1172) in Bamberg and, later, abbot of Admont (1172-1177) after the passing of Gottfried's successor. Among these Admont-trained abbots also appears a

[44] Based on papal letters in the margins of Fd, some have argued that it should be associated with Bishop Amandus (r.1153-1167) of Bisceglie in Apulia. Murano, 'Graziano' 88. Much less is known about Bc, P, Sg, etc.
[45] Murano, 'Graziano' 82-84.
[46] Ulrich Faust, 'Gottfried von Admont', *Studien und Mitteilungen zur Geschichte des Benediktinerordens* 75 (1964) 275-359.
[47] Admont supplied abbots to: Attl, St. Peter, Ossiach, Benediktbeuern, St. Emmeram, Prüll, Weihenstephan, St. Lambrecht, Göttweig, Michelsberg, Biburg, Millstatt, and Kremsmünster. Faust, 'Gottfried' 278.

certain John (d. 1174), who became abbot of Göttweig in 1157.[48] Very little is known about Abbot John, but his connection to both Admont and Göttweig provides a tantalizing human link between Aa and Gw. Perhaps Gw was copied at Admont sometime before 1157 and John was allowed to bring it with him to Göttweig? Or maybe it was copied in Göttweig only later, once John had become abbot? Further paleographical analysis of Gw may very well answer this question.

The cost of creating the massive Aa and, even more so, the extraordinarily deluxe Me suggests, however, that a senior ecclesiastical figure such as a bishop or archbishop was also involved.[49] A leading candidate for this role is surely Archbishop Eberhard I of Salzburg (r.1147-1164), who had close connections to Admont.[50] Born to a noble family in Bavaria around 1089, Eberhard completed his early studies at the Bamberg cathedral school and in Laon under the famous masters Anselm and Ralph.[51] After returning to Bamberg to teach for a few years, Eberhard joined the monastic community at Prüfening (Regensburg) and then in 1138 was elected abbot of Biburg (Bamberg). In 1139, Eberhard joined Bishop Otto of Bamberg (d. 1139) on a trip to Rome where they participated in the Second Lateran Council.[52]

Eberhard appears to have acquired many friends in the archdiocese of Salzburg, including Abbot Gottfried of Admont. In 1147, when the see of Salzburg fell vacant, Gottfried led a faction in support of Eberhard and successfully secured his election as

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[48] The election of John is recorded in sources from both Göttweig and Admont. Fuchs, *Urkunden*, 1.60; MGH SS 9.582 (*Annales Admontenses*).

[49] Me was almost certainly created as a cathedral showpiece and makes little sense as a teaching tool or reference work in a monastic library.

[50] Manfred Feuchtner, 'St. Eberhard, Erzbischof von Salzburg', *Beiträge zur Geschichte des Bistums Regensburg* 19 (1985) 139-284; Manfred Feuchtner, 'Eberhard I (1089-1164), Erzbischof von Salzburg', *Lebensbilder aus der Geschichte des Bistums Regensburg*, ed. Georg Schwaiger (Beiträge zur Geschichte des Bistums Regensburg 23-24; Regensburg 1989) 145-155; Stelzer, *Gelehrtes Recht* 17-21.

[51] Feuchtner, 'St. Eberhard' 146-158.

[52] Ibid. 159-160.

archbishop.[53] Although almost sixty years old when he took office, Eberhard proved an energetic and powerful prelate for the next eighteen years. Among his notable suffragans and subordinates were Bishop Otto of Freising (r. 1138-1158) and Provost Gerhoch of Reichersburg (d. 1169). His friendship with Abbot Gottfried and the monks of Admont would remain strong and when Admont suffered a disastrous fire in 1152, Eberhard rushed to its aid, overseeing and financing its reconstruction.[54]

In the later 1150s, as the new Emperor Frederick I (r.1155-1190) became embroiled in Italian affairs, Eberhard was gradually drawn into political conflict. During the initial stage between 1155 and 1159, Eberhard was allowed to stay north of the Alps due to his old age. In 1159, however, when Eberhard threw his support behind the new pope, Alexander III (r.1159-1181), against Frederick's anti-pope, Victor IV (r.1159-1164), Eberhard's presence in Italy became necessary to confirm his loyalty. First in 1159-60 and again in 1162, Eberhard made the journey across the Alps in the direction of the imperial headquarters at Pavia.[55] While on these trips, Eberhard often confided in Gottfried through letters and kept him appraised of current events. In fact, a major source for the papal schism between Alexander III and the anti-pope Victor IV between 1159 and 1162 is the *Admonter Briefsammlung*, a collection of 84 letters which Eberhard sent to Admont in the autumn of 1162.[56]

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[53] Ulrich Faust, 'Gottfried von Admont', *Studien und Mitteilungen zur Geschichte des Benediktinerordens* 75 (1964) 275-359.

[54] Feuchtner, 'St. Eberhard' 200-201.

[55] The first trip occurred in the winter between 1159 and 1160 in expectation of a council at Pavia. Eberhard appears to have made it as far as Treviso before a rebellion in Austria forced him to return north. Feuchtner, 'St. Eberhard' 229-232. For the next year or two Eberhard was able to operate through letters and envoys, but in spring 1162 he was summoned again to Italy with a promise of safe passage. This time he did reach Pavia via Cremona and Verona, and met with Frederick and (anti-)Pope Victor. Although Eberhard was unwilling to transfer his support to Victor, Frederick honored his promise of safe passage and allowed him to return to Salzburg. Feuchtner, 'St. Eberhard' 250-251.

[56] MGH, Briefe d. dt. Kaiserzeit 6.33-148. See the introduction on pages 9-16 for information on its arrival in Admont, Feuchtner, 'St. Eberhard' 258.

Perhaps it was during these years—on one of these trips to Italy or through his pro-Alexandrine connections—that Eberhard came into contact with the *Decretum*. Indeed, Eberhard demonstrated an interest in canonical jurisprudence throughout his career. In the 1150s, for example, he wrote two letters to Pope Hadrian IV (r.1154-1159) asking for clarification on matters relating to the marriage rights of serfs and the ordination of priests and deacons.[57] Surely Eberhard was aware in these years of the burgeoning study of law at Bologna.[58] It was in 1158 that Emperor Frederick held his famous meeting at Bologna with its law professors and issued the *authentica 'Habita*', granting rights and privileges to students and scholars. Around 1160, Gerhoch of Reichersberg, Eberhard's subordinate, first demonstrated awareness of the *Decretum* in his *De investigatione Antichristi* and *Opusculum ad cardinales*.[59]

A particularly intriguing contact of Eberhard's was Bishop Omnibene of Verona (r.1157-1185), a fellow supporter of Pope Alexander whom he met at least once in person at Verona in 1162.[60] According to standard accounts, Omnibene was a student of Gratian in Bologna, taught there himself during the 1140s and

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[57] Hadrian IV's response to the first is JL 10445, which as an *extravagans*, made it into several twelfth-century *Decretum* manuscripts. Peter Landau, 'Hadrians IV. Dekretale "Dignum est" (X 4.9.1) und die Eheschliessung Unfreier in der Diskussion von Kanonisten und Theologen des 12. und 13. Jahrhunderts', SG 12 (1967) 511-533; Hadrian's response to the second is JL 10364. Stelzer, *Gelehrtes Recht* 17-20.

[58] On Eberhard's potential use of the *Decretum* in local court cases, see: Rainer Murauer, 'Geistliche Gerichtsbarkeit und Rezeption des neuen Rechts im Erzbistum Salzburg im 12. Jahrhundert', *Römisches Zentrum und kirchliche Peripherie: Das universale Papsttum als Bezugspunkt der Kirchen von den Reformpäpsten bis zu Innozenz II*, edd. Jochen Johrendt and Harald Müller (Berlin 2008) 259-84. 267-70.

[59] Stelzer, *Gelehrtes Recht* 16-17.

[60] MGH, Briefe d. dt. Kaiserzeit, 6.117-118, no. 63. Eberhard to Gottfried: 'Securam quidem et optatam habentes vie prosperitatem usque quaque bene recepti sumus videlicet Brixie, Tridenti et Verone multumque honorifice tractabamur. Inde cum Cremonam venissemus. . .' 118.

1150s, and produced an early *abbreviatio* of the *Decretum*.[61] Eberhard's connection with Omnibene was surely more than just passing since two letters addressed to Omnibene are included in the *Admonter Briefsammlung* which Eberhard sent to Admont.[62] Perhaps at the same meeting where Eberhard procured these letters, he also managed to secure a copy of the first recension and then sent it to Admont along with the *Admonter Briefsammlung*. Or maybe Eberhard already had the first-recension manuscript by then and Omnibene provided him with a second-recension manuscript which was then used to supplement the first-recension manuscript and create Aa. These scenarios are, of course, speculative.

Regardless of whether the first recension arrived in Austria before 1157 or only later in 1162, the findings presented here suggest that engagement with the *Decretum* in the archdiocese of Salzburg was earlier and more significant than previously thought. According to the standard narrative, *Decretum* study outside Italy began first in France during the 1150s.[63] During these years, there was a school in southern France and a nascent school in Paris.[64] In the German-speaking lands, decretist study is usually said to have begun a bit later, in the 1160s and mainly under French influence. The first school was probably in Hildesheim where a procedural treatise known as the *Rhetorica ecclesiastica* was composed around 1160.[65] A second school emerged in Cologne between 1165 and 1168 under the guidance of Gerard Pucelle, an English

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[61] On Omnibene, see: Rudolf Weigand, 'Die Dekret-Abbreviatio Omnebenes und ihre Glossen', *Recht als Heilsdienst. Mathias Kaiser zum 65. Geburtstag gewidmet*, ed. W. Schulz (Paderborn 1989) 271-287.

[62] These are letters no. 70 (Fastrad of Citeaux, July 1160) and no. 84 (Alexander III, May 1162). See, respectively: MGH, Briefe d. dt. Kaiserzeit, 6.125-127, 142-143. In the former, Fastrad is mentioned erroneously as abbot of Clairvaux.

[63] For the standard narrative, see Weigand, 'Transmontane Decretists' 176-190.

[64] Rudolf Weigand, 'Die Dekretabbreviatio *Quoniam egestas* und ihre Glossen', *Fides et Ius: Festschrift für Georg May zum 65. Geburtstag*, edd. W. Aymans et. al. (Regensburg 1991) 249-265; André Gouron, 'Canon Law in Parisian Circles before Stephen of Tournai's *Summa*', *Proceedings San Diego 1998* 497-503.

[65] Linda Fowler-Magerl, *Ordo iudiciorum vel ordo iudiciarius*: *Begriff und Literaturgattung* (Ius commune, Sonderhefte 19; Frankfurt 1984) 45-56.

scholar who was trained at Bologna and taught in Paris during the 1150s.[66] The chief work of this school was the *Summa Elegantius in iure divino* or *Summa Coloniensis*.[67] A third center may also have existed in the late 1160s in Bamberg.[68] In comparison, serious engagement with the *Decretum* in the archdiocese of Salzburg is usually said to have begun only in the 1170s and mainly under French influence.[69] Gw, Aa, and Me demonstrate, however, that we can push this date back to 1160 or earlier and that the initial influence was probably Italian rather than French.

Conclusion

The revelation that Gw1 contains a 'capitulatio' of first-recension rubrics that is closely related to Aa does not have major bearing on debates about the early stages of the *Decretum*. In this respect, it serves mainly to clarify minor details about the first-recension exemplar of Gw1 and Aa. But the Salzburg program which encompasses Gw, Aa, and Me does challenge certain assumptions regarding the nature of the first recension. According to Anders Winroth, soon after the first recension was completed in Bologna around 1140, it was almost immediately supplanted by the second recension and enjoyed very limited influence outside

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[66] Peter Landau, *Die Kölner Kanonistik des 12. Jahrhunderts: Ein Höhepunkt der europäischen Rechtswissenschaft* (Badenweiler 2008).

[67] Gérard Fransen and Stephan Kuttner, edd. *Summa* '*Elegantius in iure divino*' *seu Coloniensis* (4 vols. MIC Series A 1; Vatican City 1969-1990).

[68] Although there is little biographical or narrative evidence for a school in Bamberg, an unusually large number of early *Decretum* manuscripts and decretist commentaries gathered there. Chief among these is the *Summa Parisiensis* in Bamberg, SB, Msc. Can. 36, which is edited by Terence P. McLaughlin, *The Summa Parisiensis on the Decretum Gratiani* (Toronto 1952). Perhaps Gottfried's brother Irimbert, who was abbot of Michelsberg in Bamberg, played some role in this?

[69] Weigand writes: 'In the area around Salzburg and Admont, the use of the new texts of canon law seems to have left its earliest traces ca. 1170'. Weigand, 'Transmontane Decretists' 186. Stelzer dates Aa to the 1160s or 1170s and, because of the Roman law texts in the *Collectio Admontensis*, considers it an 'emanation' (Ausstrahlung) of the southern French school of Valence and Die. Stelzer, *Gelehrtes Recht* 21-22.

the classroom.[70] Although a few students made copies, which survive today as Fd, Bc, P, and so forth, it was exclusively the second recension which circulated in academic and higher ecclesiastical circles. The case of Salzburg, however, does not fit into this paradigm. In the 1160s, or even earlier, monks in Austria were actively engaging with and copying the first recension, probably under the patronage of the archbishop. Only around 1170, with the creation of Me, does the second recension decisively supplant the first. Of course, the archdiocese of Salzburg might simply be an outlier in these respects. Maybe the reception and sustained study of the first recension there was unique. As the number of first-recension witnesses steadily grows, however, it becomes ever more difficult to explain the impact of the first recension solely through student notes taken—and quickly forgotten—in Bologna around 1140.

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[70] Winroth and others have settled on 1140 as the date of completion for the first recension based on the inclusion of canons from the Second Lateran Council (1139). Atria Larson, Kenneth Pennington, and others, however, reason that these canons are late additions and that early stages may have been taught in Bologna for a decade or more before 1140. See, most recently: Wei, *Gratian the Theologian*, 20-33; Murano, 'Graziano' 85-86; Larson, *Master of Penance* 25-28; Pennington, 'The Biography' 679-688; Anders Winroth, 'Where Gratian Slept: The Life and Death of the Father of Canon Law', ZRG Kan. Abt. 99 (2013) 105-128; José M. Viejo-Ximénez, 'Variantes textuales y variants doctrinales en C.2 q.8', *Proceedings Washington, D.C. 2008* 161-190; Atria A. Larson, 'Early Stages of Gratian's *Decretum* and the Second Lateran Council: A Reconsideration', BMCL 27 (2007) 21-56.

Appendix: Glosses in the Body of Admont, SB 23/43 (Aa)

1. Addition after D.1 c.12 (fol. 9v, Aa 23).

Usucapio est acquisitio dominii per continuationem temporis lege diffiniti.

This gloss was noticed by Rudolf Weigand, who identified it as from the oldest gloss compilation.[1] It is also present in Paucapalea's *Summa*, where it is attributed to the Digest.[2]

2. Addition after D.48 c.1a (fol. 52r, Aa 23)

Notandum est quod ea que prohibentur, alia prohibeantur ideo quorum per se mala sunt, alia ex aliqua causa. Ut apostolus prohibet neophitum ordinare, ne elatus in superbiam incidat in laqueum diaboli. Quando vero prohibitio sit ex aliqua causa, remota causa admitti potest dispensatio. Nam beatus Ambrosius electus est cum adhuc esset catecuminus, et apostolus post baptismum statim missus ad predicandum.

This 'notabilium' explicates D.48 c.1a which asks whether neophytes can become bishops. The case of Ambrose is mentioned since he was elected bishop as a catechumen. There is no parallel in Paucapalea or, as far as I can tell, in the early gloss compositions. Rufinus's *Summa*, however, evokes Ambrose with similar words and cross-references a second recension canon, D.61 c.9.[3]

3. Addition after C.3 q.3 c.1 (fol. 142v, Aa 23)

Qui partem adversariorum non simplici negatione sed sequenti confirmatione elidebant, veluti cum quis impetit alium tali nocte adulterium conmisisse Brixie negat, iterum dicit se ea nocte mansisse Mediolane, quod ad confirmandum introducendi sint testes.

This gloss is attached to C.3 q.3 c.1 which deals with delays in answering summons. The same text can be found in Paucapalea's *Summa* in reference to c.2 of the same 'questio'.[4] Interestingly, whereas Paucapalea's text mentions as example

[1] cf. Weigand, *Die Glossen* 2.663.

[2] Johann F. von Schulte, ed. *Die Summa des Paucapalea über das Decretum Gratiani* (Giessen 1890) 8: 'Sed aliter in digesto: Usucapio est acquisitio dominii per continuationem temporis lege definiti'.

[3] Friedrich Thaner, ed. *Summa Magistri Rolandi* (Innsbruck 1872) 112.

[4] Schulte, *Die Summa des Paucapalea* 64.

cities Jerusalem and Ravenna (likely from a Roman law text), the text in Aa mentions Brescia and Milan.

4. Addition after C.11 q.1 c.35 (fol. 172v, Aa 23)

Multa enim, que in iudicio captiose prescriptionis vincula promi non paciuntur, investigat et promit sacrosancte religionis auctoritas.

The material source of this text is the first Sirmondian Constitution, which is also the material source of cc.35, 36, and 37. Although probably never a gloss, this text is not present in other manuscripts of the first or second recensions. Yet, as the *Correctores Romani* note, other canonical collections which cite the first Sirmondian Constitution—including Gratian's formal source, Anselm 3.105—do tend to include this part of the text.[5]

5. Addition after C.14 q.5 c.14 (fol. 199r, Aa 23)

Nota quod aliud est agendum de re in cuius acceptione peccatam conmittitur, aliud de re propter quam accipiendam peccatam prius vel post sit. Illa in cuius acceptione peccatur, sicut usure rapine reddenda est quorum fuerint, si inveniri possunt, illa vero propter quam peccatam sit, veluti illa que meretricibus vel ioculatoribus dantur, non illis reddi precipiendum est.

I am unable to locate this 'notabilium' in any 'summa' or gloss compositions.

6. Addition after C.16 q.1 c.64 (fol. 28r, Aa 43)

Clerici tamdiu possideant quamdiu necessitas fuerit, cessante necessitate redeant possessiones ad priorem locum. Monachis quibus dantur intuitu religionis, tamdiu possideant quamdiu duraverit religio, cessante religione redeant ut supra.

I am unable to locate this text in any 'summa' or gloss compositions.

[5] Friedberg, *Decretum* 635.

Anglo-Norman Canonical Views on Clerical Marriage and the Eastern Church

Maroula Perisanidi[1]

The Eastern and Western Churches shared much of their conciliar tradition, including both ecumenical and local ancient councils. These formed the basis of the twelfth-century canonical commentaries in Byzantium, while in the West they shaped the law both as authorities in support of newer conciliar decrees and through their inclusion in canonical collections, such as the *Collectio Lanfranci,* Ivo of Chartres' *Decretum*, the *Tripartita*, and the *Panormia*. [2] Gratian's *Decretum*, the single most important canonistic work of the Middle Ages, quoted almost 200 chapters from Eastern councils, ranging from Nicaea I (325) to Constantinople IV (869-870), including eighteen references to the council in Trullo (691-692) which fixed the rules of clerical marriage for the Orthodox Church.[3]

This shared tradition meant that long after the last ecumenical council, there was still legal interaction between the

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[1] This work was kindly funded by a Leverhulme Trust Early Career Fellowship.

[2] Nicholas Tanner, 'Eastern Influences upon the West: Canonical Evidence from ecumenical and general councils, and some other sources, during the Middle Ages', *Proceedings Esztergom 2012* 661-668; Nicolas Álvarez de las Asturias, 'The Greek Councils in the *Collectio Lanfranci*', *Proceedings Esztergom 2012* 603-607; Christof Rolker, *Canon Law and the Letters of Ivo Chartres* (Cambridge Studies in Medieval Life and Thought, 4th Series 76; Cambridge 2010) 100-151.

[3] Peter Landau, 'Gratian and the Decretum Gratiani', *The History of Medieval Canon Law in the Classical Period, 1140-1234: From Gratian to the Decretals of Pope Gregory IX*, edd. W. Hartmann and K. Pennington (History of Medieval Canon Law; Washington, D.C. 2008) 26; Landau, 'Überlieferung und Bedeutung der Kanones des Trullanischen Konzils im westlichen kanonischen Recht', *The Council in Trullo Revisited*, edd. George Nedungatt and Michael Featherstone (Rome 1995) 215-227 at 216-217, 220-221; Anders Winroth, *The Making of Gratian's Decretum* (Cambridge Studies in Medieval Life and Thought, 4th Series, 49; Cambridge 2000).

Western and Eastern Churches, at least in the minds of the canon lawyers who were confronted with laws advocating practices alien to their own.[4] In this article, I will focus on one such alien practice—clerical marriage—in the commentaries of two Anglo-Norman decretists, Master Honorius and the author of the *Summa Lipsiensis*.[5] At the end of the twelfth century, when these commentaries were written, clerical marriage was still a contentious issue in the West. As such, a hostile attitude might be expected, not only towards the practice itself, but also towards the Eastern clergy who still adhered to it.

In what follows, I will argue that these Anglo-Norman decretists referred to the Eastern Church and its married priests much more often than one might expect, given the relative absence of interactions between Byzantium and the Anglo-

[4] It was rare to see participants from the East in Lateran councils. One exception was Lateran III to which Emperor Manuel Komnenos (1143-1180) sent Nektarios, abbot of Casula, as an observer. In Lateran IV, another Byzantine made an appearance in the conciliar list, Theodore of Negroponte, a bishop who had yielded to Latin control after the Fourth Crusade and was there to accompany Gervais, the Latin patriarch of Constantinople (1215–1219). See Raymonde Foreville, *Latran I, II, III et Latran IV* (Paris 1965) 256, 392.

[5] *Magistri Honorii Summa 'De iure canonico tractaturus'*, edd. Rudolf Weigand, Peter Landau, Waltraud Kozur (3 vols. MIC Series A 5; Vatican City 2004-2010) hereafter *Magistri Honorii*. *Summa 'Omnis qui iuste iudicat' Sive Lipsiensis*, edd. Rudolf Weigand, Peter Landau, Waltraud Kpzur et al. (3 vols. MCI Series A 7; Vatican City, 2007-2014) hereafter *Summa Lipsiensis*. Master Honorius is believed to have been a native of Kent and might have been a rector of Willesborough from 1184 or 1185. His commentary on Gratian's *Decretum* was written between 1188 and 1190 when he was studying at the Parisian school of canon law. The *Summa Lipsiensis* was completed around 1186 and has been called the most elaborate commentary on Gratian before Huguccio. See Stephan Kuttner and Eleanor Rathbone, 'Anglo-Norman Canonists of the Twelfth Century', *Traditio*, 7 (1949-1951) 279-358 at 304-305 and 295-296. It has recently been suggested that its author was Rodoicus Modicipassus. See Landau, 'Rodoicus Modicipassus—Verfasser der Summa Lipsiensis?', ZRG Kan., 92 (2006) 340-354.

Norman realm, and that they did so without hostility.[6] Their references include comments that sprang directly from the text of Gratian that they had in front of them, as well as more imaginative speculations about faraway priests. They accepted clerical marriage in the East as a tradition that was different from their own, but one that was also valid. In their treatment of the Western clergy, they adopted a moderate position. Regarding two of the most important issues of the reform period, church property was often mentioned, but the question of purity was rather muted. These attitudes towards Eastern and Western clerics and their marriages were likely to have stemmed from the two decretists' understanding (correct or not) of the historical development of clerical marriage, as well as their, perhaps inevitable, focus on the law. On the one hand, they thought that clerical celibacy was a man-made imposition; on the other, their purpose was to explore the limits of the laws, rather than to adopt a polemical stance. Finally, I will contrast this interest in the East to the rather indifferent and, if anything, hostile attitude that the twelfth-century Byzantine canon lawyers exhibi-ted towards the marital customs of the West. This study hopes to be a useful addition to Brieskorn's recent article on Western canonical

[6] The views on clerical marriage of these and many other canonists between the time of Gratian's *Decretum* and Ramón de Peñafort have been studied by Liotta, who discussed in particular the importance of vows, the emergence of the obligation of continence and possibilities for dispensation, as well as sanctions imposed on incontinent clerics. Filippo Liotta, *La continenza dei chierici nel pensiero canonistico classico: Da Graziano a Gregorio IX* (Studi senesi, Quaderni 24; Milan 1971). See also Stickler's synthesis on this topic in Alfons M. Stickler, 'L'évolution de la discipline du célibat dans l'église en occident de l'âge patristique au Concile de Trente', S*acerdoce et célibat: Études historiques et théologiques*, ed. Joseph Coppens (Ephemerides theologicae Lovanienses, Biblioteca 28; Gembloux-Louvain 1971) 373-442 at 416-424. For some interactions between England and Byzantium, see Jonathan Shepard, 'The English and Byzantium: A Study of their Role in the Byzantine Army in the later Eleventh Century', *Traditio* 29 (1973) 53-92; Krijnie N. Ciggaar, *Western Travellers to Constantinople: The West and Byzantium, 962-1204, Cultural and Political Relations* (Medieval Mediterranean 10; Leiden-New York 1996) 129-160.

attitudes towards the Eastern Church in the *Liber Extra* (1234) which also noted a rather positive and lenient attitude towards the married clergy in the East.[7]

Rules and Background: West and East

In the West, bishops, priests, deacons, and eventually subdeacons were expected to observe complete sexual abstinence. This had been the theory since at least the late fourth century, when we find the first legislation concerning priests who were still allowed to be married, but were prohibited from having sex with their wives.[8] A re-iteration of such rules continued periodically and with limited success until the eleventh and twelfth centuries, when the papacy became more able to force Western clergy to play by its rules. In this period, celibacy rather than continence was expected, and the marriage of clerics in major orders was presented as sinful, polluting, and ultimately invalid.[9] In some cases, priests, deacons, and subdeacons who refused to separate from their wives were forbidden to celebrate

[7] Brieskorn found that the Eastern Church came up in three different contexts: 1. when there was discussion of areas in which Greeks and Latins lived next to each other; 2. when there was conflict within the ecclesiastical hierarchy; 3. when rules affected the Greek Church and applied both within the Latin empire and the Patriarchate. When it came specifically to clerical marriage, we find some remarkable laws. In one decretal (X 5.38.7), Pope Clement III (1187-1191) demanded that Greek priests look after their offspring properly and set strict penance for those whose infants were smothered in the cradle. In another (X. 3.3.6), the sons of Greek clerics born in legitimate matrimony were allowed to join the Western Church, as long as no objection was voiced by the local clergy. See Norbert Brieskorn, '"Licet Graecos (…)": Wie der Liber Extra die Beziehungen zur griechisch-orthodoxen Kirche regelt', *Proceedings Esztergom 2012* 609-619.

[8] David G. Hunter, 'Married Clergy in Eastern and Western Christianity', *A Companion to Priesthood and Holy Orders in the Middle Ages*, edd. Greg Peters and C. Colt Anderson (Leiden 2016) 96-139.

[9] On the Gregorian reforms and clerical marriage, see Uta-Renate Blumenthal, 'Pope Gregory VII and the Prohibition of Nicolaitism', *Medieval Purity and Piety: Essays on Medieval Clerical Celibacy and Religious Reform*, ed. Michael Frassetto (London 1998) 239-267.

mass and were deprived of their benefices, while the faithful were encouraged to refuse their ministrations.[10] In terms of papal councils, a turning point was reached at Lateran I (1123), which made ordination a diriment impediment to marriage. Previously, there would have been penalties for ordained clerics who chose to take a wife, but their marriage was still considered valid. The same rule was repeated at Lateran II (1139) and reaffirmed at Lateran IV (1215).[11] By the end of the twelfth century, opposing voices on both sides of the English channel were quieting down.[12] Even those who wished for a relaxation of the rules of clerical celibacy were obliged to conform to the reformist party line.[13] However, it was by no means the case that clerical marriage was altogether eradicated.[14]

In Byzantium, the rules that were valid in the eleventh and twelfth centuries had been more or less fixed at the Council in

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[10] For an early example, see the encyclical letter sent out by Pope Nicholas II to disseminate the canons of the 1059 Synod of Rome, in MGH *Const.* 1.547.

[11] Canon 7 of Lateran II in CODG 106 and in Foreville, *Latran* 189. Chapter 14 in Antonio García y García, *Constitutiones Concilii quarti Lateranensis una cum Commentariis glossatorum* (MIC Series A 2; Vatican City 1981) 145 and now in CODG 175-176.

[12] Brigitte Meijns, 'Opposition to Clerical Continence and the Gregorian Celibacy Legislation in the Diocese of Thérouanne: "Tractatus Pro Clericorum Conubio" (c.1077-1078)', *Sacris Erudiri* 47 (2008) 223-290. On eleventh-century polemics, see also Anne L. Barstow, *Married Priests and the Reforming Papacy: The Eleventh Century Debates* (New York 1982); Leidulf Melve, 'The Public Debate on Clerical Marriage in the Late Eleventh Century', JEH 61 (2010) 688-706. Elisabeth M.C. van Houts, 'The Fate of Priests' Sons in Nor-mandy', *The Haskins Society Journal* 25 (2013) 57-105.

[13] John W. Baldwin, 'A Campaign to Reduce Clerical Celibacy at the Turn of the Twelfth and Thirteenth Centuries', *Études d'histoire du droit canonique dédiées à Gabriel Le Bras* (2 vols. Paris 1965) 2.1041-1053.

[14] Christopher N. L. Brooke, 'The Gregorian Reform in Action: Clerical Marriage in England, 1050-1200', *Cambridge Historical Journal* 12 (1956) 1-20; Julia Barrow, 'Hereford Bishops and Married Clergy c.1130-1240', *Historical Research* 60 (1987) 1-8; Brian R. Kemp, 'Hereditary Benefices in the Medieval English Church: A Herefordshire Example', *Bulletin of the Institute of Historical Research* 43 (1970) 1-15. See also Julia Barrow, *The Clergy in the Medieval World* (Cambridge 2015) 115-157.

Trullo (691-692).[15] According to canon 6 of this council, clerics in sacred orders who wished to have a wife needed to get married before their ordination to the subdiaconate.[16] According to canon 13, priests, deacons, and subdeacons were not obliged to make a vow of continence upon their ordination, but were allowed to keep their lawful wives and to continue having sexual intercourse with them at appropriate times.[17] This meant that they were only bound to temporary continence during an unspecified time before service at the altar. Canon 12 decreed that bishops had to observe absolute continence and as such needed to put their wives away in a monastery.[18] Initially, subdeacons had not been explicitly included in the lists of clerics who needed to observe temporary abstinence or who were forbidden to marry.[19] In fact, even deacons were at first treated more leniently. Acknowledging the difficulty of deciding for celibacy at a young age, canon 10 of the council of Ancyra (314) allowed deacons to declare during their ordination their wish to marry at a later date.[20] This practice was

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[15] Constantin Pitsakis, 'Clergé marié et célibat dans la législation du Concile in Trullo: le point de vue oriental', *The Council in Trullo Revisited*, edd. George Nedungatt and Jeffrey Michael Featherstone (Kanonika 6 ; Rome 1995) 263-306.

[16] *Discipline générale antique (IIe–IXe s.): Les canons des conciles œcuméniques*, ed. Périclès-Pierre Joannou (Rome 1962) 131-132.

[17] Ibid. 140-143.

[18] Ibid. 138-139.

[19] For example, canons 5 and 17 of the Apostles (c. 380) referred to 'bishops, priests and deacons', or to 'bishops, priests, deacons, and any other of the sacerdotal list'. See *Discipline générale antique* 10, 16. Similarly, the Council of Carthage promulgated three canons on clerical abstinence and two of them omitted any mention of subdeacons. See canons 3, 25, and 70 of Carthage in *Les canons des synodes particuliers (IV.-IX. s.)*, ed. P.P. Joannou (Rome 1962) 216-217, 240-241, 312-131. In theory, however, an implicit prohibition to marry after the subdiaconate had been included already in the canons of the Apostles under canon 26 which did not mention subdeacons alongside readers and singers who were given permission to take a wife. See *Les canons des synodes particuliers* 19-20. This was further assumed in Justinian's civil legislation, but the council in Trullo (691-692) was the first to put it into canon law.

[20] Ibid. 64.

prohibited in the sixth century by Emperor Justinian (527-565) but seems to have continued.[21] In the late ninth century, Emperor Leo VI (886-912) still had to forbid the custom of priests' being able to marry within two years of their ordination.[22] Although in the twelfth century we no longer hear any contemporary complaints about this issue in the Byzantine canonical commentaries, the right of Eastern clerics in major orders to marry was falsely assumed by Western canonists, as we will see in what follows.[23]

The Eastern Church in Explanations of Ancient Canons

The Eastern Church (ecclesia orientalis) often came up in the *Summa* of Master Honorius and in the *Summa Lipsiensis* as part of discussions of ancient canons that were in favor of clerical marriage. These canons were strange by definition, as they supported a discipline that advocated the opposite of contemporary Western law. As we will see, this strangeness could lead to false assumptions about the Eastern 'other', as well as to legal gymnastics aiming to explain away the contradictions. The usual explanations 'ex tempore, ex loco', and 'ex causa' could have a distancing effect, taking away some of the awkwardness of being faced with a canon that advocated clerical sex, but they did not always work in a straightforward way.[24] What is more, sometimes they led to an opposite result: confronted with the description and justification of how things worked in the East and/or the past, both Anglo-Norman decretists could appear remarkably accepting of the Eastern married clergy.

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[21] Nov. 123.14.

[22] Nov. 3 in *Les nouvelles de Leon VI le Sage*, ed. P. Noailles and A. Dain (Paris 1944) 18-21.

[23] *Σύνταγμα τῶν θείων καὶ ἱερῶν κανόνων*, ed. G. A. Rhalles and M. Potles, 4 vols. (4 vols. Athens 1852-1854) hereafter *Syntagma*. Here *Syntagma* 3.39-41.

[24] In general there were twelve different ways to explain discordant canons: 'Praefatio' to D.1 d.a.c.1, *Summa Lipsiensis* 1.3 lines 96-98: 'Hanc autem discrepantiam maxime pariunt duodecim: causa, tempus, locus, persona, rigor, dispensatio, preceptio, prohibitio, consilium, permissio, nouitas, antiquitas'.

That is to say, the strangeness of the canons led not simply to misunderstandings or quick dismissals of a distant condition, but to a frequent and rather amicable engagement with the rules of the East, the common past of the Churches, and their separate development.

A common false assumption that cropped up in explanations of ancient canons was that Eastern clerics in major orders could contract marriages. It is difficult to locate where this assumption came from. However we can see it in action in the discussion of canons 6 and 13 of the Council in Trullo, which as I have mentioned was crucial in fixing the marital law of the Eastern clergy as in canon 6 (D.31 c.7):

> Si quis eorum, qui ad clerum accedunt, uoluerit nuptiali iure mulieri copulari, hoc ante ordinem subdiaconatus faciat.

If anyone of those who accede to the clergy wishes to be joined to a wife through marital law [i.e. get married], let him do this before his ordination to the subdiaconate.

Canon 13: (D. 31 c.13 § 2):

> Si quis igitur presumpserit contra apostolicos canones aliquos presbiterorum, diaconorum priuare a contactu et communione legalis uxoris suæ, deponatur.

If anyone therefore presumes to deprive, against the apostolic canons, any priests or deacons from contact and intercourse with their legal wife, let him be deposed.

According to Master Honorius and the *Summa Lipsiensis*, these canons were to be understood ex loco and no longer applied in the West.[25] Discussion could therefore have ended at that. Nevertheless the two decretists chose to investigate the topic further. They perceived a contradiction between the two canons. This is a confusion since in fact they refer to two different issues: the first canon talks about the right of clerics to contract marriage before but not after their accession to the subdiaconate; the second refers to continence within marriage and affirms the

[25] *Summa Lipsiensis* 1.120, D.31 c.13 s.v. *Quoniam*: 'intelligi debent hec capitula ex loco'; *Magistri Honorii* 1.109, D.31 c.13 s.v. Si quis presumpserit: 'in orientali ecclesia; ad occidentalem namque hec sententia non porrigitur, scilicet ad ordinatis uxores habentibus'.

rights of Eastern priests and deacons to have sexual intercourse with their spouses. This was not, however, the interpretation of the *Summa Lipsiensis.*[26] The cause of the confusion was the word 'copulari' in canon 6 which can mean both 'to contract marriage' and 'to have sexual intercourse'. I have translated it as 'to get married', but the decretist most likely understood 'nuptiali iure mulieri copulari' to mean 'to have sexual intercourse with his wife according to his marital right'.[27] With this meaning of 'copulari', canon 6 would appear to prohibit Eastern clerics in sacred orders from having sex with their wives, while canon 13 clearly allowed that very thing. This problem did not exist in the original Greek, despite the fact that a similarly ambiguous word was used (συνάπτω). The meaning of the phrase in canon 6, γάμου νόμῳ συνάπτεσθαι γυναικί ('to be joined with a woman according to the law of marriage'), became obvious from the beginning of the canon, which was not included in the Latin:[28]

Since one finds in the apostolic canons that of those who are advanced to the clergy unmarried, only readers and singers are able to marry, we also, maintaining this, determine that

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[26] *Summa Lipsiensis* 1.120. D.31 c.13 s.v. *deponatur*: 'Sexta sinodus dicit contra in proxima <distinctione>, Si quis eorum (D.32 c.7)'.

[27] He may have been prompted to do this by the use of 'copulentur uxoribus' in the beginning of canon 13 of Trullo (D.31 c.13): 'Quoniam in Romani ordine canonis esse traditum cognouimus, eos, qui ordinati sunt diaconi uel presbiteri, confiteri, quod iam non suis copulentur uxoribus', 'Because we recognize that in the order of the Roman canon it is handed down that those who have been ordained deacons or priests profess that they will no longer have intercourse with their wives'. Here 'suis . . . uxoribus' makes it clear that we are not talking about contracting marriage.

[28] 'Επειδὴ παρὰ τοῖς ἀποστολικοῖς κανόσιν εὕρηται, 'τῶν εἰς κλῆρον προαγομένων ἀγάμων, μόνους ἀναγνώστας καὶ ψάλτας γαμεῖν,' καὶ ἡμεῖς τοῦτο παραφυλάττοντες, ὁρίζομεν ἀπὸ τοῦ νῦν μηδαμῶς ὑποδιάκονον ἢ διάκονον ἢ πρεσβύτερον μετὰ τὴν ἐπ᾽ αὐτῷ προερχομένην χειροτονίαν, ἔχειν ἄδειαν, γαμικὸν ἑαυτῷ συνιστᾶν συνοικέσιον· εἰ δὲ τοῦτο τολμήσοι ποιῆσαι, καθαιρείσθω.' The canon continues 'Εἰ δὲ βούλοιτό τις τῶν εἰς κλῆρον προερχομένων γάμου νόμῳ συνάπτεσθαι γυναικί, πρὸ τῆς τοῦ ὑποδιακόνου ἢ διακόνου ἢ πρεσβυτέρου χειροτονίας τοῦτο πραττέτω.' See *Les canons des conciles œcuméniques* 131-132.

henceforth it is in no wise lawful for any subdeacon, deacon or presbyter after his ordination to contract matrimony, but if he should dare to do so, let him be deposed.

Canon 6 clearly referred to contracting marriage, not marital intercourse. There was no contradiction between the two canons, but the author of the *Summa Lipsiensis* had reasons to think there was, given the abbreviated text he had to work with.

Master Honorius had the same problem. When commenting on canon 6 of Trullo (D.32 c.7) he asked 'But is it not the case that the sixth synod elsewhere prohibits that continence may be imposed?' The answer is 'yes' and the reader is pointed towards canon 13 of Trullo (D.31 c.13).[29] The word 'continence' (continentia) makes it clear that, like the author of the *Summa Lipsiensis*, Master Honorius understood 'copulari' in canon 6 of Trullo as referring to having sexual intercourse, not contracting marriage. This meant that both the *Summa Lipsiensis* and Master Honorius missed the point that Eastern clerics were not allowed to marry after their ordination to the subdiaconate.[30]

In terms of how the two decretists resolved the apparent contradiction, we know from their comments elsewhere that, for all their misunderstanding about when Eastern clerics could contract marriage, they were perfectly aware of their right to have sexual intercourse with their wives and abstain from them only temporarily.[31] So in their eyes the contradiction was resolved in favor of canon 13 of Trullo. How then did they explain the existence of canon 6? They suggested that the

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[29] *Magistri Honorii* 1.114, D.32 c.7 s.v. ante: 'Set num vi. sinodus alias prohibet ne indicatur continentia? Resp.: Sic, ut di.xxxi. Quoniam'.

[30] The same confusion over the meaning of 'copulari' can be found over another set of canons: D.31 c.14 and D.32 c.7. In this case, Master Honorius understands the verb to mean 'contract marriage' on both occasions, thus again creating a contradiction. This contradiction dissolves if we understand the verb to mean 'contract marriage' in one case and 'have intercourse' in the other. *Magistri Honorii* 1.109, D.31 c.14 s.v. *Aliter* etc: 'Ex hoc capitulo etiam habetur ordinatos posse contrahere, quod tamen ibi dicitur non fieri, arg. di. prox. Si quis eorum (D.32 c.7)'.

[31] See for example *Summa Lipsiensis* 1.99.

contradictory canons only *appeared* to be part of the same council.[32] This was possible in the case of the council in Trullo because of its rather complicated history. The two decretists knew from Gratian (D.16 c.6-7) that the 'sixth council' was convened in two parts, first by emperor Constantine IV (668-685) in 680-681 and then a few years later by his son Justinian II (685-695, 705-711). Yet, they also knew that the first session did not produce any canons and all 102 canons came from the second session. Master Honorius argued that there were in fact three councils: the first only condemned some heretics; the second promulgated 102 canons; the third promulgated some extra canons for the heretics that the first council had condemned. Although we are told that this information comes *ex cronicis*, it is a fanciful reconstruction of what happened at the council in Trullo. [33] Master Honorius further went on to report a contemporary speculation about the existence of another emperor also named Justinian, who would be the father of Constantine IV and who would have convened the first of the three councils.[34]

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[32] *Summa Lipsiensis* 1.120, D.31 c.13 s.v. *deponatur*: 'Set due erant sinodi, quarum utraque sexta dicebatur, ut di. xvi. Habeo. Vel respectum habuit sexta sinodus ad loca diuersa et secundum hoc diuersas dedit sententias'. *Magistri Honorii* 1.114, D.32 c.7 s.v. *Si quis eorum clericum* (clericum *male* ed.): 'Set cum non nisi eadem vi. dici possit, quia non nisi una sexta, scilicet qui media fuit celebrata, condidit canones de ecclesiastica institutione, ut contra di.xvi. Habeo'.

[33] *Magistri Honorii* 1.50, D.16 c.7 s.v. *canones non fecerunt*: 'Vnde dici potest sicut ex cronicis habetur, quod cum fuit celebrata primo sub patre, et tantum dampnauerunt hereticos et nullos fecerunt canones, postmodum idem patres iterum conuenerunt sub filio, et condiderunt canones centum et duos. . . Post ad suggestionem Iustiniani, ne sinodus habita sub patre sine nomine remaneret, conuenerunt iterum tertio et condiderunt canones de fide contra monotelitas, et primo habitam sinodum confirmauerunt'. A somewhat different explanation was given in *Summa Lipsiensis* 1.50. For background on the council of Trullo, see Michael T. G. Humphreys, *Law, Power, and Imperial Ideology in the Iconoclast Era, c. 680-850* (Oxford Studies in Byzantium; Oxford 2015) 39-80.

[34] *Magistri Honorii* 1.51, D.16 c.7 s.v. *patre tuo*: 'Dicunt enim quidam patrem Constantini fuisse Iustinianum, sub quo conuentum in prima que fuit quinta,

Such reconstructions show the creative interpretations that the two decretists could produce in order to reach legal concord, but are also a sign of their interest in the Eastern past. A similar example comes from the commentary on the council of Ancyra (314), where the same misconception, that Eastern clerics can contract marriages after their ordination to the subdiaconate, led Master Honorius to argue that parts of the same canon referred to two different Churches, East and West, although this was nowhere explicitly stated. Canon 10 of the council of Ancyra (D.28 c.8) decreed:[35]

> 1. Any who are ordained deacons, if they protested during their ordination, saying that they wanted to take wives and that they were unable to observe continence, and if they have since married, are to continue in their ministry, because the bishop gave them licence to do so.
> 2. Any however who are silent and receive the imposition of hands professing continence, if they afterwards proceed to marriage, these shall cease from the ministry.

Master Honorius claimed that the canon could be understood ex loco, with part 2 referring to the Western Church, and part 1 referring to the Eastern Church assuming that the words 'protested' and 'licence' were superfluous (ex habundanti). These qualifications were necessary because, according to the decretist, in the Eastern Church a tacit vow would not lead to an obligation of continence as in 2. nor were any protestations or license necessary as in 1.[36] Alternatively, Master Honorius suggested that the whole canon could have been addressed to the

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sub isto Constantino sexta, sub Iustiniano Constantini filio ultima, que septima dicitur'. Constantine IV's father was Constans II (641-668).

[35] D.28 c.8: 'Diaconi quicumque ordinantur, si in ipsa ordinatione protestati sunt, dicentes, se uelle habere uxores, nec posse se continere, hi, si postea ad nuptias uenerint, maneant in ministerio, propterea quod his licentiam dederit episcopus. Quicumque sane tacuerint, et susceperint manus inpositionem professi continentiam, si postea ad nuptias conuenerint, a ministerio cessare debent'.

[36] *Magistri Honorii* 1.101, D.28 c.8 s.v. *diaconi etc*.: 'uel dicas esse locale ut principium referatur ad orientalem et ex habundanti dicitur' and s.v. *protestati*, *licentiam*: 'quia sine omni protestatione possunt contrahere, finis ad occidentalem'.

Eastern Church; but if so, we would need to accept that the second part referred to clerics who after their ordination took an explicit vow of continence, completely independent of that ordination.[37] Again here it is Master Honorius' assumption that ordained clerics were allowed to marry that makes this later explicit vow necessary.

In addition to this rather contrived explanation ex loco, Master Honorius suggested that the canon could be understood ex tempore, but pointed out problems about its chronology: 'it is asked whether at the time of that council continence had been introduced or not'.[38] The *Summa Lipsiensis* raised the same issue and focused in particular on the part of the canon allowing a bishop to give a deacon license for a later marriage. The decretist made clear that this was not the case at his time, as bishops no longer had the power to give license even to subdeacons to contract marriage.[39] He then went on to ask how a bishop could 'dispense' someone from a vow in the first place: if continence had been decreed for the diaconate as an order, a simple bishop would not have the power to dispense individual cases; if continence had not yet been decreed, no dispensation would be necessary, nor would there be need to protest explicitly.[40] Neither of the two decretists, therefore, knew whether at the date of the Council of Ancyra clerical continence was already a requirement.[41] Such problems of chronology were common, and

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[37] Ibid.: 'Vel totum legatur secundum orientalis ecclesie statum et dicatur *professi* expressim, scilicet post ordinationem'.

[38] *Magistri Honorii* 1.101, D.28 c.8 s.v. *Diaconi etc.*: 'Queritur utrum tempore illius concilii introducta erat continentia uel non'.

[39] *Summa Lipsiensis* 1.104, D.28 c.8 s.v. *in ministerio*: 'Hodie non posset aliquis episcopus licentiam dare ut subdiaconus contraheret, ut dicitur in illo c. De illo (D.32 c.4)'.

[40] Ibid. 1.104-105: 'Item queri solet quomodo episcopus iste potuit dispensare contra uotum, quia si erat recepta continentia in diaconis, non poterat dispensare, si non erat recepta, non erat opus dispensatione nec sibi preiudicassent ex taciturnitate'.

[41] Elsewhere, however, he cites this law as an example of a rule that was acceptable at a time when the prohibition of marriage was still recent and the Christian faith new. Ibid. 2.175, C.2 q.7 s.v. *cogebat*: 'Quidam excusant

complicated their efforts to understand the history of both their own and the Eastern Church's discipline.

Yet, their inquisitive legal minds meant that such problems did not just cloud their view of the East, but also encouraged them to further reflect upon it. There are some instances where this reflection revealed a surprisingly conciliatory attitude towards the Eastern rules. One such example comes from the commentary on canon 4 of the council of Gangra (340) (D.28 c.15) which anathematized those who refused to partake of the Eucharist offered by a married priest.[42] The *Summa Lipsiensis* explained this canon ex causa: at the time of its promulgation there was a particular need for it, because of the heresy of the Manicheans who despised marriage.[43] Presumably, when that cause disappeared, with it disappeared also the need for the rule.[44] This kind of explanation of a canon, which valued the

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Petrum dicentes quod, licet precepta legalia eo tempore prohibita fuerant, tamen, quia recens erat prohibitio et nouelli erant in fide, dispensare potuit Petrus; arg. supra xxviii di. Diaconus (D.28 c.8)'.

[42] Master Honorius skips canon 4 of Gangra in his comments of this distinction and does not cross-reference it anywhere else in his commentary. *Magistri Honorii* 3.156.

[43] *Summa Lipsiensis* 1.112, D.30 d.a.c.1: s.v. *Illud*: 'Determinat illud capitulum supra Si quis docuerit (D.28 c.14) et illud Si quis discernit (D.28 c.15), dicens illa debere intelligi ex causa. Supponit autem multa decreta, in quibus ostendit plurimas hereticorum superstitiones et eas elidit. Omnia autem ista capitula Gangrensis concilii ex causa debent intelligi propter heresim Manicheorum, qui nuptias condempnabant et alia reprobanda probabant'. *Summa Lipsiensis* 1.118. D.31 d.p.c.7 s.v. *Quod autem* usque *illud*: 'Superius dictum supra di. prox. Si quis docuerit et Si quis discernit, quod non sunt reprehendende sacerdotum nuptie. Hoc causa Manicheorum fuit institutum, qui nuptias uituperabant'. The author of the *Summa Lipsiensis* gave also an alternative interpretation: this canon could apply to clerics who married before ordination and who observe continence with their wives. Ibid. 1.109, D.28 c.14 s.v. *Si quis* usque *docuerit*: 'quod faciebant Manichei. Hoc capitulum et sequens loquitur de illis sacerdotibus qui, habentes uxores quas prius duxerant, earum copula non utebantur; uel secundum primitiuam ecclesiam, uel secundum orientalem loquitur'.

[44] The heresy of the Manicheans comes up several times in Gratian's *Decretum*. The author of the *Summa Lipsiensis* does not discuss it in detail

work of married priests, was likely to favorably dispose Western canonists towards the discipline of the East. The heretics here are those who are against marriage but not against the married priests themselves. Indeed, the author of the *Summa Lipsiensis* cited canon 4 of Gangra to explain a chapter from the *Decretum* (D.23 c.2) which asked for candidates to the episcopacy to be men who do not prohibit lay marriage, on the grounds that it was 'heretics who used to say that no one with a wife is saved'.[45] This normalizes clerical marriage by reapplying a dictum about it to lay marriage.

Immediately afterwards the author of the *Summa Lipsiensis* adds a second citation from early legal thinking about clerical marriage to support lay marriage, stating that 'marital intercourse is chastity'. This makes direct reference to the story of Paphnoutios from the council of Nicaea (325). Although this council did not promulgate canons on the question of clerical marriage, it is the stage for an anecdote which made an influential contribution to the topic. According to this, the Council of Nicaea was about to impose continence on bishops, priests, and deacons before the intervention of an unmarried ascetic, Paphnoutios, who insisted on the sanctity of marriage and the dangers of fornication, and persuaded the council to allow clerics to continue having sexual intercourse with their wives. This story, which is now widely accepted as fiction, was first recorded in the fifth-century history of Socrates Scholasticus, but circulated in the West through the *Historia Tripartita* produced for Cassiodorus.[46] Both Master Honorius and

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and would not necessarily have had a more in depth knowledge of it, putting aside what he read in Gratian. Indeed, the suggestion that the canon should be understood ex causa was already present in Gratian (D.30 d.a.c.1).

[45] *Summa Lipsiensis* 1.78, D.23 c.2 s.v.*si nuptias non prohibeat*: 'ut heretici qui dicebant neminem cum uxore saluari, ut di.xxviii. Si quis discernit, cum castitas sit concubitus coniugalis, ut di.xxxi. Nicena'.

[46] See Socrates Scholasticus' *Church History* 1.11 PG 67.102-104. For the inauthenticity of the story of Paphnoutios' intervention, see Friedhelm Winkelmann, 'Paphnutios, Der Bekenner und Bischof', *Probleme der koptischen Literatur*, ed. Peter Nagel (Halle 1968) 145-153. See also Roman

the author of the *Summa Lipsiensis* accepted the authenticity of this anecdote.[47]

Two points of interest emerge from their commentaries. The first involves the definition of 'castitas' within Paphnoutios' story. He claimed that to have sexual intercourse with one's own wife is chastity (castitatem dicens esse cum propria coniuge concubitum). In their comments, both decretists accepted the possibility that sex within marriage can be called chaste, even though it is *clerical* marriage that is in question here. According to the *Summa Lipsiensis* sexual intercourse is not blameworthy when it is done for the procreation of children or for the rendering of the marital debt.[48] Master Honorius adds sexual intercourse motivated by the wish to avoid adultery, and states that it would be a sin if the spouses were only motivated by

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Cholij, *Clerical Celibacy in East and West* (Leominster 1988) 85-92. The story enjoyed some popularity as part of the polemical literature of the Gregorian period. See Melve, 'The Public Debate' 688-706. It was condemned in 1079 by Gregory VII at a synod, but was ultimately included in Gratian's *Decretum* (D.31 c.12). Surprisingly, it did not enjoy a similar popularity in the East. The Council in Trullo made no reference to this account, nor did the twelfth-century canonical commentators. We find the first later reference to it in 1335 in Matthaios Blastares' *Syntagma* 4.152-153.

[47] The two decretists were not uncritical about authenticity. For example, both knew from Gratian that the Western Church accepted the Canons of the Apostles (c. 380) only in part; they were not made by the apostles themselves and were apocryphal texts: *Magistri Honorii* 1.114: 'Unde sic lege: *canones apostolorum* falsi, *quorum*, non falsorum set uerorum, *orientalis* etc.'; *Summa Lipsiensis* 1.126, D.32 c.6 s.v. *apostolorum*: 'non quos fecerunt apostoli, set sub nomine apostolorum alii fecerunt et eos inter canones ueros apostolorum inserebant'. The most controversial apostolic canon in terms of marriage included in the *Decretum* was canon 5 (D.28 c.14) which anathematized those who taught priests to despise their wives. Master Honorius simply skipped this canon altogether and did not cross-reference it anywhere else in his commentary: *Magistri Honorii* 3.156. The *Summa Lipsiensis* paired it up with canon 4 of Gangra and treated it ex causa: *Summa Lipsiensis* 1.112.

[48] *Summa Lipsiensis* 1.120, D.31 c.12 s.v. *castitatem*: 'idest quiddam simile castitati, ne sit in xxvii. q. i. Nuptiarum contra. Et talis castitas est in concubitu coniugatorum, ut si fiat causa prolis commixtio illa, ut di.xiii. Nerui (D.13 c.2) uel si exactus reddat debitum, ut xxxiii. q.v. Si dicat'(C.33 q.5 c.1).

lust.[49] Both decretists apply here to the Eastern clergy their own ideas of sexual morality and borrow these from their criteria for *lay* marriage. Although these are different from the definition we would find in Byzantium, their willingness to accept that marital sex in the case of clerics can be redeemed is a remarkable example of their lack of hostility towards the Eastern Church and its tradition.

The second point of interest involves the two decretists' justification of their own practice in relation to the Paphnoutios story which supported clerical marriage and sex within it. The *Summa Lipsiensis* acknowledged the great importance of the Council of Nicaea, insisting that it had the same authority as the four gospels. To explain the departure from it, he latched on to the wording of the story in Gratian's *Decretum* in D.31 c.12:[50]

> The Nicene synod, wanting to correct the life of ecclesiastics, *proposed* laws.

and concluded that:[51]

> The council only proposed (posuit) but did not fix (statuit) the laws.

This meant that later generations of ecclesiastics could change them. Master Honorius also justified the Western Church's change of attitude since Paphnoutios, by taking advantage of the difference between 'permissio', 'preceptum', and 'prohibitio'.[52]

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[49] *Magistri Honorii* 1.109, D.31 c.12 s.v. *Nicena castitatum*: 'Idest cum castitate fieri, quod tunc est uerum cum fit ab exacto, ut xxxii. Q.v. c.i. Sic quando fit causa prolis, ut di.xiii. Nerui, quando enim causa uitande fornicationis, ut supra di.xxv. Qualis (D.25 c.4). Secus si causa libidinis, ut xxxii. Q.iiii. Origo' (C.32 q.4 c.5). Master Honorius repeats this definition of chastity elsewhere: See Ibid. 1.159, D.50 c.29 s.v. *abiciatur*: 'Vel distinguitur sic: "Si quis diaconus . . . cum uxore incontinens inuenitur", cum alia scilicet quia cum propria esse castitate, ut et adulter enim in orientali ecclesia deponitur'.

[50] D.31 c.12: 'Nicena sinodus uolens corrigere uitam hominum in ecclesiis commorantium, *posuit* leges'.

[51] *Summa Lipsiensis* 1.119, D.31 c.12 s.v. *Nicena* usque *posuit*: 'non tamen statuit, quia si hoc factum esset, non posset fieri contra, quia comparatur hoc concilium quattuor euangeliis'.

[52] On the importance of these three distinctions in canonical jurisprudence, see Brian Tierney, *Liberty & Law: The Idea of Permissive Natural Law, 1100-*

Asking whether it was allowed for the Western Church to introduce continence, he argued that it was, because while one may not go against a precept or a prohibition, one does not need to exercise the right afforded by a permission.[53] Both decretists, then, accepted the practice of clerical celibacy as an innovation of the Western Church, and justified its validity in legal terms.

This accepting attitude towards Eastern married clerics was most likely conditioned by the two decretists' understanding of the historical development of clerical celibacy in East and West. They believed that Western celibacy had not always been the rule and that it was progressively introduced by the papacy at different times for different grades.[54] This was clearly stated in the *Summa Lipsiensis*:[55]

> In summary, it ought to be known that in the past it used to be the case, and it is now still observed in the Eastern Church, that clerics in sacred orders could lawfully contract marriages and did not cease from their ministry because of this, provided however that they abstained from marital intercourse during times of service. Later on, continence was received in the Western Church among the priests, as we see in D.28 c.6. After a while after abstinence became more and more pleasing, continence was received among deacons, as we see in D.28 c.7. Then

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1800 (SMCL 12; Washington, D.C. 2014) 22-29 and passim; see Jason Taliadoros' review in this volume.

[53] *Magistri Honorii* 1.109, D.31 c.12 s.v. *permisit*: 'Num contra hanc permissionem licitum fuit introducere? Sic, ut dictum est supra de indulgentia Apostoli di.xxviii. De hiis'. *Magistri Honorii* 1.100, D.28 c.5 s.v. *concessam licentiam*: 'Set num liceret contra Apostolum introducere quod connexa esset continentia? Resp: Sic contra permissionem, quod contra perceptum uel prohibitionem non liceret'.

[54] Liotta has shown the similarities on this topic between the views of the *Summa Lipsiensis* and Rufinus. See Liotta, *La continenza dei chierici* 158.

[55] *Summa Lipsiensis* 1.99, D.27 d.a.c.1 s.v. *Quod autem*: 'In summa autem est sciendum quod olim ita erat et adhuc in orientali ecclesia obseruatur, quod licite matrimonium poterant contrahere in sacris ordinibus positi nec propterea a ministerio cessabant, dum tamen tempore quo ministrabant a coniugali officio cessarent. Post in occidentali ecclesia recepta est continentia in presbiteris, ut infra di. proxima c.Assumi (D.28 c.6). Postmodum cum magis ac magis placuisset castimonia, recepta est continentia in diaconis, ut infra di. proxima Preterea (D.28 c.7). Deinde florente castitate tertius gradus adiunctus est subdiaconorum, ut infra di. proxima Nullus' (C.28 c.1).

> with chastity flourishing, the third grade of the subdeacons was added, as we see in D.28 c.1.

The Eastern Church was following a different, more ancient, tradition.

The Travelling Priest and Other Questions about the East

In all of the questions we have examined so far, the reflections of the two decretists on the Eastern Church were prompted by the text in front of them, as they were trying to make sense of contradictions one distinction at a time. Their comments, far from turning a blind eye to laws that did not apply to them, are often particularly full, partly because explanations 'ex loco, tempore', and 'causa' did not always work easily. However, the inquiries of Master Honorius and the author of the *Summa Lipsiensis* went beyond responding to prompts and led them to ask imaginative questions about far away Eastern clerics. What would happen if a cleric from the West were to move to the East or vice versa? Would he have to follow the rule of his mother church or would he need to adapt to the rules of his new environment?

Such questions appear in a number of commentaries on Gratian's *Decretum* and are introduced by the phrases 'queritur' (it is asked), or 'queri solet' (it is often asked), which indicate that they were part of the 'quaestiones decretales'. This subgenre of legal writing dealt with particular scenarios which could be fictional or real and were often used to clarify contradictions in the sources.[56]

Rufinus, one of the sources of the Anglo-Norman decretists, writing around 1164, had briefly dealt with the question of the

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[56] See K. Pennington and Wolfgang P. Müller, 'The Decretists: The Italian School', *The History of Medieval Canon Law in the Classical Period, 1140-1234: From Gratian to the Decretals of Pope Gregory IX*, edd. Wilfried Hartmann and K. Pennington (History of Medieval Canon Law; Washington, D.C. 2008) 164-166. On Master Honorius and his particular use of this genre, see Kuttner and Rathbone, 'Anglo-Norman Canonists of the Twelfth Century' 311-313.

travelling cleric in his comments on canon 70 of the council of Carthage, which asked bishops, priests, deacons, and subdeacons to abstain from sexual intercourse in accordance with previously established law (priora instituta), but allowed all other clerics to follow the custom of their own church.[57] In his commentary, Rufinus started with a more local example concerning readers and acolytes who moved from a church which had a long custom of celibacy in minor orders to one which permitted marriage. Would they be allowed to take a wife? The answer is 'yes', but they would be advised to do so after some time had passed, in case they seemed like 'indecorous enthusiasts' for marriage.[58] Rufinus hastens to point out, however, that the answer would be entirely different in the case of subdeacons who travelled to the Eastern Church. Unlike acolytes, they would not be allowed to marry because a vow of continence was annexed to their ordination to the subdiaconate.[59]

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[57] In the Greek version the equivalent of 'secundum priora statuta' is 'κατὰ τοὺς ἰδίους ὅρους' which is taken by the twelfth-century Byzantine commentators to mean according to their liturgical schedule. As such, in the Byzantine Church, this canon is compatible with temporary continence of clerics in sacred orders. See Joannou, *Les canons des conciles œcuméniques* 312; *Syntagma* III.482-484. Here the difference between East and West had been introduced early on, already at the level of the text of the canon, rather than the level of the commentary.

[58] Rufinus von Bologna, *Summa decretorum*, ed. Heinrich Singer (Padeborn 1902) 75-76 to D.32 c.13 s.v. *Placuit* etc. *debere*: 'Queri solet, si predictum clericum contingat in aliam provinciam transire, que in minoribus ordinibus continentiam non receperit, ibique habitaturus sit, an tunc uxorem accipere possit? Et dicimus quod, cum primum ierit, hoc attentare protinus non debet, ne nuptiarum importunus appetitor esse videatur, sed procurrente tempore irreprehensibiliter uxorem suo matrimonio consociabit'. On Rufinus, see also Roman Deutinger, 'The Decretist Rufinus - a Well-known Person?', BMCL 23 (1999) 10-15.

[59] Rufinus *Summa* (ed. Singer 76) to D.32 c.13 s.v. *Verum etc*.: 'Sed obicitur quia equo modo de subdiacono dicendum erit, ut si ab hoccidentali (sic) ecclesia, ubi subdiaconi continent, in orientalem ecclesiam habitaturus venerit, nuptias contrahere valebit. Sed secus in subdiacono quam in acolito discernendum est; subdiaconus namque votum etsi non expressum vel tacitum

This reasoning is premised upon the assumption that Eastern subdeacons were allowed to contract marriages, which is also followed by the author of the *Summa Lipsiensis* and Master Honorius who pick up where Rufinus left off with this question by focusing on clergy in sacred orders.[60] Master Honorius started with the following question: 'It is asked, if an Eastern priest were to come here with his wife, would he be able to minister?'. The answer is 'no', because such a thing would cause scandal for the rest of the clergy; it was only if the priest was willing to abstain from sexual intercourse that he would be allowed to serve the Church. But such a decision depended not only on him, but also on his wife.[61] Master Honorius was here making a reference to the marital debt, which meant that spouses were to have sex with each other on demand and could not unilaterally decide to abstain.[62] He continued to ask whether a Western cleric who went to the East would be allowed to get married following local custom. The answer was again in favor of continence, which 'surpasses the custom of that Church'.[63]

The question of custom also came up in the comment of the author of the *Summa Lipsiensis* on the same topic. He argued that the custom of the Church to which a cleric had come was to take

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facit, dum annexum votum suscipit: quod utique in acolito notari nullatenus potest'.

[60] Although this seems like a more far-fetched scenario when it comes to the Anglo-Norman realm, it would not have been that strange in Italy to find priests moving between areas of Roman and Byzantine control.

[61] *Magistri Honorii* 1.109, D.31 c.14 s.v. *Aliter etc*.: 'Queritur si sacerdos orientalis cum uxore huc uenerit, an possit ministrare? Resp.: Non, quia scandalum pararet, nisi uelit continere, quod tamen non potest nisi uxor consentiat'.

[62] On the marital debt, see John W. Baldwin, 'Consent and the marital debt: five discourses in Northern France around 1200', *Consent and Coercion to Sex and Marriage in Ancient and Medieval Societies*, ed. Angelika Laiou (Washing-ton, DC. 1993) 257-270; Elizabeth M. Makowski, 'The Conjugal Debt and Medieval Canon Law', JMH 3 (1997) 99-114.

[63] *Magistri Honorii* 1.109, D.31 c.14 s.v. *Aliter etc*.: 'Set quid si noster presbiter illuc transiret? Resp.: Necesse haberi continere, quia consuetudinem illius ecclesie preuenit'.

precedence. The example he gave to support this came from advice that Ambrose (c.339-397) gave to Augustine, when the latter was living in Milan with his mother, St Monica.[64] The Romans used to fast on Saturdays, but the Milanese did not. The discrepancy bothered Monica, so Augustine turned to Ambrose, who stated that when he visited Rome, he fasted on Saturday, when he was in Milan he did not. The 'When in Rome' principle was to observe the custom prevailing in the Church you came to in order not to give offence with your conduct. For the author of the *Summa Lipsiensis* this applied to clerical marriage as it applied to fasting, showing that he considered both to be questions of custom rather than doctrine. In the opposite case, however, the *Summa Lipsiensis* used the same argument as Rufinus: a Western cleric travelling to the East would not be able to observe the local custom, because of his vow of continence.[65]

Other questions that the two Anglo-Norman decretists asked and answered about Eastern clerics included the following:
(1) If an Eastern cleric contracted a second marriage, contrary to the custom of his own church, would his marriage be valid?[66]
(2) If an Eastern married cleric was convicted of a crime, would he have to enter a monastery?[67]
(3) Can an Eastern cleric perform penance without the consent of his wife?[68]

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[64] *Summa Lipsiensis* 1.120, D.31 c.13 s.v. *deponatur*: 'Solet queri, si clericus orientalis ecclesie ad partes istas ueniret, an posset uxori adherere et celebrare. Et dici potest quod non, quia morem illius ecclesie debet seruare, ad quam uenit, ne sit aliquis ut di.xii. Mater' (D.12 c11).
[65] *Summa Lipsiensis* 1.120, D.31 c.13 s.v. *deponatur*: 'Item quid, si clericus occidentalis ecclesie ueniret ad ecclesiam orientalem? Possetne uxorem habere ut alii ibi habent? Non, quia uotum precessit'.
[66] Ibid. 'Item queritur, si clericus orientalis ecclesie contra consuetudinem ecclesie secundas nuptias contraxerit, an debeat matrimonium stare'.
[67] Ibid. 1.121: 'Item queritur, si iamdictus clericus uxoratus fuerit de crimine conuictus, an debeat retrudi in monasterium, ut di.lxxxi. Dictum' (D.81 c.8).
[68] *Magistri Honorii* 1.109, D.31 c.14 s.v. *Aliter etc*: 'Set queritur, an presbitero orientali indici possit penitentia sine consensu uxoris?'

In addition to such questions, both decretists brought up the Eastern Church in their comments on canons which were not in contradiction with the Western Church and as such did not need to be explained away. To give just one example, when commenting on canon 8 of the council of Neocaesarea (315) (D. 34 c. 11), which decreed that clerics whose wives committed adultery had to cast them away or suffer the loss of their ministry, Master Honorius explained that this referred to clerics in minor orders in the West, but to all orders in the East.[69] Then he went on to venture that Eastern clerics who did not follow the rule would not be allowed to minister, but might not be deposed.[70] In contrast to the cases that we saw in the previous section, here Master Honorius could have explained this canon with no reference to Eastern clerics. It was his choice to juxtapose the Eastern and Western examples.

For the two Anglo-Norman decretists, talking about the Eastern clerics seems to have been an opportunity to reflect on topics of contemporary interest, such as the nature of laws and customs, tacit and explicit vows, and the marital debt. The divergent laws of the Eastern Church allowed them to explore different possibilities and to verbalize concerns about their own condition. Eastern clerics could be said to have been 'creatures less clearly defined and less securely bounded by the structures that held men in place in society', and as such they were 'good to think with'.[71] This meant that contemplating the situation in the

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[69] Ibid. 1.120, D.34 c.11 s.v. *si in clericatu*: 'minorum ordinum si fuerit occidentalis; uel in quocumque ordine si fuerit orientalis'.

[70] *Magistri Honorii* 1.120, D.34 c.11 s.v. *non potest perfrui*: 'Non ministrabit, set forte non deponetur orientalis'.

[71] The words inside the first quotation marks where used by Peter Brown to describe women in the first centuries of the Church, but could easily be applied to the Eastern clerics. See Peter Brown, *The Body and Society: Men, Women, and Sexual Renunciation in Early Christianity* (New York 1988) 153. The phrase 'good to think' goes back to Lévi-Strauss' *Le totémisme aujourd'hui*, where he argued that the animals in totemism are not only objects of symbolism or sources of food, but serve an intellectual function, which can be understood within the more general problem of 'how to make opposition,

East could help Western clerics familiar with such 'quaestiones decretales' to understand and accept their own fate as celibate clergymen, or it could give them ammunition to question it.[72]

Property and Purity

I have so far considered the two decretists' discourse about clerical marriage largely in isolation from the main bugbears of many Western ecclesiastics: property and purity. In the eleventh and twelfth centuries, married clerics were often accused of alienating the property of their church for the benefit of their wives, the dowries of their daughters, and the advancement of their sons. In addition to these more material problems, married clerics in major orders were expected to be celibate in order to maintain themselves in a state of purity. Ideally, virginal hands were needed to handle the virginal body of Christ in the form of the Eucharist.[73] However, neither of these issues seems to come up in relation to the Eastern Church in the two Anglo-Norman decretists. The question of property was raised several times and in quite some detail when it came to the *Western* clergy and their need for celibacy. Master Honorius and the *Summa Lipsiensis* asked in which cases a cleric could lose his office and/or benefice because he got married; whether a priest with a family could become bishop despite the financial risk that came with his marital status; to what extent a cleric could provide for his

instead of being an obstacle to integration, serve rather to produce it'. See Claude Lévi-Strauss, *Totemism*, trans. Rodney Needham (London 1962) 89.

[72] Many of these issues come up in Gerald of Wales and Thomas of Chobham. When they refer to the Greeks, they do so bringing up more or less the same topics as the two decretists, but they go further in their questioning of the status quo. See in particular *The Jewel of the Church: A Translation of Gemma Ecclesiastica by Giraldus Cambrensis*, trans. John J. Hagen (Davis Medieval Texts and Studies 2; Lugduni Batavorum 1979) 144-145 and *Thomae de Chobham Summa confessorum*, ed. F. Broomfield (Analecta mediaevalia namurcensia 25; Paris 1968) 377-378.

[73] Chapter 2 in Hugh M. Thomas, *The Secular Clergy in England, 1066-1216* (Oxford 2014) 17-36.

former wife after his ordination, and so on.[74] The question of purity, on the other hand, came up very little, even in the case of Western clergy. The *Summa Lipsiensis* tells us that Pope Gregory the Great (590-604) extended celibacy amongst the subdeacons (D.31 c.1) 'out of reverence for the sacraments and for the sake of the purity of ministers'.[75] Similarly, in the same chapter, he says that the 'works of incontinence. . . are described as "evil" because of the law of shame (turpitudinis)' that accompanies them.[76] Elsewhere, he repeats Gratian's assertion that clerics must always observe chastity because they must always serve the altar.[77] But such statements are rare in the *Summa Lipsiensis* and even rarer in Master Honorius' commentary.[78] In sum, the reformist agenda of the eleventh century appears to have left remarkably little trace on the question of clerical marriage in the East in these decretists.

What did Byzantine Canonists Think?

The active engagement of the two Anglo-Norman decretists with the Eastern Church also contrasts starkly with the practice of the twelfth-century Byzantine canon lawyers who, as much as possible, avoided talking about the marriage customs of the Western Church, even when prompted by the canons they were commenting on.

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[74] Comment on D.28 c.2 in *Summa Lipsiensis* 1.102 and *Magistri Honorii* 1.99; Comment on D.28 c.13 in *Summa Lipsiensis* 1.108-109 and *Magistri Honorii* 1.103; Comment on D.28 c.14 in *Summa Lipsiensis* 1.109 and *Magistri Honorii* 1.104.

[75] *Summa Lipsiensis* 1.117, lines 38-39, D.31 c.1 s.v. *et futura*: 'Hoc autem licite poterat statuere propter reuerentiam sacramentorum et munditiam ministrorum'.

[76] *Summa Lipsiensis* 1.117 '*quatenus preterita mala*: idest incontinentie opera, que lege turpitudinis mala esse dicuntur'.

[77] *Summa Lipsiensis* 1.116 'Agit etiam de iugi continentia sacerdotum, ut semper castitatem, ex quo semper altari debent assistere'.

[78] For example, see Master Honorius' comments on D.81 c.6 and c.23, where he emphasizes that no matter whether the priest himself is polluted, the sacraments are not affected by his impurity. *Magistri Honorii*, 1.229, 231.

Ioannis Zonaras (d. after 1150) and Theodoros Balsamon (c.1140–after 1195) mentioned Western celibacy very briefly at the beginning of their commentaries on canon 13 of Trullo, following their custom of rephrasing what the canon itself had said.[79] Balsamon continued by referring the reader forward to another fuller comment on clerical celibacy, which, however, focused on 'barbarian churches' (ἐν ταῖς βαρβαρικαῖς ἐκκλησίαις).[80] This was a comment on canon 30 of Trullo, which acknowledged that celibacy was an acceptable choice, but expressed suspicion as to its feasibility and asked those clerics who wished to remain chaste to stop living with their wives. Instead of praising that choice, the canon presented it as a concession, stating that 'we have conceded this to them on no other ground than their narrowness of spirit, and foreign and unsettled manners'.[81] Balsamon was also sceptical but acknowledged that celibacy was a pious practice and that what is done out of piety should not be dismissed, but supported and recommended. Nonetheless, he did not advocate its widespread adoption:[82]

> Note this therefore as something that was said specifically, and ought to be understood in reference only to those who are priests in barbaric regions, not to the rest. I asked several bishops who had come from Russia about this, and even the metropolitan of Alania, and learnt that the terms of this canon are not valid for those regions, despite the fact

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[79] On Zonaras and Balsamon, see *The History of Byzantine and Eastern Canon Law to 1500* edd. Wilfried Hartmann and K. Pennington (History of Medieval Canon Law; Washington D.C. 2012) 103, 176-178, 183-184 passim (Zonaras) and 178, 180-184, 225 passim.

[80] Canon 13 of Trullo in *Syntagma* 3.336.

[81] 'Πρὸς τοῦτο δὲ αὐτοῖς οὐ δι' ἄλλο τι ἢ διὰ τὴν τῆς γνώμης μικροψυχίαν καὶ τὸ τῶν ἠθῶν ἀπεξενωμένον καὶ ἀπαγές ἐνδεδώκαμεν.' *Syntagma* 2.369.

[82] 'Σημείωσαι οὖν τοῦτο, ὡς ἰδικῶς ἐκφωνηθὲν, καὶ ὀφεῖλον ἐξακούεσθαι εἰς μόνους τοὺς ὄντας ἱερεῖς ἐν χώραις βαρβαρικαῖς, οὐ μὴν καὶ εἰς τοὺς λοιπούς. Ἐγὼ δὲ ἐρωτήσας διαφόρους ἐπισκόπους περὶ τούτου, ἀπὸ Ῥωσσίας ἐλθόντας, ἀλλὰ μὴν καὶ τὸν μητροπολίτην Ἀλανίας, ἔμαθον, μὴ ἐνεργεῖν τὰ τοῦ παρόντος κανόνος εἰς τὰς τοιαύτας χώρας, καὶ ταῦτα οὔσας βαρβαρικάς· ἀλλὰ κατὰ τοὺς ἡμετέρους ἱερεῖς κἀκείνους ἔχειν τὰς οἰκείας γυναῖκας καὶ μετὰ τὴν χειροτονίαν.' *Syntagma* 2.370.

> that they are barbaric. But like our priests they also keep their wives, even after ordination.

Like the canonist, we are not entirely sure whom the council in Trullo was referring to in this canon.[83] In the twelfth century, Balsamon did not associate the 'barbarian churches' with the West, but with Russia. Even so, this would have been a good place to make some comment about the situation in the West, as the canonist knew that Western clergy too had to be celibate. Yet, he chose to make no mention of the Roman Church here.

In fact the relationship between Western and Byzantine practices of clerical celibacy was largely avoided, and led to no introspection comparable to what we saw in the two Anglo-Norman decretists. This can be seen in another rare mention of the Western Church, in a comment on canon 4 of the Council of Carthage, which referred to the Roman custom of celibacy. There is here an explicit contradiction between Eastern and Western custom and the canonists observe that the Westerners 'are wrong about this, as they are about other things'.[84] They cite in support canon 5 of the Apostles, and then reluctantly admit that 'perhaps someone will say that also amongst us bishops do not have wives'.[85] This could have been a point of reflection on the similarities as well as the differences between Eastern and Western practices of clerical continence. But the canonists

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[83] Judith Herrin has suggested that it was clerics living in areas under either Western or Arab control. If it referred to the West, it could have meant the areas of southern Italy, Sicily, and the diocese of eastern Illyricum which embraced the Balkans, Greece, and the Aegean islands. These areas remained formally under Rome until the eighth century and should have followed Roman customs. Alternatively, in the eastern provinces that had been overrun by the Arabs during the second half of the seventh century, Christian priests might have tried to demonstrate their commitment to the faith by separating from their wives. See Judith Herrin, '"Femina Byzantina": The Council in Trullo on Women', *Dumbarton Oaks Papers* 46 (1992) 97-105 at 102.

[84] *Syntagma* 3.303: 'σφάλλονται δὲ κὰν τούτῳ, ὥσπερ καὶ ἐν ἑτέροις'.

[85] Ibid. 'καὶ ἴσως ἐρεῖ τις, ὅτι καὶ παρ' ἡμῖν οἱ ἐπίσκοποι γυναῖκας οὐκ ἔχουσιν'.

simply continued by quoting verbatim what the council of Trullo had said on this point on canon 12: [86]

> And we say this, not to abolish and overthrow things which were established of old by Apostolic authority, but as caring for the salvation of the people and their advance to better things, and lest the ecclesiastical state should suffer any reproach.

After this citation they continued with an accusation pointing out that canon 70 of the council of Carthage also 'refutes the Latins, who think wrongly about this' and then directed the reader towards a canon which asked for temporary continence.[87]

As we have seen, this attitude is in stark contrast to the two Anglo-Norman decretists' choice to talk about and sometimes imagine the different customs of the Eastern Church in detail. Perhaps it was too difficult for the Byzantine canon lawyers to explain why the practice of the Western Church, which was not barbaric, was not superior to their own, and as such they preferred to avoid any comments. To some extent their reluctance to expand can be attributed to more general differences in the way that Eastern and Western canonists worked: imaginary scenarios were not a feature of the Byzantine canonical commentaries, as they were in the West.[88] But the Byzantine canonists did go into more detail on other issues concerning the Western Church, particularly ones associated with the liturgy, such as the reception of the Eucharist, the use of leavened or unleavened bread, baptism, burial, fasting, and so on. More importantly perhaps, the Byzantines did not feel the need to justify a change; clerical marriage was for them the apostolic tradition. They had not deviated from an ancient rule still

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[86] Ibid.: 'Τοῦτο δέ φαμεν οὐκ ἐπ' ἀθετήσει, ἢ ἀνατροπῇ τῶν ἀποστολικῶς νενομοθετημένων, ἀλλὰ τῆς σωτηρίας καὶ τῆς ἐπὶ τὸ κρεῖττον προκοπῆς τῶν λαῶν προμηθούμενοι, καὶ τοῦ μὴ δοῦναι μῶμόν τινα κατὰ τῆς ἱερατικῆς καταστάσεως'.

[87] Ibid. 'Καὶ ὁ ἑβδομηκοστὸς δὲ κανὼν τῆς παρούσης συνόδου ἐλέγχει τοὺς Λατίνους, περὶ τούτου κακῶς φρονοῦντας'.

[88] See Clarence Gallagher, 'Gratian and Theodore Balsamon: Two Twelfth-Century Canonistic Methods Compared', *Byzantium in the 12th Century: Canon Law, State and Society*, ed. Nicolas Oikonomides (Athens 1991) 61-89.

followed by the Western Church, and as such their practice did not need to be explained away.

Conclusion

Master Honorius and the author of the *Summa Lipsiensis* often referred to the Eastern Church in their explanations of the ancient canons on clerical marriage, and they were not hostile or dismissive towards it. Their views on the situation of the Eastern clergy were obscured by false assumptions, problems of chronology, abbreviated canons, and ambiguous vocabulary. But they did not sweep difficulties under the carpet. For example, in their explanation of canon 10 of Ancyra, when faced with chrono-logical uncertainty and the false assumption that Eastern deacons could marry, they found imaginative ways to twist the laws and make them fit, even if it meant assuming that different parts of the same canon could refer to different Churches without explicitly saying so. Such legal gymnastics encouraged them to probe deeper and to engage further with the legal development of both Eastern and Western discipline.

Despite, or perhaps because of, the two decretists' efforts to understand the situation in the East, many misconceptions remained, and they ended up with a rather polarized image of the Eastern Church. According to their understanding, Eastern clerics were less restricted than in reality: not only could they continue to have sex with their wives, but they could also choose to marry at any point in their career. This made them perfect subjects for thought experiments: the different rules of the Eastern Church increased the variety of questions that could be discussed. Scenarios such as the one of the travelling priest satisfied the decretists' legal curiosity while allowing them to investigate contemporary topics, such as the vows of continence or the marital debt.

In these explorations of the Eastern 'other', Master Honorius and the author of the *Summa Lipsiensis* appeared remarkably accepting of alien customs. They acknowledged that it used to be

heretical to refuse the Eucharist from a married priest and that marital sex can be a form of chastity, even in the case of clerics. This more positive attitude was perhaps a result of their understanding of the historical development of the discipline of clerical celibacy: a man-made innovation that was introduced progressively by the papacy into the different grades of the Western clergy. This attitude contrasts with that of the Byzantine canon lawyers who remained almost silent about the more recent marital customs of Western clergy. But they did not have a legal shift to justify: as they saw it, they had remained steadfast in the apostolic command of clerical marriage; and even though their introduction of episcopal celibacy was acknowledged as an innovation, it was a change that had also been made by the Western Church.

The accepting attitude of the two decretists contrasts also with the reformist discourses of the eleventh and twelfth centuries. The implications of clerical marriage for Church property, more than the question of ritual purity, were occasionally discussed, but mostly in relation to the Western rather than the Eastern clergy. The impact of reformist discourses on Master Honorius and the author of the *Summa Lipsiensis* might have been more subtle: the recent attempts to enforce this older 'innovation' of clerical celibacy may have fueled their interest in the East and the past, making the Eastern clerics 'good to think with'.

Leeds.

The Two Anonymous *Liber extra* Commentaries in Paris, BNF lat. 3966

Edward A. Reno III

The paper manuscript Paris, BNF lat. 3966 contains two incomplete, unidentified commentaries on the *Decretals of Gregory IX* (1234) copied by two different mid-fifteenth-century French hands.[1] The first commentary, transcribed by Hand A and hereafter referred to as *Deduc me Domine* [= DMD] following the incipit, is the more complete of the two, running from an initial preface and commentary on the bull of promulgation *Rex pacificus* up to X 3.12.1 (fol. 1r-55v). Not all the canons within this range are covered, however—especially after the middle of Book 2, the commentary begins to skip over quite a number of texts.[2] DMD does not offer any specific content that would help us fix the original date of composition, but the legal citations and the dialectical structure point to the early fourteenth century in the environs of the University of Paris, possibly by a member of a religious order. Although an almost equal volume of text survives from the second commentary (fol. 57r-108v)—dubbed here the

[1] The manuscript's laconic entry from the eighteenth-century catalogue is as follows: 'codex chartaceus, olim Colbertinus. Ibi continentur anonymi glossae in Decretales Gregorii IX. Is codex decimo quinto saeculo videtur exaratus', *Catalogus codicum manuscriptorum Bibliothecae Regiae* (Vol. 3. Paris 1744) 'no. iiiM CMLXVI' (i.e. 3966), p. 533. It is unclear from the entry whether the cataloger recognized that the manuscript contained two different commentaries, since the plural designation of *anonymi glossae* is used for all of the anonymous commentaries listed in the catalog between nos. 3960 and 3966, and could just as conceivably be referring to a collection of glosses. There seems to be an indiscriminate application of the genre label *glossae* to cover both traditional glosses pinned to successive *lemmata* in the *Decretals* as well as the so-called *commenti* organized around the capitulum as a whole, which is the form taken by both DMD and the *LA*.

[2] See the formal description below for the complete list of canons covered by DMD, as well as the occasional transpositions of order. As will be discussed in greater detail in the analysis of DMD's contents, Hand A seems to have deliberately left out and condensed the material from his exemplar, especially as he got deeper into the commentary.

Lectura arelatensis [= LA]—the portion of the *Decretals* it covers is much more limited, consisting of the last eight titles of Book 1 (X 1.36.1-X 1.43.2) and the first three from Book 3 (X 3.1.1-X 3.3.6). We can be more precise about dating both the composition of the LA and its transcription by Hand B. The author's citation of fifteenth-century jurists, the most recent of whom was Panormitanus (1386-1445), places the LA around the middle of the fifteenth century. In addition, the transcription by Hand B of two pieces of ephemera onto fol.55v, the last leaf of DMD, enable us to provisionally identify him as Guillaume Blégier (fl. 1424-1470), a metropolitan official in the archdiocese of Arles and a 'Doctor decretorum'.[3] The first piece of ephemera, intitulated *Allegationes in causa iurium* [*sic*] *patronatus* by the scribe, is a decision rendered by Guillaume Blégier himself in a dispute over patronage rights in a local parish church in Arles. The second is a letter dated March 26, 1463 from Philippe de Lévis (1435-1475) to the Arles cathedral chapter announcing Pope Pius II's (1458-1464) decision to transfer him from the metropolitan see of Auch to become their archbishop. Beyond their assistance in identifying the scribe of the LA, the presence of these documents at the end of DMD shows that Guillaume Blégier was in possession of the entire manuscript, and thus provides a starting point for future efforts at tracing its provenance.

To date there have been no modern discussions of BNF lat. 3966, so the opportunity will be taken below to provide a thorough codicological and paleographic study of the manuscript along with an assessment of its contents.[4] The analysis will first tackle its

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[3] Biographical information for Guillaume Blégier has been assembled in Appendix I.

[4] The one mention of BNF lat. 3966 in modern literature turns out to be a case of mistaken identification. In a study of the sixteenth-century Spanish humanist Juan Jinés de Sepúlveda's translation of the Aristotelian corpus, D. de Courcelles included a note that a record of Sepúlveda having borrowed a commentary on Aristotle's *Ethics* from the Palatine Library in Rome was copied onto fol.53 of BNF lat. 3966: 'Juan Ginés de Sepúlveda (1490-1573), traducteur du grec et historiographe en langue latine: sur le choix de l'écriture en langue latine en Espagne vers 1540', *Tous vos gens á latin: Le latin, langue savante, langue mondaine (XIVe-XVIIe siècles)*, ed. Emmanuel Bury (Paris

codicological peculiarities: when the manuscript was rebound some of the quires were rearranged and even separated, thus requiring a careful renumbering of the leaves to restore the original ordering of both commentaries. Thereafter will come a discussion of the ephemera on fol.55v, which are crucial pieces of evidence for identifying the second hand as Guillaume Blégier and situating the entire manuscript at Arles. The analysis of the actual contents of the commentaries will focus largely on DMD, justified both by its greater substance and by the greater difficulty in determining its date. Following the analysis are two appendices. The first pulls together all of the available printed biographical evidence for Guillaume Blégier. The second provides an edition of the preface and *Rex pacificus* commentary of DMD, a text that because of its didactic emphasis, deserves closer scrutiny for what it reveals about the way canon law was taught at the beginning of the 14th century.[5]

Paris, BNF lat. 3966

Antea: Codex Regius 3894.8; Codex Colbertinus 1921
Paper: iii + 109 fol. + iii (plus pastedowns). 307 (215) x 220 (150) mm. *Orig*: France, Saec. XV.3
Incipit fol. 2r: 'item dicit glossa'

2005) 352 n.4. The note points back to an early twentieth-century study of the historiography on Holy Roman Emperor Charles V, which contains an aside thanking the great manuscript librarian of the Bibliothèque nationale, Léon Dorez, for making known to the author the existence of the book loan record. It turns out, however, that the manuscript in question is BAV lat. 3966, which was a register of loans from the Palatine: 'nous devons à l'obligeance de M. Dorez, bibliothécaire au département des manuscrits de la Bibliothèque nationale, la communication de cet extrait d'un registre du Vatican lat. 3966, fol. 53', Alfred Morel-Fatio, *Historiographie de Charles-Quint*, *Première partie*: *Mémoires de Charles-Quint: Texte portugais et traduction française* (Bibliothèque de l'École des Hautes Études 202; Paris 1913) 43 n.1. The misidentification was probably due to the infelicitous punctuation of the original reference, as well as the assumption that a BNF librarian would be talking about his own holdings rather than the Vatican's.

[5] The text is the first step in a future edition of the entire work planned by the author.

Fol. 1r-55va: <Anonymous, *Commentaria super decretalibus* (incomplete: X 1.1-X 3.12)> (Praefatio) 'Deduc me domine' [fol. 1ra] (s.v. *Gregorius*) 'Queritur hic quare' [fol. 1ra] (s.v. *Rex pacificus*) 'Id est Christus' [fol. 2rb] (X 1.1.1) 'Hic dicitur quod' [fol. 3ra] (X 2.1.1) 'Ista decretalis diuiditur' [fol. 43rb] (X 3.1.1) 'Nota quod tripliciter' [fol. 54rb] (Finis) 'uerum est quod habet curam omnium que spectant ad regulam' [fol. 55va].

Capitula: Liber I: X 1.1-2; X 1.3.1-3, 5-43 (cc. 35-36 *revers.*); X 1.4; X 1.5.1-4, 6; X 1.6 (cc. 29-30 *revers.*); X 1.7; X 1.8.2-7; X 1.9.1, 3-15; X 1.10; X 1.11.2-6, 8-11, 13-17 (cc. 16 *et* 11 *praeced.* c. 9); X 1.12-13; X 1.14.2-15 (cc. 13-14 *revers.*); X 1.15 *deest*; X 1.16; X 1.17.1, 5-11, 13-14, 16-18 (cc. 17-18 *insert. inter* X 1.18.2 *et* 3); X 1.18.2-4, 6-7; X 1.19; X 1.20.1-4, 6; X 1.21.1-6 (cc. 2-3, 5-6 *revers.*); X 1.22.1-2, 4; X 1.23.3, 7, 9; X 1.24.1; X 1.25-28 *desunt*; X 1.29 (c. 21 *praeced.* c. 19, cc. 34-35 *revers.*); X 1.30.1, 3-4, 7-9; X 1.31.1-4, 6-11, 13-19; X 1.32; X 1.33.1, 3-17; X 1.34; X 1.35-43. Liber II: X 2.1-6 (Lyons I, c. 9 *post* X 2.5.1); X 2.7.1, 4, 6; X 2.8-12; X 2.13.1-2, 5-19 (cc. 10-11 *revers.*); X 2.14-15; X 2.16.1-3, 5; X 2.17-18; X 2.19.1-5, 7-12, 14-15; X 2.20.1-7, 9, 12-15, 17-42, 46-48, 53-56 (cc. 20-21 *revers.*); X 2.21.2, 4, 10-11; X 2.22.1-7, 9-15 (c. 11 *praeced.* c.9); X 2.23.1-3, 5; X 2.24.1-2, 4, 13-17, 19-24, 28-29, 31-36; X 2.25.1-2, 4-8, 11-12, 14; X 2.26.1-3, 5, 10-17, 19; X 2.27.5, 7-8, 10-14, 17, 19-24 (cc. 20-21 *revers.*); X 2.28.1-7, 9-10, 13, 15-17, 19, 23, 25-26, 28, 34, 36, 38-39, 41, 43, 45, 48-50, 54, 62; X 2.29 (*sola rubr.*); X 2.30.1, 3-4. Liber III: X 3.1.1-2, 9-10, 14, 16; X 3.2.1-3-7; X 3.3.8; X 3.4.2-3, 15; X 3.5.1-4, 11, 18, 23, 25-27, 29-31; X 3.6.1-2; X 3.7.6-7; X 3.8.3-5, 8; X 3.9.2; X 3.10.6; X 3.11.3-4; X 3.12

Scribe: Hand A

fol. 55va-55vb: <Guillelmus Blegerii, *Allegationes in causa iurium patronatus*> (Titulus) Allegationes in causa iuris patronatus (Textus) Licet in testamentis (Finis) Et sic ualet uidetur michi de iure dicendum et concludendum Guillelmo Blegerii decretorum doctori saluo magis meliori consilio et determinacione cuiuslibet melius sapientis cui me et superscripta committo.

Scribe: Hand B (Guillaume Blégier)

fol. 55vb-a <Archbishop Phillipe de Lévis of Arles, Letter to the provost and cathedral chapter of Arles> (Titulus) Littera quam misit reuerendus

dominus archiepiscopus capitulo (Textus) Venerabiles et egregii uiri fratres et amici… (Finis) Rome die xxvi. Martii 1463 Ph. archiepiscopus arelatensis frater uester.[6]

Scribe: Hand B (Guillaume Blégier)

fol. 57r-108v: <Anonymous, *Lectura super decretalibus* (incomplete: X 1.36.1—X 1.43.14; X 3.1.1—X 3.3.6> (in medio X 1.43.2) et ideo curialius [fol. 57ra]…(in medio X 1.36.1) cum qui lites [fol. 69ra]…(Book III) Cleri status reuerendi [fol. 61r]...(Finis X 3.3.6) obseruari per quicumque contrahentes [fol. 96rb]… (Explicit in medio X 1.43.2) infra de prebendis [fol. 108vb].

Scribe: Hand B (Guillaume Blégier)

Three of the four watermarks found in BNF lat. 3966 can be associated with the south of France. The only watermark found in DMD (on some 22 of its 56 folia) is a bull's head quite close to Briquet 14334, traced to Fourcalquier in 1469. The LA (fol. 57-109) contains the other three watermarks. The first, a smaller and plainer bull's head found in a dozen examples in Quires VI-VII (Va-VIa), is very close to the group Briquet 14953-14964 and 14970-14972, both of which are connected to the south of France.[7] The second, a gloved hand surmounted by a cross found throughout Quires IX, V, VIII and X (VIIa-Xa), is identical to Piccard 413, where it is traced to Freiburg im Breisgau in 1466. It is also nearly identical, however, to Briquet 11086, which belongs to a group of watermarks that were available in a wide area that encompassed the south of France, the Piedmont, Sicily, Switzerland, the Netherlands, Germany, and even parts of Russia.[8] The final watermark in the LA—found on only three folia in Quire V (VIIIa)—consists of two 16mm circles with a cross in the center surmounted by a larger, 42mm cross, and does not correspond to any watermark reproduced in either Briquet or Piccard.

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[6] Étienne Baluze, *Miscellanea*, ed. Mansi 3.113 [= *Miscellanea*, vol. 4. Paris 1683, p. 522].

[7] Charles-Moïse Briquet, *Les Filigranes: Dictionnaire historique des marques du papier dès leur apparition vers 1282 jusqu'en 1600: A Facsimile of the 1909 Edition with Supplementary Material Contributed by a Number of Scholars*, ed. Allan Stevenson (4 vols. Amsterdam 1968) 2.750.

[8] Ibid. 562. Given that Briquet published approximately a quarter of the samples he had traced, giving preference to the earliest form of watermarks for which there were significant variants, it is quite possible that this gloved-hand watermark is connected to the group represented by Briquet 11086. On Briquet's methodology, see: Ibid., vol. 1, pp. xxv and *18.

Despite their differences, both Hand A and B are clearly French hands of the mid-fifteenth century, as both employ the open initial 'v' that only penetrated French writing after the 1420s. The entire manuscript is written in brown ink, with the quires containing DMD a consistent medium shade, and those devoted to LA alternating significantly from medium to a light brown verging on yellow. The script and mise-en-page suggests this was a private effort rather than that of a professional scribe, and there are no indicators, such as pecia marks, that would connect it with the book trade. The text is in two columns throughout. Through the first quire of DMD the columns are neat, though they increase gradually from 42 to 44 lines per page. Sloppiness starts to set in with the second quire, which begins with 46 lines per column but ends with 58, while the subsequent quires of DMD fluctuate anywhere between 56 to 76 lines per column. The mise-en-page of the LA remains fairly consistent, with column-width variation within a narrow range and line numbering from the low 50s to the high 60s. In both commentaries each capitulum is introduced on a fresh line by a one- or two-word incipit rendered in a larger block script (but see below for exceptions in DMD), with guide letters and space left for subsequent initial capitals that were never filled in.

There are catchwords in three different styles in the lower right margin: fol. 14v, 22v, 28v (underlined); fol. 80v, 92v (no underline); and fol. 108v (boxed). Only in the LA are the leaves of the first half of each quire numbered (1, 2, 3, etc.). Except for the final two gatherings, each quire was numbered in dark ink I through VIII by an early-modern hand (presumably that of the rebinder) on the recto of the opening leaf, though the resulting sequence departs significantly from the original ordering of the manuscript.

There are marginal notations in each commentary by the main hands, usually just simple indications of the dialectical structure of the text: quaestio (qō/q^{o}), distinctio (di^{o}), notabilia/nota (nō), solutio (s^{o}), etc. For emphasis a pointing hand is sometimes used, or a qualification such as bene et optime nō. Although the LA has significantly fewer marginal annotations than DMD, they are occasionally more verbose, but in terms of content they are still just brief formulations of the points made by the commentary.

There are no signs of ownership prior to the seventeenth century, when the manuscript made it through an as yet unknown channel to Jean-Baptiste Colbert and became part of his library (fol. 1r: Cod. Colbert. 1921). Colbert had it rebound in brown calf: his arms and initials are stamped on the binding, along with the title GLOSS IN DECRE. The rebinding process was likely the cause of the current misordering of the quires. The manuscript entered the French Royal library in 1732 together with rest of Colbert's manuscripts when they were sold by his grandson to Louis XV (fol. 1r: Regius 3894/8).

Quire ordering

The manuscript is made up of ten gatherings, which break down as follows:

Table 1: Current Quire Structure of BNF lat. 3966

Quire	Folia
I	fol. 1-14
II	fol. 15-28
III	fol. 29-42
IV	fol. 43-56
V	fol. 57-68
VI	fol. 69-80
VII	fol. 81-92
VIII	fol. 93-96
IX	fol. 97-108
X	fol. 109

All that is left of the final gathering is the blank fol. 109, which was originally perhaps a bifolium judging by the stub.[9] Whether due to a mistake during the rebinding process, or instead to some earlier mischief, the current quire structure results in a rather confounding order for both commentaries.[10] We can restore the original ordering of the manuscript, however, by simply following the sequence of capitula, which results in the following progression:

[9] Even though it is blank and has no quire numbering, fol. 109 is unambiguously an original part of the manuscript, as it possesses the same watermark found in quires VIIa-IXa (Piccard 413).

[10] The present quire sequence is without question the one intended by the rebinder, as evidenced by the early modern numeration of the quires I through VIII mentioned in the description. If the responsibility for the misordering should ultimately be laid at the feet of the rebinder, it is not difficult to imagine what probably happened, at least with DMD. Instead of a consistent pagination, the original quires are varied in size: a septenion (Ia) a senion (IIa), an octonion (IIIa), and a septenion (IVa). The displacement of the bifolium fol. 21-22 from Quire IIIa to Quire II evens the count to make every quire in DMD a septenion.

Table 2: Original Quire Structure of BNF lat. 3966

Deduc me Domine

Quire	**Type**	**Folia**	**Capitula**
Ia	septenion	fol. 1-14	Preface—X 1.3.29
IIa	senion	fol. 15-20 fol. 23-28	X 1.3.29—X 1.5.6 X 1.5.6—X 1.6.36
IIIa	octonion	fol. 21 fol. 29-42 fol. 22	X 1.6.37—X 1.6.42 X 1.6.42—X 1.41.5 X 1.41.5—X 1.43.8
IVa	septenion	fol. 43-55 fol. 56	X 1.43.8—X 3.12.1 Blank

Lectura arelatensis

Quire	**Type**	**Folia**	**Capitula**
Va	senion	fol. 69-80	X 1.36.1—X 1.38.2
VIa	senion	fol. 81-92	X 1.38.2—X 1.40.3
VIIa	senion	fol. 97-108	X 1.40.3—X 1.43.2
VIIIa	senion	fol. 57-60 fol. 61-68	X 1.43.2—X 1.43.14 X 3.1.pr—X 3.2.7
IXa	ternion or binion +1	fol. 95 fol. 93-94 missing leaf/leaves fol. 96	X 3.2.7—X 3.2.8 X 3.2.8—X 3.3.3 (X 3.3.3—X 3.3.5) X 3.3.5—X 3.3.6
Xa	bifolium -1	fol. 109	Blank

This reconstruction can be confirmed in a few places by the scribe's catchwords, and so should be treated going forward as the original ordering of the manuscript.[11] The one piece of conjecture is the amount of material missing in Quire VIII (IXa, fol. 93-96), which would have contained the now absent portions of the LA's

[11] These include: *aliquam* linking 28v with 21r; *in c. Quod dei timorem* linking 92v with 97r; *et ideo*, linking 108v with 57r.

commnentary on X 3.3.3-X 3.3.5.[12] Despite the disarray of the manuscript, we almost certainly possess all of what Hand A transcribed of DMD (if not the complete commentary itself). The extent of the losses for the LA, on the other hand, is unknowable at this point.

The Allegationes in causa iurium patronatus and letter of Philippe de Lévis

Fortunately for us, Hand B, the scribe of the LA, decided to copy into the blank space left on fol. 55v after the conclusion of DMD the two pieces of ephemera mentioned above—a judgment in a dispute concerning patronage rights in a local Arlesian church (= Allegationes), and a letter dated March 26, 1463 from the recently appointed Archbishop of Arles Philippe de Lévis (1463-75) to the cathedral chapter and provost of his new see. The preponderance of evidence laid out below points to Guillaume Blégier (Guillelmus Blegerii, al. Guillermus Bergerii), a prominent archdiocesan administrator and a 'Doctor decretorum' (as well as the author of the 'Allegationes'), as the scribe for the LA.[13] In addition, the location of these items on the last folio of DMD shows that he was in possession of the entire manuscript, and that the pairing of the two commentaries was not an accident.[14]

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[12] The original ordering of fol. 93-96 was 95, 93, 94, 96, with the bifolium fol. 95-96 forming the first and last leaves of the quire. The modest amount of material missing—one full canon and portions of another two (X 3.3.3-5)—initially suggests we are lacking just a single leaf between fol. 94 and 96. A five folio quire would be rather anomalous, however. Moreover, the first three leaves of the quire are numbered 1 through 3 in the lower right hand margin on the recto, which points to the original quire having been a ternion: fol. 95 = 1, fol. 93 = 2, fol. 94 = 3. Based upon the author's expansive comments on other texts, it is not completely out of the question that he stretched the missing material over an entire bifolium.

[13] See Appendix I for a full discussion of the surviving documentary evidence related to Blégier's career.

[14] Both documents are crammed by Blégier/Hand B into the blank space remaining after the final canons of *DMD* transcribed by Hand A (X 3.12.3-4 and X 3.12.1). There was likely some interval of time separating the transcription of the *Allegationes* and the letter—the generous sizing and spacing

The letter is a friendly self-introduction to the provost and cathedral chapter over whom Philippe, who was being translated from his previous position as archbishop of Auch (1454-1463), had just been appointed by Pope Pius II to replace the recently retired Pierre de Foix (1450-1463). There is nothing particularly remarkable or revelatory about the letter—it is a concatenation of the sorts of platitudes to humility and good will one would expect of such a communication.[15] Rather, it is its appearance in our manuscript on fol. 55v that is of interest. Given the addressees and the subject matter, there was a fairly small circle of people with the access and motive to transcribe it. Moreover the intitulation of the text with its honorific naming of the archbishop, 'littera quam misit reuerendus dominus archiepiscopus capitulo', suggests that the scribe was either a member of the cathedral chapter or an archdiocesan official.[16]

The 'Allegationes' records the judgment of Guillaume Blégier, identified as a 'doctor decretorum', in a dispute over ecclesiastical patronage rights in a chapel of the church of S. Laurentius—presumably the eponymous parish church located within the city walls of Arles.[17] In form it is framed as a 'consilium', with a chain of legal reasoning forged through canon and Roman law proof texts, concluding with the stock first-person declaration that the author, Guillaume Blégier, has formed his

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of the *Allegationes* consumed a lot of the remaining space on the page, which forced the scribe to write the last few sentences of the letter in the bottom margin of the left hand column (a) after he had run out of room on the right (b). One would expect more efficient use of space if he had both documents simultaneously in front of him.

[15] See the manuscript description above for Baluze's edition of the letter.

[16] Although the title at the head of the letter just lists the chapter generically as the recipient, the scribe added a second title at the end of the text that lists the provost and cathedral canons as the specific addressees: 'uenerabilibus et egregiis uiris dominis preposito et canonicis uenerabilis capituli sancte arelatensis ecclesie, fratribus et amicis meis prec[l]arissimis', fol. 55va.

[17] There were several churches of S. Laurentius in other parts of the archdiocese, though these were normally qualified with some further appellation (e.g., S. Laurentius de Sallona; S. Laurentius de Junqueriis), as can be seen in contemporary tax assessment documents: GC *Arles* 3.597-599 no. 1491.

judgment to the best of his ability.[18] Blégier thus appears to have been serving in the capacity of an arbiter, and so was clearly someone whose legal acumen was respected.[19] The original 'consilium' was a longer document that must have included a narration of the facts of the case—at one point the text even refers to an episode 'supra ut in causa premittitur'. It is not easy to divine all the details about the underlying dispute, but the basic contention can be characterized as follows: Ph. de Vieta—almost certainly the local nobleman Philippin de Vieta—left provisions in his will to transfer his patronage rights over the S. Laurentius chapel, which included the right of presentation of the cleric who would either serve in the chapel or at least derive a benefice from its revenues.[20] For reasons probably specified in the now-lost narrative, these patronage rights were set to pass to one Io. Quiquinarii—likely the Arlesian merchant turned nobleman Johan Quiqueran[21]—who then decided to remit at least a part of these rights to a third party for a sum of money.[22] The lack of the 'causa'

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[18] 'Et sic ualet uidetur michi de iure dicendum et concludendum Guillelmo Blegerii decretorum doctori saluo magis meliori consilio et determinacione cuiuslibet melius sapientis cui me et superscripta committo', fol. 55vb.

[19] On the prescriptive sources related to arbitration, see A. Amanieu's comprehensive and still useful entry 'Arbitrage', DDC 1.862-895.

[20] Philippin de Vieta was a figure of some prominence in the community for reasons that went beyond just his significant property holdings (for which, see the index entry for de Vieta in Louis Stouff, *Arles à la fin du Moyen Âge* (2 vols. Aix-en-Provence, 1986). He held several provincial and royal offices, serving as treasurer of Provence and counselor to the French king (Ibid. 2.522 n.188). During royal visits the king's ceremonial itinerary through the community would actually terminate at de Vieta's home (Ibid. 2.538 n.140).

[21] On Johann Quiqueran, who leveraged his prosperity as merchant into a noble title, see: Stouff, *Arles* 1.354. Activity for Quiqueran is documented as late as 1455, which is just two years before the 'terminus post quem' of the 'Allegationes'.

[22] 'Sed si premissa cessarent, quamuis non cessent [*sic*] ius presentandi ad dictam [ecclesiam *cancellat. est*] cappellam in ecclesia Sancti Lauren., non pertinent dictis heredibus quondam Ph. de Vieta, licet dominus Io. Quiquinarii transigendo remissit pro quadam peccunie summa ut supra in causa premittitur omne ius quod habebat in bonis dictis testatoris ob causam legatorum et iuris patronatus et dicte capelle', fol. 55va. It is not entirely clear from the context what the 'premissa' are, since the material immediately preceding this passage

means we can only speculate about what happened in the interim, but Quiqueran apparently either sought to recover the rights or continued to act as if he were the patron, despite the fact that a cleric identified in the *Allegationes* only as Guido had been assigned the chapel. Blégier's ultimate decision recognized the 'collatio' of the chapel to Guido. Whether it was Guido himself who was the other party to the suit, or whether it was the patron who installed him is unknowable on the basis of the existing evidence.[23]

In the absence of more direct proof, the presence of the letter and the *Allegationes* on fol. 55v presents a strong circumstantial case for identifying Guillaume Blégier as Hand B. The letter indicates the scribe to be a person connected with the metropolitan church, either a member of the cathedral chapter or one of the archdiocesan officials. The *Allegationes*, originally composed by Blégier himself, obviously makes the case even stronger (though there is no necessity that the legal judgment was actually transcribed by him). It is difficult to see, however, who else would have recorded it for posterity if not Blégier—certainly not Johan Quiqueran. The only other likely alternative would be the second party to the suit, perhaps the cleric Guido, or perhaps his no-longer identifiable patron. No evidence exists, however, of anyone named Guido connected with the Arles Cathedral around this time.[24]

The appearance of the *Allegationes* and the Philippe de Lévis letter at the end of DMD puts the text in Blégier's possession, and thus situates the entire contents of BNF lat. 3966 at Arles in the

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discusses the finer points of determining the intent of the 'testator'. It is possible it points back to material in the no longer extant statement of the 'causa'.

[23] 'Ex quibus infertur et uidetur concludere quod collatio facta de dicta cappella [fuerit et sit canonica: *cancell. sunt*] dicto Guidoni fuerit et sit canonice ualida et utilis non obstante presentacione subsequenta per dictum nobilem', fol. 55vb. This passage contains the one mention of Guido, who, given the context, must be presumed to be a member of the clergy. The 'dictum nobilem' is taken to be Johan Quiqueran himself.

[24] The lack of evidence concerns only the edited or calendared archival material related to Arles, or the local histories that make use of it. The next place to look would be the archiepiscopal accounts mentioned in Appendix I, n. 2.

third quarter of the fifteenth century. It is impossible at this point to know to what use, if any, Blégier put these texts, and whether it was for private or professional reasons. We should note, however, that he received his doctorate in 1457-1458, which is roughly contemporaneous with the transcription of the material in the manuscript.[25]

How did the manuscript make its way way from Arles into Jean-Baptiste Colbert's (1619-83) collection, whence it would eventually pass into the Bibliothèque du Roi? As with so many of Colbert's manuscripts, it was likely secured by his formidable secretary Étienne Baluze (1630-1718), whose interest in and knowledge of canon law are well known.[26] The manuscript contains no signs of ownership prior to Colbert or other marks that would indicate where it might have journeyed during the roughly two centuries between its transcription and eventual acquisition by Baluze. Nor is there any record of Baluze having acquired material from Arles, or, for that matter, the University of Avignon, where Blégier had become 'licentiatus' in canon law, if not also 'doctoratus'.[27]

One intriguing possibility comes when we consider Blégier's close connection with Philippe de Lévis' predecessor, noted bibliophile and patron of letters Archbishop Pierre de Foix, who was also the Cardinal Bishop of Albano. The Cardinal de Fuxo, as he was called, had a close association with the nearby University of Toulouse, having endowed the Collège de Foix in 1457, which regularly made provisions for subsidizing students from Arles to study canon law at the University. The Cardinal

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[25] See below, Appendix I, n.15 and n.16.

[26] On Colbert's Library, see: Denise Bloch, 'La bibliothèque de Colbert', *Histoire des bibliothèques françaises*, 2: *Les bibliothèques sous l'Ancien Régime (1530-1789)*, ed. Claude Jolly (2nd. ed. Paris 2008) 157-179. On Baluze, with particular focus on his interest in canon law, see: Jacqueline Rambaud-Buhot, 'Baluze, bibliothécaire et canoniste', *Études d'histoire du droit canonique dédiées à Gabriel Le Bras* (2 vols. Paris 1965) 1.325-342. That Baluze personally handled the manuscript cannot be doubted, since he published the Philippe de Lévis letter in his *Miscellanea*.

[27] See below, Appendix I n.7 for Blégier's continued association with the Collège d'Annecy.

donated his library to the Collège at the time of the endowment, where it sat until it was eventually acquired by Baluze for Colbert.[28] This transfer obviously happened prior to Blégier's transcription of the letter into the manuscript, but it is not inconceivable that the manuscript might have gone to the Collège after Blégier's death given the close ties between the cathedral and the University. We have no definitive record of when our manuscript ended up in Colbert's hands, but in the list printed by Delisle itemizing the books taken from the Collège de Foix, there is a note about an anonymous *Commentarius in decretales* that was missing both the beginning and end of the text (caret principio et fine), a description half-true of DMD and wholly true of the *LA*.[29]

Deduc me Domine

All of the evidence points to *Deduc me Domine* as having been composed in the very early fourteenth century by a canon law master associated with the University of Paris, who was possibly a member of a religious order. Since the author never betrays any biographical information or references any concrete historical events, we must spend some time laying out the circumstantial case for this identification.

Rather than being written in the 'apparatus glossarum' style, where the commentary is pinned to successive words or phrases (lemmata) in the underlying decretal, DMD is scaffolded as an extended series of 'quaestiones', with the answers built up using a

[28] For the history of the Pierre de Foix's library and its reception into the Bibliothèque du Roi, see: Léopold Delisle, *Cabinet des manuscrits de la Bibliothèque nationale* (Paris 1868) 1.494-496. This library included many items from Pedro de Luna's collection, of which the Cardinal had acquired substantial portions after securing the renunciation of de Luna's 'successor" Clement VIII (1424-1429), the last of the Avignon line of antipopes left over from the Great Schism.

[29] This entry is no.78 in the list of books received from the Collège on October 7, 1680, a list almost certainly compiled by Baluze himself: Delisle, *Cabinet* 1.502. Baluze's knowledge of canon law was almost unparalleled for his era, and he would have identified the text if it were known to him.

framework of 'contraria' and 'distinctiones'.[30] The internal architecture of the commentary is further highlighted by marginal notations made consistently throughout the work by the same scribe: qō (quaestio), s^{o} (solutio), di^{o} (distinctio), etc., along with the occasional pointing hand indicating a particularly salient remark in the text. The text is thus suffused with the dialectical spirit of the classroom, and so is very likely the direct product of a master's instruction. An audience of canon law students would also explain the significant emphasis in the opening commentary on *Rex pacificus* placed upon the lives and legal status of students.[31] To the extent that there is a superstructure linking together the individual capitular commentaries, it is provided, first of all, by the brief, prefatory remarks (termed rubrica) given at the outset of each title, which deal with the essential definitions of the subejct matter under discussion in that section.[32] Secondly, just about every capitulum is preceded by a concise, one-sentence summary of the legal point at stake, what the commentary itself

[30] The format is similar to that employed by the the mid-fourteen-century Parisian doctor Henri de Bohic (†1357), whose *Distinctiones* became a model for how the *Decretals* was taught at Paris. DMD is not nearly as meticulous or exhaustive as de Bohic, though, and its questions are often oriented towards more theoretical possibilities suggested by the law rather than the elementary details de Bohic usually included in his exposition. On de Bohic, see: Jean-Luc Deuffic, 'Au service de l'Université et au conseil du duc: Notes sur le canoniste breton Henri Bohic', *Pecia: Ressources en médiévistique* 4 (2004) 47-102.

[31] See Appendix p.184 lines 19-28 and p.185 lines 1-9. In this section there is a friendly admonition embedded in the distinction between those who call themselves students and those who actually pursue scholarship.

[32] The title introduction for X 1.2 *De constitutionibus* is a good example of the basic, formulaic approach of the 'rubrica' in DMD: '[D]icto supra in prohemio libri qualiter diuerse decretales et epistole in unum uolumen compilantur, ex quibus fiunt multe constituciones. Ideo consequenter subicitur hic rubrica de constitucionibus. Et primo queritur quid sit constitucio. Constitucio nichil aliud est quam quod princeps siue imperator generaliter edit, etc. Item queritur unde dicitur. Dic quod [q: *cancellat. est*] constitucio dicitur quasi institucio, ut infra eodem Que in ecclesiarum [X 1.2.7]. Item queritur a quo potest fieri. Dic quod potest fieri per episcopum cum capitulo, et per archiepiscopum, ut infra de accu. Sicut olim [X 5.1.25]. Item queritur que sit causa constitucionis. Dic quod causa est ut appetitus noxius limitetur, ut supra in prohemio. Et ista sufficians pro rubrica', fol. 4ra.

labels the 'casus'.[33] Future research that carefully scrutinizes the 'casus' and 'rubrica' of DMD in comparison to those of other jurists may help bring the intellectual parentage of the text into closer focus, though caution should obviously be exercised in drawing conclusions from what were often generic elements.

The didactic approach of DMD perhaps explains why the commentary takes a selective approach to previous jurisprudence. Omnipresent is Bernard of Parma's *Glossa Ordinaria*, which the author assumes his readers are looking at as they are working through the text. While he doesn't refer to the gloss in every individual commentary, he regularly points out places where, for example: 'glossa [hic] potest decipere aliquem' (X 1.5.6, fol. 20vb), or where some jurist 'contradicit glossam' (X 1.3.6, fol. 10vb). The commentary does not aim at being an exhaustive survey of jurisprudential opinion, but more often than not the opinion of one or more jurists is brought in to confirm or contradict the points put forth for each decretal. The author places himself in dialogue most frequently with Hostiensis and Innocent IV (with the former enjoying a slight edge in terms of frequency of citation), often noting where these two concur or disagree with one

[33] In form these 'casus' are equivalent to the opening 'casus' that one encounters in the commentaries of jurists like Bernardus de Montemirato and Johannes Andreae (and later on, the 'rubrica' of Panormitanus), which would eventually evolve into the rubrics that were inserted at the head of every capitulum in printed editions of the *Liber extra*. They are not the longer summaries—also known as 'casus'—we find in a work like Bernard of Parma's *Casus decretalium*, which in the sixteenth century would also be added to the text in printed editions of the collection as part of the *Glossa Ordinaria*. For the development of commentary genres, see: Stephan Kuttner, 'The Revival of Jurisprudence', *Renaissance and Renewal in the Twelfth Century*, edd. Robert Benson and Giles Constable (Cambridge, MA 1982) 299-323; and Knut Wolfgang Nörr, 'Die kanonistische Literatur', *Handbuch der Quellen und Literatur der neueren europäischen Privatrechtsgeschichte*, 1: *Mittelalter* (Munich 1973) 365-382.

another.[34] After this pair, Bernardus Compostellanus (junior)[35] and Abbas antiquus (Bernardus de Montemirato)[36] occupy the second tier. We should note, however, that Abbas antiquus' influence on DMD amounts to more than the simple number of citations, and certain passages show the author had Abbas' commentary in front of him while he was writing.[37] There are only a few citations of jurists outside those listed above, including Vincentius Hispanus (Vinc.), Gottfried of Trani (Goff.) and Johannes Teutonicus (Io.). At least in the case of Johannes, it is likely that the author was not reading him directly, since the few references to his work occur in places where the *Glossa Ordinaria* or canonists like Hostiensis reproduced Johannes' opinions.[38]

The commentary includes a fair, if not overwhelming number of Roman Law allegations across the entire *Corpus iuris civilis* and *Novellae*, with a tendency to favor citations from the *Codex*.[39] It is an open question, however, whether the author's knowledge

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[34] Innocent is designated consistently as Inno. The abbreviations for Hostiensis are more varied, including: Hos., Ost., H^9, and sometimes his full, unabbreviated name.

[35] Compostellanus is designated either as 9postel, or $9po^9$. Obviously, since Compostellanus' *Casus decretalium* only covers the initial titles of Book I, the author stops citing him after X 1.6 *De electione*.

[36] Bernardus de Montemirato is referred to consistently just as Abbas. To the question of whether this might possibly refer to Nicholas de Tudeschi, Abbas Modernus or Panormitanus, I have checked each of the approximately three dozen times Abbas is referenced by the author and confirmed that all of them convey opinions that are to be found in Bernardus de Montemirato's work. Incidentally, the referencing of Abbas antiquus simply as Abbas backs up the assumption that the author was writing in the fourteenth century, since he otherwise would have made the distinction between the two Abbates.

[37] This is particularly evident for the *Rex pacificus* commentary edited in Appendix II, where DMD repeats almost verbatim several points that Abbas antiquus has made on the bull of promulgation. *Cf.* Abbas antiquus, *Lectura aurea domini Abbatis antiqui super quinque libris Decretalium* (Strasbourg, 1511) fol. 2r-2v.

[38] See, for example, X 1.4.13, fol. 19vb. There is a single instance, however, where the author appears to be referring directly to Johannes' *Glossa Ordinaria* to the *Decretum* (D. 21 c. 1 *s.v. psalmista*): X 1.14.11, fol. 33va.

[39] These also include a reference at X 1.29.41, fol. 38ra to Frederick I's *Habita* on the subject of judicial qualifications,which was often included in *Codex* manuscripts at Cod. 4.13.5: X 1.29.41, fol. 38ra.

of Roman Law is simply derivative of what he encountered in previous canon law literature—subsequent study of the text should examine whether his Roman Law allegations have a precedent in prior commentaries.[40] On occasion he will employ the familiar opposition of 'leges' vs. 'canones' in relation to some particular legal question, but this framing is more incidental rather than an organizing principle of the commentary.[41] The lack of interest in the Romanist side of things is further corroborated by the fact that there are only two places in the surviving text where he cites a 'legista' by name: Odofredus (*Rex pacificus*, fol. 3va) and Azo (X 1.3.21, fol. 12va), both on the *Codex*.[42]

The author betrays no direct information about his background or position—the use of the first person is limited to a few occasions where he points to a section further in the commentary—and so we are left to speculate on the basis of the allusions in the text. Unfortunately he does not give us much material to work with. Other than a few Biblical citations and a line from Ovid's *Ars amatoria* offered half-jokingly when discussing the pallium (X 1.8 in principio, fol. 30vb), the few non-legal references are all contained in the opening commentary on *Rex pacificus*, a place where it was not uncommon for a canonist

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[40] A good place to start would be to examine the *Casus legum* literature, which listed and analyzed all the Roman Law citations used in the *Glossa Ordinaria*. On this literature, see: Martin Bertram, '*Casus legum sive suffragia monachorum:* Legistische Hilfsmittel für Kanonisten im späteren Mittelalter III', TRG 51 (1983) 317-363; reprinted in *Kanonisten und ihre Texte, 1234 bis Mitte 14. Jh.* (Education and Societry in the Middle Ages and Renaissance 43; Leiden, 2013) 37-90, with Nachträge 476-480.

[41] For example, see the commentaries for X 1.29.37 (fol. 37vb), X 2.20.17 (fol. 49va), and X 2.26.5 (fol. 52va).

[42] For the Odofredus reference, see Appendix II, p.193 lines 8-9. In the commentary on X 2.6 *Ut lite non contestata non procedatur ad testium receptionem vel ad sententiam diffinitivam* (fol. 46ra), DMD touches upon the debates between Martinus and Johannes Bassianus (X 2.6 in principio, fol. 45ra), and again between Bassianus and Azo (X 2.6.5, fol. 46ra) over whether witness testimony can be taken prior to the contestation of a lawsuit. These citations are simply a précis of previous commentaries on this title, however, like that of Hostiensis: *In secunda decretalium librum commentaria* (Venice, 1581) fol. 25ra.

to be expansive and demonstrate his ecumenical tastes. The author's writing in this section suggests someone with a greater interest in and knowledge of academic theology than what one might expect for a canonist. The referencing of Aristotle and Cicero on the nature of virtue is certainly not exceptional, but the formal definition of virtue he provides places him at a somewhat higher level of sophistication: 'virtus est quedam qualitas mentis quam deus operatur in nobis'. This was supposedly the Augustinian definition, but was in fact a hybrid formulation synthesized from Augustine's writings in Peter Lombard's *Sentences*, and repeated in later theological compendia like Aquinas' *Summa Theologica*. Even more technical is the author's distinction between types of justice, where he employs scholastic neologisms to differentiate between justice that is 'virtualis' (i.e., related to our natural capacity for virtue) and that which is 'substantialis' (i.e., received from God 'per infusionem'). Maybe he was simply drawing upon the common knowledge base available to any master at a 'studium generale', but it could be that he was the recipient of more formal theological training, perhaps as a member of a religious order that had a scholastic component.

There is, in fact, a tantalizing, offhand remark in the commentary that would fit well in the mouth of a member of the regular clergy. It occurs in the commentary on X 1.11.10, Innocent III's decretal concerning the status of a monk who had transferred monastic orders and received ordination as a priest, but subsequently returned to his original order. The author closes his otherwise straightforward commentary on the text with a cheeky verse: 'O Roberte pater, mutata ueste tua ter // es noster frater bis candidus et semel ater (O Father Robert, thrice have your garments been changed; you are our brother, twice white, once black)'.[43] While the verse was obviously prompted by the decretal's context of a monk switching back and forth between orders, it actually has a metaphorical valence, with the 'semel ater' alone referring to the (black) monastic garb, and the 'bis candidus' referring to the white

[43] Fol. 32va. The verse was not a later addition and was written in-line with the rest of the commentary, but it has no substantive connection with the preceding commentary on X 1.11.10, and it is introduced simply with 'notatur versus'.

flesh of birth and the glorified body of the afterlife or Resurrection. This can be concluded from how the verse appears in other contexts as a memorialization of prominent members of religious orders that sported a full or partial black habit, such as Thomas Aquinas as a member of the Dominicans,[44] St. Augustine as the spiritual father of regular canons and other forms of religious life modeled off the Augustinian rule,[45] or the fifteenth-century theologian and member of the Celestine Order Gabriel Leblond.[46] It is unclear who the Robertus here referred to might be, but the presence of the verse in the body of the text suggests an author and/or audience privy to a monastic inside joke.

The contents of DMD point to a French origin for the author, and a Parisian milieu for his teaching, such that our default assumption should be to associate the commentary with the University of Paris. The commentary employs Latinized French words like 'guerra' for war (fol. 2rb) and 'bladum' for grain (fol. 4vb), and the sole reference to secular offices names the French king and the Dukes of Burgundy and Holland.[47] The author often uses a Parisian setting for the many hypotheticals he employs in his 'quaestiones', like when computing the legal maximum

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[44] Oxford, Bodleian 746, fol. 1. See Falconer Madden and H. H. E. Craster, *A Summary of Western Manuscripts in the Bodleian Library at Oxford* (Vol. 2.1; Oxford 1922) 535.

[45] The verse appears at the end of an otherwise unidentified Milanese manuscript of a *Sentences* commentary by the Augustinian Johannes de Basilea, according to an early eighteenth-century historian of the order: Dominico Antonio Gandulfo Genuensi, *Dissertatio historica de ducentis celeberrimis Augustinianis scriptoribus* (Rome 1704) 205.

[46] In an autograph manuscript of a number of Leblond's works (Avignon, BM 331, fol. 171v), a later hand—presumably a member of his order—wrote the verse. See *Catalogue général des bibliothèques publiques de France* (Départements, vol. 27, Avignon 1; Paris 1894) 244.

[47] The mention of these three occurs in a hypothetical constructed to answer a question about feudal relationships: 'Pone dux Batauie habet guerram contra ducem Burgundie. Rex Francie mandat quibusdam hominibus de Batauie ut ueniant secum contra inimicos suos. Dux similiter mandat eisdem ut ueniant secum. Queritur cui magis debent obedire', fol. 8va. Although it's not much to go on, the reference to an imagined conflict between the Dukes of Holland and Burgundy might help with future attempts to more precisely determine when the commentary was written.

distance for travel to and from a court appearance (X 1.3.28, fol. 14rb); asking what currency should be used to pay a fine if at the time of the violated statute's promulgation the Parisian 'livre' was employed, even if the 'livre tournois' was in circulation at the time of the actual violation (X 1.2.3, fol. 4vb); or using the Parisian archdeacon, who exercised jurisdiction over the University of Paris, as the model when discussing the powers of this office (X 2.1.18, fol. 54ra). The other geographical references are universally French, and almost all near Paris.[48] The University of Paris would thus seem like the probable location for a commentary with so naked a didactic structure. The strongest circumstantial evidence placing DMD at the University comes in the commentary on the bull of promulgation, *Rex pacificus*. Here the author reflects on why in Gregory's address formula he places the 'doctores' (the professors) in front of the 'scholares' (the students). According to our author, it is not only due to the superior dignity of the 'doctores', it is because—the example of Bologna not withstanding—the *Ius commune* holds that it is the 'doctores' who make the University, not the 'scholares'![49] Paris, of course, was the preeminent example of the masters' University in the medieval period.

Coming now to the question of the date: if we add to the jurisprudential evidence DMD's frequent citations of Boniface VIII's *Liber sextus* (1298), we come up with an early fourteenth-century date for the commentary's composition. The author's work may even straddle the 1298 divide, as shown by how he sometimes treats Innocent IV's Lyons I (1245) legislation as if it

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[48] These include Chartres, often mentioned in combination with Paris (X 1.3.28, fol. 14rb; X 1.3.34, fol. 16rb; X 1.9.5, fol. 31rb; X 1.22.4, fol. 35ra; X 1.29.4, fol. 37vb; X 1.31.9, fol. 39ra; X 2.13.16, fol. 47vb); Sens (X 1.31.9, fol. 39ra; X 2.1.18, fol. 44ra; X 2.6.2, fol. 45vb); Orleans (X 1.3.43, fol. 17va); and possibly Lyons (X 1.3.35, fol. 16va).

[49] Appendix lines p.184 lines 19-25. A similar but more condensed version of DMD's point about the 'doctores' making the University can be found in the *Rex pacificus* commentary of Bernardus Montemirato, who was himself channeling Vincentius Hispanus: *Lectura*, *s.v. doctoribus*, fol. 2ra. The Innocent III decretal alleged at the end of that passage (l. 60), X 1.2.11, was actually sent to the University of Paris.

were still an *extravagans*, rather than as fully integrated within the *Liber sextus* collection, which it would have been for someone whose formation came after 1298.[50] Any attempt to push the commentary further into the fourteenth century would have to explain away a number of key absences, which only grow more stark as the proposed date gets shifted later, including: 1. the lack of allegations for any post-1298 *extravagantes* or the *Constitutiones clementinae* issued in 1317;[51] 2. the failure to mention any *Liber sextus* commentaries, whether Johannes Andrea's or that of Johannes Monachus, whose gloss on the *Sextus* was more common in Parisian circles through much of the

[50] There are two occasions where the author reverts to the older way of treating Innocent's legislation (NB: the numbering for the Lyons canons used here is that employed by Norman Tanner's translation of the *Decrees of the Ecumenical Councils* (2 vols. Washington, DC-London 1990) 1.278-301; the latest edition of Lyon I's Latin text is in C*onciliorum oecumenicorum generaliumque decreta*, 2.1*: The General Councils of Latin Christendom*: *From Constantinople IV to Pavia-Siena (869-1424)*, edd. Giuseppe Alberigo and Alberto Melloni (CC; Turnhout 2013) 215-245. First, a full commentary on Lyons I c.9 *Exceptionis* (VI 2.3.1) is actually included in DMD after X 2.5.1 (fol. 45va). That if any of the Lyons legislation were singled out for commentary it would be *Exceptionis* is not surprising, since it provided valuable additional guidance for a procedural title that Raymond of Penyafort—borrowing from Roman Law—created specifically for the *Liber extra*, X 2.5 *De litis contestatione*, and which contained only a single text from Gregory IX. At least in *Decretals* manuscripts, however, the Innocent IV legislation (if it was included) was normally given as a separate section after Book V. The second throwback reference is when the author alleges Lyons I c.4 *Statuimus* (VI 1.6.1) according to its pre-*Liber sextus* form in his commentary on X 1.6.42 *Quia propter*: 'infra c. Statuimus innoc. iiii', fol. 21va. On the complicated textual history of the Lyons legislation, see: Peter-Josef Kessler, 'Untersuchungen über die Novellen-Gesetzgebung Papst Innocenz IV.' ZRG Kan. Abt. 31 (1942) 142-320, 32 (1943) 300-383, 33 (1944) 56-128.

[51] It should be noted that there are no pre-1298 'extravagantes' referenced either. On the 'extravagantes' in the the thirteenth century, see the series of studies conducted by Martin Bertram on the subject, concluding with: 'Die Extravaganten Gregors IX. und Innocenz' IV. 1234-54', ZRG Kan. Abt. 102 (2006) 1-44. There is a useful survey at the beginning of the article providing summaries of his prior studies as well as previous scholarship. On the *Clementinae*, see: Jacqueline Tarrant, 'The Manuscripts of the *Constitutiones clementinae*' ZRG Kan. Abt. 70 (1984) 67-133, 71 (1985) 76-146.

fourteenth century;[52] and 3. the absence of any opinions from canon law jurists subsequent to Abbas antiquus. The early fourteenth-century date will, thus, have to stand for the moment barring new information.

A vexing question about DMD is whether what appears in Paris, BNF lat. 3966 represents the entire work. This question should actually be subdivided to ask: 1. did the commentary end at the last canon treated on fol. 55v, X 3.12.1; and 2. given that the individual capitular commentaries become shorter and more intermittent after X 2.18, did the scribe deliberately skip over and/or abridge the material as he progressed? Internal evidence suggests that the answer to the first question is an emphatic no, and that the original work covered the entire *Liber extra*. Twice in the surviving commentary the author points forward to his discussion in the no-longer-extant books 4 and 5.[53]

Determining the extent of abridgment of the surviving text is more speculative. Up through X 2.19 (fol. 48v), the commentary only occasionally skips over canons: around 10%, or just 56 out of the total 579 canons contained in X 1.1 through X 2.19 are left out, and that number includes the 20 canons from the titles related to minor ecclesiastical offices (X 1.23-28) that the text seems to have purposefully breezed through.[54] The one curiosity surrounding the

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[52] On Johannes Andreae, see: Kenneth Pennington, 'Johannes Andreae's *Additiones* to the *Decretals of Gregory IX*', ZRG Kan. Abt. 74 (1988) 328-347; reprinted in *Popes, Canonists and Texts, 1150-1550* (Variorum Collected Studies Series 412: Aldershot, 1993) XIX. On Johannes Monachus, see: R. Naz, 'Jean le Moine ou Joannes Monachus', DDC 6.112-113.

[53] The first reference points the reader towards a more substantial discussion on the subject of agreements (pacta): 'unde cum queritur quod pactum sit seruandum bene tractatur infra de condi. appo. in c. Si condiciones [X 4.5.7], et ibi uidebimus ad plenum', X 1.35.7, fol. 40va. The second concerns X 2.20.21, which was one of two extracts taken from c.26 of the Third Lateran Council (1179), the other being found at X 5.6.5, which also bears the incipit *Iudaei sive Sarraceni*. Rather than append any commentary to X 2.20.21, the author simply gives the incipit, *Iudaei siue Sarraceni*, and directs the reader to look at what he terms the 'full' text: 'uide in decretali totum' (fol. 49va), by which he presumably meant the text at X 5.6.5.

[54] The scribe's (or commentator's) lack of interest can be gauged by how he condenses the title introductions to X 1.25-28, which cover the offices of

absent capitula is that on occasion, the commentary will include the incipit for a capitulum, only to move past it with some variation of the statement: 'nichil hic notatur'. Whether this is the commentary itself speaking, or the scribe observing the absence of text is unclear.[55] Starting at X 2.20 and for the remainder of the surviving commentary, the exclusion is more stark. Of the 415 canons contained in X 2.20-X 3.11, the commentary leaves out 217, or slightly more than half. The substance of the commentary changes as well, with the entries for individual capitula becoming dramatically shorter, sometimes only one or two sentences. This substantive change is mirrored by a similar shift in the paleographic and codicological character of the manuscript. In fact, well before X 2.20 the text evinces a much more cramped and rushed complexion, as if the scribe were trying to pack as much material in as the page allowed. Quire I (Ia) arranges the material in two neat columns of 42-44 lines, with generous spacing between the lines. In Quire II (IIa) the line count gradually creeps upwards from 44 (fol. 15r) to 58 (fol. 28r), and on occasion, the two columns will have varying line counts (e.g., fol. 23r: 47(a) 49(b); fol. 26v: 53(a) 57(b). By the end of Quire III (IIIa) the line count has ballooned to 68 lines per page. In addition, whereas through Quires I-II the scribe almost always started every capitulum on a new line—even when that meant leaving a portion of the previous line blank after the end of the preceding capitulum—in Quire III the scribe begins to abandon this practice, presumably to conserve space. By the last quire of DMD (Quire IV/IVa), the text is extremely crowded and messy: line numbering hovers in the high 60s to low 70s, and the margins are less than half what they were in the first quire. The preponderance of

'primicerius', 'sacrista', 'custos' and 'vicarius', respectively, into a single, continuous introduction on fol. 35rb-35va, without any of the capitula in these titles being covered.

[55] Most surviving *Decretals* commentaries offered full coverage of each individual canon, but a few from the late-thirteenth-century do not, like those of Bernardus de Montemirato and Boatinus. There is no crossover, however, between the texts skipped by these jurists and the DMD.

evidence thus suggests that the scribe was deliberately condensing the text of his own accord.[56]

Corrections to the text of DMD are minimal, and when they occur are in the hand of the scribe. They include occasional crossing out of words, and a smattering of marginal and supralinear additions. The first marginal addition—and also the longest—appears on the very first page (fol. 1ra), where the scribe had to go back and correct a case of homeoteleuton.[57] At the very least, this error shows he was working off of a written exemplar rather than from dictation or as a function of producing a 'reportatio' of a master's lecture. Overall the corrections reflect changes that were made by the scribe at the time of writing, and do not suggest subsequent proofing by a corrector.

Lectura arelatensis

Although in its present form the *Lectura arelatensis* (=LA) provides a narrower base than DMD upon which to evaluate it, the material included immediately identifies the work as a product of the mid-fifteenth century, and one of considerable erudition at that.[58] Unlike DMD, whose manifest didactic intent governed its tight structuring into 'distinctiones', the LA takes an expansive approach, proceeding 'per modum commenti', as it was

[56] It should be noted that the conclusion of the work presents some difficulties. The text breaks off without warning on fol. 55va at the end of the commentary on X 3.12.1 only a third of the way through the column, leaving blank the rest of that page (which Hand B/Blégier subsequently filled in with the *Allegationes* and the Philippe de Lévis letter), as well as the last leaf of the quire, fol. 56 (which is blank). In addition, a little more than halfway through the column on 55rb, the scribe began to leave generous spacing in between both the words and lines, suggesting that he foresaw the imminent end of his task and no longer felt it necessary to cram the text into the available space. Whether he had been too successful in conserving space up to that point, and now found himself with more than he needed, or whether some outside circumstance brought him to terminate the commentary mid-title, is beyond recovery at this point.

[57] See Appendix p. 183 lines 2-8 n.15.

[58] The categorization of the work as a *Lectura* is based on the text's (or perhaps scribe's) own self-designation in the prayer appended at the end of the Book I commentary on fol. 61ra. On this prayer and its significance, see below n.69.

sometimes known.[59] The structure of the LA is essentially that of the better known commentaries of the late fourteenth and fifteenth centuries, like those of Antonius de Butrio (†1408) or Panormitanus (†1445). LA borrows from both of them. Each title is introduced with a succinct definition of the material under discussion along with cross references in Roman Law and other canonical sources.[60] The commentary for the individual canons follows the quadripartite division that had become standard by the fifteenth century: 1. a pointed summary of the law, usually adapted from Panormitanus;[61] 2. the so-called 'communi divisiones' indicating the different sections of the decretal; 3. a series of 'notabilia' highlighting significant themes at the outset; and finally, 4. the commentary proper presenting a broad range of practical and theoretical problems raised by the text.

The range of jurisprudence cited in the LA is impressive. Unlike DMD, which only includes jurists from the thirteenth century, the LA surveys the entire jurisprudential landscape from which it emerged, up to and including recent canonists like Panormitanus, Johannes de Imola, and Antonius de Butrio. When

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[59] For a concise take on the different character of commentary 'per modum commenti', which over the course of the fourteenth century would largely supplant the traditional 'apparatus glossarum' style of pinning commentary to specific 'lemmata' in the base text, see Stephan Kuttner, 'Johannes Andreae and his *Novella* on the Decretals of Gregory IX', *The Jurist* 24 (1964) 393-408 reprinted in *Studies in the History of Medieval Canon Law* (Variorum Collected Studies Series 325: Aldershot, 1990) no. XVI, 404-405.

[60] From the few examples we have, the LA's title introductions look like they use Antonius de Butrio as a base fleshed out with additional material from Panormitanus. Here, for example, is the LA's introduction to X 1.38 *De procuratoribus*: 'supra uisum est de postulando et de aduocatis. Nunc autem uidendum est de officio procuratoris. Quid autem sit procurator? Dic quod est ille qui mandato domini aliena negocia gerit ut in l.i. ff. de procu. Et de materia huius rubrice habetur v. q.iii. per totum, et iii. q.vii. c.i., et repetitur in vi. et cle.', fol. 79ra. The definition of a 'procurator' is that of Panormitanus but the cross-references are all those given by de Butrio (though note that de Butrio's teacher, Petrus de Ancharano, also gives the same series of cross-references).

[61] These summaries would by the end of the fifteenth century be inserted into the body of the text as rubrics in printed editions of the *Decretals*. The first example known to the author is from a Venetian edition printed June 23, 1491 (GW 11481).

alleging parallel material from the *Liber sextus*, it regularly references both Johannes Andreae's and Guido de Baysio's (Archidiaconus) commentaries on the collection, often giving the incipit of particular glosses. The detailed asides devoted to civil law, along with citations of the *Corpus iuris civilis* commentaries of jurists like Bartolus de Sassoferrato, Jacobus Butrigarius and Baldus de Ubaldis suggests a level of training consistent with someone licensed 'in utroque iure'. The author also demonstrates an interest in works outside the narrow spectrum of commentary literature, citing, for example, Johannes de Legnano's (†1383) *Tractatus de iusto bello* (X 3.1.2, fol. 61vb).

At present it is impossible to determine whether the original LA was more extensive than what we now possess, which currently covers the last few titles of Book I (X 1.36-43) and the beginning of Book III up through X 3.3.6.[62] According to the current misordering of the quires, the first leaf of the LA on fol. 57r cuts in midway through its commentary on X 1.43.2.[63] Quire VI (Va fol. 69-80), however, represents the first surviving leaves of the work, though even here fol. 69 drops us in the middle of the LA's commentary on X 1.36.1, and thus, we have no way of knowing how much of Book I the commentary originally covered. We are also in the dark about whether the LA included commentary on Book II. If it ever existed, the scribe, Guillaume Blégier, made a deliberate decision to exclude it, as the Book III commentary begins immediately following that of Book I midway through the column on fol. 61ra. The ending is similarly abrupt. It terminates in the middle of fol. 96rb, leaving blank the remaining one and a half pages in Quire VIII (IXa). The sudden break after X 3.3.6, along with Blégier's decision to opt for a ternion on the final quire (as opposed to the seniones that make up the rest of the LA), might suggest that he had intended to end his

[62] Given that the surviving 50 folia of text comprehends just 5% of the total number of capitula in the *Decretals* (95 out of 1971), if the LA originally treated the entire collection it would have been a massive work.

[63] See tables 1 and 2 above for a comparison between the original and actual quire ordering.

transcription where it currently breaks off.[64] Whether this reflects the actual end of the commentary, however, is unknown. Unlike DMD, which evinces a steady degradation in its style and formatting consistent with a scribe rushing his work to a premature conclusion, the LA is paleographically consistent, if difficult to read throughout, and there is no evidence that Blégier condensed any of the material.[65]

Taking the completion of Panormitanus' commentary on the *Decretals* as a 'terminus post quem', we can be confident about placing the LA in the second or third quarter of the fifteenth century.[66] More specific information about the identity and

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[64] It is possible that Blégier may have left the X 3.3.6 commentary incomplete. The text occupies only around half a column, which is unusually short—if not entirely unprecedented—compared to the more extensive discussions provided for previous capitula. Moreover, it consists only of *notabilia*, foregoing the detailed interrogation that was normally the heart of each capitular commentary. On the problems with Quire VIII (IXa), which was a shorter ternion rather than a senion like the other quires, see above, n. 11. Note that while this is the last material Blégier transcribed from the *LA*, the misordering made Quire IX (VIIa, fol. 97-108), which covered X 1.40.3-X 1.43.2, the final text in the manuscript.

[65] Blégier was overall a careful, though at times barely legible scribe, and so there are few corrections to the text other than the occasional crossed-out word. The one paleographic oddity consists in four, multiple-line blank spaces left in the text at fol. 61ra (10 lines), 66va (4 lines), 75vb (8 lines), and 79ra (18 lines). The one on fol. 61ra marks the transition between Books I and III, and so was probably left for the later insertion of decorated capitals containing the incipit of X 3.1.1 *Ut laici*, which Blégier penned into the intervening space as guide words. The remaining three are more obscure. That on fol. 79ra separating titles X 1.37 and X 1.38 could perhaps be justified as occurring at another moment of transition, though there are no other instances of inter-title separation. Those on fol. 66va and 75vb, however, occur in the middle of the capitular commentaries of X 3.1.16 and X 1.36.11, respectively. Blégier did draw a line through each blank space, as if to indicate that they should not be filled, and on fol. 75vb he actually wrote *nichil defficit* in the center.

[66] On Panormitanus' *Lectura*, see: Kenneth Pennington, 'Panormitanus' *Lectura* on the Decretals of Gregory IX', *Fälschungen im Mittelalter: Internationaler Kongress der Monumenta Germaniae Historica München,16.-19. September 1986*, Teil 2: *Gefälschte Rechtstexte: Der bestrafte Fälscher* (Schriften der MGH 33.2: Hannover, 1988 reprinted in *Popes, Canonists and Texts* (Variorum Collected Studies Series 412: Aldershot, 1993) XXII. See also Pennington, 'Nicholaus de Tudeschis (Panormitanus)', *Niccolò Tedeschi*

background of the author, or the place or composition, must await more extensive research into the text, and particularly its relationship to prior jurisprudence. In the meantime, we can offer here two points of reference to guide this research.

There is a close relationship between LA and Panormitanus. The Abbas Modernus is not only the most frequently cited jurist in the LA (followed not far behind by Johannes de Imola), but our author regularly appropriates Panormitanus' language, often without attribution. It is certainly true that canonists after Panormitanus almost by necessity operated in the long shadow cast by his impressive work, especially when it came to the more formulaic elements, such as the summaries and rubrics that opened each capitular commentary. LA, as already noted, follows this pattern—but the appropriation extends much deeper still. The following excerpt from the LA's commentary on X 1.37.3 *Cum sacerdotis*—in a passage on how an advocate should weigh conflicts of interest when they involve family and civic duty—offers a good illustration:

> *Lectura Arelatensis ad* X 1.37.3, fol. 78vb-79ra
>
> Hic extra glosam quero quid si est contensio inter patrem et patriam alicuius, an pocius teneatur iuuare patrem quam patriam. *Spec. tit. de aduo. § i. in effectu concludit quod tunc potest esse aduocatus contra patriam et iuuare patrem; arg. l. Veluti ff. de iusti. et iu.* (Dig. 1.1.2) *ubi prius nominantur parentes quam patria. Et hoc dicit uerum esse quando pater* [pater: *bis script. est*] *pretendit habere iustam causam*; alias contra conscienciam non deberet ipsum iuuare ne edifficet in gehennam, ut in c. litteras de resti. spo. (X 2.13.3).
>
> Panormitanus, *Lectura ad* X 1.37.3[67]
>
> Numquid possit quis aduocare contra patriam et genitorem, et numquid teneatur quis potius patrocinari pro patria quam pro genitore vel econtra, *vide in Spec. in tit. de aduoc. § i vers. Sed quid si pater hostis, et sequenti. Et in effectu concludit quod potest esse aduocatus contra patriam.* Pro

(Abbas Panormitanus) e i suoi Commentaria in Decretales, ed. Orazio Condorelli (Roma 2000) 9-36.

[67] Nicholas de Tudeschi, *Secunda Panormitani in primum decretalium* (Lyon, 1527) fol. 207vb.

> hoc facit l. pen. ff. de iust. et iur. (Dig. 1.1.11); et l. ii. C. de advo. diver. iudi. (Cod. 2.7.2), ubi certae personae prohibentur, ergo aliis permittitur. Item concluditur quod potius tenetur iurare patrem quam patriam, *arg. in. l. Vt vim ff. de iust. et iur.* (Dig. 1.1.3)*, ubi prius nominantur parentes quam patria. Hoc dicit esse verum quando pater praetendit iustam causam,* alias si esset rebellis patriae debet filius insurgere contra patrem. Unde si pater est bannitus, ita ut possit impune occidi, potest filius eum impune occidere, ut in l. minime et ibi Bar. ff. de reli. et sump. sunt.

There are other instances where LA is similarly indebted to Panormitanus, but as this passage demonstrates it is not a slavish dependence. He is able to digest Panormitanus' language and insert it into a matrix of his own design. LA's use of Panormitanus should, therefore, be front and center in any attempt to reconstruct its intellectual milieu.[68]

The second guidepost comes from the prayer that concludes the Book I commentary on fol. 61ra.[69] This prayer is responsible for the name of LA, as it is a unique moment of self-referencing where the commentary is actually termed a 'lectura'. Besides the genre designation, what interests us are the saints whose aid is summoned: after the Holy Trinity and the Virgin Mary, the prayer calls upon St. Augustine and St. Jerome. The invocation of this duo would fit well with someone who was a member of the Austin

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[68] It is unclear whether we should take it as anything more than ironic coincidence that Guillaume Blégier, who was mentored as a young cleric by the Cardinal Louis Aleman and would later become a trusted official in the latter's Archdiocesan administration at Arles, would choose to copy the work of the Cardinal's most inveterate opponent at the Council of Basel.

[69] 'Nota igitur actus nostri in rectam finem tendentes more <pec***> collisi in supernii iudicii expirant instancia, sed sua diuina suffulti cooperant gracia pro bene meritis misericordente tota celesti hierarchia mereamur adipisci paradisi gaudia amen, ineffabiles gratiarum acciones supplici corde persoluens indiuidue Trinitati, Patri, Filio et Spiritui Sancto, Virginii gloriose, sidereo patro Augustino, Hieronimo totique celesti collegio quorum suffultus [collegio: *cancellat. est*] presidio fuerit lecture concipere pro meriti in hoc decretalium primo, etc.', fol. 61ra. The grammar of the initial part of the prayer is suspect, and Blégier's at times inscrutable writing frustrates the proper transcription of at least one word, but the general sense of the prayer is clear.

friars or even a regular canon, and so subsequent searches for the author should look in this direction.[70]

Conclusion

With these two *Liber extra* commentaries brought back into the light, there are two paths going forward for future research. The first runs through the commentaries themselves. *Deduc me Domine* can hardly be described as a towering work of genius and originality, but its presumed location in time and space—at the University of Paris at the turn of the fourteenth century—makes it as valuable as one of the earliest examples for how the teaching and interpretation of canon law would shift in the wake of Boniface VIII's *Liber sextus* (1298). We know a great deal about canon law instruction at Paris in the fifteenth century thanks to the wealth of administrative and curricular records published by Marcel Fournier and Léon Dorez, but we are much less informed about the previous century, and are therefore more reliant on working backwards from the commentaries of that era.[71] DMD can help bridge the textual gap in the French decretalist tradition that exists for the early fourteenth century between the luminaries

[70] It cannot be ruled out completely that Blégier himself isn't the author of this prayer. It is formally structured as a 'notabilium', and is written in line with the body of the text, but paleographically it does stand out slightly. Begun on a new line (albeit with no blank space left in the previous one), the words are slightly more cursive in form, and are offset a few milimeters closer to the spine, almost as if Blégier wrote it only after having put down his pen for some amount of time at the conclusion of X 1.43.14. As will be detailed in Appendix I, Blégier was a cathedral canon of the church of Vaison, which might account for his Augustinian sympathies. It should also be noted that in 1462, a chapel in the Arles metropolitan Church was dedicated to St. Jerome and St. Francis through a bequest of the Archbishop Pierre de Foix, with whom Blégier worked closely as the archdiocesan vicar, and for whose last will and testament Blégier would serve as executor only two years later (*cf.* Appendix I, n.12).

[71] Marcel Fournier and Léon Dorez, *La faculté de Decret de l'université de Paris au XVe siècle* (3 vols. Paris, 1895-1913). On the challenges of accessing the practice of canon law instruction in the fourteenth century, see: Edouard Fournier, 'L'enseignement des Décrétales à l'université de Paris au Moyen Âge', *Revue d'histoire de l'Église de France* 26 (1940) 58-62.

of the previous generation like Hostiensis and Durandus and mid-fourteenth-century figures like Henri de Bohic. On the other hand, as incomplete as the *Lectura arelatensis* is, it can still reveal how canonists integrated the imposing achievement of Panormitanus, who, since Schulte, is usually thought of as the last great medieval canonist.[72] A thorough investigation of the LA's contents to determine the locale of composition, and if possible, its author, should be a high priority.

The other path runs through Guillaume Blégier himself, the metropolitan administrator and 'doctor decretorum' who copied the LA and was the possessor of the manuscript. What was he doing with such an idiosyncratic and incomplete amalgamation of new and old canonistic doctrine? It is surely no mere coincidence that these texts were copied out within a few years of his elevation as a 'doctor decretorum', which took place between mid-1457 and 1459 according to the documentary evidence examined in Appendix I—but are the commentaries connected to his activities as a student, or are they the work of someone preparing to teach the subject? If his longstanding ties to the University of Avignon persisted into the 1450s, which included not just his attendance in the 1430s but also organizing a papal-backed reform of the Collège d'Annecy in 1447 (*cf.* Appendix), it could provide us with an intellectual profile of an individual connected with the canon law faculty at the exact moment when the University was engaged in a constitutional debate about their role in the 'studium generale'.[73] The *Allegationes* indicated that he was looked to by

[72] 'Uber sie [i.e., die Schriften der Panormitanus] sind die Späteren nicht hinausgekommen, haben sie vielmehr nur ausgebeutet', Schulte, *Geschichte* 2.313.

[73] In addition to his other important studies of the University of Avignon in the fifteenth century, Jacques Verger has resurrected an important moment in 1459 when there was an ultimately failed attempt to reform the University's governance to address concerns expressed both by the other faculties and the urban elite about the canon law masters' monopoly on power within the *studium generale* as well as their undue influence in the broader community: 'L'Université, la ville, les mendiants. La réforme manquée de l'université d'Avignon en 1459', *Puer Apuliae: Melanges offerts à Jean-Marie Martin*, edd. Errico Cuozzo et al. (2 vols. CNRS Centre de Recherche d'Histoire et Civilisation de Byzance, Monographies 30; Paris 2008) 745-755.

contemporaries—at least within the provincial orbit of Arles—as a trusted legal authority. The Arles metropolitan and University of Avignon archives may yet reveal a wider influence.

Adelphi University.

Appendix I: *The Ecclesiastical Career of Guillaume Blégier*

Guillaume Blégier entered upon his ecclesiastical career as a cleric from the diocese of Vaison, but rose to become a powerful figure in the metropolitan province of Arles. Whether as a result of precocious ability, or simply on the basis of family connections—an eponymous relative was provost of the Vaison cathedral chapter in the early fifteenth century[1]—Blégier was put into service as a young cleric by the Cardinal and Archbishop of Arles Louis Aleman (1424-50), joining the Archbishop's household in 1424 as 'procurator fiscalis'.[2] The first record of his actual service for the Cardinal doesn't come until 1431, when we find him witnessing a 'vidimus' charter recording some late thirteenth-century privileges from the archives of Arles, where he is identified as a 'baccalaureus in decretis', in addition to being the Archbishop's 'procurator fiscalis'.[3] In December of that same year Blégier was among the nineteen students admitted as the inaugural student body of the Collège St. Nicholas d'Annecy at the University of Avignon, recently endowed through a testamentary bequest by the Cardinal de Brogny (d. 1426), the previous Arles metropolitan.[4] Blégier would receive the 'licentia

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[1] A Guillelmus Blegerii (*al.* Berigerii) is listed as a chapter official at Vaison as far back as 1395, and specifically as provost in documents ranging from 1402 to 1421: GC 1.939. His exact relation to our scribe is unclear (uncle? father?), but that there is a blood relation cannot be doubted given that the younger Blégier would become the Vaison sacristan. The elder Blegier was notably connected to the Antipope Benedict XIII, who in 1402 made Blegier prefect of the 'castrum' and 'castellania' of Vaison.

[2] Blégier's service to the archbishop can be tracked through the archiepiscopal account registers, which list annual payments to all the members of the household: Archives Départementales, Bouches-du-Rhone, III G: Archevêché d'Arles, comptes. This author has not examined the unedited registers, but in his comprehensive study of late- medieval Arles Louis Stouff happened to provide a number of relevant data points for Blégier's career from the document, such that we can use it to supplement the edited sources: Stouff, *Arles* 1.194.

[3] GC 3.799, no. 1874.

[4] Marcel Fournier, *Les Statuts et privilèges des universités françaises* (Paris 1891) 2.408 no. 1314. On the foundation of the Collège, see: Julien Coppier,

docendi' from the University sometime between August 1435—the date of the last document referring to him as 'baccalarius',[5]—and January 1438, when he is first mentioned as 'licentiatus in decretis'.[6] Blégier would remain closely tied to the Collège throughout his career, and in October 1447 received a special commission from Pope Nicholas V (1447-55) to issue a revised set of statutes for the institution.[7] Even before he had secured his degree, however, he had begun his ascent to more powerful ecclesiastical offices—a set of reform statutes for the metropolitan church from 1433/4 lists Blégier now as the sacristan of Vaison.[8]

It is unclear how much Blégier's close association with the Cardinal d'Aleman hurt him when Louis was removed as the Arles metropolitan by Eugenius IV in retaliation for the Cardinal's opposition at the Council of Basel. The papal sentence took some

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'Jean de Brogny et la fondation du collège Saint-Nicolas d'Annecy à Avignon', *Revue Savoisienne* 148 (2008) 239-259.

[5] Blégier supervised the collection of a tax on benefices within the archdiocese to pay for a clock for the town of Arles that was a pet project of the Cardinal d'Aleman: GC 3.1181 no. 2970. In the previous year Blégier was also among those assembled for an Archdiocesan synod to hear the reform statutes issued by the Cardinal for his province: ibid. 3.799 no. 2696.

[6] Ibid. 3.804 no. 1890. The document is a letter dated January 28, 1438, addressed by the Cardinal from the Council of Basel to '*Guillelmo Blegerii, licentiato in decretis, officiali nostro Arelatensi'* and a couple of others to deal with some jurisdictional conflicts over archdiocesan land. Blégier's position as Arles' 'officialis' meant he exercised a major role in the ecclesiastical courts; on the office of 'officialis' in France, see Charles Donahue Jr. and Sara McDougall, 'France and Adjoing Areas', HMCL 3.300-343. As a side note, it is poignant to see the Cardinal d'Aleman, who was at that moment embroiled in one of the most momentous constitutional debates in the history of the Church, attending to the mundane affairs of his See only four days removed from the Council having suspended Pope Eugenius IV (January 24, 1438). On Louis' role at the Council, see: Gabriel Pérouse, *Le Cardinal Louis Aleman, Président du Concile de Bâle, et la fin du grand Schisme* (Paris 1904).

[7] Fournier, *Statuts* 2.426-437 no. 1339. In the document, Blégier is identified as both the sacristan and a canon of Vaison, which is the first time he was labeled in the evidence surveyed thus far as a member of the Vaison chapter. There is no mention in the document of his possessing any official status at Arles, however.

[8] GC 3.1181 no. 2969. The editor was not able to provide a date more precise for the statutes than March 1433 or 1434.

time to implement due to local support for their erstwhile archbishop, and at least for the first few years the archiepiscopal account registers show Blégier continuing to serve as 'procurator fiscalis', but there is otherwise no charter evidence for Blégier's activities between 1438-1446.[9] Louis would eventually be restored as the Arles metropolitan in 1449 by Pope Nicholas V in gratitude for facilitating the abdication of Antipope Felix V. If a reconciliation with the Pope had been necessary, Blégier had already performed it independently of the Cardinal, judging by the above-mentioned October 1447 commission to his alma mater.

Upon the Cardinal's death in 1450, Blégier took the lead in shepherding the Archdiocese through the period of 'sede vacante', a role he would periodically assume in subsequent decades during changes in the archiepiscopal regime. The acts of the October 1450 metropolitan synod record him presiding over the gathering as 'vicarius et officialis', having been chosen by the Arles cathedral chapter for this position.[10] The election of Pierre de Foix as the new archbishop of Arles in 1450 brought no diminishment in Blégier's role in the metropolitan church. When his name crops up in documents during the tenure of the Cardinal de Fuxo, as Pierre was popularly known, Blégier continued to be identified variously as 'officialis, vicarius' or 'vicarius generalis' of the Archdiocese.[11] He seems to have developed a bond with the Cardinal de Fuxo comparable to what he had had with Louis Aleman, and he would end up helping to oversee the execution of the Cardinal's pious bequests. Although he is not mentioned in the 1462 charter authorizing the endowment of the chapel to St. Jerome and St. Francis in the Arles cathedral, given his role in the archdiocese we can probably assume he was involved in some

[9] Pérouse, *Cardinal Louis Aleman* 470. Pérouse's information is based on the archiepiscopal accounts mentioned above in n.2. A closer scrutiny of the registers may in the future reveal some additional details about what Blégier was doing in this period.
[10] GC 3.1293-1294 no. 3342.
[11] Ibid. 3.823 no. 1919, 3.858 no. 2000, 3.865 no. 2004, 3.1186 no. 2997, 3.1186 no. 2999.

fashion with this project.[12] Blégier was, however, listed in 1464 as both witness and executor of Pierre's will, which distributed to members of the Archdiocese the property remaining after the Cardinal's endowment of the Collège de Foix in Toulouse.[13] At the same time, he remained a champion for the Cardinal d'Aleman's legacy, and participated in the collection of miracle stories that began to be assembled soon after the Cardinal's death to make the case for beatification.[14]

The first mention of Blégier as a 'doctor decretorum' occurs in 1459, when this title appears next to his name in a line-item in the archiepiscopal account registers.[15] This means that he had been awarded his doctorate sometime in the previous two years, as the next oldest mention of Blégier comes from May 1457, where he is still identified as 'in decreto licentiatus'.[16] If we assume he was in his early to mid-twenties when he first enrolled in the Collège d'Annecy in 1431, he would have received his doctorate in his late 40s or early 50s, a very ripe age for the reception of this distinction. It is unclear whether this award was due to some additional, formal academic endeavors on his part, or whether—as occasionally happened in this era—it was simply

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[12] GC 3.867-868 no. 2012. On the potential significance of St. Jerome for the authorship of the LA see above in the main text n. 69.

[13] Léon-Honoré Labande and l'Abbé Requin, 'Testament du Cardinal Pierre de Foix (3 Août 1464)', *Bulletin historique et philologique du comité des travaux historiques et scientifiques* (1899) 274-298. Blégier's name is recorded among the executors on p. 296 and the witnesses on p. 297.

[14] GC 3.822-823 no. 1919. One of the stories recounts the tale of a monk from a monastery near Nice, who claimed that after cursing the deceased Cardinal as the 'causa de la division de laGleysa', he was struck with an illness similar to leprosy. Realizing that the Cardinal must have sent the affliction from beyond the grave, the monk made a pilgrimage to Louis' gravesite, where he was instantly cured. He immediately went and reported his miraculous recovery to Blégier and a few others, who were now bearing witness in this report that the monk had vouched for his account with a solemn oath. Louis was eventually beatified in 1527 by Clement VII. For the bull announcing the beatification, see: Petrus Saxius, *Pontificium arelatense seu historia primatum sanctae arelatensis ecclesiae* (Aix-en-Provence 1629) 356-358.

[15] Stouff, *Arles* 1.194. The first public act referencing Blégier possession of a doctorate is the 1461 miracle story mentioned in the previous note.

[16] GC 3.865 no. 2004.

made in deference to the prestige of his family background or his prominent position in ecclesiastical administration. Certainly, the one composition indubitably written by Blégier, the *Allegationes* on fol. 55v, is not the work of a *poseur*, and within the albeit limited parameters of the form it does suggest a basic jurisprudential competence and facility with the broad range of Roman and canonical sources that had to be mastered by a *doctor decretorum*. The conferral presumably came from the *doctores* in Avignon, but there is as yet no record of if and when it happened at this or any other French University for which edited records survive from this era.

Blégier continued to figure prominently in diocesan administration through the pontificate of the Cardinal de Fuxo's successor, Philippe de Lévis (1464-1475), though the record of his activities is sparse. We find him still serving at the highest levels of diocesan administration in 1468, when as *vicarius generalis in spiritualibus et temporalibus tocius archiepiscopatus Arelatensis* he convoked a meeting of the chapter to elect the successor of a convent subject to the metropolitan church.[17] The last documentary trace comes two years later in 1470, when Blégier—now identified just as the Vaison sacristan—along with three named but otherwise unknown individuals received a 'procuratio' payment from Archbishop Philippe in exchange for servicing some of Philippe's seigneurial rights.[18]

There could well be additional archival materials that would illuminate other aspects of Blégier's career, and particularly the extent of his work as a jurist. Besides the Arles metropolitan archives referenced above, his continued connections with the University of Avignon and the Collège d'Annecy may emerge

[17] GC 3.873 no. 2028.

[18] Ibid. 874 no. 2029. It should be noted that the GC index entry for Guillaume Blégier (3.1420) seems to reference the existence of a 1484 document, when Blégier would have been in his mid to late 70s, if he were even still alive. There is no document mentioning his name later than 1470 in the volume, however, raising the possibility that the entry is erroneous.

from extant archival material from the fifteenth century related to the institution.[19]

Appendix II: *Prologue and commentary on Rex pacificus of Deduc me domine, fol. 1ra-3ra*

The orthography of the text is preserved, except for the standard capitalizations of names and legal incipits, as well as the use of 'V' as the first letter of a sentence or as a numeral. Excepting the legal allegations, all abbreviations have been expanded. More significant errors, i.e., ones for which the proper reading is not evident, will be enclosed within the siglum †. As is common with many manuscripts, the first few folia of BNF lat. 3966 contain a fair number of wormholes and effaced words, which will be indicated inside brackets < >, with conjectural readings where possible, and <***> for the few cases when not. Scribal deletions are relegated to the apparatus. Paragraph divisions and punctuation have been introduced for the sake of clarity. A larger font indicates the scribe's use of block capitals for the incipit.

Sigla:
†exemplum† significant corruption in the text
<exemplum> lacuna along with conjectural reading
<***> lacuna for which there is no conjectural reading
[D] missing initial capital

[19] We possess a continuous series of enrollment records for the University of Avignon from 1430 to 1512, which are located in the Departmental archives of Vaucluse under the shelfmarks D 133, D 134 and D 135. These records have been described by Jacques Verger, 'Les comptes de l'Universié d'Avignon, 1430-1512', *Les universités à la fin du Moyen Âge*, edd. J. Pacquet and J. Ijsewijn (Publications de l'Institut d'études médiévales, 2e série, textes, études, congrès 2; Louvain 1978) 185-200.

‖**fol. 1ra**‖ [D]educ me Domine in semita mandatorum tuorum, quia ipsam uolui.[1] Istum uersum dico ad inuocandum nomen Domini, sine quo nichil boni operatur, et quod nomen domini in principio cuiuslibet operis prius sit inuocandum quam opus ingrediatur probatur infra de testi. c. In nomine domini,[2] et in multis aliis iuribus. Vnde iste uersus diuiditur in duas partes, in quarum prima ponitur inuocacio, in secunda ponitur inuocationis racio, ibi 'quia ipsam uolui, etc.' Et quod semita Domini sit inquirenda legitur Sapientia uersu c.[3] et in Prouerbiis quando dicit 'dirige gressus meos, etc.'[4] Et semita hic ad presens interpretatur sciencia canonica quam uolo scire. Vnde et bene dicitur in uersu 'uolui,' quia ex uoluntate quis consequitur meritum, et non ex necessitate. Et quod ex uoluntate probatur infra de accu. Qualiter;[5] et quod ex neccesitate quis non consequitur meritum probatur infra de regul. iuris Qui ex timore, etc.[6] Et istud sufficiat pro inuocacione domini nominis, quod nobis prestare dignetur, etc.

[G]regorius. Queritur hic quare uocatur Gregorius, cum ante fuisset papa uocabatur Hugulinus. Soluo: multiplex potest esse racio, quarum una est propter consuetudinem. Et quod usus siue consuetudo sit obseruandus probatur infra de consue. c. Consuetudinis[7] Item alia racio est quia omnis Christi accio nostra est instruccio. Sed Christus ita <aga>t, scilicet quod uocauit Petrum de eo qui antea uocabatur Symon, et quod ita sit in proposito probatur infra de elec. c. Significasti.[8] Vel alia potest esse racio, quia effectus est nouus homo, ut infra ut ec. be. sine di. confe. c.unico.[9] Vel alia potest esse racio, quia possibile esset quod ante haberet nomen turpe, etc. Item queritur unde dicitur Gregorius. Dic quod dicitur a gregos geret,[10] quod est uigilare latine, unde papa debet uigilare circa ecclesias, quia nomina

8 inquirenda] adquirenda MS

[1])Ps 118:35 [2])X 2.20.2 [3]) Wis 14:3 [4]) Prov 3:6 [5]) X 5.1.17 [6])X 5.41.8 [7])X 1.4.9 Cum consuetudinis *recte* [8])X 1.6.4 [9])X 3.12.1 [10])*cf.* Johannes Andreae *et* Panormitanus *ad* Rex pacificus, *qui alteram etymologiam nominis Gregorii praebent*, *scilicet* 'gregos regere'

debent esse consonancia rebus, ut Insti. de dona. c.iii. § Est et aliud;[11] et xxi. di. Clericos;[12] et infra eodem Sane.[13] Item uidetur quod non debet dici Gregorius, quia nemo debet prefere humanam pietatem diuine pietati. Vnde ergo dum nomen habet a Deo, scilicet hoc nomen papa, uidetur quod non debet assumere sibi aliud nomen, et si faciat tunc prefert humanam pietatem pietati diuine. Soluo: dico quod papa non assumpsit sibi aliud nomen animo preferendi humanam pietatem diuine. Sed quia uoluit capere similitudinem Dei, quia quando Deus assumpsit Petrum in apostolum, ||**fol. 1rb**|| tunc appellabatur Symon, ut <***>actum est, et postea <quod> ingressum apostolatus baptizatus fuit Pe<tr>us, 'et super hanc, etc.'[14]

Item que<ri>tur quare uocat se 'episcopum'. Dicit quod racio est quia propter excellentiam, cuius simile dicitur de Paulo, quia ubicumque <***>ls ibi intelligitur Paulus, etc. Vel alia potest esse racio, scilicet propter humilitat, quia Dominus quem tenetur imitari fuit humil<e>m omnium. Vel alia p<otest> <ess>e racio, quia episcopus est nomen g<eneralem> ad papam et cardinalem et archiepiscopum, quia <con>sequitur si papa uel si cardinalis uel si archiepiscopus sicut quod sit episcopus et non econtra, ideo etc. Item queritur unde dicitur episcopus: ab 'epy' quod est supra et 'copin' grece, quod est intendere latine, quia tenetur intendere ecclesie, ut infra de uo. et uo. re. c. Magne.[15] Et quod episcopus sic supra alium facit ix. q. iii. Cuncta, etc.;[16] et infra de elec. Licet.[17]

Item queritur hic quare dicitur 'seruus'. Racio est quia seruit ecclesie sibi acquirendo sicut seruus domino, et maxime quia seruire Deo require est pariter et dominari. Et ut aliis exemplum tradat: q<uia> quod a prelatis agitur facile trahitur ab alio in exemplum, ut infra de uo. in c.Magne.[18] Item queritur unde dicitur seruus. Dic quod

8 diuine] Item uidetur—pietatem diuine *add. marg. ad corrigendum homoeoteleuton* 10 baptizatus] baptizatus est Petrus^{ac}

11) Inst. 2.7.3 12)D.21 c.1 13) Infra § Sane 14)Mt 16:18 15)X 3.34.7
16) C.9 q.3 c.17-18 17)X 1.6.6 18)X 3.34.7

a seruiendo quia seruit ecclesie, uel a seruando quia seruat nos et custodit. Item queritur quare dicit seruorum Dei, etc. Dic quod propter humilitatem, quia 'qui se exaltat humiliabitur, etc.'[19] Vel alia potest esse racio ad differenciam paganorum et infidelium, quia non sunt serui Dei, et maxime quia de hiis que foris sunt nihil ad nos, ut infra de diuor. Gaudemus.[20] Sed contra hoc apparet infra de iudeis c. In nulli<s>,[21] et c. Sicut iudei,[22] ubi papa coherat iudeos et eis immunitatem prestat, et tamen non sunt serui Dei; et secundo q<uod> <iude>is non sunt Dei falsum est, immo sunt Dei quantum ad cohercionem et quantum ad hoc, quod a christianis non male tractentur, ut in contrariis, etc. Item queritur quare non dicitur seruus dominorum. Racio est quia tunc esset quod <habere>t superiorem se in terris, etc. quod est falsum. Immo super omnes est, ut xxi. di. Occulos,[23] et c. Clericis.[24]

Item queritur hic quare dicit 'dilectis filiis'. Racio est quia si scriberet ad episcopos et cardinales, ipsos appellaret fratres; et similiter si aliquis de cardinalibus essent dyaconi uel non, ipsos appellaret fratres, ut infra de offi. le. c. Officii.[25]

Item queritur hic quare papa premittit doctores scolaribus. Racio est quia doctores sunt digniores ipsis scolaribus, ||**fol. 1va**|| ut infra de ma. et obe. Constituimus.[26] Et uidetur quod scolares debent preferri, quia scolares faciunt uniuersitatem bononye et non doctores. Soluo: hoc non est uerum de iure communi, ymmo semper de iure communi doctores faciunt uniuersitatem et non scolares, et quod doctores debeant premitti <scolaribus> <pro>batur infra de consti. c. Ex litteris.[27] Item queritur quid prodest alicui quod sit scolaris. Dicit quod multis <mo>dis prodest. Uno modo quia si pater dederit filio scolari aliquas res, non tenetur filius ille post mortem patris computare

17 uel] *om.*[ac]

[19)]Luke 14:11 [20)]X 4.19.8 cf. 1Cor. 5:12 [21)]X 5.6.15 In nonnullis *recte* [22)]X 5.6.9 Sicut iudeis *recte* [23)]D.21 c.2 vel c.3? [24)]D.21 c.1 *recte* [25)]VI 1.15.1 [26)]X 1.33.15? [27)]X 1.2.11

illas res in rebus hereditariis, ut ff. fa. her. l. Qui pater.[28] Item iuxta hoc queritur: pater dedit filio scolari emancipatio; queritur utrum tenetur post mortem patris computare illa bona in rebus hereditariis. Quidam dicunt quod tenetur, ut in l. proxima preallegata.[29] Alii tamen distingunt aut pater dedit sibi ut doctori, et tunc non tenetur computare, aut ut scolari, et tunc tenetur. Alii tenent indistincte quod non tenetur. Item alio modo prodest quod sit scolaris, quia si iniuria sibi inferatur, potest agere accione iniuriarum sine consensu patris, ut ff. de iudic. l. Quintus Mucius.[30] Item alio modo prodest, quia quando mittit procuratorem ad iudicium, procurator potest petere inducias ad consulendum ipsum iterato utrum cedere uelit uel contendere, ut infra de procur. Cum dilectus.[31] Sed hoc tamen uerum est cum procurator habet generale mandatum et non speciale. Item potest disponere de rebus suis, ut infra de renun. c. Cum inter.[32] Item habet tres iudices, scilicet magistratum suum, ordinarium loci et prepositum, ut infra de elec. c. Innotuit,[33] et C. ne filius pro pa. auth. Habita.[34] Item iuxta hoc queritur utrum quilibet scolaris habet istos tres iudices. Dic quod non quia scolaris laycus puta coniugatus habet elec<tionem> de hiis tribus, tamen secus de scolari clerico, quia non potest renunciare foro episcopi sui, ut infra de fo. compe. Significasti,[35] et c. Si diligenti.[36] Item propter delictum patris res ipsius non confiscantur, ut C. ne fi. pro pa. auth. Habita.[37] Item facilius cum ipso dispensatur quam cum alio. Item mutuatur sibi pecunia, ut C. ad macedo. l. i.[38] Item queritur quare papa non dicit hic studentibus. Racio est propter deffectum sustentamenti, quia 'fructus longi temporis breuis hora consumit'.[39] Vnde papa curialius dicit commorantibus, nam multi morantur et non student. Melius tamen facerent tales si se et parentes suos non uexarent sumptibus, ut ff. de inoffi. tes. l. i circa fine.[40] Nam non sufficit ||**fol. 1vb**|| in scola diu fuisse, sed ibi laudibiliter uixisse

[28]Dig. 10.2.50 Quae pater *recte* [29]Dig. 10.2.50 [30] Dig. 5.1.18.1 Si longius *recte* [31]X 1.38.11 Dilectus filius *recte* [32]X 1.9.2 [33]X 1.6.20 [34]Authen. post Cod. 4.13.5 [35]X 2.2.18 [36]X 2.2.12 [37]Authen. post Cod. 4.13.5 [38]Cod. 4.28.1 [39]X 3.39.6 in principio [40]Dig. 5.2.1

inquirendum est, ut xii. q. ii. Gloria episcopi.[41] Item iuxta hoc queritur utrum proficiens in camera sua et non intrans scolas possit percipere fructus beneficii sui. Hostiensis dicit quod non, et hoc argumento tali: quia presbyter si non dixerit horas canonicas in ecclesia, non debet percipere fructus, quia licet dixerit in camera non debet quia ubi eadem racio, ibi idem ius, ut infra de consti. c. Translato.[42]

Item queritur hic quid operatur apostolica benedictio. Dicit quod remouet uenialia peccata. Sed Hostiensis dicit quod per salutacionem sit indignacionis remissio, ut lxiiii. di. Cum Arrianus.[43] Sed non plus dicit, ut infra de cleri. male. im. c. primo,[44] ubi de hoc. Item pone aliquis dicit mihi uerba contumeliosa. Post ea salutaui eum. Queritur numquid animo potero agere contra ipsum accione iniuriarum. Videtur quod non, quia per salutacionem uideor sibi remittere, et accio iniuriarum sola dissimulacione tollitur, ut Inst. de iniur. § ult.[45] Hostiensis dicit quod si aliquis inferat mihi iniuriam, et ego incontinenti non irascor nec ad animum reuocor, tacite uideor sibi remittere. Sed si moueor ad iram et iratus recedo, quantumcumque postea salutauero eum non propter hoc tollere accio iniuriarum, nisi expresse sibi remisero, ut ff. de iniur. l. Non solum;[46] infra de iniur. Olim.[47] Sed pone aliquis fecit mihi iniuriam. Postmodum do sibi pacem in ecclesia. Numquid nichilominus potero agere contra eum accione iniuriarum. Hostiensis dicit quod non, quia licet per pacem datam in ecclesia consentitur sacramentis, et rancor intelligitur esse remotus, ut de cons. di.i. Pacem.[48] Nichilominus tamen de iure possum agere ut mihi satisfaciat quantum ad hoc, ut xi. q.iii. c. Inter uerba;[49] de pen. di.i. c.finali.[50] Item benedicit 'apostolicam benediccionem' et non apostoli, quia licet papa teneat locum apostoli non tamen est apostolus, ut infra de sacra unctio. c.unico;[51] et infra de

5 ubi] ibi *supra linea scriptum est*[ac]

41)C.12 q.2 c.71 42)X 1.2.3 43)D.63 c.29 Cum Adrianus *recte* 44)X 5.26.1 45)Inst. 4.4.12 46)Dig. 47.10.11 47)X 5.36.7 48)De con. D.2 c.9 *recte* 49)C.11 q.3 c.55 50)De pen. D.1 c.90 51)X 1.15.1

transla. Quanto.[52] Et nota effectum huius uerbi ‘apostolicam benediccionem’, quia peccata uenialia vi. modis remittuntur. Vno modo tolluntur per benediccionem papalem et non episcopalem, i. q.i. Maledicta.[53] Secundo per dignam suscepcionem corporis Christi, de con. di.iiii. c. Quociens, et c. Cum crimen.[54] Tercio per aque benedicte aspersionem, de con. di.iiii. Aquam.[55] Quarto per ieiunia et elemosinarum elargicionem, de pen. di.i. Medicina;[56] xxxii. di. Presbiter.[57] Quinto per oracionem debitam, de pen. di.iii. De cotidianis.[58] Sexto per generalem oracionem uel confessionem in ecclesia factam, ut in c. De cotidianis.[59] ||**fol. 2ra**||

Item dicit glossa hic quod compilacio diuiditur in 5. partes ad similitudinem 5. sensuum corporis. Quero que est ista similitudo. Dicit quod primus comparatur uisui, quia sicut uisus discernit inter qualitatem personarum, sic primus tractat de etate et qualitate, etc. Secundus comparatur gustui, quia sicut gustus discernit inter sapidum et non sapidum, sic secundus inter equum et iniquum. Tertius comparatur auditui, quia sicut auditus discernit inter uoces et sermones, ita tertius inter temporales et spirituales. Quartus comparatur tactui, quia sicut tactus discernit inter mollia et dura, sic quartus inter licita et illicita coniugia. Quintus comparatur odoratui, quia sicut odoratus sentit fetorem et eum respuit, sic quintus discernit crimina et ea detestatur, et sicut odoratus discernit inter fetida et odorifica, sic quintus inter uicia et uirtutes. Item glossa querit quid est titulus, sed non prosequitur. Quidam dicunt quod tytulus huius libri est: incipit liber extrauagantium, ut infra in prohemio in § Sane. Alii dicunt: incipit Codex gregorianus, et nomen trahit ab actore, nam codex liber appellatur, ff. de leg. iii. l. Librum.[60] Tercii dicunt et

16 iniquum] non equum iniquum[ac]

52) X 1.7.3 53) C.1 q.1 c.76 Maledictam *recte* 54) De con. D.2 c.3 Scriptura ait *recte* et De con. D.2 c.7 Cum omne crimen *recte* 55) De con. D.3 c.20 *recte* 56) De pen. D.1 c.76 57) D.32 c.18 58) De pen. D.3 c.20 59) De pen. D.3 c.20 60) Dig. 32.1.50(52).

melius: incipit liber decretalium, et hoc ideo quia ea que directa et statuta sunt a sanctis patribus summis pontifficibus hic continentur. Sed diceret aliquis contra: compilacio decretorum debet uocari liber decretalium eadem racione. Istud non obstat, quia differencia est inter ista et illa, nam decretalis dicitur constitucio facta ad consultacionem alicuius, cum non ualet sine fratrum consilio, ut infra de elec. Bone memorie;[61] et infra de rescript. c.i.[62] Sed quia ex talibus consistit nostra compilacio, ideo taliter uocatur. Sed decretum dicitur quod papa facit sine aliqua consultacione de consilio fratrum suorum, et in scriptis redigit, xxv. q.i. Generali;[63] et quia ex talibus consistit decretum, ideo sic uocatur.

Item queritur quot sunt cause huius operis. Dicit quod quatuor, scilicet materialis, formalis, efficiens et finalis. Et nota quod duplex est causa materialis, scilicet essencialis et formalis. Essencialis ut puta constituciones, decretales et epistole ex quibus constituitur iste liber. Causa formalis potest dici papa, qui decretales per diuersa uolumina dispersas fecit compilari in unum librum, quia sicut ligna et lapides que ad domum colliguntur non habent formam nisi ||**fol. 2rb**|| per carpentarium coniungantur, sic in proposito, etc. Causa efficiens dupliciter, scilicet mediata et immediata. Immediata est magister qui per preceptum domini pape et ordinacionem compillauit decretales istas, scilicet frater Raymundus cappellanus e<t> <pe>nitenciarius Gregorii pape ix. Mediata potest dici ipse Deus quo mediante omnia fuerunt. Causa finalis est ut sciamus discernere inter equum et iniquum, quia quelibet decretalis continens. Sed quia iuris est unicuique dare quod suum est, ut Inst. de iusticia et iure, in principio,[64] unde ergo qui scit iura scit discernere inter equum et iniquum, et sic causa finalis est discernere equum ab iniquo.

[R]*ex Pacificus*. Id est, Christus. *Rex*: istud prohemium diuiditur in v. partes. In prima tangit papa qualiter et quantum si non peccasset

18 que] qui *male*

61) X 1.6.23 62) X 1.3.1 63) C.25 q.1 c.11 64) Inst. 1.1.1

homo frueretur beatitudine eterna, usque ibi *set effrenata, etc.* Ad istud statim opponitur: hic dicitur quod Christus uult pacem. Contra: nam Christus uult guerram, xxiiii. q.i. Nisi bella, ubi dicit 'induite uos armaturam'.[65] Soluo: Christus uult pacem carnalem, et ita loquitur hic, et eciam uult guerram spiritualem, scilicet quod simus contra dyabolum et eius temptationes firmi, ut in contrario. Item adhuc obicitur contra xxxiiii q.ii. c. In hoc, ubi dicitur 'non ueni in terram', etc.[66] Soluo: uerba illius capituli expone sic, sed ymmo gladium, id est discordiam et separationem a malis, sed gladium inter peccatum et hominem. Item nota quod pudicicia est carnis continentia fluxu libidinis et carnis concupiscencia refrenatis uel resecatis. Item nota pax est mentis sinceritas, cordis simplicitas, animi transquilitas, amoris uinculum et consorcium caritatis. Modestia est idem quod temperancia, medium tenens inter rigorem et equitatem, ut in glossa dicitur. Ad euidentiam glossae de predestinatis dictis, quod predestinati sunt qui saluantur per predestinacionem, predestinacio uero nihil aliud est quam eterna electione hominis bonitas, glorie prosperacio et glorie appeticio, quam Deus ab eterno hominibus quos prisciuerat conformes ad ymaginem Filii meritis preparauit. Prescisio nihil aliud est quam gracie subtractio, xxii q.v. Nabuqodnosor.[67] Sequitur secunda pars ubi tangit papa hominis a paradiso eiectionem et hominis ad peccandum prauitatem. Et ut intelligas finem istius partis debes scire quod hec littera loquitur similtudinarie, quia olim in ueteri testamento dabatur libellus repudii uxori sic: res tuas tecum habeto, amplius condicione tua non utar[68] ut infra ||**fol. 2va**|| de diuor. Gaudemus.[69] Ad istum § oppono: dicitur hic quod cupiditas per iusticiam reprimenda est. Contra: ymmo uidetur quod per largitatem deberet reprimi, quia quidquid corrumpitur uel reprimitur a suo contrario fieri deberet, ut dicit Aristoteles. Sed largitas contrariatur cupid<itas> ergo etc. ut de pen. di.i. c.i.[70] Soluo: et dic quod bene

[65]C.23 q.1 c.1 *recte* cf. Eph. 6:11 [66]D.33 q.2 d.p.c.5 *recte* cf. Mt 10:34 [67]C.23 q.4 c.22 *recte* [68]Cf. Dig. 24.2.2 [69]X 4.19.8 [70]De pen. D.1 c.1

dicit textus, quia ut dicit argumentum domini est reprimere. Sed iusticia est domina omnium uirtutum secundum Tullium, ideo ipsa debet reprimere cupiditatem. Nota quod est quedam iusticia uirtualis siue substantialis que habetur per infusionem. Nam uirtus est quedam qualitas mentis quam Deus operatur in nobis.[71] Ista iusticia sufficit ad saluacionem, quia presupponit fidem et amorem. Alia est naturalis, et hec habetur per acquisicionem, ut traditur a philosopho in primo ethicorum,[72] et est una de quatuor uirtutibus cardinalibus, et traditur ab Apostolo ad Cor., et ista bene presupponit fidem et amorem et cultum diuinum.[73] Item tertia est iusticia legalis. Et ista habetur per constituciones principum, pape uel imperatoris. Et ista non sufficit ad saluacionem, quia in ea non est amor, sed tantum timor et cultus diuinus. Et qui ex timore facit aliter quam faceret, iam facere non uidetur, ut infra de regu. iuris c. Qui ex timore.[74] Et de ista dicitur quod reddit unicuique quod suum est.[75] †Item scilicet† Deo, sibi et proximo: Deo reddit timorem, honorem et amorem. Reddit eciam timorem Patri racione potencie; reddit Filio honorem racione sapiencie; reddit Spiritui Sancto amorem racione sue bonitatis. Reddit sibi ipsi subiectionem corporis, mundiciam cordis et racionem sensus et necessarii prouisionem. Sequitur tertia pars in qua dominus papa tangit causam promulgacionis iuris siue occasionem, uidelicet quod cupiditas noxium regnerat et iusticia ipsum refrenat.

Sequitur *Ideoque lex proditur*, scilicet canonica. Ad istum § opponitur: dicit littera ut honeste uiuat, alterum non ledat, etc. Videtur quod hoc sit magna incumulacio uerborum, etc. Nam sufficeret dicere ut honeste uiuat. Nam si hoc faciat, alterum non ledet et ius suum unicuique reddet, et sic duo ulteria precepta superfluunt ergo etc. Dic

23 proditur] producit MS

71) Cf. Peter Lombard, *Sententiae* 2.27.1; Thomas Aquinas, *Summa theologica* 1.2 q.55 a.4 72) Cf. Aristotle, *Nicomachean Ethics* 1.13 73) Cf. 1Cor 13 74) X 5.41.8 75) Cf. Thomas Aquinas, *Summa theologica* 2.2 q.55 a.4

quod ista uerba adduntur per legem qua dicitur quod quando genera<lia> dicuntur, nisi specialia denotentur neglecta uidentur, ff. de iniuriis l. Item apud Labeonem.[76] Et ideo papa hic ista uerba specialia adiecit. Item nota hic vii. causas quare fit lex noua. ||**fol. 2vb**|| Prima ut appetitus noxius sub iuris regula limitetur, ut hic. Secunda ut humana cohereretur audacia, ut iiii. di. Facte sunt autem.[77] Tertia ut oppressi compatiatur, ut i. q. ii. Quam pio.[78] Quarta ut mota negocia terminentur, in Auth. ut fac. no. const. circa princ. coll. v.[79] Quinta ut laboribus et expensis consulatur uel superueniatur, ut infra de rescript. Nonnulli;[80] et infra de do. et contu. Finem.[81] Sexta ut discordia euitetur et ut fraudibus consulatur, ut infra de elec. Quia propter.[82] Septima ut mali boni et spe premiorum boni meliores efficiantur, ff. de iusti. et iure l. i.[83]

Sequitur § *Sane* ubi proponit et intendit, etc. Diceret aliquis: pater sancte, quare remouetis multas constituciones cum iusticia sit bona. Respondet papa quod quasdam remouet propter nimiam similitudinem et quasdam propter contrarietatem que confusionem inducunt. Nota ergo hic quod in isto uolumine non debet esse similitudo. Sed contra: nam due decretales sunt penitus similes, infra de li. obli. Significantibus.[84] Soluo: licet sunt similes tamen diuersi deponuntur[l] in uno titulo et in alio. Item secundo nota ex isto § quod in isto uolumine non debet esse contrarietas. Contra: nam dicit una decretalis quod laicus potest eligere, infra de elec. Querelam;[85] alia dicit quod non, ut infra eod. tit. Sacrosancta,[86] cum multis aliis. Soluo: dic quod contrarietas iuris soluitur tribus modis: quandoque per hoc uerbum aliter, quandoque per hoc uerbum aliud, quandoque per hoc

4 Prima] Primo MS 5 Secunda] Secundo MS 6 Tertia] Tertio MS 7 Quarta] Quarto MS 8 Quinta] Quinto MS 10 Sexta] Sexto MS 12 Septima] Septimo MS 20 sunt] sint MS 25 contrarietas] *add*. uidet[ac]

76)Dig. 47.10.15 77)D.4 c.1 78)C.1 q.2 c.2 79)Nov. 66 (=Authen. 5.16) 80)X 1.3.28 81)X 2.14.5 82)X 1.6.42 83)Dig. 1.1.1 84)X 2.3.2=X 2.28.49 85)X 1.6.24 86)X 1.6.51

uerbum secundum. Exemplum de primo: decretalis dicit quod laycus potest eligere, alia dicit quod non. Dicit quod hoc uerbum aliter accipitur in una, et alter in alia. In prima accipitur eligere improprie, quia pro p<resenta>re, et hoc potest laycus facere, ut in c. Querelam.[87] Sed in alia decretali eligere proprie accipitur, et hoc non potest laicus, ut in c. Sacrosancta.[88] Secundo modo soluitur per uerbum aliud, ut uerbi gratia decretalis dicit quod prelatus non potest alienare bona ecclesie sine consensu sui capituli, ut infra de hiis que fi. a pre. si. con. ca. Tua;[89] et xii. q.ii. Sine excepcione.[90] Alia decretalis dicit quod potest, ut infra eodem Cum apostolica.[91] Tertio soluitur contrarietas iurium per uerbum secundum, quia una decretalis dicit quod persona electa a layco computatur inter eligentes, ut infra de elec. Cum in iure;[92] alia decretalis dicit quod non, ut infra eodem ti. c. Cumana, et c. Quia propter.[93] Soluo: aut electio procedit per uiam compromissi, et sic loquitur prima, aut secundum formam scrutinii, et sic loquitur secunda. Et sic tribus modis soluitur contrarietas iuris, unde uersus sequitur: ||**fol. 3ra**|| respondens aliter aliud quoque sint secundum // soluens contrarium iuris quodcumque profundum. Sequitur ultima pars in qua papa facit suam conclusionem per quam presens compilatio confirmatur et alia fieri prohibetur, cum dicit ergo etc.

Item casus breuis in prohemio est quare lex condita est et quare constituciones facte sunt hic habetur. Item nota quod hic duo dubia queruntur. Primum dubium est quare in hac compillacione ponitur infra et an illud quod continetur sub infra possit tanquam ius allegari, aut illud quod remotum est, est contra iuri et tunc non debet allegari pro inde, nec potest; unde argumentum ad hoc infra de fi. instru. Pastoralis;[94] aut est remotum propter simplicitatem, quia longum †esset illud in textu sunt breue† et tunc allegari potest, ut infra de cen. c. Cum instancia, in parte decisa;[95] infra de conces. preben. c. Post

8 a] *add.* ma. parte ca.[ac] 28 breue] esset illud in textu sunt breue *add. Ed.*

87)X 1.6.24 88)X 1.6.51 89)X 3.10.8 90)C.12 q.2 c.52 91)X 3.10.7
92)X 1.6.33 93)X 1.6.50 et X 1.6.42 94)X 2.22.8 95)X 3.39.17

electionem.[96] Secundum dubium est an rubrice decretalium possint allegari pro iure. Dic quod sic quia ius ponunt, infra ut lit. non cont.[97] et infra ut lite pen.[98] et infra ut ec. ben. sine dimi. confe.[99] cum suis similibus. Et tamen non est idem de rubricis decretorum, quia quedam reperiuntur false, ut xvi. q.iii. c. Placuit.[100] Et si queratur ratio diuersitatis, est quia idem qui fecit decretales fecit rubricas, sed in decretis Gratianus fecit rubricas et sancti patres fecerunt textum ideo, etc. et istam racionem reddit Odofredus, C. ne fideius. do. den. l.i.[101] De rubricis legum tamen non est dubium, ut C. res inter alios acta, etc.[102] Item expone hic quid sit uacillare, et dic quod uacillare est a primo dicto recedere, et iterum ad ipsum reddire, ut infra de cau. pos. et propri. c. Cum ecclesia sutrina.[103] Variare autem est a primo dicto reddire et iterum ad ipsum non reuerti, ut infra de tempo. ordi. Cum dilectus.[104]

[96)]X 3.8.7 [97)]X 2.6 [98)]X 2.16 [99)]X 3.12 [100)]C.16 q.3 c.15 [101)]Odofredus ad Cod. 5.20.1 [102)]Cod. 7.56.4 [103)]X 2.12.3 [104)] X 1.11.15 Dilectus filius *recte*

Le leggi del creato e la normatività morale: La legge di natura nel trattato *De legibus* attribuito a Giovanni de la Rochelle

Riccardo Saccenti

È noto che la fonte principale del trattato *De legibus* presente nella terza parte della *Summa fratris Alexandri* è da individuare in una serie di *Quaestiones de legibus et praeceptis* attribuite a Giovanni de La Rochelle.[1] Si tratta di un testo che offre la prima sistematica trattazione della nozione di 'legge' nel quadro della riflessione teologica di ambito universitario e che è collocabile all'origine di una tradizione testuale che, oltre alla *Summa Halensis*, annovera anche altre opere, incluse le questioni dedicate alle diverse tipologie di legge contenute nella Iª-IIae della *Summa theologiae* di Tommaso d'Aquino. La serie di questioni riconducibili a Giovanni de La Rochelle e preservate in due manoscritti si configura come un vero e proprio trattato dedicato alle diverse tipologie di leggi, che sono presentate all'interno di un ordine gerarchico specifico e analizzate in ragione delle loro caratteristiche.[2] Le *Quaestiones* segnano in questo modo uno snodo essenziale nella discussione teologica sulla materia morale, nella misura in cui la griglia espositiva che Giovanni costruisce e utilizza diviene un modello per tutti gli autori successivi.

Quello che il presente contributo intende esaminare è la modalità con cui la nozione di 'lex naturalis' viene presentata nelle *Quaestiones de legibus et praeceptis* del maestro francescano, esaminandone le specificità a partire da alcune premesse. Da un lato occorre infatti tener conto delle conoscenze acquisite riguardo al testo di Giovanni grazie agli studi che sin ora si sono occupati

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[1] La sezione della *Summa Halensis* dedicata alla leggi è edita criticamente in *Summa fratris Alexandri*, pars II, Alexander de Hales, *Summa Theologica seu sic ab origine dicta 'Summa fratris Alexandri'*, ed. PP. Collegii S. Bonaventurae (4 vols. Ad Claras Aquas 1924-1948) 4.311-939.

[2] Città del Vaticano, Biblioteca Apostolica Vaticana, lat. 782 fol. 129-148 [di seguito indicato con la sigla V]; Assisi, BM 138 fol. 213r-232v [di seguito indicato con la signa A].

del testo e che ne hanno messo in luce le caratteristiche letterarie e contenutistiche. Dall'altro, si rende necessario vagliare i contenuti del testo del maestro francescano in relazione al loro retroterra storico, per poter sottolineare quanto esso innovi nella discussione teologica. Giovanni sviluppa il proprio discorso sulla legge naturale rispetto ad uno sfondo teologico nel quale questa nozione gode già di una tradizione di studio, legata però in modo dominante ad un approccio di carattere esegetico centrato soprattutto sull'interpretazione di Rm 2:13-14 e delle due formulazioni bibliche della 'regola d'oro' di Tob 4:7 e Mt 7:12.[3] Nei primi decenni del XIII secolo iniziano ad essere attestate una serie di 'quaestiones' dedicate al tema della legge naturale e tradite in alcune collezioni di origine universitaria, segno di come la discussione sul tema si sia ampliata dall'ambito della 'lectio' sul testo biblico alla disputa universitaria.[4]

Accanto alla valutazione del quadro storico occorre poi aggiungere una ulteriore considerazione che riguarda l'evoluzione del discorso relativo al tema della legge naturale e più nello specifico del valore semantico di termini chiave come 'lex naturalis', 'lex naturae', 'ius naturale e ius naturae'. Si tratta di un

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[3] Si vedano le trattazioni del tema della legge di natura nelle principali opere esegetiche del XII, con particolare riguardo all'Epistola ai Romani. Nello specifico si vedano *Biblia Latina cum Glossa Ordinaria: Facsimile Reprint of the Editio Princeps, Adolph Rusch of Strassbourg 1480/1481*, edd. Karlfried Froehlich and Margaret T. Gibson, (Turnhout 1992) 4.1059vb. Il testo è disponibile anche in versione digitale sul sito: www.glossae.net. Si veda poi la *Collectanea* di Pietro Lombardo alle epistole paoline, che dalla fine del XII secolo diviene il principale punto di riferimento esegetico. Cfr. Pietro Lombardo, *Collectanea in epistolas Beati Pauli*, PL 191.1345.

[4] Per un quadro generale si veda il capitolo di Odon Lottin, 'La loi naturelle depuis le début du XIIe siècle jusqu'à saint Thomas d'Aquin', *Psychologie et morale aux XII^e^ et XIII^e^ siècles* (8 tom. Louvain-Gembloux 1942-1960) 2.71-100. Occorre notare come la riflessione teologica sia intrecciata fin dall'inizio all'elaborazione giuridica della nozione di legge di natura, già con Graziano. Un punto questo su cui hanno fatto ampia luce i recenti lavori di Atria Larson, *Master of Penance: Gratian and the Development of Penitential Thought and Law in the Twelfth Century* (Studies in Medieval and Early Modern Canon Law 11; Washington D.C. 2014) e John Wei, *Gratian the Theologian* (Studies in Medieval and Early Modern Canon Law 13; Washington D.C. 2016).

ambito di storia intellettuale trasversale a settori diversi della cultura medievale che, a partire dai primi decenni del XII secolo, coinvolge i giuristi da un lato, sia civilisti che canonisti, e gli esegeti e i teologi dall'altro. All'interno di un arco cronologico che abbraccia i cento anni precedenti alla composizione delle *Quaestiones de legibus* di Giovanni de La Rochelle, il linguaggio relativo alla legge naturale e al diritto naturale è oggetto di analisi dettagliate che si articolano a partire dalla lettera del *Digestum* giustinianeo, del *Decretum* di Graziano e dei passi della Scrittura nei quali, già a partire dalla lettura che di essi offrono i Padri della Chiesa, si ravvisa una stretta consonanza con l'antica dottrina stoica del diritto naturale.[5] Il tratto più rilevante di questo processo è il modo in cui, progressivamente, la terminologia viene discussa e risemantizzata nei diversi ambiti culturali. Con la fine del XII secolo è così sempre più evidente la distanza creatasi fra il lessico dei giuristi e quello di esegeti e teologi, anche riguardo al tema della legge naturale, che produce una molteplicità di approcci al tema. Si tratta di prospettive che certamente restano in dialogo fra loro, come dimostra lo stesso Giovanni de La Rochelle, nel cui testo non mancano i rinvii al *Decretum*. E tuttavia, le questioni di fondo che sottendono la trattazione del diritto naturale come della legge naturale, sono identificate in modo diverso dai decretisti e dai teologi, poiché a differenziare le due prospettive vi sono due lessici, quello canonistico e quello teologico, che con il XIII secolo hanno oramai sviluppato una tecnicalità specifica e che modellano la 'forma mentis' dei maestri nei due rispettivi ambiti disciplinari.[6] È rispetto a tale sfondo che occorre considerare il contributo offerto dalle *Quaestiones de legibus et praeceptis* di Giovanni de

[5] Su questo si veda Marcia Colish, *The Stoic Tradition from Antiquity to the Early Middle Ages*, 1: *Stoicism in Classical Latin Literature*, 2: *Stoicism in Christian Latin Thought through the Sixth Century* (Studies in the History of Christian Thought 34-35; Leiden 1985).

[6] Si tratta di un aspetto, quello del rapporto fra lessico e forma mentis di colui che lo utilizza, che è stato messo in rilievo nel caso di Tommaso d'Aquino da Kenneth Pennington, che ha potuto così sottolineare il grado di specificità del lessico giuridico e di quello teologico e la distanza progressivamente creatasi fra i due a partire dalla metà del XII secolo. Cfr. Kenneth Pennington, 'Lex Naturalis and Ius Naturale', *The Jurist* 68 (2008) 569-591.

La Rochelle, la concezione di legge naturale che esse sviluppano e la modalità con cui essa confluisce nella *Summa fratris Alexandri*.

L'origine di un paradigma

L'esistenza di una serie di questioni di ambito francescano, dedicate alle diverse tipologie di leggi e collegate al contenuto del trattato *De legibus* contenuto nella *Summa fratris Alexandri*, emerge a partire dagli anni '30 del Novecento, nell'ambito degli studi condotti dagli editori di Quaracchi legati alla realizzazione dell'edizione critica della *Summa.*[7] È nel corso di questo lavoro di scavo nelle fonti dell'opera ricondotta alla cerchia di Alessandro di Hales e dei suoi allievi che si arriva ad identificare il gruppo di *Quaestiones de legibus et praeceptis* in due manoscritti che vengono dall'ambito francescano, manoscritti Città del Vaticano, Biblioteca Apostolica Vaticana, lat. 782 e Assisi, Biblioteca Comunale, 138. Già Auguste Pelzer, nel suo lavoro di descrizione dei codici della Biblioteca Apostolica, aveva individuato il gruppo di questioni dedicate alla 'lex aeterna' e alla 'lex naturalis' contenute nel manoscritto vaticano e sulla scia delle osservazioni dello studioso belga Odon Lottin aveva accostato il contenuto di questi testi alla *Summa fratris Alexandri*, sottolineando la continuità dottrinale fra il primo e la seconda.[8]

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[7] Sui padri di Quaracchi e la loro impresa editoriale, con particolare riguardo alla *Summa fratris Alexandri*, si veda *Editori di Quaracchi 100 anni dopo: Bilancio e prospettive: Atti del colloquio internazionale, Roma, 29-30 maggio 1995*, edd. Alvaro Cacciotti e Barbara Faes de Mottoni (Medioevo 3; Roma 1997). Si veda inoltre Barbara Faes de Mottoni, *Bonaventura da Bagnoregio: Un itinerario tra edizioni, ristampe e traduzioni* (Fonti e ricerche, 26; Milano 2017).

[8] Cfr. Auguste Pelzer, *Bibliothecae Vaticanae codices manuscripti recensiti: Codices Vaticani Latini: Tomus II, Pars Prior. Codices 679-1134* (Città del Vaticano 1931) 96-110, in particolare 107-108; Odon Lottin, 'Le droit naturel chez S. Thomas d'Aquin et ses prédécesseurs', *Ephemerides Theologicae Lovanienses* 2 (1925) 37-40, riedito nel volume con lo stesso titolo presso l'editore Beyaert (Bruges 1931) 53-57. Si veda anche Franz Pelster, 'Forschungen zur Quästionsliteratur in der Zeit des Alexander von Hales',

François Marie Henquinet, che assieme a Victorin Doucet lavorava all'edizione critica della *Summa*, identificò un secondo manoscritto delle *Quaestiones*, il codice assisiate, contenente un testo completo del trattato, e sostenne per primo l'attribuzione del testo a Giovanni de La Rochelle, notando come l'opera fosse tradita da codici miscellanei nei quali erano presenti in abbondanza testi del maestro francescano.[9] Inoltre, il testo completo delle *Quaestiones* mostrava ancor più chiaramente lo strettissimo legame contenutistico e in gran parte 'letterale' con il trattato *De legibus* della *Summa*, contribuendo a individuare la fonte a cui i compilatori della grande sintesi teologica avevano attinto per redigere questa sezione. Nella stessa direzione imboccata da Henquinet andavano anche le conclusioni di Doucet, che nel volume dei *Prolegomena* all'edizione della *Summa* aveva riesaminato il dossier relativo alle *Quaestiones de legibus et praeceptis*, alla loro attribuzione a Giovanni de La Rochelle e alla natura del loro legame con il testo della *Summa* stessa.[10]

Le evidenze offerte dal lavoro filologico dei padri di Quaracchi permisero già negli anni Cinquanta del Novecento di ritornare sul rapporto fra l'opera di Giovanni e la realizzazione della prima grande sintesi teologica di 'scuola' francescana.

Scholastik 6 (1931) 321-353 in particolare 333 e 'Die Quästionen des Alexander von Hales', *Gregorianum* 14 (1933) 401-422, 501-520, in particolare 405.

[9] François M. Henquinet, 'Ist der Trakt De legibus et praeceptis in der Summa Alexanders von Hales von Johannes von Rupella?', *Franziskanische Studien* 26.1 (1939)1-22, 234-258. Si veda anche François M. Henquinet, 'Notes additionelles sur les écrits de Guerric de Saint-Quentin', *Recherches de Théologie Ancienne et Médiévale* 8 (1936) 369-388 in particolare 387-388.

[10] Cfr. Victorin Doucet, *Prolegomena*, in *Summa fratris Alexandri* 4.CCVCIII-CCCVII, CCCLIV-CCCLXX. Già Martin Grabmann aveva legato il nome di Giovanni de La Rochelle alla *Summa fratris Alexandri* sottolineando la coincidenza fra la nozione di teologia morale richiamate nelle *quaestiones* del grande trattato francescano dedicate alla nozione di legge naturale e quella impiegata da Giovanni de La Rochelle nella sua incompiuta *Summa de articulis*. Cfr. Martin Grabmann, 'Das Naturrecht des Scholastik von Gratian bis Thomas von Aquin: Nach den gedruckten und ungedruckten Quellen dargestellt', *Archiv für Rechts- und Wirtschaftsphilosophie* 16 (1922-1923) 12-53, ripubblicato in *Mittelalterliches Geistesleben*: *Abhandlungen zur Geschichte der Scholastik und Mystik* (3 tom. München 1926-1956) 1.65-103, in particolare 75-77.

Ignatius Brady mise in luce tutto il rilievo di questo rapporto, seguito da Odon Lottin, che ebbe modo di rivedere il contenuto dei propri precedenti studi alla luce del quadro storico offerto dalle nuove acquisizione.[11] Iniziava in tal modo a delinearsi, per quel che riguardava la discussione teologica medievale sulle varie tipologie di 'lex', il profilo di una precisa tradizione, di matrice francescana, che a partire proprio da Giovanni de La Rochelle, attraverso la mediazione e al diffusione della *Summa Halensis*, non includeva solo i grandi maestri dell'ordine come Bonaventura ma si allargava a interessare tutti i maggiori teologi del XIII secolo.[12]

Più recentemente i lavori di Silvana Vecchio, oltre ad accostare le *Quaestiones de legibus et praeceptis* al trattato *De praeceptis et consiliis*, riconducibile anch'esso a Giovanni e tradito dal manoscritto Oxford, Bodleian Libray 2 (S.C. 1842), hanno analizzato più nel dettaglio il contenuto dottrinale del testo e messo in evidenza le caratteristiche della elaborazione di Giovanni de La Rochelle.[13] In particolare è emersa una gerarchia che, dalla 'lex aeterna', arriva alle 'leges addictae' e nella quale la legge naturale svolge un essenziale ruolo di mediazione fra la

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[11] Cfr. Ignatius Brady, 'Law in the *Summa fratris Alexandri*', *Proceedings of the American Catholic Philosophical Association* 24 (1950) 133-147. Lottin aveva affrontato lo studio della storia delle diverse nozioni di leggi in una serie di articoli: 'La définition classique de la loi: Commentaire historique de la Iª-IIae q. 90', *Revue néo-scolastique de Philosophie* 27 (1925) 129-145, 243-273; 'Les premiers exposés scolastiques sur la loi éternelle', *Ephemerides theologicae Lovanienses* 14 (1937) 287-301. Questi testi vennero quindi riediti, in forma aggiornata, in alcuni capitoli di *Psychologie et morale aux XIIe et XIIIe siècles*, 2.9-100.

[12] Un primo quadro di questa sorta di 'catena' di autori, che ha il suo anello iniziale in Giovanni de La Rochelle, è tratteggiato in Michael B. Crowe, *The Changing Profile of the Natural Law* (Den Haag 1977) 117-123, dove l'elaborazione dei maestri francescani viene accostata a quella di Alberto Magno.

[13] Per il trattato *De praeceptis et consiliis* si veda il manoscritto Oxford, Bodleian Library 2, fol. 63ra-80va. Per un esame del rapporto del trattato con le *Quaestiones di legibus* si veda Silvana Vecchio, 'Precetti e consigli nella teologia del XIII secolo', *Consilium: Teorie e pratiche del consigliare nella cultura medievale*, edd. Carla Casagrande, Chiara Crisciani, Silvana Vecchio (Firenze 2004) 33-56 in particolare 43-47.

prima e le seconde.[14] Secondo tale prospettiva, la 'lex naturalis' riguarda la 'ratio' ed è dunque un elemento proprio delle sole creature razionali e rappresenta il fondamento di legittimità per tutti gli altri generi di leggi 'positive' che si succedono nel tempo. Il contributo del maestro francescano sul tema della legge naturale veniva così ricollocato all'interno della sua sistematica trattazione delle diverse tipologie di *leges* e al tempo stesso inserito in una progressione storica nella quale esso figurava come parte di uno schema di trattazione della materia morale, in particolare del tema delle leggi e dei precetti, destinato a imporsi come vero e proprio genere letterario fino al XIV secolo.[15]

Impressio legis aeternae non est lex aeterna

Le *Quaestiones de legibus et praeceptis* di Giovanni de La Rochelle prendono il via da un dettagliato esame della 'lex aeterna', espressione con la quale viene denominata quella legge che, recuperando un'accezione agostiniana, viene concepita come espressione della verità e che ha la caratteristica di essere immutabile nel tempo. Questa legge, che coincide con la ragione e la volontà divine, rappresenta il principio da cui derivano tutte le altre specie di legge, ad eccezione delle leggi ingiuste, che sono tali perché in aperta contraddizione rispetto alle prescrizioni della legge eterna. Il rapporto fra la legge eterna e le altre tipologie di legge richiede di spiegare come sia possibile collegare una realtà eterna e immutabile come la legge eterna con realtà mutevoli come

[14] Cfr. Vecchio, 'Precetti e consigli nella teologia del XIII secolo' e 'La riflessione sulla legge nella prima teologia francescana', *Etica e politica: Le teorie dei frati mendicanti nel Due e Trecento, Atti del XXVI Convegno internazionale, Assisi, 15-17 ottobre 1998* (Spoleto 1999) 119-151.

[15] Cfr. Vecchio, 'La riflessione' 122-123. Si veda in particolare la lista di riferimenti alle note 7 e 8, dove la Vecchio annovera, fra gli eredi del 'genere' inaugurato da Giovanni teologi come Bonaventura, Pietro Aureolo, Francesco di Mayronnes, Matteo d'Aquasparta e Tommaso d'Aquino. Per un esame dell'influenza di Giovanni nella letteratura teologica dedicata allo studio dei dieci precetti mosaici si veda Carla Casagrande e Silvana Vecchio, 'La classificazione dei precetti tra settenario e decalogo (secoli XIII-XV)', *Documenti e studi sulla tradizione filosofica medievale* 5 (1994) 331-395.

quelle a cui si applicano le altre tipologie di legge, come è il caso dell'anima umana.[16]

Giovanni introduce la nozione di 'impressio' per definire il genere di relazione fra la legge eterna e le creature razionali che rende possibile alle seconde una conoscenza della prima e quindi la sua traduzione nelle altre tipologie di leggi. Come chiarisce il teologo, l'uso di questa nozione per descrivere la relazione fra legge eterna e creature razionali fa salva la libertà di arbitrio di queste ultime. Il fatto che in esse sia 'impressa' la legge eterna non comporta un obbligo, dal momento che ad essere impressa è la conoscenza (notio) della legge eterna ma alla creatura razionale resta il potere di ignorarla e di non agire in modo conseguente al suo contenuto.[17] A partire da questa chiarificazione, Giovanni può spiegare che la legge naturale altro non è che l'impronta lasciata dalla legge eterna nella creatura razionale e in particolare nella ragione umana. Richiamando la metafora del rapporto fra la cera e il sigillo, il maestro osserva che se la legge eterna è il sigillo, la legge naturale è l'impronta che il sigillo lascia nella cera, così che la 'lex naturalis' può essere definita come similitudine della legge eterna.[18]

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[16] Iohannes de Rupella, *Quaestiones de legibus et praeceptis*, A fol. 213vb, V fol. 129ra: 'Secundum Augustinum, in libro de uera religione, ubi ostendit quod lex est que ueritas dicitur. Menti, dicit, nostre impressum est uidere legem immutabilis ueritatis; sed illa ueritas immutabilis non potest fundari nisi in anima, que mutabilis est. Apparet ergo supra mentem nostram legem esse que dicitur ueritas, et ista est lex eterna. Dicendum ergo ad illud quod obicitur de uirtute legis quod uirtus legis est ratio ueritatis, scilicet ratio precipiendi et ratio uetandi, etc. Et illa ratio eterna est. Manifestatio autem istius rationis est in ipsis actibus dum aliquid precipitur uel consulitur etc. Et secundum hoc precipere et uetare et huiusmodi possunt accipi dupliciter, scilicet pro ipsa ratione precipiendi uel uetandi etc., uel pro ipso actu siue effectu. Lex autem eterna utrumque respicit, quia secundum rem et id quod est, est in ratione; secundum manifestationem uero est in ipso actu; tunc enim manifestatur quando aliquid precipitur uel uetatur etc.', Cfr. *Summa fratris Alexandri* 4.314.

[17] Ibid. A fol. 214ra, V fol.129rb: 'Habitus ergo cognoscendi Deum naturaliter impressus est, potest tamen actu ignorari Deus. Similiter dicendum de lege eterna, cuius notio impressa est nobis, possumus tamen actu ignorare'. Cfr. *Summa fratris Alexandri* 4.316.

[18] Ibid. A fol. 217va, V fol. 148ra: 'Dicendum quod dupliciter potest dici lex, scilicet imprimens et impressa, sicut dicitur imprimens in sigillo et impressa ut

Questo uso della nozione di 'impressio', che fa della legge naturale una forma di conoscenza di qualcosa che viene ricevuto dalla ragione, consente a Giovanni di spiegare anche la collocazione della legge naturale nel più ampio quadro dell'ordine delle leggi. Il binomio fra 'imprimens' e 'impressum' qui utilizzato è, infatti, accostabile a quello fra 'exemplar' ed 'exemplatum' a cui lo stesso teologo ricorre poco dopo e che chiarisce ulteriormente come, in questa prospettiva dottrinale, la legge eterna rappresenti il modello di normatività per eccellenza e la legge naturale sia quella norma che consente di esprimere un giudizio morale sulla base di un precetto che è figura della regola prima.[19]

Le *Quaestiones* del maestro francescano passano poi a discutere le specificità della legge naturale avanzando quattro interrogativi che riguardano: l'esistenza di tale legge, il suo essere creata o increata, il suo essere potenza o disposizione acquisita, il suo riguardare la sfera cognitiva o quella motiva. Discutendo dell'esistenza della legge naturale, Giovanni muove dall'osservazione che le 'auctoritates' di Rm 2:14 e di Sir 15:14 sembrano contraddirsi a vicenda, la prima ammettendo l'esistenza della 'lex naturalis' e negandola la seconda. Per definire una soluzione, il maestro francescano recupera il parallelo fra conoscenza del vero e del bene e spiega che, come esiste una conoscenza dei principi primi del conoscere, ossia la 'veritas', così ne esiste una dei principi primi dell'agire, cioè il 'bonum'. Il ricorso al duplice nesso fra verità e principi primi del conoscere da un lato e bene e legge naturale dall'altro rappresenta un dato diffuso nella letteratura teologica del tempo e lo si ritrova in

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in cera, ut dicatur lex eterna imprimens, lex uero naturalis impressa, que est similitudo legis eterne. Vnde Augustinus non dicit legem eternam impressam, sed notionem eius que est similitudo impressa illius in qua cognoscitur'. Cfr. *Summa fratris Alexandri* 4.340.

[19] Ibid. A fol. 217vb, V fol. 148ra : 'Lex naturalis non est nisi regula uiuendi uel operandi. Est autem regula duplex, scilicet exemplaris et exemplata, que indita est a creatione, et secundum utramque est iudicare, secundum primam exemplariter, secundum alteram formaliter, que est similitudo prime regule'. Cfr. *Summa fratris Alexandri* 4.341.

numerose trattazioni della prima metà del XIII secolo.[20] In ragione di questo schema argomentativo, la legge naturale rappresenta il principio in ragione del quale l'uomo ha una conoscenza di carattere operativo, che indica 'in modo naturale' di ciò che si deve fare o non fare.[21]

La legge naturale così definita pone il problema del rapporto con il libero arbitrio, inteso come facoltà che di per sé è 'absoluta', cioè si pone al di sopra dei vincoli posti dalla legge naturale.[22] Il carattere prescrittivo della legge naturale, si osserva in una delle argomentazioni vagliate da Giovanni, tende a presentarla nei termini di una legge di necessità, capace di determinare in modo vincolante alcuni appetiti e di piegare anche la 'mala voluntas'. Una legge naturale così concepita risulta apertamente incompatibile col libero arbitrio.[23]

Il contrasto si ripresenta anche concependo la 'lex naturalis' come regola del libero arbitrio, cioè come ciò che consente al

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[20] Si vedano i testi citati nell'antologia pubblicata in appendice a Lottin, *Le droit naturel*.

[21] Iohannes de Rupella, *Quaestiones de legibus et praeceptis*, A fol. 217va, V fol. 148ra: 'Dicendum quod lex nature est. Vnde, Eccli III [*recte* XVII]: "addidit illi disciplinam et legem uite hereditauit illum". Glossa: "legem naturalem quam dedit homini ut subiceretur suo creatori et bonorum operum in se honorificientiam custodiret". Hoc etiam patet ratione et experimento, quia ex parte cognitiue sunt principia per se nota, quorum notio impressa est naturaliter, ut quod omne totum maius est sua parte et quod affirmatio et negatio non sunt uera de eodem. Sicut ergo sunt principia cognoscendi ex parte cognitiue, ita sunt principia operandi ex parte motiue, ad dictandum naturaliter cuilibet quid sit faciendum et quid non, et hoc est lex naturalis'. Cfr. *Summa fratris Alexandri* 4.339.

[22] Ibid. A fol. 217rb, V fol. 148ra: 'Tria sunt principia: Deus, uoluntas et natura, sed uoluntas siue liberum arbitrium est supra naturam; ergo supra naturale et supra conditionem nature. Ergo nulla lex naturalis est presidens libero arbitrio'. Cfr. *Summa fratris Alexandri* 4.338.

[23] Ibid. A fol. 217rb, V fol. 148ra: 'Liberum arbitrium est absolutum ab omni necessitate. Sed lex naturalis est lex necessitatis, quia ligat necessitatem; ergo etc. Probatio, secundum Augustinum super Genesim: ibi Ade non inueniebatur similis. Omnis nature usitatissimus cursus habet naturales leges secundum quas spiritus uite, qui creatus est, habet quosdam appetitus determinatos quos etiam mala uoluntas non potest excedere. Ergo lex naturalis est necessitatis'. Cfr. *Summa fratris Alexandri* 4.339.

libero arbitrio di raggiungere il proprio fine. Non si può, infatti, pensare che una natura inferiore possa far da regola a una natura superiore. Eppure la definizione di legge naturale che viene dalla civilistica romana e dalla tradizione stoica, intende tale legge come un 'instinctus' che ordina ciascuna cosa al proprio fine.[24] La legge naturale così concepita e descritta riguarda l'ordine delle realtà sensibili, poiché è ciò che vincola l'agire di tutti gli animali in quanto esseri caratterizzati dalla 'sensualitas'. Il libero arbitrio, tuttavia, è dell'ordine della ragione e dunque superiore al piano della sensibilità, così che lo iato che separa 'ratio' e 'sensualitas' rende contraddittorio pensare ad una legge naturale, che obbliga le creature dotate di sensibilità, capace di vincolare il libero arbitrio, cioè la facoltà propria delle creature razionali.[25]

Giovanni esamina il rapporto fra natura e libero arbitrio a partire dalla pluralità di definizioni di legge naturale, che testimoniano del fatto che i rapporti fra queste due realtà sono definibili in molteplici modi.[26] Così, a giudizio del teologo francescano, la definizione ulpianea, tradita dal *Digestum*, secondo cui la legge naturale è 'quod omnia animalia docuit', riflette un rapporto di subordinazione della legge naturale al libero

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[24] Nell'elenco delle argomentazioni favorevoli alla esistenza della legge di natura, Giovanni cita proprio la definizione di matrice stoica della legge come 'quod omnia animalia docuit' (poi in Dig. 1.1.1, Ulpianus) e spiega: Ibid. A fol. 217rb, V fol. 148ra. 'Leges reperiuntur in irrationali creature in sensibili, Ierem. 31: "si defecerint leges celi et terre", per quas scilicet regulantur motus eorum. Similiter est illa lex in sensibili creatura, secundum quod dicitur: lex naturalis est que docuit omnia animalia, quod masculus cum femina cohiberet. Ergo cum creatura rationalis sit perfectior aliis, habebit legem naturalem qua dirigetur in suum finem; ergo erit lex naturalis'. Cfr. *Summa fratris Alexandri* 4.338.

[25] Ibid. A fol. 217rb-217va, V fol. 148ra. 'Ex parte sensus non debet ponere aliquam formam in natura naturaliter inditam, ut perueniat sensus ad suum finem. Ergo non ex parte intellectus erit ponere aliquam formam naturaliter inditam qua dirigatur in suum finem; ergo non est ponere legem naturalem, scilicet regulam liberi arbitrii, per quam ueniat in suum finem omni, cum perfectior sit natura rationalis sensibili'. Cfr. *Summa fratris Alexandri* 4.339.

[26] Ibid. A fol. 217va, V fol. 148ra: 'Ad primum ergo dicendum quod est lex naturalis infra libero arbitrio, et est lex naturalis cum ipso libero arbitrio, et est alia supra ipsum liberum arbitrium, alia autem extra liberum arbitrium et sic multipliciter dicitur lex naturalis'. Cfr. *Summa fratris Alexandri* 4.339.

arbitrio.[27] In questo caso il termine natura indica, per l'uomo, quelle facoltà irrazionali che sono subordinabili alla ragione e dunque al libero arbitrio. Diversamente la definizione secondo cui la legge naturale è ciò in virtù di cui si ha uno specifico desiderio, descrive una condizione di separazione fra natura e libero arbitrio e riguarda dunque quelle facoltà dell'anima che non sono soggette al controllo razionale.[28] Vi è poi la definizione paolina di legge naturale, in ragione della quale 'lex naturalis est qua quisque sibi conscius est' (Rm 2:14) e che definisce un rapporto di collaborazione fra natura e libero arbitrio nell'esercizio della vita morale.[29] La quarta definizione citata da Giovanni è ispirata al passo della *Glossa ordinaria* relativo a Rm 11:24, secondo cui la legge naturale sarebbe ciò per cui Dio non fa niente contro se stesso.[30] In tal caso la legge naturale è concepita come increata, eterna e immutabile e come tale superiore al libero arbitrio che invece è mutabile e passibile di errore. Una quinta e ultima definizione che il teologo francescano elenca è quella che apre il

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[27] Ibid. A fol. 217va, V fol. 148ra: 'Secundum ergo quod dicitur lex naturalis infra, dicitur quod uoluntas est supra naturam quantum ad illam partem nature que subiecta est uoluntati, quia ille uires que recipiunt motum uoluntatis, subiecte sunt libero arbitrio sicut generatiua, et secundum hoc dicitur quod lex naturalis est que natura docuit animalia'. Cfr. *Summa fratris Alexandri* 4.339.

[28] Ibid. A fol. 217va, V fol. 148ra: 'Alio modo est lex naturalis preter liberum arbitrium, et hoc modo extendit se ad totam naturam hominis, dummodo dicatur lex naturalis secundum quam habet determinatum appetitum, quia, ut dicit Damascenus, quedam uires non sunt obedientes libero arbitrio, sicut uitalis, nutritiua et huiusmodi, que pertinent ad uegetabilem. Et etiam quecumque habent determinatum appetitum respectu alicuius, et sic sumitur ab Augustino, Super Genesim. Secundum hanc legem est appetitus finis, ut felicitatis, et hoc modo non potest liberum arbitrium contra legem naturalem'. Cfr. *Summa fratris Alexandri* 4.339.

[29] Ibid. A fol. 217va, V fol. 148ra: 'Alio modo est lex naturalis cum ipso libero arbitrio, secundum quod sumitur Rom II: "lex naturalis est qua conscius est quisque sibi" etc.' Cfr. *Summa fratris Alexandri* 4.339.

[30] Ibid. A fol. 217va, V fol. 148ra: 'Alio modo est lex naturalis supra liberum arbitrium, secundum quod sumitur pro increata lege, de qua dicitur super illud Rom: "contra naturam insertus es". Glossa: "summam nature legem Deus nullo modo facit quam contra se ipsum". Et Augustinus, De uera religione: "cum mens humana mutabilitatem pati possit erroris, apparet supra mentem nostram esse legem que mutari non possit".' Cfr. *Summa fratris Alexandri* 4.339-340.

Decretum grazianeo e che identifica la legge naturale con quanto è contenuto nella Scrittura (in lege et euangelio).[31]

Questa polisemia del termine *natura*, consente di ridefinire il rapporto fra normatività della natura e libero arbitrio. Ciascuna delle definizioni elencate descrive una diversa modalità di rapporto fra le due realtà e al tempo stesso emerge come, nel caso della trattazione teologica sviluppata da Giovanni de La Rochelle, siano centrali le accezioni che definiscono la legge naturale come un principio dell'agire morale grazie al quale la ragione è in grado di esprimere un giudizio di valore sulle realtà inferiori all'uomo. Si fa, infatti, riferimento a molteplici sensi e usi del termine natura e solo alcuni di essi sono applicabili all'uomo inteso come creatura razionale. Una distinzione, questa, con la quale il teologo recupera anche una duplice interpretazione della legge naturale che era stata sviluppata principalmente dalla canonistica del XII secolo e secondo la quale o si assume una definizione assai specifica di *lex naturalis* come carattere naturale della creatura razionale o invece si accoglie la pluralità semantica del lemma utilizzandolo per definire la normatività fisica a cui sono soggetti tutti gli animali.[32]

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[31] Ibid. A fol. 217va, V fol. 148ra: 'Alio modo lex naturalis est extra liberum arbitrium, secundum quod sumitur prima distinctione Decretorum: "lex naturalis est que in lege et euangelio continetur", et appellat legem naturalem legem moralium preceptorum'. Cfr. *Summa fratris Alexandri* 4.340. Giovanni riassume qui l'affermazione iniziale del *Decretum*, d.a.c.1 dove si legge: 'Humanum genus duobus regitur, naturali uidelicet iure et moribus. Ius naturae est, quod in lege et euangelio continetur, quo quisque iubetur alii facere, quod sibi uult fieri, et prohibetur alii inferre, quod sibi nolit fieri. Unde Christus in euangelio: "Omnia quaecumque uultis ut faciant uobis homines, et uos eadem facite illis. Haec est enim lex et prophetae".'

[32] Cfr. Leonardo Sileo, 'Natura e norma: Dalla *Summa Halensis* a Bonaventura', *Etica e politica* 29-58. Sul ruolo della canonistica nella fortuna di queste definizioni di legge naturale si vedano Rudolf Weigand, *Die Naturrechtslehre der Legisten und Dekretisten von Irnerius bis Accursius und von Gratian bis Johannes Teutonicus* (München 1967); Ennio Cortese, *La norma giuridica: Spunti teorici nel diritto comune classico* (2 tom. Ius nostrum: Studi e testi pubblicati dall'Istituto di Storia del Diritto Italiano dell'Università di Roma 6; Milano 1962-1964) in particolare1.37-96 e Andrea Padovani, *Perché chiedi il mio nome? Dio natura e diritto nel XII secolo* (Il diritto nella storia 6; Torino 1996).

Giovanni de La Rochelle spiega nel dettaglio questa distinzione, allorché affronta la questione della legittimità della poligamia rispetto alle prescrizioni della legge naturale. Il teologo osserva che vi sono diversi ordini di precetto che la legge naturale contiene, in ragione della diversa accezione attribuita al termine 'natura' con riferimento alla creatura razionale. In questo caso Giovanni, servendosi di uno schema concettuale introdotto da Filippo il Cancelliere, distingue fra 'natura ut natura', 'natura ut ratio' e 'ratio ut ratio', ossia fra: la natura come ordine del creato, la natura come principio razionale e infine la ragione come ragione.[33] Il rapporto fra 'natura' e 'ratio' nella discussione relativa alla 'lex naturalis' e allo 'ius naturale' è un dato ben presente nella canonista a partire da Graziano.[34] Giovanni aveva citato la distinzione fra 'natura ut natura, natura ut ratio' e 'ratio ut ratio' anche in un'argomentazione relativa allo statuto dei dieci comandamenti mosaici rispetto alla 'lex aeterna'.

In quel caso la tripartizione veniva richiamata come uno degli argomenti che alcuni teologi citavano per giustificare una sospensione delle prescrizioni mosaiche.[35] Una tripartizione che

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[33] Iohannes de Rupella, *Quaestiones de legibus et praeceptis*, A fol. 219vb: 'Notandum quod duplex est dictamen nature secundum quod natura rationalis tribus modis mouetur. In natura enim rationali aliquando mouetur natura ut natura, aliquando natura ut ratio, aliquando ratio ut ratio. Et secundum hoc diuersificatur dictamen nature, quia secundum quod natura mouetur ut natura dictat masculum coniungi femine ad multiplicationem speciei; secundum autem quod natura mouet ut ratio, dictat quod unus cum una coniungi debeat, quia natura ut ratio confert et legit quod non est faciendum alterius quod sibi non uult fieri. Secundum autem quod ratio mouet ut ratio, ulterius confert et dictat natura quod unus debet esse una inseparabiliter. Ideo patet iam quomodo habere plures est contra dictamen nature et quomodo non, quia secundum quod natura mouet ut natura, non est contra dictamen nature habere plures'. Cfr. Philippus Cancellarius, *Summa de bono*, ed. Nikolaus Wiki (Berna 1985) 1026[60]-1027[92]. Si veda anche *Summa fratris Alexandri* 4.360-361.

[34] Cfr. D.1 c.1. Su questo si veda Pennington, 'Lex Naturalis and Ius Naturale'.

[35] Osservava in quella occasione Iohannes de Rupella, *Quaestiones de legibus et praeceptis*, A fol. 216vb-217ra, V fol. 132va: 'Bernardus: "inuiolabile preceptum est quod non est ab homine traditum, sed diuinitus promulgatum", ut "non mechaberis, non occides" etc. Deus autem quod uoluit, et quando uoluit soluit; et ponit exemplum de expoliatione Egyptiorum et de propheta Osee, cui

permette di considerare in un quadro unitario le diverse formulazioni dei precetti della legge naturale. Sul piano della natura, intesa come ordine del creato, ha valore la prescrizione, già nota al diritto romano, secondo cui si impone l'unione di maschio e femmina per generare. Diversamente, se si intende la natura come ragione, allora si fa riferimento alla formulazione della regola d'ora che impone di non fare agli altri ciò che non si vuole venga fatto a noi, da cui discende l'obbligo per un uomo di unirsi ad una sola donna. Infine, se si assume il piano delle prescrizioni

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preceptum fuit coniungi fornicarie. Ergo potest precipere contra ista precepta. Propter hoc distinguunt aliqui dicentes quod est considerare naturam ut naturam, et naturam ut rationem, et rationem ut rationem. Natura ut natura dicit coniungi alicui ad conseruationem speciei, sed non dictat utrum cum una uel cum pluribus. Natura autem ut ratio dictat coniungi cum una non cum pluribus. Ratio autem ut ratio dictat homini coniungi alicui ut sue per matrimonium. Dicunt ergo quod contra naturam primo modo non potest precipere, ut scilicet aliquis cognoscat aliquam, non intentione prolis, sed intentione solum uoluptatis. Sed contra, ius nature, que consideratur ut ratio, potest precipere, et contra istud fecit Iacob, qui habuit plures uxores. Similiter contra ius rationis, in quantum ratio est, que dictat quod cum sua coniugata sibi, et contra hoc fecit Abraham, quando cognouit Agar, que non fuit coniugata, sed concubina. Propter hoc dicunt quod contra secundum et tertium potest, contra primum non potest. Et similiter attendendum in aliis preceptis decalogi'. La discussione riguardo alla compatibilità della poligamia con la legge naturale si era ampiamente sviluppata già nella canonistica del XII secolo. La discussione aveva riguardato l'espressione 'omnia communia omnibus', che Graziano cita in D.1 c.7 con riguardo al possesso dei beni e che aveva poi analizzato più in dettaglio in D.8, dove sia gli Atti degli Apostoli che Platone sono utilizzati per giustificare l'idea della proprietà comune come carattere qualificante lo stato di natura. Graziano articola la propria posizione nel contesto della definizione del rapporto fra 'consuetudo' e 'ius' e spiega: 'Differt etiam ius natuare a consuetudine et constitutione. Nam iure naturae sunt omnia communia omnibus, quod non solum inter eos seruatum creditur, de quibus legitur: "Multitudinis autem credentium erat cor unum et anima una," etc. uerum etiam ex precedenti tempore a philosophis traditum inuenitur. Unde apud Platonem illa ciuitas iustissime ordinata traditur, in qua quisque proprios nescit affectus', D.8 d.a.c.1. I commentatori del *Decretum* associarono il principio della proprietà comune nello stato di natura alla liceità o meno della poligamia. Su questo si veda Stephan Kuttner, 'Gratian and Plato', *Church and Government in the Middle Ages: Essays presented to C.R. Cheney*, ed. Christopher N.L. Brooke et al. (Cambridge 1976) 93-118, ristampato in *The History of Ideas and Doctrines of Canon Law in the Middle Ages* (2nd ed. Ashgate 1992) XI.

della ragione in quanto tale, allora a valere è il precetto per cui l'uomo e la donna debbono unirsi in modo inseparabile e la poligamia è contraria alla natura.

In questo modo Giovanni articola una concezione della 'lex naturalis' capace di ricomprendere piani diversi di normatività naturale, che da quella di ordine fisico arriva a quella di carattere morale, riuscendo così ad includere sia le formulazioni che vengono da autori della tradizione filosofica antica, come Cicerone, sia quelle cristiane di Agostino e Isidoro di Siviglia, entro lo schema secondo cui la legge naturale è 'impressio' della legge eterna nella ragione umana. Quello che ne consegue è la possibilità di allargare il perimetro dei contenuti della legge naturale, includendo in essa sia i precetti che normano l'ordine fisico del creato che quelli di carattere morale che sono invece colti dalla ragione.[36] Più ancora Giovanni può includere nella sfera della legge naturale anche una forma di teismo, ossia di fede 'naturale' in Dio, quale frutto di un assenso della ragione, che si traduce nel precetto di amare Dio sopra ogni altra cosa.[37]

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[36] Cfr. Vecchio, 'La riflessione' 128-130.

[37] Giovanni ne parla con riferimento alla possibilità, per i filosofi, di giungere ad una qualche conoscenza di Dio e del dio trinitario in particolare attraverso la mediazione della legge naturale. Egli osserva che una tale conoscenza è possibile, anche se limitata al piano generale di una conoscenza di Dio come bontà assoluta e non capace di cogliere tutti i risvolti morali di una tale conoscenze, per cogliere i quali occorre l'intervento della grazia. Scrive Iohannes de Rupella, *Quaestiones de legibus et praeceptis*, A fol. 219ra: 'Philosophi potuerunt habere uniuersalem rationem secundum quam possent uenire ad credendum gignentem, sed non habuerunt ut crederent propter ipsam ueritatem. Vel dicendum quod cognouerunt per appropriata; et dicuntur defecisse in tertio signo, non quantum ad cognitionem bonitatis simplicem, sed quantum ad moralem cognitionem, quia hanc non habuerunt'. Cfr. *Summa fratris Alexandri* 4.356. Anche se di carattere generale, nella conoscenza di Dio che si raggiunge per via di ragione mediante la legge naturale è da includere il comandamento dell'amore per Dio: A fol. 219ra: 'In lege naturali est diligere Deum propter se et super omnia, tamquam instigante et insinuante, nos faciente uel perficiente; vnde Glossa non dicit quod faciat diligere, sed insinuat'. Cfr. *Summa fratris Alexandri* 4.357. La possibilità di una implicazione teista della nozione di legge naturale intesa in termini di *ratio* si trova già in Pietro Lombardo, che si nel commento all'Epistola ai Romani sia nelle *Sententiae* ammette la possibilità di un assenso alla fede su base razionale che muova

Habitus o *potentia*?

Una definizione così articolata, capace di tenere assieme la polisemia che il termine 'natura' ha nel linguaggio teologico, filosofico e giuridico della prima metà del XIII secolo e al tempo stesso di individuare una nozione univoca di legge naturale come 'impressio' della legge eterna nell'anima razionale, pone il problema del rapporto con l'anima razionale e le sue facoltà. Poiché è impressa nell'anima razionale fin dalla sua creazione, la legge naturale ha, per Giovanni de La Rochelle, la caratteristica di essere difficilmente mutabile: non si tratta di una realtà che può essere cancellata. Una caratteristica, questa, che sembra avvicinarla alla nozione di 'habitus', ossia di disposizione acquisita in modo permanente al modo di una seconda natura.[38] Tuttavia la notione di 'habitus', così come quella di 'potentia', è connessa ad un determinato atto, alla realizzazione del quale è ordinata.[39] È allora corretto utilizzare questa nozione anche per la legge naturale?

Il maestro francescano cita e discute la definizione di legge naturale come 'actus rationis et habitus voluntatis' che era stata proposta dall'anonimo autore di una 'quaestio' tradita dal manoscritto Paris, Bibliothèque Nationale, nouvelles acquisitions 1470.[40] Giovanni muove dalla constatazione che la legge naturale

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proprio dalla conoscenza della legge naturale. Cfr. Petrus Lombardus, *Collectanea in epistolas B. Pauli*, PL 191.1345 e *Sententiae in IV libros distinctae*, ed. Ignatius Brady (Grottaferrata 1971-1980) 1.564.

[38] Iohannes de Rupella, *Quaestiones de legibus et praeceptis* A fol. 217vb, V fol. 148rb: 'Lex naturalis est dispositio difficile mobilis; ergo est habitus'. Cfr. *Summa fratris Alexandri* 4.342.

[39] Ibid. A fol. 217vb, V fol. 148rb. 'Augustinus: "habitus est eo quo aliquid agitur cum opus est"; sed in paruulis non potest aliquid agi, et tamen est lex naturalis in paruulis; ergo non est habitus, cum nihil per eam agatur in illis'. Cfr. *Summa fratris Alexandri* 4.342.

[40] La *quaestio* si trova ai fol. 22ra-22va ed è in parte edita da Odon Lottin, *Psychologie et morale* 2.77-82. L'anonimo teologo così spiega la propria definizione di legge naturale: 'Quod queritur utrum sit actus uel habitus nature, dicendum quod est actus rationis uel habitus uoluntatis. Et hoc patet per simile in lege imperatoris que, cum est in mente ipsius, honestas quedam est, non lex

riguarda il libero arbitrio inteso come facoltà umana, di cui ragione e volontà sono parti o aspetti.[41] La 'lex naturalis', in quanto portatrice di precetti, determina un vincolo per la facoltà del libero arbitrio poiché, nella misura in cui comporta una conoscenza di ciò che è bene, essa illumina la ragione e in quanto è prescrittiva spinge la volontà ad agire. A partire da questa constatazione, Giovanni può applicare alla 'lex naturalis' una nozione ampia di 'habitus', inteso come qualcosa che rimane impresso nell'anima razionale e non è cancellabile, ma che non va inteso quale disposizione ordinata ad un atto specifico.[42] Se si utilizzasse la nozione di habitus in senso stretto, nota il maestro francescano,

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donec sit in actu sententia, tunc est lex; similiter ipsa scientia rationis lex est, ut est rationis sententiantis et imperantis; uoluntatis autem ut exsequentis quod sententiarum est. Et ita rationis actus est, uoluntatis uero uel habitus; datus est enim ei in adiutorium et habilitans ipsam ad exsequendum rationis sententiam. Sicut enim habitus informatiuus datus est in adiutorium circa habitus motiuos; est autem iste habitus uoluntatis motiuus, non informatiuus'. Anonymus, *Quaestio de lege naturali*, ed. Lottin 82[142-152].

[41] Iohannes de Rupella, *Quaestiones de legibus et praecepti*s A fol. 217vb, V fol. 148rb: 'Opinio illorum qui dicunt quod lex naturalis est actus rationis et habitus uoluntatis uidetur sumi ex illo uerbo in Glossa Rom. II: "lex naturalis est qua quisque intelligit et sibi conscius est quid sit bonum et malum". In eo quod dicit 'intelligit' notatur actus rationis, sed in hoc quod dicit 'conscius', quia dicit debitum faciendi uel non faciendi, notatur actus uoluntatis, et uolunt sumere actum secundum quod Iohannes Damascenus sumit operationem, cum dicit: "operatio est uniuscuiusque substantie innatum opus", ut sit intelligere duplicem actum, innatum et accidentalem, ut actus lucidi est lucere et illuminare, sed lucere est quasi actus naturalis et innatus. Illuminare uero actus accidentalis et separabilis ab illo. Et secundum hoc dicunt legem naturalem lucere in ratione et habilitare uoluntatem ad operationem, et ideo dixerunt actum esse rationis et habitum uoluntatis. Tamen potest dici quod id quod dicit Glossa illa dicitur de lege quantum ad actum siue ad effectum consequentem. Secundum ergo quod prius tactum est, dicendum quod lex ibi ponenda est ubi est libertas, libertas autem est in facultate; facultas enim est unde est conuerti in quod uult, quod est ante iudicare et uelle, et ita lex primo erit facultas siue in facultate et respectu rationis et respectu uoluntatis, quia ipsa facultas dicitur esse tam rationis quam uoluntatis. Vnde lex ex consequenti erit per effectum in ratione et uoluntate'. Cfr. *Summa fratris Alexandri* 4.343.

[42] Ibid. A fol. 217vb, V fol. 148rb: 'Ad illud quod queritur utrum sit habitus, dicendum quod habitus uno modo dicitur dispositio difficile mobilis, et hoc modo potest lex naturalis dici habitus'.

allora vorrebbe dire che il possessore di tale disposizione possiederebbe anche la qualità che da esso dipende: come il sapiente (sciens) è detto tale perché possiede quell' 'habitus' che è la scienza (scientia), così si dovrebbe dire 'legista' ogni essere umano, dal momento che ciascuno possiede la legge naturale che è impressa nella sua ragione. Così però non è, come attesta il fatto che il termine 'legista' denomina colui che ha scienza delle leggi e del diritto e non il possessore di una qualità morale. Per questo il concetto di 'habitus' si può utilizzare in riferimento alla legge naturale solo in senso assai ampio, per descriverne alcune caratteristiche e non per legare il possesso di essa all'esercizio di un atto specifico e dunque alla denominazione di una specifica qualità.[43]

L'esame delle caratteristiche della legge naturale porta il teologo francescano a definirne nel dettaglio le peculiarità rispetto ad altri elementi della riflessione morale. La nozione di 'lex naturalis' sembra infatti accostabile a quelle di 'synderesis' e di 'conscientia'.[44] Una delle definizioni accolte da Giovanni è quella secondo cui la legge naturale è conoscenza dei principi primi dell'agire morale, un carattere affine alla 'synderesis' che è quella conoscenza del 'bonum' innata nella ragione umana.[45] Al tempo

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[43] Ibid. A fol. 217vb, V fol. 148rb: 'Alio modo dicitur habitus qualitas, qualitans et denominans habentem, ut scientia scientem, gramatica gramaticum, etc. Secundum autem legem naturalem non est denominatio ut aliquis dicatur legista per illam, quia legista qui habet scientia legis. Vnde potius substantia facit denominationem. Hoc modo non potest dici habitus; primo autem modo potest large accipiendo'. Cfr. *Summa fratris Alexandri* 4.343.

[44] Si tratta di una nozione di legge naturale che Simone da Bisignano aveva già esplicitato nella sua *Summa in Decretum* (MIC Series A 8; Città del Vaticano 2014) 2 a D.1 d.a.c.1: 'Nobis itaque uidetur quod ius naturale est superior pars anime, ipsa uidelicet ratio que sinderesis appellatur que nec in Cain, scriptura teste, potuit extingui. Cum autem sit natura, id est naturale bonum, delictorum meritis obfuscari poterit, numquam extingui'. Cfr. Weigand, *Die Naturrechtslehre* 173-174.

[45] Iohannes de Rupella, *Quaestiones de legibus et praecepti*s A fol. 218ra, V fol. 148rb: 'Queritur utrum sit idem quod synderesis. Videtur, quia consistit synderesis circa dictamen operandorum in generali, non in ratione propria. Similiter lex naturalis est qua dictantur facienda in generali'. Cfr. *Summa fratris Alexandri* 4.344.

stesso, la definizione tratta dalla Glossa ordinaria e che trova conferma in un passo di Giovanni Damasceno, secondo cui la legge naturale implica l'acquisizione di una piena coscienza di sé stessi, sembra fare del termine 'lex naturalis' un sinonimo di 'conscientia'.[46]

Il maestro francescano si sofferma a mettere in luce le differenze che impediscono di utilizzare le tre espressioni come sinonimo di una stessa facoltà dell'anima razionale e al tempo stesso mette in luce il legame che sussiste fra queste tre nozioni e le reciproche implicazioni. La 'lex naturalis' si presenta essenzialmente come rettitudine, mentre la coscienza è una facoltà che è plasmata, nell'anima razionale, dalla legge naturale poiché è attraverso la coscienza che è possibile la conoscenza del contenuto della legge naturale (scientia legum): per questo si parla della coscienza come della regola della ragione. Diversamente la 'synderesis' è definita 'scintilla della coscienza' e volontà retta. La distinzione fra le tre, nota Giovanni, sussiste anche nelle modalità con cui operano: mentre la legge naturale opera in modo immediato imponendo un vincolo alla ragione, la coscienza opera invece in modo mediato poiché dirige la ragione verso un giudizio retto e allo stesso modo anche la 'synderesis' opera in modo mediato come regola della volontà e istinto del bene. Le tre nozioni, pur nella loro distinzione, sono tuttavia legate in un processo che indirizza l'agire morale dell'uomo.[47] La legge

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[46] Ibid. A fol. 218ra, V fol. 148rb: 'Et notat quod conscientia uno modo dicitur opinio de agendis, ut sic imputetur debitum quoddam, et sic sumitur 1Cor. 8, "Quidam autem cum conscientia ydoli ydolotitum manducant", et in hoc potest esse error, quia sumitur aliquando ex apparenti lege sicut ex natura, alio modo dicitur iudicatorium naturale, et sic sumitur Rom. 2: "Testimonium reddente illis conscientia ipsorum", et de hoc queritur utrum sit idem quod lex. Iohannes Damascenus: "Conscientia est lex intellectus nostri opposita peccato"; ergo est idem quod lex. Item, lex naturalis est qua quisque sibi conscius est; sed conscientia quisque sibi conscius est; ergo primum'. Cfr. *Summa fratris Alexandri* 4.344.

[47] Ibid. A fol. 218ra, V fol. 148rb: 'Lex naturalis non est conscientia nec synderesis, tamen in eo quod est "regulare" possunt conuenire lex, conscientia et synderesis; tamen, si uolumus distinguere, possumus dicere quod lex primo <est> regula facultatis, conscientia autem formatur ex lege, quia ponit scientiam legis, et secundum hoc est regula rationis; synderesis uero est scintilla ipsius

naturale, infatti, stabilisce che cosa si deve fare o non fare e in tal modo plasma la coscienza come conoscenza della legge. La 'synderesis' recepisce questa conoscenza sotto forma di istinto del bene che orienta la volontà.

Giovanni si muove così ancora nel solco della relazione fra legge naturale e anima razionale, suggerendo come 'conscientia' e 'synderesis' siano due facoltà dell'anima umana che vengono determinate proprio dal rapporto fra ragione e legge naturale. Se la 'conscientia' è la conseguenza di tale rapporto sul piano cognitivo, come 'scientia legum', la 'synderesis' rappresenta invece il prodotto di questa relazione sul terreno pratico proprio della volontà, traducendosi in istinto che attiva la volontà e la indirizza verso il bene da perseguire o lontano dal male da rifiutare.

Indelebilis e *inmutabilis*?

Secondo l'indice dei nodi problematici offerto da Giovanni, resta da chiarire la questione dello statuto della legge naturale nello stato postlapsario: il peccato originale comporta una cancellazione della 'lex naturalis'? Si tratta cioè di un 'habitus delebilis' che rende necessarie le leggi 'positive', come la legge mosaica e quella evangelica, per compensare il venir meno di ogni prescrizione morale? Se invece la 'lex naturalis' continua a permanere nonostante il peccato, qual è la sua funzione e quale il suo valore? Di fronte a questa serie di questioni, che inquadrano il problema nella complessa discussione relativa al rapporto fra natura e grazia nello stato postlapsario, si confrontano due possibili linee argomentative.

Da un lato, muovendo dal passo di Rm 2:14, si afferma una sostanziale consonanza fra natura e grazia: sottolineare il carattere normativo della prima non significa, secondo Giovanni, negare il

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conscientie et est regula uoluntatis et instinctus. Primo enim inscriptio faciendi et non faciendi; secunda ratio legis formans ipsam conscientiam; vnde conscientia scientiam habet a lege quod importatur per "consequens"; synderesis uero recipit instinctum a lege et respicit uoluntatem'. Cfr. *Summa fratris Alexandri* 4.345.

ruolo della grazia divina. L'opera di quest'ultima consiste, infatti, in una 'reparatio' che interviene sugli effetti del peccato e rende di nuovo efficaci quelle prescrizioni che già erano fissate nella legge naturale.[48] Si afferma così una sostanziale coincidenza e continuità fra le diverse tipologie di leggi, dal momento che sia la legge mosaica che quella evangelica si presentano come una sorta di nuova promulgazione dei contenuti della legge naturale.

Rispetto a questa argomentazione emerge un punto critico riguardo al senso della espressione 'reparatio', con cui si descrive l'opera della grazia divina sull'uomo che soffre gli effetti del peccato originale. Il carattere necessario di questo intervento sembra giustificato da una condizione postlapsaria in cui, a causa degli effetti del peccato originale, la funzione della legge naturale appare radicalmente se non totalmente compromessa. In tal caso la 'lex naturalis' sarebbe in sostanza venuta meno in conseguenza del peccato e dunque quello che viene compiuto con la legge mosaica e con la legge evangelica è una vera e propria sostituzione con leggi positive. Una conclusione, questa, alla quale si oppone una 'auctoritas' agostiniana, che parla della legge naturale come di una norma iscritta da Dio nel cuore degli uomini e dunque non cancellabile in conseguenza di qualsiasi colpa.[49]

Giovanni affronta il dilemma facendo ricorso ad una dottrina già consolidata nel discorso teologico della prima metà del XIII secolo: la distinzione fra 'substantia' ed 'effectum', che spiega attraverso la metafora dell'eclissi solare.[50] L'oscuramento del sole

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[48] Ibid. A fol. 218ra, V fol. 148va: 'Rom II: "Cum enim gentes que legem non habent". Glossa: "non quod per nature nomen negata sit gratia, sed quod per gratiam reparata est natura, qua interior homo renouatur et lex iustitie scribitur quam deleuerat culpam", et hec lex iustitie est lex nature. Ergo lex naturalis deletur per culpam'. Cfr. *Summa fratris Alexandri* 4.346.

[49] Ibid. A fol. 218rb, V fol. 148va: 'Augustinus II Confessionum: "Furtum, Domine, punit lex tua et lex scripta in cordibus hominum quam nec ulla delet iniquitas". Ergo nec culpa nec pena potest delere legem nature; ergo est indelebilis omnino'. Cfr. *Summa fratris Alexandri* 4.346.

[50] Ibid. A fol. 218rb, V fol. 148va: 'Deleri est dupliciter, scilicet quantum ad substantiam et quantum ad effectum. Quantum ad substantiam ergo indelebilis est lex nature; quantum ad effectum uero sic, sicut lux solis per enclipsim non deficit in sole, tamen quantum ad effectum et illuminationem deficit propter interpositionem lune. Peccatum enim tenebra est que obumbrat et interponit se

da parte della luna non implica un venire meno della capacità del sole di irradiare luce; non porta cioè alla cancellazione di ciò che caratterizza la natura del sole, della sua 'substantia'. L'eclissi compromette invece l'effetto dell'irradiazione solare, impedita dalla luna. Un rapporto simile, spiega il teologo, si verifica fra legge naturale, peccato e ragione umana: l'aggettivo 'delebilis' non può essere utilizzato per descrivere un venir meno della legge naturale 'quantum ad substantiam'. Il peccato originale non fa venir meno la legge naturale, cioè non cancella quella impronta della legge eterna che è nella ragione. Ne impedisce però gli effetti, poiché rende la ragione umana incapace di seguire le prescrizioni e le proibizioni che da quella legge dipendono. L'opera della grazia riguarda allora la capacità della ragione umana di comprendere e attuare il contenuto di una legge naturale che, considerata in sé stessa, è incancellabile.

Incancellabilità non significa tuttavia immutabilità della legge naturale, constatazione che pone un ulteriore quesito sulla natura della 'lex naturalis'. Due passi del *Decretum* grazianeo sembrano negare in modo deciso la possibilità di concepire la legge naturale come mutevole. Nella quinta e nella sesta 'distinctio' essa viene infatti presentata come invariata nel tempo e sempre uguale a sé stessa fin dal principio.[51] A queste 'auctoritates' si aggiunge la conseguenza di un'argomentazione che concerne la mutabilità della legge positiva, la quale dipende dal mutare della volontà del

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inter nos et legem naturalem, et ita quantum ad lectionem deletur, non quantum ad essentiam, sicut si littere sculperentur in marmore superiecto luto delerentur quantum ad lectionem, sed non quantum ad essentiam. Et hoc est quod dicitur Rom II in Glossa: "Non usque adeo loquitur de deletione ymaginis".' Cfr. *Summa fratris Alexandri* 4.346.

[51] Ibid. A fol. 218rb, V fol. 148va: 'VI distinctione Decretorum dicitur: "Ius naturale ab exordio rationalis creature incipiens manet immobile". Ergo lex naturalis est immutabilis. Item, V distinctione: "Ius naturale quod cepit ab exordio non uariatur tempore sed inuariabile permanet'. Cfr. *Summa fratris Alexandri* 4.347. Giovanni cita qui due passi del *Tractatus de legibus* contenuto nel *Decretum* di Graziano, D.6 d.p.c.3: 'Naturale ius ab exordio rationalis creaturae incipiens, ut supra dictum est, manet immobile' che rinvia all'altro passo citato da Giovanni nel quale si legge D.5 d.a.c.1: 'Naturale ius inter omnia primatum obtinet et tempore et dignitate. Cepit enim ab exordio rationalis creaturae, nec uariatur tempore, sed immutabile permanet'.

legislatore. Concepire la legge naturale come una legge che Dio pone nell'uomo, implica sostenere la dipendenza di tale legge dalla volontà divina, la quale è però immutabile e come tale non può che determinare una legge a sua volta immutabile.[52]

Di segno opposto è un 'argumentum' che utilizza la definizione di 'ius naturale' trasmessa dalle *Ethimologiae* di Isidoro di Siviglia, secondo il quale il diritto naturale è comune a tutti i popoli ma si adatta, sul piano dei precetti e delle pene, alle diverse circostanze e ai diversi contesti. Questo consente di rendere ragione della pluralità di leggi e tradizioni fra i diversi popoli.[53] Altre argomentazioni si fondano invece sull'esegesi di alcuni passi della Scrittura. Sir 17:9, sembra suggerire che la legge mosaica sia stata promulgata come correzione di alcune norme della legge naturale, la quale sarebbe quindi modificabile, come dimostra l'introduzione della bigamia che, sebbene contraria alla legge naturale, è stata resa ammessa, ad esempio, per Giacobbe.[54]

Giovanni de La Rochelle sviluppa la 'responsio' facendo propria la tripartizione fra 'precepta', 'prohibitiones' e 'demonstrationes' con la quale Guglielmo di Auxerre aveva

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[52] Ibid. A fol. 218rb, V fol. 148va: 'Lex posita manente uoluntate et potestate positoris, manet immobilis, quamuis sit abusio ipsius legis; sed uoluntas positoris manet et manet uoluntas rationalis qui posita est; ergo manet immobilis'. Cfr. *Summa fratris Alexandri* 4.347.

[53] Ibid. A fol. 218rb, V fol. 148va: 'Ysidori IIII: ius naturale commune est omnium nationum. Hoc iure communis est omnium possessio et omnium una libertas. Sed hec sanctio mutata est ut omnia sint communia et quod omnium sit una libertas. Ergo lex naturalis mutabilis est quantum ad precepta et sanctiones suas'. Cfr. *Summa fratris Alexandri* 4.347. Giovanni riporta qui la definizione di 'ius naturale' presente in D.1 d.a.c.7.

[54] Ibid. A fol. 218rb, V fol. 148va: 'Eccli 17: "Addidit illi disciplinam". Glossa: "Legem littere quam ad correptionem legis nature scribi uoluit. Ergo est corrigibilis, et mutabilis. Item, bigamia prohibetur lege nature, vnde Lamech, qui primus introduxit, arguitur; vnde Glossa: "Contra naturam et legem adulterium commisit"; sed constat quod istud mandatum postea mutatum est, quia Iacob habendo plures non peccauit. Vnde Augustinus dicit: "peccatum non erat quando mos erat". Ergo, si prius fuerat peccatum et postea factum est non peccatum, mutatum erat preceptum; ergo lex nature mutabilis'. Cfr. *Summa fratris Alexandri* 4.347.

descritto il contenuto della legge naturale.[55] Questa distinzione fissa una differenza fra i precetti e le proibizioni sanciti dalla legge naturale, che godono di uno stato di immutabilità, e le 'demonstrationes' che invece hanno lo statuto di un 'consilium' e sono quindi mutevoli e adattabili a circostanze specifiche. È il caso, osserva Giovanni, di quanto avviene con l'affermazione della comunione dei beni (omnia esse communia) che rientra nel novero delle 'demonstrationes' della legge naturale e come tale muta con il mutare delle circostanze: se nello stato prelapsario tale principio trova una piena applicazione, in conseguenza del peccato esso muta e si trasforma per preservare l'uomo dal rischio della frode.

Giovanni fissa così una distinzione netta fra il piano del principio che la legge naturale afferma, la 'ratio' della legge, e la sua traduzione in una formulazione normativa che comporta una mutabilità in relazione al mutare delle circostanze e contingenze. Il teologo chiarisce questa distinzione utilizzando come metafora l'arte medica.[56] Quest'ultima, infatti, ad alcuni uomini concede di

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[55] Ibid. A fol. 218rb, V fol. 148va: 'Quidam dicunt quod in lege naturali sunt precepta et prohibitiones, sunt etiam demonstrationes. Preceptum est "omnia quecumque uultis ut faciant uobis homines" etc. Prohibitio "quod tibi non uis fieri, alii ne feceris" etc. Et ista omnino immutabilia sunt. Sunt preterea quedam demonstrationes quasi consilia, et ille mutabiles sunt, sicut "omnis esse communis". Vnde ponunt differentias inter preceptum et demonstrationem in lege naturali, sicut inter preceptum et consilium in lege scripta'. Cfr. Guillelmus Altissiodorensis, *Summa aurea*, ed. Jean Ribailler (4 vols. Spicilegium Bonaventurianum 18A; Paris-Roma 1986) 3.370[25]-371[41]; Cfr. *Summa fratris Alexandri* 4.348. Sul rapporto fra 'demonstratio' e 'permissio' si veda Brian Tierney, *Liberty and Law: The Idea of Permissive Natural Law, 1100-1800* (SMCL 12; Washington D.C. 2014) 23-29. Per la tradizione testuale in cui questi due concetti sono posti in relazione, soprattutto nel quadro della riflessione sulla legge naturale, si veda Weigand, *Die Naturrechtslehre* passim.

[56] Ibid. A fol. 218rb, V fol. 148va: 'Aliter dicendum et melius, secundum Augustinum, qui dicit quod ars medicine immutabilis est et tamen secundum illam medicus mutat precepta languentibus, et ista mutatio non est ex parte actis, que manet eadem in suis rationibus, sed facta est mutatio ex parte languentis. Sic dicit quod lex naturalis immutabilis est quantum ad rationem suorum preceptorum, quia ratio precipiendi non mutatur; non tamen est immutabilis quantum ad effectum omnium sanctionum. Vnde iure naturali sunt omnia communia et non communia; dictat enim omnia esse communia nature bene

poter bere vino quando sono in uno stato di salute ma lo proibisce quando sono malati, adattando il principio della preservazione della 'sanitas' alle diverse circostanze. Allo stesso modo la legge naturale, che prescrive l'assoluta comunione dei beni prima della caduta, ammette invece la proprietà privata dopo il peccato originale per preservare il principio supremo di indirizzare l'uomo verso il bene e farlo rifuggire dal male. A mutare non è il principio in ragione del quale la legge naturale fissa i precetti, ma la forma con la quale tale principio viene tradotto in prescrizioni.

La possibilità di un ordine delle leggi

Indelebile quanto alla sostanza e mutevole sul piano delle 'demonstrationes', Giovanni de La Rochelle descrive una legge naturale che in ogni caso subisce una sorta di 'vulnus' a causa del peccato originale. Tornando alla metafora dell'eclissi solare, sebbene l'esistenza della legge naturale non sia compromessa dal peccato dei padri, il suo effetto è reso nullo al punto da rendere necessaria una 'reparatio' ad opera della grazia divina. La 'obumbratio' della legge naturale causata dal peccato originale investe due diversi piani. Da un lato viene compromesso l'aspetto cognitivo della legge naturale, il suo essere 'notitia' di un contenuto normativo, perché il peccato rende la ragione umana incapace di cogliere in modo chiaro i contenuti della legge. Dall'altro lato esso indebolisce e 'assopisce' la capacità della legge di operare nella ragione umana come 'instinctus' orientato al bene. La 'lex fomitis', di cui parla Paolo e che descrive lo stato dell'uomo in conseguenza del peccato originale, rende allora necessaria l'opera della grazia e la promulgazione della legge mosaica prima e di quella evangelica poi.[57]

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institute et dictat non omnia esse communia in statu nature corrupte. Sicut ars medicine concedit alicui uinum tempore sanitatis et prohibet tempore morbi; et tamen eadem ratione seruande sanitatis. Sic lex nature concedit omnia communia nature sane, sed corrupte non, propter periculum sequens, quia sequerentur mutue fraudes et multa alia. Ratio ergo sanctionis non est mutata, quamuis mutetur preceptum'. Cfr. *Summa fratris Alexandri* 4.348.

[57] Cfr. Vecchio, 'La riflessione' 130-131.

Ricollegandosi ad una tradizione che era già stata sviluppata dalla canonistica del secolo XII, Giovanni spiega allora che se la legge di Mosé restaura la legge naturale nel suo essere 'notitia illuminationis', la legge evangelica ne ricostituisce la capacità di operare come 'instinctus'.[58] Il fondamento delle due leggi risiede allora nella necessità di rendere pienamente operante la legge naturale, la quale concede all'uomo un certo potere ma non in modo pieno, perché non stabilisce le forme e le modalità con cui esercitare tale potere. Occorre superare sia uno stato di ignoranza dei contenuti della legge che una deficienza nel compimento del bene prescritto dalla legge. La legge mosaica e quella evangelica sono dunque lo strumento con cui superare i limiti della legge naturale resi evidenti dalla *lex fomitis*.

Proprio per questo la legge naturale diviene l'elemento che consente di articolare in un quadro unitario le diverse tipologie di legge. Se essa è l'impronta della legge eterna nelle creature razionali, in ragione dei limiti che le derivano dal peccato originale essa determina la legge di Mosé prima e quella evangelica poi come proprio completamento e articolazione, sancendo un

[58] Ibid. A fol. 218va, V fol. 148va-148vb: 'Differt dicere legem naturalem et legem positiuam. Cum enim dico legem naturalem, duo dico, quia per hoc quod dico 'naturalem', addo conditionem ad legem, cum enim dico 'legem', dico quod habet in se notitiam faciendi. Sed ex eo quod est, lex naturalis habet instinctum et mouere ad actionem, secundum quod dicit Ysidorus: "per peccatum autem lex naturalis erat obumbrata", quantum ad illuminationem per notitiam et quantum ad instinctum erat concepita. Vnde quantum ad utrumque reparata est per duplicem legem, scilicet per legem Moysi et per legem Spiritus. Per legem enim Moysi tollitur obumbratio contra illuminationum notitie, quia per legem cognitio peccati. Rom VI. Per legem autem Spiritus, que excitat et mouet ad bonum, reparatur instinctus. Lex enim naturalis dat quodam posse que facere possumus, quod in nobis est, sed non dat plenum posse, et ideo perficitur per legem Spiritus. Patet ergo quod utrumque est uitium legis naturalis, scilicet ignorantia faciendi et difficultas ad bonum, vnde utroque modo uitiatur, quia per difficultatem minus potest ad instinctum'. Per la discussione sul rapporto fra la nozione di legge naturale come 'instinctus' e la legge mosaica nella canonistica del XII secolo si vedano le considerazioni di autori come Rufino o Giovanni da Faenza e dell'anonimo autore della glossa del St. Florian SB III 5. Su questi testi si veda Weigand, *Die Naturrechtslehre* 145-146, 153 e 181.

principio di continuità fra le diverse *leges* e più ancora di sostanziale concordanza sul piano dei principi.[59]

Il trattato di Giovanni de La Rochelle, recepito nella *Summa fratris Alexandri*, colloca la legge naturale come parte della dinamica dell'atto morale e ne fa lo snodo dell'intero sistema delle leggi: è la sua natura di *similitudo* della legge eterna che la pone come anello di congiunzione fra quest'ultima e le altre tipologie di leggi. La *lex naturalis* è descritta come connaturale all'anima e come incancellabile, quanto alla propria sostanza, da alcun genere di colpa o peccato. Il fatto che il peccato faccia venir meno gli effetti della legge naturale è l'elemento su cui fondare la legittimità delle leggi 'positive', quella mosaica e quella evangelica, il cui compito è quello di restaurare i principi della legge naturale in relazione a specifiche circostanze e contingenze.

Conclusioni

Le *quaestiones de legibus et praeceptis* si presentano come la prima sistematica ed estesa trattazione della nozione di legge nel quadro del discorso teologico di ambito universitario. Rispetto al panorama parigino, dove sono attestate riflessioni su singole nozioni come quella di 'lex naturalis', il testo di Giovanni de La Rochelle si propone di costruire un quadro concettuale unitario entro il quale l'intero sistema delle leggi trova un ordine.[60] Si tratta di un testo che, se da un lato rappresenta lo sviluppo di formule letterarie già sperimentate, ad esempio, nella *Summa Aurea* di Guglielmo di Auxerre, assume tuttavia un tratto di novità nell'ampiezza e analiticità dell'esame del tema della legge. Proprio in ragione di questa caratteristica esso marca un punto di svolta anche per quanto riguarda la riflessione sulla nozione di 'lex

[59] Cfr. Vecchio, 'La riflessione' 134-142 e 'Precetti e consigli' 41.

[60] Sul panorama parigino e sulla discussione che in quel contesto si sviluppa sul tema della legge e delle sue diverse tipologie si vedano le *quaestiones* n.39 *De quatuor legibus* e n.571 *De legibus* conservate nel Douai, BM 434. Per una descrizione del manoscritto e del suo contenuto si veda Palémon Glorieux, 'Les 572 questions du manuscrit Douai 434', *Recherches de théologie ancienne et médiévale* 10 (1938), 123-152, 225-267. Si veda anche l'anonima *quaestio de lege naturali* preservata nel BAV lat. 782, fol. 122ra-122vb.

naturalis' che si trova ad essere affrontata non in modo isolato ma come parte di un più articolato discorso teologico. Più ancora il maestro francescano dimostra di conoscere con accuratezza i testi principali della tradizione giuridica, sia canonistica che civilistica. Se egli padroneggia il *Decretum* e il *Digestum* è verosimile che non manchi di una qualche conoscenza delle grandi tradizioni di esegesi di questi testi che si erano venute arricchendo a partire dalla metà del XII secolo e delle quali nel contesto universitario parigino vi era certamente una qualche conoscenza.[61]

Le *Quaestiones* del maestro francescano sanciscono così il passaggio da una riflessione che si articolava ora sul terreno del diritto, con i civilisti e i canonisti, ora su quello dell'esegesi della Scrittura, ad un approccio al tema della *lex* che guarda alle diverse tradizioni autoritative come elementi di una molteplicità riconducibile ad un quadro unitario. Le molteplici definizioni di legge naturale che si ritrovano nei padri della Chiesa e nell'esegesi, come nel *Digestum* giustinianeo e nel *Decretum* di Graziano e come nei testi della tradizione filosofica, sono rilette da Giovanni alla luce di un'idea gerarchica che dalla legge eterna fa derivare ogni altro genere di leggi e che dunque rende legittime tutte le forme di *leges addictae* o positive.

All'interno di questo schema, la 'lex naturalis', con la polisemia che questa espressione può assumere, è ciò che rende possibile il nesso fra legge eterna e leggi positive. Dal punto di vista del teologo francescano, il discorso sulla legge naturale diventa così fondativo di un ordine morale nel quale i diversi generi di leggi non solo sono legati fra loro, ma si richiamano e si corrispondono sul piano del contenuto. La conseguenza che il maestro francescano ne trae è duplice. Da un lato si apre la possibilità di misurare e definire il valore delle diverse 'leges

[61] Sulla circolazione di testi giuridici, sia canonistici che civilistici, nel quadro dell'università di Parigi nella prima metà del XIII secolo si vedano Anne Lefebvre-Teillard, 'Du Décret aux décrétales: L'enseignement du droit canonique au sein de l'école parsienne (fin XII^{e}-début XIII^{e} siècle)', *Les débuts de l'enseignement universitaire à Paris (1200-1245 environ)*, edd. Jacques Verger-John W. Baldwin (Studia artistarum 38; Turnhout 2013) 319-328; Chris Coppens, 'Le droit romain à Paris au début du XIII^{e} siècle, introduction et interdiction', *Les débuts de l'enseignement* 329-347.

addictae', recuperando la legge mosaica al discorso teologico quale premessa su cui si innesta la legge evangelica. Dall'altro, si propone una visione dell'ordine morale che include ogni essere umano che, in quanto dotato di ragione, porta impressa quell'impronta della legge eterna che è la legge naturale.

Bologna.

Singularia – eine fast vergessene Gattung der juristischen Literatur

Thomas Woelki

Im Jahre 1390 wurde der damals wohl berühmteste Jurist Italiens Baldo degli Ubaldi für ein märchenhaftes Gehalt an die Universität Pavia geholt. In dieser Zeit spielt eine denkwürdige Episode, geschildert von Paolo da Castro, der damals als Schüler im Publikum saß.[1]

> Casus est hic singularis. Ego [= Paolo da Castro] vidi de isto textu fieri verecundiam cuidam doctori vocato dominus Phil(ippus) de Aregio [= Filippo Cassoli] et legerat hic. Postea venit Papiam, ubi primo legerat, et fuerat doctor omnium illorum doctorum. Unde fecit quodlibetum super rubrica de testamentis asserens velle respondere de quolibet in materia ultimarum voluntatum. Baldus interrogavit eum, ubi habemus, quod

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GW = *Gesamtkatalog der Wiegendrucke*, bislang 12 Bde., Berlin, Stuttgart 1925-2013, 'www.gesamtkatalogderwiegendrucke.de'; ISTC = *Incunabula Short Title Catalogue*, 'www.bl.uk/catalogues/istc'. Eine frühere Fassung des Textes erschien in *Honos alit artes: Studi per il settantesimo compleanno di Mario Ascheri*, 1: *La formazione del diritto comune*, edd. Paola Maffei, und Gian Maria Varanini (Florenz 2014) 281-290.

[1] Paulus de Castro, *Super Digesto veteri*, Pars I, (Lyon 1535), fol. 155rb, ad § De testamento matris (Dig. 5.2.27.4). Zur Karriere des Baldo degli Ubaldi vgl. Kenneth Pennington, 'Baldus de Ubaldis', RIDC 8 (1997) 35-61; Ennio Cortese, 'Baldo degli Ubaldi (Perugia, 2 ottobre 1327-Pavia, 28 aprile 1400)', DBGI 1.149-152. Zu seiner Zeit in Pavia s. insbesondere Cristina Danusso, *Ricerche sulla 'Lectura feudorum' di Baldo degli Ubaldi* (Università degli Studi di Milano, Facoltà di Giurisprudenza. Pubblicazioni dell'Istituto di Storia del Diritto Italiano 16; Mailand 1991) 9-10.; Vincenzo Colli, 'L'esemplare di dedica e la tradizione del testo della lectura super usibus feudorum di Baldo degli Ubaldi', *Ius commune* 27 (2000) 67-117, hier 69; Andrea Padovani, 'Sette orationes pavesi pro doctoratu di Baldo degli Ubaldi', hrsg. von Bernardo Pio und Riccardo Parmeggiani, *L'università in tempo di crisi: Revisioni e novità dei saperi e delle istituzioni nel Trecento, da Bologna all'Europa* (Centro Interuniversitario per la Storia delle Università Italiane, Studi 30; Bologna 2016) 27-62. Zu Paolo da Castro († 1441), dem Verfasser der zitierten Passage, s.u. Anm. 14.

substitutio vulga(ris) facta in legato non comprehendat nisi casum, quo noluerit vel potuerit. Breviter obmutuit. Et Baldus aperuit librum et legit istum textum, unde resultavit illa maxima confusio.

Geschildert wird hier offenbar die Situation einer öffentlichen ʻDisputatioʼ des 1391 verstorbenen Legisten Filippo Cassoli.[2] Dieser erhob für sich den Anspruch, alle denkbaren Problemstellungen rund um das Testament diskutieren zu wollen. Das passt gut auf die Entwicklung der Gattung ʻDisputatioʼ, die in dieser Zeit nicht mehr nur die eng gefasste ʻQuaestioʼ bearbeitete, sondern gern alle möglichen Konstellationen durchspielte.[3] Baldus ergreift das Wort und lanciert hier eine Problemfrage über unerfüllbare Bedingungen im Testament, die gemeinerweise einen ʻcasus singularisʼ betrifft, also einen Rechtssatz, der sich nur aus einer Stelle des Corpus iuris ableiten lässt. Peinlicherweise hatte der alte Cassoli die Stelle aber gerade nicht parat und war blamiert. Baldus konnte sich durch seine öffentliche Wortmeldung vor der Universitätsöffentlichkeit in Szene setzen und damit einen glänzenden Einstand an der neuen Universität feiern. Eben weil solche Singulärstellen schwer zu finden waren, wurde es zu Beginn des 14. Jahrhunderts üblich, diese Stellen einzeln zu sammeln und in umfangreichen Kompilationen zusammenzufügen; eine eigene Textsorte entstand, die *Singularia iuris*.

Diesen Titel tragen ab dem 14. Jahrhundert zahlreiche juristische, vor allem legistische Werke. Es handelt sich meist um kurze, am konkreten Fall orientierte Erläuterungen einer wenig bekannten und dennoch bemerkenswerten Text- oder Glossenstelle. Namensgebendes Kriterium ist die Einzigartigkeit: Die Lösung eines wichtigen praktischen Problems hängt an einer einzigen Gesetzes- oder Kommentarstelle. Wer sie übersieht, ist verloren.

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[2] Zu ihm vgl. Angelo Dillon Bussi, ‘Cassoli, Filippo’, DBI 21 (1978) 520-523.

[3] Zu diesen Entwicklungen vgl. Thomas Woelki, ‘Politikberatung aus dem Hörsaal? Die Disputationen des Angelo degli Ubaldi (1385-1394)’, Jan-Hendryk de Boer u.a. (Hrsg..), *Zwischen Konflikt und Kooperation: Praktiken der europäischen Gelehrtenkultur (12.-17. Jahrhundert)* (Historische Forschungen 114; Berlin 2016) 229-258, hier 231-236 mit der Lit.

Das aus heutiger Sicht Bemerkenswerte an den so bezeichneten Texten ist ihr Erfolg. Gerade im 15. Jahrhundert erfreute sich der Texttyp *Singularia* insgesamt einer immensen Beliebtheit, wie zahlreiche Handschriften und Drucke bezeugen, welche in den Jahrzehnten um 1500 den juristischen Büchermarkt fluteten. Zufällige Namensgleichheit oder tatsächlich ein eigenes Genre der juristischen Literatur?

Den Zeitgenossen jedenfalls erschienen die Konvergenzen innerhalb der Texte ausreichend, um eine gemeinsame Zusammenstellung zu rechtfertigen. Im Laufe des 16. Jahrhunderts wurden die *Singularia* einzelner Autoren immer wieder zu großen Sammlungen zusammengebunden und oft mit Kommentaren versehen. Die Autoren zitierten die *Singularia* vorangegangener Generationen und stellten sich bewusst in eine Tradition. Von einer eigenen Gattung wird man freilich erst sprechen können, wenn es gelingt, texttypische Konventionen zu finden, welche eine Abgrenzung zu anderen Textsorten ermöglichen. Es wird darauf ankommen, Gemeinsamkeiten der *Singularia*-Sammlungen in Aufbau, Darstellungsabsicht und Argumentationstechnik herauszuarbeiten. Hierfür sind zunächst einige Entwicklungslinien zu skizzieren und anschließend der Quellenwert dieser Texte für die historische und rechtshistorische Forschung zu umreißen. Die Darstellung kann freilich nur einen vorläufigen und unvollständigen Überblick liefern. Eine systematische Untersuchung fehlt bislang.

Die historische und rechtshistorische Forschung hat sich mit diesen Texten nur vereinzelt und am Rande beschäftigt. Die großen Handbücher der juristischen Literaturgeschichte gehen praktisch nicht auf sie ein.[4] Lediglich in den beiden großen Über-

[4] Bei Norbert Horn, 'Die legistische Literatur der Kommentatoren und der Ausbreitung des gelehrten Rechts', *Handbuch der Quellen und Literatur der neueren europäischen Privatrechtsgeschichte*, 1: *Mittelalter (1100-1500): Die gelehrten Rechte und die Gesetzgebung*, hrsg. von Helmut Coing (München 1973) 261-364, hier 349, werden lediglich die *Singularia Bartoli* des Antonio Mincucci da Pratovecchio erwähnt (s.u. bei Anm. 12). Hermann Lange und Maximiliane Kriechbaum, *Römisches Recht im Mittelalter*, 2: *Die*

blickswerken des 19. Jahrhunderts über die ‘populäre’ juristische Literatur, bei Roderich Stintzing (1867) und Emil Seckel (1898), fanden die *Singularia* ausführlichere Berücksichtigung.[5] Im Zentrum stand hier jedoch der um 1450 entstandene und bis weit ins 17. Jahrhundert sehr erfolgreiche *Vocabularius utriusque iuris* des Magister Jodocus aus Erfurt, ein juristisches Lexikon für Studienanfänger und für den Alltagsgebrauch. Der Verfasser des *Vocabularius* übernahm einige Artikel ganz oder teilweise aus den weit verbreiteten *Singularia* des jung verstorbenen Juristen Lodovico Pontano († 1439), welche den Höhepunkt einer längeren Entwicklung dieser Textsorte markierten.[6]

Entwicklungslinien

Typisch für die juristische Literatur der Kommentatorenzeit war eine breite Erörterung der praktischen Bedeutung der zu

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Kommentatoren (München 2007) 831 erwähnen die *Singularia Baldi* desselben Autors (s.u. Anm. 13).

[5] Roderich Stintzing, *Geschichte der populären Literatur des römisch-kanonischen Rechts in Deutschland am Ende des fünfzehnten und Anfang des sechzehnten Jahrhunderts* (Leipzig 1867) 129-144; Emil Seckel, *Beiträge zur Geschichte beider Rechte im Mittelalter*, 1: *Zur Geschichte der populären Literatur des römisch-kanonischen Rechts* (Tübingen 1898; Neudruck Hildesheim 1967) 3-57.

[6] Stintzing, *Geschichte* 134; Seckel, *Beiträge* 54, stellt eine Liste der Übernahmen aus Pontanos *Singularia* in den *Vocabularius* zusammen. Zu den Wiegendrucken des Vocabularius: GW M12614-M12677. Zur Gattung allgemein Paul Ourliac, Henri Gilles, *La période post-classique (1378-1500): La problématique de l’époque: Les sources* (Histoire du droit et des institutions de l’Eglise en Occident 13.1; Paris 1971) 123-125. Zu Lodovico Pontano s. Thomas Woelki, *Lodovico Pontano (ca. 1409-1439): Eine Juristenkarriere an Universität, Fürstenhof, Kurie und Konzil* (Education and Society in the Middle Ages and Renaissance 38; Leiden, Boston 2011) hier 30-36 und 505-506 zu den *Singularia*. Vgl. auch Louis Chabrand, *Étude sur Gui Pape (1404?-1477)* (Paris 1912) 61-62., mit einer Definition der Singularia: ‘un recueil d’axiomes juridiques, de règles détachées, notées par l’auteur au jour de jour, mais sans aucun plan’. Andrea Labardi bezeichnet die *Singularia* als ‘un genere di ampio successo, nato dalla reazione alla sovrabbondanza della letteratura giuridica’, ‘Mattesillani, Matteo (Matthaeus Matasellanis)’, DBI 72 (2008) 259-260.

kommentierenden Textstellen.[7] ʻBrevitasʼ war hier keine juristische Tugend. Die Textmassen schwollen an und wurden immer unübersichtlicher. Das wachsende Bedürfnis nach Verdichtung, Synthese und schneller Orientierung führte zu Repertorien und Auswahllisten von Problemfragen oder Beispielsfällen. Bemerkenswerte Stellen-ʻnotabiliaʼ-wurden schon früh auch isoliert vom gewichtigen Kommentar gesammelt, neu sortiert, erweitert. Dabei bekamen Textstellen, die sich nur durch ihre Exklusivität von den herkömmlichen ʻNotabiliaʼ unterschieden, einen besonderen Stempel: ʻsingularia'. Sie wurden bald auch separat kompiliert, wobei begriffliche Grenzen unscharf blieben; so manche Sammlung hieß schlichtweg ʻsingularia seu notabiliaʼ.[8]

Nach der Einschätzung des ʻVaters der juristischen Literaturgeschichteʼ, Tommaso Diplovatazio (1468-1541), war Francesco Tigrini (ca. 1303-1365), Peruginer Kollege und Freund des großen Rechtslehrers Bartolo da Sassoferrato (1313-1357), der erste Sammler von ʻglosse singularesʼ.[9] Auch Bartolo selbst und sein berühmter Schüler Baldo degli Ubaldi (1319/27-1400) trugen derartige Texte zusammen. Die wohl von Bartolo kompilierten *Singularia* beziehen sich auf ein kanonistisches Werk, den

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[7] Horn, ʻLegistische Literaturʼ 324-325.

[8] So etwa bei Matteo Mattesilani, Lodovico Pontano, Francesco da Crema, Ippolito Marsili, Antonio Corsetto und Petrus Gerardus de Petrasancta; dazu unten bei Anm. 18-19, 23, 26-29. Vgl. Woelki, *Pontano* 33.

[9] Tommaso Diplovatazio, *Liber de claris iuris consultis. Pars posterior*, Hrsg. v. Fritz Schulz u.a. (Studia Gratiana 10; Rom 1968) 273. Zitat: Hermann Kantorowicz, ʻPraestantia doctorum (1931)ʼ, hrsg. von Helmut Coing, Gerhard Immel *Rechtshistorische Schriften von Hermann Kantorowicz* (Freiburger rechts- und staatswissenschaftliche Abhandlungen 30; Karlsruhe 1970) 377-396, hier 377. Zu Diplovatazio siehe vor allem Mario Ascheri, *Saggi sul Diplovatazio* (Studi senesi, Quaderni 25; Mailand 1971). Zu Tigrini vgl. Federico Martino, ʻ"Lecturae per viam additionum" nel Ms 317 della Biblioteca Capitolare di Luccaʼ, QF 67 (1987) 462-476; Giovanna Murano, ʻFrancesco Tigrini (1303 ca-*ante* 4 marzo 1365)ʼ, hrsg. von Murano und Giovanna Morelli, *Autographa*, 1.1: *Giuristi, giudici e notai (sec. XII-XVI med.)* (Centro interuniversitario per la Storia delle Università Italiane, Studi 16; Bologna 2012) 64-65.

Apparatus Innozenz' IV. (Sinibaldo Fieschi) zum Liber Extra.[10] Der nie im Kirchenrecht ausgebildete, aber gleichwohl sehr an kanonistischen Fragestellungen interessierte Legist nutzte offensichtlich die Methode des Sammelns von einzigartigen und für bedeutsam befundenen Stellen, um dieses umfangreiche Werk zu erschließen und für den täglichen juristischen Gebrauch nutzbar zu machen. Hierin sollte die zukünftige Bedeutung der *Singularia* liegen. Zum Merkmal der Exklusivität trat die praktische Nützlichkeit im juristischen Alltag als besonderes Qualitätssiegel.[11]

Die weitaus größere Anzahl der als *Singularia Bartoli* überlieferten Werke stammt nicht aus der Feder des Meisters selbst, sondern bezeichnet spätere Bearbeitungen seines umfangreichen Oeuvres. So fügte der Legist Antonio Mincucci da Pratovecchio (1380-1468) seinem *Repertorium aureum Bartoli* eine Serie von Gesetzes- und Kommentarstellen bei, die laut Bartolo das Siegel ʻsingularisʼ verdienten: die *Singularia Bartoli dicta.*[12] Im Aufbau sind diese *Singularia* jedoch kaum von den

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[10] Bartolus de Saxoferrato, *Singularia ex Innocentio papa*; s.u. Anhang Nr.1. Vgl. Woelki, *Pontano* 34. Zur Person vgl. Horn, 'Legistische Literatur' 274; Francesco Calasso, 'Bartolo da Sassoferrato', DBI 6 (1994) 640-669 (Lit.); Lange-Kriechbaum, *Römisches Recht* 2.682-733, 988 s.v.; Susanne Lepsius, 'Bartolo da Sassoferrato', DBGI 1.177-180.

[11] Bei Bartolus angedeutet: 'et istud fuit de facto Florenis et ita fuit iudicatum per istud dictum'; Nürnberg, SB Cent. II 83, fol. 303v.

[12] *Repertorium aureum* (Lyon 1517). Die *Singularia Bartoli* befinden sich dort auf fol. 112v-113v. Das Werk ist ebenfalls in der großen Folioausgabe der *Singularia doctorum* (Lyon 1560-1570) Bd. 2, und (Frankfurt 1596) Bd. 2, enthalten. Zu Pratovecchio vgl. Annalisa Belloni, *Professori giuristi a Padova nel secolo XV. Profili bio-bibliografici e cattedre* (Studien zur Europäischen Rechtsgeschichte 28; Frankfurt am Main 1987) 138-140; Peter Denley, *Commune and Studio in Late Medieval and Renaissance Siena* (Centro interuniversitario per la storia delle università italiane, Studi 7; Bologna 2006) 202f.; Lange-Kriechbaum, *Römisches Recht* 2.826-831; Woelki, *Pontano* 153, 158, 165. — Eine weitere Kompilation von Bartolus-*Singularia* stammt von Amalvinus de Claris Aquis, *Textus et glose singulares et speciales domini Bartoli* (Köln 1505). Des weiteren zu nennen sind die anonym erschienenen *Leges et glossae Bartoli singulares et notabiles* (Basel 1588-1589) und der kleine Traktat *Textus et glossae singulares et speciales* (Köln 1505-1506). Zu den zuletzt genannten Werken vgl. Robert Feenstra, 'Bartole dans le Pays-Bas (anciens et modernes): Avec additions bibliographiques à l'ouvrage de J.L.J.

massenhaft verbreiteten *Notabilia* zu unterscheiden. Eingeleitet durch immer gleiche Formeln wie 'nota quod', 'glossa est', 'lex est' usw. bieten sie in listenhafter Monotonie ein Corpus einzelner Allegationen, die—so die immer wiederkehrende Beteuerung—'singularis in mundo' seien und deswegen memorisiert werden müssten.

Ähnliches gilt für die *Singularia* des Baldo degli Ubaldi. Eingeleitet fast immer durch 'quero …', seltener durch 'nota' oder 'vide', handelt es sich bei den jeweils wenige Zeilen umfassenden Texten um 'quaestiones' und 'notabilia', wie sie auch in den Kommentaren zu finden sind.[13] Besonderen Charakter erhalten sie nur durch ihre immer wieder betonte Exklusivität: 'quod alibi non reperitur'—der Grundgedanke der *Singularia* des 14. Jahrhunderts.

Der listenartige Typus der *Singularia* als reine Materialsammlungen setzt sich auch im 15. Jahrhundert etwa in den Werken von Paolo da Castro († nach 1441),[14] Angelus de

van de Kamp', *Bartolo da Sassoferrato: Studi e documenti per il VI centenario* hrsg. von Danilo Segoloni (2 Bde. Mailand 1962) 1.173-281, hier 266-267 und Stintzing, *Geschichte* 484-485.

[13] *Singularia Baldi*; s.u. Anhang Nr.2. — Eine weitere Kompilation von *Singularia Baldi* stammt von Antonio Mincucci da Pratovecchio; s.u. Anhang Nr.3; Vgl. auch Anm. 12). Eine weitere, wohl auf Baldo zurückgehende *Singularia*-Sammlung findet sich im Anhang seines *Repertorium aureum super Speculo Guillelmi Durandi* (Rom: Johannes Hugonis de Gengenbach, circa 1482/1485) (ISTC iu00012500), hier 62-69: *Singularia Speculatoris ad causas cotidianas collecta per dominum Baldum de Perusio notanda et tenenda menti.*

[14] S.u. Anhang Nr.4. Es handelt sich um 48 kurze, notabilienartige Notizen vor allem zum Prozessrecht ohne praktische Beispiele, die wahrscheinlich von anderen Autoren als Exzerpt aus Paulus' Schriften angefertigt wurden. Siehe dazu Savigny, *Geschichte* 6.293. Zu Paolo da Castro vgl. Lange-Kriechbaum, *Römisches Recht* 2.813-826, 993 s.v.; Giovanna Murano, 'Paolo da Castro (1360/62-1441)', *Autographa* 1.129-135 (Lit.) und zuletzt Bernardo Pieri, *Usurai, ebrei e poteri della Chiesa nei Consilia di Paolo da Castro: Le competenze canonistiche di un civilista* (Seminario Giuridico della Università di Bologna 282; Bologna 2016).

Perusio[15], Amalvinus de Claris Aquis[16] und Guilhelmus de Ludo[17] fort. Daneben entwickelt sich seit dem beginnenden 15. Jahrhundert ein neuer, wesentlich variantenreicherer Typus, der weitere Elemente der Kommentarliteratur, vor allem ʻquaestiones', ʻoppostiones' und ʻcasus', aufnimmt und immer häufiger Bezüge zur eigenen anwaltlichen Tätigkeit einstreut. In diese Richtung weist bereits die *Singularia*-Sammlung des Matteo Mattesillani, der 1409 wegen der Pest zeitweilig aus Bologna fliehen musste und Zeit und Muße zum Sammeln lehrreicher Anekdoten fand.[18] Sein ʻjuristisches Decamerone' ist noch weitgehend schematisch aufgebaut, aber von Hinweisen auf die

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[15] S.u. Anhang Nr.5. Margarete Andersson-Schmitt, *Mittelalterliche Handschriften der Universitätsbibliothek Uppsala*, 6: *Handschriften C.551-935* (Stockholm 1993) 16-17. schreibt den Text Angelo Perigli zu. Zu diesem vgl. Belloni, *Professori* 124-127; Maria Alessandria Panzanelli Fratoni und Ferdinando Treggiari, 'Perigli, Angelo', DBGI 2.1539-1541; Thomas Woelki, 'Angelo Perigli († 1447)', Murano, *Autographa* 1.2.181-186. Stephan Kuttner, *A Catalogue of Canon and Roman Law Manuscripts in the Vatican Library*, 2: *Cod. Vat. lat. 2300-2746* (Vatikanstadt 1987) 240, 272-273. ergänzt 'Angelus [de Ubaldis]', womit der Baldusbruder Angelo di Francesco (zu diesem vgl. Carla Frova, 'Angelo degli Ubaldi sr.', DBGI 1.68-77; Thomas Woelki, 'Angelo di Francesco degli Ubaldi (post 1334 – 1400)', Murano, *Autographa* 1.2.119-128) oder dessen Enkel Angelo di Alessandro (vgl. Carla Frova, 'Angelo degli Ubaldi (Baldeschi) jr.', DBGI 1.68) gemeint sein könnte. Die mitunter als *Singularia Angeli* bezeichneten Zusätze zur *Margarita Baldi* sind wohl Angelo di Francesco degli Ubaldi zuzuschreiben; s. Paola Maffei, 'I codici urgellensi e la giurisprudenza italiana fra Tre e Quattrocento, Appunti su alcune particolarità', TRG 78 (2010) 381-393, hier 389 mit Handschriften und Drucken.

[16] S.u. Anhang Nr.6.

[17] S.u. Anhang Nr.7.

[18] S.u. Anhang Nr.8. Die Datierung ergibt sich aus der Vorrede des Werkes (Lyon 1560) 179. Die Sammlung besteht aus insgesamt 199 Singularia, fast ausnahmslos mit 'nota quod' eingeleitet, aber mit sporadischen Bezügen zur eigenen Anwaltsarbeit (vgl. Nr.37 und 69) und häufigen Ermahnungen, das Gesagte im Gedächtnis zu behalten. Zur Person siehe Lange-Kriechbaum, *Römisches Recht* 2.350, 433; Andrea Labardi, 'Mattesillani', DBI 72 (2008) 259f.; Murano, *Autographa* 1.1.279, 290; Andrea Labardi, 'Mattesil(l)ani, Matteo', DBGI 2.1308.

Rechtspraxis seiner Zeit durchsetzt.[19] Besonders der Hinweis auf ihren Wert im täglichen Gebrauch verbunden mit der Aufforderung, sich das Gesagte gut einzuprägen sollte in den kommenden Jahrzehnten den Charakter der *Singularia* bestimmen.

Richtungweisend wirkten hier insbesondere die *Singularia* des Lodovico Pontano (ca. 1409-39), die der 1427 in Bologna promovierte Legist neben seiner Lehrtätigkeit 1434-1435 in Siena verfasste.[20] Das Werk war schon handschriftlich weit verbreitet und wurde bereits in der Inkunabelzeit mehrfach gedruckt. 1444 stellte Lauro Palazzolo (ca. 1410-1465) in Padua die *Singularia* nach den Titeln des fünften Buches des *Liber Extra* zu den *Singularia in causis criminalibus* zusammen, die eine ähnlich weite Verbreitung erlangten wie die ursprüngliche Sammlung.[21] Mehrfach glossiert und kommentiert war das Werk Pontanos bis weit ins 16. Jahrhundert sehr einflussreich und wurde häufig zitiert. Dieser Erfolg dürfte dabei kaum in wissenschaftlichen Kriterien begründet sein; die zahlreichen *Consilia* und Kommentare von Pontano waren in dieser Hinsicht wesentlich anspruchsvoller als die quasi beiläufigen Notizen täglicher juristischer Probleme. Etwas anderes musste die Zeitgenossen an diesem Werk interessiert und fasziniert haben: Pontano berichtet, nicht selten mit humoristischen Einschüben, über Fälle aus der

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[19] Vgl. Mattheus de Mathesilanis, *Singularia* Nr.37: 'Et sic de facto fuit obtentum me existente advocato'; Nr.41: 'Et nota, quia paucissimi scolares hoc sciunt'; Nr.77: 'quod nota, quia quottidie accidit'.

[20] S.u. Anhang Nr.9a. Hier zitiert nach Paris (Nicolaus de Pratis) 1508. Zum Entstehungszeitpunkt vgl. die dort zwischen Nr.521 und 522 eingefügten Angaben, die die *Singularia* in zwei Serien einteilen: 'Explicita sunt notabilia Ludovici Pontani utriusque iuris monarche per universum orbem preclarissimi anno MCCCCXXXIIII, in quo quidem anno ipse legebat ti(tulum) de verborum obligationibus [Dig. 45.1] in solentissimi studio Senensi et dedit multa mirabilia in dicto titulo, in scripta cuius fama est nota per universum orbem deo gratias, et sunt in numero quingenta XXI. Incipiunt notabilia suprascripti Ludovici Pontani anno sequenti in dicto studio Senensi in modum, qui sequitur, et legebat in infortiato titulo soluto matrimonio (Dig. 24.3) etc.' Vgl. Woelki, *Pontano* 28.

[21] Siehe unter Anhang Nr.9b. Vgl. Woelki, *Pontano* 504-505, 800. Zu Palazzolo siehe Belloni, *Professori giuristi* 269-271, 415 s.v.

Praxis, die bisweilen noch nicht entschieden sind und ihn beschäftigen, oft auch über Fragen, die an ihn herangetragen werden.

Dabei kommt es dem Autor auf mehr an als auf eine Sammlung wichtiger Allegationen. Es geht ihm um praktische Handlungsanweisungen für unerfahrene Juristen. Häufig wird der Leser eindringlich ermahnt, das Gesagte auswendig zu lernen: 'Numquam ergo exeat mentem tuam, liga ad digitum et porta tecum!' (Nr.69). Bisweilen hat man den Eindruck, Pontano wendet sich an seine Schüler in Siena: 'Adverte ad me, ut refocillem intellectum tuum!' (Nr.85), besonders wenn er eine Episode aus der eigenen Studienzeit in Bologna zusammen mit den mahnenden Worten seines Lehrers Giovanni da Imola zum Besten gibt oder wenn er vor der Strafe für das Stören von Universitätsveranstaltungen warnt.[22] Fanden die Texte womöglich Verwendung im Universitätsunterricht, um die Vorlesungen aufzulockern?

Pontanos *Singularia* beeinflussten nachfolgende Autoren maßgeblich. Vor allem der bislang kaum bekannte Francesco da

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[22] Ludovicus Pontanus, *Singularia* Nr.91: '. . . dum autem essemus in colloquio, reincidimus in id quod oportet. Si quis vult scire, multum studetur. Et interrogatus per dominum Fran(ciscum) de Murcia consocium meum, an multum ipse studeret, respondit [sc. Johannes de Imola] quod sic et maxime de nocte et ante et post prandium et in ipso prandio et millies fecisse mensam de libro. Hec scripsi, ut inde capias coniecturam, quare ita clarissime evaserit et eum imitari nitaris'. Zu Giovanni da Imola s. jetzt Andrea Padovani, *Dall'alba al crepuscolo del commento: Giovanni da Imola (1375 ca.–1436) e la giurisprudenza del suo tempo* (Studien zur europäischen Rechtsgeschichte 303; Frankfurt am Main 2016), hier 121 zu der zitierten Stelle. — Siehe auch Ludovicus Pontanus, *Singularia* Nr.673: 'Quando universitas scholarium congregatur et est aliquis bestiolus, qui in ridendo et rixando conturbat totam universitatem, qua pena punitur? Dic quod excommunicatione tridua et deiectione de collegio'. —Bezüge zur universitären Lebenswelt finden sich auch bei Francesco da Crema (siehe Anm. 23); vgl. Nr.67: 'Unus scolaris meus semel mihi fecit magnum honorem, quia allegando invenit unum meum consilium . . . et ita fuit obtentum cum magno suffragio dicti scholaris quam mei.'; Nr.68: 'Nec omnia, que assero, dico esse singularia, sed pollicitus fui vobis omni lectione tria: dicta, utilia et notanda, quia non est querendum, an de aqua possit fieri acetum'.

Crema, 1452-1453 und 1453-1454 als Professor für Zivilrecht in Bologna erwähnt und sicher nicht identisch mit dem gleichnamigen Humanisten († 1525), zitiert Pontano extensiv und übernimmt einzelne *Singularia* komplett.[23] Auch diese Sammlung versteht sich als praktischer Ratgeber für Advokaten ('ut scias consulere tuo clientulo'; Nr.130) und bringt oft Erfahrungsberichte aus der eigenen Arbeit.[24]

Ähnlich praxisnah präsentiert sich die einzige französische *Singularia*-Sammlung dieser Zeit. Spätestens in den 1460er Jahren sammelte Gui Pape (ca. 1404-1477), Konsulent am *Parlement de Grenoble*, über 1000 *Singularia*, die ihm bei der künftigen Arbeit helfen sollten.[25] Die zumeist sehr kurzen Notizen konnten mitunter in längere traktatartige Ausführungen fließen, blieben jedoch unsystematisch und skizzenhaft.

Dies sollte sich, was den Texttyp betrifft, alsbald ändern. Man ging dazu über, besonders beliebte *Singularia*-Sammlungen

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[23] S.u. Anhang Nr.10. Zur Person vgl. Gilbert Tournoy, 'Franciscus Cremensis and Antonius Gratia Dei: Two Italian Humanists, Professors at Louvain in the Fifteenth Century', *Lias* 3 (1976) 33-73, hier 35 gegen Henry de Vocht, *History of the Foundation and the Rise of the Collegium trilingue of Lovaniense 1517-1550*, 1: *The Foundation*, (Humanistica Lovaniensia 10; Louvain 1951; Nachdruck Nendeln 1976) 173, der eine Identität mit dem Humanisten Franciscus Cremensis annimmt. Zu diesem vgl. auch Angela Asor Rosa, 'Francesco da Crema', DBI 49 (1997) 721-722. Der Jurist Francesco da Crema wird erwähnt als Professor in Bologna bei: Umberto Dallari, *I Rotuli dei lettori, legisti e artisti dello Studio Bolognese dal 1384 al 1799* (5 Bde. Bologna 1888-1924), 1.33 und 36. — Parallelen zwischen Lodovico Pontano und Francesco da Crema: Pontanus, *Singularia* 1 = Crem., *Singularia.* 7; Pontanus, *Singularia* 30 = Crem., *Singularia* 99; Pontanus, *Singularia* 200 = Crem., *Singularia* 171. Vgl. dazu Crem., *Singularia* nach Nr.172: 'Et quia est tempus confitendi, fateor me substraxisse octo vel decem dicta de singularibus Ludovi(ci) Ro(mani). Cetera autem sunt ex meo labore'.

[24] Vgl. Franc. Crem., *Singularia* Nr.97: 'Decidi pulchram causam in civitate Lucensi'; ähnlich Nr.61, 146, 172.

[25] S.u. Anhang Nr.11. Vgl. Chabrand, *Étude* 13-38 zur Person, 60-61 und 242-243 zu den *Singularia*; Andrea Padovani, *Studi storici sulla dottrina delle sostituzioni* (Ius nostrum 1; Imola 1983) 320-322, 394-395. — Zum Zweck der Sammlung vgl. die Vorrede: '. . . pro laboris mei alleviatione in futurum'. — Zur Datierung vgl. *Singularia* 409 (Lyon 1560) 421 (dat. 1461) und *Singularia* 774, 454 (dat. 1464).

systematisch oder alphabetisch anzuordnen oder die Sammlungen mit Registern zu versehen. Einige Sammlungen waren von vornherein alphabetisch angeordnet wie das Werk des Juristen Antonio Corsetto aus Sizilien († 1503), der seine bereits um 1472 während seines Zivilrechtstudiums in Bologna verfassten *Singularia* nach zentralen juristischen Begriffen von 'argumentum' bis 'venditio' sortierte.[26] Dabei lässt er es ebenso wenig wie seine Vorgänger an interessanten Bezügen zur eigenen Lehr- und Anwaltstätigkeit fehlen. Mit einer 1490 als Professor für kanonisches Recht in Padua erstellten Neubearbeitung gibt Corsetto allerdings eine neue Richtung vor, der die Textgattung bald folgen sollte.[27] Die einzelnen Artikel werden durch zahlreiche *additiones* erweitert und überschreiten nun das bisher gewohnte Maß beträchtlich.

Nachfolgende *Singularia*-Sammlungen, etwa die des Ippolito Marsili (1500)[28] und des Petrus Gerardus de Petrasancta (1506)[29],

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[26] S.u. Anhang Nr.12a. Zur Person vgl. Aldo Mazzacane, 'Corsetto, Antonio', DBI 29 (1981) 540-542 (Lit.); Cecilia Pedrazza Gorlero, 'Corsetti, Antonio', DBGI 1.581-582 (Lit.). Berühmt wurde Corsetto für ein *Repertorium in opera Nicolai de Tudeschis* (Venedig nach 1486 und 1499); vgl. dazu: Ourliac, Gilles, *Période* 125 Anm. 251. Neun seiner Traktate sind gedruckt im *Tractatus universi iuris* (Venedig 1584).

[27] S.u. Anhang Nr.12b. Vgl. die Überschrift in der Ausgabe Paris 1508: 'Incipiunt singularia domini Antonii Corsieti Siculi utriusque iuris doctoris in studio Bononiensi edita cum additionibus factis in studio Patavino celeberrimo anno salutis 1490 ibidem iura pontificia de mane ordinariam legentis'.

[28] S.u. Anhang Nr.13. Es handelt sich um zeitnahe Notizen zu strafrechtlichen Problemen mit besonderer praktischer Relevanz. Es handelt sich um zeitnahe Notizen zu strafrechtlichen Problemen mit besonderer praktischer Relevanz. Vgl. *Singularia* 5: 'Et non sunt adhuc duo menses, quibus ego habui in facto hoc . . . '; Nr.33: '. . .tene menti, quia quottidianum est et ego istis proximis diebus habui in facto et bis consului super hoc'; Nr.38 : '. . . tene menti, nam pauci sunt dies, quod istud evenit in facto in causa satis ardua'. Weitere Beispiele unten bei Anm. 34 und 40. Zur Person: Lia Palotti, 'Marsili, Ippolito', DBI 70 (2007) 764-767; Marco Cavina, 'Marsili, Ippolito', DBGI 2.1286-1287; Lange-Kriechbaum, *Römisches Recht* 2.933.

[29] S.u. Anhang Nr.14. Das Werk, das genau 100 *Singularia* umfasst, entstand nicht als fortlaufende Aufzeichnung, sondern als monographische Abhandlung aus einem Guss in den Weihnachtstagen des Jahres 1506; vgl. das Explizit: 'Et per hec sunt expleta singularia mea composita vacationum nativitatis domini

setzen diesen Trend fort und legen immer materialreichere Texte vor. Die meisten *Singularia* umfassen nun mehrere Spalten und beinhalten traktatartige, materialreiche Ausführungen zu einem Thema. Längst geht es nicht mehr nur darum, einzelne besonders wichtige und praktisch relevante Textstellen zu markieren; es kommt immer mehr auf Vollständigkeit an. Ein solches quantitatives Anschwellen ist häufig im Verlauf der Entwicklung von wissenschaftlichen Textgattungen zu beobachten, wenn spätere Generationen das tradierte Material weitertragen und gleichzeitig ihren eigenen Beitrag leisten möchten. Mit der Kürze und Handlichkeit der Texte gaben die Autoren allerdings einen bisher prägenden Wesenszug der *Singularia* auf, und zwar zu Lasten ihrer Bedeutung für die juristische Praxis. So erschienen im Laufe des 16. Jahrhunderts zwar einige zum Teil aufwendig kommentierte Kompilationen, jedoch kaum noch neue *Singularia*-Sammlungen. Ein Versuch zur Wiederbelebung der Gattung, den der Freiburger Jurist Fridericus Martinus im Jahre 1660 unter ausdrücklichem Bezug auf die spätmittelalterlichen *Singularia* unternahm, ähnelte mit systematisch entsprechend den Titeln des *Liber Extra* und des *Codex Justiniani* aufgebauteten traktatartigen Ausführungen ohne Verweise auf die eigene Praxis eher dem Genre des Kommentars als dem der *Singularia* des 15. Jahrhunderts.[30] Auch das als *Singularia iuris publici Germanii imperii* (1730) betitelte Werk des langjährigen preußischen Kanzlers Johann Peter von Ludewig (1668-1743) schöpft zwar aus

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nostri Jesu Christi et carnis primii presentis anni 1506 ad laudem summi redemptoris eiusque gloriosissime matris et dive Catharine mee advocate etc.'

[30] Fridericus Martinus, *Singularia atque iuris notabilia* (Köln, Calcovius, 1660). Zum Traditionsbewusstsein siehe die Praefatio (fol. 2v): 'Nimirum ista voce Singularium nos uti, veluti antiquos et famosos scriptores ea usos fuisse constat, ad denotandum aliquarum rerum eximiarum et insigniorum traditionem . . . '; und etwas weiter: '. . . complexi sumus, atque ad hoc enixi, ut ea quae praxi et quotidiano usui maxime commoda et convenientia essent, scriberemus'. Der Wunsch nach praktischer Handhabbarkeit war also durchaus noch vorhanden. Auf fol. 3v bringt der Autor eine Liste der bekannten Verfasser von Singularia nach der Edition Frankfurt 1605 und 1629.

der beruflichen Erfahrung, ist aber letztlich nichts anderes als ein Traktat über öffentliches Recht.[31]

Quellenwert

Im Unterschied zu den monumentalen Glossen und Kommentaren, zu den Summen und Traktaten erheben die *Singularia* den Anspruch, nur wirklich alltagsrelevante Probleme zu behandeln. Als praktische Handbücher für den juristischen 'Hausgebrauch' bzw. für den universitären Unterricht konzipiert, bieten sie dem heutigen Leser bereits eine didaktisch aufbereitete Auswahl rechtlich relevanter Fragen. Die vom Rechtshistoriker zu leistende Komplexitätsreduktion auf den Kern des Problems ist hier in Teilen bereits geleistet. Die *Singularia* gehörten darüber hinaus zu den Texten —ihre Verbreitung lässt kaum einen anderen Schluss zu—, die der juristische Praktiker, sei er Rechtsanwalt, Richter oder Hofrat, mit Vorliebe konsultierte, um sich einen schnellen Überblick über ein bestimmtes Problem zu verschaffen. Darüber hinaus enthalten sie häufig Hinweise zur praktischen Umsetzung theoretischer Normen.[32] Für die Frage nach der Verbindung von Wissenschaft und Praxis und nach dem Einfluss der gelehrten Rechtswissenschaft der Rezeptionszeit auf die gerichtliche Praxis sollten diese Texte daher zukünftig intensiver genutzt werden als die voluminösen und unübersichtlichen Kommentarwerke der großen Juristen wie Bartolus, Baldus, Panormitanus usw.

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[31] Johannes Petrus de Ludewig, *Singularia iuris publici Germanii Imperii* (Halle, Orphano Trophei, 1730). Nur in der Praefatio (16) findet sich der Hinweis auf die dreißigjährige Praxiserfahrung des Autors: 'Accessit demum optimus ille rerum omnium magister, usus, pragmaticus et forensis continuatus per integros triginta annos'.
Vom gleichen Autor: *Singularia iuris feudali* (Frankfurt an der Oder, Sigismund Gaebler, 1753), ein systematischer Kommentar zu den *Libri feudorum*. Zur Person vgl. Bernd Roeck, 'Ludewig, Johann Peter von', *Neue Deutsche Biographie* 15 (1987) 293-295.

[32] Vgl. Antonius Corsetus, *Singularia*, s.v. *citatio*: 'Nota practicam hodiernam citandi maxime in curia Romana . . . Et fuit adinventa hec practica pro faciliori exitu iudiciorum . . . '.

Daneben bieten diese Texte eine Reihe von Ansatzpunkten, die über rechtsgeschichtliche Fragestellungen hinausgehen.[33] Zahlreiche *Singularia* enthalten Hinweise auf frühere Karrierestationen, Ämter und Kontakte der ansonsten oft wenig bekannten Autoren.[34] Was ursprünglich wohl einerseits als Merkhilfe für die eigene Tätigkeit oder juristisches Notizheft und andererseits als praktischer Ratgeber für angehende Advokaten gedacht war, wurde mitunter zu einem farbenfrohen Zeugnis von der Lebenswelt eines spätmittelalterlichen Juristen, seinen Problemen, seiner Arbeitsweise, aber auch seinen Verdienstmöglichkeiten und seines Selbstbildes. Besonders Lodovico Pontano berichtet häufig von aktuellen oder früheren Begebenheiten und scheut sich auch nicht, die Namen seiner Zeitgenossen mitzuteilen, etwa den des Kardinals Giordano Orsini († 1438), der ihn offenbar in Rom protegierte.[35] Die behandelten Themen sind nicht immer rein juristischer Natur, sondern behandeln schon einmal den Platz des Vaterunser in der Messe und die Anzahl der Tage einer Mondphase.[36] Immer wiederkehrendes Motiv ist der Hinweis auf die praktische Nützlichkeit und den empfangenen Lohn. Hierbei konnte es sich um freundschaftliche Gesten wie ein

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[33] Vgl. Franciscus Cremensis, *Singularia* Nr.149: 'Mos puerorum Bononie est, quod ludant ad lapides, prout est etiam Perusii'.

[34] Biographisches Material etwa bei Hippolytus de Marsiliis, *Singularia* Nr.93: 'dum essem vicarius generalis et sindicator officialium ducis Mediolani'; 100: 'dum essem potestas citadelle apud Paduam'; Nr.97 und 103: 'dum essem capitaneus vallis Lugane'. Ähnlich Franciscus Cremensis 47: 'Consuluimus heri famosissimus doctor dominus Mansuetus [= Francesco Mansueti da Perugia] et ego in quadam pulchra causa'; Nr.50: 'Vidi pulchram disputationem ad mensam ducis Mediolani'. Vgl. auch Woelki, *Pontano* 35-36. Zu Francesco Mansueti vgl. Denley, *Commune and studio* 153, 162, 178, 190; Stefania Zucchini, *Università e dottori nell'economia del comune di Perugia: I registri dei Conservatori della Moneta (secoli XIV-XV)* (Fonti per la storia dello Studium Perusinum 2; Perugia 2008) ad ind.

[35] Vgl. Woelki, *Pontano* 122-124. Zu Orsini noch immer unersetzt: Erich König, *Ein Lebensbild aus der Zeit der großen Konzilien und des Humanismus* (Freiburg im Breisgau 1906). Der Kardinal fragte Pontano häufig um Rat, vgl. *Singularia* Nr.454, 660 und 701.

[36] Pontanus, *Singularia* Nr.52.

Abendessen oder zwei Birette handeln.[37] Ansonsten konnten die Dienste eines Juristen sehr teuer werden. Erwähnt werden Honorare von 60 fl. und mehr für eine Auskunft.[38] Nicht umsonst standen mittelalterliche Juristen in dem Ruf, Recht und Gesetz dem Kommerz preiszugeben, was Pontano auch ganz freimütig zugibt: 'Ita vendo leges. Scias in eodem vendere!'[39]

Öffentlicher Ruhm und Erfolg sind auch bei Ippolito Marsili die prägenden Motive.[40] Daneben sind freilich auch Hinweise auf eine andere Berufsauffassung überliefert. So appelliert Francesco da Crema an das anwaltliche Gewissen, einen Mörder, der den Tod verdient hat, nicht mit juristischen Spitzfindigkeiten zu retten. Im

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[37] Pontanus, *Singularia* Nr.454: 'Tene menti, quia lucratus sum duo birretria de illa glossa'. Auch eine Seidenhaube war ein annehmbares Honorar; vgl. Nr.256: '. . . et ex hoc lucratus sum unam cappam de serico'. Woelki, *Pontano* 124. Vgl. auch Antonius Corsetus, *Singularia*, s.v. *Minor:* 'Et de ista theorica, dum essem scholaris Bononie, de iure publice respondi ex improviso et lucratus sum diploidem serici'.

[38] Pontanus, *Singularia* Nr.489: '. . . et propter hoc lucratus sum sex florenos et quedam alia'; Nr.538: '... et lucratus sum florenos L'; Nr.147: 'Ego autem sic habui tres florenos.'; Nr.436: '. . . et hoc mihi obvenit de facto Florencie et ita consului per duas leges, et habui quattuor ducatos pro unaquaque'; Nr.487: '. . . et lucratus sum plus quam LX ducatos'; Franciscus Cremensis, *Singularia* Nr.73: '. . .et lucratus fui sex ducatos in civitate Bononie'; Nr.127: '. . .et lucratus fui duos ducatos'. Zu den Verdienstmöglichkeiten von Juristen vgl. James A. Brundage, 'The Profits of Law: Legal Fees of University-Trained Advocates', SJLH 32 (1988) 1-15, wieder in: ders., *The Profession and Practice of Medieval Canon Law* (Variorum collected studies series 797; Aldershot 2004) Nr.XII. Vgl. auch die Gehaltsaufstellungen für Rechtslehrer in Florenz (bis zu 600 fl. jährlich) bei Katherine Park, 'The Readers at the Florentine Studio according to the Communal Fiscal Records (1357-1380, 1413-1446)', *Rinascimento* 20 (2nd. Ser. 1980) 249-310, hier bes. 282-286.

[39] Pontanus, *Singularia* Nr.436. Einen Überblick über die Vorwürfe gegenüber Advokaten bietet: James A. Brundage, 'The Ethics of the Legal Profession: Medieval Canonists and their Clients', *The Jurist* 33 (1973) 237-248, wieder in: Brundage, *Profession and Practice* Nr.II; siehe auch Brundage, *The Medieval Origins of the Legal Profession: Canonists, Civilians, and Courts* (Chicago-London 2008) passim.

[40] Vgl. Hippolytus de Marsiliis, *Singularia* Nr.13: 'et ex ea consecutus sum decus et lucrum'; Nr.81: 'consecutus sum maximum honorem in civitate Ianue, non iam inter rusticos et imperitos sed profecto in cetu peritorum'; Nr.180: 'Et ex hoc poteris lucrare multas pecunias et tunc eris mei memor'.

vorliegenden Fall hatte das sterbende Opfer von einem Freund den Gnadenstoß erhalten, was eine Strafbarkeit des Täters wegen Totschlags ausschloss.[41]

Auch für die Frage der Interdisziplinarität von Juristen enthalten die *Singularia* interessantes Material. Die Forschung nimmt allgemein an, dass sich seit dem 14. Jahrhundert kanonisches und römisches Recht immer stärker gegenseitig durchdrangen, so dass ein guter Kanonist immer auch ein leidlicher Legist gewesen sein musste und umgekehrt.[42] Dies mag für herausragende Rechtslehrer wie Bartolus zutreffen; die Berichte aus der Praxis in unseren *Singularia* sprechen jedoch eine andere Sprache. Immer wieder finden sich Hinweise, die darauf schließen lassen, dass praktizierende Advokaten kaum über den Tellerrand ihres Faches hinaussahen, selbst in Fällen, die an typischen Schnittstellen zwischen römischem und kanonischem Recht lagen (Eherecht, Stiftungen usw.).[43] Lodovico Pontano,

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[41] Franciscus Cremensis, *Singularia* Nr.55: 'Quidam malus advocatus etiam modice conscientie evasit quendam amicum suum a pena mortis. Ecce quidam nobilis quasi interfecerat suum inimicum vulnere mortalissimo, ita quod illico fuisset moriturus. Advocatus consulit, quod unus famulus reiteraret ictum cum excussione vite. Evasit ille nobilis, quia solum tenebatur de vulnerato, secundus autem de occisio'. Zum 'Berufsethos' mittelalterlicher Anwälte vgl. Brundage, 'The Ethics of Advocacy: Confidentiality and Conflict of Interest in Medieval Canon Law', hrsg. von Richard H. Helmholz, *Grundlagen des Rechts: Festschrift für Peter Landau zum 65. Geburtstag* (Paderborn u.a. 2000) 453-466; wieder in *Profession and Practice* Nr.X.

[42] Vgl. Giuseppe Forchielli 'Bartolo canonista?', *Bartolo da Sassoferrato* 2.237-250; Gabriel Le Bras, 'Bartole et le droit canon', *Bartolo da Sassoferrato* 2.293-308, hier v.a. 305; Ourliac, Gilles, *Période* 142; Orazio Condorelli, 'Bartolo e il diritto canonico', *Bartolo da Sassoferrato nel VII centenario della nascita: Diritto, politica, società* (Atti dei convegni del Centro Italiano di Studi sul Basso Medioevo, Accademia Tudertina e del Centro di Studi sulla Spiritualità Medievale N.S. 27; Spoleto 2015) 463-558. Zum Problem der Interdisziplinarität vgl. auch Thomas Woelki, 'Theologische und juristische Argumente in den Konzilstraktaten des Lodovico Pontano († 1439)', *Proceedings Esztergom 2008* 747-763; Woelki, *Pontano* 223-233 (Lit.).

[43] Zahlreiche Beispiele bei Pontanus, *Singularia* Nr.115, 151, 321; Nr.77: 'Scio, tu ires ad titulum de pena iudicis [Cod. 7.49] et an iudex facit litem suam [Dig. 50.13] et tutti quelli novelli. Sed de hoc est unum dictum legistis incognitum, canonistis autem cognitum per leges tamen nostras, quod est vilipendium

selbst ‘doctor utriusque’ und in jugendlicher Brillianz offen für benachbarte Wissenschaften, auch für die Theologie, beklagt mit oft emotionalen Worten die Ignoranz seiner Kollegen: ‘quod nota, tu legista!’ (Nr.395) Bisweilen gleitet ihm dabei die Feder sogar in die italienische Muttersprache ab: ‘Io ti dico che legista senza capitolo vale poco, ma lo canonista senza lege vale niente!’[44]

Schluss

Zusammenfassend lässt sich durchaus eine vorläufige Definition der *Singularia* als Gattung der juristischen Literatur festhalten: Als *Singularia* bezeichnete man vor allem zwischen dem 14. und dem 16. Jahrhundert eine Zusammenstellung von praktisch relevanten und in ihrem Aussagegehalt exklusiven Quellen- und Glossenstellen, die oft anhand von aus dem Leben gegriffenen Beispielsfällen und praktisch aufgetretenen Problemen erläutert wurden. Gerade diese häufig umgesetzten inneren Konventionen machen diesen Texttyp über die rein rechts- und ideengeschichtliche Bedeutung hinaus für kultur- und sozialgeschichtliche Fragestellungen interessant. Ihre systematische Eingliederung in die rechtgeschichtliche Quellenkunde ist ein Desiderat.

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Anhang: Einige Singularia-Sammlungen

Die folgende Liste der Sammlungen spätmittelalterlicher ‘Singularia’ kann keinen Anspruch auf Vollständigkeit erheben und dient dem Überblick.

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nostrum. Dictum est unicum in mondo (!). . . . et miror de legistis, quod hoc non notent in dictis locis.’

[44] Pontanus, *Singularia* Nr.654. Zur Wirkungsgeschichte dieses Spruchs s. Friedrich Merzbacher, ‘Die Parömie “Legista sine canonibus parum valet, Canonista sine legibus nihil”,’ SG 13 (1967) 273-325; wieder in ders., *Recht – Staat – Kirche. Ausgewählte Aufsätze*, Hrsg. Gerhard Köbler u.a. (Köln, Wien 1989) 403-410. Zum impulsiven Wechsel ins Volgare vgl. auch Nr.77 und Nr.363: ‘non mi recordo’.

1. Bartolus de Saxoferrato, *Singularia ex Innocentio papa*. Inc.: ‘Rubrica de constitutionibus. Constitucio publice promulgata. . .’. Handschriften: München, BU 2° cod. ms. 296, fol. 273ra-304ra (Mitte 15. Jh.); Nürnberg, SB Cent. II 83, fol. 303r-309r (Padua 1446).

2. *Singularia Baldi*. Inc.: ‘Incipiunt glosse seu textus, que vel qui alibi non reperiuntur in iure dicte seu dicti per dominum Baldum de Ubaldis de Perusio. Quero primo: patrono competit hereditas. . .’. Handschriften: Dessau, SB Georg. Hs. 253, fol. 200r-201v; Halle, Universitäts- und Landesbibl., Ye 2° 68, fol. 419ra-435va (1459); Nürnberg, SB Cent. IV 95, fol. 509r-524r; Würzburg, BU M. ch. f. 5, fol. 35v-43r. Drucke: *Singularia omnium clarissimorum doctorum*, ed. Gabriele Sarayna, Lyon (Apud haeredes Jacobi Juntae) 1560, 25-30.

3. Antonio Mincucci da Pratoveccio, *Singularia Baldi*. Inc.: ‘Ubi dare venit in contractu. . .’. Handschriften: Leipzig, BU Cod. 1054, fol. 275v-281v**;** Lyon, BM 385, fol. 126r-134v.

4. Paulus de Castro, *Singularia*. Inc.: ‘Expensa facta in causa principali ...’. Drucke: Lyon (Jacobus Giuncti) 1531; Lyon (Apud hæredes Iacobi Iuntæ) 1560, 30-32; Frankfurt/Main (Apud Andreae Wecheli heredes) 1596.

5. Angelus de Perusio, *Glosse singulares* (geordnet nach den Büchern des Corpus iuris civilis); Uppsala, BU cod. 700 (= C 559), fol. 118v-119r; BAV lat. 2656, fol. 81rb-82vb; BAV lat. 2683, fol. 91va-97ra.

6. Amalvinus (Amanellus) de Claris Aquis. *Casus speciales.* Inc.: ‘Casus est legis, quod mater in subsidium tenetur alere filium vel filiam, non tamen filius matrem. . .’. Handschriften: La Seu d’Urgell, 2099, fol. 46va-52vb. Drucke (unter dem Namen Amanellus de Claris Aquis): Lyon (Jacobus Giuncti) 1531, (Apud hæredes Iacobi Iuntæ) 1560, 801-812; Paris (Nicolaus de Pratis) 1508.

7. Guilelmus de Ludo, *Singularia.* Inc.: ‘Lex est cum glossa, quod impuberes neque senes non debent questionari pro aliquo facto. . .’. Drucke: Lyon (Jacobus Giuncti) 1531; (Apud hæredes Iacobi Iuntæ) 1560, 793-800; Paris (Nicolaus de Pratis) 1508.

8. Mattheus de Mathesilanis, *Singularia sive notabilia*. Inc.: ‘Cum fluxissent annorum curricula ...’ (Vorrede), ‘Nota, quod in causis brevioribus. . .’. Handschriften: Barcelona, ACA, Cugat 40, fol. 40v-101r; Bologna, BM A. 991, fol. 71-74 (Text bricht ab); Dessau, SB Georg. Hs. 253, fol. 270r-279v (Perugia, ca. 1432-1436); Lucca, BC Feliniana, cod. 224; Lyon, BM 387, fol. 40r-58r; Madrid, BN 2209, fol. 138ra-158vb; Metz, BM 26, Nr.2. Drucke: Lyon (Apud hæredes Iacobi Iuntæ) 1531 und 1560, 179-303; Mailand (Philippus de Lavagna) um 1477 (GW M21659; ISTC im00364400), (Ulrich Scinzenzeller) 1496 (GW M21660), (Johannes Antonius de Honate) s.a. (GW M34963), (Scinzenzeler) 1519; Parma (Stephanus Corallus) 1473/1474 (GW M21661 und M21662; ISTC im00364200), (Andreas Portilia) s.a. (GW M21663; ISTC im00364500); Paris (Nicolaus de Pratis) 1508; Venedig (Andreas de Bonetis) s.a. (GW M34983), (Andreas Calabrensis) 1489 (GW M34986), (Baptista de Tortis) 1496 (ISTC ip00932100, GW M34992), (Comin da Trino Montisferati) 1557.

9a. Lodovico Pontano, *Singularia*, Inc.: ‘Verbum omnino intelligitur ipso iure …’. Handschriften: Augsburg, SB fol. cod. 283, fol. 188r-235r und 239r-245r; Barcelona, ACA, Cugat 40, fol. 68-70v; Bologna, Collegio di Spagna 81, fol. 57r-64v; Bologna, BU 654 (1214) (dat. 1463, Schreiber: Antonius Sinibaldus de Urbe); Escorial, Real Biblioteca, E.I.2, fol. 282-286; Freiberg, Bibl. der Oberschule, C VIII, fol. 67ff.; Freiburg, BU lat. 233, fol. 298r-377v (alphabetisch geordnet); Freiburg, BU lat. 322, fol. 110r-161v (mit Zusatznotizen 164r-164v); Florenz, Biblioteca Moreniana, B.VI.13; Hereford, BC O.9.IV, fol. 146-194; Köln, Historisches Archiv, GB Oct. 117, fol. 213r-240v; ebd., GB oct. 283, fol. 242r-265r; Kopenhagen, Königl. Bibl. Gamle Koniglige Samling 203 folio; London, BL Arundel 489, fol. 203ff.; Lübeck, SB jur. gr. folio 20, fol. 287ra-311vb; Lucca, BC Feliniana 179, fol. 95r-174r; ebd., 433, fol. 244ra-284ra (auf f. 283r-284r von Felino Sandeo unter dem Text als Nr.719-833 nachgetragene Singularia; Hs. von ihm erworben am 19. August 1462); Madrid, BN 2139, fol. 78vb-128va; München, BSB Clm 5357, fol. 156-193; Clm 5479, fol. 147-187; Clm 12233, fol. 211r-252vb; Prato, Bibl. Ronciana, Q V 18 (36), fol. 186-235 (aus dem Besitz des

Gimignano Inghirami); Rom, Bibl. Angelica, 564, f. 182-235 (dat. vor 1439); BAV Chigi E.IV.87, fol. 1-160; Chigi E.VII.212 fol. 121r-152v (kop. 1468 Nov. 16); Ottob. lat. 2080; Ross. lat. 1058, fol. 1r-55v; BAV lat. 2693, fol. 143r-167v; BAV lat. 5923, fol. 272ra-308rb; BAV lat. 8079, fol. 14r-81r; Salamanca, BU 2560, fol. 202r-206v; Siena, BM degli Intronati, I.III.10, fol. 418r-470v; Toledo, BC 8-17, fol. 156ra-180rb; ebd., 41-4; Turin, BN I.I.21, fol. 1r-10vb (Fragment) und fol. 11ra-50vb; H.I.7, fol. 278ra-316vb; Uppsala, BU 700 (= C 559), fol. 31r-118v (dat. 1455); La Seu d'Urgell, BC cod. 2577, fol. 31ra-47rb (dat. 1459); Wien, ÖNB 5103, fol. 382r-407v; Würzburg, BU M.ch.f.5, fol. 69r-74v; Zürich, Zentralbibl. C 4-221, fol. 109r-141r. Drucke: Frankfurt am Main 1596, 1629; Lyon 1517, 1526, 1531, 1535, 1541, 1542, 1560; Mailand 1501, 1506, 1508, 1519; Paris (Nicolaus de Pratis) 1508, 1510; Pavia (Michele und Bernardino Garaldi) 1501; Rom (Antonio und Raffaele da Volterra) 1473/1474 (ISTC ip00926500, GW M34969); Strasbourg (Heinrich Eggestein) 1475/80 (ISTC ip00929000, GW M34970); Venedig (Vindelinus de Spira) 1471 (ISTC ip00925000; GW M34989), (Johann von Köln und Johann Manthen) 1475 (ip00928000, GW M34988), (Andreas de Bonetis) 1485/1486 (ISTC ip00931000, GW M34983), (Andreas Calabrensis) 1489 (ISTC ip00932000, GW M34986), (Baptista de Tortis) 1496 (ISTC ip00932100, GW M34992), (Bernardinus Stagninus) 1499 (ISTC ip00932300, GW M34990), 1557, 1558. Druck der alphabetisch geordneten Ausgabe: Rom (Vitus Puecher) ca. 1475/1476 (ISTC ip00927000, GW M34968); Segovia (Johannes Parix) ca. 1472/1474 (ISTC ip00926300, GW M34972); Toulouse (Henricus Turner und Johannes Parix) ca. 1476 (ip00929400; GW M34971).

9b. Lodovico Pontano, *Singularia in causis criminalibus*, ed. Lauro Palazzolo. Inc. 'De accusationibus, titulus primus. Regulariter inimicus non potest accusare. . .'. Handschriften: Braunschweig, SB 177; Eichstätt, Staats- und UB Cod. st. 266, fol. 128r-154r; Escorial, Real Biblioteca, D.II.15, fol. 46-120; Hamburg, BU, Cod. jur. 2322, fol. 1-86; Kopenhagen, Königl. Bibl., Gamle Koniglige Samling, 203 2°; München, BU, 2° 295, fol. 256va-270rb; München, BSB, Clm 6661, fol. 211-254; ebd.,

Clm 12231, fol. 72-102 (dat. Bologna 1463/64, Schreiber: Iacob Everardi de Colberga); Nürnberg, SB Cent. II 83, fol. 262r-302v (dat. Padua 1445, Schreiber: Michael Ludwig aus Nürnberg); Saint Mihiel, BM 50; Salzburg, Erzbischöfliches Priesterseminar, Cm 263, fasc. 3, fol. 1-37; Tübingen, BU Mc. 9, fol. 334-394r (dat. 1457/58); Wien, ÖNB 5056, fol. 250r-293v; Zürich, SB C 4-221, fol. 109r-141r. Drucke: Frankfurt am Main 1629; Lübeck s.a. (Hain, Repertorium, Nr.13268); Magdeburg (Bartholomaeus Ghotan) ca. 1482 (ISTC ip00930400, GW M34961); Mailand (Christophorus Valdarfer für Philippus de Lavagna) 1477 (ISTC ip00929500, GW M34965), (Johannes Antonius de Honate) ca. 1479/1481 (ISTC ip00930000, GW M34963); Niederlande ca. 1472 (ISTC ip00926000; GW M34978), ca. 1465/1480 (ISTC ip00926100; M34977).

10. Franciscus Cremensis, *Singularia sive notabilia dicta*. Inc.: 'Quero prima de ista questione ...'. Drucke: Bologna (Andreas Portilia) um 1475 (GW 10265; ISTC if00291000), (Ugo Rugerius) um 1487/93 (GW 10266; ISTC if00292000); Mailand (Scinzenzeler) 1519; Pavia (Antonius Carcanus) 1491 (GW 10267; ISTC if00292500), (Bernardinus und Ambrosius de Rovellis für Aloysius de Castello) 1498 (GW 10268; ISTC if00292600), (Michele und Bernardino Garaldi) 1501; Paris (Nicolaus de Pratis) 1508; Lyon (Jacobus Giuncti) 1531, (Apud haeredes Jacobi Juntae) 1560, 473-497.

11. Guido Papa Gratianopolitanus, *Singularia*. Inc. 'Si quis intret ecclesiam animo gaudendi immunitatem. . . '. Drucke: Frankfurt am Main (Apud Andreae Wechelii heredes) 1596, 1.358ff., (typis Wechelianis sumptibus Clementis Schleichii und Petri de Zetter) 1629, 1.358-458; Lyon (Joannes Jonvelle dictus Piston) 1516, (Nicolai Petit und Hector Penet) 1533, (Jacobus Giuncti) 1540, (Jacobus Boyerius) 1560, (Apud haeredes Jacobi Juntae) 1560, 394-472, 1570, fol. 207-263; Mailand (Scinzenzeler) 1519.

12a. Antonius Corsetus Siculus, *Singularia et notabilia*. Druck: Bologna (Balthasar Azzoguidus) 1477 (GW 07788; ISTC ic00937000).

12b. Antonius Corsetus Siculus, *Singularia et notabilia cum additionibus*. Inc.: ‘Optavi sepe numero. . .’. Drucke: Lyon (Apud haeredes Jacobi Juntae) 1560, 576-643; Mailand (Johannes Antonius de Honate für Petrus Antonius de Castelliono) 1492 (GW 07790; ISTC ic00937400); Paris (Johannes Barbier) 1508; Pavia (Franciscus de Nebiis) 1500 (GW 07792; ISTC ic00937800); Venedig (Bernardinus Stagninus) 1490 (GW 07789; ISTC ic00937200), (Bernardinus Stagninus) 1499 (GW 07791; ISTC ic00937600).

13. Hippolytus de Marsiliis, *Singularia seu notabilia*. Inc.: ‘Priscorum consuetudo conditorum …’. Drucke: Bologna (Hector) 1501 und 1514; Lyon (Jacobus Giuncti) 1531 und 1548; Mailand (Legnano und Scinzenzeler) 1519; Paris (Johannes Barbier) 1508; Pavia (Michele und Bernardino Garaldi) 1501; Venedig (Comin da Trino) 1555; Lyon (Apud haeredes Jacobi Juntae) 1560, p. 644-794.

14. Petrus Gerardus de Petrasancta, *Singularia seu notabilia*. Inc. ‘Nota quod ex quibus causis potest exheredari filius ...’. Drucke: Lyon (Jacobus Giuncti) 1531, fol. 235v-262v, (Apud haeredes Jacobi Juntae) 1560, 543-575.

Legista sine canonibus parum valet, canonista sine legibus nihil

Kenneth Pennington

Legista sine canonibus parum valet, canonista sine legibus nihil.[1] Students of canon law learn that maxim early on in their studies. No modern scholar has ever doubted that Roman law was crucial for the development and understanding of medieval canon law. At the dawn of jurisprudence in the twelfth century, however, the Church's attitude towards Roman law in particular and secular law in general was not always positive. Pope Innocent II thought the study of law was inappropriate for the religious clergy, monks, and canons regular, and he promulgated *Prava autem consuetudo* at the Second Lateran Council in 1123 in which he forbade the religious to study law.[2] Saint Bernard of Clairvaux famously complained to Pope Eugenius III about the pernicious effect of law on the papal curia.[3] Nevertheless, the papal curia understood the importance of Roman jurisprudence for canon law. Pope Lucius III (1181-1185) recognized the close relationship of the two laws at the end of the twelfth century and quoted a famous text of

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[1] Frederick Merzbacher, 'Die Parömie "Legista sine canonibus parum valet, canonista sine legibus nihil",' *Collectanea Stephan Kuttner* (SG 13; Bologna 1967) 275-282 and Stephan Kuttner, 'Some Considerations on the Role of Secular Law and Institutions in the History of Canon Law', *Studies in the History of Medieval Canon Law* (Aldershot 1990) X.

[2] See Robert Somerville, 'Pope Innocent II and the Study of Roman Law', *Papacy, Councils and Canon Law in the 11th-12th Centuries* (Variorum Collected Studies 312; Aldershot 1990) and Pennington, 'Roman Law at the Papal Curia in the Early Twelfth Century', *Canon Law, Religion, and Politics: Liber Amicorum Robert Somerville,* edd. Uta-Renate Blumenthal, Anders Winroth, and Peter Landau (Washington, DC 2012) 233-252.

[3] On the theologians' and others attitudes toward law see James A. Brundage, 'The Teaching and Study of Canon Law in the Law Schools', HMCL 2.119-120 with an extensive bibliography; also Stephen C. Ferruolo, *The Origins of the University: The Schools of Paris and their Critics, 1100-1215* (Stanford, California 1985) 102-103, 126-127 and passim.

Justinian to underscore the point in two decretals.[4] Although there has been debate about his intentions, when Pope Honorius III forbade the teaching of Roman law at the University of Paris in 1219 with his decretal *Super specula*, the canonists and the law schools had already integrated Roman law completely into their work and into the law schools' curriculum. It was an indispensable tool for the study of canon law.[5] By the end of the twelfth century, an inscription on the tomb of Bassianus (†1197) in San Pietro, Bologna praised him for his learning in both laws.[6]

The anti-Roman law attitude found in *Super specula* was never completely erased until the early modern period. Since

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[4] Much earlier Pope Lucius III had endorsed Roman law in two decretals ca. 1181-1185: 2 Comp. 2.1.8 (X 2.1.8) 'Cum imperator dicat quod etiam leges eorum non dedignantur sacros canones immitari', and 2 Comp. 3.26.3 (X 5.32.1): 'sicut humanae leges non dedignantur sacros canones imitari, ita et sacrorum statuta canonum *priorum* principum constitutionibus adiuvantur'. Tancred of Bologna's gloss to Lucius' second decretal connected the text to Justinian's legislation: 'Precise dicendum est quod in causis ecclesie indifferenter utendum est legibus sicut canonibus ut hic traditur, nisi canones contradicant, quia tunc non est eis utendum, ut x. di. c.i. Ratio quare? Quoniam leges non dedignantur sacros canones immitari, ut in authen. ut clerici apud proprium episcopum, in fine (Nov. 83=Authen. 6.11) et supra de iudiciis c. penult. lib. i. (1 Comp. 2.1.8 [X 2.1.8]) t.' Bamberg, SB can. 20, fol. 89ra, Florence, Biblioteca Laurenziana 4 sin. 2, fol. 115rb, 2 Comp. 3.26.3 (X 5.32.1) s.v. *priorum principum constitutionibus*.

[5] Tancred included the decretal in his collection of Honorius's decretals at 5 Comp. 5.12.3 (X 5.33.28). The practical relationship between canon law and Roman jurisprudence stretches back to the fourth century if not earlier. See Peter Landau, 'Kanonisches Recht und römische Form: Rechtsprinzipien im ältesten römischen Kirchenrecht', *Europäische Rechtsgeschichte und kanonisches Recht im Mittelalter*: *Ausgewählte Aufsätze aus den Jahres 1967 bis 2006 mit Addenda des Autors und Register versehen* (Badenweiler 2013) 93-110; earlier discussions by Hans Erich Feine, 'Vom Fortleben des römischen Rechts in der Kirche', ZRG Kan. Abt. 42 (1956) 1-24 and Carl Gerold Fürst, 'Ecclesia vivit lege Romana?' ZRG Kan. Abt. 61 (1975) 17-36.

[6] Noted by Ennio Cortese, 'Bassiano (Bosiano, Boxiano), Giovanni', DGI 1.191-193 at 192 and Antonia Fiori, 'Baziano', DGI 1.199-200 who both discuss the problem of identifying Johannes Bassianus and Bazianus. For the inscription see Guido Panciroli, *De claris legum interpretibus* (Venice 1637) 137-138.

Honorius III's *Super specula* had been incorporated into the body of canon law, its ramifications continued to raise questions about the teaching of Roman law in the canon law curriculum.[7] Pope Leo X settled the issue permanently in Rome when he integrated Roman law into the curriculum of the papal law school in Rome, Sapienza, in 1515. He commanded that all students of canon law, no matter what their status, should be instructed in Roman law at the papal university.[8] Leo's bulla was a privilege for Rome but not for other universities. Consequently, the issue was not conclusively settled everywhere. Its example, however, was powerful.

Seventeenth-century jurists embraced Roman law completely. Prospero Fagnani (†1678) captured his fellow jurists' understanding of the relationship of the two laws in his commentary on Pope Honorius III's decretal *Super specula*:[9]

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[7] Stephan Kuttner, 'Papst Honorius III. und das Studium des Zivilrechts', reprinted with additional notes in *Gratian and the Schools of Law 1140-1234* (Variorum Collected Studies 185; London 1983) X. In spite of whatever doubts theologians and others had about Roman jurisprudence, the canonists without exception understood that after ca. 1175 and perhaps earlier Roman law could not be ignored.

[8] Pope Leo X, *Bulla privilegiorum studii Romani . . . concessa* (Rome 1515) unfoliated *in fine*: 'Et modernis temporibus pro clariori canonum intelligentia legum cognitio non absque re esse dignoscitur . . . aliis clericis secularibus etiam personatus habentibus ac presbiteris quibus leges audire sub excommunicationis sententia et aliis penis est a iure prohibitum in studio urbis huiusmodi dumtaxat pro clariori dictorum canonum intellectu leges absque alicuius censure sive pene incursu audiendi sancte commemorationis Honorii pape iii. similiter predecessoris nostri et aliis constitutionibus et ordinationibus apostolicis ceterisque contrariis nequaquam obstantibus auctoritate et tenore premissis plena et liberam licentiam elargimur'.

[9] Prospero Fagnani, *Commentaria* (Cologne 1703) to X 3.50.10: 'Quoniam justissimae leges et sacri canones ex uno utero vel fonte divino processerunt. Vnde leges firmantur canonibus et canonum ambiguitates legibus resolvuntur, sicut ex discursu glossarum utriusque juris loculenter apparet. Huic dicebant Romanus Singularia 654: "Legista sine canonibus parum valet, canonista sine legibus nihil".' Several early modern jurists authors refer to Ludovico Pontano Romanus' (†1439) discussion of the maxim in his *Singularia*; he was, as far as I know, the first jurist to coin the maxim.

> The most just laws and the sacred canons have sprung forth from one womb or source. Consequently, the laws are supported by the canons, and the ambiguities of the canons are resolved by the law, just as the glosses of both laws richly reveal and as Ludovico Pontano stated in his *Singularia* 654 'A civil lawyer without a knowledge of canon law is worth little, a canon lawyer without a knowledge of Roman law is worth nothing'.

Early modern jurists had many opinions about the maxim that Prospero cited and its meaning.[10] In his introduction to his commentary on the *Decretals* of Gregory IX Hendrik Zoesius (†1627) argued that Justinian recognized the importance of canon law in his legislation after his codification of Roman law, when he acknowledged that civil law did not scorn to follow ecclesiastical norms.[11] He also pointed out that Baldus de Ubaldis (†1400) concluded that the authority of canon law supported the majesty of Roman law.[12] Early modern jurists were fond of 'quoting' Cicero to make their point about the relationship of the two laws. Zoesius summed up Cicero with the pithy sentence:[13]

> nudos eos ad rempublicam venire, dicat, qui tantum habet legalem scientiam non conjunctam ei pontificiam.

Cicero's original comment was much more ornate and complex:[14]

> Nunc contra plerique ad honores adipiscendos et ad rem publicam gerendam nudi veniunt atque inermes, nulla cognitione rerum, nulla

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[10] E.g. Melchior Lotterio (†1632), *De re beneficiaria* (Rome 1635), Johann Georg Anacletus Reiffenstuel (†1703), *De regulis iuris* (Rome 1831) 35-36, Lucius (Ludovicus) Ferraris († ca. 1763), *Prompta bibliotheca, canonica, juridica, moralis, theologica* (Vol. 7; Naples 1855) 159-160.

[11] Hendrik Zoesius, *Commentarius paratitlaris in decretales epistolas Gregorii IX* (Cologne 1668) 2b paraphrasing Novella 83 (Authenticum 6.11).1: 'Neque enim volumus talia negotia omnino scire civiles iudices, cum oporteat talia ecclesiastice examinari et emendari animas delinquentium per ecclesiasticam multam secundum sacras et divinas regulas quas etiam nostrae sequi non dedignantur leges'. This was a common trope among the jurists.

[12] Ibid. quoting Baldus in his *Lectura super primo <libro> decretalium* (1489) fol. 1ra: 'Nam iuris canonici sanctitas iuris civilis sublimitate decoratur et econverso iuris civilis maiestas canonum auctoritate firmatur'.

[13] Ibid.

[14] Cicero, *De Oratore liber tres*, ed. Augustus S. Wilkins (Oxford 1892) 73, Book 3.33.

> scientia ornati . . . aut iuris scientiam, ne eius quidem universi; nam pontificium, quod est coniunctum, nemo discit.

At the end of the seventeenth century, Giovanni Carlo Antonelli (†1694) was still arguing for the right of religious to study Roman law. Without it, he wrote, they could not understand canon law.[15]

The jurists recognized the special relationship between the living law practiced daily in the courts, canon law, and the law of theory and the classroom, Roman law. Zoesius noted that Pierre Rebuf (†1557) had called canon law the practice 'practica' of civil law.[16] Rebuf repeated a theme that Andreas Barbatia (†1479) had emphasized a century earlier. It was taken up by many early modern jurists: canonical jurisprudence reflected practice; Roman law theory.[17] Rebuf made the point even more dramatically:[18]

> I say audaciously that pontifical law cannot be perfectly understood without Roman law since it is the quintessence of laws and canon law is the practice of civil law.

Rebuf also claimed that canon law was the 'practice' of theology.[19]

The practice of law without the theory is problematic. 'Legista sine canonibus parum valet, canonista sine legibus nihil' compellingly brought the two disciplines together. In the early

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[15] Giovanni Carlo Antonelli, *Tractatus posthumus de juribus et oneribus clericorum in duos libros distributus* (Rome 1699) Rota decisio 26, p. 87b: 'Igitur si regulares studiis legum incumbere non valent, impossibile prorsus eis redditur, quod jus canonicum legere seu explicare possint; nam inter leges et canones connexio quaedam ac mutua causalitas inest, ita ut sine scientia legum, perfecta canonum scientia haberi non possit'.

[16] Ibid. quoting Rebuf in his *Tractatus nominationum* (Paris 1551) 18: 'nisi quis sciat canones cum legibus non potest practicam iudiciorum cognoscere'. 'Practica' was a late medieval term that meant 'exercise', 'practice', or 'method'.

[17] Andreas Barbatia (Barbazza), *Repertorium principalium et emergentium questionum* (Venice 1508) fol. 184vb: 'Nihilominus durum esset contra stimulum calcitrare (Acts 9:5) quia iste textus ponit hanc praticam libellandi et videmus ius canonicum est pratica iuris civilis'.

[18] Pierre Rebuf, *Tractatus nominationum* (Paris 1551) 18: 'Immo audacter dico quod ius pontificium perfecte non potest intelligi sine legibus cum sit medula legum et ius canonicum est practica iuris civilis'.

[19] Ibid. 16: 'ut ius canonicum est practica theologiae et dirigit animas deo, sicut theologia'.

fifteenth century, Ludovico Pontano Romano was the first to coin his original, Italian version of the maxim in his *Singularia*: 'Io ti dico che legista senza capitulo vale poco, ma lo canonista senza lege vale niente'. Jurists who quoted the later Latin maxim attributed Pontano as having been its originator. They seem to have been right.[20]

However, Pontano's 'formulation' was different in meaning and intent from the later maxim. Pontano discussed a single example with which he demonstrated that if a canonist did not know Roman jurisprudence, his understanding of a legal issue would be flawed. He was not describing the general relationship of the two laws.

Pontano had a reputation among his fellow jurists as being brilliant. In his works he demonstrated a rare gift for approaching legal problems in creative and unusual ways. He concentrated his efforts on Roman law and fostered a new genre of legal literature, *Singularia*.[21] He coined the Italian maxim in a *Singularia* that was numbered slightly differently in various printed editions. Pontano pointed to a disconnect between canon and Roman law that would affect legal conclusions in the case of assault:[22]

> Habens funem seu filum ligatum in capite an dicatur esse cum capite nudo. Glossa est singularis, xxi. di. Cleros in verbo *nudum* (sic), quod non; quod

[20] The maxim was not a 'geflügeltes Wort' at the beginning of the thirteenth century, cf. Lars-Arne Dannenberg, *Das Recht der Religiosen in der Kanonistik des 12. und 13. Jahrhunderts* (Vita regularis 39; Berlin-Münster-Wien-Zürich-London 2008) 20.

[21] Thomas Woelki, *Ludovico Pontano (ca. 1409-1439): Eine Juristenkarriere an Universität, Fürstenhof, Kurie und Konzil* (Education and Society in the Middle Ages and Renaissance 38; Leiden-Boston 2011) 23-50, *Singularia* 30-36. Bartolus has been credited with writing *Singularia*, but works in manuscripts attributed to him are probably not by him; cf. Emanuele Casamassima, *Codices operum Bartoli a Saxoferrato recensiti: Iter Germanicum* (Firenze 1971) 256. The title *Singularia* was attached to various small works at the end of the fourteenth century, but none seems to have provided a model for Pontano. As Woelki, *Ludovico Pontano* 33, the name means 'noteworthy' (bemerkenswert) or 'original, special' (eigenartig).

[22] *Singularia* (Venice 1496) fol. 18va (not numbered), (Pavia 1501) fol. 22vb (numbered 654), (Paris 1508) unfoliated, numbered 656.

> faceret ad statuta loquentia de percutiente aliquem in capite nudo? Petas a tuo magistro hec: 'Io ti dico che legista senza capitulo vale poco, ma lo canonista senza lege vale niente'.

Johannes Teutonicus noted in his gloss to D.21 c.1 s.v. *nudis* that a person's head was not considered bare if cord had been woven into the hair.[23] It is a mark of Pontano's cleverness and his knowledge of both laws that he raised the question of presumption of intent. How was a bare head to be defined if a criminal statute mandated that the covering of the head must be considered in a blow to the head? Both canonists and Romanists had long concluded that a blow to the head could be considered proof of attackers' intention to kill. If the head was covered with a helmet perhaps not. Pontano called for students to ask their teacher to explain these two texts, but it was clear to him if a canonist knew only the canon law and not the jurisprudence of the *Ius commune*, he would have trouble answering the question.[24] However, if the teacher of Roman law did not know the text in Gratian's *Decretum*, it was not very important. Pontano's point was narrow and limited to one chapter of Gratian and the jurisprudence of one area of criminal law. Even then, he did not get the relationship between the two laws exactly right. When a few years earlier Bartolus had asked in his *Commentary* on the *Digest* dealing with homicide what the presumption of guilt would be when an attacker struck a head or another part of the body, he turned to canon law. He cited Bernardus Parmensis' *Ordinary Gloss* to a decretal that discussed a cleric who had participated in the murder of a thief. It

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[23] The text of D.21 c.1 stated: 'Nam nudis penitus eos capitibus incedere nefas erat. Vnde a filo, quo utebantur flamines dicti sunt, quasi filamines', to which Johannes noted "Argumentum quod non incedit nudus qui filum fert in capite'.

[24] The jurists discussed the question of blows and placement of blows again and again; see Petrus Caballus († ca. 1616), *Tractatus de homicidio* (1614) 145-146; Prospero Farinacci (†1618), Title 14, *De homicidio* in *Praxis et theoricae criminalis amplissimae* (2nd ed. Nürmberg 1676) 379 n.191-198. Farinacci was the most prolific and distinguished of the early modern criminal jurists; see Pennington, 'Torture and Fear: Enemies of Justice', RIDC 19 (2008) 203-242 at 230-238.

had become a central text for the presumption of guilt in the case of murder in canon law—and in Roman law, id est in the *Ius commune*.[25] However, Pontano's purpose was not to get the relationship between the two laws exactly right but to point out an interesting wrinkle in the two laws and, perhaps, to amuse his readers.

It took a while for Pontano's Italian tag to evolve into the Latin maxim. As far as I can tell Zoesius was the first jurist to turn Pontano's Italian into Latin in the late sixteenth or early seventeenth century.[26] Antonelli was the only jurist to preserve Pontano's Italian, but he altered it. By rendering legge and capitolo into the plural he adapted the Italian to match the meaning of the Latin maxim that was circulating widely: 'Legista senza capitoli val poco, ma il canonista senza leggi val niente'.[27] By that time, however, the Latin maxim had won the day. I have not found any other jurist who quoted the maxim in Italian.

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[25] Bartolus de Sassoferrato, *Commentaria* (Venice 1526) fol. 180r ad Dig. 48.8.1.3: 'Item si in rixa fiunt debemus inspicere cum quo percussit an cum gladio an cum baculo vel lancea et si cum lancea aut cum ferro aut cum basta, ut glossa dicit, et cum bastone aut percussit in capite aut alia parte corporis, ita nota glossa on c. Significasti in fine, extra de homicidio (X 5.12.18)'. See also Richard H. Helmholz, '*Si quis suadente* (C.17 q.4 c.29): Theory and Practice', *Proceedings Cambridge 1984* 425-438 and Thierry Kouamé, 'Legitime défense du corps et légitime défense des biens chez les Glossateurs (XIIe-XIIIe)', *Violences souveraines au Moyen Âge: Travaux d'une école historique*, edd. François Foronda, Christine Barralis, and Bénédicte Sère (Paris 2010) 19-27 and Pennington, 'Moderamen inculpatae tutelae: The Jurisprudence of a Justifiable Defense', RIDC 24 (2013) 27-55.

[26] Hendrik Zoesius (Heinrich Zoes) had an extraordinary career if one would judge by the printings of his works. His commentaries on the *Digest*, *Codex*, and *Institutes* were printed well into the eighteenth century. His commentary on the *Decretales of Gregory IX* had its last printing in 1840-1841. He also wrote a commentary on feudal law that enjoyed equal popularity until the seventeenth century. His fame work in Roman, canon, and feudal law was unusual for the early modern period.

[27] Antonelli, *Tractatus* 87b: 'indeque passim per ora doctorum volitat adagium illud, de quo originaliter Roman. d. Singul. 654'. He too thought that Pontano created the maxim.

Today, Roman law is important for the students of canon law, and a course on Roman law is mandated as part of the degree requirements for the licentiate today. The two disciplines began to go their separate ways, however, in the eighteenth century. It was a process that had already begun in the sixteenth and seventeenth centuries with the slow death of the *Ius commune*, the Protestant Reformation, and the establishment of law schools that taught the law of the nation states.[28] Canon law lost its coercive power, and Roman law became more and more a field of antiquarian study, especially focusing on the ancient Roman law in Justinian's compilation and before. As Roman law descended from essential theory to antiquarianism, it lost much of its luster in the eyes of some jurists. Lucius Ferraris (†1763) was a Franciscan from northern Italy who became a provincial of the order. He spent many years in Rome at the Curia, where, according to Schulte, he garnered a good reputation. Schulte also noted that his work was old-fashioned and scholastic.[29] His most important work was a massive eight volume work on canon law entitled *Prompta biblioteca juris canonica* that was reprinted multiple times in the eighteenth and nineteenth centuries.

After quoting Rebuf's encomium of the relationship of canon law and Roman law quoted above in notes 18-19, he launched into a diatribe against Romanists, their practice, and their law:[30]

> They should be called not doctors of law but vexations of the law . . . they should be called doctors of necessity, that is without law, because necessity knows no law.[31]

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[28] See Manlio Bellomo, *The Common Legal Past of Europe 1000-1800* (SMCL 4; Washington DC 1955) 1-33, 223-235.

[29] Schulte, *Geschichte der Quellen* 531: 'so steht dasselbe ganz auf dem scholastischen Standpunkte, befolgt durchaus die bloss casuistische Methode und weist in keinerlei Hinsicht eine freie, eigne Affassung oder einen Fortschritt auf'.

[30] Lucius Ferraris, *Prompta biblioteca canonica* 159b: 'Possent que vocari non juris doctores, sed juris dolores, ut aliquos vocat . . . appellando etiam ipsos doctores necessitatis, hoc est sine lege, quia necessitas non habet legem'.

[31] On the maxim 'Necessitas legem non habet' see Franck Roumy, 'L'origine et la diffusion de l'adage canonique *Necessitas non habet legem* (VIIIe-XIIIe

That was just the beginning of his attack. Most of his quotations and ideas were borrowed from other early modern jurists who had equally low opinions of Romanists. This sea change of opinion is not surprising. As canon law became a 'territorial' law of the Church, it separated itself from a long-standing relationship that had nurtured its jurisprudence for centuries.

Washington, D.C.

s.)', *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 DC 2006) 301-319.

Tierney, Brian. *Liberty and Law: The Idea of Permissive Natural Law, 1100-1800*. SMCL 12. Washington D.C.: Catholic University of America Press, 2014. Pp. xii, 380. $39.95. ISBN: 978-0-8132-2581-4

Jason Taliadoros

Brian Tierney's most recent monograph, *Liberty and Law: The Idea of Permissive Natural Law, 1100-1800*, continues a prolific and influential line of scholarship that challenges the notion of a substantial break between pre-modern and modern political and constitutional thought.[1] Instead, Tierney argues for a continuity between the two periods, situating many of these precursors to modernity in the legal writings of the twelfth-century canonists. His *Foundations of the Conciliar Theory* argued that the conciliarist doctrine of papal power was grounded on constitutional principles formulated in earlier canonistic writings.[2] In his *Origins of Papal Infallibility*, Tierney controversially located the seeds of the doctrine of papal

[1] Brian Tierney, *Liberty and Law: The Idea of Permissive Natural Law, 1100-1800* (SMCL 12; Washington D.C. 2014). Those who argue for a distinctive rupture, or at least a lack of continuity, between medieval and modern political and constitutional ideas include Leo Strauss, *Natural Right and History* (Chicago 1953) 166, 180-181, who holds that the objective *ius* was decisively displaced by the subjective *ius* with Thomas Hobbes in the seventeenth century; Norberto Bobbio, *Thomas Hobbes and the Natural Law Tradition*, trans. Daniela Gobetti (Chicago 1993) 154, arguing that the theory of natural rights was born with Hobbes; Jack Donnelly, *Universal Human Rights in Theory and Practice* (3rd ed. Ithaca 2013) 86-106, who argues that natural rights had a distinctly Western origin in the revolutions of the seventeenth and eighteenth centuries, especially in the writings of Locke; Alisdair MacIntyre, *After Virtue: A Study in Moral Theory* (3rd ed. Notre Dame 2007) 70, who considers natural rights as fictions and an invention of modern liberal individualism; and Crawford B. Macpherson, *The Political Theory of Possessive Individualism: Hobbes and Locke* (Oxford 1962) 1-4, 220-238, who argued for the origins of a doctrine of possessive individualism in the seventeenth century, notably in Hobbes, the English Levellers, Harrington, and Locke.

[2] Brian Tierney, *Foundations of the Conciliar Theory: The Contribution of the Medieval Canonists from Gratian to the Great Schism* (Cambridge 1955; reprinted with additional material Leiden 1998).

infallibility in theological discussions by the Franciscan order in the thirteenth century—not the medieval canonistic tradition.[3] In his *Crisis of Church and State*, Tierney's introduction situates the Investiture Controversy as a study of the ideologies behind medieval papal power, which was part of 'a persisting tendency toward the emergence of constitutional forms of government'.[4] Also in *Foundations of the Conciliar Theory*, and later in *Religion, Law, and the Growth of Constitutional Thought*, Tierney challenged the traditional dichotomy between communal-pre-modern and individual-modern mentalities, arguing that medieval notions of the corporation—for instance in communes, guilds, universities, collegiate churches, monastic houses, confraternities, etc.—was a model for large-scale government in church and state.[5]

The purpose of *Liberty and Law*, according to its author, 'is to present some illustrations of the history of an idea—the idea of permissive natural law',[6] 'to call attention to a persistent but neglected theme that . . . formed a significant part of the whole tradition of natural law thinking'.[7] What is 'permissive natural law'? Tierney observes that it is one of the three parts constituting natural law, these parts being precepts, prohibitions, and permissions. Permissive natural law refers to behavior that is neither obligatory nor prohibited but permitted.[8] In this way *Liberty and Law* builds on the project begun by Tierney in his *The Idea of Natural Rights*, in which he argued that traditional natural law gave rise to individual natural rights. A central part of Tierney's thesis in that earlier work was that *Ius naturale* meant both 1) a zone of human autonomy or sphere of licit conduct—that is, permissive natural rights—and 2) a faculty or power of

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[3] Brian Tierney, *Origins of Papal Infallibility, 1150-1350: A Study on the Concepts of Infallibility, Sovereignty and Tradition in the Middle Ages* (Leiden 1972).
[4] Brian Tierney, *The Crisis of Church and State 1050-1300* (Toronto 1964) 1.
[5] Brian Tierney, *Religion, Law, and the Growth of Constitutional Thought, 1150-1650* (Cambridge 1982; rpt. 2009).
[6] Brian Tierney, *Liberty and Law* vii.
[7] Ibid. xi.
[8] Ibid. vii-viii.

the individual—that is, subjective rights.[9] Tierney located this important shift in the writings of the twelfth-century canonists, which in turn influenced subsequent thinkers up to and including Hugo Grotius. In *Liberty and Law*, however, Tierney notes that the concept of permissive natural rights (now called permissive natural 'law') is only peripherally about its relationship as species to the *Ius naturale* genus. It has many other applications, namely 'to assert individual rights or to defend absolute government', including such instances as the foundation of private property, sexual ethics, international law, the Franciscan poverty disputes of the fourteenth century, and the 'adiaphora' controversies of the Reformation era.[10] Further, permissive natural law called attention to the intrinsic nature of law itself, since 'to assert that law could include free choice seemed contrary to the very nature of law itself . . . to impose obligation and so limit freedom'.[11] In short, *Liberty and Law* extends the notion of permissive natural law first conceptualized in *The Idea of Natural Rights* beyond the context of rights to its political-philosophical and legal theoretical-jurisprudential contexts.

By way of outline, *Liberty and Law* comprises an introduction, sixteen chapters, an afterword, and a select bibliography. The structure is chronological and divided into seven parts, beginning with Part I (Foundations), which includes chapter 1 on the Stoic concept of 'adiaphora' or 'indifferent things', the early medieval Church Fathers, and twelfth-century theologians, and chapter 2 on twelfth-century canonistic jurisprudence. Part II deals with the thirteenth-century theologians, including William of Auxerre and the anonymous *Summa Halensis* (chapter 3) and Aquinas (chapter 4); and Part III moves to an analysis of the fourteenth-century thinkers William of Ockham (chapter 5), Marsilius of Padua (chapter 6), and

[9] Brian Tierney, *The Idea of Natural Rights* (Grand Rapids-Cambridge 1997) 68. The thesis appears in chapter 2 of that work, 'Origins of Natural Rights Language: Texts and Contexts, 1150-1250', which was earlier published as Brian Tierney, 'Origins of Natural Rights Language: Texts and Contexts, 1150-1250', *History of Political Thought* 10 (1989) 615-646.
[10] Tierney, *Liberty and Law* viii.
[11] Ibid. ix.

Johannes Andreae (chapter 7). From the medieval period, Part IV directs attention to early modern texts of the Protestant Reformation in the sixteenth century that dealt with the 'Adiaphorist Controversy' in Germany and the 'Admonition Controversy' in England (chapter 8) and the contribution of Richard Hooker (chapter 9), while Part V examines one of the Spanish neo-scholastics of the sixteenth-century Salamanca school, Francisco Suarez (chapter 10), and then Hugo Grotius (chapter 11). Part VI analyzes the thought of Grotius and Hobbes on natural law through John Selden (chapter 12), Samuel Pufendorf (chapter 13), and their critics (chapter 14), while the final part (Part VII) turns to the German Enlightenment figures, the predecessors to Immanuel Kant (chapter 15) and then Kant himself (chapter 16).

This essay will focus on the ideas and sources in chapter 2, the canonists of the twelfth century, since these are of most interest to readers of this journal, form the bedrock for Tierney's theses, and have been the focus of my own work in this area.[12] As background, chapter 1 situates the two key sources for Tierney's study: the Stoic 'adiaphora'—part of an understanding of natural law that depicted things neither intrinsically good nor evil but indifferent, such as the 'vicissitudes of life'[13]—and the Roman law text that reflected Stoic thought (although arguably

[12] Jason Taliadoros, 'The Notion of Human Rights in the Twelfth Century: Tierney's Thesis Reconsidered', *Rule Makers and Rule Breakers: Proceedings of a St. Michael's College Symposium (1-2 October 2004)*, edd. Joseph Goering, Francesco Guardiani, and Giulio Silano (New York 2006) 223-238; idem, 'Sacred Rules, Secular Revelations: The Conceptions of Rights in Pre-Modern Europe', *Sortuz (Oñati Journal of Emergent Socio-Legal Studies)* 3 (2009) 78-94; idem, 'Law, Theology, and Morality: Conceptions of the Rights to Relief of the Poor in the Twelfth and Thirteenth Centuries', *Journal of Religious History* 37 (2013) 474-493; and idem, 'Interpreting Permissive Natural Law and Subjective Rights from *ius naturale*: Twelfth-Century Canonists' Ideas in Action', *Beyond Law's Borders: Canon Law as a Window to the Medieval World, 1000-1224*, edd. Melodie H. Eichbauer and Danica Summerlin (Leiden under review).

[13] Tierney, *Liberty and Law* 4.

Aristotelian),[14] namely *Digest* 1.3.7: 'The force of law is to command, to prohibit, to *permit*, to punish'.[15] This latter concept in particular is taken up in the canonists' notion of permissive natural law, Tierney argues.

Foundations: Gratian's Decretum on Ius naturale

The foundation for understanding Tierney's works on subjective rights and permissive natural law is the text of Gratian's *Decretum* and the glosses and commentaries on it, the 'canonistic jurisprudence' of chapter 2 of *Liberty and Law*.[16] The first twenty distinctions of Gratian's text, known as the 'treatise on laws' because of its theoretical analysis of the definition and nature of law, were the subject of analysis by canon lawyers who used both subjective rights and permissive natural law language to accommodate Gratian's opening definition of natural law, which included the Golden Rule of scripture and Isidore of Seville's manifold meanings of natural law from Stoic ideas transmitted through Roman law.

In *Liberty and Law* Tierney analyzes the treatment of natural law in the *Decretum* in a more detailed manner than in *The Idea of Natural Rights*. In doing so, he highlights the contradictions that arose there. First, the *Decretum* defined natural law as the Golden Rule of scripture: 'Natural law is what is contained in the Law and the gospel, by which each is commanded to do to others what he would have done to himself and not to do to others what he would not have done to himself [Matthew 7:12]'.[17] Second followed a text taken from Isidore of Seville that 'Divine laws are grounded on nature, human laws on usages'.[18] Although these two passages seem to suggest that natural law and divine

[14] James Bernard Murphy, 'Review of Brian Tierney, *Law and Liberty: The Idea of Permissive Natural Law, 1100-1800*', AHR 120 (2015) 704.
[15] Tierney, *Liberty and Law* 6 (emphasis in the original).
[16] Ibid. 15-47 (ch. 2).
[17] Ibid. 18, citing Gratian, *Decretum* D.1 c.1; *cf.* Tierney, *Idea of Natural Rights* 58.
[18] Ibid. 19, citing Gratian, *Decretum* D.1 c.1; Isidore of Seville, *Etymologies*, 5.2.1-2. *Cf.* Tierney, *Idea of Natural Rights* 59.

law (from scripture) were the same, Gratian distinguished them: 'Natural law is contained in the Law and the gospel but not everything in the Law and the gospel is natural law'.[19] Gratian went on to explain that divine law ('Law'), understood as the moral teachings of the Old Testament, expressed natural law and was immutable but that the ceremonial or 'mystical' precepts were no longer literally observed. Nevertheless, despite understanding this difference, many canonists used the terms natural law and divine law interchangeably. Third, Gratian's discussion of natural law continued, quoting Isidore of Seville again, natural law derived from natural instinct rather than scripture or the Golden Rule:[20]

> Natural law is common to all nations because it is held everywhere by natural instinct, not by virtue of any enactment; for instance, the union of men and women, the succession and upbringing of children, the common possession of all things, the same liberty for all, the acquisition of what is taken by land, sea, and air; also the return of a thing deposited or of money entrusted, the repelling of violence by force. For this and anything similar is never unjust but is held to be natural and equitable.

Fourth, Gratian's text went on to consider natural law as superior to all others in age and in dignity: 'It began with the origin of rational creatures and does not change with time but remains immutable'.[21] Fifth, natural law prescribed community of property: 'By natural law all things are common. By the law of custom and statute this is mine and that is another's'.[22] Finally, in a sixth step, Gratian wrote of the priority of natural law over custom and written law: 'Natural law prevails over custom and statute in dignity. Whatever has been received as custom or set

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[19] Tierney, *Liberty and Law* 19, citing Gratian, *Decretum* D.6 d.p.c.3. *Cf.* Tierney, *Idea of Natural Rights* 59. Compare Alexander J. Carlyle, *The Political Theory of the Roman Lawyers and the Canonists, from the Tenth Century to the Thirteenth Century* (6 vols; London 1903-1936) 2.98-99, 102.

[20] Ibid. 20, citing Gratian, *Decretum* D.1 c.7. *Cf.* Tierney, *Idea of Natural Rights* 59.

[21] Ibid. 20, citing Gratian, *Decretum* D.5 d.a.c.1; *cf.* Tierney, *Idea of Natural Rights* 59.

[22] Ibid. 20, citing Gratian, *Decretum* D.8 d.a.c.1; *cf.* Tierney, *Idea of Natural Rights* 59.

down in writing is vain and void if it conflicts with natural law'.[23]

Subjective Rights in ius and ius naturale

I have outlined these texts in Gratian's account of law in some detail, since Tierney focuses then on how the contradictions they presented were to be resolved by the decretists. The principal one was the fundamental inconsistency between natural law's support for community of property on the one hand and positive human law's support of private ownership of property on the other. Tierney's *The Idea of Natural Rights* provides a detailed explanation of how the canonists dealt with this problem in part by using a language of subjective rights in respect of the terms 'ius' and *Ius naturale*. Although an account of subjective rights is largely absent from *Liberty and Law*, that concept is crucial to understanding Tierney's overall project in tracing precursors to natural rights in medieval notions of natural law.

Gratian used the term 'ius' to mean 'designated systems of objective law', such as natural law, customary law, civil law, military law, public law, whereas 'in everyday discourse' the decretists understood 'ius' as 'a subjective right'.[24] In response to Gratian, the decretists 'unreflectively shifted between objective and subjective meanings of 'ius' without seeing any need for explanation'.[25] The *Ordinary Gloss* (1215-1218) on custom to D.1 c.5 acknowledged Gratian's understanding of 'ius' as objective when referring to customary law by usage, but also that this customary law was not established by repeated usage unless there was an intention to establish such a custom; and that 'this was true even when a person acted by virtue of his right (iure suo)'. Thus, the *Ordinary Gloss* 'casually' introduced the

[23] Ibid. 20, citing Gratian, *Decretum* D.8 d.p.c.1; *cf.* Tierney, *Idea of Natural Rights* 59.
[24] Tierney, *Idea of Natural Rights* 61. On the distinction between the tripartite division of 'ius' as the objective systems of law of 1. *ius naturale*, 2. *ius gentium*, and 3. *ius civile*, on the one hand, and 'ius' as a 'subjective right' as understood by Tierney, on the other hand, see Carlyle, *Political Theory* 2.28.
[25] Ibid. 61.

subjective meaning of 'ius'.[26] Further, the *Ordinary Gloss* on Isidore's distinction between divine natural law (fas) and human law in to D.1 c.1 used the word 'ius' to refer to both 'a body of law' and what was permitted by law—what we might call a 'right' (eg, Isidore's 'To pass through another's field'). The *Ordinary Gloss* stated: 'It is permitted by divine law (iure divino), nevertheless it is not a right (ius) because it is not permitted by human law (iure humano)'.[27] Thus, here the word 'ius' oscillated between the two meanings of objective law and subjective right.[28]

As they did with the term 'ius', Tierney argues, the decretists gave subjective and objective meanings to the term *Ius naturale*. They differentiated the ways that Gratian used the term *Ius naturale*.[29] Huguccio, for instance, in his *Summa* on the *Decretum* (c. 1190), dealt with this issue by saying that:[30]

> not all the examples of *Ius naturale* . . . refer to the same meaning of natural law; therefore a prudent reader will carefully discern which example refers to which meaning.

But crucial to subjective understandings was an 'influential discussion' by Rufinus, who defined *Ius naturale* as [1] 'a certain force instilled in every human creature by nature to do good and avoid the opposite' and [2] comprising 'three things, commands, prohibitions and demonstrations'.[31] This first part of Rufinus's definition of *Ius naturale* as a 'subjective moral force or power inhering in individuals'[32] or 'a faculty or power of the individual'[33] was followed by many other decretist commentators: Odo of Dover in his *Decreta minora* of *c.*1170;

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[26] Ibid. 61.
[27] Tierney, *Idea of Natural Rights* 61.
[28] Ibid. 61-62.
[29] Ibid. 60-61; *cf.* Tierney, *Liberty and Law* 20-21.
[30] Ibid. 60-61, citing Huguccio, *Summa Decretorum* to D.1 c.6; *cf.* Tierney, *Liberty and Law* 21-22. Oldřich Přerovský, *Summa decretorum* (MIC Series A 6; Vatican City 2006) 30 introduced two errors into this text: Kenneth Pennington, 'Review of Huguccio, *Summa Decretorum*', *The Jurist* 71.1 (2011) 238-240, 239.
[31] Ibid. 62.
[32] Ibid. 66.
[33] Ibid. 68.

Simon of Bisignano in his *Summa* of 1177-1179; Sicardus of Cremona in his treatise of 1182-1185; Ricardus Anglicus in his *Summa quaestionum* of 1186; and Huguccio.[34] Huguccio was exceptional in that he not only followed this subjective definition (i.e., that *Ius naturale* meant 'a force of reason and moral discernment innate in humans') but privileged it over and above the objective meaning, that is 'the moral laws known through reason' and which were summed up by the scriptural Golden Rule. Huguccio stated that this second objective meaning of *Ius naturale* was not the same as the first, since moral precepts 'are effects of natural *ius* or that they derive from natural "ius" rather than they *are* natural "*ius*".'[35] Therefore the first subjective sense was the 'primary one' of *Ius naturale* as a '"force of the soul" associated with human rationality'.[36]

Tierney notes further that these twelfth-century canonists' made an extremely subtle distinction within this subjective meaning of *Ius naturale*. As opposed to the Stoic doctrine of there being a 'force' in humankind through which she could discern *Ius naturale*, for the twelfth-century canonists '*ius naturale* itself could be defined as a subjective force or faculty or power or ability inherent in human persons' and not simply the power to discern this.[37] That is, Stoics thought of *Ius naturale* in semantic terms of 'cosmic determinism' (i.e., objective terms) while canonists thought in terms of 'human free choice'.[38]

Tierney then observes the significance of this notion of subjective rights in *Ius naturale*. 'Although such definitions do not in themselves express a doctrine of natural rights, once the term *Ius naturale* was clearly defined in this subjective sense the argument could easily move in either direction, to specify natural laws that had to be obeyed or natural rights that could licitly be exercised'.[39] For Tierney, this notion of *Ius naturale* as an

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[34] Ibid. 63-65.
[35] Tierney, *Idea of Natural Rights* 64 and 65.
[36] Ibid. 65.
[37] Ibid. 65.
[38] Ibid. 66-67.
[39] Ibid. 65.

inherent power in the individual to do 'good' was within humankind and thus subjective, not external to humankind and therefore objective. Further, as a solution to the problem of private property and common property, Tierney considers the right of the poor to use the surplus property of the rich to sustain life in cases of extreme 'need', that is the natural law principle of sharing in times of need trumped private ownership.[40]

Permissive Natural Law (previously Permissive Natural Rights) in Ius naturale

In *The Idea of Natural Rights* Tierney notes that, when addressing the problems that arose in their discussion of the different meanings of *Ius naturale*, and the difference between natural law and man-made law, the decretists often included the idea of permissive natural law among these different meanings. Rufinus' included it as part of his definition of *Ius naturale*, in which he divided it into commands, prohibitions, and 'demonstrations' ('demonstrationes'), from *Digest* 1.3.7: 'The force of law is to command, to prohibit, *to permit*, to punish', as noted above.[41] Although demonstrations often had the meaning of a primeval state of affairs or the 'state of nature',[42] Tierney observes that demonstrations also were understood as 'a permanently existing feature of the law (or right) of nature, a kind of natural "ius" that defined an area of permissiveness where rights could licitly be exercised, rather than a body of restrictive law'.[43] This corresponded to modern meanings that to

[40] Ibid. 72-73. This was the subject of his Brian Tierney, *Medieval Poor Law: A Sketch of Canonical Theory and Its Application in England* (Berkeley-Los Angeles 1959). See also Jason Taliadoros, 'Law, Theology, and Morality'.
[41] Tierney, *Idea of Natural Rights* 63, 66.
[42] A 'primeval state of affairs' or 'a state of nature' that was later superseded 'by human law and government', per Alanus, cited in Tierney, *Idea of Natural Rights* 66 n.79.
[43] For example, the *Summa 'Imperatorie maiestati'* (=*Summa Monacensis*) of 1175-1178, in dealing with Gratian's inconsistent concepts of common property and private property, allowed private property as a natural right—despite its inconsistency with the notion of common property under *Ius*

have a 'right' is 'to enjoy a sphere of personal liberty', a 'zone of autonomy', 'an area of licit choice where the right holder is free to act as he [or she] pleases', or 'a zone of human autonomy or sphere of licit conduct'.[44] H.L.A Hart, in discussing modern rights language, explained that a right defines an area where the agent is free to act as he chooses, to assert a claim or not to assert it; these canonists, Tierney says, were making the same point.[45] This was the very doctrine of individual rights that Michel Villey argues was formulated after Ockham, that implied 'a quality of the subject, one of his faculties, a liberty, a possibility of acting'.[46]

These English decretists, Tierney suggests, wove together in a 'new synthesis' three notions: the idea of a permissive *Ius naturale*, Isidore's definition of *Fas*, and Paul's words in 1 Corinthians 6:12 'All things are licit for me'.[47] Decretists of the Bolognese school, from England in the 1180s, define *Ius naturale* as conduct that was 'licit and approved', in the sense of specifying '"a zone of human autonomy", "a neutral sphere of personal choice".'[48] Tierney refers to several of these commentaries on Gratian, namely *Summa, 'In nomine'* (*c.*1185), *Summa 'Permissio quaedam'* (= formerly, *Distinctiones Halenses = Distinctiones Bambergenses*) of *c.*1185-1186, Ricardus Anglicus's *Summa quaestionum* of 1186; and Huguccio's *Summa*, which more broadly diffused these ideas.[49] In this way, Tierney argues that the association of *Ius naturale*

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naturale. In this case, *Ius naturale* was sometimes identified with *Ius gentium*, which also permitted private property: *Ius naturale* is called the law of nations (*Ius gentium*) because, 'by dictate of nature rather than command of a statute (*lex*), one has [their] right' (de natura dictante…habet ius suum), Tierney, *Idea of Natural Rights* 66 n.80.

[44] Tierney, *Idea of Natural Rights* 66, 68.

[45] Tierney, *Idea of Natural Rights* 68. Compare H. L. A. Hart, 'Are There Any Natural Rights?', *Philosophical Review* 64 (1955) 175-191, 184.

[46] Tierney, *Idea of Natural Rights* 68, citing Michel Villey, 'La genèse du droit subjectif chez Guillaume d'Occam', *Archives de philosophie du droit* 9 (1964) 97-127, 101.

[47] Ibid. 67.

[48] Ibid.

[49] Ibid.

with Paul's text broadened the apostolic teaching on Christian exemption from Jewish ceremonial precepts into a 'more generalized doctrine of natural liberties'.[50] He cites Hart, Wolff, and Villey for the identification of this notion with modern notions of rights language in which a right is an area where the agent is free to act as he or she chooses.

Liberty and Law signals a shift in Tierney's approach to permissive natural law. Tierney now makes explicit the various 'vocabularies' by which the decretists expressed the idea, using five terms, 'demonstratio/permissio', Fas, 'libertas, perplexitas-tolerantia', and 'licitum'. How does this depiction differ from *The Idea of Natural Rights*, and how can we explain it? Although Tierney had used these terms in his earlier work, their treatment in *Liberty and Law* represent an evolution and development in his ideas. Part of this shift is evident in a 2001 article that examined Immanuel Kant's treatment of permissive natural law or 'aporia' in his theory of property.[51] In that same year Tierney further developed his ideas on permissive law in Kant, specifically on how that thinker dealt with private property against common property; Tierney there considered a 'whole earlier tradition of thought' on permissive natural law, especially as it related to property rights, in writers from the twelfth century to the time of Kant.[52] This article signals Tierney's shift from relying on an argument of 'subjective rights' as the origin to natural rights (or human rights) to an emphasis instead on permissive natural law as a ground of natural rights. In the words of another reviewer, this term grounded a theory for natural rights separate from arguments about subjective powers and from mere dependence on precepts of natural law.[53]

Another line of scholarship by Tierney informs *Liberty and Law*, namely his response to recent interventions in the debates

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[50] Ibid.68.

[51] Brian Tierney, 'Kant on Property: The Problem of Permissive Law', *Journal of the History of Ideas* 62 (2001) 301-312.

[52] Brian Tierney, 'Permissive Natural Law and Property: Gratian to Kant', *Journal of the History of Ideas* 62 (2001) 381-399.

[53] Gladden J. Pappin, 'Review' Review of Politics 79 (2017) 131-133, esp. 131.

on natural law as precursor to natural rights. In a 2002 article Tierney considered recent debates on natural rights as derived from natural law and the 'impasse' arising from this scholarly debate.[54] He posited that an 'alternative approach' to deriving natural rights from natural law was to consider permissive natural law, a line of inquiry ignored by most scholars.[55] Tierney observed that from the twelfth to the eighteenth century and beyond 'the idea of permissive natural law was persistently invoked as a ground of natural right, especially the right to property'.[56] He noted that neither Aquinas nor Hobbes assimilated the concept of permissive natural law into their system of thought, and this may explain why neither author developed a 'meaningful concept of natural rights'.[57] He also noted the absence of a detailed history of the concept and its varied applications in Western thought, clearly foreshadowing his *Liberty and Law*.

In *Liberty and Law* Tierney reprises his earlier arguments on the role of Rufinus in identifying permissive natural law as part of *Ius naturale*.[58] Rufinus, in his *Summa* (ca.1158-1164), introduced the term 'demonstratio' in this context. This word designates a permissive or non-obligatory aspect of natural law. This fell within the second part of Rufinus's definition of natural law: 'Natural law consists of three things, commands, prohibitions, and demonstrations (demonstrationes). It commands what is beneficial, it prohibits what is harmful, and it demonstrates what is fitting, for instance, that all things be held in common and the same liberty of all'.[59] But whereas in Hugh of Saint Victor's work the precepts and prohibitions were themselves called demonstrations of God's will, for Rufinus the demonstrations referred to an area of conduct where natural law

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[54] Brian Tierney, 'Permissive Natural Law and Natural Rights: Old Problems and Recent Approaches', *Review of Politics* 64 (2002) 381-399.
[55] Tierney, 'Old Problems' 399.
[56] Tierney, 'Old Problems and Recent Approaches' 401.
[57] Ibid. 406.
[58] Ibid. 23; *cf.* Tierney, *Idea of Natural Rights* 62.
[59] Ibid. 23-24, citing Rufinus, *Summa Decretorum* to D.1 d.a.c.1, p. 6. *Cf.* Tierney, *Idea of Natural Rights* 62-63, 66.

did not command or forbid. And applying this new definition of natural law as 'demonstratio' to resolve Gratian's unresolved inconsistency between human positive law and the law of nature, Rufinus stated:[60]

> [Natural law] cannot be detracted from at all in its commands and prohibitions . . . but it can be in the demonstrations, which nature does not command or forbid but shows to be good, and especially as regards the liberty of all and common possessions for now, by civil law, this is my slave, that is your field.

Here Rufinus argued that the natural law relating to common property and human liberty was a permissive and non-obligatory kind of law; that is, human statute law could derogate from natural law as demonstrations but not as precepts or prohibitions.[61] Subsequently, the word 'permissio' was occasionally substituted for Rufinus's 'demonstratio' and the two terms were used interchangeably.[62]

Huguccio too employed the tripartite division of natural law between precepts, prohibitions, and demonstrations; demonstrations of natural law were 'what is fitting and expedient', such as common property and liberty.[63] In an unusual twist, however, Huguccio varied the usual argument that common property was introduced by natural law and private property by human law; he maintained rather that individual

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[60] Tierney, *Liberty and Law* 24, citing Rufinus, *Summa Decretorum* to D.1 d.a.c.1, p. 7. *Cf.* Tierney, *Idea of Natural Rights* 62-63, 66.

[61] Tierney, *Liberty and Law* 24; *cf.* Tierney, *Idea of Natural Rights* 62-63, 66.

[62] Ibid. 25, citing by way of example the *Summa Bona a deo patre*, in Rudolf Weigand, *Die Naturrechtslehre der Legisten und Dekretisten von Irnerius bis Accursius und von Gratian bis Johannes Teutonicus* (Münchner Theologische Studien III. Kanonistische Abteilung 26; Munich 1967) 392; the *Summa Duacensis* (c. 1200) to D.1 c.7, cited in Weigand, *Naturrechtslehre der Legisten* 300. The *Summa Elegantius* (1169) used the term '*demonstrationes'*, *Summa 'Elegantius in iure diuino' seu Coloniensis*, ed. Gérard Fransen and Stephan Kuttner (MIC, Series A: Corpus Glossatorum 1; Vatican City 1969) 11; as did the *Summa 'Tractaturus magister'* (1182-1185) in Weigand *Naturrechtslehre der Legisten* 187; and also the gloss *Ecce vicit leo* (1202-1210), cited in Weigand, *Naturrechtslehre der Legisten* 323.

[63] Tierney, *Liberty and Law* 25, citing Huguccio, *Preface*, p. 9. Cf. Tierney, *Idea of Natural Rights* 72.

ownership was also instituted by natural law since it was grounded in a permission of the law.

It is said that by civil law something is mine and something is yours, but by natural law too something is mine and something yours; this is by permission not by precept for natural law never commanded that everything be common or everything private but it permitted that either everything be common or that something be private, and so by natural law something is private.[64] Consistent with this line of thought, Huguccio argued that common possession of all things did not exclude individual ownership; it meant rather that private possessions had to be shared with the poor in time of need.[65]

Alanus Anglicus, writing in the first years of the thirteenth century, also gave a new description of demonstrations. He wrote that they consisted of counsels, permissions exhortations, and dissuasions. But, in his primary understanding of *Ius naturale*, he distinguished three senses: the natural law of scripture, natural equity, and the natural instinct of sensuality. In the last two of these senses—equity and sensuality—the law consisted entirely of demonstrations.[66] Alanus also discussed the old problem of common property and private ownership in a new way: while having something of one's own was in accord with positive law and having something in common was in accord with natural law, he reversed the usual argument (that common property was a permission of natural law) and stated that private property was only a permission of positive law.[67]

Tierney then turns from 'demonstratio' to the concept of *Fas* as a concept meaning permissive natural law. Gratian's *Decretum* borrows a quote from Isidore of Seville in its 'treatise on laws': 'All laws are either divine or human . . . *Fas* is divine

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[64] Ibid. 26, citing Huguccio, *Summa Decretorum* to D.1 c.7, p. 35; to D.1 c.7, p. 36. *Cf.* Tierney, *Idea of Natural Rights* 72-73.

[65] Tierney, *Liberty and Law* 26, citing Huguccio, *Preface*, p. 12. *Cf.* Tierney, *Idea of Natural Rights* 72-73.

[66] Ibid. citing Alanus, to D.1 d.a.c.1, cited in Weigand, *Naturrechtslehre der Legisten* 227.

[67] Ibid. citing Alanus, cited in Weigand, *Naturrechtslehre der Legisten* 318. *Cf.* Tierney, *Idea of Natural Rights* 72.

law, "ius" is human law. To pass through another's field is *Fas*, it is not "ius".'[68] In this passage, canonists understood the term *Fas* to mean 'a permission of divine or natural law',[69] while 'ius' was understood to mean a 'legal right', as in a legal right of way to cross the field.[70] But the two terms were understood in terms of the need to balance the right of the owner based on human positive law with the right of passage of others based on divine natural law, as Huguccio summarized: if the owner prohibited entry it was not permitted by either divine or human law; if the owner allowed entry it was permitted by both divine and human law; and if the owner neither permitted nor prohibited entry, it was permitted by divine law but not by human law.[71] And since natural law merely permitted that property be held in common without actually commanding this, and so the owner's prohibition on entry was not in conflict with any natural law precept, the human law instituting private property did not violate any precept of natural law.[72] Huguccio supported this argument too, but supplemented it by noting scriptural texts in support of the natural law right to enter another's property, such as the permission to eat another's grapes 'in times of necessity'.[73] As to the consequences of the owner not allowing a person in need to enter their land to eat, Huguccio noted that the owner did not sin but performed a 'lesser good'.[74]

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[68] Ibid. 29, citing Gratian, D.1 c.1.

[69] Ibid. 30, citing Sicardus of Cremona (c.1180) to D.1, cited in Weigand, *Naturrechtslehre der Legisten* 184, and the *Summa Et est sciendum* (1181-1185), cited in Weigand, *Naturrechtslehre der Legisten* 193.

[70] Ibid. 29, citing Stephan of Tournai to D.1 c.1, cited in Weigand, *Naturrechtslehre der Legisten* 228.

[71] Tierney, *Liberty and Law* 29, citing Huguccio, in Maximiliane Kriechbaum, '*Actio, fas*, und *ius* in der Kommentierungen der Dekretistik zu D.1 c.1', *Die Bedeutung der Wörter, Festschrift für Sten Gagnér zum 70. Geburtstag*, edd. M. Stolleis et al. (Munich 1991) 155-175, here 160-161. *Cf.* Tierney, *Idea of Natural Rights* 72-73.

[72] Ibid. 31, explaining and citing the *Summa Elegantius*, ed. Fransen-Kuttner, 12

[73] Ibid. 32, citing Huguccio, *Summa Decretorum* to D.1 c.1, p. 21.

[74] Ibid. citing Huguccio, *Summa Decretorum* to D.1 c.1, p. 23.

The next concept of permissive natural law that Tierney considers is 'libertas'. This concept existed within Isidore of Seville's text in the *Decretum*, regarding natural law as comprising 'the one liberty of all'.[75] Christian authors necessarily regarded servitude as an unfortunate but permanent consequence of human depravity. The institution of slavery was a condition in which many people lived in the medieval period, as serfs; it was approved of in the Old and New Testaments, and also in Roman law and in the teachings of the Church Fathers. The canonists took for granted the Stoic doctrine, transmitted by Cicero and the Roman law and some of the Church Fathers, that all humans were by nature free, in accordance with natural law, but that slavery was an instance of human positive law, and contrary to this provision of natural law. The explanation for this contradiction was that liberty was only a demonstration of natural law, a view offered by Rufinus, which Huguccio repeated and summarized: 'It seems that all should be free. Nevertheless this was derogated from by contrary enactment; for human law derogates from divine law in its demonstrations but not in its precepts and prohibitions'.[76] The canonists provided an account of the origins of the institution of slavery on two bases, one consistent with biblical texts that attributed the state of servitude to the curse of Noah on Chanaan for exposing his nakedness (Genesis 9:25), the other as deriving from Roman law (i.e. on the law dealing with prisoners of war).[77]

Huguccio attempted to deal with the inherent contradiction that remained: the 'demonstratio' of natural law that recommended liberty and the *precept* of natural law that commanded slavery. He referred to the different meanings of *Ius naturale*: in its meaning as 'an order and instinct of nature, or reason . . . there is the same liberty for all' but according to the

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[75] Ibid., citing Gratian, *Decretum* D.1 c.7; cf. *supra* Rufinus, *Summa Decretorum*, ed. Heinrich Singer (Paderborn 1902; reprinted Aalen 1963) to D.1 d.a.c.1, p. 7.

[76] Tierney, *Liberty and Law* 35, citing Huguccio, *Summa Decretorum* to D.1 c.7, p. 37.

[77] Ibid. citing Huguccio, *Summa Decretorum* to D.35 c.8, to D.1 c.9, p. 50.

'divine law that is divine precept, servitude was introduced on account of sin, for servitude is a penalty'.[78] But this was more a restatement of the contradiction than an explanation for it. Bernard of Compostella's solution, a few years later, provided that the precept of natural law (slavery) prevailed over the demonstration of natural law (liberty for all), since 'one thing [i.e. liberty for all] cannot belong to the precepts of natural law and is contrary to a demonstration of natural law [since] . . . it [liberty] would counsel and prohibit the same thing', an implausibility.[79] His final solution was that two contrary notions could co-exist but only if both were within permissions of the law of nature: '[I]n demonstrations each of the contraries may exist, because of the two contraries either is permitted and therefore either may be counseled'.[80] But presumably, liberty and slavery were not both permissions within natural law and so could not co-exist.

Tierney next deals with 'perplexitas' ('ensnarement'), the idea that a person might be entrapped in a situation where he could not help sinning however he acted. Was it permissible to choose one evil to avoid another?[81] This allowed for Huguccio to develop his three-fold classification of permission as either free, absolute, or relative.[82] This typology was ultimately incorporated into the *Ordinary Gloss* of Johannes Teutonicus.

The final concept of 'licitum' within permissive natural law arose from the words of St. Paul at 1 Corinthians 10:22: 'All things are *permitted* to me but not all are expedient'.[83] Given the importance of semantics in this discussion, Tierney may have been better advised to translate 'licitum' as 'licit' rather than as

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[78] Ibid. 36, citing Huguccio, *Summa Decretorum* to D.1 c.9, p. 35; Johannes Teutonicus, *Glossa ordinaria to* D.1 c.9.
[79] Ibid. 37, citing Bernard of Compostella, to D.38 c.8, cited in Weigand, *Naturrechtslehre der Legisten* 275.
[80] Tierney, *Liberty and Law* 37, citing Bernard of Compostella to D.38 c.8, cited in Weigand, *Naturrechtslehre der Legisten* 275.
[81] Ibid. 37-43.
[82] Ibid. 43, citing Huguccio, *Summa Decretorum* to D.13 c.2, p. 226.
[83] Ibid. 44 (my emphasis).

'permitted'.[84] Here St. Paul was discussing the dietary customs in Judaic law, saying that converts to Christianity were not bound by them but must not scandalize their more scrupulous brethren who considered themselves so bound. The canonists interpreted the biblical text more broadly in their commentaries defining the concept of *Ius naturale*. For the *Distinctio Lex naturalis* of the late twelfth century '*Ius naturale* [meant] . . . Licit and approved not commanded or prohibited by the Lord or by any law . . . as for instance, to claim something or not to claim it, to eat or not to eat'. Whence upon the words of the Apostle, 'All things are permitted to me', [to which] Ambrose wrote, "By the law of nature".'[85] Likewise, the *Summa Lipsiensis* used similar words in a second definition of *ius naturale*.[86] Another contemporary work repeated the body of the argument, adding another permissive text from St. Paul regarding the 'putting away' of an 'unbelieving wife'.[87] The *Summa Lipsiensis* repeated the notion of *Ius naturale* as something 'licitum' and approved, as per St Ambrose's glossing of the biblical text from 1 Corinthians 10:22 'All things are permitted to me by the law of nature' (Omnia mihi licent lege naturae).[88] Another text, the *Summa 'Permissio quedam'*, emphasised that this licitness was 'permitted by the power of free will and by natural law' (potestate liberi arbitrii et lege naturali).[89] In these commentaries, natural law itself authorized a 'realm of human free choice'.[90]

Tierney concludes Part I by observing that the thirteenth century saw 'juridical reflections on the idea of permissive natural law' fall into the background, with canonists now turning their attention to interpreting the mass of new legislation put forward by popes and councils.[91] Theologians now gave more prominence to natural law in their writings, which Tierney

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[84] Pappin, 'Review of Brian Tierney' 132.
[85] Ibid. citing Weigand, *Naturrechtslehre der Legisten* 209.
[86] Ibid. citing Weigand, *Naturrechtslehre der Legisten* 197.
[87] Ibid. 44, citing Weigand, *Naturrechtslehre der Legisten* 197.
[88] Ibid. 45, citing Weigand, *Naturrechtslehre der Legisten* 203.
[89] Ibid. 45, citing Weigand, *Naturrechtslehre der Legisten* 205.
[90] Ibid. 45.
[91] Ibid. 49-50.

explores in chapters 3 and 4 in the works of William of Auxerre, in his *Summa aurea* (c. 1220s); the *Summa Halensis*; Hugh of St Cher; and then Thomas Aquinas.[92] These theologians—with the exception of Aquinas—Tierney concludes, assimilated canonistic materials into their theological discourses and generally accepted the notion of permissive natural law 'as essentially unproblematic'.[93] Aquinas, however, did not include a law of permission in his treatment of natural law.[94]

An Assessment

How are we to assess *Liberty and Law*'s articulation of permissive natural law as a pre-modern cognate to modern notions of liberty as a feature of natural rights? This essay can only provide the briefest of comments, as its purpose has been primarily to explicate the thesis of *Liberty and Law* as part of Tierney's broader project. Tierney is far more cautious in his claims in *Liberty and Law* than in *The Idea of Natural Rights*. Tierney explains that, over a long span of time, there was 'nothing like a continuous process of organic growth' but rather many thinkers 'wove the idea of permissive natural law into their systems of thought' in a discontinuous narrative.[95] This, no doubt, is by way of pre-emptive response to one strand of criticism of his previous work, which pointed to an apparent teleology in Tierney's arguments for connections between pre-modern natural law and modern natural rights.[96] That criticism

[92] Ibid. ch. 3 and ch. 4.
[93] Ibid. 68.
[94] Tierney, *Liberty and Law* 91.
[95] Ibid. x.
[96] Ernest L. Fortin, 'On the Presumed Medieval Origins of Individual Rights', *Classical Christianity and the Political Order: Reflections on the Theologico-Political Problem*, ed. Ernest L. Fortin (Lanham 1996) 243-264, 257; reprinted in *Final Causality in Nature and Human Affairs*, ed. Richard F Hassing (Washington D.C. 1997) 86-106. John Millbank, 'Against Human Rights: Liberty in the Western Tradition', *Oxford Journal of Law & Religion* 1 (2012) 203-234, 220 dubs Tierney's thesis as 'a common Christian-American doublethink' in its identification of human rights 'as understood by the United States of America today…with Catholic natural law theory'. Cary

will persist, despite features of Tierney's scholarship that characterize *Liberty and Law* as much as his previous works: a close yet contextualized analysis of the sources, an attention to semantic and linguistic detail with a simultaneous eye on the broader relevant intellectual discourses, and an engaging and compelling rhetoric. Very few scholars have successfully contested Tierney's reading of his sources, and this will more than likely remain the case.

A second strand of criticism of *The Idea of Natural Rights* alleges that Tierney mis-identified medieval understandings of 'ius' and *Ius naturale* with modern understandings of subjective rights or individual rights. For Fortin, the medievals subordinated rights to duties—a feature that meant they were not truly subjective—whereas modern individual rights took precedence over duties.[97] Tierney would brook no issue with this observation that medieval world notions were far less individualistic and atomistic than modern ones. Another argument suggests that the twelfth-century canonists' notions were of 'right-order' or objective rights, since they were 'relational' in the sense that they required corresponding duties by those against whom claims were made.[98] Nederman has long claimed that the natural rights

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J. Nederman has labelled Tierney a 'neo-Figgisite' for arguing for the continuity between medieval and modern notions of constitutional government and popular sovereignty: Cary J. Nederman, 'Review of Brian Tierney', *The Idea of Natural Rights* and *Rights, Law and Infallibility*', AJLH 42 (1998) 217-219, 218; Cary J. Nederman, *Lineages of European Political Thought: Explorations along the Medieval/Modern Divide from John of Salisbury to Hegel* (Washington D.C. 2009) 29-48.

[97] Fortin, 'On the Presumed Medieval Origins of Individual Rights' 247-248, 257.

[98] Millbank, 'Against Human Rights' 214, 221, addressing Charles Reid, Jr.'s claims that Tierney's subjective rights satisfied the Hohfeldian correlativity axiom of requiring duties: Charles J. Reid, Jr., 'The Canonistic Contribution to the Western Rights Tradition: An Historical Inquiry', *Boston College Law Review* 33 (1991-1992) 37-92; idem, *Power over the Body, Equality in the Family: Rights and Domestic Relations in Medieval Canon Law* (Grand Rapids 2004). Millbank insisted that Ockham's interpretations were truly subjective as they required no such relation: Millbank, 'Against Human Rights' 205, 216.

in Tierney's thesis are different from modern natural rights in that they are not concerned with rights 'insofar as these have direct political consequences for the powers enjoyed by government over individuals'.[99] Others have noted the liberal and 'revolutionary paradigm' of rights that Tierney applies, observing its relevance only in American and French historical contexts but not English and Commonwealth milieux, which are more correctly modelled on a paradigm of 'constitutionalism'.[100] Yet, as with Tierney's previous research, scholars will appreciate *Law and Liberty*'s role in bringing to light the innovative use of language by canonists of the twelfth and thirteenth centuries in their discussions of 'ius' and *Ius naturale*. Tierney concedes that *Liberty and Law* is 'more descriptive than analytical', its prime aim being to 'call attention to a persistent but neglected theme that. . . formed a significant part of the whole tradition of natural law thinking'.[101] Whether this side-step to permissive natural law will gain more traction in natural rights scholarship remains to be seen. The current trend of de-stabilising understandings of 'human rights' and natural rights concepts means that Tierney's work, with its ability to bridge the disciplines of history, philosophy, law, and political science, will be required reading for a continuously expanding audience.[102]

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[99] Nederman, 'Review of Brian Tierney' 218; idem, *Lineages of European Political Thought* 45; idem, 'Rights', *The Oxford Handbook of Medieval Philosophy*, ed. John Marenbon (Oxford 2012) 643-660, esp. 651

[100] Millbank, 'Against Human Rights' 214, 221; Geoffrey Samuel, 'Epistemology, Propaganda and Roman Law: Some Reflections on the History of the Subjective Right', JLH 10 (1989) 161-179, Geoffrey Samuel, *Epistemology and Method in Law* (Aldershot 2003).

[101] Tierney, *Liberty and Law* xi.

[102] See for instance Samuel Moyn, *The Last Utopia: Human Rights in History* (Cambridge, MA 2010), who locates the origins for human rights in 1970s Carter-era America, and Stefan-Ludwig Hoffman, 'Human Rights and History', *Past and Present* 232 (2016) 279-310, who responds by locating the origins to an even later date in the 1990s, when the West intervened in the Balkan conflict.

Bruce C. Brasington. *Order in the Court: Medieval Procedural Treatises in Translation*. Medieval law and Its Practice, 21. Leiden: Brill 2016. Pp. xxviii, 329. $181.00. ISBN: 978-9-0042-1434-7 (hardback), 978-9-0043-1532-7 (E-book).

Charles Donahue, Jr.

The traditional understanding of western European legal history was that a watershed moment happened in the late eleventh or early twelfth century when the *Digest* was somehow rediscovered at Bologna by a man named Irnerius. From Bologna the new legal method that the Bolognese professors developed spread all over western Europe, leading directly to the codifications of the nineteenth century.[1] The development of Romano-canonical procedure over the course of the twelfth century, a development that seems to have begun with a letter by Bulgarus, one of the 'four doctors' who are thought to have succeeded Irnerius as teachers of Roman law at Bologna, provided considerable support for the story. This development is strongly supported by contemporary evidence, a number of 'ordines iudiciarii', treatises that describe the entire course of a lawsuit, and a number that deal with some aspect of the procedure, such as testimony by witnesses.[2]

Although there were always those who had their doubts about the traditional understanding, it is, I think, fair to say that the last twenty years have seen work that makes the traditional story no longer tenable as it was originally formulated. In particular, Anders Winroth's path-breaking work on the making

[1] For a version of this story in which I no longer have confidence, see Charles Donahue, Jr. 'Law, Civil - *Corpus Juris*, Revival and Spread', DMA 7.418-425.

[2] See, most recently, *The History of Courts and Procedure in Medieval Canon Law*, edd. Wilfried Hartmann and Kenneth Pennington (History of Medieval Canon Law 5; Washington D.C. 2016), a work that, probably unfortunately, was not available to Brasington when he wrote, just as Brasington's work, certainly unfortunately, was not available to those of us who wrote in *The History of Courts and Procedure*.

of Gratian's *Concordance of Discordant Canons* raised doubts as to the very existence of Irnerius as a teacher of Roman law at Bologna.[3] A number of studies by the late André Gouron showed how little-known law-teachers, principally in the south of what is now France, may have been as important as the Bolognese professors.[4] Historians of canon law have known for a long time that there was an important 'school' of canonists in the Anglo-Norman realms in the twelfth century. Paris was also a center of canonical studies; Cologne has recently emerged as another important center of such studies.[5]

Not everyone agrees with these challenges to the traditional story. There are those who continue to argue that Irnerius did indeed teach law at Bologna in the first decades of the twelfth century.[6] I do not know of anyone who denies that the teachers in southern France whom Gouron discovered existed, but their importance remains an open question. That there were 'schools' of Anglo-Norman, Parisian, and Rhenish canonists is undeniable, but their existence much before mid-century is doubtful. Prior to that, in the late eleventh and early twelfth centuries, there was certainly a circle of scholars associated with Ivo of Chartres who worked principally with sources that we would call 'canonic', but who seem, at least occasionally, to have ventured into Roman law.[7]

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[3] Anders Winroth, *The Making of Gratian's Decretum* (Cambridge Studies in Medieval Life and Thought, Fourth Series; Cambridge 2004).

[4] An extensive list of Gouron's works may be found in Brasington's Bibliography 298-300.

[5] On the 'schools' of canonical studies in general, see HMCL 2; on Cologne in particular, see Peter Landau, *Die Kölner Kanonistik des 12. Jahrhunderts: Ein Höhepunkt der europäischen Rechtswissenschaft* (Kölner rechtsgeschichtliche Vorträge 1; Badenweiler 2008).

[6] Ennio Cortese, 'Irnerio', DBGI 1.1109-1113, reviews the evidence and the literature. Of recent studies arguing that Irnerius did teach law at Bologna in the early decades of the twelfth century, Kenneth Pennington's 'Odofredus and Irnerius', forthcoming in RIDC, a pre-publication copy of which he kindly shared with me, is particularly forceful.

[7] Christof Rolker, *Canon Law and the Letters of Ivo of Chartres* (Cambridge Studies in Medieval Life and Thought, Fourth Series; Cambridge 2010)

Recent work, then, would tend to cast doubt on a number of the elements of the traditional story. The 'revival of legal studies', as it was traditionally understood, may have happened later than was previously thought, the 1120s or 1130s rather than c.1100. Bologna was not the only place where it happened. And, perhaps most important, canonical studies may have played a more important role in this revival than previously thought. That leaves, however, a piece of the traditional story, the making of Romano-canonical procedure, as something to be explored in the light of our new, and by non means complete, understanding of what happened.

Bruce Brasington's *Order in the Court* tackles this topic. It is the first work that I know of that attempts to do so. As a quite path-breaking work, its conclusions will almost certainly have to be modified and refined. It is, however, a very good start, a work that everyone who attempts to describe the development of procedure in the West will have to take into account. It is not going to be easy to do so, however, because answering the question how the development of procedure fits into our new understanding of how law changed in the twelfth century is not the sole purpose of Brasington's work, nor is the topic to which he devotes the most pages.

After the usual front matter, the book begins with a 24-page Introduction that addresses the theme mentioned above. The argument of the Introduction, oversimplified, is that prior to 1100 there was no law of procedure, at least as we understand a law of procedure. Actual cases were decided by arbitration. (The word and its variants are used twelve times, without much of a definition.) The Introduction also anticipates the Conclusion, appropriately without much detail, that all of this changed in the twelfth century.

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reviews the extensive literature. The most recent efforts of the team of modern scholars working on Ivo and his circle may be found at https://ivo-of-chartres.github.io/index.html.

The second chapter is devoted to 'The Ecclesiastical *Ordo iudiciorum* Around 1100'.[8] The chapter features extended quotations in translation from letters of Ivo of Chartres, noting his use of references to both Roman and canon law, but arguing that Ivo still does not have a sense of a legally-required course of procedure.

Chapter 2 argues that the sense that there was a legally-required course of procedure began to emerge a generation or more after Ivo.[9] The chapter is devoted principally to translations of, and commentary on, the account of Abbot Hariulf of Oudenberg's litigation before the pope in 1141, and Bulgarus' well-known letter to Emery (Haimericus), chancellor of the Roman church. That letter outlines an early form of the 'ordo'. The letter, though undated, is normally thought to have been written before 1141, when Emery died. Although both texts make use of law, in the sense that they deal with legal proceedings and what happened, or ought to happen, in such proceedings, the contrast between them is quite dramatic. There is no sense in Hariulf's account that what happened followed a prescribed order, certainly no sense that such an order was legally required. Bulgarus' account has a definite sense that there is a prescribed order for legal proceedings, and that that order, and quite a few subrules about each piece of that order, is required by the texts of Roman law.

We have reached page 112 of Brasington's book, and we have 175 pages to go before we reach the back matter. So far the argument has proceeded quite tightly. One could argue with the absence of extended discussion of sources that antedate Bulgarus or are contemporary with him but probably not by him,[10] but one could hardly argue with the focus on Ivo and Bulgarus. They certainly can be used, and are well used, to make Brasington's

[8] Chapter 1 in the numbering, 28 pp.

[9] 'The Early Romano-Canonical Process: The Worlds of Hariulf and Bulgarus' 61 pp.

[10] These sources are referenced in the notes. Brasington clearly knows that they exist.

basic point. At this point, however, the nature of the book changes. Rather than continuing to pursue the development of the 'ordo' generally, Brasington gives us a detailed account and translation of three (out of many) post-Gratian and pre–1190 'ordines': Pseudo-Ulpianus, *De edendo*,[11] William of Longchamp's *Practica legum et decretorum*,[12] and the so-called *Ordo Bambergensis*.[13] That leaves him only ten pages for a Conclusion, and ten pages is probably not enough.

There is a line of argument that runs through Brasington's discussion of these three 'ordines': We start with the *De edendo*, which is quite early (sometimes dated c.1150, although Brasington argues for a date in the first two decades of the reign of Henry II [1154 X 1174]), and which is based, with one exception, entirely on sources from Roman law.[14] We proceed to the *Practica legum et decretorum*, which almost certainly is to be dated between 1182 and 1189, and which cites relatively few sources, but which, particularly in its recently-discovered addition, clearly has reference to papal rescripts as a possible element in the legal process.[15] From there we go to the *Ordo Bambergensis*, which is probably contemporary with the *Practica* and which, at least in some of the manuscripts, references a full panoply of sources from both Roman and canon law, and in the latter case, both Gratian and the *ius novum*. By the time we reach the *Ordo Bambergensis*, the implication seems to be, 'it' has happened.

The problem is that it is not quite clear exactly what 'it' is. The Conclusion does not really spell out the argument. It moves to a somewhat different plane. It makes the argument that the

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[11] Chapter 3 112-172.
[12] Chapter 4 172-197.
[13] Chapter 5 197-276.
[14] For the exception see p. 126 and n. 80-82. The reference is to Gratian's *Decreta* by name, and almost certainly to C.2 q.6 c.28, which is, in turn, an extensive quotation of Nov. 23.
[15] For the recently-discovered addition, see Gérard Fransen and Pierre Legendre, 'Rectifications et additions au texte imprimé de la "Practica legum et decretorum",' RHD 44 (1966) 115-118.

development of the 'ordo' was the work of the twelfth century, an argument for which we are prepared. It also makes the argument that the 'ordo' itself became almost irrelevant in the time of Innocent III because of the rise of inquisitorial procedure. That is an argument for which we are not prepared. That argument would have been quite surprising to Tancred, who wrote at the end of Innocent's pontificate.[16] It would have been even more surprising to the hundreds, perhaps thousands, of lawyers who paid to have Tancred's 'ordo' copied for them in the thirteenth and later centuries. It would have been most surprising to Durantis, who toward the end of the thirteenth century wrote a veritable encyclopedia based on the 'ordo', the outlines of which can be seen quite clearly in the *Ordo Bambergensis* and even more in Tancred.[17] Those who have studied the ecclesiastical court records of the thirteenth, fourteenth, and fifteenth centuries will only be puzzled by this remark. Inquisitorial procedure can be found in these records, but many of them reflect quite clearly the use of the 'ordo' as it developed from the *Ordo Bambergensis* to Durantis.[18] Those who are interested in the codes of civil procedure in Continental Europe today will be equally puzzled because much that is in them bears a distinct family resemblance to what we find in the *Ordo Bambergensis* and even more in Tancred.

Most of the Conclusion, however, is not devoted to the argument about the effect of the rise of inquisitorial procedure. It is, rather, devoted to an exploration of the question whether we should regret the movement from a more arbitral to the more rule-based procedure that has been outlined in what has come before. We are somewhat unprepared for this element in the Conclusion because little that has preceded it is evaluative in

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[16] Tancredus bononiensis, 'Ordo iudiciarius', *Pillii, Tancredi, Gratiae Libri De iudiciorum ordine*, ed. F. Bergmann (Göttingen 1842) 89-316.

[17] Guilelmus Durantis, *Speculum iudiciale*. No modern ed., but a number of early modern printings, e.g., 4 vol., Nürnberg, 1486.

[18] To cite as an example, among a number of studies and editions of these records: Charles Donahue, Jr. *Law, Marriage, and Society in the Later Middle Ages*: *Arguments About Marriage in Five Courts* (Cambridge 2007).

quite the way that this discussion is. The discussion is somewhat inconclusive, though we can appreciate that Brasington has raised the issue. We may, however, doubt that that is what happened. The proceduralists may have been trying to eliminate the element of judicial discretion that seems to have characterized some of the proceedings of the eleventh and early twelfth centuries. There is certainly some evidence that they were trying to do so. In my view, however, it is not at all clear that they succeeded.[19]

The argument about discretion is connected with a more subtle argument. Put bluntly and not quite in the terms that Brasington puts it, the importation of much Roman law into the creation of a procedure for the church made canon law less religious than it had been before. This argument can be connected to a broader argument: the disciplinary separation of canon law from theology that occurred over the course of the twelfth century impoverished both disciplines. If one does not want to be normative—as at times Brasington seems reluctant to be—one can state the argument positively: Canon law became a separate discipline from theology over the course of the twelfth century and in the process left behind consideration of those sources, such as the Bible and the 'sententiae', that could shape and qualify the rules of law.

I have some sympathy with this argument. Indeed, I have made a somewhat similar argument myself.[20] It is a tricky argument to make because neither the Bible nor theology more generally disappeared from canonical writing in the thirteenth and later centuries. Indeed, Brasington closes his book with an extract from the sermon that the *civilian* Placentinus seems to have preached at the beginning of the academic year in Bologna, probably in 1186. Academic specialization came in the twelfth

[19] See, most recently, Charles Donahue, Jr. 'Procedure in the Courts of the Ius commune', in HMCL 74-124.

[20] Charles Donahue Jr., 'Malchus's Ear: Reflections on Classical Canon Law as a Religious Legal System', *Lex et Romanitas: Essays for Alan Watson*, ed. Michael Hoeflich (Berkeley 2000) 91-120.

century, but that does not mean that those who wrote specialized literature were solely concerned with the ideas expressed in that literature. And those who wrote the specialized literature were not the only people deeply involved in the new process. Prelates, many of whom were not legal specialists, served as papal judges delegate in this period and continued to so serve in the first half of the thirteenth century. One hopes that Brasington will continue to pursue this theme as he moves from the period in which he has established a well-deserved name for himself, the eleventh and early twelfth centuries, into what for him is relatively new territory, the 'big bang' and its effects.

Let us return to the theme with which we began, even though we were not completely sure that this was the theme that Brasington intended to address: What does his study tell us that can inform our new understanding of what happened with regard to the development of legal studies in the twelfth century? Winroth may or may not be right that study of Roman law did not precede the study of canon law at Bologna, but there can be little doubt that Roman law was the original source of 'ordines'. The vulgate edition of Gratian had already added extensive citation to and quotations from Roman legal sources, notably in Causae 2-4. We can argue whether Bulgarus' letter to Emery was the first 'ordo'. (There are arguments both that it was anticipated by more obscure works probably dating from the eleventh and earlier twelfth centuries and that it was not really an 'ordo'.) We cannot argue—because it is undeniably a fact—that it is based entirely on Roman-law sources. We can argue whether the *De edendo* was the next 'ordo' after Bulgarus'. Its date is uncertain and there are competitors for the moniker 'next', works that seem to be early but that have equally wide bracketing dates.[21] We

[21] The following works on procedure all seem to be roughly contemporary with *De edendo*: 'Omnium prescriptionum iura' (Rogerius), 'Prescriptiones in iure', 'Superest videre', 'Pro utraque parte', 'Nunc primo', 'Cum essem Mantue' (Placentinus), '. . .Tam veteris quam novi testamenti' (*Rhetorica ecclesiastica*), '…etiam testimonia removentur', 'Quoniam de restitutionibus' (also Placentinus). For these works, their possible dates, and references to

cannot strongly argue, however, because it seems to be a fact, that the *De edendo* is also based, with one exception, entirely on Roman-law sources. That the literature of the 'ordo' began with Roman law and then proceeded, somewhat later, to incorporate canonical sources seems likely. It cannot quite be proven on the basis of Brasington's work, however, because he moves from a close to comprehensive review of the sources up to 1141 to a highly selective review of the sources after 1141. Even if he had attempted a comprehensive review of the 'ordines' that probably date from before 1190, there would still be difficulty in assessing the respective roles of Roman and canon law granted the fact the vulgate edition of the principal source for the canonists, Gratian, is, on this topic, suffused with Roman law.

So far as the contribution of Bologna, as opposed to other places, in the revival of legal studies is concerned, Brasington's work does not help much. After Bulgarus, Brasington's text focuses on three Anglo-Norman sources. The Bolognese sources can be found in the notes, but they are not discussed generally. Brasington has certainly shown that procedural writing was alive and well in the Anglo-Norman realm in the second half of the twelfth century. That finding is not new, but his focus on the details of these three works has considerably expanded our knowledge of just what they were doing. Particularly useful is his identification of the sources cited in all three works and his identification of probable sources of statements in the works where the work itself does not cite a source.

I have considerable sympathy for what seems to be overall thesis of the book: There was probably a movement from a more arbitral style of judging to judging more according to rule, particularly procedural rules, over the course of the twelfth century. It cannot, however, be regarded as quite proven by the examples that Brasington has chosen. As he himself points out, accounts of actual litigation prior to 1100 are relatively rare, and those that exist are almost all contained in narrative accounts,

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further literature, see Wiesław Litewski, *Der römisch-kanonische Zivilprozess nach den alteren ordines iudicarii* (2 vols; Kraków 1999) 1.22-24.

where we would not expect to find careful delineation of just what procedural steps were followed. Normative sources describing what procedures ought to be followed are even rarer, and their relative absence is probably telling us something. They are not, however, totally absent. The Anglo-Saxon compilation known as *Swerian* seems to be telling us something about, among other things, court procedure, as are the quite extensive normative texts about the ordeal from the same period.[22] On the basis of texts dating from the thirteenth century, the late Professor S.F.C. Milsom reconstructed what he called the 'ancient pattern of law-suit', a quite fixed procedure in secular lawsuits, and a procedure that showed no influence at all of the 'ordines'.[23] To describe a move from one type of procedure to another by contrasting Hariulf's account of his litigation in the papal court with Bulgarus' letter to Emery is too facile. One must take into account the different genre of the two works. Ivo of Chartres may well have anticipated by at least a generation the method that Gratian was to use in the *Concordance*,[24] but Ivo did not leave us any writing that shows him executing the method. What he left was letters, a number of which contain, admittedly fascinating, narrative accounts of actual litigation.[25]

That brings me to the translations, which comprise more than half of the book. There are those who think that medieval juristic sources should not be translated. What the jurists wrote, they wrote in Latin. It is hard enough to figure out what they might have meant dealing with what they said; one should not put an extra layer on top of it, a layer that can only introduce

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[22] *Die Gesetze der Angelsachsen*, ed. Felix Liebermann (3 vols; Halle 1903-1916) 1.396-398 (Swerian), 1.401-429 ('Iudicium Dei') (online: http://www.earlyenglishlaws.ac.uk/laws/texts/).

[23] S.F.C. Milsom, *Historical Foundations of the Common Law* (London 1969) 27-28.

[24] The development of this method may be studied by those who have no Latin in *Prefaces to Canon Law Books in Latin Christianity: Selected Translations, 500-1245*, edd. and trans. Robert Somerville and Bruce Brasington (New Haven 1998).

[25] See most recently Rolker, *Canon Law and the Letters of Ivo of Chartres*.

further ambiguities or resolve, without saying so, very real ambiguities. Medieval juristic sources are particularly difficult to translate because many of them (for example, almost all of those that deal with Roman law) are commentaries on, or are derived from, texts that were written in the ancient world. Centuries of scholarship on those texts have, in many cases, arrived at a consensus about what those texts originally meant. There is, however, no guarantee that the medieval jurist thought that that is what they meant. Finally, and perhaps most important, both the texts from the ancient world and those from the Middle Ages employ an extensive technical legal vocabulary. English has a technical legal vocabulary, derived principally from English law. The temptation to translate a Latin technical legal term into the roughly equivalent technical legal term in English is hard to resist. It is, however, a temptation that, at least in my view, must be resisted.

Despite all of these difficulties, I believe that the texts of the medieval jurists must be translated. If they are not, the study of medieval law risks becoming a field like Egyptology, a field in which a very few universities will have, at most, one professor. Every law student and every student of the Middle Ages ought to have the opportunity to get some exposure to medieval law, and if that is the goal, then translations are essential, because very few students today have any acquaintance with Latin at all. Even those who can make sense out of Cicero or the Vulgate Bible will not be able to make sense out of medieval juristic texts without extensive study of their language, study that the ordinary student will not be able to undertake. Moving beyond the student, the same applies to our colleagues both in history and in law, particularly those who focus on more recent historical periods or on today. Even those who can handle the Latin texts quite comfortably, can benefit from translations. Rare is the person—and I do not include myself among the rare—who can find within a long Latin text a topic for which s/he is looking as quickly as s/he can find it in a translation written in his/her native tongue. Rare is the person—and I do not include myself among the rare—who cannot benefit from the thoughts of someone who is

equally or more expert in the text than s/he is about what a difficult text might mean. We all should translate the texts with which we are dealing, even when we are writing for that increasingly rare publication that will accept quotations in the original language.

So we must translate, but, as suggested above, it is hard. Perhaps the first step is to decide who is the principal audience for the translation. If the audience is the scholar who could do the translation him/herself, then the translation should probably be painstakingly literal, something that the specialist could translate back into the original and get 90 to 95% right. Such a translation will not translate technical terms; they will remain in Latin. The problem with such translations is that they will probably be almost as incomprehensible to the non-specialist as is the Latin original. At the other end of the spectrum is a translation that translates thoughts rather words. Such translations put a very large filter between the reader and the original text. If done well, they may translate what the author of the text meant; they will rarely translate what the author said. Such translations can be quite elegant. The problem is that medieval juristic texts are often not elegant.

Brasington acknowledges the difficulty of translation and says something about his approach.[26] I wish he had said more. As it is, I take him at his word that he is translating for the reader who has no Latin, but that he wants to be fairly literal. The best way to come to grips with what he has done is to look at a couple of examples, both to suggest that Brasington has achieved a great deal and to suggest that what he has done falls short, in some places, of what might be ideal.

All we have space for is a few sentences from Bulgarus' paragraph about witnesses in the letter to Emery.[27] This is not the first time that witnesses are mentioned in the book. Proof by witnesses was not an invention of the 'ordines'. Marbode of

[26] Brasington, *Order in the Court* xvii-xix.
[27] Ibid. 95-97.

Rennes mentions witnesses.[28] Ivo does so in one of his letters about a real case.[29] He mentions them again several times in another of his letters about a real case, and this time he suggests that there are rules both about the number and qualification of witnesses.[30] The Maturi case mentions witnesses.[31] The Hariulf account contains a possible reference to a *Digest* text about witnesses without using the word 'witness'.[32] Bulgarus' letter, however, is the first time in the book that anyone states rules about the qualification of witnesses and how to evaluate them.

Virtually every phrase in Bulgarus' paragraph about witnesses is accompanied by a footnote, twenty-six in all.[33] The notes identify the probable sources of the statements in the text. (The original does not seem to have had citations.) The notes also cite extensively to secondary literature that compares the rules stated by Bulgarus with those found in later 'ordines', including, in particular, those found later in the book, and also to literature that explains the context of these rules in Roman law. As we have already noted, such notes are found in all of Brasington's translations from the 'ordines'. They are a considerable contribution to scholarship. How helpful they will be for the ordinary student is another story. The principal works cited here are those of Litewski and Mausen.[34] Neither work is easy to find; the former writes in (actually, was translated into) German, the latter in French. Much more useful for the ordinary student are the references to Bulgarus' probable sources. All the source passages that Brasington cites are from the *Digest*, and English

[28] Ibid. 37.
[29] Ibid. 43.
[30] Ibid. 46-47.
[31] Ibid. 54.
[32] Ibid. 76 and n.100, possibly referencing Dig. 25.5.3.1.
[33] Ibid. 95-97 n.225-250.
[34] Litewski, *Der römisch-kanonische Zivilprozess*; Yves Mausen, *Veritatis adiutor: La procédure du témoignage dans le droit savant et la pratique française (xiie-xive siêcles)* (Milan 2006).

translations of the *Digest* exist.[35] One can imagine setting a paper for a smart undergraduate asking him or her to compare Bulgarus' text with his sources and to try to draw some conclusions about what Bulgarus is doing with his sources.

When we come to the translation, there are some problems. It is not completely clear whether Brasington is translating from Wunderlich's edition of 1843 or Wahrmund's of 1925.[36] Clearly, for the second part of the letter,[37] he is translating from Wahrmund, because Wunderlich's edition does not contain this part. I have compared Wahrmund with Wunderlich for the passages that concern me, and the Latin words are mostly the same in both. I have used Wahrmund's text, which is a bit clearer, without being sure that Brasington was following it.

> The rule concerning witnesses is as follows. (Testium ratio talis est).[38]

The Latin may mean what the English says, but the translation is misleading. As Brasington well knows, because he deals with the concept,[39] there is a perfectly good word in juristic medieval Latin for 'rule', 'regula'. Bulgarus wrote a treatise on the *Digest* title *De regulis iuris* (Dig. 50.17), and that is not what he is saying here. Finding a single English word that captures, on the one hand, what we would call 'rules', but which Bulgarus—it

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[35] *The Digest of Justinian*, trans. and ed. Alan Watson (4 vols; Philadelphia 1985) is to be preferred to the translation found in *The Civil Law*, trans. S. P. Scott (17 vols; Cincinnati 1932), but the latter is available online (http://www.constitution.org/sps/sps.htm) and would do for these purposes.

[36] *Anecdota quae processum civilem spectant*, ed. Agathon Wunderlich (Göttingen 1843) § 7, p.19-20; *Quellen zur Geschichte des römisch-kanonischen Processes im Mittelalter* 4.1, ed. Ludwig Wahrmund (Innsbruck 1925) 5-6.

[37] Brasington, *Order in the Court* 104-111.

[38] Through the kindness of Ken Pennington, I was able to examine this passage in Vat. Lat. 8782, fol. 192ra (*in fine*), which is said to contain the only glossed version of the letter. Next to this sentence it cites Dig. 43.4.3, which is not squarely on point but is presumably cited for what it has to say about the power of the judge to compel evidence to be produced in court. Right under it, it cites 'C. de testibus. Inviti'. There is no *lex* 'Inviti' in Cod. 4.20, and the reference is probably to Dig. 22.5.8, i.e., 'D. de testibus Inviti'. This deals with 'senes valetudinarii', who are discussed a bit later.

[39] Brasington, *Order in the Court* 83-84.

would seem quite deliberately—does not want to call rules here, is not easy, particularly when we are dealing with a word like 'ratio', which has a wide semantic range. If forced to find a single English word, I think I would use 'doctrine'. That would be comprehensible, at least to lawyers. 'Doctrine (ratio)' might be even better.

> The judge can compel us to testify and those living improperly can be coerced without prescription of court. (Ad testimonium compelli possumus per judicem et improbe versantes absque fori praescriptione coerceri [possunt].)

The Latin is elliptical; we have to supply 'possunt', as Brasington does in his translation. The question is whether 'without prescription of court' will make any sense to the English-speaking reader. All that I can say is that it made no sense to me until I looked at Brasington's footnote, which told me that the Latin is 'fori praescriptione'. That is a technical term found only in the *Code*, where it seems to refer to what the later medieval proceduralists will call the 'exceptio declinatoria fori', in this case, a preliminary defense to an action on the ground that the judge has no personal jurisdiction over the defendant.[40] What is interesting about this passage is that Bulgarus seems to want to generalize from quite specific provisions in the *Code* that deal with those who had the privilege of being cited before a particular forum (or were immune from suit) but have now left their office and can be cited before an ordinary judge to answer for their misdeeds in office. Bulgarus may be thinking about the possibility that those clerics in his own time who were 'improbe versantes' lost the 'privilegium fori'.

> Sometimes we are excused in all cases as are the elderly who are ill; at other times, in some cases, as in public crime, we are admitted willingly against a relative. Sometimes we are excused, sometimes, though unwilling, we can be compelled to testify. Sometimes we are excused unwillingly and sometimes, though willing, are rejected, as are freeborn sons against parents and vice-versa. (Aliquando excusamur, sive in omnibus causis, ut senes, valetudinarii sive in aliquibus, veluti in publico

[40] Cod. 3.13.7.1, 3.23.2, 3.24.1, 3.25.1, 3.26.11.

> crimine. Contra[41] cognatum, admittimur volentes[.] Et quandoque excusamur et quandoque cogi possumus inviti. Interdum inviti excusamur et volentes repellimur, ut liberi contra parentes et e converso').

The passage seems confused. Part of the problem lies in the Latin and in the underlying texts that Bulgarus is trying to reconcile. Part of the problem, however, lies in the translation. The first part of the first sentence is clear enough 'senes valetudinarii' are excused in all cases. That is Dig. 22.5.8, but the *Digest* text seems to be confined to sick old men who do not want to come, i.e., they can come if they want to but cannot be compelled to come. In the Latin (the second sentence, the second clause of the first sentence in the translation), Bulgarus goes on to say that in certain types of cases, for example, where we are asked to testify against a relative in a case of a public crime, we may do so if we want to, but, by implication from what preceded, cannot be compelled if we do not want to. That is Dig. 22.5.4, with a long list of relatives against whom we cannot be compelled to testify in cases of public crime. Here, the translation is misleading. It would have been better to spell out what both the sources and Bulgarus clearly imply: 'at other times [only] in some cases, as in public crime [where] we are admitted against a relative [only if] willing'.

The third sentence in the Latin (the second sentence in the English) is a bit confusing, because it seems to repeat what was said previously. We can make sense out of it if we imagine that it has reference to Dig. 5.2.3.6, which itself gives somewhat contradictory rules about when a witness can be compelled to travel a long distance. One rescript reported in the text seems to suggest that such a witness cannot be compelled to testify, while a later rescript says that if it is the custom of the province that a witness may be compelled to travel to another city, then the judge may compel him to do so.

The translation of the fourth sentence in the Latin (the final phrase in the translation) is just wrong. It has nothing to do with

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[41] Vat. Lat. 8782 omits 'contra', almost certainly an error, but its joining of 'veluti' with what follows makes good sense.

freeborn sons (that would be 'ingenui filii') but rather children generally ('liberi,' in the sense of children). That is Dig. 22.5.9, expanded to include all children, and not, as the *Digest* text probably means, just sons.[42]

None of these problematic translations is a disaster. The reader who has no Latin and no access to the underlying sources will get the basic idea. There are quite a few more examples of this type of problem throughout the work. There seem to be more of them in the technical juristic works than there are in the less technical. What we have here is a good start. It might have been better to publish the translations online, where they could be corrected over time, rather than committing them to paper and cold type, where it will be expensive to make changes.

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[42] Vat Lat. 8782 cites Cod. 4.20.6: 'Parentes et liberi invicem adversus se nec volentes ad testimonium admittendi sunt'. What that passage means, and how it might be reconciled with Dig. 22.5.9, is a puzzle, just the kind of puzzle that a good glossator would be pointing out.

Hartmann, Wilfried, and Kenneth Pennington, edd. *The History of Courts and Procedure in Medieval Canon Law*. History of Medieval Canon Law. Washington, D.C.: The Catholic University of America Press, 2016. Pp, xiv, 506. $75.00. ISBN: 978-0-81322-904-1.

Gero Dolezalek

This is a collection of twelve independent essays—and thus not a handbook which would systematically cover the entire field mentioned in the title. This implies that matters discussed by one author may at times also be taken up by another. In this regard, readers are assisted by a general index.[1]

All essays circle around the function of the medieval Western Church as a local arbiter or judge in local litigations. In the time period in question (1140 to 1500) this function of the Church was fulfilled relatively homogeneously in all geographical regions of Western Christianity. The uniformity is owing to the endeavour of the reform popes, from 1049 onward, who had set a broad homogenisation of the Western church in motion.

The editors have wisely abstained from considering litigation which directly took place at the Holy See (thus before papal auditors, etc.). This would have needed much additional space, and it was not urgent, anyway, because sources and literature of direct litigation in the papal curia are sufficiently described elsewhere and commented on.

The contributors have furthermore restricted the topic 'inquisition into heresy' to a few scant mentions[2]—likewise for good reasons. Respective publications are extremely numerous. Already in 1963 a bibliography by Émile van der Vekene had

[1] 'General Index', HMCL 3.497-506.

[2] For instance, Charles Donahue, Jr. 'The Ecclesiastical Courts: Introduction', HMCL 3.266; Charles Donahue, Jr. and Sara McDougall, 'France and Adjoin-ing Areas', HMCL 3.318-319.

gathered more than 3000 of them, and his listing was by far not complete.[3] The flood of publications on this fashionable topic progresses steadily.

Before I look at the book in detail, I would like to place it into its context beforehand. The book's series 'History of Medieval Canon Law' produces research tools. It comprises guides for beginners (or historians of other disciplines), but it also goes beyond this aim, providing surveys of the present state of research in a field. As a consequence, I place this series next to other publications which serve the same purposes, and I canvass in the subsequent two paragraphs the picture which then arises. It will be shown that the publications in question do not actually compete with each other. On the contrary, they work together and complement each other.

Older historians will recall Stephan Kuttner's admonitions, from the 1972 Congress of Medieval Canon Law onwards, that we need new tools to survey the discipline's various fields.[4] Scholars interested in the history of canon law wish to have overviews of medieval literature and its dissemination in manuscripts and editions, together with listings of secondary publications. They furthermore desire biographies of authors, outlines of doctrines, and inventories of documentary evidence from legal practice (and there in particular studies on court structure and procedure). By 1972, all this had become urgent because much time had lapsed since previous tools of the kind had been published, and in the

[3] Émile van der Vekene, *Bibliographie der Inquisition: Ein Versuch* (Hildesheim 1963). More recent surveys can easily be retrieved in an internet search for 'bibliography' coupled with 'inquisition', e.g. http://www.david-zbiral.cz/bgher.htm 'Biography of Ancient, Medieval, and Early Modern Christian Heresy, Inquisition, and Witchcraft'.

[4] See BMCL 3 (1973) ix, xv. The problem was discussed in a special meeting on the last day of the Toronto Congress, and it was decided that as a first step a computerized data collection on manuscripts and another one on recent secondary literature should be brought into being. I discuss this in *Toronto Proceedings 2012* 275-287.

meantime floods of new research results had arisen. Not only did this hamper scholars of legal history, it also made it virtually impossible for historians of other disciplines to gain reliable insight into the current state of canon law research.

The previous state of affairs and consequential admonitions sparked a variety of initiatives. Although the discipline's needs are not yet fully met, much has been achieved in the meantime. We now have comprehensive data collections which survey juridical literary genres and allow us to trace the dissemination of their specimens. This is the case, for instance, in Lotte Kéry's guide to canonical collections before Gratian (= first volume of the series 'History of Medieval Canon Law')[5] and in various data bases.[6] Some important data col-lections of the kind couple genres of juridical literature with biographies of authors and listings of publications on them and their works—thus Ken Pennington's bio-bibliographic guide [7] in concerted effort with national

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[5] Lotte Kéry, *Canonical Collections of the Early Middle Ages (ca. 400-1140): A Bibliographical Guide to the Manuscripts and Literature* (History of Medieval Canon Law; Washington D.C. 1999, reprinted 2014).

[6] 'Manuscripta Juridica' (http://manuscripts.rg.mpg.de).
'Manuscripta Mediaevalia' (http://www.manuscripta-mediaevalia.de).
Austrian Academy of Sciences
(http://www.oeaw.ac.at/imafo/die-abteilungen/schrift-und-buchwesen).
Bibliothèque Nationale de France (http://archivesetmanuscrits.bnf.fr/cdc.html).
'Gallica'
(http://www.bnf.fr/fr/collections_et_services/mss_oc/s.manuscrits-occident_grec_latin.html).
'Medium' (http://medium.irht.cnrs.fr).
'In principio' (http://www.brepols.net/publishers/pdf/brepolis_inpr_en.pdf).
'Nuova Biblioteca Manoscritta' (http://www.nuovabibliotecamanoscritta.it).
'Manus' (http://manus.iccu.sbn.it).

[7] Kenneth Pennington, 'Medieval and Early Modern Jurists: A Bio-Bibliographical Listing', first put online 1993:
(http://legalhistorysources.com/biobibl.htm). Updated and enlarged: http://amesfoundation.law.harvard.edu/BioBibCanonists/HomePage_biobib2.php).

biographies.[8] Outlines of doctrines of canon law and their impact up to date have been published in the five-volume series 'Norm und Struktur'.[9] In addition, the series 'History of Medieval Canon Law' has delivered four volumes with essays on: early papal letters,[10] the history of canon law's 'classical period' 1140-1234[11] Byzantine and Eastern canon law,[12] and lastly courts and procedure found in the present volume. The latter should be used with the handbooks on romano-canonical procedure by Wiesław Litewski[13] and Knut Wolfgang Nörr.[14] Furthermore, an all-embracing 'Cambridge History of Medieval Canon Law' is forthcoming and will serve as a general guide-book.

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[8]Edd. France: Patrick Arabeyre, Jean-Louis Halpérin, and Jacques Krynen, *Dictionnaire historique des juristes français XIIe-XXe siècle* (Paris 2007). Italy: the entries in DGI.

[9] Edd. Mathias Schmoeckel, Orazio Condorelli, Franck Roumy, *Der Einfluss der Kanonistik auf die europäische Rechtskultur* (Norm und Struktur. Studien zum sozialen Wandel in Mittelalter und Früher Neuzeit 37; Wien-Cologne-Weimar 2009-2016). Part 37.1: *Zivil- und Zivilprozessrecht* (2009). Part 37.2: *Öffentliches Recht* (2011). Part 37.3: *Straf- und Strafprozessrecht* (2012). Part 37.4: *Prozessrecht* (2014) (additional editor Yves Mausen). Part 37.5: *Das Recht der Wirtschaft* (2016) (additional editor David von Mayenburg).

[10] Detlev Jasper and Horst Fuhrmann, *Papal Letters in the Early Middle Ages* (History of Medieval Canon Law; Washington D.C. 2001).

[11] Edd. Wilfried Hartmann and Kenneth Pennington, *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; Washington D.C. 2008).

[12] Edd. Wilfried Hartmann and Kenneth Pennington, *The History of Byzantine and Eastern Canon Law to 1500* (History of Medieval Canon Law; Washington D.C. 2012).

[13]Wiesław Litewski, *Der römisch-kanonische Zivilprozeß nach den älteren ordines iudiciarii* (2 vols; Kraków 1999).

[14]Knut W. Nörr, *Romanisch-kanonisches Prozessrecht: Erkenntnisverfahren erster Instanz in civilibus* (Enzyklopädie der Rechts- und Staatswissenschaft: Abteilung Rechtswissenschaft; Berlin-Heidelberg 2012) and idem, *Ein geschichtlicher Abriss des kontinentaleuropäischen Zivilprozesses in ausgewählten Kapiteln* (Tübinger rechtswissenschaftliche Abhandlungen 118; Tübingen 2015).

The volume which I review here contains seven introductory articles on judicial procedure and practice in the medieval church between 1100 and 1500,[15] and thereafter five reports on 'Structure and Practice of the Courts in Several Lands'.[16] I begin with the eye-opening account by Brigide Schwarz on the formation of the papal curia, from 1049 until about 1300,[17] because this article is basic for an understanding how it came that Western Christianity was held together, rather than seeing the various geographical regions drift in different directions. The reform popes (1049 onward) and their entourage worked under continuous extreme difficulties. They strove to bring the Church in line under effective central government, but several times their project almost capsized. In the end they nevertheless succeeded in laying foundations, on which their successors could then build a strong central guidance. This took a long time, however. Judicial organization at the Roman curia set the model for judiciary practice throughout the Western Church. History of canon law, as described in this book, would most probably have gone in fundamentally different directions if the events which Brigide Schwarz relates had not taken place. She also mentions the harsh costs for the Church, however: namely under the conditions of the time, central government could only be exerted with strong reliance on nepotism and similar personal networking. Furthermore the curia, in order to finance itself, had to seek bribes ('gifts', 'subsidium'), and it had to resort to practices which in effect came down to selling ecclesiastical ministries.

It is my opinion that what I call the 'Romanist attitude' towards law (resuscitated by the glossators, and afterwards seen to be the typical characteristic of Western legal culture) would not have spread so quickly and so effectively without a central papal

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[15] Part 1, HMCL 3.3-243.
[16] Part 2, HMCL 3.247-462.
[17] Brigide Schwarz, 'The Roman Curia (until about 1300)', in HMCL 3.160-228.

government which backed it from the middle of the twelfth century onward. With the term 'Romanist attitude', I give a name to the juridical technique of subsuming facts of a case under abstract legal rules which are retrieved from authoritative texts, thus creating a set of norms for the resolution of lawsuits. This is indispensable for effective central government. A distant ruler can only maintain order if he gives his subjects clear guide lines which must be obeyed. This 'Romanist attitude' was a novelty of the twelfth century. It was not previously recognized to be self-evident. For instance, the *Decretum* of Ivo of Chartres is still based on the concept that authoritative texts only serve as recommendations, and that judges who decide lawsuits are not bound to uphold such texts.[18] And Donahue pointed out, in this present book,[19] that none of the many Anglo-Saxon records of lawsuits from before 1100 show that judges applied texts of the Anglo-Saxon law codes.

The book starts with Ken Pennington's 'Introduction to the courts'.[20] He summarises the contents of the book on only two pages,[21] and then immediately turns to substantive topics. He criticizes a number of publications that assert medieval courts did not respect rules of fair procedure and rights of accused persons.[22] Thereafter he explains essentials of criminal procedure: accusatorial and inquisitorial.[23] Finally he accounts in detail how summary procedure came about and how it worked.[24]

Barbara Deimling describes the usual locations where court

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[18] See Christof Rolker, 'Ivo of Chartres and the *Panormia*: The Question of Authorship Revisited', *Esztergom Proceedings 2008* 187-206.
[19] Charles Donahue Jr. 'Procedure in the Courts of the Ius commune', HMCL 3.81.
[20] Kenneth Pennington, 'Introduction to the Courts', HMCL 3.3-29.
[21] Ibid. 3-4.
[22] Ibid. 4-8.
[23] Ibid. 8-24.
[24] Ibid. 24-29.

proceedings took place.[25] Up to the fourteenth century, sessions of lay courts and of ecclesiastical courts would most often take place under the open sky, or under a porch—to protect the proceedings from unsuitable weather—preferably in a church portal, because such location offered the additional advantage that it constantly recalled God's omnipresence and his wrath against perjurers and injustice. The essay refers to many examples from places in Germany and Italy.

James Brundage furnishes an account of the early formation of ranks of learned lawyers.[26] Formal requirements for admission to practice began to be set up by the 1230s.[27] Records of professional associations occur earliest by the second half of the thirteenth century.[28] Persons with substantial training in law could exercise four distinct roles: they could be advocates, legal counsellors, proctors, or notaries.[29] The essay cites examples from Italy, France,[30] England,[31] and then—conspicuously—Scotland which otherwise is left out of this book.[32] The last part of the essay discusses problems of high fees and misbehaviour of lawyers.[33]

In Charles Donahue's essay on 'Procedure in the Courts of the Ius commune'[34] his main question is whether Oliver Wendell Holmes' 'realist predictive theory of law' is evident in medieval

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[25] Barbara Deimling, 'The Courts: From Church Portal to Town Hall', HMCL 3.30-50.
[26] James A. Brundage 'The Practice of Canon Law', HMCL 3.51-73.
[27] Ibid. 54, 63-65.
[28] Ibid. 60.
[29] Ibid. 55-59.
[30] Ibid. 61.
[31] Ibid. 62.
[32] Ibid. 62-63. For the role of canon and Roman law in Scotland, see in particular Gero Dolezalek, *Scotland under Jus Commune* (The Stair Society 55-57; Edinburgh 2010).
[33] Brundage 'The Practice of Canon Law' HMCL 3.66-72.
[34] Charles Donahue Jr., 'Procedure in the Courts of the Ius commune' HMCL3.74-124.

court documentation,[35] and, since this is not obviously the case, he asks whether the theory may nevertheless be useful in explaining those sources. The 'realist' theory puts procedural law in the foreground. Abstract constructs of 'substantive law' are seen to be futile.[36] Legal history shows, however, that already the ancient Romans had a concept of abstract 'substantive law', but this concept vanished in subsequent centuries,[37] until the Romanist attitude was revived in the twelfth century. Donahue chooses proof by witnesses as a sample problem. He outlines the learned doctrines on it, and their development.[38] Thereafter he looks at how the courts handled this in practice: both in times before the learned doctrines spread, and afterwards.[39] This is exemplified with illustrative lawsuits, chosen from court records of the thirteenth and fourteenth centuries.

In 'The Jurisprudence of Procedure', Kenneth Pennington describes the reintroduction of clearly defined juridical procedure in the twelfth century, and its interrelation with the ascent of papal central government of the Church.[40] The essay focuses on criminal procedure, and there in particular on the notion of fair trial and rights of the accused, and finally on torture.[41] The author comes back in greater detail to what he had already explained on pages 3-29 about accusatorial and inquisitorial procedure and about pertinent literature of *Ius commune*.

One matter here is, in my opinion, not explained sufficiently clearly. The author's text on page 132 (compare also page 140) can be misunderstood to say that medieval popes openly ignored an accused person's right to a fair trial. However, in the examples given the juridical question is different—namely: when a superior

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[35] Ibid. 78.
[36] Ibid. 75-78.
[37] Ibid. 78-80.
[38] Ibid. 82-96.
[39] Ibid. 96-124.
[40] Kenneth Pennington, 'The Jurisprudence of Procedure', HMCL 3.125-159.
[41] Ibid. 156-158.

sees that a subject openly rebels against law and order, and the facts of the case are so clear that they require no further taking of evidence, and the facts are even scandalously known to a wide public (= 'notorium', a legal technical term of *Ius commune*), can then the superior take swift measures, lest this should constitute a bad example for others? Or must the superior in all cases wait and first summons the malefactor to court, in all formality? Jurists have debated this question through the entire Middle Ages, and pernicious long wars have been fought over it.[42] A question of terminology arises on page 133. I would prefer to use the word 'accused' instead of 'plaintiff' for the first and third occurrences of the word 'plaintiff'.

The late Charles Duggan reports on papal judges delegate who decided lawsuits outside Rome. Papal instructions to them are preserved in collections of decretals.[43]

The specific section on local ecclesiastical courts begins with an introduction by Charles Donahue.[44] He first accentuates the importance of studies on legal practice. Thereafter he mentions the wide-going general uniformity of church-court activities in all regions of Western Christianity, but then points to 'remarkable divergences' in certain types of cases—which 'may reflect differences in the underlying societies'.[45]

I miss in this book a reference to an authoritative text of 'ius divinum' which underlies this attention or non-attention—namely the command by Jesus in the gospel of Matthew 18:15-17:[46]

> If thy brother shall trespass against thee, go and tell him his fault between

[42] For instance, the war 'Mainzer Stiftsfehde' (1459-1463) was fought because Pope Pius II had removed the allegedly notoriously rebellious archbishop of Mainz from office, without summoning him, and had enthroned a new archbishop. Five substantial legal opinions on this case have been edited and commented on by Adalbert Erler, *Mittelalterliche Rechtsgutachten zur Mainzer Stiftsfehde* (Wiesbaden 1964).

[43] Charles Duggan (†), 'Judges Delegate', HMCL 3.229-243.

[44] Donahue, 'The Ecclesiastical Courts' HMCL3.247-299.

[45] Ibid. 249-250, 297-298.

[46] Taken up by Pope Innocent III in X 2.1.13 'Novit ille'.

> thee and him alone: if he shall hear thee, thou hast gained thy brother. But if he will not hear thee, then take with thee one or two more, that in the mouth of two or three witnesses every word may be established. And if he shall neglect to hear them, tell it unto the church [= to all fellow Christians].

This command gave to Christian society, and to the Church in particular, a general responsibility to make sure that all types of sinful interference with another person's matters could be remedied. In a fully Christianized Europe, the recourse to fellow Christians was of course interpreted to lie in first line in the hands of the Christian state's judicial system, but if the respective region's law, the 'leges', made no suitable remedy available, only then, in a subsidiary function,[47] the Church had to provide one. Each geographical region's system of secular justice had its own defects. Therefore, the points where the church courts had to patch a defect varied according to place. Richard Helmholz rightfully observes this in his report on England.[48]

As Donahue explains in an overarching narrative on the gradual development of local ecclesiastical court organization from Antiquity to 1300,[49] steadily sitting separate courts only developed from the mid thirteenth century onwards.[50] In most regions they were called 'officialatus' = officiality. Thirty years ago an international Working Group on Church Court Records started a systematic search for surviving records, and published reports in 1989 and 1994.[51] Donahue summarizes the group's findings, and presents a typology of respective archival materials which the group has developed,[52] together with remarks on their

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[47] Nörr, *Romanisch-kanonisches Prozessrecht* 65.
[48] Richard H. Helmholz, 'Local Ecclesiastical Courts in England', HMCL 3.379.
[49] Donahue, 'The Ecclesiastical Courts' 250-256.
[50] Ibid. 255-256, 260-266.
[51] Charles Donahue Jr. *The Records of the Medieval Ecclesiastical Courts: Reports of the Working Group on Church Court Records* (Comparative Studies in Continental and Anglo-American Legal History 6-7; Berlin 1989 and 1994).
[52] Donahue, 'The Ecclesiastical Courts' 259-260.

respective survival chances.

I can bear witness that the same archival phenomena which the group observed for church courts also exist for lay courts—as far as I have had occasion to examine. One very important thing was not noticed by the group, however: namely there existed an older system of gathering case papers (libels, exceptions, positions, etc.), and a more modern one. In the modern system, the court not only kept records of what happened in its sessions, but it also archived case papers which the litigating parties had handed in. This enabled the court to survey on its own, at any time, the contents and state of all pending lawsuits. In contrast, in the old system the judge only took short notice of case papers when they were handed in, and then just handed them over to the other litigating party. They were thus not archived in court. Only when the lawsuit became ready for a decision, each party handed to the judge a purse which contained the full dossier of papers. The judge could control the completeness and genuineness by collating both parties' dossiers. They should match. After the litigation had ended, the parties were supposed to come to court in due time to collect back the dossier which they had handed in. If they failed to do so, the court scrapped the dossier. It is fully clear that in the old system the chances of case papers to survive were much dimmer than in the modern one. The old system, for instance, continued to be used in the region Netherlands and Belgium right into the sixteenth century and perhaps even longer. The same is true for Scotland,[53] and—as far as I can conjecture—also for the Holy See's *Sacra Rota Romana*. In contrast, the German Reichskammergericht archived dossiers from its first erection in 1495 onwards.

Donahue's essay continues with a comparative report on

[53] The supreme court of Scotland ('Court of Session') did not archive cause papers, but some dossiers from the sixteenth and seventeenth centuries have escaped scrapping and can be inspected in Edinburgh in the National Records of Scotland, for instance in series CS15/1.

court competences in various regions.[54] There follows a short survey of romano-canonical procedure in 'civil cases', in which mainly *Ius commune* literature is cited, but some references to local archival sources are interspersed.[55] A series of examples illustrates interrelations between individual ecclesiastical statutes and respective taking notice of the statute in church court records.[56]

The volume ends with four regional reports, full of interesting details which cannot all be summarized here. For Spain, however, the late Antonio García y García had to rely almost completely on synodal legislation, formularies and medieval writings on procedure—because, so far, no legal historian had investigated original surviving records from the ecclesiastical courts.[57] Charles Donahue updated García's text and points to recently discovered records in Zaragoza and Barcelona.[58]

The activities of Eastern Central Europe's ecclesiastical courts were investigated by Péter Cardinal Erdő.[59] He was likewise constrained to largely rely on ecclesiastical legislation and formularies, because Romania, Serbia, Croatia, Hungary, and Slovakia had lost almost all their medieval records in times under Turkish government, and only scattered documents are left. In Czech territories,[60] however, and in Poland,[61] there still exist substantial holdings of church court records from the Middle Ages.

Results from investigations in France, Belgium, the

[54] Donahue, 'The Ecclesiastical Courts' 267-276.
[55] Ibid. 277-287.
[56] Ibid. 287-296.
[57] Antonio García y García (†), 'Ecclesiastical Procedure in Medieval Spain', HMCL 3.392-425.
[58] Donahue and McDougall, 'France and the Adjoining Areas', HMCL 3.339; García y García (†), 'Ecclesiastical Procedure in Medieval Spain', 392-393.
[59] Péter Cardinal Erdő, 'Ecclesiastical Procedure in Eastern Central Europe', HMCL 3.426-462.
[60] Ibid. 428.
[61] Ibid. 434-440.

Netherlands and Switzerland are canvassed by Charles Donahue and Sara McDougall.[62] Their account also comprises comparative glimpses on Germany, Italy and England. I found it especially interesting to read that in the kingdom of France ecclesiastical courts remained powerful and effective right into the sixteenth century, despite strong efforts by the French secular authorities to restrict ecclesiastical jurisdiction. The authors mention here an active attitude towards prosecution 'ex officio' of sexual misbehavior and blasphemy, but also towards punishment of acts of violence and defamation. I thus draw from there the conclusion that, obviously, the secular authorities there did not regard this as an unwelcome encroachment into their own competences.

England is enviably rich with regard to surviving records from medieval courts and respective legal-historical studies. Richard Helmholz reports on them.[63] He considers eight different fields of possible church court activities,[64] and he contrasts the English medieval practice in these fields to the theoretical 'normal' state of church jurisdiction, valid in continental Europe. Readers will be astonished to see which vast discrepancies existed, but it appears that in England secular authorities and church authorities had silently and peacefully developed among them a jurisdictional compromise that satisfied both sides. English common law had many gaps, therefore church jurisdiction was tolerated (and even welcomed) to fill them. In return, the Church tolerated that its clergy could be sued civilly in common law courts: this was obviously not considered to be too burdening.

The general impression remains, after all, that great progress has been achieved, but 'there is much more to be done'.[65] Several regions of Europe have not yet been considered at all, and others

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[62] Donahue and McDougall, 'France and the Adjoining Areas' 300-343.
[63] Helmholz, 'Local Ecclesiastical Courts in England' 344-391.
[64] Ibid. 354-383.
[65] Donahue and McDougall, 'France and the Adjoining Areas' 343.

have only received mentions in the text and footnotes,[66] or in the bibliography.[67] Furthermore, records must not be searched solely in archives. Many have migrated into collections of manuscripts in libraries. I only mention here one particularly bizarre example. Around 1313, the Dean of the chapter of Bamberg kept writing records of the chapter's law court onto free spaces (bottoms of pages) in his volume of emperor Justinian's *Digestum novum*! The volume migrated in the early nineteenth century to the University Library in Saint Petersburg.[68]

University of Aberdeen.

[66] Italy: 248 n.2, 323 n.88, 339 n.146, 342 n.160; Germany and Austria: 248 n.2, 329 n.105, 330 nn.110-111, 339 n.147; Scotland: 62-63, and 236 n.36.
[67] 'Selected Bibliography', HMCL 3.463-495.
[68] Sankt-Peterburg, Gosudarstvennyj Universitet, Naučnaja Biblioteka imeni Maxima Gor'kovo, shelf mark lat. 1.

Zechiel-Eckes, Klaus. *Die erste Dekretale: Der Brief Papst Siricius' an Bischof Himerius von Tarragona vom Jahr 385 (JK 255): Aus dem Nachlass mit Ergänzungen herausgegeben von Detlev Jasper.* MGH Studien und Texte Band 55. Hannover: Hahnsche Buchhandlung, 2013. Pp. xiii, 136. €25.00. ISBN: 978-3-7752-5715-2.

Eric Knibbs

After his fabled victory at the Milvian Bridge, Constantine ended the persecutions of Diocletian and extended to Christianity the status of a tolerated religion, one with powerful support from the uppermost reaches of the imperial government. Thirteen years later, bishops from across Christendom convened at Nicaea under the emperor's aegis. As a robust conciliar tradition emerged, Peter's successors awaited the institutional and bureaucratic developments befitting their central position in the empire. A great part of these accrued during the reign of Theodosius. The edict *Cunctos populos,* promulgated at Thessalonica on 28 February 380, bound Roman subjects to profess the faith proclaimed by the bishops of Rome and Alexandria, formally enforcing Nicene orthodoxy. The preceding years had seen legislation establishing procedural rules for ecclesiastical courts, freeing Christian clergy from public service and taxation, and proscribing heresy. These measures coincided with the pontificate of Pope Damasus I (d. 384), who brought to bear a corresponding insistence on the authority and the dignity of his office. Among other things, he articulated a vision of Roman primacy that circumvented the rival claims of other sees by drawing on Jesus's familiar statement to Peter in the Gospel of Matthew: 'Upon this rock I will build my church. . . And I will give to thee the keys of the kingdom of heaven, and whatsoever thou shalt bind upon earth, it shall be bound also in heaven' (Matt. 16:16-18).[1]

[1] For all of this, Detlev Jasper, 'The Beginning of the Decretal Tradition: Papal Letters from the Origin of the Genre through the Pontificate of Stephen V', *Papal Letters in the Early Middle Ages*, edd. Wilfried Hartmann and

Assertions like these opened a new era in canonical history, one that found its law not only in the conciliar tradition, but also among the decretal letters issued by the bishops of Rome. That Damasus's assertions were taken seriously even in the provinces we learn from an inquiry on matters of church discipline that Bishop Himerius of Tarragona directed to the Apostolic See in 384. Damasus died shortly before the letter arrived, and thus it is that the first papal decretal came to be issued by his successor, Pope Siricius, on 10 February 385. This is JK 255, *Directa ad decessorem*, and it is the subject of an edition, facing-page translation, and brief monographic study by Klaus Zechiel-Eckes, late professor of medieval history at the University of Cologne. The publication is a posthumous one. As the forward explains, Zechiel-Eckes began work on the project as early as the 1990s, but soon set it aside in favor of other projects. It has been left to Detlev Jasper to complete the introduction and bring the manuscript to press.[2]

After he had been confirmed in office, Siricius convened a Roman synod to assist him in answering Himerius's questions. The text of JK 255 nods only briefly to this 'conventus fratrum'. The accent lies rather on Roman primacy, here characterized, in the manner pioneered by Damasus, as inherited from Peter the Apostle. 'We bear the burdens of all who are weighed down', Siricius writes, 'or rather, the blessed apostle in us carries them—he who protects and maintains us in all things. . .as the heir of his office'.[3] These are among the most widely received statements of the entire decretal.

Kenneth Pennington (History of Medieval Canon Law 2; Washington D.C. 2001) 3-133 at 7-11. Also, more briefly, Zechiel-Eckes, *Erste Dekretale* 1-3.

[2] Thus the forward by Annette Zechiel-Eckes, *Erste Dekretale* v: 'Mein Dank gilt insbesondere Herrn Dr. Detlev Jasper, der es auf sich genommen hat, die Einleitungspartien zu ergänzen und auch sonst das Manuskript in eine publikationsfähige Form zu bringen'.

[3] Zechiel-Eckes, *Erste Dekretale* 84 line 4 ('. . .in conventu fratrum. . .'), 84 lines 12-14 with n.4: 'Portamus onera omnium, qui gravantur; quin immo haec portat in nobis beatus apostolus Petrus, qui nos in omnibus, ut confidimus, administrationis suae protegit et tuetur heredes'.

Siricius first addresses congregational discipline. He forbids the rebaptism of Christians who have been baptized by Arians; like Novatians and other heretics, they are to be rejoined to the orthodox congregation 'solely by the invocation of the septiform spirit, through the imposition of the episcopal hand'.[4] Also forbidden is the baptism of catechumens on Christmas, the feast of the Epiphany, and the feasts of the apostles and martyrs. The sacrament is reserved for Easter and Pentecost, with exceptions for infants and those near death. Apostates who seek readmission to the Christian community are to be denied the Eucharist and assigned lifelong penance, to be reconciled only on their deathbeds. Men may not marry women who have been betrothed to someone else, 'because the blessing that the priest imparts to the betrothed, should it be violated by any transgression, appears sacrilegious to the faithful'.[5] Those who sin after penance, either by reentering military service, fornicating, entering new marriages, or engaging in other forbidden sexual activity, may attend Mass but are to be denied the Eucharist until the point of death. Unchaste monks and nuns must be expelled from their institutions and imprisoned. They, too, are to be permitted communion only at life's end.[6]

As Siricius takes up the problem of clerical discipline, he becomes reproachful. 'Let us now proceed to the sacred clergy', he writes. 'We have found, through the report of your charity, that they have been trampled and cast into confusion throughout your provinces, in injury to our holy religion'.[7] Himerius has

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[4] Ibid. 86 lines 21-22 (c.1): 'Quos nos cum Novatianis aliisque hereticis, sicut est in synodo constitutum, per invocationem solam septimformis spiritus episcopalis manus inpositione catholicorum conventui sociamus'. The citation is to the eighth canon of the Council of Nicaea, which however deals only with returning Novatianist clergy and not with the problem of baptism.

[5] Respectively, Ibid. 86-92 (cc.2-4); the quotation is at 92 lines 61-63: '...quia illa benedictio, quam nupturae sacerdos inponit, apud fideles cuiusdam sacrilegii instar est, si ulla transgressione violetur.

[6] Ibid. 92-94 (cc.5-6).

[7] Ibid. 96 lines 91-93: 'Veniamus nunc ad sacratissimos ordines clericorum, quos in venerandae religionis iniuriam ita per vestras provincias calcatos atque confusos caritate tua insinuante repperimus'.

asked about priests and deacons who have fathered children, and who have excused their conduct on the grounds that the priests of the Old Testament also had families. Siricius explains that these priests were required to leave their homes during their service at the temple, 'namely. . .to avoid sexual congress with their wives, so that they might. . .offer an acceptable sacrifice to God'.[8] They were permitted procreation for the purpose of succession, 'because it had been established that only those from the tribe of Levi be admitted to God's ministry'.[9] The priests and deacons of the Christian church are to observe chastity from the day of their ordination. Those who have lapsed out of ignorance, provided they repent, may keep their positions but are denied further advancement. The unchaste and unrepentant are to be deprived of office altogether.

Siricius has more to say about clerical marriage. He clarifies that men who have been married more than once are ineligible for holy orders. That some have nevertheless found their way into the clergy is laid at the door of Spanish metropolitans, who have selected candidates for office less than carefully. The Apostle required priests and deacons to be 'men of one wife' (1 Tim. 1:13), a precept 'that has been so despised by the bishops of your region, it is as if the opposite had been established'. Such indiscipline requires Siricius to explain in all clarity 'what is henceforth to be observed by all your churches, and what is to be avoided'.[10]

At the head of this list stand basic regulations on the conferral of holy orders. Candidates pledged to the clergy from childhood must be baptized before puberty and made lectors, whence they may advance to the ranks of acolyte and subdeacon.

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[8] Ibid. 98 lines 111-113: '. . .hac videlicet ratione, ne vel cum uxoribus possint carnale exercere commercium, ut conscientiae integritate fulgentes acceptabile deo munus offerrent'.

[9] Ibid. 98 lines 114-116: '. . .quia non ex alia nisi ex tribu Levi quisquam ad dei ministerium fuerat praeceptus admitti'.

[10] Ibid. 102-104 lines 153-155: 'Quae omnia ita a vestrarum regionum dispici-untur episcopis, quasi in contrarium agis fuerint constituta. Et quia non est nobis de huiusmodi usurpationibus neglegendum. . .quid ab universis posthaec ecclesiis sequendum sit, quid vitandum, generali pronuntiatione decernimus'.

They are permitted a single marriage, to a virgin, which is to be blessed by a priest. After their thirtieth birthday they may proceed to the diaconate, and after a further five years to the priesthood. A final period of ten years opens eligibility for the episcopate. The same 'cursus honorum' applies to those who enter the holy orders as adults. Clerics who marry a second time, or marry a widow, are to be deprived of office and reduced to lay communion. There are to be no women in the homes of clerics, except for reasons of necessity, in accordance with the third canon of Nicaea.[11] Monks who enter the clergy must observe the same sequence of ordinations as their secular counterparts. Siricius notes in particular that they are not to advance immediately to the episcopate.[12] Laity who have done penance and received absolution are barred from the clergy. Finally, Siricius emphasizes again that those in holy orders who have done penance, are twice-married, or have married a widow, since they were consecrated out of ignorance, may keep their position but have no hope of advancement:[13]

> The foremost bishops of all your provinces, should they ever again believe that anyone of this sort is to be advanced to holy orders, will know henceforth that the Apostolic See will pronounce judgment on their position and also upon the position of those whom they have advanced in violation of the canons and our orders.

Siricius's letter assumes the authoritative tone that would become a standard feature of the decretal tradition. He is also sharply reproachful in his surprise and dismay at the decay of

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[11] Again the Nicene legislation is imperfectly characterized; the third canon permits only close relatives, such as mothers, sisters or aunts, to reside with clergy; the standard is not necessity but those who are above suspicion. Zechiel-Eckes, *Erste Dekretale* 108 n.45, locates the true source of the notion of 'necessity' ('necessitudo') in the 'Interpretatio Rufini' provided by Rufinus of Aquileia.

[12] Ibid. 110 lines 192-194: 'Nec statim saltu ad episcopatus culmen ascendant, nisi in his eadem, quae singulis dignitatibus superius praefiximus, tempora fuerint custodita'.

[13] Ibid. 112 lines 208-212: 'Scituri posthac provinciarum omnium summi antistites, quod si ultra ad sacros ordines quemquam de talibus crediderint adsumendum, et de suo et de eorum statu, quos contra canones et interdicta nostra provexerint, congruam ab apostolica sede promendam esse sententiam'.

discipline in Himerius's diocese, and in his warning of the consequences of departing from the apostolic precepts outlined in JK 255. Here the German translation is completely faithful to the demeanor and the force of the letter. A minimal apparatus of notes elucidates Siricius's sources (most of them biblical), resolves several references to historical persons and places, and, most abundantly and usefully, provides philological commentary. The apparatus comments with particular diligence on variant readings in the 1721 text of Pierre Coustant, which Jacques-Paul Migne reprinted in volume thirteen of the *Patrologia Latina* and which, until now, has served as the standard text of JK 255.[14]

Zechiel-Eckes divides the edited text into the fifteen chapters. These divisions are familiar from Coustant's edition (and therefore from Migne), but of course they are not original to Siricius's decretal. They represent the work of Dionysius Exiguus, who folded JK 255 into his *Collectio Dionysiana* 115 years after Siricius's death. Similar divisions characterize other decretals in the collection of Dionysius, who wrote in his preface of compiling papal letters and distinguishing their content under appropriate 'tituli'. The *Collectio Hispana* and the Pseudo-Isidorian Decretals, both of which have JK 255 via the *Dionysiana,* ensured the fifteen-chapter form of JK 255 the widest possible distribution.[15] The retention of these chapter divisions, though entirely defensible, reminds readers that no edition could hope to reconstruct Siricius's decretal as he first wrote it. JK 255 survives only as it circulated in canonical collections from the early sixth century.

Jasper, in bringing Zechiel-Eckes's work to press, endorses the analysis of Christian Hornung, who detects a stylistic division

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[14] Pierre Coustant, *Epistolae Romanorum Pontificum et quae ad eos scriptae sunt: A S. Clemente I usque ad Innocentium III, quotquot reperiri potuerunt*. *Tomus I ab anno Christi 67 ad annum 440* (Paris 1721) 623-638; reprinted PL 13.1132-1147.

[15] Zechiel-Eckes, *Erste Dekretale* 7 with n.23. Franciscus Glorie ed., *Dionysii Exigui: Praefationes Latinae Genuinae* (CCL 85; Turnhout 1975), 35-51 at 45: 'Praeteritorum sedis apostolicae praesulum constituta, qua valui, cura diligentiaque collegi *et in quendam redigens ordinem titulis distinxi compositis*'.

in the text of the decretal. The first eight Dionysian chapters, comprising all of the material on congregational discipline, the initial statements on clerical marriage, and the problem of unworthy clergy in the Spanish church, mimic imperial constitutions. Each opens with a brief 'narratio' stating the problems raised by Himerius's question, followed by explicit provisions in a 'dispositio'. In some cases the statement then concludes with a 'sanctio' where punishments for the recalcitrant are laid out. From the ninth chapter, however, a simpler literary form emerges; the provisions becomes briefer, and 'narratio' and 'sanctio' disappear. Hornung and Jasper propose to read the first eight chapters as Siricius's own composition, while taking the simpler provisions that begin with chapter nine as the legislation of the Roman synod that Siricius acknowledges at the start of his letter.[16]

One point, implicit in Jasper's overview of Hornung's conclusions, deserves more direct emphasis. This is that the text of JK 255 itself signals an important shift in the course of the eighth chapter. After Siricius has finished his fulminations against the 'inexploratae vitae homines' who have been admitted despite their multiple marriages to clerical orders, he announces—as we saw above—that he will proceed to a general outline of disciplinary matters.[17] These are the provisions on holy orders that we surveyed above, and they correspond precisely with the stylistically simpler Latin that Hornung analyzes. At the end of them we find a summing up on 'all those things' that ignorance alone can excuse, which is clearly a gesture to the preceding simply stated regulations.[18] The chapter scheme imposed by the Dionysius Exiguus, therefore, has suppressed an important matter of hierarchical arrangement. The first seven chapters, on congregational discipline and clerical marriage, deal

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[16] Christian Hornung, *Directa ad decessorem: Ein kirchenhistorisch-philologischer Kommentar zur ersten Dekretale des Siricius von Rom* (Münster 2011). Textual analysis summarized at *Erste Dekretale* 6-9 with n.15.

[17] Zechiel-Eckes, *Erste Dekretale* 102 line 143, 104 lines 155-159.

[18] Ibid. 112 lines 201-208.

with disparate themes. Chapters eight through fifteen, however, in fact constitute one continuous discussion that includes, as its middle portion, a series of basic regulations on eligibility for holy orders and related matters. Whether these provisions come from a Roman synod convened under Siricius or derive from some other source is wholly uncertain.

At the end of JK 255, Siricius demands that Himerius circulate his decretal far and wide:[19]

> Finally, we encourage you to observe the canons and uphold the papal decrees, and to bring these items, which we have set forth in response to your inquiry, to the notice of all our fellow bishops.... What we have outlined here . . . should be directed with your letter of introduction not only to the bishops of your province, but also to all Carthaginian, Baetican, Lusitanian and Gallican bishops, as well as to all the bishops in provinces that neighbor yours.

Zechiel-Eckes traces the path of JK 255 through twenty historically ordered Italian and Gallican canonical collections, ranging in date from the early sixth through the later ninth century.[20] These include widely circulated monuments like the *Dionysio-Hadriana* and the *Hispana*, as well as many earlier and more obscure compendia that survive only in isolated codices. In all, forty-two manuscripts and two printed editions have been consulted. Through their evidence, Zechiel-Eckes is able to reconstruct the stemmatic relationships that prevail among the collections for the space of JK 255.[21] For twenty lines of edited

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[19] Ibid. 114 lines 217-224: 'Nunc fraternitatis tuae animum ad servandos canones et tenenda deretalia constituta magis ac magis incitamus, ut haec, quae ad tua consulta rescripsimus, in omnium coepiscoporum nostrorum perferri facias notionem, et non solum eorum, qui in tua sunt diocesi constituti, sed etiam ad universos Carthaginienses ac Baeticos, Lusitanos atque Gallicos vel eos, qui vicinis tibi conlimitant hinc inde provinciis, haec quae a nobis sunt salubri ordinatione disposita, sub litterarum tuarum prosecutione mittantur'.

[20] Ibid. 9. Systematic collections as textually secondary to the earliest historically arranged collections have been excluded from consideration: thus *Erste Dekretale* 24.

[21] Ibid. 59. In addition to Coustant's 1721 printing (variants from which are enumerated and discussed in the notes, rather than in the apparatus criticus), Zechiel-Eckes uses Francisco Antonio González, *Collectio Canonum*

Latin, the critical apparatus generally approaches a page or more in length.

A great mystery of ancient legal texts like JK 255 is their path from the papal pen into the canonical tradition, and the analysis offered here is especially intriguing for the light it sheds on this problem. A great part of the tradition is purely Italian and primarily Roman, and consists of five collections that attest to two different recensions of JK 255. Asterisks indicate collections extant in a single codex:

Collectio Quesnelliana, circa 500, Rome
Collectio Dionysiana or *Dionysii Secunda*, perhaps 514, Rome
Collectio Frisingensis, after 495, Italy and probably Rome
**Collectio Tiburiensis* (fragmentary), circa 580, diocese of Trent
**Collectio Weingartensis*, late sixth century, Rome[22]

The editors survey and include in their apparatus variants from the broader Dionysian tradition, including the *Dionysiana Bobbiensis*, the *Dionysio-Hadriana*, the *Dionysiana Aucta*, and

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Ecclesiae Hispanae (Madrid 1821), as reprinted by Migne in PL 84.629-638, for the vast non-Gallican *Hispana* tradition. There is no attempt to determine stemmatic relationships within collections attested by more than one manuscript; recension therefore leads to a 'stemma collectionum' (67) rather than a 'stemma codicum'.

[22] On the *Quesnelliana*, Zechiel-Eckes, *Erste Dekretale* 24-28; Kéry 27-29. JK 255 occurs among *Quesnelliana* extracts in Paris, BNF lat. 1455 (Reims, s. IX 2/2), as well as in the other codices adduced by Kéry. Zechiel-Eckes consults the entire ninth-century tradition save for Oxford, Oriel College 42 (s. XII). On the *Dionysiana* (here the *Dionysii Secunda* because it represents Dionysius Exiguus's second redaction of his collection, Zechiel-Eckes, *Erste Dekretale* 49-51 and Kéry 9-13. Manuscripts attesting to the second-recension decretals section of the *Dionysiana* are rare. Zechiel-Eckes consults Paris, BNF lat. 3837 (s. IX, Angers) and BAV lat. 5845 (915-934), as well as the much earlier yet less direct tradition on hand in Modena, BC, O.I.12 (northern Italy), the so-called *Collectio Mutinensis* (Kéry 22) that combines decretals drawn from the *Dionysiana* with material from other sources. On the *Frisingensis* (Munich, BSB lat. 6243, s. VIII ex., Freising), *Tiburiensis* (Munich, BSB lat. 29550/1, s. VIII 3/3, Rhaetia) and *Weingartensis* (Stuttgart, BM, HB.VI.113, s. VIII ex., Rhaetia and probably Chur), Zechiel-Eckes, *Erste Dekretale* 28-32 and Kéry 2-3 and 42-43. All are extant only in 'codices unici', save for the *Frisingensis*: Munich, BSB lat. 5508 (s. IX, Reichenau) is a copy of Munich, BSB lat. 6243 and therefore not consulted by Zechiel-Eckes.

the decretals section of the *Hispana*.[23] Because all are clearly derived from the *Dionysiana*, their textual evidence is secondary, though they won JK 255 by far its greatest number of readers. 'Historical influence and text-critical importance differ substantially in this respect'.[24]

A further five collections attest to the distribution of JK 255 in Gaul. These are, at base, about twenty-five years younger than their Italian counterparts, and they also manifest two different recensions of JK 255:

*Collectio Corbeiensis, post-524, southern Gaul and probably Arles
*Collectio Coloniensis, s. VI 2/2, southern Gaul and probably Arles
*Collectio Albigensis, s. VI 2/2, southern Gaul and probably Arles
Collectio Laureshamensis, s. VI med., southern Gaul
Collectio Sancti Mauri, s. VI ex., southern Gaul[25]

The close relationship binding the *Corbeiensis*, *Coloniensis*, *Albigensis*, and *Laureshamensis* sets them apart from the *Collectio Sancti Mauri*, which is so heavily contaminated that the nature of its text cannot be determined reliably.[26]

Finally, a further six collections, the earliest of them from Italy and the later from Gaul, carry a fifth recension of Siricius's decretal:

Collectio Vaticana, s. VI inc., Rome

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[23] On all of these, Zechiel-Eckes, *Erste Dekretale* 51-58; Kéry 13-21 and 61-67.

[24] Zechiel-Eckes, *Erste Dekretale* 59.

[25] Ibid. 32-40; Kéry 44-50. The *Corbeiensis* (Paris, BNF lat. 12097, s. VI 2/4, southern France) and *Coloniensis* (Cologne, Erzbischöfliche Diözesan- und Dombibl. 212, s. VII, Lyon?) survive only in single codices. The *Albigensis* (Toulouse, BM 364 + Paris, BNF lat. 8901, copied shortly before 667 at Albi) comes down additionally in a ninth-century copy: Albi, BM 2 (s. IX 2/2, Albi), which as 'codex descriptus' derived from the Toulouse/Paris manuscript has not been consulted for this edition. For the *Laureshamensis*, Zechiel-Eckes has consulted only BAV Pal. lat. 574 (ca. 800, upper Rhine), passing over Gotha, Forschungsbibl. Mbr. I.85 (ca. 800, Alsace), because of its nearly identical text (*Erste Dekretale* 37 n. 124). Likewise, Zechiel-Eckes consults only two of three extant copies of the *Collectio Sancti Mauri*, citing again the close relationships among the witnesses (39 n.132). The earliest codex of the *Collectio Sancti Mauri* is Den Haag, Museum Meermanno-Westreenianum 10.B.4 (s. VIII 2/2, Reims?).

[26] Zechiel-Eckes, *Erste Dekretale* 64-66.

Collectio Sanblasiana (Italica), s. VI ¼, Italy/Rome
*Collectio Ingilramni/Teatina, ca. 525, Italy
*Collectio Remensis, VI 2/2, Gaul
*Collectio Pithouensis, s. VI ex., central Gaul (Sens/Auxerre)
*Collectio Diessensis, s. VII 2/4 at the earliest, Gaul[27]

Here the *Vaticana* has the earliest and best text, with the *Sanblasiana*, *Ingilramni*, *Remensis*, *Pithouensis*, and *Diessensis* providing related yet progressively inferior versions.[28]

It is notable that the earliest Gallican collections relevant for establishing the text of JK 255 survive predominantly in isolated codices. Carolingian reform initiatives, which prioritized the Roman *Dionysio-Hadriana* and, to a lesser extent, the *Quesnelliana*, replaced a much more varied tradition full of local peculiarities. At least as far as JK 255 is concerned, the deepest roots of these Gallican collections extend to Arles and the papal vicariate that had been located with bishops of that city since the pontificate of Caesarius.

As a historical matter, decretal law traces its origins to Pope Siricius in 385, and yet nothing shows more clearly than the edition under review that the textual basis of the decretal tradition is much later. JK 255, in the form that we know it today, does not descend directly from Siricius's pontificate or even from the later Roman Empire. Rather, it is entirely a product of

[27] On these, Ibid. 40-49; Kéry 3-4, 24-26, 29-31, 48-50. The edition under review draws on all extant codices of the *Vaticana* (the oldest of which is probably BAV lat. 1342, after 743, Rome?) and the *Sanblasiana* (the earliest being Cologne, Erzbischöfliche Diözesan- und Dombibl. 213, s. VIII inc., Northumbria). The *Ingilramni/Teatina* (BAV lat. 1997, s. IX med., Chieti), *Remensis* (Berlin, Staatsbibl., Preußischer Kulturbesitz, Phil. 1743, s. VIII 2/2, Bourges?), *Pithouensis* (Paris, BNF lat. 1564, ca. 800, Chelles?) and *Diessensis* (Munich, BSB lat. 5508, s. VIII ex., Salzburg) all survive only as 'codices unici'.

[28] Zechiel-Eckes, *Erste Dekretale* 62: 'In der Tat lassen sich für den Text von JK 255 alle sechs Sammlungen zu einem von *V* angeführten Traditionsstrang bündeln, der bis in Einzelheiten klassifizierbar ist und als Musterbeispiel einer sich stetig verschlechternden Überlieferung gelten kann'. At the end of this process stands the shared archetype of the *Pithouensis* and *Diessensis*, which present a heavily corrupted recension of the decretal (64).

the sixth-century Ostrogothic papacy.[29] While Siricius hoped that papal decretals would join conciliar legislation as the fundamental law of the church, Dionysius Exiguus felt it sufficient to compile the first redaction of his *Collectio Dionysiana* from conciliar decrees alone. Only in a second, expanded recension did the Scythian monk append thirty-nine decretals to his conciliar compendium. The two recensions of the *Dionysiana* have been traced to 500 and 514, respectively—that is to say, to the beginning and the end of the pontificate of Pope Symmachus.[30]

The fifteen years of Symmachus's pontificate witnessed legal developments as momentous as they are obscure. Symmachus's election was opposed by a Byzantine faction that supported a rival candidate, Laurentius. The result was the Symmachian schism, in the course of which partisans on both sides forged a series of conciliar 'acta' and spurious trial narratives. The greater part of these aimed to shield Symmachus from legal accusations by enshrining the notion of papal immunity in canon law. This controversy, together with the broader environment of Symmachus's assertive papacy, is deeply entwined with the earliest traces of the circulation of JK 255. In collections of Roman origin like the *Dionysiana* and the *Quesnelliana* the drama surrounding Symmachus is implicit. Elsewhere, especially in the closely related *Vaticana*, *Sanblasiana*, and *Ingilramni/Teatina* collections, the schism has left very definite traces. All three carry the Symmachian forgeries, suggesting that they owe their origins to the circles of Symmachus's supporters.[31]

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[29] Compare Ibid. 9: 'Diese ungewöhnlich starke Streuung mag durch das Promulgationsgebot am Ende der Dekretale befördert worden sein'. In fact the only branch of the tradition with Spanish origins, the *Hispana*, gets its text of JK 255 from the Roman *Dionysiana*.

[30] For the date, Ibid. 50.

[31] On the Symmachian schism, see Eckhard Wirbelauer, *Zwei Päpste in Rom: Der Konflikt zwsichen Laurentius und Symmachus (498-514)* (Munich 1993). A convenient account of the events of the schism itself is Thomas F.X. Noble, 'Theoderic and the Papacy', *Teoderico il Grande e Goti d'Italia*: *Atti del XIII Congresso internazionale di studi sull'Alto Medioevo* (2 vols. Spoleto 1993)

These connections underpin the Gallican side of the tradition of JK 255 as well. It was Symmachus who made Caesarius his vicar at Arles, and the earliest Gallican collections to bear JK 255 all originated in Arles or southern Gaul, as we have seen. Among the Gallican collections studied here, the *Remensis*, *Pithouensis*, and *Diessensis* provide a text that is closely related to the *Vaticana* and its Italian relatives. All of them moreover include JK 255 as one element of a small Symmachian dossier. Eckhard Wirbelauer has hypothesized that Symmachus himself assembled this dossier and directed it to Caesarius at Arles in 513. The close textual relationship of JK 255 as it appears in all six of these collections suggests to Zechiel-Eckes that we have before us this entire process. Its Roman end, and very possibly the text in use at the Roman chancery in the early sixth century, would therefore be represented by the *Vaticana* and its Italian relatives, while the Arles side finds an echo in the slightly later Gallican collections of lesser textual quality.[32]

The *Quesnelliana* and the *Dionysiana* are unique in this dense tradition for their closely related, nearly error-free text. Together, the recension to which they attest has informed Zechiel-Eckes's edition more than any other.[33] There is no evidence that either collection owes its text to the archival resources of the papacy. On the contrary, Hubert Wurm has argued that Dionysius Exiguus worked instead from older collections that no longer survive.[34] In their 'stemma collectionum', Jasper and Zechiel-Eckes provide some glimpse of these, in suggesting pre-500 archetypes for the *Quesnelliana* and *Dionysiana* (siglum: *X*), the *Frisingensis*, *Tiburiensis* and

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1.395-424. For papal immunity (the maxim that 'prima sedes a nemine iudicabitur') in later canonical theory and practice, see Harald Zimmermann, *Papstabsetzungen des Mittelalters* (Graz-Vienna-Cologne 1968).

[32] Wirbelauer, *Zwei Päpste* 119-120 with n.31, cited as a strong possibility by Zechiel-Eckes, *Erste Dekretale* 46-47 with n.145.

[33] Zechiel-Eckes, *Erste Dekretale* 66, 71-72, and finally 74, where one reads: 'Für die Texterstellung von JK 255 steht die Quesnelliana- und Dionysius-Tradition sicherlich im Vordergrund'.

[34] Ibid. citing Wurm, *Studien und Texte zur Dekretalensammlung des Dionysius Exiguus* (Bonn 1939) 232-233.

Weingartensis (*Y*), and the string of collections tied to the *Vaticana* (*Ω*).[35] Beyond hypothetical philological reconstructions, however, it is remarkable indeed that we have no trace of JK 255 before 500. The features of early decretal law in the period before the pontificate of Symmachus have been entirely, and probably deliberately, obscured.

Jasper and Zechiel-Eckes, in providing the first critical Latin edition and a modern German translation of a fundamental text of decretal law, have done scholarship an enormous service. Their project is primarily a textual undertaking. The historical excursus is brief, reflecting not only the philological focus of the editors but also, perhaps, the emergence of Christian Hornung's substantial doctoral thesis on historical and philological aspects of JK 255 in the years before their edition went to press. Beyond a substantial survey of the earliest canonical sources to transmit the decretal and an analysis of their textual relationships, the editors provide an interesting overview of the printing history of JK 255 and a substantial index.[36]

The early history of the papal decretal, as a legal genre and a literary form, is an interesting problem, one full of promise for our understanding of the papacy and development of the canonical tradition in the earliest centuries of Roman Christianity. To date our historical perspective rests on the aging work of nineteenth- and early twentieth-century scholarship, and on a very few modern philological investigations, including Eckhard Wirbeluaer's study of the Symmachian forgeries and now the text-critical work of Jasper and Zechiel-Eckes on JK 255, *Directa ad decessorem*.[37] We have learned a lot from these close studies. Broader work on the earliest canonical collections and their interrelationships promises to teach us a great deal more.

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[35] Ibid. 67.

[36] Ibid. 11-23 on 'Die vorhergehenden Drucke'.

[37] For a brief overview of the foundational scholarship of the later nineteenth through twentieth centuries, with some appraisal of its importance, see Jasper, 'Beginnings of the Decretal Tradition' 3-6.

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