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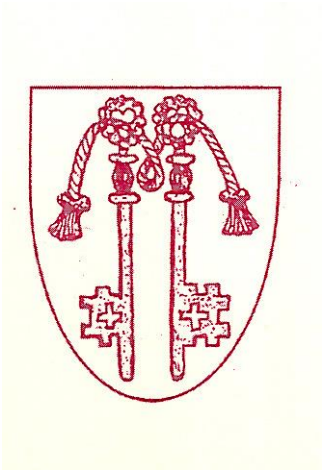
OF MEDIEVAL CANON LAW

NEW SERIES 2021 VOLUME 38

AN ANNUAL REVIEW



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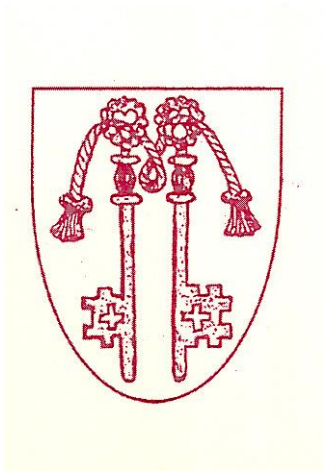

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Abbreviations

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 comune, 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
COD	*Conciliorum oecumenicorum decreta*, ed. Centro di Documentazione... (COD^3: ed. 3)
COGD	*Conciliorum oecumenicorum generalium-que decreta*, 2.1*: The Oecumenical Councils of the Roman Catholic Church*: *From Constantinople IV to Pavia-Siena (869-1424);* 2.2*: From Basel to Lateran V (1431-1517*, edd. Alberto Melloni et alii (Corpus Christianorum; Turnhout 2013)
CSEL	*Corpus scriptorum ecclesiasticorum latinorum*

DA	*Deutsches Archiv für Erforschung des Mittelalters*
DBI	*Dizionario biografico degli Italiani*
DDC	*Dictionnaire de droit canonique*
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 et alii (2 vols. Bologna 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*
Fowler	*Linda Fowler-Magerl, Clavis Canonum: Selected Canon Law Collections Before 1140* (Hannover 2005): https://beta.mgh.de/databases/clavis/db/
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 (Veröffent-lichungen des Max-Planck-Instituts für Europäische Rechtsge-schichte, München 1973-1977)
HRG	*Handwörterbuch zur deutschen Rechtsgeschichte*
HZ	*Historische Zeitschrift*
IRMAe	*Ius romanum medii aevi*
JEH	*Journal of Ecclesiastical History*
JH^1, JH^2, JH^3	Jaffé, *Regesta pontificum romanorum* ... ed. tertiam curaverunt Nicholas Herbers et al. (JH^1 A S. Petro–604), (JH^2 604-844), (JH^3 844-1024)
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)
JTS	*Journal of Theological Studies*

Kéry	Lotte Kéry, *Canonical Collections of the Early Middle Ages (ca. 400-1140): A Bibliographical Guide to the Manuscripts and Literature* (Washington DC 1999)
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
• Capit.	Capitularia
• Conc.	Concilia
• Const.	Constitutiones
• 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
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.
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*

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NOTES

REVIEWS

Stephan Georg Kuttner[1]

Ken Pennington

Eva Illch Kuttner and Stephan Georg Kuttner
Washington, D.C. 1957
Photo thanks to Ludwig Kuttner

Stephan Georg Kuttner founded the *Bulletin of Medieval Canon Law* fifty years ago with the support of the Law School at the University of California, Berkeley. From the beginning he envisioned the journal as serving the international community by publishing essays in German, French, Italian, Spanish and English. The first issue appeared in 1971 and contained essays in all four European languages. It was a first for an American scholarly journal.

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[1] This is an abbreviated, augmented, and edited version of an essay that appeared in *Great Christian Jurists in German History*, edd. Mathias Schmoeckel and John Witte Jr. (Tübingen: Mohr Siebeck, 2020) and used with their permission.

Kuttner was born in Germany on March 24, 1907 to Georg and Gertrude Kuttner. His father was born into the Jewish faith but converted to Lutheranism. He had written his 'Habilitation' at the University of Berlin in law and later taught civil procedure at the University of Frankfurt before he died in 1916 by his own hand when Stephan was nine years old.[2] Stephan struggled his entire life with depression or melancholy.[3] He finished his Abitur in Frankfurt where he developed a passion for music and religion. He enrolled in the University of Frankfurt to follow in his father's footsteps to study law, but moved to Freiburg im Breisgau, and finished his studies in Berlin's Friedrich-Wihelms-Universität and received his 'Doctor iuris utriusque' (Doctor of both Laws) on July 2, 1930. He made several other trips to Italy during 1932-1933. Undoubtedly, those research trips ignited two fires that never burned low for the rest of his life: Rome and canonical manuscripts. Before he could complete his degree work the Nazi party came to power and immediately banned Jews from holding positions or receiving degrees from German universities.

Stephan's future was uncertain. He was a 'full Jew' with no chance to find a position at a university or in the German judiciary. In spite of his parlous legal status, Eva Illch married him on August 22, 1933. Eva was also Jewish, and they both had converted to Catholicism two weeks before their wedding. In 1976 she and I were sitting in a café during a conference in Salamanca, Spain having an apertivo in the late afternoon. I asked her why she converted to Catholicism. 'I would have become a witch if that's what Stephan wanted,' she told me with a typically Eva-amused look. Eva supported Stephan vigorously during his long

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[2] Georg Kuttner, *Die privatrechtlichen Nebenwirkungen der Zivilurteile* (Abhandlungen zum Privatrecht und Zivilprozeß des Deutschen Reiches 16.2; München: Beck, 1908) and *Urteilswirkung außerhalb des Zivilprozesses* (Abhandlungen zum Privatrecht und Zivilprozeß des Deutschen Reiches 26.3; München: Beck, 1914; reprinted Aalen: Scientia, 1971).

[3] Ludwig G. Kuttner, 'Memories of Stephan Kuttner', *Bulletin of Medieval Canon Law* 30 (2013) 167-181 at 180. See also Kuttner's son, Thomas S. Kuttner's memoir that also reports on a series of interviews with Stephan in the last years of his life, 'Stephan Kuttner: Both German Jew and Catholic Scholar', *Journal of Law, Philosophy and Culture* 5 (2010) 43-65.

career. Many scholars, including myself, remember her hospitality, dinners, and companionship during research stays in Berkeley.

After their wedding Stephan and Eva immigrated to Rome. He had little choice. In Germany he was 'careerless'. He still had one year of fellowship support from the 'Notgemeinschaft' and continued his project to study canonical manuscripts from 1140 to 1234, the 'Classical Age' of canon law. In April 1934 Stephan received a research position in the Vatican library with the support of Cardinal Pacelli, Giovanni Mercati (1866-1957), the Prefect of the Vatican Library, and the blessings of Pope Pius XI. He proposed to compile a corpus of glosses on Gratian's *Decretum* from the first primitive glosses to Johannes Teutonicus' *Glossa ordinaria*. Stephan estimated the project would take fifteen years.[4] His dream is still far from being realized.

However, his Roman years were enormously productive. Stephan published his work on canonical criminal law that he had begun in Berlin in 1935.[5] He followed that volume in 1937 with his massive catalogue of canonical manuscripts.[6] It is still the cornerstone of canonical historical studies. These two volumes immediately established him as the leading scholar of medieval canon law in Europe.[7] Historical canon law as a subject of

[4] 'Aggregato alla Biblioteca Apostolica Vaticana.' See Schmugge, 'Stephan Kuttner' 149-150.

[5] *Kanonistische Schuldlehre von Gratian bis auf die Dekretalen Gregors IX: Systematisch auf Grund der handschriftlichen Quellen dargestellt*: *I* (Studi e Testi 64; Città del Vaticano: Biblioteca Apostolica Vaticana, 1935).

[6] *Repertorium der Kanonistik (1140-1234): Prodromus corporis glossarum*. (Studi e Testi 71; Città del Vaticano: Biblioteca Apostolica Vaticano, 1937).

[7] For Stephan's achievements in those years, see Knut Wolfgang Nörr, 'Stephan Kuttner: Wissenschaft im Zeichen dreier Kulturen', *Der Einfluss deutscher Emigranten auf die Rechtsentwicklung in den USA und in Deutschland: Vorträge und Referate des Bonner Symposions im September 1991*, edd. Marcus Lutter, Ernst C. Stiefel, and Michael H. Hoeflich (Tübingen: J.C.B. Mohr (Paul Siebeck), 1993) 343-359 at 349-353 and for an appreciation of Kuttner's scholarship, see Knut Wolfgang Nörr, 'Stephan Kuttner: Persönlichkeit und wissenschaftliches Werk', ZRG Kan. Abt. 74 (1988) iii-xi.

scholarly inquiry did yet not exist in North America.[8]

In 1937 Stephan was appointed to a professorship in canon law at the Lateran University. Among his first students was an Austrian, the future cardinal and historian of canon law Alfons Maria Stickler. Italy, however, was no longer a safe haven for a Jew. In September of 1938 Mussolini promulgated his own set of laws that were aimed at Jews living in Italy. In mid-1940 Stephan received an invitation to teach at The Catholic University of America in Washington, D.C. On June 4, 1940 he arrived by train in Lisbon. In Rome Eva obtained exit papers and left Rome on July 29, 1940 with their three children. They flew to Lisbon on an Italian military aircraft. Since she and the children did not have visas for Portugal and only a German passport with the obligatory 'J,' they were interned at the airport. A sympathetic Portuguese policeman reunited the family. Stephan and his family left on the steamship Quanza for the United States on August 8, 1940.[9]

When Stephan stepped off the Quanza and began teaching canon law at The Catholic University of America as a visiting professor in the Fall of 1940 he was beyond the reach of the Nazis and the Italian fascists. His position at Catholic University would provide him with a stable platform to advance the study of canon law and legal history in the United States for almost twenty-five years. He became a man with a mission to establish Catholic University as a center for medieval legal history. As part of his project he worked to establish International Congresses of Medieval Canon Law, and they began to meet at regular four year intervals on both sides of the Atlantic. The first met in Louvain and Brussels in 1958.

In 1955 he founded the Institute of Medieval Canon Law at Catholic University. Only a figure of his stature could have succeeded in bringing the illustrious, international group of scholars together in support of an American institution. The

[8] An exception to that generalization is the work of Gaines Post who began to study canonical manuscripts in the mid- and late-thirties.

[9] Ludwig Schmugge, 'Stephan Kuttner (1907-1996): The Pope of Canon Law Studies: Between Germany, The Vatican and the USA', BMCL 30 (2013) 141-161 at 158-160.

advisory board and corresponding members that he recruited included almost every prominent legal scholar of the twentieth century.[10] Stephan also established the *Bulletin* of the Institute of Medieval Canon Law that would appear every year as an appendix to the journal *Traditio* until 1970. After leaving Catholic University Stephan first moved to Yale University in 1964 and then to the University of California, Berkeley in 1970. In 1971 at Berkeley he began publishing the *Bulletin of Medieval Canon law, New Series*. Stephan died on August 12, 1996, the first day of the Tenth International Congress of Medieval Canon Law being held in Syracuse, New York. A remarkable coincidence. This volume marks the *Bulletin*'s 50th birthday and the 25th anniversary of Stephan's death. It is dedicated to the memory of its founder.

Washington, D.C.

[10] The first *Bulletin* of 1955 in *Traditio* 11 (1955) 429-448 lists the members of the Institute, the projects, and new information about manuscripts.

Stephan Kuttner 1977 in Berkeley

Stephan Kuttner at Yale

Robert Somerville

In 2012 at the Fourteenth International Congress of Medieval Canon Law in Toronto I presented a short tribute to Peter Landau titled, 'Peter Landau at Yale', subsequently published in the *Toronto Proceedings 2012* (pp.1169-1173). The following memories are parallel reflections, and are based on a paper given in a session devoted to Stephan Kuttner's memory at the Kalamazoo Medieval Congress in May, 1999, soon after Kuttner's death. Both the Toronto paper and the following are personal, episodic, and could have been expanded, and no attempt has been made to consult other works about Kuttner and his career.

***

At some point in the late 1960s, while I was a graduate student at Yale, I attended a piano recital in a large lounge at Yale Divinity School. The student pianist was excellent, although I now have no memory of his name or what he played, but part of one piece was very fast, prestissimo, perhaps. At a certain moment a member of the audience who was seated far from the piano, facing the back of the performer and thus able to see the score from which the pianist was playing, stood up. The audience was seated informally in a semicircle, with the piano off center at the front of the room. The person in question walked to the piano, hovered for a few seconds, and then deftly flipped a page of the score for the feverishly pounding musician at just the right moment, and then returned to his seat, almost trance-like. When I remarked to Professor Kuttner afterward, for the page-turner was Stephan Kuttner, that what he did was rather amazing at least to someone who was not a pianist, he smiled that gentle but crafty smile which one often saw when he was pleased and said, 'Well, I thought that he was going to be in trouble'. I relate this story at the beginning because it encapsulates much about how many people perceived Kuttner during the late 1960s at Yale. He was a man of uncommon if not preternatural capabilities, kind and eager to help those in need, possessed of a distracted air when thinking deeply, locked

into what could be described as almost a hypnotic state, and self-effacing about his accomplishments. We'll return to this piano episode later.

During the summer of 1970 a migration was underway from Sterling Memorial Library at Yale to Boalt Hall and the Law School of the University of California in Berkeley. Kuttner was moving from Yale to Berkeley to become Director of the Robbins Collection of Canon Law, and with him went his Institute of Medieval Canon Law and an array of Yale graduate students who were planning to write dissertations under his direction. For the previous six years, from Fall of 1964 through Spring of 1970, he had been the first T. Lawrason Riggs Professor of Roman Catholic Studies in the Dept. of Religious Studies at Yale. Kuttner and his wife, Eva, and several of their nine children, lived in New Haven for about six years. This is approximately the same length of time that Eva and he lived in Rome after leaving Germany in 1933 before eventually immigrating to the United States in 1940. But it is only about a quarter as long as the 24 years the Kuttners lived in Washington, DC, from 1940 to 1964, when Kuttner was professor of canon law at the Catholic University of America; and the Yale years also are much briefer than the 26 years the Kuttners lived in Berkeley after 1970.

Kuttner's Yale years constituted a relatively brief period, as just mentioned comparable to the time he spent in Rome after leaving Germany at the start of his career. Those years in the 1930s as a 'scriptor' at the Vatican Library were extraordinarily fruitful for him. They witnessed the development of Kuttner's special relationship with the Biblioteca apostolica, and the publication in *Studi e testi* of both the *Kanonistische Schuldlehre*, and the *Repertorium der Kanonistik*. And to mention only two singular achievements from the 24 years at Catholic University in Washington, D.C., there was the founding of the journal *Traditio* in 1943, and the establishment of the Institute of Medieval Canon Law in 1955.

But with Germany, Rome, and Washington as the past, and with Berkeley as the future, we can look at New Haven and Yale. What would Stephan himself have considered the most important

events of those six years in Connecticut? I never asked him, and even if I had I may well not have gotten an answer that was as clear as hoped. He could be very reserved in response when he had not made up his mind on something, or did not want to have a long discussion. But while this question is simple, the answer probably would not have been. Remembering his Yale years after 1970 must have aroused mixed memories, for those half dozen years included both important accomplishments and personal crises.

The appointment itself to the Riggs chair was not an uncomplicated issue. Eva Kuttner once said that Kuttner deliberated long and hard about whether or not to accept the offer to go to Yale. The first appointee to the Riggs Chair in Roman Catholic Studies at Yale University was considered newsworthy enough to merit an article in *Time* magazine, and Kuttner must have arrived in New Haven with both excitement and also uncertainty. He was leaving a university which had given him a home in 1940 when he badly needed one; and for a scholar whose work centered on medieval canon law, that was a very good home in many ways. Kuttner's scholarly reputation was very secure by 1964. He had been, for example, elected a Fellow of the Medieval Academy of America in 1956, the same year he was awarded a Guggenheim Fellowship. But his was a scholarly reputation based on a subject little studied and thus little understood in North American academe outside of a very limited circle.

The Riggs Chair and Yale would open new professional opportunities for Kuttner, but what might be expected of the occupant of such a chair in a place like Yale? He would have surely wondered about that in 1964, and perhaps when he left New Haven for Berkeley he was aware of the undercurrent of murmuring that had surfaced now and then that he had not been as active a Catholic presence as a professor of Roman Catholic studies should have been. The people who felt that, of course, were hoping for a notable scholar but perhaps also for something of a preacher. They may well have not changed their view when told that in 1965 the Riggs Professor served as Vice-President of the Canon Law Society of America, and founded the series of publications known as the *Monumenta iuris canonici*. In 1965

Yale's Riggs Professor had been appointed a member of the Pontifical Commission of Historical Studies, and in 1967 he was chosen by no less than Pope Paul VI as a consultant to the Pontifical Commission for the Revision of the Roman Catholic Church's *Code of Canon Law*. These appointments, even if they were aware of them, probably did not quiet the grumblers.

But notwithstanding the vagaries of holding a chair of Roman Catholic Studies in a major secular university, the years at Yale also brought Kuttner a serious medical problem, and then toward the end personal tragedy. Early in 1965 he weathered major surgery for lung cancer (he had been a chain smoker of Pall Mall cigarettes). And to say 'he weathered lung cancer' is an understatement. Bear in mind that Kuttner was in his late 50s when the disease struck and cost him two-thirds of one lung, yet he died in Berkeley in 1996, 30 years later, at age 89.

But misfortune during those years was not limited to illness. Early in 1969 the Kuttner family was rocked by the death of Stephan's and Eva's second oldest child, Andrew Kuttner, who was killed in a car accident in Washington. Nothing can compensate for the loss of a child, and no one could downplay the fortitude needed to recover in three months from lung surgery. Without question a strong Catholic faith and the strong bond which existed between the Kuttners helped them to deal with those stunning blows.

The crises, while never forgotten, were balanced in some way by a string of remarkable academic and professional achievements for Kuttner which occurred at the same time. In 1966 he was awarded a second Guggenheim Fellowship, which enabled him to spend several months living in Rome with Eva and their two youngest sons, Francis and Philip, while he worked at the Vatican Library. Between 1964 and 1969, furthermore, Kuttner was elected a fellow of nine academies and learned societies in the US and abroad, and received honorary degrees from universities in Genoa, Milan, and Salamanca.

His scholarly productivity did not slack off in New Haven, for in the 6 years between 1964 and 1970 he published 20 articles (in 4 languages), plus editing the annual volume of *Traditio* and

collaborating on the critical editions being produced for the *Monumenta iuris canonici*. He did this, bear in mind, despite a bout with lung cancer, despite familial tragedy, despite having neither a full-time secretary nor a great amount of research assistance, and while teaching a full-course load in Religious Studies. Gazing back from the distance of many decades, and from one's own crowded academic life, Kuttner's scholarly productivity at Yale is almost unbelievable. One thing is certain: without his wife Eva and the constant buffer which she provided to shield him from everyday concerns, Kuttner's scholarly life would certainly have been markedly different.

What did Stephan Kuttner teach at Yale? He offered a couple of versions of a year-long graduate seminar on the sources of medieval canon law, and a variety of undergraduate classes. Among the latter was a lecture course on the history of the Catholic Church, and seminars on the Ecumenical Councils, and another specifically on Vatican II. But Church councils and Roman Catholic history were as far afield as he was prepared to go from 'canon law', strictly speaking. A couple of graduate students once pondered what we might like Kuttner to teach, and agreed that a graduate seminar on the Gregorian Reform would be great. That was then actually mentioned to him, and he smiled and said, 'But I don't know anything about it'. Such a response probably was his way of saying, 'I don't want to do that'. But I do believe that he could have thought that he did not know enough about the Gregorian Reform to teach a graduate seminar about it. Specifically, he may well have worried that he did not command all aspects of the subject's considerable bibliography.

It is fair to say that Kuttner was not a spellbinding lecturer. His 'Catholic Church' lectures were delivered sitting down, basically reading his notes. But he always had time for questions, answered undergraduate queries with the same thoroughness that he gave to source-based questions from advanced students or from colleagues. His seminars were nothing if not thorough, often more lecture than discussion. There was no syllabus nor was a bibliography distributed, and even few if any specific readings were assignments. Kuttner himself was the bibliography; where he

found the time to devour everything he read was amazing. Students were expected to explore readings in the massive amount of material which he pointed out on a given topic, and eventually to find a subject on which to write a seminar paper. Significant portions of the literature that he cited were to be found easily at hand, gathered on the shelves of the Canon Law Institute in Sterling Library where he had his office and held the seminar.

Kuttner did not lack for students for either graduate or undergraduate courses, in great part because colleagues at Yale such as Roberto Lopez, Jaroslav Pelikan, and George Lindbeck encouraged students to seek him out. And the graduate students who came his way and took his seminar had their eyes opened to new historical possibilities. They were not priests studying canon law in order to be Church administrators, but people in training to be medieval, ecclesiastical, and legal historians. Kuttner's paedagogical style was never flashy, but through his own magisterial absorption of the Latin Church's legal tradition, and his gently encouraging personality, a generation of students at Yale came to see how canon law could help illuminate not only the medieval Church, but also the Church in the Patristic age, Carolingian monasticism, medieval kingship, medieval urban history, and relations between Rome and Byzantium, to list some topics which developed into term papers in Kuttner's seminars.

And Kuttner was accessible. In the years in which the Canon Law Institute was in Sterling Library the door between his personal office and the general working area was seldom if ever closed. Privacy was not a high priority, and people came and went, and phone calls came and went, and if the issue on the phone demanded discretion, Kuttner simply lowered his voice, or spoke another language. Office hours never were posted simply because he was always 'in', from around 9:30 in the morning until about 6:30 at night six days a week, excepting classes, meetings, and lunch, which he often took at a local burger joint in order to get back to the Institute quickly. Isolating himself to pursue his scholarship was not his style. After his surgery sometimes lunch was at home, with a subsequent nap.

Brian Tierney once told a friend that at Catholic University, where Brian had been his assistant, Kuttner was a much more intense and driven man than he was at Yale. Recall the chain smoker. Perhaps the bout with cancer early on at Yale mellowed him. But mellowed or not, it is hard to imagine that Kuttner's devotion to his work was any less all-encompassing at Yale than in earlier years. He came to the Institute six days a week, and simply knew that he would be there tomorrow, and the next day, and the day after that. The research, editing, and proofreading that did not get done today would get done at home that night, or at work tomorrow or the next day. Even when he was making frequent, week-long trips to Rome as part of his work on the Commission for the Revision of the *Code of Canon Law*—'He's in Rome so often', Eva remarked in 1968, 'that he's getting his haircuts there now'—Kuttner routinely returned with information about manuscripts which he had seen at the Vatican or the Biblioteca Vallicelliana, and which he was eager to discuss with others.

This paper is a snapshot. Many important facets of Kuttner's Yale years must be skated over or not mentioned at all. For example, there was Kuttner the devout Christian, Kuttner the musician, Kuttner the gourmet, and Kuttner the swimmer and sunbather. Yes, even in Connecticut, where Hamonnassett Beach was less than an hour away from New Haven, Kuttner enjoyed swimming and sunbathing. But we can return, in conclusion, to the musical episode with which these remarks opened. Thinking about it again after many years does not negate the sense of wonder, but does force forward other thoughts on the matter too. He was an accomplished musician, and did he really believe that a good pianist who obviously had practiced a particular piece required his help flipping a page of a score? Not likely.!

Let me then end with the question posed earlier. What would Kuttner have considered most memorable professionally about his half dozen years at Yale? Admittedly, there is no clear answer, and there were some hefty honors which came his way in this years. But perhaps the chance to teach a group of mainly non-clerical graduate students in a secular university about canon law, and, to

make the case for, as he once wrote, ‘the need and the opportunity’ to study it, would rank highly. In 1964 canon law was largely ‘terra incognita’ in the curricula of American universities. Now, more than half a century later, courses on and around the subject are taught under the rubrics of history, or legal history, or church history. That this is so in North America is in a significant way a legacy of Stephan Kuttner’s years in the United States, including six years in the 1960s spent at Yale.

Columbia University.

Stephan Kuttner: A Remembrance

Stanley Chodorow

As did everyone else in our field of medieval canon law, I read everything Stephan Kuttner wrote from the 1930s to the 1990s. Actually, I read everything at least twice, because when Stephan was assembling the volumes of his collected articles for publication by Variorum Reprints, he called on me to help with the project.

Even before we undertook that effort, I knew that Stephan had never let go of any of his publications. As he continued his work and learn new things, he returned to his earlier work and made notes. On every publication, he had files with corrections and additions carefully noted. When he faced the prospect of reprinting the articles, he and I gathered and organized all those notes and additions and appended them to the volumes. It pleased him greatly to title the additions 'Retractationes', the title of the revisions and reconsiderations that St. Augustine wrote at the end of his life. Stephan was one of those rare people who knew that his work was invaluable and who could not be accused of hubris or excessive self-regard in so thinking.

I began working with Stephan in 1971-1972, during a year I spent on an ACLS Fellowship at the School of Law at Berkeley. Stephan had moved to Berkeley from Yale the year before to become one of two directors of the Robbins Collection, dedicated to research in religious and civil law. David Daube, a renowned scholar of civil and Jewish law, was his co-director. Stephan brought the Institute of Medieval Canon Law with him from Yale; he had founded the Institute at The Catholic University of America in the 1950s, after emigrating from Europe during World War II. I was taking law courses as part of my fellowship, but I spent every available hour in the Institute doing research in the Robbins Collection and learning from Stephan. The relationship we developed during that year led to my assisting him with the Variorum project.

As I learned during that year at Berkeley, Americans did not do their doctoral work under Stephan Kuttner. (Robert Somerville was the only American student who took his doctorate under him.) Rather, those who regarded themselves as studying with Stephan were recent Ph.Ds. That pattern began, so far as I know, with my own mentor, Brian Tierney, who completed his doctorate at Cambridge under Walter Ullmann and then won a position, with Stephan's help, at Catholic University. Brian established the pattern many of us later followed. It was not that we went to study with Stephan at Catholic or Yale or Berkeley, but that we worked in his aura and absorbed his standards by listening to his direct comments, reading his scholarship, and observing him at work. I came to think that a doctoral student was not yet knowledgeable or experienced enough to get what Stephan had to offer, although Somerville's example belies that view. The danger for a doctoral student working with Stephan was that he set such a high standard of knowledge and insight that one could not imagine being able to do scholarship worthy of his example or sit for the exams of the doctoral program with him as one of the examiners. Once one had done all that, one could work with the master.

The experience of working with Stephan was humbling. His scholarship set the standard we all aspired to, and his genius sometimes overwhelmed. It was a common experience to go ask him a question and hear, 'Oh. You asked me that three months ago, and the answer I gave you was . . .'. He was not criticizing you; he was merely stating a fact. By the time I was working with him, he had gotten over any feelings of superiority he might have had as a young man. He just remembered everything and from time to time noted the fact. The most common experience of working in his shop was the feeling that his help and his example made you better at the job. He did not give an impression of a stellar classroom teacher, but he was a marvelous teacher to all of us who were fully committed to our common work.

Working with Stephan was not restricted to the milieu of the university. Stephan brought those who worked with him home, where Eva, whom he married in 1933, welcomed us. In the case of my generation, she welcomed us as additional children; she and

Stephan had had nine. By the time I joined the Kuttner circle, her youngest children had gone off to college. I and my cohort were their welcome surrogates. I often stayed with the Kuttners when I was in Berkeley to do research and always felt myself to be part of the family. The Kuttners had lived an eventful life—marrying in Germany, going into exile in Rome when Hitler came to power, converting to Catholicism, leaving Rome in a hurry, when the independent fascist regime gave way to one under Nazi control, squeaking through Portugal to get to Washington, D.C., where the Catholic University gave Stephan a position in its School of Canon Law. Looking back, I think that what held their lives together through all that was the household that Eva created and maintained as a stable center of their lives. Stephan's scholarship and his role in our field rested on a firm foundation that allowed his genius to flourish.

Stephan was part of the migration of medievalists from fascist Europe who transformed American medieval studies from the 1940s on. Those scholars brought the highest standards of research to our programs and, in many cases, added new subjects to our field. Stephan created medieval canon law studies in America and helped all the scholars who found the subject fascinating to do first-class work.

University of California, San Diego.

Destroyed but not Lost: A Digital Reconstruction of the Chartrain Copy of Burchard's *Liber decretorum* (Chartres BM 161)[1]

Michela Galli and Christof Rolker

Part I: Burchard's Place in the History of Canon Law

The *Liber decretorum* compiled shortly before 1023 by Burchard of Worms (†1025) was the most influential canon law collection of the eleventh century. Bishops, abbots, teachers, and many other prelates valued the *Liber decretorum* as a comprehensive, well-structured canon law collection covering a very wide range of issues; it was copied frequently, and many compilers used Burchard's work as a model for their own canonical collections. Thus, not only are there some 100 medieval copies (or fragments thereof) still extant, but also a large number of other collections drawing on the *Liber decretorum*. Crucially, this group includes the *Decretum* of Ivo of Chartres, which incorporated most of Burchard's *Liber decretorum* and in turn became widely influential both in its own right and via the large number of derivative collections drawing on it.

Via these later collections, the decisions Burchard had made in omitting, retaining, reworking, and arranging his material had a profound impact on medieval and even early modern canon law, if only because material not found in his comprehensive collection had a significantly lower chance of being included in any of the most influential collections of the twelfth century. After all, the *Tripartita* (in part B), the *Panormia*, and the *Decretum Gratiani*

[1] This article grew out of joint research after the authors in July 2021 discovered that they both had begun to study the fragments of Chartres BM 161 and independently of each other had identified most, but not all Burchardian texts. Galli is mainly responsible for Part II, and Rolker for Parts I and IV, while Part III presents the results of our joint research. All references to the Ivonian collections use the forthcoming (2022) version of Martin Brett's editions available at https://ivo-of-chartres.github.io/.

all depend either directly or indirectly on the *Decretum* of Ivo of Chartres mentioned above as an important Burchard derivative.

Yet before the Burchadian material ended up (or not) in the collections of the twelfth century, the *Liber decretorum* already had undergone considerable changes. From early on, the *Liber decretorum* existed in different versions, as Burchard and his collaborators were still making additions and other changes to their work when the collection began to be used outside Worms.[2] As Hoffmann and Pokorny established, the arrangement of canons differs significantly already among the very early copies. In particular, they distinguish two variants of the 'Order of Worms': 'type A' (found only in the Vatican double codex, two Würzburg copies, and the editio princeps), and 'type B', also known as 'Frankfurt' order, which is found in almost all extant copies of the *Liber decretorum*. For the textual history of the collection, special attention has to be paid to the reception of Burchard in northern Italy, as it was here that several distinct versions emerged in the second half of the eleventh century. The most important branch of transmission are the so-called 'deteriores' manuscripts. As Gérard Fransen demonstrated in a number of studies,[3] many copies of the *Liber decretorum* go back directly or indirectly to exemplars which either have a number of distinctive omissions in books 8, 12, 19, and 20, or 'scars' suggesting that these gaps had been mended one way or the other. By 'scars' we refer to all phenomena which can be best explained as the result of adding some or all of

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

[3] Gérard Fransen, 'La tradition manuscrite du Décret de Burchard de Worms: une première orientation', *Ius sacrum. Klaus Mörsdorf zum 60. Geburtstag*, ed. Audomar Scheuermann and Georg May (Munich 1969) 111-118; idem, 'Trois notes', Traditio 26 (1970) 444-447; idem, 'Le manuscrit de Burchard de Worms conservé à la Bibliothèque municipale de Montpellier', *Mélanges Roger Aubenas* (Société d'histoire du droit et des institutions des anciens pays de droit écrit. Recueil de mémoires et travaux 9; Montpellier 1974) 301-311; idem, 'Le Décret de Burchard de Worms: valeur du texte de l'édition: essai de classement des manuscrits', ZRG Kan. Abt. 63 (1977) 1-19; idem, 'Le Décret de Burchard', *Burchard von Worms, Decretorum libri XX [...]. Ergänzter Neudruck der editio princeps Köln 1548*, ed. idem and Theo Kölzer (Aalen 1992) 25-42.

the missing canons from a complete version of the *Liber decretorum*. For example, the missing material may be found in the margin rather than the main text, inserted at the end of the respective book, written by a different hand, and/or the gaps may be commented upon; sometimes, canons were conflated (or mutilated) as a result of the insertion of missing material, or inscriptions became muddled, or the capitulatio was not, or not adequately, brought up to date. As already Fransen observed, some of these features were often preserved, at least in part, when new copies were made from such 'mended' exemplars. For example, the phrase 'hic minus habetur' in several Burchard manuscripts is found in the main text of a canon to which it originally was a marginal comment.[4]

In all probability, the characteristic gaps first occurred with a Burchard manuscript written in or brought to northern Italy in the mid-eleventh century. Indeed, most Burchard copies written in northern Italy display the characteristic 'deteriores' gaps and/or 'scars' in the above sense; vice versa, most extant manuscripts belonging to the 'deteriores' tradition were written in Italy (mostly northern Italy).[5] It is striking that there are 'deteriores' copies written in (or brought to) southern Italy, Aquitaine, and the Iberian Peninsula, but no Burchard manuscript written in Germany displays the 'deteriores' gaps (or scars). The gaps first studied by Fransen therefore can also be used to determine whether a given Burchard manuscript ultimately depends on the 'German' or the 'Italian' branch of the transmission. In France in particular one may assume that both traditions were known at some point, and libraries in possession of more than one copy may thus have ended up with codices of both versions.

[4] Fransen, 'Essai' 9.

[5] In addition to Fransen's articles, see also Hubert Mordek, 'Handschriften-forschungen in Italien, I: Zur Überlieferung des Dekret des Bischofs von Worms', QF 51 (1971) 626-651. All complete Burchard manuscripts Mordek describes belong to the 'deteriores' tradition.

The Chartrain Copy of the Liber decretorum and Ivo's Burchard

Given all this, it should come as no surprise that the only copy of the *Liber decretorum* known to have been at Chartres in the Middle Ages (Chartres BM 161) is of special importance for the history of pre-Gratian canon law. One the one hand, it is an important witness to the reception of the *Liber decretorum* in northern France, and establishing which branch of the transmission it belongs to would help to understand the way Burchard reached this region: was it mainly the 'German' tradition that slowly made its way west, perhaps via Lotharingia? Or were Burchard copies in northern France influenced by the 'Italian' versions which were so influential in Aquitaine? In addition, the question presents itself whether or not Chartres BM 161 was related to or perhaps even identical with the Burchard copy used by Ivo of Chartres. This in turn would allow one to better understand the legal thought of Ivo: how did he, in detail, treat one of his most important formal sources? What did he leave out (and why), for which canons did he turn to Burchard (or not), and did Ivo always preserve the texts he found in his copy of the *Liber decretorum*?

Unfortunately for such an enterprise, Chartres BM 161 was largely destroyed in the devastating fire after the air raid of 26 May 1944. To establish which version(s) of the *Liber decretorum* Ivo used to produce his own collection, scholars therefore have turned to Ivo's *Decretum*, a way of enterprise that only became feasible with the editorial work of Martin Brett.[6] Other studies into the textual transmission of individual texts likewise have shed light on the relation between Ivo's collection and different versions of the *Liber decretorum*. Fransen was the first to highlight that Ivo's *Decretum* contained an augmented form of Burchard 1.21 (beginning 'Cavendum est summopere') first found in Milano, Ambrosiana, E.144.sup.; he later identified this augmented canon

[6] See in particular Brett's concordance tables available at https://ivo-of-chartres.github.io/ as part of his edition of Ivo's *Decretum*; in addition, see Christof Rolker, *Canon Law and the Letters of Ivo of Chartres* (Cambridge Studies in Medieval Life and Thought, Fourth Series 76; Cambridge 2010) esp. 109-112.

as one of the characteristics of an Italian Burchard version he dubbed 'recension grégorienne'.[7] Pokorny, in contrast, seems to have assumed that the Chartrain Burchard copy contained the 'German' version of the *Liber decretorum*, perhaps because he was aware that Ivo must have had access to a complete version of Burchard.[8] Fowler-Magerl expanded Fransen's argument, highlighting that Ivo's Burchard indeed must have contained other 'Italian' elements but not the 'deteriores' gaps; she proposed that Ivo used both an Italian version of the *Liber decretorum* (perhaps similar to Milano, Ambrosiana, E.144.sup.) and a complete, 'German' exemplar.[9] Schneider in his study on the synodal orders added to these observations, pointing to the peculiar 'ordo' (his '*Ordo 5*') and other 'Italian' elements in Ivo's *Decretum* which he took as evidence that Ivo was working with a Burchard copy ultimately drawing on an Italian exemplar.[10] Rolker in turn took up Fowler-Magerl's argument and speculated that the combination of both 'Italian' and 'German' features may already have been found in Ivo's exemplar.[11] However, all these speculations on the lost Burchard manuscript(s) used at Chartres to produce Ivo's *Decretum* could not be matched with studies on Chartres BM 161. After the war, fragments of the Chartrain manuscripts including Chartres BM 161 were brought to Paris; a 1962 survey gave a grim impression of the state of the surviving manuscripts.[12] Yet in 2005,

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[7] Fransen, 'Montpellier' 306 and idem, 'Essai' 6; idem, 'Décret' 38.

[8] Pokorny in Kéry 136.

[9] Linda Fowler-Magerl, 'Fine Distinctions and the Transmission of Texts', ZRG Kan. Abt. 83 (1997) 146-186 at 149: 'This augmented form of the *Liber decretorum* was used . . . by Ivo of Chartres in the 1090s, who, however, must have had access to more than one copy of the *Liber decretorum*, because his *Decretum* does not have the gaps characteristic of the deterior group'.

[10] Herbert Schneider, 'Einleitung', *Die Konzilsordines des Früh- und Hochmittelalters*, ed. idem (MGH. Ordines de celebrando concilio; Hannover 1996) 1-124.

[11] See Rolker, *Canon Law* 112, arguing that 'is also possible that Ivo's model had already combined these features. If Ivo used only one Burchard copy, it was a complete version augmented with the Italian additions described above'. Fowler 197 likewise accepted that Ivo may have used a 'mixed version'.

[12] *Manuscrits des bibliothèques sinistrées de 1940 à 1944* (Catalogue général 53; Paris 1962). See also Fransen, 'Trois notes' 446 for a brief mention.

the Institut de recherche et d'histoire des textes (IRHT) began to restore, digitize, and analyse the fragments from Chartres, and since 2011 has put more and more materials online allowing scholars to identify the parts that are more or less legible.[13]

Part II: Paleographical Analysis

Codex 161 (old shelfmark 154) of the Bibliothèque municipale of Chartres has not attracted much scholarly attention in the older literature; we are largely left with the brief notes in the catalogues.[14] According to Omont, the manuscript had 169 folios but was incomplete ('la fin manque'), and the collection contained a preface and a table of contents (capitulationes) at the end. While the 1840 catalogue gave the date 'saec. xi', Omont held it was written in the twelfth century. Post-war scholarship could no longer work with the original, and likewise was divided concerning the date.[15]

Codicological note

Chartres BM 161 is a fragmentary parchment codex of today about 370x292 mm, a measurement taken from fol.32, one of the best preserved folios. One would assume that it originally was even larger before it shrunk in the heat of the 1944 fire, but in fact

[13] For the project, see Claudia Rabel, 'A Virtual Renaissance for the Manuscripts of Chartres Damaged During World War II', *What Do We Lose When We Lose a Library? Proceedings of the Conference Held at the KU Leuven 9-11 September 2015*, ed. Mel Collier (Leuven 2016) 161-166 and https://www.manuscrits-de-chartres.fr/.

[14] *Catalogue des manuscrits de la bibliothèque de la ville de Chartres* (Chartres 1840); Henri Auguste Omont in *Catalogue générale* 11 (1890) 84. The earliest reference to Chartres BM 161 may be the list of manuscripts seen by Pierre Pithou in 1579 in the library of the Chapter of Chartres Cathedral, extant in Paris BNF Dupuy 673 fol.35r; before 1594, this list was copied by Augustin Dupuy in the same manuscript at fol.133v. Two other seventeenth-century catalogues also mention it: Paris Bibliothèque de l'Arsenal 4630 fol.225r (by Le Tonnelier, who dated Chartres BM 161 to the twelfth century) and Paris BNF français 20842 fol.121-1r (where it was dated to the eleventh century). Subsequent catalogues include Chartres BM 1171 and the 1816 catalogue by Charles Claude François Hérisson extant in Chartres BM 1715.

[15] Pokorny in Kéry 136; the new online catalogue at https://www.manuscrits-de-chartres.fr/fr/manuscrits/chartres-bm-ms-161 dated it 'saec. xii1/2' but by now (autumn 2021) 'XIIe s. (début ou 1er quart)'.

Omont in the 1890 catalogue gave precisely the same measures. Given the presence of the holes in the outermost part of folios for the rulings and that in the lower margin one can find the fascicule number, the codex was trimmed only moderately. As already mentioned, according to Omont it must have consisted of 169 folios, but the current state of preservation does not allow verification. The 1944 fire has destroyed some folios completely, while others have survived as fragments of different size, many of them bearing traces of fire and heat. In particular, both the first part (fol.1-13) and the last (unquantifiable folios, the last folio with a numbering considered certain after the recent reordering is fol.135) are lost completely, as is the binding (made of parchment according to Omont). All in all, there are 156 extant fragments, some being fragments of the same folio. Some of the best preserved folios have a modern foliation in pencil, in arabic numerals, in the upper right corner of the recto. According to our reconstruction of the codex, there was no folio 55, due to an error in numbering.

The fragments contain parts, however small, of all twenty books of the *Liber decretorum*. The first canon that can be identified is Burchard 1.128 (fol.14rb), the last is Burchard 20.90. Only three small fragments have survived from the capitulatio (found at the very end of the codex according to Omont). In general, books one, nineteen, and twenty have suffered the heaviest loss. The other books are more or less extensively damaged; all folios are burnt at least in the margins, some reduced to fragments, and the heat has dissolved much of the black ink of the main text. The green ink that was used to alternate the rubricated initials in red is likewise lost almost completely; blue ink was used only rarely but occasionally is preserved.[16] On the other hand, the two-tone red ink used for the chapter headings and rubricated initials has survived surprisingly well; often, the rubrics are the only hints that allow us to identify the fragments.

Given the state of preservation of the fragments, it is not possible to reconstruct the composition of the quires. Only one

[16] On the initials see Yves Delaporte, *Les manuscrits enluminés de la Bibliothèque de Chartres* (Chartres 1929) 23.

clearly visible numbering can be found in a small fragment belonging to book 19 (fragment 37) 'XVIIII' in the lower margin; in the same position on fol.32v, although the ink has disappeared, it is possible to see the numbering 'IIII'.

The dry point scoring is clearly visible and there are an average of 39 lines per page (e.g. fol.26r and 36r). The writing, a small-format praegothica (with letters of approximately 3-4 mm), is arranged in two columns and begins above the first line. The mirror of writing is 95x259mm per column and the intercolumn is 16mm. The pagination appears to be regular, with wide lower and outer margins, almost never occupied by annotations, corrections, or nota signs.

Unusually for a *Liber decretorum* copy, the appearance of the codex is that of a luxury copy, with large ornate initials at the beginning of all twenty books, rubricated initials for each canon, and the near absence of annotations. This suggests that Chartres BM 161 may have been a copy not for consultation and active study or use, but rather display; the illuminated decoration certainly is among the finest to be found among all extant Burchard manuscripts.

One can recognise the presence of at least three hands in Chartres BM 161: the hand of the copyist of the text, apparently the same one that filled in most of the inscriptions, the hand of a rubricator who uses a few different motifs from the previous one (serif at the base of r, forked ascenders instead of spatula-shaped) and a hand that, in brown ink, occasionally corrects the main text. All three hands use a praegothica, the characteristics of which, as we shall see, suggest that it may have been written in the first half of the twelfth century.

Palaeographic note on the text

The praegothica of the Chartrain codex is a laid script, drawn by a very skilled copyist, who was able to trace the letters quickly using some ligature elements, mostly with a right-handed cursus. There are, however, letters drawn with a left-handed cursus, such as lowercase b and upper case Q. Ascenders end with a spatula and sometimes with a thin and light fillet (hairline). The ductus is sharp

and not very broken, with the single strokes clearly identifiable. The writing is very legible and rather rounded.

Let us analyse the writing in more detail, letter by letter. There are several letters that tend to make ligatures, among them the letter a, drawn in two strokes: the first stroke in the shape of a '2' is often bound to the left with the previous letter, the second, vertical, tends not to make ligatures to the right. The letter d takes the two forms of uncial d, drawn in one stroke, or of straight d, drawn in two strokes. The forms are used apparently indiscriminately; both are often found closely together and Meyer's third rule is not respected.[17] The letter e is drawn in one or two strokes. To draw the letter e in one time, the copyist used a fluid right-handed movement that starts at the bottom, traces the curve and then closes from above with a more or less oblique stroke that is always in conjunction with the letter that follows. The hatching can be broken into two times with a first curvilinear stroke and a second oblique stroke to form the loop. In the case of ę, sometimes the cauda is nothing more than the extension of the stroke that forms the loop of e, sometimes it is added to complete the letter drawn at one time. The letter f is drawn in two strokes, with a cross-stroke that can bind to the right. The letter g has an open lower loop and is completed by an upper right-hand hyphen that can bind with the following letter. The ascenders of b, straight d, h, and l are high on the headline and usually end in a spatula. The letter r is usually straight and lowercase, tending to link the first vertical stroke with the preceding letter and the second horizontal and wavy stroke to the right. There are very few examples where r takes the form of a '2' after a letter with a convex curve to the right, but it is usually reserved for the abbreviation '-rum' that can be fairly broad and sometimes ends with a loop. The letter s is found in two forms: normally it is straight at the beginning, in the middle, and at the end of words; however, occasionally its round form is used at the end of words. The letter t is lowercase, sickle-shaped, written in two strokes and with the headstroke that can ligate either to the right or to the left. The ligatures st and ct are standardised. The

[17] See Wilhelm Meyer, *Die Buchstaben-Verbindungen der sogenannten gothischen Schrift* (Abh. Akad. Göttingen N.S. 1.6; Berlin 1897).

letter y has the typical dot-shaped apex. One frequently finds the ampersand ('&') and occasionally the Tironian '7' (uncrossed, with a relatively long and wavy horizontal bar) both for 'et' as a separate word and sometimes in 'etiam', but not when et formed part of other words like 'habet'. Abbreviations are not overly frequent and the copyist often decides not to use them; if they are used they comform to canonical usage.[18]

What, then, allows us to place the copy in the first half, or even hypothetically in the first quarter, of the twelfth century from a palaeographical point of view? The twelfth century is a time of great cultural changes: from the point of view of writing, the Caroline script, which between the ninth and eleventh centuries had become a common script throughout Europe, stiffens into various forms of praegothica and new letterforms begin to develop, even if not always adopted in a consistent way, beginning to move towards what is properly called 'Gothic style'. Typical of the twelfth rather than the eleventh century are the alternations between the two forms of letter d, s, and r respectively. The use of the round form of s at the end of a word and the round r in the form of a '2' after a convex curve to the right in Chartres BM 161 is only hinted at, imprecise, and rare. More frequent is the alternation of straight and oncial d, but not used according to the rule that would have oncial d after letters with a rounded body and straight d after straight letters. The lower left leg of the letter x is often well below the line, another feature pointing to the twelfth century. The diphthong ae can be represented by ę (e.g. in 'hęc'); actual ae is very rare. Likewise, diphthong oe is often, but not always represented by ę (e.g. 'pęnitentia' and 'cęlum'). Occasionally, especially with Greek loanwords, we find ę for simple e (e.g. 'ęcclesia' and 'ęlemosina', but also 'ęterna').

Not only do we find ourselves at the beginning of Gothic typification, but there are also a number of features missing that could shift the temporal location of Chartres BM 161 beyond the middle of the century: the strongly broken hatching, the blending

[18] On the 'canonical' meaning, see Guglielmo Cavallo, 'Fenomenologia "libraria" della maiuscola greca: stile, canone, mimesi grafica', *Bulletin of the Institute of Classical Studies* 19 (1972) 131-140.

of convex curves, the narrow and tight appearance of the script, the frequent use of abbreviations, in particular *'con-' / 'cum' in* Tironian notation and *quia* in the form of 'q_2', normal from 1150 onwards.[19]

A note on decoration

As mentioned above, the decorative apparatus of the codex is among the most beautiful in a manuscript of the *Liber decretorum* and it clearly demands some attention, not least because it contributes to the dating of the codex. In general and for every book, the decoration of the manuscript consists of:

1. a large letter decorated with different motifs at the beginning of each book;
2. the *incipit* of each book alternating in red, blue, and green ink (with the latter having been lost due to the heat);
3. the rubrics to individual canons;
4. initial letters for each canon alternately in red and green ink (the latter again mostly lost), with a large variety of shapes for individual letters.

Most books begin on a recto, and sometimes space was left empty at the end of the preceding book. In more detail, books 2, 3, and 11 all have the inital letter in the upper part of the first column on a new recto, with some lines left empty after the last canon of the preceding book, and also the book title (in red) already written on the same verso. The title is invariably written in small rustic capital letters in red ink. The most prominent marker of the beginning of a new book is the very large ornate initial letter of the opening canon. For no less than eighteen books, these initials are damaged but still largely intact;[20] only the initials of the first and the last book are lost completely. According to Delaporte, the initial to book twenty was found on fol.157r, but in fact it is extant on fragment 59, a verso.[21] Thanks to a photograph taken before 1944 in black and white, as we have already seen, we also know the

[19] See Armando Petrucci, *Breve storia della scrittura latina* (Rome 1992) 131-132.

[20] Chartres BM 161 fol.25r, 40r, 60v, 68r, 72r, 77r, 80r, 86v, 92r, 100v, 108r, 111r, 112v, 114r, 119v, 123v, 130r, and 132v.

[21] See below for the opening page of book 20.

initial B at the beginning of the manuscript. Some of these initials are partially zoomorphic, others are carved out and all are decorated, at least in part, with plant motifs. All the letters, with the exception of the initial N of book 14 (fol.112v), are filled in with blue, yellow and red ink.[22] These initials are no less than seven lines high; they are followed by the opening words of the first canon in large capital letters alternating line by line, word by word or letter by letter in red, blue, and apparently green ink (the latter being completely lost to the heat).

All books are composed of canons, with each canon being introduced by a rubric, an inscription (in smaller writing) and a decorated initial. Between the inscription and the body of the canon there often is a paragraph sign in red ink. The initials alternate between red and green ink; sometimes the red used for the rubric differs from that used for the initials. One exception is the letter at the beginning of *Ordo 5* (see below) on fol.60r, which is in black ink with a red filigree. Very occasionally, red initials are used within the main text of canons.

Some of these initials stylistically resemble eleventh-century codices, such as furred letters and dotted letters, but other letters are decorated with red filigrees, very simple but suggesting a later, twelfth-century date. Several initials deserve special attention, such as the presence of the initial A in book 2 (e.g. fol.28v and 36v) and book 9 (fol.91r-91rv) the shape of which is very close to that typical of Le Bec's scriptorium (see e.g. Cambridge UL B.16.44 and Paris BNF lat. 12211); the Q with the normally descending stroke inscribed in the body of the letter; letters which have a small trefoil at the end of their strokes; the presence of an inverted Z-shaped S (fol.100r).

The manuscript seems to have been decorated in Chartres. For Yves Delaporte its decoration was somehow reminiscent of that of Chartres BM 151, a manuscript from Saint-Père-en-Vallée in Chartres (destroyed, no known reproduction), and he dated both

[22] The illuminator of this letter is not the same as for the others according to Claudia Rabel. See the description of the manuscript online at the Bibliothèque de Chartres website for a more detailed description of the decoration at https://www.manuscrits-de-chartres.fr/fr/manuscrits/chartres-bm-ms-161.

codices to the first half of the 12th century; according to François Avril, the decoration in Chartres BM 161 shows influences from Normandy, like that in other manuscripts written at Saint-Père-en-Vallée around the year 1100.[23]

Part III: Identification of the Texts

Let us now consider the elements that make it possible to distinguish which version of Burchard's *Liber decretorum* Chartres BM 161 contains. First of all a practical question: how did we proceed?

We have analysed the manuscript from its digitisation. As part of the project to reconstruct the damaged manuscripts of the Bibliothèque Municipale of Chartres, the IRHT is using the International Image Interoperability Framework (IIIF) standard. IIIF is a protocol for viewing, annotating, sharing, and manipulating very high definition images, and in particular it supports the use of photoediting and zooming tools. These tools turned out to be advantageous for our study of the badly damaged fragments. The lack of page-specific, persistent identifiers (e.g. stable URLs) in turn has sometimes made it difficult to study, discuss, and quote individual fragments.

The text, as far as it was legible, was checked against the editio princeps of the *Liber decretorum* edited by Bartoldus de Questenburgh, printed in Cologne by Melchior de Neuss in 1548.[24] Brett's edition of Ivo's *Decretum* has been used to check possible links to the Burchard copy (or copies) used by Ivo and his collaborators. Special attention has been paid to all features identified by Fransen and others to be indicative of the various versions of Burchard's collection ('German' vs. 'Italian', 'Milan', 'Gregorian' etc.). For all these steps, the *Clavis canonum* database has been invaluable; even very fragmentary material could often

[23] Delaporte, *Manuscrits enluminés* 24; François Avril, 'Notes sur quelques manuscrits bénédictins normands du XI[e] et du XII[e] siècle (suite)', *Mélanges d'archéologie et d'histoire de l'École française de Rome* 77 (1965) 209-248 at 245-246.

[24] For the editio princeps (quoted simply as 'ed. pr.' in the following), we have used both the 1992 reprint (above, n. 2) and the digitized version of the Munich exemplar (urn:nbn:de:bvb:12-bsb10148587-8).

be identified with the help of the *Clavis*, and the transmission of individual canons established swiftly.[25] In the absence of a critical edition of the *Liber decretorum*, the texts found in Chartres BM 161 have been compared to those of a number of digitized copies of Burchard. In addition to the editio princeps, the Vatican double codex and the copies at Bamberg, Frankfurt, and Freiburg have been chosen to represent the 'German' tradition; the latter three codices are among the oldest copies of the vulgate or 'Frankfurt' version of the *Liber decretorum* (also known as 'Konstanzer Ordnung' of 'Order of Worms, type B').[26] As for the Italian branch of the transmission, two Vatican codices (Vat. lat. 1355 and Urb. lat. 180), the Milan copy (Milan Ambrosiana E.144.sup.), and the Novara copy (Novara BC XXVIII) have been studied to establish any similarities of Chartres BM 161 to the 'Italian' branches of the transmission of Burchard. Given the complexities of the numerous Italian Burchard versions, we often had to rely on scholarly literature in addition to manuscript evidence for this part of the analysis.[27]

As a result, we reconstructed the original arrangement of the fragments, and made a number of observations concerning the relation between Chartres BM 161, other *Liber decretorum* copies, and Ivo's *Decretum*. The results of our study have informed the presentation of the digitized fragments on the IRHT site.[28] All digital resources used in the context of this study (and also the

[25] We have used both the 2005 version (now 'legacy search') and the new search function now available at https://beta.mgh.de/databases/clavis/db/.

[26] BAV Pal. lat. 585/586 (https://digi.vatlib.it/view/ MSS_Pal.lat.585); Bamberg SB Msc.Can.6. (urn:nbn:de:bvb:12-sbb00000072-2); Frankfurt UB Ms. Barth. 50 (urn:nbn:de:hebis:30:2-12488); Freiburg UB Hs. 7. (http://dl. ub.uni-freiburg.de/diglit/decretorum1034). In the following, these manuscripts are quoted by their current location only, except for the BAV manuscripts which are quoted by their shelf marks.

[27] Milano Biblioteca Ambrosiana E.144.sup.:
(http://213.21.172.25/0b02da8280193b38); Novara Biblioteca capitolare di Santa Maria XXVIII (not digitized); Urb. lat. 180:
(https://digi.vatlib.it/view/MSS_Urb.lat.180); Vat. lat. 1355:
(https://digi.vatlib.it/view/MSS_Vat.lat.1355). See last note.

[28] Our thanks are to Dr Claudia Rabel of the IRHT. See the documentation at at https://www.manuscrits-de-chartres.fr/fr/manuscrits/chartres-bm-ms-161.

respective IRHT site) have been captured and saved using the Internet Archive to spare other scholars the painful experience of link rot.[29]

Book 1

Unfortunately, the first half or so of book one is destroyed; the first text that can be identified with certainty is Burchard 1.129 on fol.14r. Thus, one cannot check whether Burchard 1.21 was augmented or not, and what Burchard 1.112 and 121 looked like.[30] The only evidence for the first part of Chartres BM 161 apart from descriptions of the codex therefore is a pre-1944 photograph of the upper part of the opening page.[31] The page is mostly covered by a giant initial, 15 lines high and leaving little space for the rest of the first word of Burchard's prologue. The fact that Burchard's name is spelled 'Broc<a>rdus' here may already hint at an Italian origin of the exemplar from which Chartres BM 161 was copied, but otherwise very little can be derived from this photograph.[32]

Beginning of book 2

Two fragments survive of fol.25, the beginning of book 2 of Burchard's *Liber decretorum*. The recto side contains Burchard 2.1-5 and the beginning of Burchard 2.6; the verso side has the end of this canon, followed by Burchard 2.7-9, 10-11 (with only the rubrics legible), 12, 13 (badly damaged), 14, 15 (rubric only), 16 (?), 17 (?), 18 (rubric); the second, rather small fragment contains parts of Burchard 2.18, 23, and 19 (in this sequence). On fol.26r, we find the end of Burchard 2.19, followed by Burchard 2.20-22 and 24-26. So Chartres BM 161 seems to have contained a version where canon 23 of the second book was displaced (Burchard 2.18,

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[29] See the Wayback Machine at https://archive.org/web/.

[30] On these canons, see Fransen, 'Décret' 38-39 and Fowler-Magerl, 'Fine Distinctions' 147-148.

[31] The original is preserved in the BM Chartres; for a digital image see: https://bvmm.irht.cnrs.fr/consult/consult.php?reproductionId=20000.

[32] See, for example, Urb. lat. 180 fol.2ra for 'Brocardus' in Italian manuscripts. Pierre Pithou noted this spelling for the Chartrain codex, too. See Pierre Pithou, 'Appendix: Synopseos historicae virorum clarorum, qui praeter Gratianum canones et decreta ecclesiastica collegerunt', *Corpus iuris canonici Gregorii XIII. pontificis maximi auctoritate post emendationem absolutam*, ed. Justus Henning Böhmer (2 vols. Magdeburg 1747) 1.1237-1242 at 1239.

23, 19-22, 24); this corresponds to the order found in some Italian Burchard copies and also in Ivo's *Decretum*.[33] In other words, Chartres BM 161 seems to belong to the same Italian branch of the transmission which also was used for the making of Ivo's collection. According to Fransen, the transposition of Burchard 2.23 belongs to the features of the 'tradition la plus récente' found in more than half of the extant manuscripts.[34]

Minor variants in Burchard 2.154-155

Burchard 2.154 in Chartres BM 161 towards the end of the canon reads 'scandalizat<us est> in Deum' like Ivo and the Italian manuscripts instead of 'est scandalizatus in Deum' like the German Burchard copies.[35] The rubric to the next canon reads:

> Ut singuli presbiteri singulis annis episcopo suo de ministerio rationem reddant

and the canon begins 'Unusquisque presbiter' instead of 'Ut unusquisque presbiter'.

This is another canon where Chartres BM 161 seems to be slightly closer to Ivo's *Decretum* rather than many Burchard manuscripts.[36]

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[33] Pal. lat. 585 fol.116ra-117va, ed. pr. fol.56r-56v, Bamberg fol.57r, Frankfurt fol.51r, Freiburg fol.55r, and also Milan fol.35v all contain Burchard 2.18-24 in this sequence. In contrast, Novara fol.32v, Vat. lat. 1355 fol.51v, and Urb. lat. 180 fol.57v have the 'Italian' order (Burchard 2.18, 23, 19) also found in Ivo 6.37-39 (ed. Brett).

[34] Fransen, 'Montpellier' 301 and 307.

[35] Chartres BM 161 fol.34va. The ed. pr. fol.47ra; Pal. lat. 585 fol.143va; Bamberg fol.70rb; Frankfurt fol.64rb; Freiburg fol.68rb all have 'scandalizatus est'. Milan fol.44r, Novara fol.41r, Vat. lat. 1355 fol.66r, Urb. lat. 180 fol.71v, and Ivo 6.245 (ed. Brett) all have 'est scandalizatus'. Note that the canon is displaced in Urb. lat. 180 and Novara.

[36] Pal. lat. 585 fol.143va; ed. pr. fol.47rb; Bamberg fol.70va; Frankfurt fol.46va; Freiburg fol.68rb all have 'suo episcopo' and 'ministerio suo'. The rubric Ivo 6.246 (ed. Brett) has 'suo episcopo' like Chartres BM 161 but also adds another 'suo' after 'ministerio'. The canon in Chartres BM 161 begins 'Unusquisque presbiter' like Ivo 6.246. Pal. lat. 585 fol.143va; ed. pr. fol.47rb; Bamberg fol.70va; Frankfurt fol.46va; Freiburg fol.68rb all begin 'Ut unusquisque'. The inscription is 'Ex concilio Magontiensi a Riculfo eiusdem sedis archiepiscopo habito, cap. Iii.' as in all Burchard manuscripts (only Ivo has 'cap.ii.').

Additions after Burchard 2.118 and muddled rubrics

Chartres BM 161 fol.32v contains Burchard 2.118, followed by four additional canons not normally found in the *Liber decretorum*. As two of these texts are exceedingly rare material and provide important evidence for the genesis of Ivo's *Decretum*, let us look at fol.32v in some detail. It begins with the rubric of Burchard 2.118, the respective inscription, and the canon itself. The text is very legible; a small variant links Chartres BM 161 to Ivo's *Decretum*: both in mid-canon have 'cotidiani' where most Burchard copies read 'cottidianis'.[37]

The next canon (Burchard 2.118A) is a long excerpt from Pope Siricius' famous decretal JK 255.[38] In Chartres BM 161, it begins:

> De sanctitate vitae clericorum. Siricius papa ca<p. VII> de Calcidonense concilio. Plurimos Christi <sacerdotes a>tque levitas post longua consecr<ratione>s sue tempora

Excerpts from JK 255 are fairly common in pre-Gratian canon law collections. For example, many collections including the *Dionysiana* and the *Hispana* contain the complete c.7 (from 'Veniamus' to 'medicinam'), while others like the *Tripartita* only have the middle part (from 'Plurimos sacerdotes Christi' to 'admitti'). In Chartres BM 161, too, the excerpt begins with Plurimos, but the parallel to most other collections (and the original text of JK 255) ends after a few lines.[39] After this, the canon has a sentence (beginning 'Sed illi per success<ionem>') manifestly not taken from JK 255, and in the following presents more a paraphrase than a quotation of JK 255. Chartres BM 161 here does not seem to follow any major collection like the *Dionysiana* or Pseudo-Isidore. However, as far as the text is

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[37] Ivo 6.194 (ed. Brett). Burchard 2.118 as found in Pal. lat. 585 fol.138rb; ed. pr. fol.45ra; Bamberg fol.67vb; Frankfurt fol.61vb; Freiburg fol.65va all have 'cottidianis' (or 'quotidianis' in case of the ed. pr.).

[38] For an edition, see Klaus Zechiel-Eckes, *Die erste Dekretale: Der Brief Papst Siricius' an Bischof Himerius von Tarragona vom Jahr 385 (JK 255): Aus dem Nachlass herausgegeben von Detlev Jasper* (MGH. Studien und Texte 55; Hannover 2013).

[39] Chartres BM 161 fol.32v: 'ac ministris generandi <facultas legitur attrib>uta'. See JK 255, ed. Zechiel-Eckes, 96 lines 101-106.

legible in Chartres BM 161, the rest of the column and the first ten lines of the right column correspond perfectly to the heavily abbreviated version of JK 255 found in the collection of Abbo of Fleury.[40] Compared to Abbo, Chartres BM 161 seems to have had a slightly longer version of the text. The parallel to Abbo's text ends in line ten ('sive sit episcopus sive'), after which the canon has another five and a half lines apparently not taken from JK 255 and having no parallel to other collections known to contain JK 255 excerpts:

> <h>uic decreto obvia<m> †…†
> <d>istricte interdict†…†
> ana<t>hematis iugula†…†
> ma<rana>tha; A cunctis†…†
> <aeq?> †…†st.

No ready explanation is at hand on how to explain the parallel between Abbo's collection, which has no known influence on other pre-Gratian canon law collections, and Chartres BM 161. Likewise, the reference to Chalcedon in the inscription calls for an explanation.

The next canon in Chartres BM 161 (Burchard 2.118B) is a short excerpt from a letter of St Jerome, and as far as it is legible it corresponds to a canon found also in Gratian:

> Hieronim<us>. Negotiato<rem clericum, et ex inope divitem, ex> ignobili gloriosum, quasi qua<mdam pestem fuge.>

This canon is not normally found in Burchard, and only rarely in pre-Gratian collections.[41] The next canon (Burchard 2.118C) is not very legible, except for its initial (Q) and the rubric: 'De ordinatis si usuras <exe>cuerint'. This very rubric is found in Ivo's *Decretum*, where it introduces a spurious canon attributed to Jerome (Ivo 6.194A); crucially, this canon in Ivo is found immediately after Burchard 2.118. The text in Chartres BM 161, supplied from Ivo's *Decretum*, reads as follows:

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[40] Abbo of Fleury, *Collectio canonum* c.39 (PL 139.495-496). See Franck Roumy, 'Remarques sur l'œuvre canonique d'Abbon de Fleury', *Abbon, un abbé de l'an mil*, ed. Anne Dufour and Gilette Labory (Bibliothèque d'histoire culturelle du Moyen Âge 6; Leuven 2008) 311-342 esp. 338.

[41] According to the *Clavis* database, only 3L and 10P have it, both in the form also found in Gratian D.88 c.9; the Vienna 7L has a variant (longer?) version. The material source is Jerome, ep. 52.5 (ed. Hilberg CSEL 54.422).

Q<uos in> ecclesiast<ico ordine videris usurarios,>
adulteros, <concubinarios et ad cumulandam>
mammo<ne pecuniam semper intentos, velut>
<h>ereticos devita. Si <presbiter est, corpus et>
<sanguinem Domini> illum tractando <non audieris,>
<sed etiam tractare> non permiseris.

The loss of text is considerable, but the legible parts perfectly fit the text as found in Ivo. The parallel to Ivo continues with Burchard 2.118D; again, much has to be supplied from Ivo's *Decretum*, but the legible parts again match Ivo's text:

I<dem?>. De ea<dem re>
N<on potestis, inquit Deus veritas, Deo servire et>
mammone. Cui ergo servit qui mammone
<serv>it? Vis audire cui<? Idolorum culture.
Audi aposto>lum: Avarus, quod <est idolorum servitus,>
non <habet here>dit<atem in regno Christi et Dei.
Qui ergo propter suam aviditatem perdit regnum
Dei, et efficitur idolatra potest dici Christicola? Non
colit Christum, non sacrat corpus suum nec Christus
per ipsum. Quid ergo? Iudicium et suam condemnationem
tractat, non solum dico sibi sed et tibi, si sibi
consentiens extiteris.>

After these two spurious canons, which have no known parallel in pre-Gratian canon law except for Ivo's *Decretum*, Chartres BM 161 fol.32v-33r continues with Burchard 2.119-127. However, presumably as a direct result of the addition of the material just quoted, the rubrics are out of order, as the following table shows:

Canon number and rubric in Burchard (ed. pr.)	Rubric in Chartres 161	Canon number and rubric in Ivo
118 De ordinatis [...] furto	De ordinatis [...] furto	194 De ordinatis [...] furto
[118A]	De sanctitate vitae clericorum	[See Ivo 6.50]
[118B]	[No rubric]	-
[118C]	De ordinatis si usuras exercuerint	194A De ordinatis si usuras exercuerint [canon in PVE only]
[118D]	De eadem re	194B De eadem re [canon in PVE only]
119 De ordinatis si usuras exercuerint	De †…†	195 De eadem re
120 De eadem re	De eodem	196 De eodem
121 De eadem re	De eodem	-
122 De eadem re	Item de eadem	197 [no rubric]
123 De eadem re	Item de usurariis	197A Item de usurariis [canon in PVB only]
124 De eadem re	Quid sit usura	198 Quid sit usura PVBD / De eadem re CRH
125 Item de usurariis	De eadem re	199 De eadem re
126 Quid sit usura	De eadem re	200 De eadem re PVBD / Quid sit usura CRM
127 De eadem re	De eadem re	201 De eadem re

The rubric to Burchard 2.118A apparently was taken from the source that also supplied the canon itself; at least it is the same also found in Abbo's collection. Burchard 2.118C, however, in Chartres BM 161 was given the rubric of Burchard 2.119, and the rubrics to the next eight canons are similarly 'displaced'. Only from Burchard 2.127 on, Chartres BM 161 again has the normal rubrics. What is striking is that in Ivo's *Decretum*, the rubrics are likewise confused for the same canons, which are part of a very long series of Burchard canons.[42] This very strongly suggests that Ivo for this part of his *Decretum* relied on a Burchard exemplar very similar to Chartres BM 161, from which it copied two 'additional' canons (= Burchard 2.118C-D) and all the confused rubrics along with the more standard Burchardian material. The link is even stronger if we take into account that the two texts have no known transmission in any pre-Gratian canon law collection.[43] In fact, the only other known transmission is a twelfth-century manuscript today in Amiens, a miscellany containing letter sand tracts by Anselm of Laon, Odo of Cambrai, Fulbert of Chartres, Hildebert of Lavardin, and Ivo of Chartres.[44]

Interestingly, the story does not end here. As Brett's edition shows, Ivo 6.194A-B are found only in two *Decretum* manuscripts, namely Paris BNF lat. 14315 (his P) and Vat. lat. 1357 (his V).[45] Also, P and V have the same (slightly confused) rubrics also found in Chartres 161. While they have the two

[42] Ivo 6.125-310=Burchard 2.24-237 with only a few omissions and no non-Burchardian material except the texts under discussion here.

[43] Ivo 6.194A-B (ed. Brett). Abelard quotes both texts, apparently from Ivo, in *Sic et non* q.120 cc.2-3; see *Peter Abelard, Sic et non: A Critical Edition*, ed. Blanche Beatrice Boyer and Richard Peter McKeon (Chicago-London 1977) 413-414.

[44] Amiens BM Fonds Lescalopier 10 (387) fol.82r. The manuscript is digitized: https://bvmm.irht.cnrs.fr/consult/consult.php?reproductionId=15349. See *Catalogue général* 19 (1893) 466 and Bernard Lambert, *Bibliotheca hieronymiana manuscripta: La tradition manuscrite des œuvres de Saint Jérome* (Instrumenta Patristica et Mediaevalia 4; Den Haag 1859-1972) at vol.4A.3. The manuscript comes from Park Abbey near Leuven according to a note fol.2r; it seems to date from the second half of the twelfth century.

[45] See Brett's edition available at https://ivo-of-chartres.github.io/, here checked against Vat. lat. 1357 fol.114r-114v.

additional canons Burchard 2.118C-D, they both lack a canon found in all Burchard manuscripts checked for this study (Burchard 2.123). The other main branch of the transmission of Ivo's *Decretum*, represented by Brett's manuscripts C and R, has Burchard 2.123 but does not have Burchard 2.118C-D (or any other additional material, for that matter). The rubrics to Burchard 2.124 and 126 in these *Decretum* manuscripts are those found in the editio princeps and many Burchard manuscripts, but in other cases they are still closer to Chartres BM 161 than the editio princeps.

There are at least three possible explanations for these findings. First, Ivo's *Decretum* may have been compiled from a Burchard copy similar to Chartres BM 161, from which the additional canons were copied. In this case, one would have to assume that the exemplar of P and V retained Ivo 6.194A-B while the other manuscripts go back to an exemplar where the additions were deleted (and some rubrics corrected), presumably after comparison of Ivo's *Decretum* to a more standard Burchard copy. A similar process can be observed, for example, in the production of the Novara copy of Burchard's *Liber decretorum*. Here, a later hand marked additional canons for deletion,[46] evidently after having compared the codex to a more standard form of Burchard's collection. This model would also explain why C and R have rubrics (to Ivo 6.195, 196, and 199) closer to Chartres BM 161 than the more standard Burchard copies: they were found in the notional Ur-*Decretum*, and as there was no urgent need to correct them, they were retained.

Another possibility would be that Ivo's *Decretum* originally was compiled from a Burchard copy not containing the additional canons after Burchard 2.118. Later, however, someone compared it to a Burchard copy similar to Chartres BM 161 and inserted the two canons in Ivo's book six. In this model, *Decretum* manuscripts C and R represent the original version of this part of the collection, while P and V go back to an exemplar which was added to somewhat later. Such additions are frequent among manuscripts of

[46] See Novara fol.61rb and 172rb (as mentioned below, notes 61 and 76).

pre-Gratian collections and thus do not demand special explanation. However, adopting this model makes it more difficult to explain why the rubrics to Ivo 6.195, 196, and 199 in manuscripts C and R of Ivo's *Decretum* are so similar to those found in Chartres 161.

A third, and more complex model would assume that the additional canons were inserted into the exemplar of P and V from an unknown source available at Chartres rather than a Burchard copy. The presence of these materials in Chartres BM 161 in this case would have to be explained by the use of both a Burchard copy (not containing the additions) and Ivo's *Decretum* to produce the extant version that can be reconstructed from the extant fragments. However, this suggests that scribe of Chartres BM 161 recognized Ivo's *Decretum* to contain long series of Burchardian material in the first place, and in addition that he chose to use Ivo's collection rather than another copy of Burchard as his source for additional material. This would be a very unusual procedure, and the model would fail to explain why the scribe took so little non-Burchardian material from Ivo, and from which source he took Burchard 2.118A-B not found in any extant manuscript of Ivo's *Decretum*.

Therefore, the last explanation can be dismissed; the parallel between Burchard 2.118-127 as found in Chartres BM 161 and Ivo 6.194-201 is best explained by the availability of a Burchard copy very similar to Chartres BM 161 to Ivo and his collaborators, whether they used this copy from the very beginning, or only later compared an early *Decretum* to this manuscript. This in turn suggests that a Burchard copy very similar to Chartres BM 161 was available at Chartres in the mid-1090s or (if it was used only to supplement Ivo's *Decretum*) not much later; Chartres BM 161 could well have been copied directly from this working manuscript of Ivo and his collaborators. The chronology makes it also tempting to assume that it was Ivo himself who brought the exemplar of Chartres 161 with him from Italy (perhaps when returning from Capua in 1091), but this must remain speculative.

Let us now turn to the other unusual contents of this part of Chartres BM 161. As for the Siricius text (Burchard 2.118A), we

may assume that it was present in a *Liber decretorum* copy available to Ivo and his collaborators at some point. Why, then, was this canon not taken into Ivo's *Decretum*? The answer seems to be that Ivo in his *Decretum* already had a longer, overlapping excerpt from JK 255 which he took from the *Tripartita* (Ivo 6.50=*Tripartita* A1.36.4). The omission of Burchard 2.118A as found in Chartres BM 161 therefore can be explained by the desire of Ivo and his collaborators to avoid internal overlap in his collection. The same holds for the absence of Burchard 2.123 in some manuscripts; it overlaps with Ivo 6.65, a longer excerpt from the same material source Ivo found in the *Tripartita*. Some repetitious canons were dropped very early in the making of Ivo's *Decretum* (and thus found in no extant copy), others apparently only when the respective exemplars of C and R on the one hand and P and V on the other were made.[47] In the case of Burchard 2.118B (likewise found in Chartres BM 161 but not in Ivo's *Decretum*), no such explanation is at hand; it may simply have been too short to be seen as a valuable addition to the rich materials of Burchard's book two.

Variants in Burchard 2.134

Burchard 2.134 prohibits the celibate clergy from attending weddings, lest they be tempted by lascivious songs or dances performed at such occasions. The material source is the Council of Agde (506) but in Burchard and many later collections the canon is misattributed to St Augustine. In the standard form found in many collections, the prohibitions specifically include subdeacons: 'Presbiteri, diaconi, subdiaconi vel deinceps, quibus ducendi uxores non est licitum'. In Chartres BM 161 fol.33v, however, Burchard 2.134 begins 'Presbiteri et diaconi vel deinceps', and the same omission is found in two Italian Burchard copies and Ivo (Ivo 6.208). According to the *Clavis* database, the very same omission is also found in two Italian collections, namely the *Ambrosiana II* and the *Collection in Two Books/Eight*

[47] See Rolker, *Canon Law* 112-113, 173-174, and 258-263 on overlap in Ivo's formal sources not duplicated in the *Decretum* (or only in certain branches of the tradition).

Parts (2L/8P).[48] The *Ambrosiana II* was compiled for use at Milan around 1100; the most recent text is JL 5388, most likely written in the early 1090s. The *Collection in Two Books/Eight Parts* is related to a number of collections compiled in northern Italy in the late eleventh century; Anselm of Lucca, Bonizo of Sutri, and Deusdedit seem to have taken material from this collection which may have been compiled in the 1080s. It may well be possible this version of 'Adge' first originated with Italian Burchard copies, from where it may have entered other collections.

In addition, Chartres BM 161 in mid-canon lacks the phrase 'sacris misteriis deputati' (or 'deputatus'), which is found in all Burchard manuscripts checked so far and also in Ivo.[49] So while the first gap, shared with two Italian collections and at least one Italian Burchard manuscript, links Chartres BM 161 and Ivo, the second gap tells against the idea that Chartres BM 161 was Ivo's only exemplar (or a faithful copy of Ivo's only exemplar).

End of books two and three: Order of Frankfurt

The order of canons in Chartres BM 161 is largely the so-called 'Frankfurter Ordnung' as found in almost all extant copies of the *Liber decretorum* (but not the editio princeps). In particular, the sequence of canons at the end of books two and three corresponds to that found in the Frankfurt and Freiburg manuscripts, not the sequence of Pal. lat. 585 and 586. As the Frankfurt order is found in almost all extant copies, whether 'German' or 'Italian' ones, this finding is not surprising.[50] The relevant passages in Ivo's

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[48] See the *Clavis* database for *Ambrosiana II* (MJ380) and *2L/8P* 6.51 (VB06.051). On the *Ambrosiana II* see Fowler 124; on the other collection, see Christof Rolker, 'Bonizo von Sutri, die "Sammlung in zwei Büchern/acht Teilen" und das Gespenst der gregorianischen Zwischensammlung' BMCL 36 (2019) 55-106.

[49] Pal. lat. 585 fol.140ra, Bamberg fol.68v, Frankfurt fol.62vb, Freiburg fol.66va, Milan fol.42v-43r, and Urb. lat. 180 fol.170ra all mention the 'subdiaconi' at the beginning; they all read 'sacris misteriis deputati', except for Urb. lat. 180, where one reads 'sacris deputatus' [*sic*] instead. Novara fol.40ra also mentions the subdeacons and has 'deputatus' instead of 'deputatis'. Only in Vat. lat. 1355 fol.64r the canon begins 'Presbyteri et diaconi vel deinceps' as in Chartres BM 161 and Ivo 6.208 (ed. Brett).

[50] Chartres BM 161 fol.37r-39v: Burchard 2.226, 234, 227-233, 236, 239; canon 235 is found after Burchard 2.197, while canons 238 and 237 are found after

Decretum contain the Burchardian texts in almost exactly the same sequence.[51] Also, compared to the editio princeps, Chartres BM 161 contained Burchard 4.57-58 in the reverse order, as it is typical of the vulgate (Frankfurt) arrangement of canons.[52]

Addition after 3.15 (Gregory I, JE 1317)

Chartres BM 161 fol.40vb contains an additional canon after Burchard 3.15 (= 3.15A) taken from a letter of Gregory the Great (JE 1317). The same excerpt (in fact, only the last sentence of the letter is missing) from JE 1317 is found after Burchard 3.15 in Italian manuscripts, though not the Milan Burchard.[53] It is also found in Ivo's *Decretum* as part of a longer series taken from Burchard.[54] The additional canon in Chartres BM 161 (with gaps supplied from Ivo) reads:

> E<x decretis Gregorii pape missis ad Iohannem Raven>nensem episcopum.
>
> Perv<enit ad me quod in ecclesiis fraterni>tatis tuę <, aliqua loca monasteriis co>nsecrata, nunc habitacul<a clericorum facta su>n<t;> dumque hi qui sunt in ec<clesiis, fingunt se religi>ose vivere, mon<asteriis preponi> appetunt, et per e<orum vitam monasteria d>est<ruun>tur. Nemo et<enim potest ecclesiasticis obsequiis> deservire <et in monachica regula ordina>te persistere, <ut ipse districtionem monaste>rii teneat, <qui quotidie in ministerio ecclesiastico> cogitur <permanere. Proinde fraternitas tua> hoc, quoli<bet in loco factum sit, emendare> festinet, <quia ego nullo modo patior ut lo>ca sacra per <c>lericorum <ambitum destruantur.>

Burchard 2.201. Chartres BM 161 fol.54v-59v: Burchard 3.217-222, 227-228, 225-226, 230-238, 240, 239, 223-224, 241 (followed by the synodal order on which see below).

[51] Ivo 6.269-271 (= Burchard 2.197, 201, 198), 6.301-310 (= Burchard 2.226, 234, 228-233, 236, 239), and 4.267-284 (= Burchard 3.227-228, 225-226, 230-238, 240, 239, 223-224, 241).

[52] Chartres BM 161 fol.64ra; ed. pr. fol.88va. See Fransen, 'Décret', 33.

[53] See Milan fol.53rb (Burchard 3.15-17), Urb. lat. 180 fol.85v, Vat. lat. 1355 fol.80r (where the sequence is Burchard 3.15, 15A, 17, 16); Novara fol.49r; Ivo 3.17-20 (ed. Brett)=Burchard 3.15, 15A, 16, 17.

[54] Ivo 3.17-20 (ed. Brett)=Burchard 3.15, 15A, 16, 17. In Chartres BM 161, but not in Ivo, the rubrics to Burchard 3.16-18 are out of sequence, evidently as a result of the insertion of 3.15A. Note also that Ivo knew the complete text of JE 1317 via *Tripartita* A1.55.101.

The canon was first reported by Fransen as an addition typical of the *deteriores*.[55] According to him, the presence of this text after Burchard 3.15 is typical of the 'deteriores'. However, as in the case of other texts added to the *Liber decretorum*, it had a life of its own in the sense that it seems to have been added also to other Burchard copies otherwise unrelated to the 'deteriores' tradition.[56]

Burchard 3.95 missing

On fol.47r, a well-preserved page, one can read most of Burchard 3.90-98, but c.95 is clearly missing. Fransen reported this as a common phenomenon.[57] All German and most Italian Burchard manuscripts we have seen have it.[58] The absence of the canon constitutes a weak link to Ivo, whose Burchard exemplar seems to have had this gap too.[59]

Burchard 3.178-179 interpolated

Burchard 3.178 and 179 in Chartres BM 161 fol.52v are both interpolated in a way that strengthened the local clergy in the administration of ecclesiastical property. The interpolations were first reported by Kölzer, who noted that they were found in a number of Italian and Spanish copies of the *Liber decretorum*, in the *Collectio Farfensis*, and in Ivo's *Decretum*.[60]

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[55] Fransen, 'Montpellier' 306; idem, 'Décret' 39.

[56] See, for example, Milano Biblioteca Trivulziana 601 fol.41rb. The copy is fragmentary, but as it contains Burchard 8.38-49 (except for c.40), 12.9-20, 19.109-159, and 20.58-110 I assume it does not belong to the 'deteriores' tradition.

[57] Fransen, 'Décret' 40.

[58] See ed. pr. fol.65vb; Frankfurt fol.88rb; Freiburg fol.91rb; Pal. lat. 585 fol.190vb-191rb; Milan fol.60va; Urb. lat. 180 fol.96ra (as no. '105'), which all have c.95; Vat. lat. 1355 fol.89v lacks it.

[59] One finds most of Burchard's third book in Ivo's book three, and a handful of canons in his books two and four, but Burchard 3.95 is not found anywhere in Ivo's collection. Its content does not suggest that it was omitted for ideological reasons.

[60] See Theo Kölzer, 'Prolegomena', *Collectio canonum Regesto Farfensi inserta*, ed. idem (MIC. Ser. B 5; Vatican City 1982) 1-123, 59-60, esp. 59 n.155 for a number of Burchard manuscripts. Note that one of the three copies today held in Spanish libraries was written in Italy; we assume that the other ones ultimately go back to Italian exemplars, too. The augmented form of Burchard 3.178-179 is found in *Collectio Farfensis* 3.68-69 (ed. Kölzer 242) and Ivo 3.240-241 (ed. Brett).

Burchard 3.178 in Chartres BM 161 fol.52va (interpolation italicized) reads:

> Item p<lacu>it ut presbiteri non vend<ant> rem ęcclesię ubi sunt constituti nesc<ient>ibus episcopis suis, quomodo et episcopis non lice<at v>endere predia ęcclesię ignorante con<cili>o vel presbiteris suis. Non habenti ergo nec<essi>tatem, nec episcopo liceat matris ęcclesię *ig<nor>ante concilio vel presbiteris* suis titulis u<su>rpare.

The ‘rem’ before ‘matris’ in the last sentence seems to have been overlooked by the scribe. Among the Italian manuscripts checked for the present study, the addition is found in Vat. lat. 1355 and Novara, but not the Milan copy or Urb. lat. 180.[61]

Burchard 3.179 in Chartres BM 161 fol.52va (interpolation italicized) reads:

> Si quis presbiter aut diaconus inventus fuerit <de mini>steriis ęcclesię, *ignorante concilio*, aliquid <venund>asse, quia sacrilegium commisit, placuit eum in ordinatione ęcclesię non haberi. <In iudicio> tamen episcopi dimittendum <sive dignus sit sive> indignus in suo recipi gradu.

Among the Italian Burchard copies, the addition is found in Novara and Vat. lat. 1355, but not the Milan copy or Urb. lat. 180.[62]

Burchard 3.194

The canon in fol.53v begins ‘Reum (rather than ‘Servum’) confugientem ad ęcclesiam’, a common variant also found in Ivo 3.111. The canon begins with ‘Reum’ in three of the four Italian manuscripts checked for this study.[63]

Synodal order after book 3

At the very end of Burchard’s book three, Chartres BM 161 fol.59ra-60rb contains a synodal order which can be identified as Schneider’s *Ordo 5*, inserted after book three in almost all Italian

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[61] Milan fol.67ra; Novara fol.61rb; Urb. lat. 180 fol.106rb-106va; Vat. lat. 1355 fol.100v (all with minor variants). In Novara, a later hand has marked the interpolation for deletion.

[62] Pal. lat. 585 fol.210va; ed. pr. fol.73va; Frankfurt fol.97rb; Freiburg fol.100vb, Milan fol.67ra, Novara fol.61rb, and Urb. lat. fol.106va all lack ‘ignorante concilio’ while Vat. lat. 1355 fol.100v has it. Note that the inscription to Burchard 3.179 in Chartres BM 161 has ‘cap. xxii’ but Ivo 3.241 has the usual ‘cap. xxx’.

[63] Milan fol.68va, Novara fol.62r (where the canon is added in the margin), and Urb. lat. 180 fol.167rb) all have ‘Reum’; only Vat. lat. 1355 fol.102v has ‘Servum’.

Burchard manuscripts and also found in Ivo's *Decretum* (Ivo 4.246-257). As Schneider established, Ivo's text is close to Milano Biblioteca Trivulziana cod. 601 and to some degree also to El Escorial Real Biblioteca de San Lorenzo T.I.14 and Novara BC XXVIII.[64]

The last legible words of *Ordo 5* in Chartres BM 161 fol.60rb are 'Quibus expl<etis>, archidiaconus dicat' (in red ink), a variant that links Chartres BM 161 to Ivo and three French manuscripts including the Pontifical of Chartres.[65] The passages in black ink are completely lost here, so nothing else can be said about the end of *Ordo 5* except that there is very little space for the last passages that normally are found here. Perhaps Chartres BM 161 even lacked the last sentence ('Tunc' to 'redeant'), which would link it to Ivrea BC XCIV, the only manuscript for which Schneider reports this gap.[66]

Burchard 6.40-41 and 9.54: Remarriage

The *Liber decretorum* has three conciliar canons allowing remarriage (Burchard 6.40-41 and 9.54), and three times mentions remarriage in the long questionnaire in his penitential book (Burchard 19.5). Significantly, Ivo in his *Decretum* omits two of these texts (Burchard 6.40 and 19.5) and presents the other two in a form lacking the crucial passages on remarriage. Special attention is therefore due to Ivo's possible sources for these texts, as this may be one of the very few cases where Ivo interfered with his proof texts in order to present the material law differently.[67]

Burchard 6.41 (ed. pr. fol.105vb-106ra) reads:

> Si qua mulier mortem viri sui cum aliis conciliata est, et ipse vir aliquem illorum se defendendo occiderit, et si hoc probare potest ille vir eam ream esse consilii, potest, ut nobis videtur, ipsam uxorem dimittere et, si voluerit, aliam uxorem accipere. Ipsa autem insidiatrix, pęnitentie subiecta, absque spe coniugii maneat.

[64] See Schneider, 'Einleitung' and the edition itself.

[65] See Schneider's edition (MGH Ordines 257 line 158). The manuscripts in question are Schneider's manuscripts P4 (= BNF lat. 945, the Chartres pontifical), P5, and S.

[66] See *Ordo 5*, ed. Schneider (MGH Ordines 257, lines 159-160).

[67] See Rolker, *Canon Law* 230 (with wrong canon numbers in n. 106).

Ivo 10.169 (ed. Brett) lacks the crucial passage ‘et si voluerit aliam uxorem accipere’. Chartres 161 and all Italian Burchard manuscripts seen have Burchard 6.40-41, with only trivial variants to the *editio princeps*.[68] The passage in Chartres BM 161 reads:

> si probare potest ille vir eam ream <esse> consilii, potest, ut nobis videtur, ipsam uxorem dimittere et si voluerit al<i>am uxorem ducere; ipsa autem insidiatrix, pęnitentie subiecta, absque spe coniugii maneat.

The case is similar with Burchard 9.54 which in its original form (ed. pr. fol.129rb) reads as follows:

> Si quis necessitate inevitabili cogente, in alium ducatum seu provinciam fugerit, et uxor eius cum valet et potest amore parentum aut rerum suarum eum sequi noluerit, ipsa omni tempore, quamdiu vir eius quem secuta non fuit, vivit, semper innupta permaneat. Ille vero, qui necessitate cogente in alia patria manet, si numquam in suam patriam se reversurum sperat, si se continere non potest, aliam uxorem accipiat, tamen cum poenitentia.

Ivo 8.189 (ed. Brett) lacks the last sentence, which is clearly legible in Chartres BM 161 and the Italian manuscripts checked for this study.[69] Thus in Chartres BM 161 all three canons (Burchard 6.40, 6.41, and 9.54) were present in their normal, unabridged form. Given that Chartres BM 161 is so closely related to the Burchard copy used by Ivo of Chartres, this provides an important argument for supposing that he almost certainly knew the three canons in their normal form. If so, one may assume that Ivo of Chartres was responsible for the omission of Burchard 6.40 and the abbreviation of the two others (Burchard 6.40 and 9.54). In doing so, he adopted his Burchardian material to the new view of marriage prevalent around 1100.

An arbor consanguinitatis at the end of book seven?

Chartres 161 contains the last canons of book seven on fol.79r (Burchard 7.28) and 80ra (Burchard 7.29-30), with an empty page in between (fol.79v). If Chartres BM 161 here had the *arbor consanguinitatis* found in many Burchard manuscripts at the end of book seven, it is lost. In principle this is possible, but it seems more likely that the page was left blank intentionally, as there is

[68] Chartres BM 161 fol.76rb, Milan fol.96ra, Novara fol.85vb, Urb. lat. 180 fol.150ra, and Vat. lat. 1355 fol.145v all have the crucial provision on remarriage.

[69] Chartres BM 161 fol.89v. Milan fol.116ra, Novara fol.103ra, Urb. lat. 180 fol.178va-178vb and Vat. lat. 1355 fol.174v all have the last sentence.

no trace of ink on it (unlike on virtually all pages of the codex). So, perhaps it was left blank in anticipation of a miniature being made after the text was completed. There is in fact evidence that Chartres BM 161 was never finished; it never was properly bound, and according to Omont it lacked the end, a comment that may well be understood to refer to the codex being unfinished.[70]

Burchard 8, 12, 19, and 20: The deteriores gaps

As mentioned above, Fransen identified four gaps typical of the 'deteriores' tradition: Burchard 8.38-49, 12.10-20, 19.109-159, and 20.57-110.[71] In Chartres BM 161 fol.83r we find a canon beginning like Burchard 8.38, but ending like Burchard 8.49, followed by c.50 with no trace of cc.39-48. In other words, Chartres BM 161 in book eight had one large gap characteristic of the 'deteriores' tradition first described by Fransen. There are actually several forms of this gap. In the earliest form, going back perhaps to the mise-en-page of a physically incomplete exemplar, the canon breaks off in Burchard 8.38 mid-canon with 'cohabitare tecto' as the last words, and continues with Burchard 8.49, beginning 'valeat custodiri detrudere' (equally in mid-canon). Later scribes treated this gap in different ways; some merged the two incomplete texts into one, some left a gap after 'cohabitare tecto', others omitted the incomplete sentence, and yet others duly noted (in the margin) that something was missing here: 'hic minus habetur'. Chartres BM 161 seems to belong to those manuscripts where Burchard 8.38 and 49 are merged into one text, as far as this can be established given the damage to this fragment. One can still read 'cohabitare' at the end of one line (roughly mid-page), and 'ere et ita' in the next, which would fit the end of the mutilated c.38 and the beginning of the equally mutilated c.49, respectively. So apparently in Chartres BM 161 both canons were merged, even if the resulting Latin made little sense:

> [...] <sub uno non> cohabitare
> <tecto?> †…† <detrud>ere et ita
> <omnem circa illam solicitudinem exhibere>.

[70] *Cat. Gén.* 11 (1890) 84: 'la fin manque'.
[71] Fransen, 'Essai' 8-12 and idem, 'Décret' 34-38.

Fransen reported very similar phenomena for other Burchard manuscripts, in particular Italian manuscripts and those produced from Italian exemplars.[72] So in book eight, Chartres displays the gap typical for the 'deteriores' tradition.

Book 12, in contrast, has no large gaps.[73] Significantly, however, Burchard 12.9 lacks the last nine words, an omission Fransen reported for certain 'deteriores' manuscripts.[74] Likewise, Burchard 12.29 in Chartres BM 161 has a gap reported by Fransen as typical for the 'deteriores'; it is found in all Italian manuscripts checked for this study.[75] In book twelve, therefore, Chartres BM 161 had no major gaps, but 'scars' and smaller gaps linking it to the 'deteriores' tradition.

Turning to book 19, the loss of relatively many folios hampers a detailed reconstruction of the whole book. Nonetheless, the presence of Burchard 19.122, 126-128, 135-136, 141-145, 149-151, and 153 is solid proof that book nineteen in Chartres BM 161 at least did not have the typical 'deteriores' gap as found, for example, in the Milan Burchard. At the same time, the fragment containing c.153 shows that Chartres BM 161 ultimately belongs to the 'deteriores' group. Before c.153 it contains some (barely legible) text that does not fit the normal end of c.152 but instead can be identified with an addition Fransen reported for a number

[72] See Fransen, 'Montpellier' 303 (quoting Escorial T.I.14 and Madrid BN 386).
[73] Chartres BM 161 fol.108r-109v has Burchard 12.1-25, including cc.10-20, some or all of which are missing from some 'deteriores' manuscripts.
[74] Chartres BM 161 fol.108va; see Fransen, 'Montpellier' 304 and idem, 'Décret' 36. Milan fol.137vb only has 'Sin autem' (as reported by Fransen), Urb. lat. 180 fol.217v-218r merges the beginning of c.8 and the second half of c.10 (omitting c.9 completely), Vat. lat. 1355 fol.208r has the complete form of c.9. Of all manuscripts checked for our study, Novara fol.122ra is the only to have the short form of c.9 also found in Chartres BM 161.
[75] Chartres BM 161 fol.110va: 'periurium sacramento. Et post / <pauca> miserabilis necessitas', lacking 'de Iepte discernens', and 'profluus / <e>loquentie fructu fecundus' lacking 'de flore venustus, sapientiae' as found in the ed. pr. fol.157ra. See Fransen, 'Décret' 41. Both gaps are also found in Novara fol.124ra (marked by nota signs), Urb. lat. 180 fol.221vb, and Vat. lat. 1355 fol.209v. Note that Ivo 12.84 (ed. Brett) has a much shorter version of this text which does not extend to this part of Burchard 12.29.

of Italian Burchard manuscripts including Vat. lat. 1355.[76] As Fransen established, this addition to Burchard 19.152 belongs to the 'scars' of the 'deteriores' tradition. Furthermore, it is possible, but by no means certain, that the last texts of Burchard's penultimate book (Burchard 19.153-159) were abbreviated or even missing in Chartres. The reason to think so is that the lost part of the last folio of book nineteen can hardly have contained all the text found in complete versions of the *Liber decretorum*. The folio containing the end of book 19 and the beginning of book twenty survives in two fragments, both containing parts of the last ten lines or so. Burchard 19.153 begins at the bottom of the left column of the recto; the right column seems to have been empty apart from an inscription in red ink that would fit Burchard 20.1 ('Augustin<us> dicit'). On the verso side, one finds the end of Burchard 20.2 at the bottom of the left column and parts of Burchard 20.7 in the right column. One can assume that the upper part of the verso in the left column contained the title of book twenty, a decorated initial, and the main text of Burchard 20.1 itself. This is hard to reconcile with Delaporte's account relating that the initial to book twenty was found on fol.157r; perhaps this reference should have been to the verso rather than the recto.[77]

However, the problem is that Burchard 19.153-159, if present, would have to have been crammed into the upper part of the right column of fol.156, thus 30 lines or less. This seems implausible at best given that these texts fill almost a complete page in the editio princeps, and almost two pages in Urb. lat. 180. Given that several Italian Burchard manuscripts lack some or all of the last canons of

[76] See Fransen, 'Montpellier' 303 on this addition, derived from Burchard 20.95. Urb. lat. 180 fol.308va has Burchard 19.152-153, but no addition; note, however, that Burchard 19.152 lacks a few words at the end. Vat. lat. 1355 fol.289r has the expanded form of c.152; the addition reads: 'qui in eorum exploratione [*sic*] ad medium perducuntur sed etiam homines [*sic*] electi arguunt dum contempnunt dum virtute mentis eius malicie resistunt'. Almost the same version of Burchard 19.152 is found in Novara fol.172rb, but ending 'virtute mentis in alio desistunt' and with the addition marked for deletion by a later hand. In Chartres BM 161, fr. 9, the text ends 'desistunt', too. Note that Ivo in his book 15 retains most of Burchard 19, but not Burchard 19.152.

[77] Delaporte, *Manuscrits enluminés* 23.

book nineteen, it seems reasonable to assume that this also holds for Chartres BM 161, even if it must remain speculative what exactly the end of the book looked like. Perhaps the very end of book 19 in Chartres was similar to Italian copies like Vat. lat. 1355 and Novara.[78] In any case it is clear that substantial parts of the second part of book nineteen were present in Chartres BM 161; it seems to depend on an exemplar where most, though not all, of the missing material (Burchard 19.109-159) had been added again.

With book twenty, the evidence is less straightforward. As Chartres BM 161 was incomplete towards the end already before 1944 and the last part of the codex was particularly severely damaged by the fire, it is no surprise that we find very little trace of the second part of the last book. In fact, only two fragments contain texts that can be identified as coming from Burchard 20.58-101, and both are problematic. The first fragment on the recto has Burchard 20.50-51 and on the verso Burchard 20.59 and 76. More specifically, the last line of the right-hand column apparently reads '<eius ven>ia frustra postulatur. De hoc adhuc', a passage found in the second half of Burchard 20.59. What is odd, however, is the text in the right-hand column of the same fragment, containing the last words of Burchard 20.75 plus parts of the rubric and the first lines of Burchard 20.76. It is inconceivable that the right column contained the rest of Burchard 20.59 plus cc.60-75, a series of canons filling almost ten columns in the editio princeps (fol.230vb-233ra). A similar oddity surrounds Burchard 20.90, as the last lines of this canon are found on a fragment which on the other side contains the end of Burchard 20.17 (in the left column) and 18 (in the right column). Theoretically, it would be possible that ink was transferred from another folio, but this is not the case here. In both cases, one has to conclude that a number of texts from

[78] In Milan fol.198, book 19 ends with c.108 and a note 'non est finitus iste nonusdecimus liber'; the following pages originally were left empty, but partly were later filled with additions. In Novara fol.172va, book 19 ends with c.158, with Burchard 19.153 added in the margin by another hand. In Urb. lat. 180 fol.308v-309r, Burchard 19.152-159 are present; after c.159, the codex contains additions by later hands, while book 20 is lacking. In Vat. lat. 1355 fol.289r, Burchard 19 ends with c.152, or rather the rubric to c.153 and a marginal note 'hic minus deest' [*sic*].

Burchard 20 were either displaced or completely absent from Chartres BM 161. So on the one hand, the presence of Burchard 20.59, 75, 76, and 90 tells against the idea that Chartres BM 161 was missing the second half of book 20 completely, as some 'deteriores' did; on the other hand, the mise-en-page of the respective fragments also suggest that some, perhaps even many of the canons in Burchard 20 were missing and/or not found in the usual sequence. Such phenomena tend to occur in manuscripts going back to 'deteriores' exemplars which were mended more or less skilfully from more complete Burchard copies, but other explanations cannot be ruled out; maybe Chartres BM 161 was never finished or it was physically damaged at some point.

So Chartres BM 161 contained one of the four 'deteriores' gaps (in book 8) and may have been missing parts of book 20, but apparently did not have the typical 'deteriores' gaps in books 12 and 19. This is probably best explained by Chartres BM 161 going back ultimately to an exemplar of the 'deteriores' tradition where most, though not all, of the missing material was added more or less skillfully. This also means that Chartrain is similar to, but cannot be identical with the *Liber decretorum* copy Ivo of Chartres used to compile his *Decretum*, at least not if we assume for the moment that Ivo used only one copy. After all, the hypothetical Burchard copy Ivo used seems to have had none of the *deteriores* gaps, including book eight.[79] If Chartres BM 161 was, or faithfully represents, a copy of the *Liber decretorum* used by Ivo in the making of his *Decretum*, Ivo must have supplemented this copy from another, more complete Burchard copy.

Burchard 8.82

The rubric to Burchard 8.82 in Chartres BM 161 fol.85r reads 'Ut monachi vel monache compatres non habeant'; the 'vel monache' addition is also found in some, but not all Italian Burchard

[79] Ivo 7.26-119 (ed. Brett)=Burchard 8.1-101 with only few omissions or displaced canons; the crucial series Burchard 8.38-50 is preserved faithfully in Ivo 7.57-68, only that Burchard 8.40-41 are merged into one canon.

copies.[80] The same form of the rubric is also found in the *Burdegalensis*, the Turin *Collection in Seven Books*, and Ivo's *Decretum*. All three collections seem to depend on an Italian version of Burchard for this canon.[81]

Gaps and Variants in Burchard 13.28

Burchard 13.28 contains a canon from the Council of Erfurt 932.[82] In Chartres BM 161 and Ivo 4.60, the canon is abbreviated, lacking eight words in mid-canon (from 'ibique' to 'banno') compared to the editio princeps. A comparison of the German manuscripts, the Italian manuscripts, Chartres BM 161, and Ivo suggests that the canon suffered first a loss of four words ('ibique manendo indeque revertendo'), and only later was further changed to produce the version in Chartres BM 161 and Ivo.

Burchard 13.28 as found in the German manuscripts Vat. Pal. lat. 586 fol.90va-90vb (=Va), the editio princeps fol.160rb, Frankfurt fol.206va-206vb (=Fa), and Freiburg fol.204vb (=Fb):

> Precipimus namque ut nullus Christianus pro reverentia ecclesiam petendo ibique manendo indeque* revertendo**, alicuius publice potestatis banno ibidem constringatur**, ne forte dum ad ecclesiam causa orationis properat, per bannum impediatur pro salute anime devote insistere.
>
> _____
>
> *manendo indeque *om.* Fb **revertendo] vertendo Va; *** constringatur] confringatur Va, *corr. ex* confringatur Fa

Burchard 13.28 as found in the Italian manuscripts Milan fol.141va, Novara fol.126rb, Urb. lat. 180 fol.226ra, and Vat. lat. 1355 fol.215v (= Vc):

> Precipimus namque ut nullus Christianus pro reverentia ecclesiam petendo, alicuius publice potestatis banno ibidem constringatur, ne forte dum ad* ecclesiam causa orationis properat, per bannum impediatur pro salute anime devote insistere.
>
> _____
>
> * a *sed corr.* Vc

[80] The addition is found in Vat. lat. 1355 fol.165r and Urb. lat. 180 fol.168rb but not in Milan fol.108va, and none of the German manuscripts: Pal. lat. 585 fol.325vb; ed. pr. fol.122ra; Frankfurt fol.157rb; Freiburg fol.156va.

[81] *Burdegalensis* 6.21 and Turin *7L* 4.226 according to the *Clavis canonum* database; Ivo 7.100 (ed. Brett).

[82] Erfurt 932 c.3, ed. Hartmann MGH Conc. 6.1:109.

Burchard 13.28 as found in Chartres BM 161 fol.112v (=C) and Ivo 4.60 (ed. Brett), based inter alia on the Lincoln abbreviation (=L) and Pal. lat. 587 (=D), has yet another form:

> Precipimus namque* ut nullus Christianus pro reverentia ecclesiam petendo, alicuius publice potestatis banno ibidem constringatur, ne forte dum ad ecclesiam causa orationis properat, per bannum impediatur pro salute anime sue Domini misericordiam minus** devote*** postulare.
>
> * om. L ** <minus> C *** iuste D

Evidently, Chartres BM 161 is very similar to Ivo's Burchard for this canon, both by virtue of the gap in mid-canon and the rather different ending of the canon.

End of Book 16

Some Italian manuscripts including the 'Milan' subversion contain the widely popular letter *Fraterne mortis* (JL †6613a) at the end of book 16.[83] From fol.123r it is clear that Chartres BM 161 does not belong to this branch of the transmission. It may be worth noting that Ivo knew JL †6613a, but apparently not via Burchard; the version found in his *Decretum* is different from that found in Italian Burchard manuscripts.[84]

Burchard 20.76

Burchard 20.76 was present in Chartres BM 161, but as only the first few lines are extant, it remains unclear whether it had the long form or the shorter version reported by Fransen for several manuscripts.[85] Note that Ivo 17.87 has the short form (lacking the last lines from quamvis miseris subvenit on).

Part IV: Conclusions

Clearly, Chartres BM 161 belonged to the so-called Frankfurt (vulgate) version of the *Liber decretorum*, and contained a number

[83] On JL †6613a, see most recently Charles West, 'The Simony Crisis of the Eleventh Century and the "Letter of Guido"' JEH (2022) [pre-print available online].

[84] Fransen, 'Montpellier' 305 and 308; idem, 'Trois notes' 447; Fowler-Magerl, 'Fine Distinctions' 147-148 ('Milan' Burchard) and eadem, *Clavis canonum* 89. In some 'deteriores' copies, JL †6613a is found after Burchard 19.108 according to Fransen, 'Essai' 10. On the version found in Ivo 2.84 (ed. Brett) see Rolker, *Canon Law* 120. Milan, Novara, Urb. lat. 180, and Vat. lat. 1355 do not contain additional material after book 16; note, however, in the Novara copy, that a folio seems to have been cut out after Burchard 16.

[85] Fransen, 'Décret' 42.

of features which are specifically Italian: gaps and 'scars' of the *deteriores* tradition, transposed, enlarged, or additional canons in books two and three otherwise only known from Italian Burchard copies, the synodal order found in the same tradition, and numerous smaller variants. While Chartres BM 161 itself was not written in Italy, it ultimately depends on an Italian model belonging to a sub-group of the 'deteriores' tradition; there is some reason to think the Burchard version behind Chartres BM 161 emerged in northern Italy late in the eleventh century. Of all Burchard manuscripts used in the context of the present study, Chartres BM 161 shares most features with the Novara *Liber decretorum* (Novara, BC, XXVIII), but also has many variants in common with Vat. lat. 1355.

Many, but not all of the features just quoted are also found in Ivo's *Decretum*. Rare texts like the additional material after Burchard 2.118 strongly suggest that Chartres 161 is not only similar, but indeed closely related to one of the Burchard manuscripts used to compile Ivo's *Decretum*. However, Chartres BM 161 itself cannot be Ivo's only Burchard exemplar, nor a faithful copy of it. There are mainly two reasons for this. First, compared to the Burchardian content of Ivo's *Decretum*, Chartres BM 161 contains a relatively large number of minor differences not discussed here (e.g. word order, use of synonyms, orthography). While most differences do not affect the meaning, erroneous place names in particular suggest a scribe not very familiar with canon law. Every single of these differences could in principle be explained by scribal errors, and thus in theory Chartres BM 161 could still be an imperfect copy of Ivo's exemplar. However, the sheer number of cases where Chartres BM 161 differs from the consensus of numerous *Liber decretorum* copies and all manuscripts of Ivo's *Decretum* makes this explanation unlikely. In any case the second argument carries greater weight: While Ivo must have had access to a 'complete' version of Burchard's *Liber decretorum* containing none of the four gaps of the 'deteriores' tradition, Chartres BM 161 in book eight clearly had the characteristic gap between canons 38 and 50, and may have lacked several canons in the second half of books

nineteen and twenty. This gap strongly tells against the idea that Ivo in compiling his *Decretum* was working only with an exemplar containing the same version of the *Liber decretorum* as found in Chartres BM 161.

At the same time, it is also true that Chartres BM 161 is closely related to the Burchardian parts of Ivo's *Decretum*; the additional material in books two and three, but also a number of smaller variants, strongly suggest that Ivo was working with an exemplar similar to Chartres BM 161. The best explanation for this is that Ivo indeed used at least two copies of Burchard, as Fowler-Magerl had suggested long ago.[86] If so, one exemplar must have been very similar to Chartres BM 161, while another one provided Ivo with enough material to mend the gap in book eight, and presumably contained better readings of many inscriptions and canons than Chartres BM 161. Whether the Burchard copy similar to Chartres 161 was used from the outset, or only to improve the nascent *Decretum*, remains a question to be solved by future research.

Chartres BM 161 may well have been written in Ivo's lifetime, and maybe Ivo's work on his *Decretum* was even the reason for the making of the manuscript; at least one can well imagine that the Burchard copies used in the making of the *Decretum* came under considerable strain in this process. Perhaps the copies were disbound into quires to test various arrangements of the material, and to prepare the insertion of sections taken from other sources than the *Liber decretorum* (the second part of Paris Arsenal 713 has been identified as a copy of non-Burchardian material compiled and rearranged in preparation for Ivo's *Decretum*).[87] Almost certainly, Ivo's copies of the *Liber decretorum* were heavily annotated; one may suppose nota signs and comments on excerpts ultimately going back to the same material sources, with doublets being marked to avoid repetitive canons (the final versions of Ivo's *Decretum* are remarkably free from internal overlap). In any case, the *Liber decretorum* copies

[86] Fowler-Magerl, 'Fine Distinctions' 147-149.
[87] Martin Brett, 'The Sources and Influence of Paris, Bibliothèque de l'Arsenal MS 713', *Proceedings Munich 1992* 149-167.

must have been used intensively when the *Decretum* was compiled, and this may well have made the making of a new copy necessary.

Chartres BM 161 was thought to be lost completely for decades. As we hope to have shown, despite its fragmentary state, its content can be reconstructed in considerable detail. This was only feasible because the extant fragments can now be studied by scholars worldwide thanks to the efforts of the IRHT. At the same time, the digitization of many important manuscripts and printed books, the online edition of the Ivonian collections, and tools like the *Clavis canonum* database provide the means necessary to reconstitute manuscripts like Chartres BM 161 even from small fragments. In our opinion, the reconstruction of Chartres BM 161 thus also is a good case study on the advantages of digital tools for manuscript studies. From the time of Mabillon, palaeography has profited from technological progress, whether it was copper engravings in the eighteenth or photography in the nineteenth century. Today, digitization is taking manuscript studies to a new level. Comparison of different manuscripts, the key method in palaeographic studies, is greatly facilitated, and image tools make it possible to reconstruct texts barely visible to the human eye. Future research, we therefore hope, will reconstruct many more codices today thought to be lost.

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Notas sobre la *Collectio decem partium* de Colonia

José Miguel Viejo-Ximénez

Introducción

El manuscrito Colonia, Historisches Archiv der Stadt 7010 199 (Wallraf 199) (K) contiene una colección jurídica conocida desde 1974 gracias al estudio que Johanna Petersmann dedicó a la tradición canónica de la donación de Constantino.[1] La obra, cuyos capítulos proceden de las compilaciones relacionadas con Ivo de Chartres, llama la atención porque está dividida en diez libros, que a su vez se organizan en distinciones.

Los estudiosos han incluido la *Collectio decem partes Coloniensis* (10PK) en el grupo de las colecciones de la reforma gregoriana evolucionada de difusión local.[2] Su desconocido autor trabajó sobre una colección cronológica, cuyos materiales reorganizó sistemáticamente. Aunque la copia de las *Exceptiones ecclesiasticarum regularum* haría pensar en el *Decretum* o en la *Panormia* de Ivo de Chartres, la versión del *Constitutum Constantini* de 10PK 8.1.7[6a] conecta con la de la primera parte de la *Tripartita* (TrA 1.31.7bc [1.31A.1-2]), que a su vez deriva de la redacción pseudoisidoriana extensa de la falsificación.[3] La colección en diez partes sería, por tanto, una reelaboración de la *Tripartita A*.[4] Los años 1094-1095—conclusión de las colecciones relacionadas con Ivo—y 1146—fecha del documento mercantil copiado al final del manuscrito—son los términos *post* y *ante quem* más probables, si bien es cierto que el volumen de Colonia

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[1] Johanna Petersmann, 'Die kanonistische Überlieferung des *Constitutum Constantini* bis zum Dekret Gratians: Untersuchung und Edition', DA 30 (1974) 356-449, en especial 383, 385, 386-389 y el *excursus* de 447-449.

[2] Kéry 287.

[3] Petersmann, 'Die kanonistische Überlieferung' 383-389.

[4] Martin Brett, 'Tripartita', DGDC 7.699-701, 700. Linda Fowler-Magerl, *Clavis Canonum: Selected Canon Law Collections before 1140* (MGH Hilfsmittel 21; Hannover 2005) 191.

no pudo haber sido confeccionado antes de 1139, porque algunos de los textos suplementarios copiados por el mismo escriba después de 10PK 10.15.5[4]—última autoridad de la colección—proceden, aparentemente, del II Concilio de Letrán. Como quiera que el único testimonio conocido perteneció a la abadía premonstratense de Knechsteden, establecida en Dormagen (Renania del Norte-Westaflia) en 1130, la elaboración de la copia se puede situar razonablemente en el período 1130-1139.[5] Quién fue el autor de la colección y cuál fue el lugar de su composición son dos cuestiones no resueltas. El análisis codicológico del volumen que perteneció al erudito Franz Ferdinand Walraff (1748-1824), hoy en el Archivo Histórico de Colonia, dirige a un escritorio profesional de la *Colonia Claudia Ara Agrippinensium*.[6]

En 2014, Martin Brett informó que la colección del manuscrito Hänel 16 de la Biblioteca de la Universidad de Leipzig (L), hasta entonces descrita genéricamente como una compilación pregracianea singular, era, en realidad, una copia más antigua y de mejor calidad de 10PK.[7] La organización de los materiales—prólogo de Ivo, *capitulatio*, colección—la ordenación de los capítulos en partes y distinciones, y el contenido de la obra son, en efecto, los mismos. La reconstrucción de la hisotria del volumen

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[5] Petersmann, 'Die kanonistische Überlieferung' 449.

[6] Juliane Trede, *Die juristischen Handschriften des Stadtarchivs Köln: Köln: Historisches Archiv der Stadt Köln* (Mitteilungen aus dem Stadtarchiv von Köln: Sonderreihe: Die Handschriften des Archivs. Hefte 8: Die juristischen Handscriften; Köln 2005) 79: como quiera que la caligrafía, los colores y las formas de las letras inciales de las partes y distinciones de 10PK son similares a la inicial de la bendición regia del *Pontificale Coloniensis*—Köln, Dombibliothek 139 fol. 21r—Trede sugirió que el manuscrito fue confeccionado en un *sriptorium* profesional de la región de Colonia. Fowler–Magerl, *Clavis canonum* 192, advirtió que la 'y' de 'Nykolaus' es una indicación de que el manuscrito fue copiado al este del Rhin.

[7] La noticia de Brett se publicó en la *Tripartita. Prefatory Note* de 9/13/2014, disponible en https://ivo-of-chartres.github.io/tripartita/trip_a_pref.pdf (31/10/2021), y también en una anotación complementaria a la catalogación realizada por Rudolf Helssig, *Katalog der Hanschriften der Universitäts-Bibliothek Leipzig: Abteilung VI: Die lateinischen und deutschen Handschriften Band 3. Die juristischen Handschriften: Unveränderter Nachdruck der Auflage von 1905* (Wiesbaden 1996) 288-290.

lipsiense también conduce a las riberas del Rhin: en 1843, Gustav Hänel recibió el ejemplar del erudito Josef Niesert (1766-1841), párroco de Velen (Renania del Norte-Westfalia), quien probablemente lo adquirió en una subasta pública celebrada en Colonia en 1820.[8]

El manuscrito K de 10PK fue objeto de la tesis doctoral que Moisés Tena-Malo defendió en la Universidad Pontificia de Salamanca, en diciembre de 2020.[9] Por lo que se refiere a la historia del códice, Tena-Malo localiza su elaboración en Colonia, no en Knechsteden, y sugiere que su traslado a Dormagen pudo estar relacionada con el Heriberto 'scholalisticus SS. Apostolorum' de Colonia, 'praepositus' de la nueva abadía desde su fundación hasta 1150.[10] Por lo que se refiere a la colección, la tesis salmantina popone una nueva 'capitulatio'—que se aparta en algunos puntos de la que realizó Linda Fowler-Magerl al confeccionar su *Clavis canonum*—así como una relación de las fuentes formales y materiales;[11] ofrece pistas para rastrear los modelos de las siete autoridades de 10PK que no proceden de las obras de Ivo;[12] e identifica las tres series de adiciones de los folios finales de K, poniendo en cuestión el vínculo de los siete primeros cánones suplementarios con el II Concilio de Letrán (1139), pues los concilios de Clermont (1130) y Reims (1131) tomaron decisiones similares.[13] Para Tena-Malo, la relación de 10PK con las obras de Ivo es evidente, la colección es más parecida a un libro de estudio o de enseñanza, y su composición es anterior a 1130. Probablemente la aportación más relevante de la memoria de

[8] Helssig, *Katalog der Hanschriften* 289.

[9] Moisés Tena López-Malo, *La colección canónica 10PK de Colonia: Historisches Archiv der Stadt Köln Wallraf 199* (Universidad Pontificia de Salamanca. Tesis, 265; Salamanca 2021). Cf. la recensión de José Miguel Viejo-Ximénez en REDC 78 (2021) 505-510.

[10] Tena-Malo, *La colección canónica* 27-34, en especial 30.

[11] Ibid. 40-50 (*capitulatio* y fuentes formales) y 69-73 (fuentes materiales). Estas 'Notas' siguen la numeración propuesta por Tena-Malo, quien indica entre corchetes el número de cada capítulo en la base de datos de Fowler-Magerl, *Clavis canonum*.

[12] Tena-Malo, *La colección canónica* 75-76.

[13] Ibid. 76-87, 76-79 para los cánones conciliares suplementarios.

doctorado sea la transcripción completa de K, no incluida en el resumen publicado hace unos meses en Salamanca, un primer paso para la deseable edición crítica de la obra. En cualquier caso, cualquier valoración de este trabajo debe tener en cuenta el alcance de su objeto material: como advierte la *Introducción*, para esta ocasión, Tena-Malo dejó a un lado L, el segundo testimonio conocido de 10PK, pues su tesis se centra en el ejemplar de Colonia.[14] A pesar de ello, después de comparar la 'capitulatio' de la colección en K y L, el joven doctor formula una hipótesis preliminar sobre sus mutuas dependencias, que contradice la opinión de Brett: a su entender, K sería el modelo de L.[15]

Aunque los ensayos publicados desde 1974 hasta la fecha han ampliado nuestros concimientos sobre 10PK, no han resuelto todos los interrogantes que plantea la confección y el uso de la colección agripina.[16] Todavía no se conoce, por ejemplo, el contenido de todas las distinciones, porque los dos testimonios, K L, tienen lagunas. Por otra parte, la tesis de 2020 amplía el elenco de fuentes formales a disposición del coleccionista, porque refiere algunos lugares del *Decretum* del obispo de Chartres como posibles modelos de otros tantos capítulos de 10PK.[17] A propósito de esta cuestión, Tena-Malo ha señalado, aemás, las correspondencias con la segunda parte de la *Tripartita* (TrB), y ha sugerido a existencia de otras fuentes formales menores de difícil identificación.[18]

[14] Ibid. 11-16.
[15] Ibid. 15.
[16] La colección de Colonia ha llamado la atención por la inclusión del capítulo *De communi uita*, aquí atribuido al concilio de Piacenza celebrado durante el pontificado de Urbano II: Robert Somerville, *Pope Urban II's Council of Piacenza, March 1-7, 1095* (Oxford 2011) 58-59. Los apéndices de 10PK también han interesado a los estudiosos de la transmisión de los cánones del II concilio de Letrán (1139): Martin Brett and Robert Somerville, 'The Transmission of the councils from 1130 to 1139', *Pope Innocent II (1130-43): The World vs the City*, edd. John Doran and Damian J. Smith (Oxford-New York 2016) 226-271. La división en distinciones fue comentada por el autor de estas 'Notas' en 'Distinciones', DGDC 3.424-428.
[17] Tena-Malo, *La colección canónica* 50.
[18] Ibid. 50-51.

El lector interesado en la elaboración y difusión de las obras de Ivo de Chartres encontrará en el Apéndice I de estas páginas el material desconocido de 10PK, es decir, los ochenta y un capítulos ausentes de K como consecuencia de los saltos apreciables en sus folios 26r y 88v. Una vez realizada esta tarea de restauración, las líneas que siguen profundizan en las fuentes formales (apartados II y III) y la estructura sistemática de 10PK (apartado IV), ahora desde la perspectiva que resulta de comparar las versiones coloniense (K) y lipsiense (L) de la obra. El ensayo concluye con el examen de los suplementos a la *Collectio decem Partium* de Colonia en uno y otro códice (apartado V), únicos vestigios de su efímera historia. Aunque no ha sido posible establecer de manera definitiva la relación completa de los modelos empleados por el coleccionista, la información que ahora se publica puede constituir un punto de partida para futuros estudios que arrojen luz sobre la canonística renana anterior a Graciano, esto es, los precedentes inmediatos de la escuela que la bibliografía contemporánea relacionan con el episcopado del arzobispo Rainald von Dassel (1159-1167) y con las dos estancias de Gerard Pucelle en Colonia (1165-1168 y 1180-1182).[19] Pues estas *Notas* se han recogido con la intención principal de ofrecer un modesto homenaje a Stephan Kuttner, 'anotonomastice dictus magister', quien abrió los caminos y coordinó los esfuerzos para cartografiar la historia de la decretística, a uno y otro lado de los Alpes.[20]

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[19] Rudolf Weigand, 'The Transmontane Decretists', HMCL 2.174-211. Peter Landau, *Die Kölner Kanonistik des 12. Jahrhunderts: Ein Höhepunkt der europäischen Rechtswissenschaft* (Kölner Rechtsgeschichtliche Vorträge, Heft 1; Badenweiler 2008); 'Miszellen. Die Dekretsumme Fecit moyses tabernaculum–ein weiteres Werk der Kölner Kanonistik', ZRG Kan. Abt. 96 (2010) 602-608; y 'Gérard Pucelle und die Dekretsumme reverentia sacrorum canonum: zur Kölner Kanonistik im 12. Jahrhundert', *Mélanges en l'honneur d'Anne Lefebvre-Teillard*, edd. Bernard D'Alteroche, Florence Demoulin-Auzary, Olivier Deschamps, Franck Roumy (Paris 2009) 623-638.

[20] Stephan Kuttner, *Kanonistische Schuldlehre von Gratian bis auf die Dekretalen Gregors IX. systematisch auf Grund der handschriftlichen Quellen dargestellt* (Studi e Testi, 64; Città del Vaticano 1935); Kuttner, *Repertorium*; y los estudios reunidos en el volumen *Gratian and the Schools of Law, 1140-1234* (London 1983-1994).

Los principales proveedores del autor de 10PK

Tena-Malo propone una nueva organización de la colección en 1432 capítulos y sugiere la posible fuente formal de 1425. Su tabla de correspondencias arroja estos datos: la mayoría, 710, son cánones de concilios procedentes de la segunda parte de la *Tripartita A* (TrA 2), aunque hay 655 que son fragmentos de decretales que fueron tomados de la primera parte (TrA 1); 55 capítulos de 10PK proceden de la *Tripartita B* (TrB), 5 del *Decretum* de Ivo; y, finalmente, hay un capítulo del prólogo *Exceptiones ecclesiasticarum regularum*.[21] Los textos cuyo modelo es desconcido son siete, menos del uno por ciento del total.

Este cuadro confirma lo que las comprobaciones parciales precedentes habían puesto de manifiesto: el autor de 10PK dispuso de un ejemplar completo de la *Tripartita*, similar al de los testimonios hoy en día conocidos, por lo que la colección de Colonia no probaría la existencia de copias de TrA y de TrB que circularon de manera independiente.[22] Lo que hasta ahora no se sabía es que el *Prologus* y el *Decretum* también formaron parte de su *corpus fontium*, y que, además de las colecciones relacionadas con el círculo de Ivo de Chartres, en la mesa de trabajo del canonista renano había otras fuentes menores. Las líneas que siguen revisan en primer lugar las evidencias sobre las que desacansa la determinación de los principales proveedores de 10PK, para presentar después los datos que orientan la identificación de los modelos menores o secundarios. Como es natural, las comprobaciones abarcan los capítulos hasta ahora desconocidos de la colección.

Exceptiones ecclesiasticarum regularum

La colección de Colonia tiene el *Prologus* de Ivo de Chartres antes de la *capitulatio*, igual que otras colecciones dependientes de las obras atribuidas al obispo de Chartres.[23] Según Tena-Malo, el

[21] Tena-Malo, *La colección canónica* 40-51.

[22] La *Prefatory Note* de la edición de trabajo de la *Tripartita* concluye: 'Trip. B does in fact appear occasionally in the collection'.

[23] Entre ellas la *Collectio X Partium* elaborada—probablemente en Thérouanne por John of Warneton (1 recensión) y Walter de Thérouanne (2 recensión)—a

compilador de 10PK usó 'un ejemplar del *Decretum* de Ivo con ese prefacio que, a su vez, reproducía una redacción muy antigua'.[24] La presencia en la versión de la colección de Colonia de tres frases omitidas en la edición provisional preparada por Bruce Brasington[25]—la primera, en la cita de la epístola 185 de san Agustín; las dos siguientes, en la cita de la decretal de Juan VIII—, así como el análisis de cuarenta y siete variantes, son los argumentos que avalan esta conclusión, que el autor completa al sugerir la vinculación del prefacio de 10PK con el de de los códices Mb (*Panormia*) Pd (*Decretum*) Sa (*Panormia*) Vs (*Panormia*) Vt (*Panormia*) empleados por Brasington.[26]

Las *Exceptiones ecclesiasticarum regularum* de 10PK tienen, en efecto, uno de los elementos que caracterizan la transmisión del tratado sobre la dispensa de Ivo como prefacio de una colección, y no como escrito independiente, fuera esta colección la *Panormia*, el *Decretum*, o bien otra compilación dependiente de las anteriores: si bien es cierto que los dos manuscritos de 10PK carecen de las palabras iniciales de las *Exceptiones ecclesiasticarum regularum*, que son propias de los testimonios en los que este *Prologus* es la introducción de una obra más extensa, K L tienen la advertencia final, inspirada en el gramático Prisciano, que anuncia el propósito de aclarar la intención del libro al que los

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partir de la *Panormia*: Fowler-Magerl, *Clavis canonum* 209-214. Agradezco al Profesor Joaquín Sedano Rueda (Universidad de Navarra) haber compartido sus conclusiones sobre la relación entre los manuscritos de la colección, en parte publicadas en sus estudios 'The *Collectio decem partium*'s Distinctive Sections: Parts 4 and 10', *Proceedings Toronto 2012* 31-60; y 'A Comparative Analysis of the Panormia and the Collectio X Partium', ZRG Kan. Abt. 96 (2010) 80-110. Cf. también Melodie H. Eichbauer, 'A Desire for the Latest and the Greatest: Recent Papal Decretals and Roman Law in the Collectio decem partium', BMCL 36 (2019) 195-208.

[24] Tena-Malo, *La colección canónica* 56.

[25] Bruce Brasington, *Ways of Mercy: The Prologue of Ivo of Chartres: Edition and Analysis* (Vita regularis. Ordnungen und Deutungen religiosen Lebens im Mittelalter 2; Münster 2004) 115-42. En adelante, las citas de las *Exceptiones ecclesiasticarum regularum* de Ivo de Chartres harán referencia a la página y a las líneas de esta edición.

[26] Tena-Malo, *La colección canónica* 56. Significado de las abreviaturas: Brasington, *Ways of Mercy* 113.

párrafos precedentes sirven de pórtico mediante la *capitulatio* de su contenido.[27] En estas palabras finales de transición del *Prologus* / prefacio a la capitulación, los dos testimonios de 10PK coinciden en la lectura 'Hec hactenus', en lugar de 'Set hec hactenus' (Brasington 142.9), así como en la transposición 'breuiter prestingemus intentionem' (Brasington 142.10 'intentionem breuiter prestingemus').

Las tres frases suplementarias identificadas por Tena-Malo, también presentes en los ejemplares de Colonia y Leipzig, ponen de manifiesto la singularidad del modelo que utilizó el autor de 10PK, al menos a la vista de la edición provisional del *Prologus* realizada por Brasington, así como de la edición de trabajo del *Decretum* de Ivo de Chartres.[28] La comparación con el prefacio de la *Collectio decem partium* elaborada en Therouanne (10PT), y dependiente de la *Panormia*, reafirma esta conclusión. El hecho de que la primera frase suplementaria sea una adición marginal en L sugiere que, en este caso, el autor de 10PK consultó dos obras distintas. Veámoslo con mayor detenimiento.

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[27] Frase inicial: Brasington 115.1-2 y nota 365. Advertencia final: Brasington 142.9-13 y notas 844-847. Ambos elementos pertenecen, sin duda, a la tradición de las *Exceptiones ecclesiasticarum regularum* como *Prologus* de una colección. La mayoría de los testimonios conocidos de esta obra—también los dos manuscritos de 10PK—tienen el párrafo inicial 'Exceptiones ecclesiasticarum regularum—sue ualere perspexerit' (Brasington 115.3-9), en el que Ivo explica que ha reunido las reglas eclesiásticas en un volumen—'in unum corpus'/'in uno corpore' (Brasington 115.7)—con la intención de facilitar su consulta a quien tuviera interés en profundizar en su contenido, y no dispusiera de las obras originales. Esta afirmación vincula la confección de las *Exceptiones* con la elaboración de una colección canónica, igual que las cuatro advertencias a un hipotético lector, también presentes en el *Prologus* de 10PK: (i) 'In quo prudentem lectorem premonere congruum duximus ut si forte que legerit non ad plenum intellexerit uel sibi inuicem aduersari existimauerit'; (ii) 'Hec attendens diligens lector intelliget unam esse faciem eloquiorum sacrorum'; (iii) 'sed prudenti lectori et ei qui nouit de paucis plura intelligere debent predicta sufficere'; y (iv) 'ut hinc prudens lector aduertat quid in unaquaque parte sibi necessarium querere debeat' (Brasington 116.1-3, 118.2-3, 141.12-13, 142.10-12, respectivamente).

[28] Elaborada por Martin Brett y disponible en: https://ivo-of-chartres.github.io/decretum/ivodec_1.pdf (31/10/21).

Agustín, *Epistola* 185.45

Todas las versiones del *Prologus* de Ivo citan—con las adaptaciones exigidas para su inserción en el discurso—un párrafo de la carta que Agustín dirigió, el año 417, a Bonifacio, a propósito de las herejías arriana y donatista, en la que, entre otros asuntos, trata la situación canónica de los clérigos *lapsi* reconciliados. Como pone de manifiesto el siguiente cuadro, la *auctoritas* agustiniana parece más completa en la versión de 10PK:

Prologus ID edición de Brett	. . . fiat clericus vel maneat clericus. Que posteriorum . . .
Prologus edición de Brasington 122.11-12	. . . fiat clericus uel maneat clericus. Que posteriorum . . .
Prologus 10PT, BNP 10743 p. 14	. . . fiat clericus uel maneat clericus. Que posteriorum . . .
K fol. 4r	. . . fiat clericus uel maneat clericus ut desperatione temporalis altitudinis medicina maior et uerior esset humilitatis. Que posteriorum . . .
L fol. 4r	. . . fiat clericus uel maneat clericus (ut desperatione temporalis altitudinis medicina maior et uerior esset humilitatis)$^{\text{add. marg.}}$ Que pos-teriorum . . .

El autor de 10PK pudo contrastar la cita de la carta de Agustín que encontró en el *Prologus* sobre la dispensa con otro modelo, más fiel al original, de donde tomó la frase que no transcribió el obispo de Chartres. Cabría pensar en un volumen con las epístolas agustinianas, o bien en alguna compilación de *auctoritates*: el párrafo de la epístola a Bonifacio llegó 'completo', por ejemplo, al *Decretum* de Ivo (ID 6.86), así como al título sobre las causas de los clérigos de la *Tripartita B* (TrB 3.10.21), entre otras colecciones.[29] El principio de economía de fuentes favorece la

[29] *Tripartita B* y *Decretum* de Ivo son las únicas colecciones que transmiten una cita de la epístola de Agustín a Bonifacio con la misma extensión que D.50 c.25 del Decreto de Graciano. Pero la frase suplementaria de 10PK también se incluye en los párrafos de la misma carta que llegaron a Anselmo de Lucca (*Ans*.

opción de la colección canónica, en especial porque la *Tripartita B* estuvo a disposición del autor de 10PK.

Por otro lado, que la frase suplementaria sea una adición marginal en L y haya llegado al interior del texto en K, concede cierta prioridad al ejemplar lipsiense de 10PK.

Juan VIII (JH[3] 6826: JE 3271)

En la parte final de las *Exceptiones ecclesiasticarum regularum*, dedicada a la restitución de los clérigos depuestos, hay una extensa cita de la carta que el papa Juan VIII dirigió, el año 879, a los emperadores Basilio, Constantino y Alejandro para responder a sus peticiones relativas a la situación de Focio, patriarca de Constantinopla, que había sido depuesto por el papa Nicolás I. En el primer párrafo de la decretal llama la atención esta variante:

Prologus ID edición de Brett	. . . Petrum, dicente ad eum. Tibi dabo claves regni celorum; et quodcumque ligaveris super terram, erit ligatum et in celis; et quodcumque solveris super terram, erit solutum et in celis, habet potestatem . . .
Prologus edición de Brasington 138.11-12	. . . Petrum, dicente ad eum: Tibi dabo claues regni celorum et quodcunque ligaueris super terram erit ligatum et in celis et cetera habet potestatem . . .
Prologus 10P BNP 10743 p. 20-21	. . . Petrum dicente ad eum Tibi dabo claues regni celorum et quodcumque solueris super terram erit solutum et in celo et quodcumque ligaueris super terram erit ligatum et in celo, habet potestatem . . .
K fol. 8v	. . . Petrum dicente ad eum: ‘Tibi dabo claues regni celorum et quodcumque solueris super terram erit solutum et in celis et quodcumque ligaueris super terram erit ligatum et in celis’, habet potestatem . . .

8.3), la *Collectio trium librorum* (*3L* 3.19.9), o al *Polycarpus* (*Pol*. 6.20.16), entre otras colecciones gregorianas. La frase suplementaria de 10PK también se distingue en el *Liber de misericordia et iustitia* de Algerio de Lieja (2.43 can. d).

L fol. 7v	. . . Petrum dicente ad eum: 'Tibi dabo claues regni celorum et quodcumque ligaueris super terram erit ligatum et in celis et quodcumque solueris super terram erit solutum et in celis', habet potestatem . . .

La coincidencia de K L en 'apostolicis debitis', en lugar de la lectura más correcta 'apostolicis decretis' de Brett y 10PT, emparenta la versión del *Prologus* de los dos testimonios de 10PK. A primera vista, los manuscritos utilizados por Brasington para su edición provisional de las *Exceptiones ecclesiasticarum regularum* omiten las palabras 'eum restituere uolumus, sed ex apostolicis debitis',[30] por lo que, en este caso, la versión de K L se apartaría de la que transmiten esos testimonios. Pero sus notas críticas no registran la presencia de esas palabras en, al menos, uno de los ejemplares monacenses de la *Panormia*, en dos de los testimonios vaticanos de esta colección, así como en otro ejemplar vaticano del *Decretum*.[31] Por tanto, esta variante no puede tomarse como referencia para reconstruir las dependencias del *Prologus* de 10PK.

Juan VIII (JH[3] 6826: JE 3271), cita de Mt 16, 19

Unos párrafos después, casi al final de la decretal sobre la restitución de Focio, Juan VIII recuerda a los emperadores que la potestad universal de la sede apostólica tiene su fundamento en la entrega de las llaves del reino de los cielos al apóstolo Pedro en Cesarea de Filipo. La cita de Mateo 16, 19 no es igual en todas las versiones:

Prologus ID edición de Brett	Petrum, dicente ad eum. Tibi dabo claves regni celorum; et quodcumque ligaveris super terram, erit ligatum et in celis; et quodcumque solveris super terram, erit solutum et in celis, habet potestatem

[30] Brasington, *Ways of Mercy* 136.

[31] Cf. München BSB lat. 28223, fol. 9ra (*Panormia*, Ma: Brasington, *Ways of Mercy* 113); Vat. Reg. Lat. 340, fol. 6v (*Panormia*, Vr: ib.); Vat. Archiv. San Pietro G 19, fol. 7v (*Panormia*, Vs: ib.); y Vat. Pal. lat. 587, fol. 3va (*Decretum*, Vt: ib.).

Prologus edición de Brasington 138.11-12	Petrum, dicente ad eum: Tibi dabo claues regni celorum et quodcunque ligaueris super terram erit ligatum et in celis et cetera habet potestatem . . .
Prologus 10P BNP 10743 p. 20-21	Petrum dicente ad eum Tibi dabo claues regni celorum et quodcumque solueris super terram erit solutum et in celo et quodcumque ligaueris super terram erit ligatum et in celo, habet potestatem . . .
K fol. 8v	Petrum dicente ad eum: 'Tibi dabo claues regni celorum et quodcumque solueris super terram erit solutum et in celis et quodcumque ligaueris super terram erit ligatum et in celis', habet potestatem . . .
L fol. 7v	Petrum dicente ad eum: 'Tibi dabo claues regni celorum et quodcumque ligaueris super terram erit ligatum et in celis et quodcumque solueris super terram erit solutum et in celis', habet potestatem . . .

La frase neotestamentaria parece más completa en las versiones del *Prologus* de Brett, de 10PT y de 10PK, aunque siete de los doce manuscritos empleados por Brasington transmiten todas las palabras que Cristo dirigió a Pedro. [32] Sorprendentemente, los dos testimonios de 10PK no son concordantes: mientras que L coincide con la edición de Brett—y con la vulgata y la neovulgata—en la secuencia 'ligaueris . . . ligatum . . . solueris. . . solutum', K sigue a 10PT en 'solueris . . . solutum . . . ligaueris . . . ligatum'. Esta variante distorsiona la relación de dependencia de K respecto a L: al tratarse de una cita bíblica, la redacción de K podría achacarse a un defecto de memoria del copista; sin embargo, la presencia del mismo error en la versión de 10PT cuestiona la credebilidad de esta explicación.

El *Prologus* que sirvió de modelo al autor de 10PK funcionó, ciertamente, como prefacio de una colección, pero no hay evidencias suficientes para preferir el *Decretum* a la *Panormia*. El

[32] Brasington, *Ways of Mercy* 138, quien deja constancia de las lecturas de Ly Ma Mb Pd Sa Vs: 'et quodcunque solueris super terram erit solutum et in [celo La] celis' (nota 782).

hecho de que estas colecciones no pertenezcan al *corpus fontium* del autor de 10PK abre la vía a otras tradiciones de las *Exceptiones ecclesiasticarum regularum* como, por ejemplo, la representada por aquellas colecciones derivadas de las obras de Ivo que transmiten su famoso tratado sobre la dispensa a modo de *Prologus*, inmediatamente antes de la *capitulatio*.

Por lo demás, el autor de 10PK no solo enmarcó su colección con el *Prologus* del obispo de Chartres, porque también tomó de las *Exceptiones ecclesiasticarum regularum* un capítulo de la parte cuarta de su obra. Se trata del fragmento de la decretal que Juan VIII envió con sus apocrisarios a Constantinopla para resolver el asunto de Focio que, además de en el *Prologus* de 10PK, también se utiliza en la distinción sobre 'Quo tenore et a quibus dispensationes fieri debeant', es decir, 10PK 4.7.4[3] =Brasington 137.6-8=*ex* Juan VIII (JH[3] 6826: JE 3271). Las *Exceptiones ecclesiasticarum regularum* son una de las pocas obras que citan las palabras de Juan VIII, quien a su vez remitió a León I (¿?) para explicar que el estado de necesidad justifica la dispensa. La comparación de la cita leonina en el *Prologus* de Ivo, en las *Exceptiones* de 10PK y en el interior de 10PK, arroja el siguiente resultado (las lecturas del *Prologus* de K L se reflejan en las notas de la primera columna):

Prologus (Brasington 137.6-8)	10PK 4.7.4 (K fol. 49v)
Et sanctissimus papa Leo in eodem spiritu precepit[1] dicens: Ubi necessitas non est, nullo modo uiolentur sanctorum patrum constituta[2]. Ubi uero necessitas fuerit ad utilitatem ecclesie qui potestatem habet ea dispenset. Ex necessitate enim fit mutacio legis.	Leo Papa. Ibi[1] necessitas non est, nullomodo uiolentur sanctorum patrum statuta. Vbi uero necessitas fuerit ad utilitatem ecclesie, qui potestatem habet ea dispenset. Ex necessitate enim fit mutatio legis.
[1] precipit K L [2] statuta K L	[1] Vbi L fol. 38r

En lugar de 'constituta', los dos testimonios de las *Exceptiones* de 10PK leen 'statuta', que es también la lectura de la cita del papa León en el interior de la colección de Colonia. En principio, el modelo de 10PK 4.7.4[3] fue un *Prologus* de Ivo de

Chartres similar al que se utilizó para elaborar el prefacio que, al menos en esta variante, conecta con los manuscritos La Mb Vs Vt de la edición provisional de Brasington.[33]

Más intentesante, sin embargo, es comprobar que el autor de 10PK dedicó una distinción de su colección a la dispensa, en la parte que dedicó a describir las fuentes formales del derecho canónico (vid. el apartado IV y el Apéndice V).

¿*Decretum* o *Tripartita*?

Según Tena-Malo, el autor de 10PK tomó cuatro capítulos del *Decretum* de Ivo de Chartres: 10PK 5.7.9 y 5.8.1-3[1a-c], conforme a su propuesta de nueva capitulación.[34] La ausencia de una explicación más detallada aconseja la cautela, porque la *Tripartita* también ofrece correspondencias para este pequeño grupo de textos.

En efecto, es poco probable que 10PK 5.7.9 (= Gregorio I [JH[1] 2863: JE 1747, *ex Registrum* 9.218]) proceda de ID 5.112, y no de TrA 1.55.45-46. La distinción séptima del libro quinto de 10PK recoge veintidós capítulos sobre los que ordenan y son ordenados por simonía: 'De his qui per simoniam ordinant uel ordinantur'. Las tablas de Tena-Malo informan que esta sección comienza con ocho fragmentos gregorianos, que han sido tomados de TrA 1.55: se trata de 10PK 5.7.1-8, todos ellos reconocibles en TrA 1.55.5, 6ab, 13, 24, 35, 36, y 39.[35] A continuación hay otros dos textos de Gregorio I que, según Tena-Malo, procederían de dos almacenes distintos: mientras que el modelo de 10PK 5.7.9 sería ID 5.112, el modelo de 10PK 5.7.10 habría que buscarlo en Tr 1.55.47.[36] Pero el autor de la colección de Colonia también pudo encontrar 10PK 5.7.9 en la *Tripartita A*, donde la autoridad gregoriana forma los capítulos TrA 1.55.45-46. Ninguna razón explica en este caso el cambio de modelo, de TrA a ID. Por el contrario, el principio de economía de fuentes favorece a la *Tripartita*: mientras que los diez

[33] Brasington, *Ways of Mercy* 138 y la nota 748.
[34] Tena-Malo, *La colección canónica* 44, 50.
[35] Ibid. 44.
[36] La distinción tiene otro capítulo gregoriano más, 10PK 5.7.13, que se corresponde a TrA 1.55.30.

textos de 10PK 5.7.1-10 están en la *Tripartita*, el *Decretum* de Ivo de Chartres solo tiene 5 correspondencias con ese bloque de *auctoritates*.

Algo similar ocurre con los párrafos de la decretal que Inocencio I dirigió a los obispos de Macedonia el año 414 (JH[1] 691: JK 303), con los que se elaboraron los tres primeros capítulos de la distinción de Colonia sobre los que son ordenados por herejes o excomulgados: 10PK 5.8 'De ordinatis ab hereticis vel excommunicatis'. Para Tena-Malo, los textos llegaron desde el *Decretum* de Ivo de Chartres, esto es, 10PK 5.8.1-3[1a-c]=ID 6.59-61, como sugiere su tabla de correspondencias.[37] Pero tampoco en este caso están claras las razones para descartar que estas *acutoritates* dependan de TrA 1.38.12-14; por el contrario, el recurso al *Decretum* de Ivo para este bloque de solo tres capítulos implicaría un cambio de modelo dentro de una amplia serie de textos que el autor de la colección agripina tomó de la *Tripartita*.

La crítica textual permitió a Pertersmann connectar la versión del 'Exemplar Constantini Constantinopolitani Imperatoris' de 10PK 8.1.7-8 con la *Tripartita*, modelo del que también procedería ID 5.49.[38] En la colección de Colonia, la falsificación forma parte de la distinción titulada 'De primatu et digninate Romane Ecclesie'. Esta sección tiene veinticinco capítulos, de los que veintidós están presentes en las dos partes de la *Tripartita A*, y tres en la *Tripartita B*. El *Decretum* de Ivo no tiene correspondencias para 10PK 8.1.1, 11[9], 16[13b], 17[14], 18[15], 21[17], 22[18] y 24[20]. Esta información complementa la imagen que aportan las variantes de 10PK 8.1.7-8, al tiempo que aconseja mirar con cautela los cambios de modelo en otras distinciones de la obra.

Tripartita A y *Tripartita B*

A partir de las tablas de fuentes formales y de la transcripción del manuscrito de Colonia elaboradas por Tena-Malo es relativamente sencillo esbozar los rasgos distintivos de la versión de la *Tripartita*

[37] Tena-Malo, *La colección canónica* 44.
[38] Petersmann, 'Die kanonistische Überlieferung' 389.

que consultó el autor de la colección de Colonia (vid. el Apéndice II).

El principal proveedor de 10PK tenía: (i) la sección de decretales de León IX, esto es TrA 1.65; (ii) la sección de decretales de Alejandro II, TrA 1.66; (iii) la sección de decretales de Urbano II, con la falsa atribución de TrA 1.67.2, 'Urbanus secundus Alberto Metensi episcopo'; (iv) las *Sententie grecorum* de TrA 2.14; (v) las *Sententie* de TrA 2.50; y, (vi) la *Tripartita B*. Por lo demás, es probable que los capítulos de la *Tripartita A* que manejó el autor de 10PK estuvieran provistos de sumarios. Es verdad que los capítulos de 10PK no tienen sumarios. Pero los sumarios de la segunda versión de la *Tripartita* son reconocibles en alguna de las etiquetas que describen el contenido de las distinciones en que se han divido las 10 partes de la obra (vid. Apéndice VII).

Estos rasgos (i-vii) son propios de la segunda versión de la *Tripartita*.[39]

Otros modelos menores

Las compilaciones relacionadas con Ivo de Chartres no ofrecen correspondencias para siete capítulos de la colección de Colonia: 10PK 3.7.12[9a], 5.3.2-4, 5.16.21[18], 6.1.6[5] y 7.6.2. Ante la imposibilidad de establecer el modelo de estas *auctoritates*, Tena-Malo abre diversos caminos para indagaciones ulteriores.[40] En la mayor parte de los casos, su información esclarece la tradición tardía de los textos, por lo que ahora se completa con las referencias que, a primera vista, tienden puentes hacia su pasado más inmediato, o bien conectan con otros círculos intelectuales, contemporáneos a las fechas más probables de composición de la colección agripina. En ningún caso los datos singularizan de manera concluyente las obras, los autores o las situaciones a través

[39] Christoph Rolker, *Canon Law and the Letters of Ivo of Chartres* (Cambridge Studies in Medieval Life and Thought. Fourth Series 76; Cambridge 2010) 101-104.

[40] Tena-Malo, *La colección canónica* 75. El extracto publicado en 2021 no incluye sus consideraciones sobre el origen material y transmisión de estos textos de las páginas 82 a 90 de la tesis.

de las cuales el autor de 10PK conoció estas *auctoritates*. Lo único cierto es que, junto a la *Tripartita*—y junto a un ejemplar de las *Exceptiones ecclesiasticarum regularum*—, en su relación de proveedores hay que incluir otros escritos menores. Por lo demás, la relación de capítulos de origen incierto debe ampliarse con otros tres más que no están en K como consecuencia del salto apreciable en el fol. 25v, laguna que se puede reconstruir a partir de L: son los fragmentos 10PK 3.2.9-10 y 3.7.16.

Los capítulos cuya fuente formal no ha sido posible identificar se analizan a continuación siguiendo el orden de 10PK, aunque los atribuidos a Urbano II se agrupan en un apartado distinto.

10PK 3.2.9 Interdicimus y 10PK 3.2.10 Decime

Ambos capítulos son adiciones marginales en L fol. 19v. Se han copiado entre las autoridades 'In eodem cap. ciii. Vidue que stipendiis—ecclesiam adiuuent' (TrA 2.18.102) y 'Gelasius uniuersis episcopis per Lucaniam et Siciliam. Quattuor autem de redditu—putauerit supprimenda' (TrA 1.46.19), por lo que en el Apéndice I de estas 'Notas' se numeran como 10PK 3.2.9-10. En cualquier caso, su posición en la copia de Leipzig y su origen incierto sugieren que no formaban parte de la distinción sobre los bienes eclesiásticos:[41] los veinte capítulos restantes de esta parte proceden de la *Tripartita*. Por otra parte, la laguna de K en fol. 25v no permite concluir sobre la configuración original de esta sección, un dato que hubiera ayudado a esclarecer la relación entre L y K.

He aquí el texto de 10PK 3.2.9:

> Ex concilio Remensi cap. uiii. Interdicimus ut nullus presumat ecclesiam inter duos uel plures diuidere, quia ecclesia Christi uxor et sponsa Christi debet esse non scortum, sicut Calixtus papa testatur

Es la segunda parte de un *caput incertum* que, desde Regino de Prüm (RP) se relaciona con un concilio celebrado en Reims: RP 1.247 'Ex concilio Remensi, cap uiii. Ut in ecclesia una non plures prebiteri constituuntur. Sicut in unaquaque ecclesia—et sinceriter

[41] 10PK 3.2 'De rebus ecclesie quibus et quomodo et a quibus distribui debeant et quorum regimine gubernari uel non'.

regat + Vnde interdicimus ut nullus—Calixtus papa testatur'.[42] El capítulo pasó con la misma extensión al Decreto de Burcardo (DB), quien, sin embargo, abrevió la inscripción: DB 3.45 'Ex con. quo supra cap. uiii. Item ex eodem. Sicut in unaquaque ecclesia—Calixtus papa testatur'.[43] Al parecer, el obispo de Worms pensaba que DB 3.44 y 45 fueron promulgados en la misma asamblea.[44] El *Decretum* de Ivo conserva la extensión y la atribución de Burcardo.[45] Según la *Panormia*, el capítulo es también una de las disposiciones adopatadas en Reims.[46] La adición marginal de L concecta con esta tradición que se difundió

[42] Friedrich Wasserschleben, *Reginonis Abbatis Prumensis Libri Duo de Synodalibus Causis et Disciplinis Ecclesiasticis* (Lipsiae 1840) 119-120, advirtió que 'inter editos canones non exstat' (nota q); Wilfried Hartmann, ed. y trad. *Das Sendbuch des Regino von Prüm (Regionis Prumiensis Libri duo De synodalibus causis et disciplinis ecclesiasticis* (Ausgewählte Quellen zur deutschen Geschichte des Mittelalters 42; Darmstadt: Wissenschaftliche Buchgesellschaft, 2004) 134.

[43] Hartmut Hoffmann- Rudolf Pokorny, *Das Dekret des Bischofs Bruchard von Worms: Textstufen: Frühe Verbreitung: Vorlagen* (MGH Hilfsmittel 12; München 1991) 192, no identificaron la fuente. La *Collectio quattuor librorum* de Colonia tiene la atribución de Regino: *4L* 2.139 'Ex con. Remensi cap. uiii. require cap. cclxxuiu. Ut in una ecclesia non plures presbiteri constituantur. Sicut in unaque ecclesia presbiter—Calixti pape testatur'.

[44] DB 3.44 (=RP 2.77) 'Ex concil. Remensi cap ii. Vnusquisque presbyter—ministrates presumat'. Hoffmann-Pokorny, *Das Dekret* 192: DB 3.44 corresponde al c. 15 de los *Capitula Monacensia*.

[45] ID 3.49 'Item ex eodem. Ex con. quo supra cap. uiii. Sicut in unaquaque ecclesia—Calixtus papa testatur'. La inscripción y la extensión de ID 3.48 coinciden con la de DB 3.45.

[46] IP 2.44 'Item ex edoem. Ex con. Remensi cap. uiii. Idem. Sicut in unaquaque ecclesia—Calixtus papa testatur' (IP 2.43 es RP 2.77, DB 3.44, ID 3.48). La etiqueta pasó a la *Collectio decem partium* de Therouanne (10PT 2.24.1 'Ex eodem concilio cap. uiii. Ne ecclesia diuidatur inter plures presbiteros sed singuli singulos habeatn si fieri potest. Sicut in unaquaque ecclesia presbiteri—Calixtus papa testatur'). El texto se recogió también en la colección de Santa Genoveva (1.4.16) y en la segunda versión de la colección *Caesaraugustuna* (*Caes*. [2] 8.48. 'Ex con. Remensi cap. uiii. Sicut in unaquaque ecclesia—Calixtus papa testatur'). Llegó al Decreto de Graciano como C.21 q.2 c.4 'Vnde in Remensi Concilio legitur. Una ecclesia duobus sacerdotibus diuidi non potest. Sicut in unaquaque—papa Calixtus testatur'.

en el círculo de Ivo de Chartres,[47] si bien es cierto que el copista omitió la introducción del capítulo—donde la imposibilidad de dividir una iglesia entre varios sacerdotes se explica a partir de la imagen del matrimonio espiritual del presbítero con su parroquia—porque solo seleccionó la parte dispositiva: las palabras 'Interdicimus ut nullus presumat–Calixtus papa testatur' de 10PK 3.2.9 corresponden, en efecto, al párrafo final del canon 'Sicut in unaquaque ecclesia—Calixtus papa testatur'. Quien completó esta distinción de la colección de Colonia manifestó estar familiarizado con el derecho canónico. ¿Se trataba del autor de la colección? ¿del autor de la copia de Leipzig? ¿de uno de sus primeros usuarios? El origen de las adiciones marginales de L anteriormente comentadas, y el modo en que llegaron al interior de K, las sitúan en un momento muy próximo a la confección de la obra.

La segunda anotación marginal de L fol. 19v es 10PK 3.2.10, cuyo texto dice:

> Ex concil. Turonico. Decime que singulis dabuntur ecclesiis a presbiteris ad usum ecclesie et pauperum summa diligentia dispensentur

Las colecciones relacionadas con Ivo no transmiten el c.16 del concilio de Tours (813), que *Benedictus Levita* recogió, junto a otros cánones de esta asamblea conciliar, en las adiciones de su capitular (BL Add. 3.83).[48] La versión de la adición marginal de L suprime las palabras 'per consulta episcoporum'—lee 'ecclesiis a presbiteris ad usum', en lugar de 'ecclesiis per consulta episcoporum ad usum' del Capitular[49]—lo que concede al sacerdote un amplio poder de autonomía para disponer a favor de su iglesia y de los pobres de los diezmos recaudados. El estado del texto de la adición plantea el interrogante de cuál fue el modelo de su autor y si fue él quién modificó la disciplina aprobada en Tours.

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[47] El fragmento también llegó a la Colección en 4 Libros de Köln, HA 124, donde es el texto 2.139: Ex con. Remensi cap. viii. require cap. cclxxiiii. Ut in una ecclesias non plures presbiteri constituantur. Sicut in unaquaque—Calixtus pape testatur.

[48] El concilio de Tours en MGH Conc. 2 1.288, 22.

[49] El concilio y el Capitular leen 'ecclesiis per consulta episcoporum ad usum'.

Lo único cierto es que se trataba de la misma persona responsable de la adición inmediatamente anterior.

10PK 3.7.16 *Statuimus*

El capítulo es también una adición en el ejemplar de Lepizig, porque se ha copiado aprovechando el final del fol. 22v y el comienzo del fol. 23r. En K no queda rastro del texto, como consecuencia del salto en la obra que se produce del fol. 25v al 26r.

La adición de L dice:

> Gregorius papa. Statuimus secundum priorem diffinitionem ut monasteria nullomodo ex suis prediis cogantur ab episcopis decimas dare quia si legitime dande non sint nisi orphanis et peregrinis indignum valde est ut ab eis exigantur qui propter eum cuius decime sunt pauperes efficiuntur.

Este *caput incertum* se difundió con cuatro inscripciones distintas. La más común informa que se trata, o forma parte, de una carta que el papa Gregorio—no se dice cuál, aunque del destinatario se deduce que se piensa en Gregorio Magno—envió a Mariano, arzobispo de Rávena, pidiéndole que no inquietara a los monasterios de su diócesis exigiéndoles el pago de los diezmos. Esta versión de la decretal se caracteriza además porque el párrafo 'Statuimus secundum—pauperes eficiuntur'—que es el fragmento que llegó a 10PK—se completa con la exhortación final del papa—'Nam si pauperes—charisime patiantur'—como, por ejemplo, en los apéndices a la *Tripartita* en los manuscritos Admont y Munich, [50] en la colección del manuscrito de la Universidad de Leipzig[51] y en la Colección en Nueve Libros del

[50] Cf. München BSB lat. 12603 fol. 147r: 'Ex dictis Gregorius papa ad Marianum archiepiscopum Rauenne. Statuimus secundum priorem—fili charisime patiantur'. Para la realización de este estudio no ha sido posible consultar las adiciones de Admont SB 162, de cuyo contenido se tienen noticias gracias a la edición de trabajo de Martin Brett:
https://ivo-of-chartres.github.io/tripartita/dkmn_app.pdf (31/10/21).

[51] Lepizig UB 276, texto 4.1: 'Gregorius papa ad Marianum Rauennantem ep. An monachi de laboribus suis decimas dare cogantur. Statuitum secundum priorem—fili carissime patiantur'.

Archivo de San Pedro.[52] La versión *A Aucta* de la colección de Anselmo de Lucca [53] y la *Collectio tredecim librorum* del manuscrito Vat. lat. 1361[54] emplean una inscripción genérica—'Ex decretiis Gregorii papa'—para identificar un texto cuya extensión es mayor que la del ejemplar lipsiense de 10PK, porque coincide con la de las adiciones de Admont y Munich mencionadas. En la colección del manuscrito de Mantua, la primera parte del texto, 'Statuimus secundum—pauperes eficiuntur', se localiza en el registro del papa.[55] Esta versión breve es la que llegó a las adiciones de la *Panormia* en uno de los manuscritos de Admont, pero con una inscripción que menciona un destinatario nuevo, también relacionado con el pontificado de Gregorio Magno: el patriarca Eulogio de Alejandría.[56] En fin, en las adiciones de la abreviación de la colección de Anselmo de Lucca del manuscrito Pisa Santa Catarina, el texto aparece sin inscripción.[57]

10PK 3.7.28(12) *Liberum est* (L fol. 23v adición marginal, K fol. 27r)

La autoridad 'Ieronimus ad Damasum papam. Liberum est episcopis—quam religionem attendere' (10PK 3.7.28[12]) forma

[52] *9L* (Vat. Archivio San Pietro, C. 118, fol. 63vb) 4.19: 'Gregorius Mariano Rauennati. Ne decime exigantur a monachis. Statuimus secundum priorem—patiantur fili carissime'.

[53] *Ans*. (A Aucta) 4.5: 'Ex decretis Gregorii papa. Statuimus secundum priorem—fili carissime patiantur'.

[54] *13L* (Vat. lat. 1361 fol. 245vb) 13.43: 'Ex decretis Gregorii. Item quod monachi non dent decimas. Statuimus secundum priorem—carissime fili patiantur'.

[55] Mantua BM 439 (D. III. 13): 'Gregorius in registro. Statuimus secundum definitionem—pauperibus est eroganda'.

[56] Admont SB 257: 'Ex decretis Gregorii pape capitulo cclxxxiii. Gregorius Eulogio patriarche Alexandrino. Statuimus secundum—pauperibus est eroganda'. Esta versión no pudo ser el modelo de 10PK 3.7.16 porque lee 'decimas dare quia si sunt nisi orphanis et peregrinis, quantomagis indignum valde est ut' en lugar de 'decimas dare quia si legitime dande non sint nisi orphanis et peregrinis indignum valde est ut ab eis' de la colección de Colonia.

[57] Es la adición sexta del libro seis y tiene la extensión Statuimus secundum priorem—patiantur fili carissime (fol. 64r).

parte de una falsificación que circuló en el norte de Italia en los años 1120 y 1130. Stephan Kuttner editó la carta que Jerónimo dirigió supuestamente al papa Dámaso I a partir del manuscrito Vat. lat. 1361, una copia de la *Collectio tredecim librorum* (*13L*), donde el texto aparece como *13L* 13.41; y de Vat. Barberini lat. 1450, que transmite el *Liber decretorum* de Burcardo de Worms con algunos complementos, entre los que se encuentra la falsificación. En la edición de Kuttner, la inscripción y la extensión de la falsificación son: 'Beatissimo pape Damaso Hieronimus presbiter in Domino salutem. Inter alia que scripsisti—sibi manducant et bibunt. [Et infra. Par sacrilegium est rem pauperum non pauperibus dare. At uero quicquid habet episcopus, quicquid ecclesia, pauperum est]'.[58] El fragmento que utilizó el autor de 10PK apenas comprende tres de las cincuenta líneas que alcanza el documento.[59] La falsificación también llegó a la versión extendida de la colección de Anselmo de Lucca (*Ans*. *Aucta* 4.6). En el dossier de textos sobre los derechos monacales del manuscrito Lepizig UB 276, hay dos *excerpta* de la presunta carta: de un lado, 'Ieronimus ad Damasum. An decime episcoporum sint et in quorum usus debeant prouenire. Inter alia que scripsistis—dominium illorum cedit' (Leipzig 1.1=Kuttner 2.2-31); y, de otro, 'Ieronimus ex epistola ad Damasum papa. Et quoniam quicquid habent episcopi pauperum—quam religionem attendere' (Leipzig 3.5a=Kuttner 2.34-41), que comprende las palabras 10PK 3.7.28[12]. Éstas también son reconocibles en los párrafos que llegaron a C.16 q.1 c.68 del *Decretum Gratiani*, probablemente desde las *Sententiae Magsitri A.*[60]

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[58] Stephan Kuttner, 'Some Roman Manuscripts of Canonical Collections', BMCL 1 (1971) 7-29, edición en páginas 26-28. El estudio fue reeditado con el número II en el volumen *Medieval Councils, Decretals, and Collections of Canon Law* (Hampshire–Brookfield 1980 y 1992) con *Retractationes* (1-3) y *New Retractationes* (4-5).

[59] En concreto, 10PK 3.7.28(12) corresponde a las líneas Kuttner 2.38-41 de la falsificación.

[60] C.16 q.1 c.68, 'B. Ieronimus Damaso pape scribit dicens. Quoniam quicquid habent—manducant et bibunt' (Kuttner 2.34-52=*edF* 784.43-785.20).

La versión breve de K L se aparta de la generalmente difundida porque su *incipit* dice 'Liberum est episcopis monachis', en lugar de 'Liberum est enim illis'.[61] Por otro lado, la adición marginal de L conserva la lectura 'Deum timentibus et colentibus' de la falsificación, mientras que K lee 'Deum timentibus'. En este caso, por tanto, K parece depender de L.

Los capítulos 10PK 5.3.2-4 (K fol. 60rv)[62]
La distinción sobre el palio y las virtudes del metropolitano (10PK 5.3) tiene cuatro capítulos: el canon primero del III Concilio de Rávena (877), que fue tomado de TrA 1.63.1,[63] y tres textos atribuidos, respectivamente, a los papas Juan, Gregorio e Inocencio, que llegaron a la colección de Colonia por otros intermediarios, hoy desconocidos.

10PK 5.3.2 *Pallii*
Es un fragmento de la decretal que el papa Juan VIII envió, el 28 de noviembre del 873, a Wiliberto, arzobispo electo de Colonia, convocándole a Roma para decidir sobre su elección, antes de entregarle el palio.[64] Los párrafos seleccionados por el autor de 10PK transmiten la explicación del papa a propósito del significado y las virtudes del palio, así como sobre las disposiciones que debe tener quien lo recibe. Estos mismos párrafos llegaron a la colección del manuscrito Roma,

[61] Kuttner 2.38. K L coinciden, además, en 'de suo iure' en lugar de 'de iure suo' (Kuttner 2.39-40).
[62] L no tiene estos textos: el fol. 41v termina con 'Et illud statuendum ut quando ad eligendum episcopum conuernerimus si qua contradictio', que pertenecen al comienzo de 10PK 5.2.27[25]; mientras que el fol. 42r comienza con 'ad letanias uel ad concilium uenerint, rationem episcopo suo reddant qualiter susceptum officium celebrent uel baptizent', que es el final de 10PK 5.4.60[61].
[63] Celebrado durante el pontificado de Juan VIII (10PK 5.3.1=Ravenna 877; JH^3 6552: JE *infra* 3109=MGH Conc. 5 68: Mansi 17.337).
[64] Iohannes VIII JH^3 6365, del 28 de noviembre del 873: JE 2986: MGH Epp. 6 256 n. 12 (fragm): MGH Epp. 7 290 n. 30 y 313 n. 1 (fragm.) (líneas 8-15): MGH Epistole Merovingici et Karolini aevi 5 314.8-15.

Vallicelliana B 89, que no parece fuera conocida al norte de los Alpes.[65]

10PK 5.3.3 *Quisquis*

La autoridad 'Gregorius papa Victori episcopo. Quisquis metropolitanorum quod—ab omni ordine deponatur' no tiene correspondencia en las colecciones canónicas. Tampoco está registrada en los *regesta* de los pontífices medievales, si bien es cierto que la inscripción—'Victori episcopo (Panormitano)'—pudo inspirarse en el epistolario de Gregorio I.[66]

10PK 5.3.4 *Si quis*

La inscripción 'Innocenitus papa Victorico episcopo Rothomagensi' pertenece a la decretal que el papa Inocencio I envió al obispo Victori(c)o de Ruan, el 15 de febrero del año 404.[67] Desde la *Dionysiana*, este documento se organiza en veinte capítulos, siete de los cuales llegaron hasta la colección de Colonia a través de la *Tripartita*.[68] Sin embargo, ni en la versión original, ni en cada uno de los capítulos que interesaron a los autores de colecciones canónicas, hay una disposición similar al capítulo 10PK 5.3.4, porque no consta que, en su respuesta al obispo de

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[65] Es el texto 154, conforme a la numeración de Fowler-Magerl, *Clavis canonum*: 'Waliberto Agripinensis episco. Palli namque usus inter cetera tante—peruenire non meruit' (fol. 18v). Otras colecciones que recogen otro fragmentos de esta decretal: con la extensión 'Optatum tibi pallium nunc—iureiurando firmandam miseris' (MGH Epistole Merovingici et Karolini aevi 5 314.23-31): *Ans*. 6.89, *Caes*. (1) 3.54, *Deusdedit* 1.191 (1.238), *Coll. Britann.* 11.49 (306), Vat. Lat. 3829 (2 parte) 72.1, *13L* (Savigny) 5.62 (es la extensión con la que llegó a D.100 c.4).

[66] Gregorio I: cf. Joahnnes Diaconus, *Sancti Gregorii Magni Vita*, 3.42 y 4.442 (PL 75.153B y 204C); y *Registrum* 6.42, 825 y 9.92 (PL 77.830B, 927D y 1018B).

[67] *Innocentius I* JH[1] 665, del 15 de febrero del 404: JK 286.

[68] En concreto: (i) 10PK 5.2.43[41]=TrA 1.38.18=JH[1] 665 c.1; (ii) 10PK 5.4.21=TrA 1.38.6= JH[1] 665 c.5; (iii) 10PK 5.4.24=TrA 1.38.7= JH[1] 665 c.6; (iv) 10PK 5.4.29=TrA 1.38.19= JH[1] 665 c.2; (v) 10PK 6.4.15=TrA 1.38.21= JH[1] 665 c.9; (vi) 10PK 7.14.1=TrA 1.38.8= JH[1] 665 c.12; y (vii) 10PK 8.5.10=TrA 1.38.20= JH[1] 665 c.3.

Ruan, Inocencio I ordenara deponer al arzobispo que hubiera conferido el sacramento del orden antes de recibir el palio.[69]

El autor de la colección de Colonia utilizó de manera incorrecta la inscripción 'Innocenitus papa Victorico episcopo Rothomagensi' en, al menos, otras dos ocasiones. En la distinción sobre los clérigos que cometen un crimen antes o después de recibir la ordenación sacerdotal del libro sexto, citó el párrafo 'Proposuisti quod—oportet impleri' como si formara parte a una carta enviada al obispo de Ruan, cuando en realidad esas frases se localizan en la decretal que Inocencio I dirigió al obispo Esuperio de Tolosa.[70] En la distinción sobre la pena capital del libro noveno cometió un error similar: citó el texto 'Quesitum etiam est—omnis seruabuntur' de la decretal dirigida a Esuperio como si se tratara de un capítulo de la decretal a Vitori(c)o.[71] En uno u otro caso, las inscripciones de las colecciones del círculo de Ivo—*Tripartita* y *Decretum*—mencionan correctamente al destinatario, el obispo Esuperio, por lo que no explican la confusión del autor de 10PK.[72] Aunque es poco probable que para esos fragmentos utilizara un modelo distinto, esta circunstancia no puede descartarse absolutamente, pues el estado actual 10PK 5.3.4 abre la puerta a la existencia de una versión hoy desonocida de la decretal que Inocencio I dirigió al obispo de Ruan, o de una falsificación de la misma. Si ese modelo no existió, habría que concluir que el autor de la colección de Colonia no dudó en falsificar un texto—cuyo modelo no ha sido posible identificar—mediante el recurso a la pseudoepigrafía.

La búsqueda de posibles modelos fuera de los círculos canónicos, sin embargo, pone de manifiesto que los capítulos 10PK 5.3.3-4 eran conocidos en otros centros culturales centroeuropeos. El manuscrito Vaticano, Pal. lat. 830, fols. 1v-

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[69] La edición de la decretal en PL 20.468. Cf. también la *Collectio Quesnelliana* (PL 56.519) y la *Dyonisiana* (PL 67.241).

[70] 10PK 6.5.21[15]=TrA 1.38.10=*Innocentius I* JH[1] 675, del 20 de febrero de 405: JK 293 c.1.

[71] 10PK 9.2.1=TrA 1.38.23=*Innocentius I* JH[1] 675, del 20 de febrero de 405: JK 293 c.3.

[72] TrA 1.38.10=ID 6.57. Y TrA 1.38.23=ID 6.349A y 10.94.

169v es uno de los pocos testimonios de la crónica de *Marianus Scottus* (1028-1082), monje escocés que profesó solemnemente en el monasterio de san Martín de Colonia (1056), y que también residió en Fulda y Mainz, donde murió. El volumen se confeccionó en el monasterio de San Martín de Mainz, en cuya biblioteca permaneció al menos hasta el final de la Edad Media.[73] Tras la muerte de su autor, la crónica universal fue actualizada con diversas *continuationes*. El último 'continuador' pautó los folios finales del ejemplar moguntino con las entradas correspondientes a los años 1108-1313, conforme a la doble computación seguida por *Marianus*. La última anotación, sin embargo, corresponde al eclipse solar de agosto de 1133. El fol. 170, que no pertence a la crónica, no tiene la mitad inferior. En el anverso, un nuevo copista ha transcrito un decreto del papa Gregorio Magno sobre la participación del diácono en las misas solemnes. En fol. 170v, otra mano distinta ha copiado las dos *auctoritates* que cierran la distinción de la colección de Colonia dedicada al palio. La tabla compara los capítulos de 10PK con el folio final del manuscrito vaticano:

10PK 5.3.3-4 K fol. 60rv	BAV Pal. lat. 830 fol. 170v
Gregorius papa Victori episcopo Quisquis metropolitanorum quod minime credimus sine pallio aliquem ordinare presumpserit, et ordinator et is qui ordinatur et cooperatores inrecuperabiliter ab omni ordine deponantur.	Gregorius Victori episcopo Quisquis metropolitanorum quod minime credimus sine pallio aliquem ordinare presumpserit, et ordinator et is qui ordinatur et cooperatores inrecuperabiliter ab omni ordine deponantur (deponat)^{ac}.
Innocentius papa Victorico episcopo Rothomagensi Si quis archiepiscopus aliquem suffraganeorum suorum sine pallio	Innocentius papa Victrici Rotho-maginensi <sic> episcopo Si quis archiepiscopus aliquem suffraganeorum suorum sine pallio

[73] Wojciech Baran-Kozlowski, 'Chronicon by Marianus Scotus. Between Computistic and Historiography. World Chronicles and the search for a suitable Chronology of History', *Quaestiones Medii Aevi Novae* 13 (2008) 313-347: biografía de *Marianus* en páginas 318-319; manuscritos de la crónica en páginas 319-328.

ordinare presumpserit, sciat se ipsum destructorem ordinis sui esse. Et is qui ordinatur ab episcopali officio deponatur et omnes cooperatores eius similiter.	ordinare presumpserit, sciat se ipsum destructorem ordinis sui esse. Et is qui ordinatur ab episcopali officio deponatur et omnes cooperatores eius similiter.

Sea cual fuere el origen de este medio folio suplementario de la crónica compuesta por el monje escocés, la mano que copió las dos *auctoritates* de su reverso empleó una caligrafía del siglo XII. Ambas falsificaciones, por tanto, eran conocidas en los monasterios de la llanura del Rin en la primera mitad de la centuria, que es precisamente el 'mileiu' en el que se puede situar razonablemente la confección y el uso de 10PK.[74] Así pues, que el autor de esta colección fuera el autor de las falsificaciones es una cuestión que, por el momento, permanece abierta.

Los capítulos de Urbano II

En 10PK hay trece capítulos atribuidos a Urbano II (vid. Apéndice III).[75] Una inscripción es incorrecta, porque 10PK 5.7.16[17] es, en realidad, una disposición de Alejandro II. El error se arrastra desde TrA 1.67, sección de donde también se tomaron 10PK 5.8.8[5] y 5.13.3 (JL 5393 y JL 5730, respectivamente). Las *Sententiae* de TrA 2.50 tienen correspondencias para seis capítulos de la colección de Colonia: 10PK 1.3.5[4] (JL 5741), 1.8.1 (JL 5742), 3.14.8 (JL 5740), 5.2.52[50] (—), 10.1.17[16] (JL 5741) y 10.13.6 (JL 5742). Como quiera que la inscripción de 10PK 1.8.1 mezcla el *incipit* de TrA 2.50.22 con la inscripción de TrA 2.50.24,[76] mientras no aparezcan otros datos contradictorios, se

[74] El capítulo atribuido al papa Gregorio aparece después de las oraciones pronunciadas por el papa en la ceremonia de entrega del palio de un *Ordo de sacris ordinibus* de autor anónimo editado en PL 138.1010A. El texto procede del manuscrito Wien, ÖNB lat. 1817 (Theol. 277), que es una copia del siglo XI de un pontifical de Passau: Michel Andrieu, *Les ordines romani du haut Moyen Âge. 1: Les manuscrits* (Spicilegium Sacrum Lovaninese 11; Louvain 1931) 394.

[75] Tena-Malo, *La colección canónica* 79, registra doce capítulos porque 10PK 5.16.22 falta en K.

[76] La inscripción de 10PK 1.8.1 no se corresponde con la de TrA 2.50.24, aunque la colección de *Sententiae* de la *Tripartita* ofrece una explicación plausible a lo que, a primera vista, parece una confusión del autor de Colonia:

puede afirmar que esta sección de textos misceláneos de TrA aportó al autor de 10PK estos seis capítulos de Urbano II.

Es poco probable que el modelo de 10PK 5.16.22[19] (JL 5763) fuera TrB 3.10.43 ó ID 6.411: [77] la inscripción de TrB / ID, 'Vrbanus secundus abbati sancti Rufi', es más completa que la de 10PK, 'Idem'; las palabras 'Statuimus ne professionis canonice—discedentem uero nullus abbatum' se reconocen en otras decretales de Urbano II; [78] y, por último, *Statuimus* (10PK 5.16.22), aparece habitualmente en las colecciones canónicas al lado de *Due leges* (10PK 5.16.21[18]), ausente de TrB / ID. El canonista de Colonia dispuso, por tanto, de un proveedor de materiales de Urbano II, hoy desconocido, lo cual se deduce también de los tres capítulos de 10PK que no se encuentran en las obras habitualmente relacionadas con el círculo de Ivo de Chartres, ni en el modelo habitual de este último, la *Collectio Britannica*: se trata de 10PK 5.16.21[18], 6.1.6[5] y 7.6.2. El primero, *Due leges* (JL 5760), afirma la superioridad de la *lex priuata* sobre la *lex publica*. Las inscripciones de los otros dos, relacionan los textos con el concilio de Piacenza (1095): son *De communi clericorum* y *Mandamus et mandantes* a propósito de los canónigos regulares, que no aparecen entre las decretales de Urbano II registradas por Jaffé.

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quien confeccionó 10PK 1.8.1 tomó la primera parte de la inscripción de este capítulo del comienzo de TrA 2.50.22, 'Artaldus Alanensis episcopus' (inscripción: 'Vrbanus secundus. De Artaldo a papa Vrbano consecrato'), y la segunda de la inscripción de TrA 2.50.23 'Idem Vitali episcopo Briuensi' (JL 5741). El primero, TrA 2.50.22, procede de *Collectio Britannica* 44 y fue editado por Robert Somerville–Stepahn Kuttner, *Pope Urban II the Collectio Britannica and the Council of Melfi (1089)* (Oxford 1996) 165-167. El autor de 10PK utilizó TrA 2.50.22 para 10PK 5.2.23.

[77] En L fol. 56r, la frase final del capítulo, 'monachorum sine communi litterarum cautione suscipiat', presente en TrB 3.10.43 e ID 6.411—también en C.19 q.2 c.3—ha sido borrada.

[78] Esas palabras, que llegaron a C.19 q.3 c.3, se repite en otras decretales mediante las que Urbano II confirma la erección y concede protección pontificia a una fundación en la que viven hermanos bajo la regla de san Agustín (JL 5428, del año 1090), o bien confirma los privilegios de un cenobio de vida canónica bajo la regla de san Agustín (JL 5550, del año 1095) (o JL 5567, del año 1095, con algunas variantes).

La de Colonia es la única colección canónica que transmite *De communi clericorum*.[79] Pero 10PK también destaca por la colocación y uso de los cuatro capítulos de Urbano II que no proceden de las colecciones habitualmente relacionadas con Ivo de Chartres. El autor del *Polycarpus*, por ejemplo, desconocía *Statuimus* y *De communi*, pero copió *Due leges* y *Mandamus* al final de una extensa serie de ochenta y una autoridades sobre la vida y las costumbres propias de los clérigos.[80] El autor de la *Collectio trium librorum*—que tampoco utilizó *Statuimus* y *De communi*—fue más preciso, pues relacionó *Due leges* y *Mandamus* con la movilidad de obispos y clérigos.[81] Esta materia fue la que eligió el autor de 10PK para invocar *Due leges* y *Statuimus*,[82] mientras que reservó *De communi clericorum* para la distinción sobre la vida común de los clérigos;[83] por lo demás, recurrió a *Mandamus* para resolver el problema que plantean los clérigos que desean ingresar en un monasterio.[84]

10PK 5.16.21[18] *Due leges*

La distinción 'De clericis transmigrantibus qua ratione suscipiendi sint uel non' se elaboró con veintinueve cánones conciliares, tomados de la primera parte de la *Tripartita* (TrA 2), y tres decretales pontificias: una de León I, 10PK 5.16.6 (JH[1] 918: JK 411), que procede de TrA 1.43.26; y dos de Urbano II, 10PK 5.16.21-22[18-19], de las cuales solo la segundo era conocido en el círculo de Ivo (TrB 3.10.43 e ID 6.411).

El penúltimo capítulo de la distinción, *Due leges*, permite abrazar la vida religiosa, o la propia de los canónigos regulares, a los clérigos seculares que se sienten movidos por el Espíritu Santo

[79] Al menos 10PK 6.1.6[5] es el único resultado que proporciona la base de datos de Fowler-Magerl, *Clavis canonum*.

[80] *Pol*. 4.32 'De vita et moribus et munditia sacerdotum clericorumque vel subiectorum', donde los textos de Urbano II son los capítulos *Pol*. 4.32.82 y 83.

[81] *3L* 2.5 'De episcoporum et clericorum mutatione', donde los textos de Urbano II son los capítulos *3L* 2.5.36 y 37.

[82] 10PK 5.16 'De clericis transmigrantibus qua ratione suscipiendi sint uel non'.

[83] 10PK 6.1.6 'Quod inter clericos uigere debeat communis uita'.

[84] 10PK 7.6.2 'De clericis qui monachorum propositum appetunt ne quis canonicus regulariter professus monachus fiat'.

(lex priuata), sin contar con el permiso de su obispo, y sin que se lo impidan los cánones (lex publica). No tiene correspondencia en las obras relacionadas con el obispo de Chartres, ni en las de sus proveedores habituales. Además de en 10PK, aparece en ocho colecciones anteriores al Decreto de Graciano—todas italianas, salvo las dos recensiones de la *Caesaraugustana*—y en cuatro apéndices a colecciones, o escritos canónicos, de mediados del siglo XII.[85] La colección de Colonia es, por tanto, el decimotercer testimonio, el más septentrional de los conocidos hasta la fecha.[86] Su inscripción, 'Vrbanus secundus', es igual a la de la colección en la *Collectio tredecim librorum* del manuscrito Vat. lat. 1361 (*13L*), colección con la que comparte la lectura 'aliquo monasterio uel regulari canonica se saluare', según la cual, la *lex priuata* también autoriza el ingreso en una comunidad de canónigos regulares a los clérigos que se sientan llamados por el Espíritu Santo. Estos datos no son suficientes para establecer una relación directa, porque la circulación de *13L* fue limitada.[87] Como tampoco puede descartarse la existencia de un modelo común, de momento no es posible establecer el camino a través del cual *Due leges* llegó a 10PK.[88]

[85] Titus Lenherr, 'Zur Überlieferung des Kapitels *Duae sunt, inquit, leges* (Decretum Gratiani C.19 q.2 c.2)', AKKR 168 (1999) 359-384, analiza la tradición pre-gracianea de *Due leges* (páginas 363-369), pero no menciona 10PK 5.16.21[18].

[86] *Due leges* es una adición en los manuscritos Admont SB 62 y München BSB lat. 12603, que transmiten la segunda versión de la *Tripartita*. El capítulo es también una adición en el manuscrito Saint Omer BM 381 de la *Panormia*. Estos tres testimonios tampoco fueron considerados por Lenherr.

[87] En cualquier caso, cf. las valoraciones de Anzelm Szuromi, 'Anselm of Lucca as a Canonist. Critical summary on importance of the Collectio Anselmi Lucensis', RDIC 16 (2005) 225-239, en especial 228.

[88] Que la versión divulgada de C.19 q.2 c.2 también lea 'uel regulari canonica' habla a favor de la existencia de otros testimonios de *Due leges*, hoy desconocidos.

10PK 5.16.22[19] *Statuimus*

En el círculo de Ivo, *Statuimus* se utilizó al tratar en general de los asuntos propios de los clérigos.[89] Colocado a continuación de *Due leges* en 10PK, como último capítulo de la distinción sobre si hay que recibir o no a los clérigos que desean cambiar de condición, este capítulo complementa la disposición anterior, porque se refiere a los canónigos regulares que quieren abrazar una vida más estricta e ingresar en un monasterio: el papa Urbano II (JL 5763) les permitió abandonar el claustro, siempre que obtuvieran el permiso del abad y de todos los miembros de su congregación. Cuáles fueron las razones por las que el autor de la colección de Colonia citó *Statuimus* en 10PK 5.16, pero 'olvidó' esta disposición de Urbano II cuando trató específicamente de los canónigos regulares que pretenden hacerse monjes (10PK 7.6) es una cuestión que permanece abierta.

Tampoco hay datos que permitan identificar el modelo de 10PK 5.16.22[19]. Los autores de colecciones canónicas prestaron menos atención a *Statuimus* que a *Due leges*: además de en TrB e ID, el fragmento aparece en el interior de *13L* (4.48), en la colección en *Diez Partes* dependiente de la *Panormia* (10PT 4.3.2) y en la *Caesaraugustuna* (*Caes*. 8.38).[90] Según esas obras—la única excepción sería la *Caesaraugustana*—el destinatario de la decretal de Urbano II fue el abad San Rufo de Marsella. Ante una inscripción tan precisa, es poco probable que el autor de 10PK se tomara la libertad de abreviarla: al menos no actuó de esa manera con los otros dos fragmentos de Urbano II que se comentarán a continuación. En definitiva, sobre el origen de *Due leges* y de *Statuimus* lo único que puede decirse es que el autor de 10PK dispuso de un proveedor hoy desconocido.

[89] TrB 3.10 'De clericis et eorum causis'; o bien ID 6 'Hec pars continet de clericorum conversatione, et ordinatione, et correctione, et causis'.

[90] El capítulo es una adición en la versión Bb de la Colección de Anselmo de Lucca y en la Colección en *9L*. Es también uno de los textos suplementarios de la *Panormia* en el manuscrito Saint Omer BM 381.

10PK 6.1.6[5] *De communi*

10PK 6.1 es un pequeño tratado sobre la vida común de los clérigos.[91] El autor de la colección de Colonia elaboró esta distinción con siete capítulos: mientras que los seis primeros son fragmentos de decretales pontificias—los cinco primeros pseudoisidorianos, y el sexto de Urbano II—el séptimo y último es un canon del concilio celebrado en Roma el año 1063, durante el pontificado de Alejandro II. La selección de textos ofrece una imagen muy favorable de este género de vida: los dos primeros capítulos proceden de la carta que el papa Clemente dirigió al obispo Santiago y a los hermanos de la iglesia de Jerusalén conminándoles a observar y predicar la vida común, por considerarla de derecho apostólico; vienen a continuación tres citas del decreto del papa Urbano I sobre la vida común y las ofrendas de los fieles, que ponen el acento en el desprendimiento de los bienes, especialmente necesario en el caso de los clérigos, suerte o heredad de Dios; el sexto capítulo, atribuido a Urbano II, impone la vida común a los clérigos que disfrutan de un beneficio eclesiástico; finalmente, la distinción invoca la legislación de Alejandro II, quien vinculó la vida común a la castidad. A excepción de *De communi clericorum* (10PK 6.1.6), todos los capítulos tienen correspondencias en la *Tripartita A*.

De communi no llegó a ninguna colección compuesta entre la reforma gregoriana y el *Decretum Gratiani*. Las únicas versiones conocidas del texto son la del libro que pertenció a los canónigos regulares de San Arbogast de Estrasburgo, y la de la recopilación de fragmentos sobre estos clérigos del manuscrito Utrecht, Bibliotheek der Rijksuniversiteit 111. La rúbrica de 10PK 6.1.6, 'Vrbanus secundus in Placentino Concilio', es más completa que la de la versión que conocieron los canónigos alsacianos, porque coincide con la del ejemplar de Utrecht.[92] Sin embargo, no hay

[91] El título 'Quod inter clericos uigere debeat communis uita' se encuentra en la *capitulatio* y también al comienzo de la distinción en L fol. 57r, pues en K fol. 88v hay una laguna (vid. Apéndice I).

[92] Robert Somerville, *Pope Urban II's Council of Piacenza. March 1-7, 1095* (Oxford 2011) 58-59.

elementos que permitan establecer una relación entre esta compilación y la colección de Colonia.

10PK 7.6.2 *Mandamus*

Mandamus et mandantes es el segundo y último capítulo de 10PK 7.6, distinción dedicada a los clérigos y canónigos regulares que pretenden hacerse monjes:[93] mientras que los primeros están autorizados por el c.49 del IV Concilio de Toledo, 'quia meliorem uitam cupiunt' (10PK 7.6.1=TrA 2.37.17), Urbano II prohibió el tránsito a los segundos (10PK 7.6.2). El texto, que se ha considerado una falsificación,[94] se transmitió junto a *Due leges* en el *Polycarpus* (*Pol*. 4.32.83), la *Collectio trium librorum* (*3L* 2.5.37), la *Caesaraugustana* (Caes. 8.34) y la *Collectio tredecim librorum* (*13L* 4.51), entre otras colecciones,[95] y también llegó al Decreto de Graciano (C.19 q.3 c.2). *Mandamus* aparece además en la *Collectio decem partium* de Therouanne (10PT 4.3.31), es una adición en la versión Bb de la colección de Anselmo de Lucca (Ans. Bb apéndice 7) y es uno de los textos suplementarios en dos manuscritos de la *Tripartita*.[96] A diferencia de todos esos testimonios, la versión de 10PK es la única que especifica que la prohibición fue promulgada 'in Placentino concilio', un aspecto que dificulta la identificación de su modelo.

La sistemática de 10PK

La colección de Colonia es el resultado de la transformación de una colección cronológica en una colección sistemática. El punto inicial del proceso fue la *Tripartita*, compilación que tradicionalmente se relaciona con el círculo de Ivo de Chartres. El

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[93] Inscripción de 10PK 7.6: 'De clericis qui monachorum propositum appetunt et ne quis canonicus regulariter professus monachus fiat' (K) / 'De clericis qui monachorum propositum appetunt et ne quis (clericus)^{ac} canonicus canonicus regulariter proffesus monachus fiat' (L).

[94] Horst Fuhrmann, *Papst Urban II. und der Stand der Regularkanoniker* (Bayerische Akademie der Wissenschaften. Philosophisch- historische Klasse, Heft 2; München 1984) 17-21.

[95] Como la *Collectio septem librorum* (*7L* 3.85.6), o también la *Collectio novem librorum* (*9L* 2.5.36).

[96] Admont SB 162; y München BSB lat. 12603.

autor de 10PK dispuso de un ejemplar de esta obra que estaba dividido en tres bloques de *auctoritates*: los dos primeros, a los que los estudiosos denominan *Tripartita A*, yuxtaponen en orden temporal ascendente decretales pontificias y cánones conciliares, al modo de las antiguas colecciones cronológicas; el tercero, la *Tripartita B*, agrupa los textos por materias en veintinueve series etiquetadas con otras tantas rúbricas que se inspiran en los diecisiete libros del *Decretum* atribuido al obispo de Chartres.[97] El autor de 10PK utilizó el 'índice' de ID-TrB como guión orientativo para distribuir los materiales de TrA-TrB. Ahora bien, adaptó ese esquema a su visión personal del *ius canonicum*.

La sistemática de 10PK, en efecto, depende de la de ID - TrB. La correlación de materias es clara hasta la parte séptima, porque las siete primeras partes de 10PK progresan paralelamente a los libros primero a séptimo del *Decretum*, o a las primeras secciones de la tercera parte de la *Tripartita* (vid. Apéndice IV).

Las distinciones de las tres últimas partes de 10PK abandonan el hilo conductor del *Decretum* y de la *Tripartita*, y (re)ordenan la disciplina canónica por su relación con los laicos, los clérigos o bien con el matrimonio: las catorce distinciones de 10PK 8—'de negotis et causis clericorum'—tratan los temas de los libros cuarto, quinto, sexto y decimocuarto del *Decretum*; las dicisiete distinciones de 10PK 9—'de uita et instructione et correctione laicorum'—consideran los temas de los libros décimo a decimosexto;[98] y, por último, las quince distinciones de 10PK

[97] A partir de la colección de Colonia no es posible explicar la composición de las colecciones vinculadas a Ivo de Chartres. Para entender la relación entre el *Decretum*, la *Tripartita* y la *Panormia* son útiles las nociones de 'living texts / living law / textual families' propuestas por Anzelm Szuromi, *From a Reading Book to a Structuralized Canonical Collection: The Textual Development of the Ivonian Work* (Aus Religion und Recht 14; Berlin 2010).

[98] El autor de 10PK organiza el derecho penal a partir de la condición de los autores de los crímenes. Así, los temas de los libros décimo—'de homicidiis spontaneis et non spontaneis, de parricidiis et fratricidiis, et de occisione legitimarum uxorum et seniorum et clericorum et quod non omnis hominem occidens homicida sit, et eorum penitentia'—undécimo—'de incantatoribus, de auguribus, de divinis, de sortilegis, de sortiariis et variis illusionibus diaboli et de singulorum penitentia'—duodécimo—'de mendacio et periurio, de

10—'de coniugio et de transgressione eius et fornicatione diuersi generis'—disponen de una manera singular las materias de los libros octavo y noveno de la colección de Ivo de Chartres. La teología fue el único asunto que no despertó el interés del canonista de Colonia: en 10PK no hay ninguna sección equivalente a las 'speculativas sanctorum patrum sententias, de fide, caritate et spe' del libro séptimo del *Decretum*.

Aunque se inspiró en ella, el autor de la compilación agripina no replicó mecánicamente la sistemática ideada por Ivo. Desde el punto de vista formal, en lugar de ordenar el derecho canónico en libros (ID), o en series temáticas de *auctoritates* (TrB), empleó la división en partes y distinciones (10PK). Este método, desconocido por sus antecesores, le permitió alcanzar un considerable grado de precisión en la distribución, y consecuente localización, de los materiales,[99] aspecto que también cuidó mediante la elaboración de rúbricas o sumarios para cada división sistemática. Desde el punto de vista del contenido, el autor de 10PK redistribuyó bloques de *auctoritates* e introdujo secciones no previstas en el esquema subyacente.

Quienquiera que fuera, la persona que compuso 10PK tenía una idea personal del *ius canonicum* a partir de la cual desarrolló los ocho núcleos temáticos característicos del círculo de Chartres:

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accusatoribus, de iudicibus, de defensoribus, de falsis testibus et de singulorum penitentia'—decimotercero—'de raptoribus, de furibus, de venatoribus, de maledicis et contentiosis, de commessationibus et ebrietatibus, de furiosis, de Iudeis et eorum correctione'—decimocuarto—' de excommunicatione iusta vel iniusta et quibus de causis et quo ordine facienda sit excommunicatio'—décimoquinto—'de penitentia sanorum et infirmorum, qua commutatione leviari possit penitentia'—y decimosexto del *Decretum*—'de officiis laicorum et causis eorundem'—son considerados en las diecisiete distinciones de la novena parte de 10PK, dedicada a los laicos. Pero alguno de estos asuntos penales aparecen también en la parte sexta de la colección agripina, cuyas distinciones tratan, entre otras cosas, de los clérigos homicidas (10PK 6.6), los clérigos usureros (10PK 6.7), los clérigos magos (10PK 6.8), los pendencieros (10P 6.9), los perezosos (10PK 6.10), los que contraen matrimonio o frecuentan banquetes y tabernas (10PK 6.11), los clérigos bufones (10PK 6.12) y de los clérigos cazadores (10PK 6.13).

[99] Viejo-Ximénez, 'Distinciones' 426-427 relaciona las partes y las distinciones con las reglas de la gramática que delimitan las partes de un discurso.

fe y sacramentos; bienes de la iglesia; normas eclesiásticas; clérigos y monjes; matrimonio; delitos y penas; laicos; teología.[100] Lo que en el *Decretum* o en la *Tripartita* está simplemente enunciado, adquiere entidad propia en 10PK, como pone de manifiesto, por ejemplo, la reflexión sobre la autoridad de las decretales pontificias; o también la elaboración de una distinción específica sobre la dispensa. Se trata, por tanto, de un canonista capaz de profundizar en la compresión de la disciplina eclesiástica propia del obispo de Chartres y de adaptarla a sus ideas e intereses particulares. Una persona con la formación y los recursos suficientes para completar los argumentos de autoridad con *capitula* no utilizadas por Ivo o sus discípulos, o que uno y otros habían utilizado en otros contextos distintos.[101]

A primera vista, 10PK 4 corresponde a ID 4/TrB 3.4-7, secciones que reúnen las disposiciones relativas a los días festivos, las escrituras canónicas, los concilios y las costumbres. El autor de la colección de Colonia, sin embargo, introdujo dos innovaciones: después de la distinción sobre las escrituras auténticas (10PK 4.3), y antes de la que dedica a la autoridad de los concilios (10PK 4.5), consideró el valor de las decretales pontificias (10PK 4.4); y, en segundo lugar, elaboró una distinción específica sobre la dispensa (10PK 4.7), que situó entre las dedicadas a las decisiones de los obispos (10PK 4.6) y a las costumbres (10PK 4.8). Además desplazó las reglas sobre la celebración de los concilios de ID 4 a la octava parte de 10PK, que está dedicada a los negocios

[100] El esquema condensa en ocho puntos los temas de los libros/partes de ID/TrB: (i) fe y sacramentos (bautismo, unción de los enfermos y eucaristía=ID 1-2/TrB 3.1-2; (ii) bienes de la iglesia=ID 3/TrB 3.3; (iii) normas eclesiásticas =ID 4 / TrB 3.3-7; (iv) clérigos y monjes=ID 5-7/TrB 3.8-14; (v) matrimonio =ID 8-9/TrB 3.15-19; (vi) delitos y penas=ID 10-15/TrB 3.20-28; (vii) laicos=ID 16/TrB 29; y (viii) teología=ID 17/TrB—.

[101] Destaca la originalidad de las palabras utilizadas para enunciar los temas de las once distinciones sobre la pofesión de fe, el bautismo y la confirmación de la primera parte de 10PK, así como las que resumen el contenido de las diecisiete distinciones sobre la eucaristía y la unción de los enfermos de 10PK 2.

y causas de los clérigos, y que se abre con los capítulos que demuestran el primado de la iglesia romana (ID 5).[102]

Las trece *auctoritas* sobre 'de stabilitate decretorum romanorum pontificum' (10PK 4.4) son decretales procedentes de la *Tripartita A*: la más antigua se atribuye al papa Fabián, la más moderno al papa Esteban V. De estos trece capítulos, solo ocho tienen correspondencias en el *Decretum*: cuatro en el libro cuarto—dedicado a las fiestas, ayunos, escrituras auténticas, costumbres y la celebración de concilios—tres en el libro quinto—primado de la iglesia romana, primados, metropolitanos y obispos—y uno en el libro sexto sobre los clérigos (vid. Apéndice V.i). En las colecciones de Ivo no hay un bloque de *auctoritates* sobre el valor de los actos de los pontífices romanos.[103] La iniciativa del autor de 10PK recuerda la organización de las dos primeras partes de la *Tripartita*—primero decretales, en segundo

[102] El primado de la iglesia romana con el que comienzan ID 5 y TrB 3.8 es sustituido en 10PK 5 por la elección del papa (10PK 5.1). La autoridad y posición singular de la sede de Pedro es considerada en 10PK 8.1, esto es, la primera distinción sobre las causas de los clérigos. La celebración de los concilios y el derecho de los metropolitanos, que en Ivo forman parte de los libros ID 4 y 5, en 10PK se integran también en la parte octava, como temas relacionados con la causas de los clérigos. En 10PK 5.2, la elección—edad del elegido, grado del sacramento del orden de los electores, ordenación—es también la perspectiva desde la que se explica la figura del arzobispo y el obispo.

[103] En el libro cuarto del *Decretum* se distinguen nueve series de *auctoritates*: (i) ID 4.1-60, días de fiesta y ayunos; (ii) ID 4.61-74, sagradas escrituras, libros auténticos y apócrifos, costumbres eclesiásticas, con cinco capítulos sobre las autoridades a las que acudir para resolver las causas eclesiásticas (ID 4.70-75); (iii) ID 4.76-85, cánones de concilios; (iv) ID 4.86-167, recurso a las leyes civiles, a los escritores eclesiásticos, sínodos y concilios que recibe la iglesia, libros apócrifos; (v) ID 4.168-193 leyes civiles; (vi) ID 4.194-213, costumbres, usos y tradiciones (eclesiásticas); (vii) ID 4.214-228, escrituras eclesiásticas y escritos de los padres; (viii) ID 4.229-237, interpretación de las leyes, legalidad; (ix) ID 4.238-257, celebración de los concilios. Ivo estaba más preocupado por una interpretación pastoral, caso por caso, del derecho canónico que por establecer una jerarquía entre las autoridades canónicas; no mostró una especial preferencia por la legislación pontificia sobre otras fuentes; y afirmó que el papa no podía legislar contra los *statuta patrum*: Rolker, *Canon Law* 165-171 y 196-99.

lugar cánones de concilios—aunque el argumento histórico que propone el autor del prólogo de esta colección cronológica—las decretales de los papas anteriores a la edad constantiniana preceden a los sínodos/concilios—no fue determinante: el interés del canonista de Colonia por los decretos de los romanos pontífices tiene que ver con los decretos pseudo-gelasianos sobre las escrituras auténticas.[104] Es probable que los sumarios de alguno de los fragmentos del papa Nicolás I en la *Tripartita A* fueran su fuente de inspiración para elaborar una distinción específica sobre la materia, así como para colocarla entre las dedicadas a las escrituras auténticas y los cánones de los concilios. El resultado final—las distinciones de la parte cuarta de 10PK—es una descripción del sistema de fuentes del derecho de la iglesia más precisa y ordenada que la que encontró en su modelo.

En el caso de la distinción sobre la dispensa (10PK 4.7), su inclusión en el cuerpo de la colección demuestra la confianza en la operatividad real de esta institución a la hora de interpretar y aplicar los cánones, más allá de cualquier consideración teórica. La persona que se encuentra detrás de la composición de 10PK demostró tener gran sentido práctico: de un lado, convirtió seis *auctoritates* de las *Exceptiones ecclesiasticarum regularum* en otros tantos capítulos de esta distinción;[105] y, de otro, completó los argumentos de autoridad empleados por Ivo de Chartres en su tratado sobre la dispensa con una inteligente selección de párrafos pertencientes a la decretal que el papa Gelasio I dirigió, el año 494, a los obispos italianos invitándoles a atemperar el rigor de los cánones para paliar la escasez de clero motivada por la guerra y el hambre, y que encontró en la primera parte de la *Tripartita* (vid. Apéndice V.ii).

La independencia de criterio y los intereses particulares del autor de 10PK—reconocibles en otras distinciones, como las

[104] La distinción inmediatamente anterior, 10PK 4.3, trata, en efecto, de los escritos auténticos, 'Que scripturis sunt autentice uel non et quod non sint proprio exponende'; sus tres primeros capítulos (10PK 4.3.1 [1a]–3 [1b]) proceden del decreto gelasiano sobre los libros apócrifos de TrA 1.46.1.

[105] Cinco de ellos conforme a la versión de los capítulos correspondientes de la *Tripartita* (vid. Apéndice V.ii).

dedicadas a la entrega del palio (10PK 5.3), la asistencia a los obispos enfermos (10PK 5.13) o a la vida común de los clérigos (10PK 6.1)—son compatibles con la utilización de un lenguaje que se inspira en el de las colecciones relacionadas con Ivo de Chartres. El canonista de Colonia no utilizó los escasos sumarios de los capítulos de la *Tripartita*: cuando distribuyó los textos en cada una las secciones de su obra conservó la inscripción—no siempre con fidelidad al modelo—, pero eliminó cualquier indicación relativa a su contenido. El lector de 10PK encuentra esta orientación en los títulos de las partes y distinciones—en la *capitulatio* inicial y en el interior de la colección—, cuyas palabras, en muchos casos, han sido tomadas de las etiquetas de la *Tripartita* (vid. Apéndice VI).

Por lo demás, el autor de 10PK conocía las decretales y los cánones con la suficiente profundidad como para relacionar sus contenidos con aspectos singulares de la disciplina eclesiástica. Esto le permitió diseccionar los capítulos de la *Tripartita* y distribuir sus frases o parráfos entre las diversas distinciones, en atención a su pertinencia al tema enunciado en cada una de las rúbricas de la *capitulatio* inicial. En 10PK 1.3.5, por ejemplo, copió las palabras iniciales de TrA 2.50.23a, un capítulo cuya primera parte procede de JL 5741, donde Urbano II afirma la validez del bautismo administrado por una mujer en caso de necesidad; no se interesó por la segunda parte de la respuesta a Vital, en la que el papa aclara las consecuencias de este acto en relación al parentesco espiritual, porque la distinción tercera de la parte primera se solo se ocupa del ministro ordinario del bautismo, así como del ministro en caso de necesidad. Más adelante, al tratar de las personas que pueden contraer nupcias legítimas (legitimum coniugium) copió la segunda parte de TrA 2.50.23b (JL 5741) como 10PK 10.1.17.

Esta manera de tratar los textos—que podría ejemplificarse con otros numerosos capítulos en prácticamente todas las secciones de la obra[106]—es característica de quien está más interesado por la práctica que por la enseñanza del derecho. De la

[106] Cf. los casos de 10PK 3.2.9-10, 5.3.2 o 5.13.3 comentados anterioremente.

división en partes y distinciones puede deducirse que el autor de 10PK conocía las artes liberales. Pero esta manera de organizar los materiales recibidos de Ivo tenía como objetivo separar y agrupar las *auctoritates* por materias, no resolver sus contradicciones internas: aunque el canonista responsable de la compilación copió el prólogo de Ivo de Chartres y elaboró una distinción sobre la dispensa, seleccionó las *auctoritates* fijándose únicamente en su contenido y no las distribuyó a partir de un principio o método que resolviera sus conflictos. Es poco probable que la *Collectio decem partium* de Colonia fuera un libro de texto o un manual. Los suplementos de K L tampoco parecen el resultado de una actividad de enseñanza.

Las adiciones de K L

La colección de Colonia termina con un fragmento de la regla de san Fructuoso que procede de la sección de sentencias de la *Tripartita*: 10PK 10.15.5[4]=TrA 2.50.12.[107] A continuación hay siete *auctoritates* suplementarias, cuya transcripción es contemporánea a la confección de K L—porque, en ambos casos, se distingue la caligrafía de la mano principal—, y que son reconocibles en diversos cánones de los concilios de Clermont (1130), Reims (1131) y II Letrán (1139).[108] A partir de aquí, la copia de suplementos difiere en ambos testimonios, una circunstancia que hay que relacionar con el uso de cada ejemplar: la colección fue utilizada en dos ambientes distintos, o bien por personas que tenían conocimientos e intereses singulares.

En L fol. 119v la misma mano principal que copió la colección transcribió, en un momento posterior, los cinco primeros

[107] 'Ex dictis Fructuosi episcopi. Monachus uel clericus—coniungendus. Explicit feliciter Amen' (L fol. 119r) / 'Ex dictis Fructuosi (episcopi) (prepositi). Monachus uel clericus—coniungendus. Explicit' (K fol. 180r). La inscripción de K fue corregida por el rubricador, pero es difícil conceder la precedencia a una de las dos lecturas: 'episcopi' / 'prepositi'.

[108] La descripción de Helssig, *Katalog der Hanschriften* 290 debe ser corregida: la colección canónica termina con el capítulo de la regla de Fructoso en L fol. 119r—esto es, el último texto de 10PK—, y fue completada con doce cánones transcritos por la mano principal en L fol. 119v, probablemente en dos momentos distintos.

cánones de II Letrán (1139).[109] El ejemplar que hoy se encuentra en la biblioteca universitaria de Leipzig se interrumpe abruptamente con 'Illud autem quod in sacro Chalcedonensi—ad opus ecclesie et succeso', que corresponde a la primera parte del c.5 aprobado el año 1139 (L fol. 119v). Pero lo más probable es que la copia de suplementos continuara en los folios del cuadernillo XV(I) hoy perdidos.

La copia de suplementos continuó en K con nuevas *auctoritates*, que fueron transcritas por diversas manos: después del séptimo canon suplementario—también copiado en L—, en K fol. 180v hay dos capítulos sobre el matrimonio, que proceden de la mano principal, aunque fueron añadidos en un momento posterior; a continuación, el final de K fol. 180v fue utilizado por otra persona para copiar seis autoridades sobre la vida monacal; en el final de K fol. 181r y en el comienzo de fol. 181v, una tercera persona transcribió dos fragmentos de otras tantas decretales pontificias que recurren a la imagen de la unión conyugal para explicar el vínculo del obispo o del sacerdote con su iglesia o su parroquia; y, por último, en la mitad inferior de fol. 181v, otra mano distinta ha copiado un documento referente a una transacción comercial realizada en Colonia el año 1146.

Las líneas que siguen analizan los suplementos canónicos de 10PK en K L, en este orden: [110] los siete canónes que comparten K L, los cinco cánones de L, las *auctoritates* sobre el matrimonio de K, los capítulos sobre los monjes de K, y las decretales sobre el compromiso de obispos y sacerdotes también del códice renano.

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[109] La coincidencia entre las siete primeras piezas suplementarias de K L y la existencia de una línea en blanco en L, antes de la copia de los cinco cánones siguientes, son dos circunstancias que sugieren que la copia de esta segunda serie fuera posterior: L se pudo utilizar para la confección de K inmediatamente después de que se copiaron los siete primeros cánones suplementarios; más adelante, la copia lipsiense de 10PK fue completada con nuevas adiciones.

[110] Tena-Malo, *La colección canónica* 76-87, solo considera los suplementos de K. Los datos sobre el recibo mercantil de K fol. 181v en ibid. 86-87.

Los siete primeros suplementos de K L

El primer bloque de sumplementos de 10PK en K L está formado por siete *auctoritates* sin inscripción y sin numeración, cada una de las cuales está provista de una letra roja capital (vid. Apéndice VII).[111] Las piezas corresponden a los cánones c.6, c.7a, c.15a, c.10b-e del II Concilio de Letrán (1139), si bien es cierto que todas habían sido promulgadas en dos asambleas anteriores, celebradas durante el pontificado de Inocencio II (1130-1143): los concilios de Clermont (1130) y Reims (1131).[112] Como quiera que, en los dos testimonios de 10PK conocidos hasta la fecha, fueron añadidos por el copista principal, la transcripción de estos suplementos puede considerarse contemporánea a la confección de la colección. A primera vista, la copia de este primer grupo de adiciones obedeció al propósito de poner al día 10PK de manera selectiva: no se transcribieron todas las disposiciones aprobadas en un concilio, fuera éste cual fuere; ni tampoco se respetó el orden o la sucesión de los cánones, al menos si se toman como referencia las principales tradiciones hoy conocidas.[113]

Para Tena-Malo el modelo más probable de estas siete autoridades suplementarias ‘es alguna copia de los cánones del Concilio de Clermont de 1130 y de los cánones del Concilio de Reims de 1131, pero no la redacción—donde hay reiteración—de los respectivos cánones según la versión del Concilio Lateranense

[111] En K fol. 180r, la tercera pieza no se separa de la segunda con la letra incial en tinta roja.

[112] Entre las disposiciones aprobadas en el concilio de Pisa (1135) no hay un canon sobre el nicolaísmo correlativo a los cánones c.6 y c.7a del II Concilio de Letrán, por lo que hay que descartar que estas siete piezas procedan de este concilio. Sobre el concilio de Pisa cf. Robert Somerville, ‘The Council of Pisa, 1135: A Re-examination of the Evidence for the Canones’, *Speculum* 45 (1970) 98-114=*Papacy, Councils and Canon Law in the 11th-12th Centuries* (Aldershot 1990) n. XVI.

[113] Descritas por Robert Somerville, ‘The Canons of Reims (1131)’, BMCL 5 (1975) 122-130=*Councils and Canon Law* n. XV; ‘The Council fo Pisa’; y ‘Another Re-examination of the Council of Pisa, 1135’, edd. Martin Brett-Kathleen G. Cushing *Readers, Texts and Compilers in the Earlier Middle Ages* (Farnham 2009) 101-110; y, más recientemente, por Brett-Somerville, ‘The Transmission’.

II más difundida'.[114] Esta conclusión descansa en comprobaciones filológicas, a las que podría añadirse otros datos circunstanciales referentes a la confección de las copias. El hecho de que K L coincidan en las siete primeras piezas suplementarias de 10PK, mientras que en L la copia de adiciones continúa con otras cinco autoridades que corresponden a los cuatro primeros cánones de Letrán sería una de ellas. Por lo general, quienes 'actualizaron' las colecciones canónicas de comienzos del siglo XII con los cánones de II Letrán—transcritos al final de la obra—identificaron el material con diversas inscripciones—también con prefacios—lo cual no ocurre en el caso de los suplementos de 10PK que comparten L K.[115] En definitiva, con estas salvedades, K L pueden permanecer en la lista de testimonios (fragmentarios) del concilio de 1139 que se remontan a la primera mitad del siglo XII. A la hora de datar la elaboración de 10PK no se puede excluir, sin embargo, una fecha anterior a 1130, pues los fragmentos de los cc. 7, 15 y 10 lateranenses que se copiaron como suplementos a 10PK tienen la misma extensión que las decisiones adoptadas en concilios anteriores.

La primera serie de complementos de 10PK es una selección cuyas razones no están claras: quien prolongó la colección en K L se interesó por las disposiciones relativas al matrimonio o concubinato de los subdiáconos (Clermont 1130 c.4: Reims 1131 c.4: II Letrán c.6), la continencia clerical (Reims 1131 c.5: II Letrán c.7),[116] las agresiones sacrílegas contra clérigos y monjes (Reims 1131 c.13: Pisa 1135 c.12: II Letrán c.15)[117] y el

[114] Tena-Malo, *La colección canónica* 79.

[115] Ejemplos de inscripciones y prefacios en Brett-Somerville, 'The transmission' 258-259. En las adiciones de München BSB lat. 12603—un ejemplar de la *Tripartita*—, los cánones de 1139 se presentan como 'Decreta Innocentii pape ii. Rome generali concilio constituta' (fol. 149ra).

[116] Útiles para las distinciones de la sexta parte de 10PK dedicada a 'de uita et correctione supradictorum graduum', en especial para 10PK 6.4 'De continentia ministrorum altaris et quibus clericis matrimonio copulari liceat uel non', y 10PK 6.5 'Quid obseruandum sit de his qui ante uel post sacros ordines in fornicatione uel aliud capitale crimen lapsi sunt et de his qui restitui possunt uel non'.

[117] Las diez de 10PK 9 tratan 'de uita et instructione et correctione laicorum'.

patrimonio eclesiástico (Clermont 1130 c.6-c.8: Reims 1131 c.7: Pisa 1135 c.7 y c.9: II Letrán c.10).[118] Llama la atención que, en un primer momento, el autor de estas adiciones no copiara las disposiciones de Inocencio II sobre la simonía (Clermont 1130 c.1: Reims 1131 c.1: Pisa 1135 c.1a: II Letrán c.1-c.2a), [119] las vestiduras clericales (Clermont 1130 c.2: Reims 1131 c.2: Pisa 1135 c.1c: II Letrán 4a), [120] el levantamiento de la pena de excomunión (II Letrán c.3), ni sobre el destino de los bienes de los obispos, sacerdotes y clérigos a la muerte de sus propietarios (Clermont 1130 c.3: Reims 1131 c.3: Pisa 1135 c.1d: II Letrán c.5).

De los suplementos de 10PK que comparten K L no es posible deducir la extensión de su modelo. Que el texto de los cánones no vaya acompañado de aclaraciones o notas habla a favor de la necesidad de poner al día la colección para su uso en la práctica cotidiana del derecho canónico.

Los cinco cánones suplementarios de L

Los siguiente cinco cánones suplementarios de las adiciones de L no proceden del concilio de Clermont del año 1130: las dos primeras piezas del ejemplar lipsiense, que corresponden al c.1ab de Clermont, son más extensas, porque coinciden con los cc. 1 y 2 de II Letrán; el concilio de Clermont no tiene la tercera pieza de las adiciones de Leipzig, esto es, el c.3 de 1139; y la cuarta pieza de Leipzig es más extensa que el c.2 de Clermont (vid. Apéndice VII). Las mismas razones excluyen el concilio de Reims del año 1131. Estos cánones son, por tanto, los cinco primeros del II Concilio de Letrán (1139), si bien es cierto que el último está

[118] La tercera parte de 10PK tiene dieciocho distinciones sobre ‘de rebus ecclesiasticis et de sacerdotibus et earundem reuerentia et obseruatione’.

[119] La distinción dedicada a esta cuestión (10PK 5.7) se ha elaborado con veintiún capítulos tomados de la *Tripartita*: los diez primeros son fragmentos de Gregorio I procedentes de TrA 1.55; a continuación hay dos cánones conciliares con correspondencias en TrA 2.46.3 y 2.10.2; los siguientes capítulos pertenecen a decretales de Gregorio I, Alejandro II (tres textos, uno de ellos atribuido falsamente a Urbano II) y León IV; y los cinco últimos son cánones conciliares de TrA 2.12.

[120] Con la que se podía haber puesto al día 10PK 6.3.

incompleto, porque el manuscrito L se interrumpe en fol. 119v. Es probable que, en esta ocasión, quien confeccionó L pudo consultar un modelo, hoy desconocido, con todos los cánones aprobados en la asamblea universal de 1139, y que los copiara en los folios perdidos del último cuadernillo del códice.

Aunque estos complementos propios de L no esclarecen de manera definitiva sus relaciones con el ejemplar agripipino de 10PK, sí permiten trazar dos imágenes provisionales de sus mutuas dependencias: o L fue el modelo de K, o bien ambos manuscritos se confeccionaron a la vez, y en el mismo *scriptorium*, hasta los siete primeros suplementos; a partir de ahí—en uno y otro caso—cada uno de ellos fue utilizado en ambientes distintos: mientras que 10PK fue puesta al día poco después de 1139 por el/los usuario/s de L—muy próximo al lugar de confección de la colección—los usuarios de K desarrollaron alguno de sus contenidos mediante la copia de nuevos textos sobre materias específicas. Lo cierto es que quienes completaron K hasta el año 1146 dispusieron de obras que no estuvieron al alcance del autor de 10PK.

Las dos auctoritates sobre el matrimonio de K

La décima parte de 10PK se dedica al matrimonio y está dividida en quince distinciones que, entre otras cosas, tratan sobre el alcance de la fe esponsalicia y los impedimentos de parentesco.[121] Las dos primeras autoridades suplementarias proprias de K hacen referencia a estas cuestiones.

La primera ofrece un criterio para determinar cuándo existe matrimonio desde el hecho de una previa promesa esponsalicia. [122] He aquí su texto:

> Si aliqua alii iurauerit se nupturam ei, et interim alii nupserit, non debet separari ab eo, quia adhuc cum priore coniugium non contraxerat. Non enim est coniugium donec eam in sua accipiat.

[121] 10PK 10.4 ‘Quod fides sponsaliorum non sit frangenda’ y 10PK 10.14 ‘Per quas personas et quo ordine inquirenda sit linea consanguinitatis et de sacramento separationis’.

[122] Tena-Malo, *La colección canónica* 80-81.

El capítulo, para el que no se encuentran correspondencias en colecciones canónicas—tampoco en otras obras anteriores o contemporáneas a la colección de Colonia—carece de inscripción. Fue copiado por la misma persona que transcribió el siguiente texto, por lo que podría proceder del mismo modelo: una colección de sentencias teológicas sobre el matrimonio.

En efecto, en el segundo suplemento sobre el sacaramento del matrimonio que se ha copiado en K fol. 180v se distinguen tres partes: (i) la primera recuerda el alcance de los impedimentos de consanguinidad y afinidad; (ii) la segunda explica el cómputo de las generaciones y de los grados; y (iii) la tercera, la extinción del parentesco de consanguinidad. Mientras que para la primera no hay una fuente de inspiración clara, más allá de los cánones que prohíben el matrimonio entre cognados y agnados, la segunda parte parece combinar la división de los seis grados de la consanguinidad propuesta por Isidoro de Sevilla con la regla atribuida al papa Zacarías—en realidad, Gregorio I—para el cómputo de generaciones y grados.[123] Para la última parte, el autor del texto pudo tomar como modelo las Etimologías de Isidoro de Sevilla (*Etim*. 9.6.29). El conjunto es reconocible en el *Cum omnia sacramenta*, el segundo de los tratados sobre el matrimonio editados como parte de las *Sententiae Anselmi* y que hoy se considera una de las cuatro colecciones de sentencias teológicas matrimoniales de la escuela de Laon.[124] A su vez, la imagen de las

[123] Isidorus, *Etymologiarum*, 6.28-29 (DB 7.10: ID 9.46: TrB 3.16.11: IP 7.76: C.35 q.5 c.1), y *Gregorius I* JH[1] †3095: JE †1936, (*Pol*. 6.4.63 ['Ex decretis Zacharie pape'] C.35 q.5 c.4 ['Item Zacharias papa']).

[124] Franz P. Blietzmetzrieder, *Anselms von Laon Systematische Sentenzen* (Beiträge zur Geschichte der Philosophie des Mittelalters 18; Münster 1919) 129-151. Cf. Heinrich J. Reinhardt, *Die Ehelehre der Schule des Anselms von Laon: Eine theologie- und kirchenrechtsgeschichtliche Untersuchung zu den Ehetexten der frühen pariser Schule des 12. Jahrhunderts: Anhang: Edition des Ehetraktates der Sententie Magistri A* (Beiträge zur Geschichte der Philosophie und Theologie des Mittelalters. Texte und Untersuchungen. N.F., Bd. 14; Münster 1974) 38-39; Paule Mass, *The Liber Sententiarum Magistri A.* (Middeleeuwe Studies XI; Nijmegen 1995) 101-102; y Cédric Giraud, *Per verba magistri: Anselme de Laon et son école au XIIe siècle* (Bibliothèque d'histoire culturelle du Moyen Âge 8; Turnhout 2010) 367-388.

seis edades del mundo del final del párrafo del *Cum omnia sacramenta* hace pensar en una relaboración del capítulo correspondiente de las Etimologías de Isidoro de Sevilla.[125] La tabla compara el texto suplementario de K con dos párrafos del *Cum omnia sacramentum*:

Cum omnia (Blietzmetzrieder 143.1-14)	K fol. 180v
Dictum est quod nulli liceat cognatam suam ducere. Quod intelligendum est usque ad sextum gradum, quod est septima generatio. Primum pater et mater radices sunt generationis, sed inter generationis gradus non computantur. Deinde filius et filia prima generatio et fundamentum graduum, sed non gradus. Deinde nepos et neptis, primus gradus et secunda generatio. Deinde pronepos et proneptis, secundus gradus et tertia generatio. Deinde abnepos c et abneptis, tertius gradus et IIIIa generatio. Deinde adnepos et adneptis, quartus gradus et V. generatio. Deinde trinepos et trineptis V. gradus et sexta generatio. Deinde trinepotis et trineptis filii VI. gradus et VIIa generatio. Sic ergo VI. generationis gradus sunt, et VII. generatio, et hucusque uetita coniugia sunt, nisi dispensatorie fiant.	Dictum est quod nulli liceat cognatam suam aut coniugis prioris defuncte cognatam ducere, quod intelligendum est usque ad sextum gradum quod est septima generatio. Primum pater et mater radices sunt generationis, sed inter generationis gradus non computantur. Deinde filius et filia prima generatio et fundametum graduum generationis, sed non gradus. Deinde nepos et neptis primus gradus et secunda generatio. Deinde pronepos et proneptis, secundus gradus et tercia generatio. Deinde abnepos et abneptis tertius gradus et quarta generatio. Deinde adnepos et adneptis, quartus gradus et quinta generatio. Deinde trinepos et trineptis, v. gradus et sexta generatio. Deinde trinepotis filia et trineptis filii, vi. gradus et septima generatio. Sic ergo vi. generationis gradus sunt et vii. generationes, et adhuc usque coniugia uitanda sunt. Nisi dispensatorie fiat.
Hic uero idcirco generationis carnalis cognationes terminari dicuntur, quia in sexta etate mundi status destruetur.	Hic uero idcirco generationis carnalis cogitationis (uel copulationis)$^{gloss.}$ terminari.

[125] Isidorus, *Etymologiarum*, 9.6.29 (ID 9.7, ID 9.46 fin.: TrB 3.16.5 y 3.16.11 fin. IP 7.74).

Quien utilizó K dispuso de una colección de sentencias teológicas sobre el matrimonio. La copia de dos *auctoritates* sin inscripción no es muy apropiada para su alegación en el foro—o en el gobierno de la iglesia—aunque también es cierto que ambos suplementos tienen el atractivo de proporcionar certeros criterios prácticos. Que el responsable de su copia en K conciera estos textos gracias a una escuela o a un *scriptorium* es una circunstancia que no prejuzga el propósito original de la colección.

La colección sobre clérigos y monjes de K

El siguiente suplemento de 10PK en K fol. 180v ha sido copiado por una mano distinta, cuya caligrafía no corresponde a ninguna de las que trabajaron en el manuscrito. Es un pequeña colección de seis *auctoritates* sobre las relaciones entre canónigos regulares y monjes que se introduce con el título 'Quod precellat propositum clericorum institutis monachorum'. Las cinco primeras referencias son patrísticas, y proceden del epistolario del obispo de Chartres. La última es una falsificación que llegó al *Decretum* de Burcardo de Worms, de donde pasó a las colecciones relacionadas con Ivo.

Este es el nuevo texto suplementario de K:

> Quod precellat propositum clericorum institutis monachorum.
>
> Augustinus. 'Vix etiam bonus monachus bonum facit clericum'.
>
> Ieronimus. 'Monachus non docentis, sed dolentis habet officium'. Et alibi: 'Clerici oues pascunt, ego pascor'. Item: 'Si cupis esse quod diceris monachus id solus, quid faceris in urbibus? Que utique non sit habitacula solorum sed multorum. Habet unumquodque propositum principes suos et, ut ad nostra ueniamus, episcopi et presbiteri habeant apostolos et apostolicos uiros ad exemplum quorum honorem possidentes habere nitantur et meritum. Nos autem habeamus propositi nostri principes Paulum, Antonium, Iulianum, Hilarium, Macharium'. Et alibi: 'Michi opidum carcer, et solitudo paradisus est. Quid desideramus urbium frequentiam, qui de singularitate censemus?'
>
> Item ex decretis Siluestri pape cap. iiii. Ita fratres honorem representent pontifici: presbiter, diaconus, subdiaconus, acolitus, acolitus <sic> exorcista, lector, abbas, monachus. In omni loco representent obsequium.

Ivo de Chartres escribió a Pedro, obispo de Poitiers, con ocasión de la pretensión del abad Rainaldo de transformar la iglesia de Santa Cruz de Angles-sur-Anglin en un priorado dependiente de San Cipriano, a partir de la donación de la colegial realizada por su fundador a favor de aquel monasterio, donación que había sido confirmada por Urbano II.[126] Ivo reprochó a Pedro las injurias causadas a los clérigos regulares en beneficio de los monjes con ocasión de la gestión de este asunto. Para defender la dignidad del estado clerical, el obispo de Chartres recordó primero una frase entresacada de la correspondencia de Agustín de Hipona.[127] A continuación, reunió cuatro citas de Jerónimo en una composición en mosaico sobre la superioridad del orden clerical, con el propósito de mostrar al obispo de Poitiers lo que un monje, Jerónimo, afirma a propósito de la 'inferioridad' del estado monacal.[128] La *auctoritas* de Agustín y las cuatro *auctoritates* de Jerónimo tienen la misma extensión, aparecen en el mismo orden, y tienen las mismas palabras de enlace, en la correspondencia de Ivo y en la colección suplementaria del ejemplar coloniense de 10PK. [129] Algunos manuscritos de la correspondencia de Ivo

[126] Ivo, *Epistola* 36. La decretal de Urbano II es JL 5493, de noviembre de 1093 ó 1091. Los detalles del conflicto, en el que Ivo actuó en defensa de los canónigos regulares instalados en la Santa Cruz en Charles Derein, 'L'elaboration du statut canonique des chanoines reguliers specialement sous Urbain II', RHE 46 (1951) 534-565, 540.

[127] Ausgustinus, *Epistola* 60 (CSEL 34, 221).

[128] La frase de Ivo 'audiamus monachum dicentem de monachis' introduce frases sacadas de estas obras Jerónimo: *Adversus Vigilantium*, c. 15 (CCSL 79C, 28); *Epistola 34* (CSEL 54, 55); *Epistola 68* (CSEL 54, 533); y *Epistola 35* (CSEL 55, 1). Derein, 'L'elaboration' 545 nota 1, analiza las fuentes de la carta de Ivo de Chartres. El recurso a las afirmaciones de Jerónimo sobre la superioridad de los clérigos en el contexto de las disputas entre canónigos regulares y monjes era habitual: cf. *Ans*. 7.116.

[129] Las cinco *auctoritates* son reconocibles en el *Decretum* de Ivo de Chartes, pero con extensiones diferentes y en una serie no concordante. Todas menos la tercera están también en la *Tripartita* y en la *Panormia*: (i) *Vix etiam bonus*: ID 7.7, TrB 3.11.5, IP 3.180; (ii) *Monachus non docentis*: ID 7.3, TrB 3.11.2, IP 3.176; (iii) *Clerici oues*: ID 3.127b; (iv) *Si cupis*: ID 7.2., Tr 3.11.1, IP 3.175; y

presentan la carta dirigida al obispo de Poitiers con la rúbrica 'De dignitate clericorum', o también 'De con<tro>uersia monachorum et clericorum'. Al autor de la colección de los suplementos de 10PK en K este sumario le pareció insuficiente, porque su propósito era demostrar la preeminencia de los clérigos sobre los monjes.[130]

La intención del autor de esta colección queda clara al analizar la sexta y última *auctoritas*, que se ha elaborado a partir del capítulo séptimo del *Constitutum Silvestri*, el primero de los apócrifos relacionados con la disputa entre Símaco y Lorenzo (498-507)**.**[131] El *incipit* de este texto suplementario del manuscrito de Colonia conecta con la reelaboración de la falsificación silvestrina dedicada a la jerarquía de los grados eclesiásticos presente en el *Decretum* de Burcardo de Worms (2.224) y en el *Decretum* de Ivo de Chartres (ID 6.299)**.**[132] La deficiente selección del autor del suplemento de 10PK no deja lugar a dudas sobre sus intenciones:

ID 6.299	K fol. 180v final
De honore universis ordinibus competente. Ex decretis sancti Silvestri pape, cap. 4 Ita fratres iubet auctoritas divina et affirmat ut a subdiacono usque ad lectorem omnes subditi sint diacono.	Item ex (decretis)^{pc} Siluestri pape capitulo iiii. Ita fratres honorem representent pontifici presbiter, diaconus, subdiaconus, acolitus, acolitus <sic> exorcista, lector, abbas, monachus, in omni loco representent

(v) *Mihi oppidum*: ID 7.2 (o 4), Tr 3.11.3, IP 3.177. Cf. Rolker, *Canon law* 306-307.

[130] En los sumarios de los capítulos del libro séptimo del *Decretum*, en los del libro undécimo de la *Tripartita B*, y en los del libro tercero de la *Panormia* no hay correspondencia para la frase 'Quod precellat propositum clericorum institutis monachorum'.

[131] Maassen, *Quellen* § 539 n. 3, que fue recensionado en la primera edición de Jaffe post CXXXII. Nueva edición: Eckhardt Wirbelauer, *Zwei Päpste in Rom: Der Konflikt zwischen Laurentius und Symachus (498-514) (Studien und Texte)* (Quellen und Forschungen zur antiken Welt 16; München 1993) 228 y ss.

[132] DB 2.224 'Ex decretis Siluester pape cap. iiii. Ita fratres—gremio ecclesie'. ID 6.299 'De honore universis ordinibus competente. Ex decretis sancti Silvestri pape, cap. 4. Ita fratres—gremio ecclesie'.

Cardinali urbis Rome in ecclesia honorem representantes tantum. Pontifici vero presbiter diaconus, subdiaconus acolitus, exorcista, lector, abbas, monachus in omni loco representent obsequium, sive in publico sive in gremio ecclesie.	obsequium.

Este fragmento del *Constitutum Silvestri* coloca a los monjes en el último lugar de la escala de honores eclesiásticos, debajo incluso de acólitos, exorcitas y lectores. La imagen que resulta al combinar las cinco *auctoritates* patrísticas con la falsificación silvestrina es muy favorable a los clérigos. Fuera o no el autor de esta pequeña colección, el usuario de K que decidió copiarla al final de 10PK no debió quedar muy satisfecho con el contenido de las distinciones de las partes quinta, sexta y séptima de la colección de Colonia, ni con el resultado de su eventual interpretación sistemática.

Las decretales de K

Un nuevo usuario del manuscrito de Colonia añadió dos textos suplementarios, para lo que aprovechó la parte inferior del fol. 181r—la parte superior está vacía—así como la parte superior del fol. 181v.[133] Se trata de dos falsificaciones que proceden, respectivamente, del capítulo decimocuarto de la pseudo-decretal que Calixto I envió a los obispos de las Galias, a propósito de diversas cuestiones; y del capítulo cuarto de la pseudo-decretal que el papa Evaristo dirigió a los obispos de Egipto sobre los obispos expulsados de sus sedes.[134] Uno y otro papa explicaron la intensidad y estabilidad del vínculo del obispo con su diócesis a partir de la analogía con la unión conyugal.

Las colecciones gregorianas recogieron ambas *auctoritates* en el título ‘De electione et ordinatione ac de omni potestate siue

[133] Editados por Tena-Malo, *La colección canónica* 85-86.

[134] *Calixtus I* JH[1] †162: JK †86: Hinschius 139.28-36: Fuhrmann post 373, cf. 223; y *Euaristus* JH[1] †43: JK †21: Hinschius 90.13-26: Fuhrmann post 375, cf. 438.

statuto episcoporum',[135] o bien en el dedicado a 'De episcoporum mutatione auctoritate Romane ecclesie'.[136] Ivo de Chartres, por su parte, incorporó los párrafos de Calixto en el libro tercero de su *Decretum*, dedicado a 'De ecclesia et de rebus ecclesiasticis et earundem reverentia et observatione', al final de una serie de cuatro capítulos sobre 'Ut unusquisque presbiter una ecclesia contentus sit';[137] más adelante citó las palabras de Evaristo cuando trató de 'Ut ab episcopis aliena parochia minime peruadatur', asunto al que dedicó dos capítulos del libro quinto.[138] Estas cuestiones llamaron también la atención del autor de la colección agripina,[139] quien, sin embargo no recurrió a los fragmentos pseudoisidorianos, probablemente porque no los encontró en la *Tripartita*.

El último usuario de K—quien trabajó después de la fundación de Knechsteden, pero antes de 1146, fecha de la transacción que acredita el documento mercantil de K fol. 181v—consultó otras obras distintas de las que estuvieron al alcance del autor de 10PK. La versión de los dos últimos suplementos canónicos de K entronca aparentemente con la que transmitió el *Decretum* de Ivo de Chartres, si bien es cierto que el copista abrevió la inscripción del primero: 'Ex decreto Calixiti pape'.[140]

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[135] Anselmo de Lucca, donde los textos son *Ans*. 6.98 (*Euaristus*) y 99 (*Calixtus*).

[136] *Polycarpus*, donde los textos son *Pol*. 1.10.1 (*Euaristus*) y 2 (*Calixtus*).

[137] ID 3.50-53, donde el capítulo calixtino es ID 3.53.

[138] ID 5 'De primatu Romane ecclesie et de iure primatum et metropolitanorum atque episcoporum et de ordinatione eorum et de sublimitate episcopali', donde el fragmento de Evaristo es ID 5.182.

[139] Son el tema de 10PK 3.14 'Quod non liceat uni persone plures ecclesias uel diuersa officia obtinere uel in duabus ecclesias ministrare et quod nulla ecclesia per laicos uel per per pretium obtineri debeat', y de 10 PK 5.14 'Qua ratione concedenda sit mutatio episcoporum uel non'.

[140] La inscripción del fragmento de Calixto II en el *Decretum* de Ivo, 'Ex decretis Calixti pape cap. iiii.', es distinta a la que aparece en la colección de Anselmo de Lucca (6.99 'Calixtus papa omnibus episcopis'), que llegó a C.7 q.1 c.39. A pesar de ello, la versión de JH[1] †162 en K fol. 180r tiene lecturas variantes características de la tradición que llego al *Decretum* del obispo de Chartres, como por ejemplo 'sic nec uxor episcopo uel presbiteri', en lugar de 'sic nec uxor episcopi' (Anselmo), o también 'eo uiuente ab altero diiudicare',

Aunque ambos capítulos llegaron a la *Concordia discordantium canonum*, C.7 q.1 c.11 (*Euaristus*) y c.39 (*Calixtus*) conservan las variantes características de las colecciones italianas, por lo que el último usuario de K—que pudo trabajar al comienzo de la década de los años cuarenta del siglo XII—no los tomó de allí.[141]

Resumen

La *Collectio decem partium* de los manuscritos L K fue compuesta entre 1094 / 1095 y 1130, en la ciudad de Colonia, por un canonista desconocido educado en las artes liberales. El autor de 10PK seleccionó y redistribuyó los capítulos de las dos partes de la *Tripartita*—más una decena larga de textos procedentes de otras obras no identificadas—conforme a un esquema que se inspira en la sistemática ideada por Ivo de Chartres, pero que adaptó a su visión peculiar del *ius canonicum*, en sintonía con los grandes temas de las reformas promovidas por los papas desde Gregorio VII.

No es posible establecer un vínculo entre la composición de la colección y la enseñanza del *ius canonicum*. Los dos testimonios conocidos no tienen los vestigios propios de los usos académicos de la época. La única relación de 10PK con los 'precursores de Graciano' es la copia de las *Exceptiones eclesiasticarum regularum*. La elaboración de una sección dedicada a la dispensa (10PK 4.7) ofreció al operador jurídico una regla práctica para interpretar armónicamente la disciplina canónica transmitida

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en lugar de 'eo uiuente absque consilio et uoluntate alteri iudicare', en las que la versión de Anselmo sigue a la de Hinschius. La inscripción del suplemento de K fol. 181v, 'Ex epistola Euaristi pape fratribus per Egiptum. capitulo iiii.', coincide con la de ID 5.182, y se separa de la de Anselmo de Lucca (6.98 'Euaristus papa omnibus episcopis'), que es la que utilizó Graciano para C.7 q.1 c.11.

[141] Por lo demás, los dos ejemplares agripinos del *Deretum Gratiani* que utilizó Friedberg—Köln Dombibliothek 127 y 128—suelen fecharse en la segunda mitad del siglo XII. Sobre el *Codex* 128 cf. Stpehan Dusil, 'Visuelle Wissensvermittlung in der Gratian-Handschrift Köln, Diözesan- und Dombibliothek, 128', *Mittelalterliche Handschriften der Kölner Dombib-liothek: Siebtes Symposium der Diözesan- und Dombibliothek Köln zu den Dom-Manuskripten*, ed. Horst Harald (Köln 2018) 115-138.

a lo largo de un proceso milenario. Junto a ello, quien consultara la cuarta parte de la compilación agripina disponía de una explicación más clara del sistema de fuentes del derecho canónico—decretales, concilios, estatutos episcopales, costumbres—que la que se desprende de las obras de Ivo de Chartres. Estos esfuerzos por jerarquizar e interpretar el *ius canonicum*—así como por sistematizar cuidadosamente sus contenidos—no tuvieron otro objetivo distinto que el de facilitar la aplicación cotidiana del derecho.

La colección tuvo una difusión limitada y una vida efímera. De los suplementos de L K, puede deducirse que fue utilizada en, al menos, dos lugares distintos. La preocupación del coleccionista por defender los derechos de los clérigos frente a los monjes, por fomentar la vida común de los sacerdotes, o también por abarcar prácticamente todos los aspectos de la vida monacal explica su traslado a la abadía premostratense de Knechsteden en Dormagen. Esto pudo ocurrir antes de 1139—en cualquier caso durante el priorado de Heriberto—porque en los suplementos de K no están los cánones del II Concilio de Letrán. El otro ejemplar de 10PK, L, permaneció en el lugar de composición de la colección.

La vida de 10PK—igual que la de las demás colecciones relacionadas con Ivo de Chartres—terminó con la difusión del *Decretum Gratiani* en la archidiócesis renana, en la segunda mitad del siglo XII. Desde entonces, el *ius antiquum* es gracianeo: los canonistas—también Gerard Pucelle y sus colegas de la Escuela de Colonia—son decretistas. La *Summa Elegantius de iure diuino seu Coloniensis*, cuya fecha de redacción se fija en 1169, apenas cita treinta y un capítulos del *Decretum* de Burcardo, cinco del *Decretum* de Ivo, tres de la *Panormia* y doces pasajes de las *Exceptiones ecclesiasticarum regularum*.[142] El escrito más representativo de la Escuela de Colonia solo conoció las *auctoritates* de la *Tripartita* incluidas en la *Concordia discordantium canonum*.

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[142] Gerard Fransen-Stephan Kuttner, *Summa 'Elegantius in iure diuino' seu Colonienses* (4 vols. MIC Series A 1; Città del Vaticano 1969-1990) 4.149-150.

Apéndice I
Collectio decem partium 2.15.3–3.7.16 y 5.16.21-22

10PK 2.15.3-3.7.16

K se interrumpe al final del folio 25v, donde 10PK 2.15.3=TrA 2.37.1 queda incompleto: 'Conc. Toletano iiii. c. xiii. De himnis canendis et saluatoris—quem nato'. El folio 26r comienza con 'Pelagius Cathego patritio. De Syracusane urbis—uel heredibus relicturus'=TrA 1.54.12, que tanto Fowler-Magerl como Tena-Malo numeran como 10PK 3.7.1, aunque en realidad ocupa la posición 10PK 3.7.17.

El contenido de las distinciones 10PK 2.16–17 y 10PK 3.1–3.7—conocidas gracias a la *capitulatio* inicial—se reconstruye a continuación a partir de los materiales copiados en L folios 18r-22r. La relación comienza con la versión completa de 10PK 2.15.3:

(i) 10PK 2.15 'Vt post antiphonam orationes dicantur. Et quibus horis oratio dominica dicatur. Et de himnis canendis'

10PK (L fol. 17v-18r)		Fuente Material	*Tripartita*
10PK 2.15.3	Conc. Toletano iiii. c. xiii. De hymnis canendis et saluatoris—hispaniaque celebret	Toledo IV c.12	TrA 2.37.1

(ii) 10PK 2.16 'Qui sacra uasa uestimenta tractare debeant et sacrarium ingredi uel non'

10PK (L fol.18r)		Fuente Material	*Tripartita*
10PK 2.16.1	Conc. Martini pape cap. xli	Can. Mar. c.41	TrA 2.47.41

	Non liceat quemlibet ministeria—uasa dominica		
10PK 2.16.2	Conc. Bracarensi i. cap. i. Placuit ut non liceat cuilibet—fuerint ordinati	Braga I c.10	TrA 2.45.1
10PK 2.16.3	Syxtus i. dilectis fratribus in Christo Syxtus a Petro papa sextus in primo suorum decre-talium. A nobis et a reliquis—populo suo	*Sixtus I* JH[1] 59: JK †32: Hinschius 108.6-11	TrA 1.5.1
10PK 2.16.4	Stephanus i. Hylario episcopo Vestimenta ecclesiastica quibus—eos faciat ad ima	*Stephanus* JH[1] †257: JK †130: Hinschius 183.1-5	TrA 1.21.2
10PK 2.16.5	Sother papa episcopus Italie Sother papa undecimus a Petro in decretali suo. Sacratas Deo feminas uel monachas—citissime mandamus	*Soter* JH[1] †112: JK †61: Hinschius 124.7-12	TrA 1.10.1
10PK 2.16.6	Conc. Martini papa cap. xlv. Non liceat mulieres in secretorium ingredi	Can. Mar. c.42	TrA 2.47.42

(iii) 10PK 2.17 ‘De unctione infirmorum et de aspersione salis et aque’

10PK (L fol.18r)		Fuente Material	*Tripartita*
10PK 2.17.1	Innocentius papa de epistolas s. Iacobi cap. uiii Illud superfluum uide-mus—respondere cura-uimus	*Innocentius I* JH[1] 701: JK 311: Hinschius 528b.56 -529	TrA 1.38.5
10PK 2.17.2	Alexander omnibus orthodoxis Aquam sale conspersam populis benedicimus—homines	*Alexander I* JH[1] 49: JK †24: Hinschius 99.19-27	TrA 1.4.5

	defendit. Explicit pars secunda.		

(iv) 10PK 3.1 ‘De statu ecclesie et primitiua ecclesia et quomodo ecclesia creuerit in gentibus’ (cf. 10PK 6.1, donde se cita la decretal de Clemente y la de Urbano I)

10PK (L fol. 18v-19r)		Fuente Material	*Tripartita*
10PK 3.1.1	Clemens in prima epistola. Comparatio nauis ad ecclesiam Similis est omnis ecclesie status—mereantur audiri	*Clemens I* JH[1] †26: JK †10: Hinschius 34.1-35.4	TrA 1.1.10a
10PK 3.1.2	Melciades episcopis Hispaniarum Futuram ecclesiam in gentibus apostoli—fouendos egentes	*Miltiades* JH[1] 358: JK †172: Hinschius 247.33-38	TrA 1.31.4
10PK 3.1.3	Item eisdem At uero cum inter—pro futuram concederet	*Miltiades* JH[1] 358: JK †172: Hinschius 247.38 - 248.7	TrA 1.31.5
10PK 3.1.4	Vrbanus omnibus christianis Vrbanus papa sextusdecimus a Petro in primo decretali suo Scimus uos non ignorare quia—egens inueniatur	*Urbanus I* JH[1] 171: JK †87: Hinschius 143. 24 - 144	TrA 1.15.1

(v) 10PK 3.2 ‘De rebus ecclesie quibus et quomodo et a quibus distribui debeant et quorum regimine gubernari uel non’

10PK (L fol. 19r-20v)		Fuente Material	*Tripartita*
10PK 3.2.1	Calixtus in ii. epistola Benedicto episcopo Decanie prebende cetere—reus iudicetur	Calixtus (¿?)	TrA 1.14.14

10PK 3.2.2	Vrbanus omnibus christianis Ipse enim res fidelium—dampnatione feriatur	*Urbanus I* JH[1] 171: JK †87: Hinschius 144.21-27,145.14-19	TrA 1.15.2
10PK 3.2.3	Gregorius Demetiano <sic>et Valeriano Gregorius Demetiano <sic> et Valeriano clericis Firmianis. Sacrorum canonum statuta—obici quetionem	*Gregorius I* JH[1] 2684: JE 1582: *Registrum* 9.52	TrA 1.55.12
10PK 3.2.4	Idem in epistolam ad Dominum <sic> Sicut omnino graue—redemptione cessare	*Gregorius I* JH[1] 2562: JE 1481: *Registrum* 7.35	TrA 1.55.106
10PK 3.2.5	Conc. Cart. iiii. cap. ci. Vt uidue adolescentes—sunt sustententur	Cartago IV c.101	TrA 2.18.100
10PK 3.2.6	Conc. Aurelianensi cap. xii. Episcopus pauperibus uel infirmis—habuerit largiatur	Orleans c.12	TrA 2.29.12
10PK 3.2.7	Concil. Cartag. iiii. cap. cii. Ad reatum episcopi—familiaritatibus subiciantur	Cartago IV c.102	TrA 2.18.101
10PK 3.2.8	In eodem cap. ciii. Vidue que stipendiis—ecclesiam adiuuent	Cartago IV c.103	TrA 2.18.102
10PK 3.2.9	[add. marg. 1 fol. 19v] Ex concilio Remensi cap. viii. Interdicimus ut nullus presumat—Calixtus papa testatur	*Caput incertum:* Reims (¿?) c.8b	—
10PK 3.2.10	[add. marg. 2 fol. 19v] Ex concilio Turonico Decime que singulis dabuntur—diligentia dispensentur	Tours (813) c.16 (MGH Conc. 2, 1 288, 22)	—
10PK 3.2.11	Gelasius uniuersis episcopis per Lucaniam et Siciliam	*Gelasius I* JH[1] 1270: JK 636:	TrA 1.46.19

	Quattuor autem de redditu—putauerit supprimenda	Hinschius 654a.44–b.25	
10PK 3.2.12	Idem Gelasius romane ecclesie episcopus dilectissimis et in Christi unanimi caritate conexi scribens episcopis qui in Sicilia sunt constituti Quoniam presulum nostrorum auctoritas—largitores esse possint	*Gelasius I* JH[1] 1271: JK 637: Hinschius 654b.36-53	TrA 1.46.20a (Quoniam presulum–esse possint + Illud quoque–tempus exclusit)
10PK 3.2.13	Idem Iustino archidiacono et Fausto defensori Vobis enim et fame—respiciat communes	*Gelasius I* JH[1] 1397: JK 740	TrA 1.46.56
10PK 3.2.14	Conc. Aurelian. cap. x. Antiquos canones relegentes—potestate durantibus	Orleans c.10	TrA 2.29.10
10PK 3.2.15	In eodem cap. xi. De his que parrochus<sic>—episcopis deferatur	Orleans c.11	TrA 2.29.11
10PK 3.2.16	Leo iiii. episcopis Britannie Legenda est unaquamque—utilitate cogente	*Leo IV* JH[3] 5388: JE 2599	TrA 1.60.4 (Regenda)
10PK 3.2.17	Conc. Antioceno cap. xxxiiii. Quecumque res ecclesiastice—esse commisse	Antioquía c.24a	TrA 2.6.18
10PK 3.2.18	Conc. Cartag. iiii. cap. xxxi. Vt episcopus rebus ecclesie tamquam commendatis non tamquam propriis utatur	Cartago IV c.31	TrA 2.18.30
10PK 3.2.19	Conc. Toletano iii. cap. xviiii. Sic quidem contra omnem—potestatem pertineant	Toledo III c.19	TrA 2.36.8

10PK 3.2.20	Conc. Martini papa cap. xv. Que sunt ecclesie communi—incidere uideatur	Can. Mar. c.15	TrA 2.47.15
10PK 3.2.21	In eodem cap. xvi. Episcopus habeat potestatem—sancto concilium	Can. Mar. c.16	TrA 2.47.16
10PK 3.2.22	Conc. Agathensi c. xxxvii. [C]lerici etiam omnes—sacerdotibus consequantur	Agda c.36	TrA 2.28.35

(vi) 10PK 3.3 'Vt decime et primitie et oblationes fideliter a laicis ecclesiis baptismalibus reddantur et de his qui reddere distulerint et quorum oblationes ecclesia suscipere non debeat'

10PK (L fol. 20v)		Fuente Material	*Tripartita*
10PK 3.3.1	Leo iiii. episcopis Britannie De decimis iusto ordine—baptismata deberi	*Leo IV* JH[3] 5388: JE 2599	TrA 1.60.7
10PK 3.3.2	Conc. Gangrensi cap. uii. Si quis oblationes fructuum—anathema sit	Gangres c.7	TrA 2.4.7
10PK 3.3.3	In eodem cap. uiii. Si quis dederit uel acceperti—anathema sit	Gangres c.8	TrA 2.4.8
10PK 3.3.4	Alexander secundus Deinde ut decime—communione separentur	Roma (1063) c.5	TrA 1.66.3
10PK 3.3.5	Conc. Cartag. iiii. cap. xcv. Qui oblationes defunctorum—necatores excommunicentur	Cartago IV c.95	TrA 2.18.94
10PK 3.3.6	Conc. Vasensi cap. iiii. Qui oblationes defunctorum—fraudari sacrilegium	Vaison c.4	TrA 2.27.1
10PK 3.3.7	Concil. Agathensi cap. iiii.	Agda c.4	TrA 2.28.3

	Clerici etiam uel seculares qui—ecclesiis excludantur		
10PK 3.3.8	Conc. Cartag. iiii. c. xciiii[143] Eorum qui pauperes opprimunt dona a sacerdotibus refutanda	Cartago IV c.94	TrA 2.18.93

(vii) 10PK 3.4 ‘Quod economi ecclesiis dentur et ex laicis non constituantur’[144]

10PK (L fol. 20v-21r)		Fuente Material	*Tripartita*
10PK 3.4.1	Conc. Calcedonensi cap. xxui. Quoniam in quibusdam ecclesiis sicut—subiaceat regulis	Calcedonia c.26	TrA 2.10.25
10PK 3.4.2	Vii. synodo cap. xi. Cum simus debitores—in monasteriis	VII Sinodo (Ansatasio)	TrA 2.12.9
10PK 3.4.3	Conc. Spalensi cap. ix. Nona actione didicimus—manebit obnoxius	Sevilla II c.9	TrA 2.49.5

(viii) 10PK 3.5 ‘Quod laici in rebus ecclesiasticis disponendis nullam potestatem habeant, defensores ecclesiarum tamen constitui possint’

10PK (L fol. 21r)		Fuente Material	*Tripartita*
10PK 3.5.1	Leo i ad Pulcheriam augustam Res omnes aliter—defendit auctoritas	*Leo I* JH[3] 968: JK 448	TrA 1.43.3

[143] Segunda inscripción: ‘in eodem capitul. xciiii.’
[144] En la *capitulatio* de K fol.11r la rúbrica de 10PK 3.4 no tiene el ‘non’.

10PK 3.5.2	Conc. Cartago u. cap. ix. Ab imperatoribus uniuersis—prouisione delegentur	Cartago V c.9	TrA 2.19.9
10PK 3.5.3	Symacus papa Non licuit laico—auctoritas imperandi	*Symmachus* JH[1] Hinschius 660.b.47-50 Roma (501) c.2	TrA 1.48.13
10PK 3.5.4	Gelasius papa Laicis quamuis religiosis—attributa facultas	*Symmachus* JH[1] 1436: Hinschius 660b.65-661a.1 Roma (501) c.2	TrA 1.48.14 (Et Gelasius) TrB 3.29.10

(ix) 10PK 3.6 'Quid de rebus episcopi uel sacerdotis post mortem eorum obseruari debeat'

10PK (L fol. 21r-22r)		Fuente Material	*Tripartita*
10PK 3.6.1	Conc. Calcedonensi cap. xxii Non licere clericis post—proprio gradu	Calcedonia c.22	TrA 2.10.22
10PK 3.6.2	Conc. Terraconensi cap. xii. Sicubi<sic> defunctus fuerit episcopus—restituat uniuersa	Tarragona c.12	TrA 2.31.9 (Si ubi defunctus)
10PK 3.6.3	Conc. Herelonensi <sic>cap. xui. Hec huius placiti constitutione—aliquatenus crucientur	Lérida c.16b	TrA 2.34.11
10PK 3.6.4	Concil. Agathensi cap. ui. Pontifices uero quibus in summo—retinere non poterit	Agada c.6	TrA 2.28.5
10PK 3.6.5	In eodem cap. xxxiiii. Episcopus si filios—ecclesie consulatur	Agda c.33	TrA 2.28.32 (Episcopus qui)
10PK 3.6.6	In eodem cap. lu.	Agda c.54	TrA 2.28.53

	Presbiterum dum diocesim—ordinatione discedat		
10PK 3.6.7	Conc. Cartag. iii. cap. xli Placuit ut episcopi—reprobi iudicentur	Cartago III c.49	TrA 2.17.30
10PK 3.6.8	Conc. Toletano ix. cap. iiii. Sacerdotes uel quicumque—in perpetuum uendicabit	Toledo IX c.4	TrA 2.41.1

(x) 10PK 3.7 'De alienatione et commutatione rerum ecclesiasticarum quo tenore fieri possit uel non'

10PK (L fol. 22r-23r)		Fuente Material	*Tripartita*
10PK 3.7.1	Clemens in ii. epistula Si forte quispiam presbiter siue—suscepturum penam	*Clemens I* JH[1] †27: JK †11: Hinschius 48.16-18	TrA 1.1.17a
10PK 3.7.2	Iustino archidiacono et Fausto defensori. Gelasius Volaterane ecclesie actus uel patrimonium—patiamini generari	*Gelasius I* JH[1] 1398: JK 741	TrA 1.46.57a (TrA 1.46.56: Iustino archidiacono et Fausto defensori)
10PK 3.7.3	Symachus cap. iiii. Quod pape non liceat predium—ho(norem perdat)[deest]	± Symmachus JH[1] 1436 Hinschius 661b.9-52 Roma (501) ex cc.5-6	TrA 1.48.15
10PK 3.7.4	Item cap. ui. Vt qui subscripserit anathema sit—nisi restituantur	± Symmachus JH[1] 1436 Hinschius 661b.53-63 Roma (501) ex c.7	TrA 1.48.16 (Et qui)
10PK 3.7.5	Item cap. vii. Vt liceat quibuslibet ecclesiasticis personis—uidetur conuenire	± Symmachus JH[1] 1436 Hinschius 662a.3-15 Roma (501) ex c.8	TrA 1.48.17 (Et liceat)

10PK 3.7.6	Symachus ad Cesarium episcopum cap. i. Possessiones ecclesie alienare—temporaliter fruantur	± Symmachus JH[1] 1460 JK 764: Hinschius 657	TrA 1.48.20
10PK 3.7.7	Pelagius Hostilio episcopo Augusto sedis nostre notario suggerente—usibus reformare	*Pelagius I* JH[3] 1949: JK 1010	TrA 1.54.20
10PK 3.7.8	De synodo Anchiritana c. xu. Si qua de rebus ecclesie—precio reddi	Ancira c.5	TrA 2.2.4
10PK 3.7.9	Concilio Agathensi cap. v. Si quis clericus furtum ecclesie—communione tribuatur	Agda c.5	TrA 2.28.4
10PK 3.7.10	In eodem cap. xxii. Et licet superfluum sit de re—communione priuentur	Agda c.22	TrA 2.28.20
10PK 3.7.11	In eodem cap. xxvvi. Si quis de clericis documenta—superiorem sententia teaneatur	Agda c.26	TrA 2.28.24
10PK 3.7.12	In eodem cap. liiii. Quicquid parrochiarum presbiter de ecclesiastici—actione uendentis	Agada c.53	TrA 2.28.52
10PK 3.7.13	Concilio Martini papa cap. xuii. Si quis presbiter aut diaconus inuentus fuerit—dimissum est	Can. Mar. c.17	TrA 2.47.17
10PK 3.7.14	Concilio Toletano uii. cap. u. Sepe fit ut proprietati originis—uidebitur priuare	Toledo VI c.5	TrA 2.38.1
10PK 3.7.15	Concilio Aurelianensi secundo cap. xii.	Orleans (538) c.26	TrA 2.40.1

	Abbatibus presbiteris aliisque ministris—episcopi reuocetur		
10PK 3.7.16	Gregorius papa Statuimus secundum priorem diffinitionem—pauperes efficiuntur	*Caput incertum*	—

10PK 5.16.21-22

K folio 88v termina con 'Que leges sunt: una publica, altera priuata. Publica lex est que a sanctis patribus est confirmata, ut est lex canonum. Que quidem propter transgressores est tradita, uerbi', palabras que pertenecen a 10PK 5.16.21. K folio 89r comienza con 'et reliqua. Istius enim—mortui delati sunt ambo', un fragmento de TrA 1.1.23 que Fowler-Magerl y Tena-Malo numeran como 10PK 6.1.1. Por su parte, L folio 56r tiene los siguiente textos:

10PK (L fol. 56r)		Fuente Material	*Tripartita*
10PK 5.16.21	Vrbanus secundus Due leges sunt—non estis sub lege	*Urbanus II* JL 5760	—
10PK 5.16.22	Idem [Vrbanus secundus] Statuimus ne professionis—et nullus[145].	*Urbanus II* JL 5763	TrB 3.10.43

L fol. 56r está cortado, por lo que hoy no es posible saber si estos dos fragmentos son adiciones posteriores, ni tampoco si 10PK 5.16 tenía más *auctoritates*.

[145] La palabras finales del capítulo en TrB 3.10.43, ID 6.411 y C.19 q.3 c.3—'monachorum sine communi litterarum cautione suscipiat'—han sido borradas mediante raspadura.

Apéndice II
La *Tripartita* de 10PK

Las decretales de León IX de TrA 1.65:

10PK 4.2.23 [20a]=TrA 1.65.1
10PK 4.2.24 [20b]=TrA 1.65.2

Las decretales de Alejandro II de TrA 1.66:

10PK 3.3.4=TrA 1.66.3
10PK 3.14.4=TrA 1.66.5
10PK 3.14.7=*ex* TrA 1.66.4
10PK 5.4.16 [17]=TrA 1.66.7
10PK 5.7.14 [14a]=TrA 1.66.1
10PK 5.7.15 [14b]=TrA 1.66.6
10PK 6.1.7 [6]=*ex* TrA 1.66.2
10PK 6.4.19 [18]=*ex* TrA 1.66.2
10PK 7.1.4 [3]=*ex* TrA 1.66.4

Las decretales de Urbano II de TrA 1.67:

10PK 5.7.16 [15]=TrA 1.67.2
10PK 5.8.8 [5]=TrA 1.67.1
10PK 5.13.3=*ex* TrA 1.67.3

Las *Sententie grecorum* de TrA 2.14:

10PK 1.1.2=TrA 2.14.31
10PK 2.1.2=TrA 2.14.32
10PK 2.1.3=TrA 2.14.8
10PK 3.10.4=TrA 2.14.29
10PK 4.7.5 [4ab]=TrA 2.14.3
10PK 4.7.7 [6]=TrA 2.14.4
10PK 5.4.5 [5ab]=TrA 2.14.7
10PK 6.4.7=TrA 2.14.15
10PK 6.14.1 [1a]=TrA 2.14.18
10PK 6.14.2 [1b]=TrA 2.14.19
10PK 6.14.3 [1c]=TrA 2.14.20
10PK 6.14.4 [1d]=TrA 2.14.21
10PK 7.5.2 [1b]=*ex* TrA 2.14.17

10PK 7.9.4 [4a]=*ex* TrA 2.14.17
10PK 7.9.5 [4b]=*ex* TrA 2.14.17
10PK 7.9.6 [4c]=TrA 2.14.23
10PK 7.9.7 [4d]=TrA 2.14.24
10PK 7.9.8 [4e]=TrA 2.14.30
10PK 7.11.6=*ex* TrA 2.14.17
10PK 8.1.19 [16a]=*ex* TrA 2.14.5
10PK 8.1.20 [16b]=*ex* TrA 2.14.5
10PK 9.1.11=TrA 2.14.6
10PK 9.7.8 [8a]=TrA 2.14.9
10PK 9.7.9 [8b]=TrA 2.14.10
10PK 9.7.10 [8c]=TrA 2.14.11
10PK 9.7.11 [8d]=TrA 2.14.12
10PK 9.7.27 [22a]=TrA 2.14.14
10PK 9.7.28 [22b]=TrA 2.14.13
10PK 9.16.1 [1a]=TrA 2.14.25
10PK 9.16.2 [1b]=TrA 2.14.26
10PK 10.8.4=TrA 2.14.22

Las *Sententie* de TrA 2.50:

10PK 1.3.5 [4]=*ex* TrA 2.50.23
10PK 1.8.1=*ex* TrA 2.50.24
10PK 2.13.3 [2]=TrA 2.50.2
10PK 3.8.4=TrA 2.50.20
10PK 3.14.8=*ex* TrA 2.50.24
10PK 5.2.52 [50]=TrA 2.50.22
10PK 5.9.15 [12]=TrA 2.50.13
10PK 5.9.16 [13]=TrA 2.50.14
10PK 5.9.17 [14]=TrA 2.50.15
10PK 5.9.18 [15]=TrA 2.50.16
10PK 5.9.19 [16]=TrA 2.50.17
10PK 7.4.4 [4a]=TrA 2.50.4
10PK 7.4.5 [4b]=TrA 2.50.5
10PK 7.5.3 [2]=TrA 2.50.1
10PK 7.9.9 [5]=TrA 2.50.11
10PK 8.2.24 [19]=TrA 2.50.21
10PK 10.1.17 [16]=TrA 2.50.23
10PK 10.13.6=*ex* TrA 2.50.24
10PK 10.15.5 [4]=TrA 2.50.12

La *Tripartita B*:

10PK 3.12.3 [3a]=TrB 3.3.11

10PK 3.12.4 [3b]=TrB 3.3.12
10PK 4.2.22 [19]=TrB 3.8.2
10PK 7.11.7=TrB 3.12.8
10PK 7.13.5=TrB 3.13.1
10PK 7.15.2=TrB 3.13.2
10PK 8.1.9 [7]=TrB 3.8.6
10PK 8.1.10 [8]=*ex* TrB 3.8.7
10PK 8.1.12 [10a-d]=TrB 3.8.9
10PK 8.7.60 [54ab]=TrB 3.10.53
10PK 8.13.15 [14]=TrB 3.10.10
10PK 8.13.16 [15]=TrB 3.10.7
10PK 8.13.17 [16]=TrB 3.10.50
10PK 8.14.5 [4]=TrB 3.27.14
10PK 9.1.6=TrB 3.29.4
10PK 9.1.12=TrB 3.9.23
10PK 9.6.4=TrB 3.27.5
10PK 9.6.23=TrB 3.27.15
10PK 9.7.14 [10]=TrB 3.28.11
10PK 9.7.18 [14]=TrB 3.28.8
10PK 10.1.2=TrB 3.15.1
10PK 10.1.3 [3a]=*ex* TrB 3.15.4
10PK 10.1.4 [3b]=*ex* TrB 3.15.4
10PK 10.1.5 [4]=TrB 3.15.63
10PK 10.1.6 [5]=TrB 3.15.6
10PK 10.1.7 [6ab]=TrB 3.15.5
10PK 10.1.8 [7]=TrB 3.15.27
10PK 10.1.9 [8]=*ex* TrB 3.15.18
10PK 10.1.10 [9]=TrB 3.15.17
10PK 10.1.11 [10]=TrB 3.15.21
10PK 10.1.12 [11]=TrB 3.15.22
10PK 10.1.18 [17]=Tr 3.15.70
10PK 10.1.19 [18]=Tr 3.15.71
10PK 10.8.3=TrB 3.15.79
10PK 10.8.10=TrB 3.15.53
10PK 10.8.11=TrB 3.15.80
10PK 10.14.1=TrB 3.16.8
10PK 10.14.2=TrB 3.16.14
10PK 10.14.3=TrB 3.16.15
10PK 10.14.4=TrB 3.16.16
10PK 10.14.5=TrB 3.16.17
10PK 10.14.6=TrB 3.16.18
10PK 10.15.4 [3]=TrB 3.16.26

Apéndice III
Capítulos de 10PK atribuidos a Urbano II

10PK	Jaffe	Coll. Brit.	TrA	Gracian o
10PK 1.3.5[4] Vrbanvs secundus Vitali presbitero Briuensi Super quibus consuluit nos—in nomine Trinitatis baptizauerit[146]	*Urbanus II* JL 5741 Vitali presbytero Brixienxis respondet: et baptismus esse—Trinitatis baptizauerit + et spiritualium—compatres sint effecti	—	*ex* TrA 2.50.23 Idem Vitali presbitero Briuensi. Quod baptismus sit si mulier infantem in nomine Trinitatis necessitate baptizauerit, et quod filii uel filie compatrum excepta persona qua compatres efficiuntur legitime possint coniungi. Super quibus consuluit—Trinitatis baptizauerit + et quod spiritualium—compatres effecti sunt	C.30 q.3 c.4[147]
10PK 1.8.1 Archaldus Alanensis episcopus Vitali	*Urbanus II* JL 5742 Vitali presbytero Brixiensi haec scribit: Quod	—	*ex* TrA 2.50.24a Item [Idem Vitali presbitero Briuensi]	C.30 q.4 c.6[149]

[146] El autor de 10PK se desentiende de la parte final de TrA 2.50.23 (‘et quod spiritualium—compatres effecti sunt’), en la que el papa resuelve los problemas vinculados al impedimento de parentesco espiritual cuando la madre bautiza a sus hijos en caso de necesidad.
[147] Con la misma extensión que TrA 2.50.23.
[149] Con la misma extensión que TrA 2.50.24a.

prebitero Briuensi Quod autem uxor—aspirare minime presumant[148]	autem uxor—aspirare minime presumant + Quia uero piaculare—sibi debet inungi		Quod autem uxor—minime presumant—+ Quia uero piaculare—iniungi debet	
10PK 3.14.8 Vrbanus secundus Vitali presbitero Briuensi Porro eos qui ecclesiam — condescendendo ministrare concedimus, absque tamen sanctorum canonum preiudicio.	*Urbanus II* JL 5740 Vitali presbytero (Brixiensis) ita scribit: Eos qui ecclesiam emerunt—condescendendo ministrare concedimus	—	*ex* TrA 2.50.24c Porro eos qui ecclesiam—condescendendo ministrare concedimus absque tamen sanctorum canonum preiudicio	C.1 q.5 c.2[150]
10PK 5.2.52[50] Vrbanus seundus Artaldus Alanensis episcopus Narbonensis—a sacerdotio me repellat	—	CB *Urbanus II* 44	TrA 2.50.22 Vrbanus secundus De Artaldo a papa Vrbano consecrato. Artaldus Alanensis episcopus Narbonensis—a sacerdotio me repellat	C.8 q.3 c.2[151]

[148] El autor de 10PK se desentiende del final de TrA 2.50.24a (Quia uero piaculare—sibi debet iungi), porque aquí solo le interesa el apadrinamiento espiritual por parte de los padres.

[150] Con la misma extensión que TrA 2.50.24c.

[151] Sobre el *incipit* 'Artaldus Arelatensis episocpus' cf. Somerville–Kuttner, *Pope Urban II* 166-167.

10PK 5.7.16[15] Vrbanus secundus Alberto Metensi episcopo Presentium portitorem quem—sacerdotali officio fungi	*Alexander II* JL 4589	CB *Alexander II* 70	TrA 1.67.2 Idem Alberto Metensi episcopo De quodam ordinato per pecuniam non episcopo sed cuidam principum eius datam Presentium portitorem quem—sacerdotali officio fungi	C.1 q.5 c.3
10PK 5.8.8[5] Vrbanus secundus Gebehardo episcopo Constantiensi Vt ab excommunicatis quondam—est precipua concedendum	*Urbanus II* JL 5393	CB *Urbanus II* 38b[152]	TrA 1.67.1 Vrbanus secundus Gebeardo episcopo Constantiensi De ordinatis ab excommunicatis, quondam tamen catholicis Vt ab excommunicatis—est precipua concedendum	C.9 q.1 c.4[153]
10PK 5.13.3 Vrbanus secundus Hugoni Gratianopolitano episcopo Compatimur infirmitati tue—quamdiu eo tua	*Urbanus II* JL 5730	—	*ex* TrA 1.67.3 Idem Hugoni Gratianopolitano episcopo De amminiculo concedendo episcopo quamdiu illius infirmitas indiguerit et de quadam	C.35 qq.1-2 c.11[155]

[152] Cf. Somerville–Kuttner, *Pope Urban II* 134-151.

[153] Sin ‘et hoc tamen ipsum rarius cum cautela est precipua concedendum’ del final de TrA 1.67.1.

[155] Solo la parte final sobre la polución noctura: ‘Extraordinaria pollutio—sit et dampnabilis’.

infirmitas indiguerit[154]			extraordinaria pollutione Compatimur infirmitati tue— tua infirmitas indiguerit + Extraordinaria pollutio nisi— criminosa sit et dampnabilis	
10PK 5.16.21[18][156] Vrbanus secundus Due leges sunt—non estis sub lege	*Urbanus II* JL 5760	—	—	C.19 q.2 c.2
10PK 5.16.22[19][157] Idem [Vrbanus secundus] Statuimus ne professionis uel episcoporum et nullus	*Urbanus II* JL 5763 Monasterii S. Ruffi	—	TrB 3.10.43[158] Vrbanus secundus abbati sancti Rufi De stabilitate canonicorum regularium Statuimus ne professionis et nullus	C.19 q.3 c.3[159]

[154] El autor de 10PK se desentiende de la parte final de la *auctoritas*, dedicada a la polución nocturna, porque la distinción 10PK 5.13 se dedica a la ayuda que se presta al obispo enfermo.

[156] En K fol. 88v está incompleto, porque tiene la extensión: 'Que leges sunt— est tradita uerbi'. En L fol. 56r la extensión es la habitual: 'Due leges sunt— estis sub lege'.

[157] El capítulo falta en K fol. 88v-89r. En L fol. 56r tiene la extensión que se transcribe en la tabla.

[158] ID 6.411: 'Urbanus II abbati Sancti Rufi. De stabilitate canonicorum regularium. Statuimus ne professionis canonice quispiam, postquam Dei vice super caput sibi hominem imposuerit, alicuius levitatis instinctu, vel districtioris religionis obtentu, ex eodem claustro audeat sine abbatis totiusque congregationis permissione discedere; discedentem vero nullus abbatum, vel episcoporum, et nullus monachorum sine communi litterarum cautione, suscipiat'.

[159] Con la misma inscripción y extensión que TrB 3.10.43.

(monachorum sine communi litterarum cautione suscipiat)[del.]			monachorum sine communi litterarum cautione suscipiat	
10PK 6.1.6[5] Vrbanus secundus in Placentino concilio De communi clericorum uita—et possideantur a Domino	—	—	—	—
10PK 7.6.2 Vrbanus secundus in Placentino concilio Mandamus et mandantes—ultimus in choro maneat	—	—	—	—
10PK 10.1.17[16] Vrbanus secundus Vitali presbitero Briuensi < *sic* Brinensi> Super quibus consuluit nos—qua compatres effecti sunt[160]	*Urbanus II* JL 5741 Vitali presbytero Brixienxis respondet: et baptismus esse—compatres sint effecti	—	*ex* TrA 2.50.23 Idem Vitali presbitero Briuensi Quod baptismus sit—legitime possint coniungi + Super quibus consuluit nos—compatres effecti sunt	C.30 q.3 c.4[161]
10PK 10.13.6	*Urbanus II* JL 5742 Vitali	—	ex TrA 2.50.24a	C.30 q.4 c.6[162]

[160] El autor de 10PK no ha copiado las palabras ‘et baptismus sit si instante necessitate femina puerum in nomine Trinitatis baptizauerit et quod’ del interior de TrA 2.50.23, porque ya utilizó este capítulo para 10PK 1.3.5.
[161] Con la misma extensión que TrA 2.50.23.
[162] Con la misma extensión que TrA 2.50.24a.

Vrbanus secundvs Vitali presbitero Briuensi Quia uero piaculare flagitium commisit qui duabus commatribus uelut duabus sororibus nupsit, magna iuxta modum culpe penitentia iniungi debet	presbytero Brixiensi haec scribit: Quod autem uxor—aspirare minime presumant + Quia uero paiculare—sibi debet iungi		[Idem Vitali presbitero Briuensi] Quod autem uxor—minime presumant—+ Quia uero piaculare—iniungi debet	

Apéndice IV
ID 1- 7/TrB 1-11/10PK 1-7

Ivo *Decretum*	TrB	10PK
[1] Prima pars continet de fide et sacramento fidei, id est baptismate et ministerio baptizandorum et baptizatorum et consignandorum et consignatorum et de observatione singulorum, et quid conferat baptisma, quid confirmatio	[1] De baptismo	[1] Quid prima pars contineat. Prima pars continet de fide et baptismo et manus impositione habens undecim distinctiones
[2] Secunda pars continet de sacramento corporis et sanguinis Domini, et de perceptione et observatione de missa et aliorum sacramentorum sanctitate	[2] De sacramentis	[2] Secunda pars continet de sacramento corporis et sanguinis Domini, de missa et de quibusdam aliis officiis, de reuerentia sacrorum uasorum et uestimentorum. De unctione infirmorum et aspersione salis et aque habens decem et septem distinctiones
[3] Tertia pars continet de ecclesia et de rebus ecclesiasticis et earundem reverentia et observatione	[3] De rebus ecclesiasticis	[3] Quid tertia pars contineat. Tertia pars continet de ecclesia et de rebus ecclesiasticis et de sacerdotibus et earundem reuerentia et obseruatione habens decem et octo distinctiones
[4] Quarta pars continet de observandis festivitatibus et ieiuniis legitimis, de scripturis canonicis et	[4] De obseruatione dierum [5] De ieiunio	[4] Quid quarta pars contineat. Quarta pars contineat octo distinctiones[163]

[163] La correspondencia con ID 4 se aprecia en las distinciones 10PK 4.1 'De obseruantia festorum dierum', 4.2 'De ieiuniis et abstinentiis', 4.3 'Que

consuetudinibus et celebratione concilii		
[5] Quinta pars continet de primatu Romane ecclesie et de iure primatum et metropolitanorum atque episcoporum et de ordinatione eorum et de sublimitate episcopali	[8] De primatu Romane ecclesie	[5] Quid quinta contineat. Quinta pars continet de electione et consecratione pape, archiepiscoporum, presbiterorum et reliquorum graduum. Habens distinctiones sedecim
[6] Sexta pars continet de clericorum conversatione et ordinatione et correptione et causis	[10] De clericis et eorum causis	[6] Quod contineat sexta pars. Sexta pars continet de vita et correctione supradictorum graduum. Habens distinctiones xiii.
[7] Septima pars continet de monachorum et monacharum singularitate et quiete et de revocatione et penitentia eorum qui continentie propositum transgrediuntur	[11] De monachiis	[7] Septima pars continet de monachis et sacris uirginibus et uiduis. Habens distinctiones xvii.

scripture sunt authentice uel non et quod non sint proprio ingenio exponende', y 4.5 'De autenticis conciliis'.

Apéndice V
10PK 4.4 y 4.7

(i) Contenido de 10PK 4.4:

10PK	*Fontes materiales*	*Tr* A	*Decretum*
4.4.1	*Nicolaus I* J JH[3] 5960: JE 2785, MGH Epist. 6, n. 71 (394.4-15)	TrA 1.62.10[164]	ID 5.33a
4.4.2	*Nicolaus I* JH[3] 5960: JE 2785, MGH Epist. 6, n. 71 (394.23-395.35)	TrA 1.62.11[165]	ID 5.33b
4.4.3	*Nicolaus I* JH[3] 5769: JE 2691, MGH Epist. 6, n. 86 (448.5-7)	TrA 1.62.14[166]	< ID 4.211
4.4.4	*Nicolaus I* JH[3] 5769: JE 2691, MGH Epist. 6, n. 86 (450.17-18)	TrA 1.62.16[167]	—
4.4.5	*Nicolaus I* JH[3] 5870: JE 2750, MGH Epist. 6, n. 18 (286.19-22)	TrA 1.62.38[168]	ID 5.19A[169]
4.4.6	*Stephanus V* JH[3] 7203: JL 3444, MGH Epist. 7, n. 26 (348.22-24)	TrA 1.64.6[170]	—

[164] 'Idem archiepiscopis et episcopis per Gallias. Quod que sedes apostolica scripsit ceterorum tractatorum scriptis debeant preferri. Si Romanorum pontificum—accepta esse perhibeant'.
[165] 'De eodem. Si ideo non—Gelasium mandasse probauimus'.
[166] 'Idem Michaheli imperatori. Vt quod apostolice sedis auctoritate sancitur inconcusse teneatur. Consequens est ut—atque inconcusse teneatur'.
[167] 'Quod qui decreta Romanorum pontificum non habent, de neglectu sunt arguendi, qui uero habent et non obseruant, de temeritate corripiendi. Si decreta Romanorum—corripiendi et increpandi'.
[168] 'Quod qui decreta a sedis apostolice presule promulgata contempserit anathema sit. Si quis dogmata—contempserit anathema sit'.
[169] Cf. ID 5.35 'Ex concilio Leonis pape IV, episcoporum 72, cap. 5. Si quis dogmata—anathema sit'.
[170] 'Quod quicquid Romana ecclesia statuit irrefragabiliter obseruandum est. Enim uero quia—inrefragabiliter obseruandum est'.

4.4.7	*Fabianus* JH[1] †192: JK †93, Hinschius 166.16-18	TrA 1.18.7[171]	ID 6.322
4.4.8	*Zosimus* JH[1] 740: JK 334, MGH Epist. 3, n. 5 (11.28-31)	TrA 1.39.2[172]	ID 4.226
4.4.9	*Gelasius I* JH[1] 1390: JK 733, Thiel Epist. I 453.21-26	TrA 1.46.48[173]	—
4.4.10	*Hormisda* JH[1] 1531: JK 788, Hinschius 691b.3-8	TrA 1.49.2[174]	—
4.4.11	*Gregorius I* JH[1] †2467: JE †1334, Hinschius 749.39-750.2	TrA 1.55.7[175]	—
4.4.12	*Leo IV* JH[3] 5424: JE 2609, MGH Epist. 5, n. 14 (592.14-17)	TrA 1.60.1[176]	ID 4.186
4.4.13	*Leo IV* JH[3] 5388: JE 2599, MGH Epist. 5, n. 16 (595.22-596.5)	TrA 1.60.9[177]	ID 4.72

171 'Non esse contraeundum auctoritati. Qui uero omnipotentem—aliquid ullomodo consentit'.

172 'Idem episcopis Narbonensis ecclesie. Quod nec Romana sedes contra statuta patrum quicquam potest. Contra statuta patrum—patrum sanxere reuerentiam'.

173 'Item. Quod non sit eundum contra pontificalia constituta. Celestinus uero presbiter—instituta uenire contendat'.

174 'Item ad episcopos per Hyspaniam. Quod prima salus sit fidei regulam custodire et a constitutis patrum non deuiare. Bonefacius notarius sancte—patrum nullatenus deuiare'.

175 'Quod non sint destruenda que ab antecessoribus sunt statuta. Reuerentissimo fratri Felici episcopo Gregorius seruus seruorum Dei. Si ea destruerem—se diuisa destruetur'.

176 'Ex registro Leonis quarti Coloroth archiepiscopo et Bertulfo. Quod patrum instituta intacta conseruanda sint. Ideo permittente Domino—intactum non conseruamus'.

177 'Per que decreta iudicare debeant episcopi. De libelliis et—retinere uel credere'.

(ii) Contenido de 10PK 4.7:

10PK	*Fontes materiales*	*Prologus*[178]	*Tripartita*	*Decretum*
4.7.1	*Leo I* JH[1] 1098: JK 544: Hinschius 616b.19-27	126.1-7[179]	TrA 1.43.46[180]	—
4.7.2 [2a]	*Gelasius I* JH[1] 1263: JK 636: Hinschius 650b.11-22	—	TrA 1.46.4[181]	ID 3.141
4.7.3 [2b]	*Gelasius I* JH[1] 1263: JK 636: Hinschius 650b.40-49	—	TrA 1.46.5[182]	ID 3.142
4.7.4 [3]	*ex Iohanes VIII* JH[3] 6826: JE 3271 (¿Leo I?)	< 137.6-8[183]	—	—

[178] Brasington, *Ways of Mercy*. Los números corresponden a la página y a las líneas.

[179] 'papa Leo de stabilitate non mutandorum et discrecione temperandorum ita scribit Rustico episcopo Narbonensis Sicut quedam—inueniatur aduersus' (Hinschius 616b.19-27).

[180] 'Idem Rustico episcopo Narbonensi. De stabilitate non mutandorum et discretione temperandorum. Sicut quedam sunt—inueniatur aduersum' (Hinschius 616b.19-27).

[181] 'Ex generalibus decretis pape Gelasii. cp. i. De institutis ecclesiasticis pro temporum qualitate moderandis. Dilectissimis fratribus uniuersis episcopis per Lucaniam et Syciliam Gelasius. Necessaria rerum fieri temperemus' (Hinschius 650b.11-22).

[182] 'Vbi nulla urget necessitas instituta patrum non esse uiolanda cp. ii. Priscis igitur dispensanda concedimus' (Hinschius 650b.40-49).

[183] 'Et sanctisimus papa Leo in eodem spiritu precepit dicens: Ubi necessitas non est—mutacio legis' (Brasington 137.6-8). La cita del papa León, de origen desconocido, y que tampoco se encuentra entre los documentos de León I, aparece dentro de la decretal que Juan VIII escribió con ocasión de la deposición de Focio (JH[3] 6826). Brasington explica que se conocen dos versiones del documento de Juan VIII, el registro pontificio (Vat. Reg. lat. 1) y la versión de Constantinopla. La decretal fue utilizada por *Deusdedit* (4.434: Victor W. von Glanvell, *Die Kanonessammlung des Kardinals Deusdedit* [Paderborn 1905; Aalen 1967] 612.10-615.14) y por Ivo (*Prologus* 135.17-140.6) Ni Ivo ni

4.7.5 [4]	*ex Nicaea II* (vers. Anastasius Biblothecarius), Acta conciliorum oecumenicorum Ser. II (i), 79-80	130.8-131.5[184]	TrA 2.14.3[185]	—
4.7.6 [5]	*Inocentius I* JH[1] 691: JK 303: Hinschius 550b.58-62	< 129.6-8[186]	< TrA 1.38.27[187]	< ID 6.350
4.7.7 [6]	*ex Nicaea II* (vers. Anastasius Bibliothecarius), Acta conciliorum oecumenicorum Ser. II (i) 81	< 131.6-12[188]	TrA 2.14.4[189]	—

Deusdedit utilizaron la versión de JH[3] 6826 del registro pontificio, sino la traducción de *Anastassius Bibliotecarius*. Ivo no depende de *Deusdedit*. Aunque la versión de *Deusdedit* ('Item Iohannes papa Basilio, Leoni, Alexandro augustis (. . .) Item. Vnanimitatem et pacem—pape nostro Iohanni') es más extensa que la de Ivo ('Scripsistis nobis—facere presumpserit'), ninguna evidencia permite establecer una relación directa. Sobre la decretal de Juan VIII cf. Detlev Jasper, 'Papal Letters of the Merovingian and Carolingian Periods', Detlev Jasper–Horst Fuhrmann, *Papal letters in the Early Middle Ages* (History of Medieval Canon Law; Wahington 2001) 89-133, aquí 126-130; y Horst Fuhrmann, 'The Pseudo-Isidorian Forgeries', ib., 135-195, aquí 194.

184 'Habemus simile quidam ex epistola Cirilii missa Maximo diacono Antiocheno: Didici a diligendo—negocium multum'.

185 'Ex epistola Cyrilli missa Maximo dyacono Antiocheno. De habenda dispensatione. Didici a diligendo—negotium multum'.

186 'Idem eisdem. Sacerdotum summa—maneat in clero' (Hinschius 550b.46-551a.4, Brasington 128.18-129.13).

187 'Idem Rufo et Eusebio Macedonibus episcopis. Cur recepti sint Bonosiani et Cathari et Nouatiani Sacerdotum summa—ipsa demonstrat' (Hinschius 550b.46 - 551a.18).

188 'Eiusdem ad Gennadium presbyterum et archimandritam: Dispensaciones rerum—comministrum nostrum' (Brasington 131.6-14).

189 'Eiusdem ad Gennadium presbiterum et archimandritam. De eodem. Dispensaciones rerum—patiamur dispendia' (Brasington 131.6-12).

4.7.8 [7]	*Inocentius I* JH[1] 691: JK 303: Hinschius 551b.15-23)	< 128.14-18[190]	TrA 1.38.14[191]	ID 6.61

[190] 'Inde Innocencius Rufo et Eusebio et ceteris episcopis Macedonie: Nostre lex—soleat transire' (Hinschius 550b.35-40 + 551b.15-21 Brasington 128.11-18).

[191] 'Quod in ecclesia peccatum populi inultum soleat preteriri. Prouideat ergo—sollicitudine precauendum' (Hinschius 551b.15-23, Brasington 128.14-18).

Apéndice VI
Modelos de los sumarios de 10PK

Tripartita	10PK
TrB 3.8.2 Quod Gloria in excelsis Deo in cena Domini sit dicenda, et apostolico pallio utendum (= 10PK 4.2.22) TrA 1.65.1 De Alleluia et Gloria in excelsis Deo (= 10PK 4.2.23) TrA 1.65.2 Quod Gloria in excelsis Deo in cena Domini sit dicenda, et apostolico pallio utendum (= 10PK 4.2.23) TrA 2.29.22 *Vt letanie ante Ascensionem Domini celebrentur cp. xxii* (= 10PK 4.2.24)	10PK 4.2 De usu pallii 'In cena Domini' et de 'Gloria in excelsis' et 'Alleluia' et de diebus rogationum>
TrB 3.10.41 De ordinatis ab excommunicatis TrA 1.67.1 De ordinatis ab excommunicatis quondam tamen catholicis (= 10PK 5.8.8[7])	10PK 5.8 De ordinatis ab hereticis uel excommunicatis
TrB 3.10.20 Cur permittantur fungi officiis suis reuertentes ab heresi	10PK 5.9 Quid obseruandum sit de clericis reuertentibus ab heresi
TrA 1.55.64 Non debere fieri reordinationes (= 10PK 5.10.1)	10PK 5.10 Non debere fieri reordinationes
TrA 1.17.1 Qua ratione concedenda sit mutatio episcoporum (= 10PK 5.14.1)	10PK 5.14 Qua ratione concedenda sit mutatio episcoporum uel non
TrA 2.40.6 De his qui uenatione studeant	10PK 6.13 De his qui uenationi student
TrA 2.37.17 De clericis qui monachorum propositum appetunt (= 10PK 7.6.1)	10PK 7.6 De clericis qui monachorum propositum appetunt et ne quis canonicus regulariter professus monachus fiat
TrA 1.55.25 De seruis ad ecclesiam uenire uolentibus	10PK 7.7 De seruis conuerti uolentibus

TrA 2.50.11 Monachum carnem manducare non debere (= 10PK 7.9.9)	10PK 7.9 Vt monachi secularia negotia non suscipiant et de monachis murmurantibus contentiosis suspectis et quod monachus carnem manducare non debeat
TrA 1.55.102 Quod mulieres nulla occasione permittantur in monasterium accendere neque monachi sibi commatres facere debeant (= 10PK 7.10 un.)	10PK 7.10 Quod mulieres in monasterium ascendere non debeant nec monachi commatres habere
TrB 3.27.1 De excommunicatione iusta uel iniusta TrB 3.27.4 De excommunicatione iniusta	10PK 9.6 De excommunicatione iusta uel iniusta et de quibus causis et quo ordine facienda sit excommunicatio et de uitandis excommunicatis et de his qui excommunicatis communicant
TrA 2.18.89 De inerguminis cap. xc. (= 10PK 9.8.1)	10PK 9.8 De energumenis
TrB 2.18.88 De seruientibus auguriis et incantionibus (= 10PK 9.11.6)	10PK 9.11 De seruientibus auguriis et incantationibus et uariis superstitionibus
TrA 1.14.8 De raptoribus (= 10PK 9.13.1)	10PK 9.13 De raptoribus
TrA 2.30.14 De falsis testibus (= 10PK 9.14.2)	10PK 9.14 De falsis testibus
TrA 2.12.2 Quod melius sit iurantem periurare quam confractione sanctarum imaginum sacramentum custodire (= 10PK 9.15.1)	10PK 9.15 Quod melius sit iurantem periurare quam illicita faciendo sacramenta custodire
TrA 1.55.72 Quod ad concubitum mulieris enixe uir suus accedere non debet quousque ecclesiam intrare non prohiberi debet (= 10PK 10.5 un.)	10PK 10.5 Quod ad concubitum mulieris enixe uir suus accedere non debet quoadusque quos gignitur ablactetur
TrA 1.45.28 Quod uiri de captiuitate reuersi debent recipere uxores suas que aliis nupserant (= 10PK 10.9.1)	10PK 10.9 Quod uiri de captiuitate reuersi uxores suas recipere debent que aliis nupserant
TrA 1.55.33 De his qui commisceri non possunt (= 10PK 1.10.1)	10PK 10.10 De his qui commisceri non possunt
TrA 2.2.9 De adulteriis (= 10PK 1.11.1)	10PK 10.11 De adulteriis

Apéndice VII
Cánones suplementarios de 10PK en K L

Additiones 10PK K fol. 180rv	*Additiones* 10PK L fol. 119v	Clermont (1130)[192]	Reims (1131)[193]	Pisa (1135)[194]	Letrán II (1139)[195]
Decreuimus ut hi qui a subdiaconatu—et immunditiis seruire	Decernimus ut hi qui a subdiaconatu—et immunditiis deseruire	[c.4] Decreuimus ut hii qui a subdiaconatu—et immunditiis deseruire	[c.4] Decernimus ut hi qui a subdiaconatu—et immunditiis deseruire	—	[c.6] Decreuimus etiam ut ii qui in ordine—et immunditiis deseruire
Ad hec predecessorum nostrorum Gregorii vii.—indubitanter habere cognouerit	Ad hec predecessorum nostrorum Gregorii septimi—indubitanter habere cognouerit	[c.5 / c.19] Ad hec predecessorum nostrorum —habere cognouerit	[c.5] Ad hec predecessorum nostrorum Gregorii septimi—indubitanter habere cognouerit	—	[c.7a] Ad hec predecessorum nostrorum Gregorii VII—concubinas habere cognouerit
Item placuit quod si quis suadente—iniecerit anathemati subiaceat	Item placuit quod si quis suadente—iniecerit anathemati subiaceat	[c.10a / c.8 / c.9a / c.8] Item placuit utsi quis suadente—iniecerit antahemati subiaceat	[c.13a] Item placuit utsi quis suadente—iniecerti anathemati subiaceat	[c.7] Precepimus ut si quis suadente—apostolico conspectui presentetur	[c.15a] Item placuit ut si quis suadente—anathematis uinculo subiaceat
Precipimus etiam ut laici qui ecclesias—aut excommunicationi	Precipimus etiam ut laici qui ecclesias—aut excommuni-cationi subiaceant	[c.6 / c.15 / c.15 / c.15] Precipimus etiam ut laici qui ecclesias—aut excommuni	[c.7] Precipimus etiam ut laici qui ecclesias—aut excommuni	[c.3a] Precipimus etiam ut laici—excomunicationi subiaceant	[c.10b] Precepimus etiam ut laici—aut excommuni-cationi subiaceant

[192] Brett–Somerville, 'The Transmission'.
[193] Brett–Somerville, 'The Transmission'.
[194] Somerville, 'The Council of Pisa'.
[195] COD 197-203.

subiace-ant		-cationi subiaceant	-cationi subiaceant		
Innoua-mus autem et precipi-mus ut nullus—honore suscepto priuentur	Innouamus autem et precipimus ut nullus—honore suscepto priuentur	[c.7 / c.16 / c.16] Innouamus autem et precipimus ut nullus—honore suscepto priuentur	[c.8a] Innouamus autem et precipimus ut nullus—honore suscepto priuentur	[c.3b] Innouamus autem et precipimus–honore suscepto priuentur	[c.10c] Innouamus autem et precipimus ut nullus—honore suscepto priuentur
Prohibe-mus autem ne adolescent ibus uel infra—predicti conced-antur honores	Prohibemus autem ne adolescenti-bus uel infra—predicti concedantur honores	[- / - / c.17 / c.17] Prohibemus autem ne adolescen-tibus uel infra—predicti concedan-tur honores	[c.8b] Prohibemus autem ne adolescen-tibus uel infra—predicti concedan-tur honores	[c.3c] Prohibemus autem ne–predicti concedatur honores	[c.10d] Prohibemus autem ne adolescen-tibus uel infra—predicti concedantur honores
Precipi-mus etiam ne conducti-ciis presbi-teris ecclesie—proprium habeat sacerdo-tem	Precipimus etiam ne conducticiis presbiteris ecclesie—propriat habeat sacerdotem	[- / - / c.18 / c.18] Precipimus etiam ne conducti-ciis presbiteris ecclesie—propriat habeat sacerdotem	[c.9] Placuit etiam ne conductitiis presbiteri ecclesie—propium habeat sacerdotem	[c.4] Precepimus etiam ne conducticiis–habeat sacerdotem	[c.10e] Precipimus etiam ne conducticiis presbiteris ecclesie—propriat habeat sacerdotem
—	Statuimus ut si quis simoniace—quod illicite usurpauit	[c.1a] Statuimus ut si quis simoniace—quod illicite usurpauit	[c.1a] Statuimus ut si quis simoniace—quod illicite usurpauit	[c.1a] Statuimus ut si quis simoniace—quod illicite usurpauit	[c.1] Statuimus ut si quis simoniace—quod illicite usurpauit
—	Si quis prebendas seu prioratum—atque beneficio perfruatur	> [c.1b] Vel si quis prebendas aut honorem uel promotione m aliquam ecclesiasti-cam—infamie percellantur	> [c.1b] Vt si quis prebendas aut honorem uel promoti-onem—nota infamie percellantur	> [c.1b] Vel si quis prebendam—nota infamie percellatur	[c.2a] Si quis prebendas seu prioratum—nota infamie percellantur + [c.2b] Et nec pro pastu—atque beneficio perfruatur
—	A suis episcopus	—	—	[c.1c] A suis episcopis	[c.3a] A suis

	excom-municatus —sententie teneatur obnoxius			excom-municatos– omnibus prohibemus	episcopus excom-municatus —ominibus prohibemus + [c.3b] Qui uero excommuni-cato— sententie teneatur obnoxius
—	Precipimus etiam quod tam episcopi— ecclesiasti-cis careant beneficiis	> [c.2] Precipimus etiam quod tam episcopi— eorum deceat sanctitatem	> [c.2] Precipimus etiam quod tam— eorum deceat sanctitatem	[c.1d] Precipimus etiam quod tam– eorum deceat sanctitatem	[c.4a] Precipimus etiam quod tam episcopi— eos deceat sanctitatem + [c.4b] pre se ferant. Quod si moniti— ecclesiasti-cis careant beneficiis
—	Illud autem quod in sacro Chalcedone nsi—ad opus ecclesie et succeso[196]	< [c.3] Illud autem quod in sacro Chalcedone nsi—simili sententie subiciatur	[c.3] Illud etiam quod in sacro Chalcedone nsi—simili sentenie subiciantur	[c.1e] Illud autem quod in sacro—simili sententie subiciantur	[c.5] Illud autem quod in sacro Chalcedone nsi—simili sententie subiciantur

[196] El manuscrito se interrumpe aquí, sin las palabras finales de II Letrán c.5: ‘successoris sui in libera—simili sententie subiiciantur’.

Venetiis in Rivo alto:
Letters for English Recipients issued from Venice in mid-1177

Anne J. Duggan

There is little doubt that Alexander III's sojourn in Venice was a significant European event.[*1] Not only did the reconciliation with the emperor Frederick I end the schism that had divided Catholic Christendom for almost eighteen years, but it set the stage for the making of peace (at Constance, July 1183) with the league of sixteen Lombard cities which had opposed Frederick's political ambitions in northern Italy and also with the Norman kingdom in southern Italy and Sicily,[2] even though the working out of the territorial and jurisdictional details led to serious tensions, including another German invasion of northern Italy (1186), led by Henry (VI), Frederick's heir.[3] For those five months, between 11 May and 16 October 1177, Jaffé lists 121 letters issued *Venetiis, in Rivo alto* – at Venice, on the Rialto (JL 12836–12956). This unique address designated the new palace of Patriarch Enrico Dandalo of Grado, where Alexander resided, near the church of San Silvestro and close to the heart of Venice's thriving commercial district.[4] Only eight of these 121 letters were

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[*] NOTE: Medieval spellings have been restored where appropriate: ae = e, v = u (except capital letters), j = i.

[1] Thomas F. Madden, 'Alexander III and Venice', *Pope Alexander III (1159-81)*: *The Art of Survival*, edd. Peter D. Clarke and Anne J. Duggan (Farnham 2012) 315-339, at 332. For English accounts of the peace, see Roger of Howden, *Chronica magistri Rogeri de Houedene*, ed. William Stubbs (4 vol. RS 51; London 1868-1871) 2.137-143; Rodney M. Thomson, 'An English Eyewitness of the Peace of Venice, 1177', *Speculum* 50 (1975) 21-32.

[2] Jochen Johrendt, 'The Empire and the Schism', *Pope Alexander III* 99-126, at 121-126.

[3] As Frederick himself emphasized to the new pope Lucius III after the Constance agreement in 1183: MGH *Const.* 420-421 no. 296; cf. Peter Partner, *The Lands of St Peter: The Papal State in the Middle Ages and Early Renaissance* (London 1972) 210-219.

[4] *Italia pontificia: sive Repertorium privilegiorum et litterarum a Romanis pontificibus ante annum MCLXXXVIII Italiae ecclesiis monasteriis, civitatibus singulisque personis concessorum*, ed. Paul F. Kehr (8 vol.; Berlin 1906-1935;

addressed to recipients in England, but other sources allow us to add a further eight to the tally (and there may be more to be recovered). Two of this sixteen were issued on papal initiative, but the remaining fourteen offer a fascinating snapshot of the range of petitioners prepared to send envoys, or even travel themselves, more than one thousand miles, to seek justice, confirmation of privileges, reinforcement of their own authority, or authoritative advice on intricate points of canon law.

Acta dated in Rivo alto in Jaffé's register: Papal initiative

The letters issued on papal initiative record two stages in the making of the Peace of Venice. The first, *Exigunt gratissime* (26 July),[5] notifies Archbishop Roger of York and Bishop Hugh of Durham about Frederick I's renunciation of the schism in the church of San Nicolò on the Lido, his solemn acknowledgement of Alexander's papacy, 'ante ecclesiam Beati Marci', and the celebratory Mass in the basilica of St Mark, all of which had been conducted with considerable ceremony on the preceding Sunday, 24 July 1177.[6] This announcement was very similar to that issued on the following day to Abbot Peter of Montecassino and Archbishop Alphano of Capua; and similar letters were sent to other prelates across Europe.[7] The second, *Immensas laudes*, issued on 6 August to Archbishop Richard of Canterbury, his suffragans, and 'abbots within the archbishopric of Canterbury with a particular attachment to the Roman Church (dilectis filiis abbatibus specialiter ad Romanam Ecclesiam pertinentibus in archiepiscopatu Cantuariensi constitutis)', reports the final

reprinted 1961) 7/2.163-164. For the patriarch's jurisdiction, which included Venice, see Madden, 'Alexander III and Venice' 326-328.

[5] JL 12891, *Exigunt gratissime*, 26 July, 1177: PL 200 no.1304. This *epistola* is copied in a fine clerical hand on a single leaf inserted into the assortment of materials preceding the Cantor's Book, Durham, Dean and Chapter Library B.IV.24 fol.3v. It is also recorded in [Roger of Howden], *Gesta regis Henrici secundi Benedicti abbatis*, ed. William Stubbs (2 vol. RS 49; London 1867) 1.187-188 and Howden, *Chronica* 2.141-143. For shorter notifications to the archbishops of Reims and Sens and their suffragans, the Cistercian general chapter, and Louis VII of France: PL 200 nos. 1306-1308 and 1310.

[6] Following the agreement drawn up at Chioggia on 22 July: MGH, DD FI, 3.202-206 no. 687; Madden, 'Alexander III and Venice' 335.

[7] JL 12892, 27 July, 1177: PL 200 no. 1305; cf. JL 12893-12895.

solemnization of the peace on 1 August.[8]

The remaining six English *acta* in Jaffé's *rivo alto* list comprise three privileges for monastic foundations; a papal mandate for the execution of a judge-delegate determination; confirmation of an earlier settlement; and an assertion of the full exemption from tithes for two Cistercian nunneries, respectively in Yorkshire and Lincolnshire. All were replies to reports, petitions, or appeals from interested parties.

Privileges

The three indults are fairly standard products of the papal Curia. *Iustis petentium* (3 June 1177) for St Augustine's abbey, Canterbury, confirms its prebends in St Martin's Dover, Lenham, and Fordwich, 'sicut eas rationabiliter possidetis', at the request of Abbot-elect Roger;[9] *Quotiens illud* (4 July 1177) is the great privilege listing all properties of the alien priory of St Nicholas at Spalding (Lincolnshire), at the request of its prior, Reginald;[10] and *Iustis petentium* (13 Oct. 1177), for Evesham Abbey, confirms its possession of the church of St Michael in London.[11] Although

[8] JL 12910; PL 200 no. 1314. Also in Howden, *Gesta regis* 1.188-190; *Chronica* 2.140-141; and Gervase of Canterbury's *Chronica: The Historical Works of Gervase of Canterbury*, ed. William Stubbs (2 vol. RS 73; London 1879-1880) 1.268-269 (from Howden, *Gesta*). The favoured abbots may be superiors of houses enjoying the protection of St Peter and the pope: 'sub beati Petri et nostra protectione'.

[9] JL 12860: Thomas of Elmham, *Historia monasterii S. Augustini Cantuariensis*, ed. Charles Hardwick (London 1858) 419-420 no. 50, esp. 419. Roger had been elected in 1176, but the dispute with Archbishop Richard about profession and benediction meant that his confirmation was deferred until Pope Alexander himself performed the ceremony in Tusculum on 28 Jan. 1179, where he conferred the mitre, ring, and gloves as a sign of independence: Diceto: *Radulfi de Diceto decani Lundoniensis opera historica*, ed. William Stubbs (2 vol. RS 68; London 1876) 1.428-429; *The Heads of Religious Houses: England and Wales, 940-1216*, ed. David Knowles, Christopher N. L. Brooke, and V. C. M. London (Cambridge 2001[2]) 36.

[10] JL 12878: William Dugdale, *Monasticon Anglicanum* (6 vols. London 1846) 3.218-219 no. 13, at 219, 'Sane de noualibus uestrorum que propriis manibus aut sumptibus colitis, de nutrimentis uestrorum animalium, nullus a uobis decimas presumat exigere'. Spalding was a dependency of the Benedictine abbey of Saint-Nicholas in Angers, and so did not enjoy the extended exemption from tithes conferred on the more privileged orders. Hence the tithe privilege was restricted to 'noval' lands: cf. below, at n.42.

[11] JL 12955: BL Harley 3763 fol.95.

these are routine products of the papal chancery, their impetration enables us to add the unnamed representatives of St Augustine's, St Nicholas, and Evesham Abbey to the list of English petitioners at Venice during these days.

Other letters

The final three *acta*, however, are more interesting for the legal historian, although they left no trace in collections of canon law.

1. *Ex litteris dilectorum*, addressed on 23 May 1177 to Archbishop Richard of Canterbury, records the penultimate stage in the long dispute between the Premonstratensian canons of Newhouse in Lincolnshire and the Benedictine nuns of Elstow in Bedfordshire, about possession of the church of St Peter at (East) Halton in Lincolnshire.[12] Alexander's mandate rehearses the judgment rendered in Newhouse's favour by Abbot Silvanus of Rievaulx and Prior Gregory of Bridlington, whom he had delegated to hear the case,[13] orders the archbishop to ensure that the judgment is upheld, and instructs him to enjoin his suffragans to protect the canons against any surreptitious action by the nuns during his own absence.[14]

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[12] 12846α, incorporated in BL Harley Charter 43 G. 24, Archbishop Richard of Canterbury's mandate ordering his suffragans to execute the papal mandate: *English Episcopal Acta* (EEA) 2, *Canterbury 1162-1190*, edd. Christopher R. Cheney and Bridgett E. R. Jones (Oxford 1980) 140-142 no. 169. For the papal mandate alone, see Walther Holtzmann, *Papsturkunden in England* [PUE] 1, *Bibliotheken und Archive in London* (Abh. Gesellschaft Göttingen 25; Berlin 1930) 418-419 no. 146.

[13] Their original judgment, given at Beverley on 10 January 1177, survives as BL Harley Charter 44 I. 3: *Documents Illustrative of the History of the Danelaw [Yorkshire]. From Various Collections*, ed. Frank M. Stenton (Records of the Social and Economic History of England and Wales 5; London 1920) 214-215 no. 285, but a copy must have been sent to the Curia. For their commission (1174), see *Papal Decretals Relating to the Diocese of Lincoln in the Twelfth Century*, edd. Walther Holtzmann and Eric Waldram Kemp (Lincoln Record Society 47; Lincoln 1954) 12-17 no. 6 col. 1. The survival of the original grants by Ralf and Gervase of Halton confirm the validity of Newhouse's claim: BL Harley Charters 51 B. 50 and 51; *Documents . . . Danelaw* 211-212 nos. 281-282

[14] This unusual instruction is possibly explained by the fact that the archbishop was in Flanders on royal business in January-February 1177 (EEA 2.279), when

More important than its contents, however, is the manner of its transmission. *Ex litteris dilectorum* survives only because Richard of Canterbury quoted it in full, together with its date, in his own instruction to his suffragans, in which he ordered them, 'by the authority of this mandate', to protect the canons against any disturbance by the said nuns in respect of the said church and, 'by apostolic authority and ours, very sternly restrain them from their unjust vexations or presumptions'.[15] In the event, the nuns appear to have renewed their claim, for Alexander issued yet another commission, this time to Archbishop Richard and a colleague, probably Roger of Worcester, again laboriously rehearsing the progress of the dispute, before allowing them to bring the matter to a conclusion by agreement or judgment (concordia uel iudicio).[16] The case was finally (1178x1181) settled in Richard's presence by a compromise (which cites the papal mandate), in which the nuns relinquished their claims to Halton church, and various other rights, in return for 4 marks of silver a year.[17] A better example of collaboration between papal and episcopal authority in the administration of justice would be hard to find.[18]

2. *Ea que compositione,* addressed on 15 June 1177 to Archbishop Roger of York, is a confirmation in the form of a minor privilege of the settlement of a territorial dispute between the archbishopric of York and the bishopric of Lincoln, which had been mediated by King William II and confirmed by Paschal II at the turn of the eleventh century (1099x1100).[19] Why the matter should have been

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the messengers bearing the judges' notification of their verdict set out for the Curia.

[15] *Documents . . . Danelaw* 215-216 no. 286, at 216; EEA 2.142: 'Huius auctoritate mandati . . . ab iniustis uexationibus et presumptionibus suis, apostolica auctoritate et nostra seuerius eas compescatis'.

[16] *Papal Decretals . . . Lincoln* 12-17 no. 6 col. 2.

[17] Recorded in a chirograph (1178-1181): BL Harley Charter 43 G. 23: *Documents . . . Danelaw* 216-217 no. 287; EEA 2.142-143 no. 170.

[18] But not impossible. For Richard's promulgation of an earlier Alexandrine mandate, also copied in full, see EEA 2.93-95 no. 115. In this case, the papal mandate (*Licet iuxta Apostolorum*, 26 June 1174-1176) was transmitted through the legal tradition to X 5.37.3: WH 615; JL 14315.

[19] JL 12871, *Ea que compositione*: *Concilia magnae Britanniae et Hiberniae a Synodo Verolamensi anno 446 ad Londinensem* 1717, ed. David Wilkins (4 vol.

raised more than seventy years later remains a mystery, but it may have reflected York's concern that the young Geoffrey Plantagenet, Henry II's illegitimate son, whose election as bishop of Lincoln had just been confirmed in 1175,[20] might attempt, or perhaps was attempting, to overturn the earlier agreement. The matters at stake were significant. Alexander confirmed York's jurisdiction over Selby Abbey (Yorkshire) and the priory of St Oswald (Gloucestershire), and also Lincoln's over the 'parish' of Lindsey, a large region in North Lincolnshire, formerly part of the Anglo-Saxon kingdom of the same name. Moreover, he prefaced his endorsement with the declaration that 'matters established by agreement or judgment should remain firm and secure (ea que compositione uel iudicio statuuntur, firma debent et inconcussa consistere)'. Lying behind this statement is the civilian principle of 'res iudicata', that any dispute judicially settled by the formal pronouncement of a judge could not be brought back into litigation.[21] It had occurred three times in the mature Gratian (1140-1145), where its Civilian source in the *Codex* is noted;[22] it appeared regularly in papal letters;[23] and, following its use in

London 1737) 1.437, from the Register of Archbishop William Greenfield (1306-1314).

[20] Although he had been elected under royal pressure in 1173, Alexander III did not confirm his election until mid-1175, from which time he enjoyed all the rights of a bishop-elect; but he avoided consecration until Alexander offered the choice of episcopal consecration or resignation, following which he resigned in 1181 (effective from 1 August 1181): EEA 1, *Lincoln 1067–1185*, ed. David M. Smith (Oxford 1980) xxxvii-xxxviii; cf. Marie Lovatt, 'Geoffrey (1151?–1212), archbishop of York', *ODNB online*, accessed 16.9.2019.

[21] Dig. 42.1.1, *Modestinus* (220s-240s): 'Res iudicata dicitur, quae finem controversiarum pronuntiatione iudicis accipit: quod vel condemnatione vel absolutione contingit'; Cod. 7.52, etc.

[22] C.2 q.6, d.p.c.[41] §3: 'Item sententia citra solitum ordinem iudiciorum a preside prolata auctoritatem rei iudicate non obtinet' (cf. Cod. 7.45.4); §23: 'Litigatoribus uero copia est etiam non conscriptis libellis illico uoce appellare, cum res iudicata poposcerit, tam in ciuilibus quam in criminalibus causis' (cf. Cod. 7.62.14); §25: 'Hec omnia in VII. libro Codicis inuenies, a titulo de appellationibus et consultationibus (Cod. 7.62) usque ad titulum ne liceat in una eademque causa' (Cod. 7.70). C.3 q.7 d.p.c.1: '. . . Verum, si seruus, dum putaretur liber, ex delegatione sententiam dixit, quamuis postea in seruitutem depulsus sit, sententia ab eo dicta rei iudicate firmitatem tenet' (cf. Dig. 5.1.13).

[23] *Papsturkunden in England* [PUE], 3, *Oxford, Cambridge, kleinere Bibliotheken und Archive und Nachträge aus London*, ed. Walther Holtzmann (Abh. Wissenschaft Göttingen 33; Göttingen 1952) 434-435 no. 320, at 435

English ecclesiastical cases from the 1150s onwards, it became imbedded in English common law in the course of the thirteenth century.[24]

3. The third is an important assertion of the total exemption from tithes, issued from the Rialto on 2 August 1177, in favour of the Cistercian nuns at Swine in Yorkshire and Cotum (Nuncotham) in Lincolnshire. Responding to the religious women's complaint, *Significauerunt nobis*[25] mandated the same Roger of York and Geoffrey, bishop-elect of Lincoln, to ensure that the nuns' exemption was respected by everyone, under threat of excommunication for laymen and suspension and excommunication for clerics. Its key instruction reads:[26]

> although by the clemency of the apostolic see, they [the nuns], like the brethren of the Cistercian order, have been privileged by the favour of the apostolic see so that they are bound to pay tithes to no one from the *labores* which they cultivate with their own hands or at their expense, certain ecclesiastics have perverted that *clause by a wicked and perverse interpretation*, claiming that *labores* should be understood as *new works*, and thus, contrary to the privilege of the apostolic see, the said nuns are being oppressed by the demand for tithes.

This strongly-worded mandate was one of many similar letters expressing Alexander's displeasure at what he deemed deliberate

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(Drax Priory, OSA, Yorkshire); PL 200 no. 536 (Reims), 587 (Reims), 655 (Reims), 1491 (Grado).

[24] *Seipp's Abridgement: An Index and Paraphrase of Printed Year Book Reports, 1268-1535*, compiled by David J. Seipp, online database (Harvard Law School), https://www.bu.edu/phpbin/lawyearbooks/search.php, no. 1293.018rs; 1310.018rs; 1311.119ss; 1313.698ss, *par excepcion rei iudicate*; 1440.100; 1487.049; 1488.036. For these developments, see Anne J. Duggan, 'On Re-Reading van Caenegem: Romano-canonical influence on the Formation of the Common Law 1070-1300', *La culture judiciaire anglaise au Moyen Âge, 2me partie*, ed. Yves Mausen (Histoire du droit et des institutions; Paris, in press) at nn.102-113.

[25] JL 12901; PL 200.1136-1137 no. 1311.

[26] PL 200.1136: 'cum eis [monialibus], sicut fratribus Cisterciensis ordinis indultum sit de clementia sedis apostolice, ut de *laboribus* suis, quos propriis manibus uel sumptibus excolunt nemini decimas soluere teneantur, quidam ecclesiastici uiri capitulum ipsum *praua et sinistra interpretatione peruerterunt*, asserentes per *labores noualia intelligi*, et sic contra priuilegium apostolice sedis predicte moniales decimarum exactione gravantur'. Note that Geoffrey is mistakenly called 'bishop' instead of 'elect', of Lincoln, probably a mis-reading of 'electo', since he is addressed as 'dear son' (dilecto filio) not 'venerable brother' (uenerabili fratri). For an earlier privilege for Nuncotham alone, see below, at n.50.

misinterpretation of the full exemption that he had restored to the Cistercian order at the beginning of his pontificate (first recorded in privileges for three English houses for men in November 1160),[27] and then extended to the Order's monasteries across Europe.[28]

The background to *Significauerunt nobis* is the crisis produced by sudden changes in papal tithe policy in the mid-twelfth century. Although many religious houses had acquired various kinds of exemption from the obligation to pay tithes to neighboring parish churches, such relief tended to be restricted to the produce of land exploited or cultivated for the first time (novales/novalia), and so did not impinge on existing parochial rights. That changed, however, when popes, especially Innocent II

[27] For these 'November privileges', see PL 200.92-95 no. 21 (Rievaulx, Yorkshire), *Religiosis votis,* dated *Anagnie . . . XII Kalend. Decembris, indictione IX, Incarnationis Dominice anno m.c.lx, pontificatus uero domni Alexandri pape III anno II.*; PUE 1.340-343 no. 80 (Rufford, Nottinghamshire), *Religiosis desideriis,* and 81 (Sibton, Suffolk), *Pie postulatio.* Rufford's original copy still survives as BL Harley Charter 111 A. 5. It is a matter of some interest that these privileges were among the first letters obtained by English petitioners from the new pope, following Henry II's recognition of Alexander at the end of July 1160. Only one earlier letter is known: *In beati Petri,* obtained by William de Lega, archdeacon of Derby, on 1 Oct. 1160: PL 200.706; JL 11839 (where mistakenly assigned to 1170). See Mary G. Cheney, 'The Recognition of Pope Alexander III: Some Neglected Evidence', EHR 84 (1989) 474-497, esp. 478 and 496-497.

[28] *Kurie und Kloster im 12. Jahrhundert,* 1, ed. Georg Schreiber (Kirchenrechtliche Abhandlungen 65, Stuttgart 1910) 266 n.3, lists La Cour-Dieu (1162), Poblet (1162), Eberbach (1163), Vaux-de-Cernay (1163), Savigny (1163), Becherunensis (1163), Châtillon (1163), L'Aumône (1163), Santa Maria Montis Rami (1163), Bonneval (1163), Perseigne (1163), Escharlis (1163), and Saint-Aubin (1163). To these we may add examples from *Papsturkunden in Portugal,* ed. Carl Erdmann (Abh. Gesellschaft Göttingen, New Series 20.3; Berlin 1930) no. 61, 64, 66: S. João de Tarouca (1163, citing Innocent II), S. Christovam de Lafões (1163), and S. Maria de Alcobaça (1164), in addition to privileges for English houses: PUE I no. 102 (Sawtry, Cambridgeshire): Sens, 8 Sept. 1164; no. 115 (Meaux, Yorkshire): Tusculum, 18 Dec. 1172; no. 139 (Sawtry): Anagni, 3 June, 1176; see also no. 154-155, 182, 186, 188, 195, 197. PUE 3 no. 142 (Fountains): Saint-Genouph, 26 Sept. 1162; 156 (Fountains): Benevento, 12 Nov. 1167-1169; 267 (Thame): Lateran, 22 April 1179; 269 (Thame): Lateran, 15 May 1179; 304 (Stanley), undated; 315 (Holm Cultram), undated: Holtzmann suggests 1175-1181.

(1130–1143)[29] and Eugenius III (1145–1153),[30] began granting Cistercian monasteries (and some others) the much more extensive privilege of exemption for 'all the lands worked by [themselves] or at [their] expense', succinctly expressed in the *Sane laborum* clause.[31] The result, as Adrian IV (1154-1159) expressed it, was a chorus of protest, from 'bishops, abbots, canons, and chaplains in Italian and French regions … that abbots and monks of the Cistercian order were unjustly taking their tithes from them', so that 'the churches which were supported by them from the earliest days of the infant Church were being destroyed'.[32] In response, Adrian peremptorily modified the exemption in the mandate, *Graues ante presentiam nostram*, sent in early 1155 to English recipients,[33] and probably also to prelates in Italy and France, from

[29] Giles Constable, *Monastic Tithes*: *From their Origins to the Twelfth Century* (Cambridge 1964) 237-240, for 'more than a hundred' grants bestowed by Innocent II. For an English example, see *Desiderium quod*, below, n.37.

[30] For his privilege to Sawtry Abbey (O.Cist.), issued from Auxerre, 9 Sept. 1147, see PUE 1 277-279 no. 42. For those to Oseney (OSA), Sibton (O.Cist.), and Old Wardon (O.Cist.), see PUE 3.193-194 no. 65, dated Auxerre, 17 July 1147; 207-208 no. 77, dated Segni 1 Nov. 1150; 220-221 no. 88, no date recorded.

[31] Below, at n.37.

[32] *Graues ante presentiam*, n.34, below. This phrasing echoes the end of a comment by Gratian, which argued that privileges to religious houses, like freedom from paying tithes on *novales*, should be used to relieve their own poverty, not to increase their wealth and extend their property 'so that baptismal or parochial churches are utterly destroyed' (ut eorum subueniatur inopie, non ut suarum diuitiarum augmento, et possessionum non modica extensione porrecta, baptismales seu parrochiane ecclesie penitus destruantur): *Decretum Gratiani*, C.25 q.2 d.p.c.25 *in fine* (col. 1019). For a sense of the rapid expansion of Cistercian monasticism in France alone, with splendid time-sensitive maps, see Jon E. K. Rasmussen, 'The Foundation of Cistercian Monasteries in France 1098-1789: An Historical GIS Evaluation', MA Thesis Western Michigen University (2015), online at:
https://scholarworks.wmich.edu/masters_theses/599/.

[33] The English address comes from the *Summa 'Elegantius in iure divino' seu Coloniensis*, ca 1169: Bamberg SB can. 39 fol.98v: 'questionem istam determinatum est in decretali epistola Anglicis directa'. Its author may have been Master Bertram of Metz, canon of St. Gereon in Cologne, later bp Metz 1180-1212, who may have been a pupil of Master Gerard Pucelle in Cologne: Pieter Gerbenzon, 'Bertram of Metz the author of *Elegantius in iure divino* (*Summa Coloniensis*)', *Traditio* 21 (1965) 510-511; Rudolf Weigand, 'The Transmontane Decretists', HMCL 2.173-210, at 183-184. On Gerard, see Peter Landau, 'Gérard Pucelle und die Dekretsumme *Reverentia sacrorum canonum*: Zur Kölner Kanonistik im 12. Jahrhundert', *Mélanges en l'honneur d'Anne Lefebvre-Teillard*, edd. Bernard D'Alteroche *et al*. (Paris 2009) 623-638. On

whose provinces the complaints had come. Its key directive reads:[34]

> we have decreed that the said Cistercians may keep tithes from the *new lands* which they cultivate by their own labour; but they must without any delay restore the rest to the churches to whose parishes the lands and properties are known to belong. We define as new lands those of whose cultivation no memory survives.[35]

This modification, which Alexander III later claimed had been made on Pope Adrian's own authority,[36] was then systematically applied in the confirmation of existing privileges and the formulation of new ones for all privileged houses or orders. The change was achieved by the simple device of substituting one or two words in the relevant section of the document. Where the full immunity clause had read: [37]

> Indeed let no one at all, cleric or layman, dare to demand tithes of your *lands* which you cultivate with your own hands or at your expense or from the fodder of your animals. (Sane *laborum* uestrorum quos propriis manibus aut sumptibus colitis, siue de nutrimentis uestrorum animalium nullus omnino clericus uel laicus a uobis decimas exigere presumat.)

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the date, it is likely that Adrian decided to make this change very early in his pontificate, since his two confirmations of freedom from tithes on *labores* are dated respectively 25 December 1154 and 5 January 1155, for the Benedictine monastery of Tudela (dioc. Tudela in Navarre) and the Premonstratensian house of Saint-Yved de Braine (dioc. Soissons): PL 188.1369-1371 no. 5, at 1370 and 1378-1380 no. 12, at 1380.

[34] JL —; WH 533b; *Decretales ineditae saeculi XII*, edd. Stanley Chodorow and Charles Duggan (MIC, Ser. B, 4, Vatican City 1982) 140-141 no. 81, at 140: 'statuimus ut predicti Cistercienses decimas de *noualibus* que proprio labore excoluerint sibi retineant; ceteras uero ecclesiis, ad quarum dioceses terre et possessiones pertinere noscuntur, sine ulla dilatione reconsignent. Nouales autem illos appellamus quorum cultus memoria non extat'. Anne J. Duggan, *'Servus servorum Dei*', *Adrian IV*: *The English Pope: Studies and Texts*, edd. Brenda Bolton and Anne J. Duggan (Aldershot 2003) 181-210, at 185-189 and 205 no. 6; reprinted in Anne J. Duggan, *Popes, Bishops, and the Progress of Canon Law, c.1120-1234*, ed. Travis R. Baker (Brepols Collected Essays in European Culture 6; Turnhout 2020) 109-136, at 113-116 and 133 no. 6.

[35] This last sentence is transmitted only in the Zaragoza collection: Paris BNF lat. 3876, fol.57r: below n.42.

[36] *Fraternitatem tuam* (probably 1160s): WH 518; 1 Comp. 3.26.8: 'our predecessor, Pope Adrian of holy memory, changed *labores* into *noualia, pro uoluntate sua*'.

[37] From Innocent II's *Desiderium quod* (1135-1143) for Abbot Simon and the monks of S. Maria de Sartis (Old Wardon) in Bedfordshire: PUE 3.163-164 no. 41, at 164.

Adrian's restriction read: [38]

> Indeed let no one at all, cleric or layman, dare to claim the tithes of the *newly worked* lands which you cultivate with your own hands or at your expense, or from the fodder of your animals (Sane laborum *noualium* uestrorum, que propriis manibus aut sumptibus colitis siue de nutri-mentis animalium uestrorum nullus omnino clericus uel laicus a uobis decimas exigere presumat.)

The use of the term 'nouales/noualia' to define a special category of land exempt from tithing was not an invention of Pope Adrian or his chancery, however. It was an adaptation of a civilian term[39] whose employment by the papacy is traceable at least to Urban II's privilege for the recently-founded Augustinian monastery of Saint-Jean-des-Vignes (near Soissons) in 1089;[40] and there is an earlier usage by Philip I of France, who had confirmed an existing grant of 'novel' and other tithes from a forest in Normandy to the Cluniac monastery of Marmoutier (dioc. Tours) in 1060.[41]

On the precise meaning of the term, the copy of Adrian's *Graues ante presentiam* inserted in the margin of the Zaragoza decretal collection concludes: [42]

> We define as "new" those lands of whose cultivation no memory survives (Nouales autem illos appellamus quorum cultus memoria non extat).

Whether this is Adrian's own definition, and the plural form *appellamus* suggests that it is, or that of a canonist, it represents an important contemporary clarification, and one that categorically excludes fields intermittently left fallow to increase their fertility.[43] In other words, the exemption from tithes applied only to lands which the Cistercians (and other recipients of the privilege) reclaimed by their own labor or at their own expense

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[38] From Adrian's *Effectum iusta* (23 Nov. 1156), the privilege for Abbot Roger and the monks of Byland (Yorks), see PUE 3.256-258 no. 116, at 257.

[39] Dig. 47.21.3.2, condemning those who alter natural features in order to extend an estate by fraud 'or make ploughed land or anything similar out of a forest (aut ex silva novale aut aliquid eiusmodi faciunt)'.

[40] PL 151.295-296 no. 12, at 296: *Iustis uotis*.

[41] Constable, *Monastic Tithes* 106.

[42] *Collectio Caesaraugustana*: Paris BNF lat. 3876 fol.57r (*in marg.*).

[43] Note that what claims to be Eugenius III's privilege (31 Oct. 1145) for the Benedictine abbey of San Giovanni Evangelista in Parma (PL 180 no.44), with its definition of 'newly cultivated land' as 'olim a sexaginta, vel quinquaginta seu quadraginta annis, et infra, culte non fuerint', cited by Constable, *Monastic Tithes* 280, is a forgery. See *Italia pontificia* 5.424 no. 4.

from marshland, wilderness, moorland, or woodland, where, presumably, there were no parish or baptismal churches or resident tithe-payers.

Unsurprisingly, Alexander III's restoration of the full *Sane laborum* privilege at the beginning of his pontificate[44] met considerable resistance, some of which involved physical violence against monks, 'conuersi', and hired workers, as clerics and laymen invaded monastic estates to seize the 10% of agricultural produce which they claimed was due to their churches. One early example is the complaint of the Cistercian abbots of Roche (Yorkshire) and Rufford (Nottinghamshire), to which Alexander III replied in *Non uidetur ulla* in 1164. Addressed to the archbishop of York (Roger) and the bishops of Lincoln (Robert) and (Coventry)-Chester (Richard), it ordered the recipients to excommunicate, in accordance with the decree issued in the Lateran Council,[45] any clerics or laymen who laid violent hands on the brethren or their *conuersi*, and 'cause them to be avoided as excommunicate until they present themselves with your letters before us or our successors'.[46] Simultaneously, there were attempts to interpret Alexander's *Sane laborum* clause as if it were Adrian's *Sane noualium*. In his defense of the full exemption for

[44] Above, at nn.27-28. Danica Summerlin's recent conclusion in *The Canons of the Third Lateran Council of 1179: Their Origins and Reception* (Cambridge Studies in Medieval Life and Thought; Cambridge 2019) 51, that 'When it left the papal curia the clause would have been merely one phrase (*sic*) in a privilege that was not considered of particular significance', demonstrates ignorance of the context and consequences of the Alexandrine action. '[N]ot considered of particular significance' could not be further from the truth. Apart from the reaction discussed here, the fact that the *Sane laborum* clause was excerpted and transmitted through early decretal collections down to 1 Comp. 3.26.12 (WH 895) implies that it was recognized as an authoritative statement of a particular category of tithe exemption, with legal force, not, as Summerlin concluded, that its treatment 'demonstrates how an initially non-legal letter came to be classified as a decretal'. No such classification occurred in the legal sources. In 1 Comp. 3.26, 'On Tithes, First Fruits, and Offerings', the clause (not 'an initially non-legal letter') is identified (c.12) as an 'extract from a privilege of Pope Alexander' (*Item ex privilegio Alex. pape*), while the last two sentences of Lateran III c.14, which forbade laymen to hold tithes, are duly identified in c.23 as 'from the Lateran Council' (*ex Conc. Lat.*). Neither was 'classified' as a decretal.

[45] Lateran II [1139] c.15: Anne J. Duggan, '*Si quis suadente* (Lateran II, c. 15): Contexts and Transformations to 1234', *Proceedings Paris 2016* in press.

[46] PUE 3.293-294 no. 151: Sens, 30 Sept. [1164].

the whole order (*Cisterciensis ordo*), for example, addressed to Roger of York and Hugh of Durham in 1175 or 1176, he added:[47]

> if by *labores* we undestood 'new lands' we would have put 'new lands', as we do in the privileges of other religious (si pro laboribus noualia intellegeremus non labores set noualia posuissemus, sicud in aliorum religiosorum priuilegiis ponimus).

Alexander's generosity remained controversial throughout his pontificate and beyond, especially as the Cistercians and other privileged orders were enjoying considerable economic success. Contemporary legal opinion was highly critical. In his *Summa* on Gratian's *Decretum*, for example, Simon of Bisignano (1177-1179) praised Adrian's restriction of the exemption to *nouales* and roundly condemned the living pope's reversal, even though he was still, 'in eminenti specula disponente Domino constitutus'.[48] A compromise was eventually achieved thirty-five years later, when Innocent III induced the Cistercian general chapter to approve a significant change in policy. The order agreed not to purchase tithe-paying lands, except to found new houses, and also to entrust the cultivation of such estates, however acquired, to others, who would pay the tithes, 'lest churches be further burdened on account of their privileges'. This agreement was then enshrined in canon 55 of the Fourth Lateran Council (1215) and extended to all religious who enjoyed similar privileges:

> We therefore decree that on lands assigned to others and on future acquisitions, even if they cultivate them with their own hands or at their own expense, they shall pay tithes to the churches which previously received tithes from those lands, unless they decide to compound with the churches in another way, notwithstanding any privileges to the contrary.

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[47] *Quanto Cisterciensis ordo* (Anagni, 24 Nov. 1175 or 1175) ibid. 385 no. 251, from *Fontanensis*, 2.10. Cf. the similar language in *Significauerunt,* above, at n.26.

[48] *Summa in Decretum Simonis Bisinianensis*, ed. Pier V. Aimone-Braida (2 vols; Fribourg 2007), electronic edn: http://www3.unifr.ch/cdc/fr/doc.html, I, 303-304, at nn.80-85. Simon cited Adrian's *Nobis in eminenti specula*, which had on 3 November 1155 ordered the Cluniac priory of Pontida in Lombardy to pay the tithes formerly paid to the canons of Pontirolo (WH 664; *1 Comp*. 3.26.15); Alexander's *Fraternitatem tuam* (above, n.36), which had refused to allow Roger of York to compel 'black or white monks, or secular or regular canons' to pay tithes on lands which they leased; and his *Ad audientiam nostram,* which had ordered the archbishop of Canterbury and his suffragans to insist on the correct interpretation of the *Sane laborum* clause (WH 31; X 3.30.12) in terms very similar to *Quanto Cisterciensis ordo,* above, n.47.

Additional letters for English petitioners issued in Rivo alto

To these eight letters can now be added a further eight: one privilege and seven decretals, of which three are rescripts to appeals and four are responses (*responsa*) to consultations, all impetrated in Venice by English petitioners and appellants, two of whom were laymen.

The Privilege: Quotiens a personis: 23 June 1177

Addressed to the prioress and nuns of the Cistercian convent of Nuncotham, who were also party to *Significauerunt nobis*, discussed above,[49] this privilege accedes to their petitions, confers papal protection on the convent, confirms its properties, its adhesion to the Rule of St Benedict and the 'institutionem Cisterciensium fratrum', and forbids anyone to demand tithes from their 'labores' and animal fodder.[50] This short indult may mark Nuncotham's formal association with the Cistercian order, for two earlier privileges had granted the convent exemption only from tithes on 'nouales', and in the second of the two, the nuns were described simply as following the Benedictine rule.[51] Here their Cistercian credentials are emphasized.

Rescripta: Suggestum est auribus: 25 June 1177

This rescript was addressed to Archbishop Roger and the dean and chapter of York in response to a challenge by the Augustinian canons of Newburgh. They claimed that three churches, assigned by the lord of the estate, with the archbishop's approval, to support a prebend in the cathedral, had earlier been granted to them.[52] Alexander's response is typical of papal handling of such cases. Instead of making a judgment on the case presented, he laid down

[49] Above, at n.26.
[50] PUE 3.370-371 no. 241.
[51] PUE 3.303-304 no. 164, Benevento, 7 June 1168 or 1169; ibid. 366-367 no. 236, undated (?1168-1169).
[52] JL 13882 (where dated 1159-1181); X 3.38.20: WH 998. The heading in X reads 'Valet secunda concessio ecclesie, facta alteri ecclesie per episcopum et patronum, non obstante priori, facta per patronum solum'.

the canonical principle that should be applied to its resolution:[53]

> Therefore, although the approval of the patron is required in such grants of churches, since such churches cannot be canonically granted without the intervention of the diocesan bishop, we declare to all of you, that if the earlier grant was made with the consent of the patron and by the authority of the diocesan bishop, or if his approval followed, it should be preferred to the later one; otherwise, that which is supported by the consent of the *dominus fundi* and the bishop's authority should be preferred, even if it is later.

It can be established from independent evidence that the earlier grant to Newburgh had not been confirmed by Archbishop Henry Murdac (1147-1153), while the second, to the cathedral chapter, was authorized by Archbishop Roger between 1154 and 1157 and later confirmed by the lay patron, Roger de Mowbray; and that the latter was duly ratified, in conformity with Alexander's instruction.

The treatment of this letter in the canonical tradition is a master-class in the processes of enucleation that transformed papal rescripts into concise statements of principle, often wholly dissociated from the details of names and places. This practice was copied from Justinian's *Digest,* whose contents are described as 'enucleati ex omni vetere iure'. In this example, what reached *Compilatio I* and the Gregorian *Decretales* (*Liber extra*) was the essence of the legal case and its solution, but the details can be recovered only from the archival copy of the original in York's *Registrum Magnum Album*, part III, fol.93r and the relevant charters of the Mowbray family.[54] From these we learn that the

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[53] 1 Comp. 3.33.26=X 3.38.20: 'Unde, licet in donationibus ecclesiarum requirendus sit et exspectandus patronorum consensus, quia tamen ecclesie *ipse*, nisi auctoritas interuenerit pontificalis, canonice concedi non possunt: *universitati uestre* significamus, quod prior concessio, si cum assensu patroni et auctoritate diocesani episcopi facta est, aut eius assensus fuerit postea subsecutus, posteriori concessioni prefertur; alioquin illa debet preferri, quamuis posterius facta *sit*, que consensu domini fundi et episcopi auctoritate fulcitur'. Italicized words omitted in the *Liber extra*.

[54] See the excellent summary in Charles Duggan, 'Decretals of Alexander III to England' *Miscellanea Rolando Bandinelli, Papa Alessandro III*, ed. Filippo Liotta (Siena 1986) 85-151, at 144-145; reprinted (same pagination) in Charles Duggan, *Decretals and the Creation of the 'New Law' in the Twelfth Century: Judges, Judgements, Equity and Law* (Collected Studies 607; Aldershot 1998) no. III; *Charters of the Honour of Mowbray, 1107-1191*, ed. Diana E. Greenway (London 1972) no. 196, 197, 199, 203, 214, 325, 326.

dispute centred on the substantial churches of Masham, (Kirkby) Malzard, and Langford.

Significauit nobis O.: 30 June 1177

In an even more difficult case, with *Significauit nobis* Alexander III commissioned Abbot Robert of Fountains[55] and the Roman lawyer, Master Vacarius,[56] to hear and settle the extraordinary case presented to the Curia by Henry, brother of the appellant Oliver Angevensis.[57] Oliver claimed that W(illiam) de Roumare, now deceased, had imprisoned him in iron chains (in vinculis ferreis) until he swore that he would marry a certain Ha(wise), but that he had managed to escape and married another lady, by whom he had children (filios*)*. Later (in fact much later) Ha(wise) appealed to Archbishop Roger of York (1154-1181), who compelled Oliver to swear that he would not return to his wife until the question of his marital status was settled. Ha(wise), however, died before the case could even be opened, and Oliver, afraid to return to his wife, sent his appeal to the Curia by the hands of his brother Henry.

One can only speculate about the reason for the appeal to 'Rome'. Oliver may have distrusted the archbishop who had insisted on his oath to wait for his judgment, or feared the current earl of Lincoln, grandson of the man who had tried to force him into marriage in the first place. In response, perhaps at the request of Oliver's brother, Alexander appointed two experienced judges

[55] At much the same time (1177-1181) Robert acted as judge delegate (together with the abbot of Vaudey in Lincolnshire) in a case between the prior of Drax (Yorks) and Dean Guy of Waltham about possession of the church of Swinstead (Lincs). Alexander's confirmation of their judgment in favour of Drax is recorded in PUE 3.434-235 no. 320 (1177-1181).

[56] Peter Landau, 'The Origins of Legal Science in England in the Twelfth Century: Lincoln, Oxford and the Career of Vacarius', *Readers, Texts and Compilers in the Earlier Middle Ages*, edd. Martin Brett and Kathleen G. Cushing (Aldershot 2009) 165-182.

[57] 1 Comp. 4.7.2; X 4.7.2 (abbrev.); JL 13937 (where dated 1159-1181); WH 973: Charles Duggan, 'Equity and Compassion in Papal Marriage Decretals to England', *Love and Marriage in the Twelfth Century*, edd. W. van Hoecke and A. Welkenhuyen (Leuven 1981) 59-87, at 71; reprinted (same pagination) in Duggan, *Decretals and the Creation of the 'New Law'*, no. IX. For the text and identification of the key players, see *Papal Decretals to Lincoln* 20-21 no. 8, and Note.

delegate and issued clear guidance on how the case should be determined. If they find that force was used against O(liver) and that he had neither freely agreed to marry Ha(wise) nor had marital relations with her, they should allow him to return to the lady he had married. If, on the other hand, they find that he did willingly consent to Ha(wise) and had relations with her (carnaliter cognovit), he was not to return to the second, even though the putative first wife was dead, because the second marriage was invalid since it was contracted during the life of the first wife; but he could freely marry someone else. As in many such cases, the final outcome is unknown, but the clear papal instruction, stripped of all its incidental details, reached the *Liber extra*, where it was used to establish that a second marriage contracted during the life-time of a first legitimate spouse was invalid; and that the reverse was true, if the first 'marriage' was defective. Nothing in the decretal indicates the rank of the persons involved, but William de Roumare was the first earl of Lincoln (1143-1155x1161)[58] and Oliver Angevensis held one knight's fee from the archbishop of York. Here an aggrieved layman had called in papal authority to protect him against the tyranny of an English earl and the possible bias of a powerful archbishop of York.

Conquestus est nobis Herbertus: 5 July 1177

Impetrated in person by Herbert, another layman,[59] *Conquestus est* is a very short document addressed to the two most highly-regarded episcopal judges in England, Bartholomew of Exeter (1161-1184) and Roger of Worcester (1164-1179),[60] the 'two great lights of the English Church' (duo magna luminaria Anglicane ecclesie), as Alexander III is reported to have called them,[61] and the second surviving decretal in which Alexander III espoused the principle of legimization by subsequent marriage. In

[58] These dates mean that the attempt to coerce Oliver Angevensis into marriage with Ha. must have occurred at least 17 years before his appeal in 1177.
[59] JL 14167 (addressed 'episcopo cuidam' and dated 1159-1181); 1 Comp. 4.18.1; X 4.17.1; WH 150.
[60] Cheney, *Roger, Bishop of Worcester* 317-376, lists 126 papal letters addressed to him.
[61] *Giraldi Cambrensis Opera*, ed. J. S. Brewer, J. F. Dimock, and G. F. Warner (8 vol. RS 21; London 1861-1891) 7.57.

this case, Herbert complained that after his marriage to the niece of R. (Robert of Manston in Suffolk), the uncle attempted to disinherit her on the ground that she had been born before her mother's marriage to her father. Again, as in *Suggestum est auribus*, *Significauit nobis O.*, and *Continebatur in litteris*,[62] Alexander did not determine the case, but gave precise instructions on the facts presented to him:[63]

> Therefore we order your fraternities that, if the matter is as stated (si ita est), you are to declare her legitimate, notwithstanding any contradiction or appeal, and forbid the said R(obert) to trouble or oppress the said woman and her heirs on this account, in respect of her paternal inheritance.

In the *Liber extra*, of course, the text is even shorter and omits the date, which is transmitted in full only by *Parisiensis I*,[64] a collection assembled in northern France, in part from English materials, while a further two collections transmit the place.[65] This decision – that subsequent marriage conferred legitimacy, with all its attendant rights of inheritance, on children born before their parents' matrimony, was one of Alexander's most important decisions relating to marriage law, and forms the first chapter in the Title on legitimacy in the *Liber extra.*[66] With the paradoxical exception of England, whose barons refused 'to change the laws of England' at the council of Merton in 1236,[67] the principle was accepted by secular jurisdictions across most of Europe.[68]

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[62] At nn.52 and 57 above and 74 below,

[63] 1 Comp. 4.18.1=X 4.17.1:'Ideoque fraternitati uestre *per apostolica scripta precipiendo mandamus*, quatenus, si est ita, *nullius contradictione vel appellatione obstante*, eam legitimam *esse* iudicetis, predicto R. *ex nostra et uestra parte* inhibentes, ne sepe dicte mulieri *et heredibus suis* hac occasione super heredidate paterna molestiam inferat uel grauamen'. Italicized words omitted in the *Liber extra*.

[64] *1 Par*. 156: Paris BNF lat. 1596, fol.38r: Emil Friedberg, *Die Canones-Sammlungen zwischen Gratian und Bernhard von Pavia* (Leipzig 1897, reprinted Graz 1958) 61.

[65] *Cusana* 6; *Duac.* 37; *Claustr*. 68.

[66] X 4.17.1. Ultimately derived from Roman law: George Mousourakis, *Fundamentals of Roman Private Law* (New York-Berlin 2012) 95-96; cf. Cod. 5.27.11. H. Wolf, *Die Legitimatio per subsequens matrimonium nach Justinianischen Recht* (Brunswick 1881).

[67] Sir Maurice Powicke, *The Thirteenth Century 1216–1307* (Oxford 1953) 70-71.

[68] Anne Lefebvre-Teillard, '*Causa natalium ad forum ecclesiasticum spectat*: un pouvoire redoutable et redouté', *Cahiers de recherches médiévales et humanistes (XIIIe-XVe)*, 7 (2000) 93-103.

The transmission of the Venetian date here allows us to suggest that *Meminimus nos*, the undated response sent to Bartholomew of Exeter, which contains Alexander's better-known definition of the principle of 'legitimatio per subsequens matrimonium', memorably expressed in the clause, *Tanta est uis matrimonii*, was issued before 1177, since its teaching underlies the judgment in this case.[69] Extracted from its parent letter and slightly adapted, *Tanta est uis* had a long independent life, before incorporation into the *Liber extra* in 1234.[70]

The four responsa

1. *Ad aures nostras pervenit*: 3 June 1177

Addressed to Archbishop Richard of Canterbury and his suffragans,[71] *Ad aures nostras* is an important example of mandates obtained by prelates to reinforce their own authority in dealing with recalcitrant subordinates—in this case, to support the archbishop and bishops in taking effective action against particular abuses of archdeacons and priests. Its first short section orders the recipients (per apostolica scripta mandamus) to compel archdeacons who have retained control of vacant churches to surrender them forthwith, to punish the delinquents severely (animaduersione), and then appoint suitable clergy themselves. The second is equally curt. It condemns the evil custom ('prauam consuetudinem' [omitted from the *Liber extra*]) whereby clerics

[69] *Meminimus nos*, WH 650; JL 13917 (where dated 1159-1181); *App.* 33.1 (full text).

[70] *Tanta est uis*: WH 1023; 1 Comp. 4.18.6=X 4.17.6: Duggan, 'Equity and Compassion' 77. Alexander's *Tanta est uis matrimonii* is an echo of Gratian, D.27 d.p.c.1, 'tanta est uis in sacramento coniugii'.

[71] The full dating clause is transmitted only in *1 Vict*. (Paris BNF lat. 12148) 136, fol.259vb; *1 Par.* 126 records the city (Venetiis) and date for §b, but omits *Rialto* and addresses the letter to the bishop of Exeter. In 1 Comp. and the *Liber extra*, the letter is divided into two segments, both addressed to Exeter: 1 Comp. 5.27.3; X 5.31.3 (abbrev.): §a, *Ad aures nostras*; 1 Comp. 3.33.8; X 3.38.6 (abbrev.): §b, *Quia clerici quidam*, whence the two entries in Jaffé, JL 13909 (§a) and JL 13954 (§b). The correct address to Canterbury and suffragans is transmitted by *Wig*. 4.3, *Chelt*. 7.1, *Cott*. 3.20, 1 *Par*. 1.125, for §a. In *Chelt*. 7.1 it is addressed only to Canterbury, but uses the plural form. For further variants, see WH 46.

purchase or otherwise acquire the advowson of churches, which they then present to their own sons or nephews. Again, the archbishop and bishops were ordered ('presentium uobis auctoritate mandamus atque precipimus' ['presentium uobis . . . atque' omitted from the *Liber extra*]) to prevent such practice by depriving the clergy of any advowsons so acquired. Despite the repeated use of 'mandamus', however, this response is an example, not of 'papal monarchy' trampling over the rights of the local hierarchy, but of that hierarchy calling in the authority of the papal office to reinforce its own disciplinary capacity—a process made explicit in Alexander's *Nuntios et litteras,* on the payment of tithes by powerful laymen and other matters, sent later to Bishop Richard of Winchester.[72]

2. *Continebatur in litteris*: ?30 June x 5 July, 1177

This reply to a consultation from Bishop Roger of Worcester[73] about a case that had already been referred to his judgment[74] concerns the relative validity of grants of tithe made to two different clerics. When the parties, Masters Herbert and Nicholas, first appeared before Bishop Roger, it appeared that Abbess Emma of Winchester had, with her convent's consent, granted the tithes of the church of W(etham?) to Herbert, and that he had been formally invested by the archdeacon of Winchester; but then, Master Nicholas proved by witness testimony that the abbess had earlier granted the tithes to him, and that the bishop (of Winchester) had confirmed it. Alexander directed that the earlier grant should stand, if the convent knew about the grant and did not dissent; otherwise, the second should be upheld. This is an interesting example of a bishop seeking an interlocutory judgment on a point of law that had arisen in a case already referred to his audience.

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[72] Below, at nn.79-82.
[73] Above, n.60.
[74] JL 14033 (where addressed to Norwich and dated 1159-1181); WH 201; 1 Comp. 3.9.2; X 3.10.2 (abbrev.): addressed to Norwich; Mary G. Cheney, *Roger, Bishop of Worcester, 1164-1179* (Oxford 1980) 331 no. 30, where dated 13 May-15 Oct. 1177.

3. *Quamuis simus:* 21 July 1177

Sent to Richard of Winchester, *Quamuis simus* is a very important 'responsum' answering a series of technical questions relating to aspects of ecclesiastical jurisdiction. Its significance can be gauged by the fact that all eight of the segments into which it was divided reached Bernard of Pavia's *Compiliatio prima,* and four (§§ a [last sentence], d, g, and h) survived into the *Liber extra*.[75] Of these latter, two concern delegated jurisdiction:

> §a, X 1.29.6 *in fine* (summary). If a case is committed to two judges (-delegate), even if it is not stated that one can proceed in the matter without the other, one can sub-delegate his authority to his fellow judge or to another.
>
> §d X 1.3.3 (summary). If two litigants obtain commissions to different judges, the first commission should prevail, unless the second refers to the first, in which case the judgment is removed from the first judge, since the second letters were not obtained 'tacita veritate', by suppression of the truth. If, however, a case is commissioned with the assent of both parties, and one then surreptitiously obtains another commission, 'tacito' ('tacita veritate' in 1 Comp.), the party guilty of deceit and fraud should be condemned to pay his opponent's expenses.

one related to the complicated field of lay patronage:

> §g X 3.38.8 (summary). If a lay person grants a non-vacant church to a religious house without consulting the bishop and afterwards, when it is vacant, on the presentation of the same layman a cleric is instituted by the bishop, the former presentation cannot prevent the latter, because a non-vacant church cannot be granted and a layman cannot grant churches to anyone without the bishop's authority, although he can confer the patronage on a religious house. But if the right of patronage is granted to a religious house during the vacancy of a church, and someone is afterwards instituted in that church without the presentation of the brethren, according to the rigor of the law (secundum rigorem iuris), his

[75] WH 761; JL 14156 (§§ a, b, d-f, h), 14152 (§c), 14154 (§g) (where dated 1159-1181). All eight segments reached 1 Comp.: 1.21.7 (§a), 2.13.13 (§b), 2.20.34 (§c), 1.2.3 (§d), 2.14.1 (§e), 1.21.8 (§f), 3.33.10 (§g), 1.20.4 (§h); four reached X: 1.29.6 (§a, *in fine*), 1.3.3 (§d), 3.38.8 (§g), 1.28.3 (§h). Anne J. Duggan, 'Master of the Decretals', in *Pope Alexander III (1159-81). The Art of Survival*, edd. Peter D. Clarke and Anne J. Duggan (Farnham 2012) 365-417, at 379-80; reprinted Duggan, *Popes, Bishops, and the Progress of Canon Law* 213-258, at 225-226. Cf. Charles Duggan, 'Papal Judges Delegate and the Making of the "New Law" in the Twelfth Century', *Cultures of Power: Lordship, Status, and Process in Twelfth-Century Europe*, ed. Thomas N. Bisson (Philadelphia 1995) 172-199, at 178-180; reprinted (same pagination) in Duggan, *Decretals and the Creation of 'New Law'* no. I.

> appointment should be quashed.

and one to the assignment of income to ecclesiastical vicars.

> §h X 1.28.3 (summary). If, with the approval of the bishop, the rector (persona) assigns a portion (of the income of the church) to the vicar, his successor cannot remove the vicar or assign him a smaller portion, unless the vicar commits (an offence) for which he deserves condemnation by a judge.

The remaining four sections relating to the technicalities of judicial procedure did not pass beyond *Compilatio prima*, but they are no less legally significant. §b allows a defendant to object to a witness produced against him on the ground of a crime that would prevent the witness giving evidence in civil cases (in civilibus causis); §c declares that the principal case can be deferred when an incidental question related to its substance is referred to the superior judge, until he decides otherwise; §e declares that the Roman Church does not compel witness testimony; and §f authorizes a judge delegate to execute his own judgment if the diocesan bishop neglects to do so.

In its form, *Quamuis simus* belongs to the long tradition of papal *responsa* reaching back to *Directa ad decessorem*, Pope Siricius's letter to Himerius of Tarragona (385), in which he answered a series of questions (consultationes) sent to his deceased predecessor Damasus;[76] Innocent I's schedule of answers for Victricius of Rouen in 404 (*Etsi tibi*), which Robert of Torigny almost certainly had in mind in the late twelfth century, when he noted that Innocent I had sent a 'decretalem epistolam' to Victricius;[77] and *Epistolas fraternitatis tue*, Leo I's famous reply (458/9) to Bishop Rusticus of Narbonne.[78]

4. *Nuntios et litteras*: c. 21 July 1177

A second *responsum* issued from the Rialto for Richard of

[76] JK 255; PL 13 1131-1147 no.1; translated by Bruce Brasington and Robert Somerville, *Prefaces to Canon Law Books in Latin Christianity: Selected Translations, 500-1317* (2nd ed. Studies in Medieval and Early Modern Canon Law 18; Washington D.C. 2020) 31-39.
[77] JK 286; PL 20 465-481 no. 2, 14 Feb. 404; *Chronique de Robert de Torigni, abbé du Mont-Saint-Michel*, ed. Léopold Delisle (2 vols. Rouen 1871-1873) 1.3.
[78] JK 544; PL 54 1197-1209 no.167.

Winchester[79] mandates him to order all earls, barons, knights, and others in his parish (bishopric) to pay tithes from their estates in full to mother churches (matricibus ecclesiis) (§a1); compel all his subjects to pay their tithes of hay (foeno equitio), apples (pomis), pears (pyris), bees (apibus), and all produce (omni fructu) (§a2); prohibit for the future anything to be exacted, given, or promised for the licence to teach (licentia docendi), and, if anything is paid or promised after his prohibition, the promise must be remitted and the payment returned; but if anyone defers appointing appropriate masters on this account, the bishop is authorized to appoint other suitable men (§b); and the final segment orders the full restitution of estates held in pledge, once the agreed share of the income and expenses have been received (§c)[80]—that is, once the debt secured on them has been cleared. Like *Quamuis simus*, *Nuntios et litteras* also left a permanent mark in the tradition of the canon law. All three segments reached *Compilatio prima*[81] and §§a2 and b reached the *Liber extra*.[82]

Apart from the obvious significance of its directives on tithe payments, the license to teach, and return of pledged property upon the settlement of the debt, its first paragraph contains an otherwise overlooked explanation of the use of mandatory clauses in similar letters issued in response to episcopal consultations or appeals: [83]

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[79] JL 14157 +14155; WH 691. The date *Dat. Venetiis in Rivo alto* is provided by four collections: *Cus.* 7 and *Duac.* 38, both of which present the letter as an integer; *2 Par.* 56.13, which transmits §a; and *Francofurtana* 54.5, which transmits §c. It is likely that the same unnamed messengers obtained both letters. A printed version of the complete letter can be reconstructed from *Appendix Concilii Lateranensis* (*App*.) 4.3 (§a1-2) + 2.17 (§b) + 16.8 (§c).

[80] For a variant, see X 5.19.8, possibly addressed to the abbot and brethren of S. Lorenzo in Aversa (Campania): *Italia Pontificia* 8.293 no.15: JL 13979; WH 149.

[81] 1 Comp. 3.26.3, 5.4.2, 5.15.6

[82] X 3.30.6 (§a2: abbrev.), 5.5.2 (§b).

[83] *Wig.* 5.5 (BL Royal MS 13 B II, fol.38va-vb): 'Cum igitur ad officium tuum spectent [ea] in quibus precepti nostri auctoritate desideras muniri . . . *fraternitati tue per apostolica scripta precipiendo mandamu*s quatenus, tam comites quam barones, necnon milites et omnes alios de parochia tua, moneas propensius et inducas, et appellatione cessante ecclesiastica censura compellas, ut decimas matricibus ecclesiis de suis dominiis cum omni integritate persoluant'. Cf. *App*. 4.3. Although transmitted in full in 1 Comp. 3.26.3, the whole of this section was omitted from X 3.30.6.

> Therefore, since you express the wish to be supported by the authority of our command in those matters which belong to your office . . . *we order your fraternity by apostolic ordinance* to warn and persuade more firmly, and without right of appeal compel by ecclesiastical censure both earls and barons, as well as knights and all others in your 'parish', to pay tithes from their estates in full to mother churches.

The prelate who sent these two sets of queries to Pope Alexander was no shrinking violet. As archdeacon of Poitiers from 1163 and bishop of Winchester from 1173 to 1188,[84] Richard of Ilchester had been an active member of Henry II's court at the Exchequer from 1165, and would, from 1179, be one of the 'arch-justiciars of the realm'.[85] In these positions he belonged to what Paul Brand called the 'inner core' of justices who, with the justiciars of the day, shaped the new law of Henry II.[86] It was not ignorance or weakness that induced this bishop of Winchester to send his messengers to Venice in 1177, but the desire to have the added authority of papal definitions, directives, and even mandates, addressed to himself, in order to buttress his own authority in dealing with powerful laymen and difficult subordinates. As a royal official he could rely on the authority of the king; as a bishop, he could deploy specially tailored papal bulls as weapons against the recalcitrant.

Conclusion

Together with *Ex litteris dilectorum* and *Ea que compositione*,[87] these seven additional letters issued in reply to English petitions or appeals presented to the pope in Enrico of Grado's palace on

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[84] EEA 8: *Winchester 1070-1204*, ed. M. J. Franklin (Oxford 1993) xlix-li, 103-148, 220-221; *Dialogus de Scaccario*, ed. and trans. Charles Johnson, revised by F. E. L. Carter and Diana E. Greenway (Oxford Medieval Texts; Oxford 1983) 25-27. On his career, see Charles Duggan, 'Richard of Ilchester, Royal Servant and Bishop', *Transactions of the Royal Historical Society*, 5th Ser. 16 (1966) 1-21; idem, 'Bishop John and Archdeacon Richard of Poitiers. Their Roles in the Becket Dispute and its Aftermath', *Thomas Becket: Actes du colloque international de Sédières* (19–24 août 1973), ed. Raymonde Foreville (Paris 1975) 71-83: both reprinted (same pagination) in Charles Duggan, *Canon Law in Medieval England* (Collected Studies 151; London 1982) no. XII and XIII.

[85] Diceto 1.435.

[86] Paul Brand, *The Making of the Common Law* (London 1992) 92-93 and nn.73-74.

[87] At nn.12-17 and 19.

the Rialto in Venice in 1177, demonstrate the 'passive strength' of the papacy, to which Peter Partner alluded in the Venetian context in 1972,[88] and what Benedict Wiedemann recently (2020) called its 'instrumentalization' by Abbot Suger of Saint-Denis during Louis VII's absence on the second crusade.[89] None of these interventions could have occurred without the willing collaboration of appellants and petitioners on the one hand, and abbots, bishops and lesser clerics on the other, who acted as papal agents or judges delegate. The Elstow vs. Newhouse dispute is particularly revealing of the latter. Even the strongly-worded mandate in defense of the tithe privilege of the nuns at Swine and Nuncotham,[90] and its numerous analogues, were issued in response to complaints.

Equally important however, is the evident willingness of bishops and archbishops to request not just clarifications of the current law on marriage or rights of patronage or tithe payment, for example, but also, on occasion, mandates ordering them to execute a judgment or apply a definition. In many cases the prelates were probably fully cognizant of the specific regulation or process, but they requested its precise re-statement in a papal decretal letter, 'sub certa forma', to enhance their own executive power. Richard of Winchester's two Venice letters are similar in purpose to the three letters obtained in person by Richard of Canterbury in Anagni, following his episcopal consecration in 1174, and the further nine acquired in 1175;[91] similar also to the set of five decretals which their younger colleague, Walter of Coutances, obtained from Lucius III in October 1185, soon after his enthronement as archbishop of Rouen on 3 March in the same

[88] Partner, *Lands of St Peter* 217.
[89] Review of *Pope Eugenius III (1145-53): The First Cistercian Pope:* https://reviews.history.ac.uk/review/2300.
[90] At n.25.
[91] Anne J. Duggan, 'Making Law or Not: The Function of Papal Decretals in the Twelfth Century', *Proceedings Esztergom 2008* 41-70, at 42-47; eadem, '*De consultationibus tuis*: the role of episcopal consultation in the shaping of canon law in the twelfth century', *Bishops, Texts and the Use of Canon Law around 1100: Essays in Honour of Martin Brett*, edd. Bruce C. Brasington and Kathleen G. Cushing (Aldershot 2008) 191-214, at 198-200, both reprinted in Duggan, *Popes, Bishops, and the Progress of Canon Law* 259-287, at 260-266; and 361-381, at 368-369.

year.[92] All five were secured to underpin his authority in confronting particular problems in the Norman Church; but one of them, *Ad hoc te credimus*, opens with a solemn reminder of the responsibility of the dignity to which divine providence had raised the new archbishop, before expressing the sense of papal partnership in its execution rather nicely:[93]

> Lest the authority granted to you be diminished in any way by the defiance or obstruction of the wicked [wrote Lucius III], we freely bestow apostolic favour on you in everything that touches your office, so that, *armed as is appropriate with our authority*, you may properly proceed with the work of correcting those things in your Church which you perceive require emendation.

King's College London.

[92] On this legally-learned and powerful Anglo-Norman prelate, whose known administrative career from 1169 to 1207 included a short stint as Richard I's Justiciar (1191-93), see Anne J. Duggan, 'Canon Law in Normandy, *c*.1100–1234', *La Normandie, terre des traditions juridiques*, edd. Gilduin Davy and Yves Mausen (Cahiers historiques des Annales de Droit 2; Rouen 2016) 139-187, at 147-148, 161-164, and, for the dossier of letters, 178-180 nos. 3-7: WH 70–71, 254, 546, 837; Ralph V. Turner, 'Coutances, Walter de', *Oxford Dictionary of National Biography* (2004), online: https://doi.org/10.1093/ref:odnb/6467.

[93] WH 71; JL —: *Decretales ineditae* 33-34 no. 18, at 33, dated Verona 16 Oct. (1185): 'Ne autem ex contradictione uel obstaculo malignorum tradita tibi auctoritas in aliquo minueretur libenter tibi in omnibus que ad officium tuum pertinere nocuntur fauorem apostolicum impartimur ut *nostra sicut conuenit auctoritate munitus* que in ecclesia tua emendanda cognosceris digne correctionis opere prosequaris'. For a particularly impressive example of papal responses to episcopal consultation, unconnected with specific cases, see Innocent III's *Pastoralis officii*, which answered nineteen procedural questions posed by Eustace of Ely in 1204: Potth. 2350; *Selected Letters of Innocent III Concerning England, 1198-1216*, edd. Christopher R. Cheney and William H. Semple (London 1953) 69-78, no. 22. It is not without significance that Innocent employed Alexander III's clause 'Quamuis simus multiplicibus negotiorum occupationibus prepediti' (above, n.75) in the arenga (first paragraph) of his *Pastoralis officii*: Anne J. Duggan, 'The Ghost of Alexander III. "Following closely in the footsteps of Pope Alexander, our predecessor of good memory, so great is our veneration for him . . ."', in *The Fourth Lateran Council and the Development of Canon Law and the* ius commune, edd. Atria L. Larson and Andrea Massironi (*Ecclesia militans.* Histoire des hommes et des institutions de l'église au moyen âge 7; Turnhout 2018) 29–61, at 42.

A la recherche de magister .A. Notes sur le manuscrit 592 de la bibliothèque municipale de Douai

Anne Lefebvre-Teillard

Le manuscrit 592 de la bibliothèque municipale de Douai est un des manuscrits témoins de l'enseignement du droit canonique tel qu'il fut délivré à Paris au début du XIIIe siècle. C'est un manuscrit glosé du *Décret* de Gratien. Il avait attiré l'attention de Stephan Kuttner qui, dans son célèbre *Repertorium,* avait signalé la parenté de sa plus ancienne couche de gloses avec l'apparat au *Décret Animal est substantia*.[1] Récemment une glose provenant de ce manuscrit et publiée par Benoît Alix dans sa thèse sur 'La notion de 'judex ordinarius' en droit romano-canonique (XIIe-XVe siècle)' m'a incitée à examiner de plus près ce manuscrit.[2] Cette glose rapportait en effet l'opinion d'un certain magister .A. dont j'avais par ailleurs relevé les gloses à la *Compilatio prima* au début de mes recherches sur l'école parisienne.[3] Son examen s'imposait d'autant plus que les travaux menés depuis par le regretté Chris Coppens sur *Animal est substantia* avaient mis en évidence l'existence d'un maître dont le nom, souvent siglé Aub', commencé également par A.[4] S'agissait-il d'un même et seul

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[1] Kuttner, *Repertorium* 36. Pour une première approche des gloses contenues dans ce manuscrit, cf. Alfons M. Stickler, '"Die glossa Duacensis" zum Decret Gratians (Cod. ms.592 der Bibl. Municipale Douai)', *Speculum iuris et ecclesiarum : Festschrift fur Willibald M. Plöchl zum 60.Geburtstag* (Wien 1967) 385-392.

[2] Benoît Alix, *La notion de judex ordinarius en droit romano-canonique (XIIe-XVe siècle)* (thèse de doctorat en droit, Université de Paris II nov.2020 dact.) 533 n.198.

[3] Anne Lefebvre-Teillard, 'Magister .a. Sur l'école de droit canonique parisienne au début du XIIIe siècle', RHD 80 (2002) 401-417 et in *'Panta rei: Studi dedicati a Manlio Bellomo* (5 vol. Roma 2004) 3.499-514. Ces gloses appartiennent à la deuxième couche de gloses contenues dans le manuscrit 107 de la bibliothèque municipale de Saint Omer.

[4] La transcription de cet apparat effectuée par Coppens (†1215) qu'il n'a hélas pu mener jusqu'au bout, est accessible jusqu'à la Causa X in a Pd hosted at the

personnage? Les sigles, surtout lorsqu'ils sont aussi courts que .a. ou b. peuvent en effet être trompeurs. L'examen de ce manuscrit 592 devrait permettre de répondre définitivement à cette question, mais peut-être en soulever d'autres.

Le manuscrit 592 de la bibliothèque municipale de Douai provient de l'abbaye bénédictine de Marchiennes.[5] La copie du *Décret* qu'il contient sort, d'après sa facture, des ateliers parisiens du milieu du XIIIe siècle.[6] En marge figurent deux couches de gloses. La plus ancienne est celle dont est extraite la glose mentionnée ci-dessus. Elle a été en partie arasée au profit de la glose ordinaire dans sa version revue par Barthélémy de Brescia, donc au plus tôt dans les années quarante.[7] Fort heureusement pour nous, l'arasement a laissé subsister suffisamment de gloses de cette première couche pour en permettre l'analyse. C'est la copie d'une 'lectio' délivrée avant la diffusion de la *Compilatio tertia*.[8] Qu'on ait pris la peine vers le milieu du XIIIe siècle de

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Radboud Repository of the Radboud University, Nijmegen. Elle repose sur quatre manuscrits : B=Bamberg SB can.42 (fin sur C.24 q.3 c.6); K=Bernkastel-Kues,Sankt Nikolaus Spital 223; E= Luxembourg, BN 139 ; L=Liège, BU 127E. Elle sera citée ci-après: Coppens, *Transcription*.

[5] C. Deshaines, *Cat. Gén.* (vol. 6; Paris 1878) 365. Il rectifie sur ce point l'analyse d'Henri Duthilloeul qui le faisait provenir de l'abbaye d'Anchin dans son *Catalogue descriptif et raisonné des manuscrits de la bibliothèque publique de Douai* (Douai 1846) n°592. Tous deux le datent du XIIIe siècle.

[6] Je remercie Patricia Stirneman, membre de l'Institut de recherche et d'histoire des textes (CNRS) et spécialiste de la production des ateliers parisiens, de m'avoir donné cette précieuse information. C'est une copie qui est faite d'après d'anciens exemplaires du Décret, car la plupart des 'paleae' en sont absentes. A titre d'exemple, sur les onze 'paleae' contenues dans les vingt premières distinctions de l'édition de Friedberg, une seule est présente. Il s'agit du très court canon 11 de la D.18. En marge de la D.5, une main postérieure a copié *Cum enixa* (c.1) en soulignant sa nature de 'palea'. Sur les huit 'paleae' de la Causa 27, trois seulement sont présentes.

[7] Barthélémy de Brescia achève en 1241 sa révision définitive de la glose ordinaire de Jean le Teutonique sur le *Décret*, cf. Orazio Condorelli, 'Bartolomeo da Brescia', DGI 1.82-183. Sa diffusion et sa copie sur notre manuscrit sont donc postérieures à cette date.

[8] C'est bien une copie comme l'avait très justement observé Stickler, 'Die glossa' 385. Ils sont deux copistes dont un à l'écriture plus fine que l'autre, est majoritaire.

copier cette *lectio* avant de l'araser partiellement au bénéfice de la glose ordinaire peut paraître surprenant. Elle témoigne néanmoins de la survie d'un enseignement du *Décret* tributaire des grands apparats parisiens du début du siècle, apparats dont il subsiste encore de nombreux manuscrits.[9] Cette première couche est visible par intermittence à partir du canon *Nunc autem* (c.1) de la D.5 (fol.3rb). Sa copie s'interrompt (fol.249rb) après une dernière glose sur le canon *Dum sanctam* (c.15) de la D.2 du *De penitentia*. Elle reste absente jusqu'à la fin de ce traité inclus dans la C.33 q.3 (fol.262va), pour reprendre (fol.262vb) avec la *questio* 4 de cette même *Causa*.[10] Elle se termine au fol.294rb par une dernière glose *s.v.non potest* de l'avant dernier canon (*De spiritu sancti*) du *De consecratione*[11].

Grâce aux décrétales qui sont citées dans les gloses de cette première couche, on peut dater avec précision l'époque où cette 'lectio' a été délivrée. Introduites par la mention:'extra' lorsqu'il s'agit d'un renvoi à la *Compilatio prima* ou par la mention:'extra ti' ou 'extra ty', lorsqu'il s'agit d'un renvoi à des collections qui lui sont postérieures, elles sont toutes antérieures à la diffusion de la *Compilatio tertia.* En dehors de la *Compilatio prima* qui sert alors de base à l'enseignement du *ius novum,*[12] deux collections alimentent essentiellement la réflexion de notre glossateur: la collection de Gilbert l'Anglais, facilement qualifiée de *secunda*

[9] Les deux principaux sont *Ecce vicit leo* et *Animal est substantia*. Sur les manuscrits qui en subsistent, cf. Rudolf Weigand, 'The transmontane Decretists' HMCL 1.205-207. Rudolf Weigand dès sa thèse *Die bedingte Eheschliessung im kanonisschen Recht* (München 1963) s'était beaucoup intéressé à ces apparats. Malheureusement décédé en 1998, il n'a pu tenir compte des travaux menés depuis le début des années deux mille par Coppens sur *Animal est substantia* et par moi-même sur *Ecce vicit leo.*

[10] Cette interruption est donc l'œuvre du ou des copistes. Elle a induit en erreur Alfons Stickler ('Die glossa' 386) qui fait terminer la 'lectio' sur cette D.2 du *De penitentia.* Seul figure du fol.249va au fol.262 va la glose ordinaire, ce qui laisse penser que sa copie a suivi de près celle de notre 'lectio'.

[11] D.5 c.39. La voici : 'inseparabili enim sunt opera trinitatis'.

[12] Cf. notre étude 'La lecture de la *Compilatio prima* par les maîtres parisiens du début du XIIIe siècle', *Proceedings Washington 2004* 221-248.

par les canonistes parisiens[13] et la *Compilatio romana* de Bernard de Compostelle. Certaines décrétales citées ne figurent que dans cette dernière,[14] ce qui permet d'affirmer que notre 'lectio' est postérieure à 1208 et date vraisemblablement des années 1209-1210. On y trouve même citée une décrétale d'Innocent III de juillet 1208 (Potth.3449) qui sera intégrée dans la *Compilatio tertia* mais qui ne provient pas de cette dernière.[15] Enfin notre glossateur qui parle avec autorité à la première personne, tantôt du singulier tantôt du pluriel, enseigne à Paris. On peut le déduire non seulement d'un certain nombre d'exemples qui s'y réfèrent[16] mais

[13] Anne Lefebvre-Teillard, 'La diffusion de la collection de Gilbert l'Anglais dans la France du Nord', BMCL (2016) 69-135 à 89 (A paraître également in *Proceedings Paris 2016*). Notre manuscrit témoigne de cette pratique, comme le montrent les mentions relevées par Alfons Stickler ('Die glossa' 388) pour des décrétales absentes de la future *secunda*.

[14] Comme en témoigne (fol.79va) sur *Si quis obiecerit* (C.1 q.3 c.7) la mention : 'extra ty. De prebendis, Dilectus ubi dicitur'. Cette décrétale qui date de 1206 (Potth. 2754) figure pour la première fois dans Bernard (3.7.6) avant de se retrouver dans la *Compilatio tertia* (3.5.6) puis en X.5.19. Même chose (fol.125vb) sur *Placuit* (C.11 q.3 c.43) : 'extra ty. de foro competenti, Si Diligenti' (Bern. 2.2.4 ; 3 Comp.2.2.4=X 2.2.12) ou encore (fol.163ra) sur *Sunt quedam* (C.17 q.1 c.1) : 'extra ti. De regularibus, Licet' (Bern.3.25.4=3 Comp.3.24.4=X 3.31.18). Bernard ayant largement puisé dans les collections de Gilbert et d'Alain, c'est parfois grâce au titre mentionné que l'on est sûr que la décrétale citée a été prise chez Bernard. La glose sur le c.*Cum sacris* (c.5) de la D.2 du *De consecratione* en offre un exemple lorsqu'elle cite la décrétale *Cum Marte*. Celle-ci figure chez Alain sous le titre *De celebratione eucharistie* (6.2.1) et chez Bernard sous le titre *De celebra-tione misse* (3.32.6). C'est sous ce dernier titre qu'elle apparaît dans notre glose: 'Sed de aqua queri solet in quid transuberetur ? . . . Innocentius III tenenda est in hoc scilicet quod aqua cum vino in sanguinem transuberantur extra de celebratione misse c.Cum Marte § Quesivisti' (fol.274vb *s.v. in sacramento*). Reprise dans la *Compilatio tertia* (3.35.5), *Cum Marthe* figure en X 3.41.6 sous le titre *De celebratione missarum*.

[15] Elle est en effet introduite par la mention 'extra ty': ar. quod concessio de non vacante in generali facta valet, extra ty. de concessione non vacante, Dilectus (Potth. 3449 ; 3 Comp.3.8.9=X 3.8.12). Contra de concessione non vacante, Nulla (1 Comp.3.8.2=X 3.8.2). Dico quod nunquam valet talis concessio nisi fiat auctoritate apostolica' (fol.116rb sur C.8 q.1 c.5 *s.v. plerique*). Cette référence à *Dilectus* figure également sur le même canon dans *Animal est substantia* (Coppens, *Transcription* 2645).

[16] Certaines d'entre elles avaient été relevées par Alfons Stickler ('Die glossa' 387-388) qui par prudence parlait 'd'école franco-rhénane'. Aux exemples

encore des maîtres qu'il cite[17] ainsi que de sa parenté avec l'apparat *Animal est substantia* dont l'origine parisienne ne fait plus de doute.

C'est cette parenté qui a guidé ma recherche. Le maître visé sous le sigle .a. dans notre manuscrit était-il bien le même que celui visé dans *Animal est substantia* ? En effet d'après la transcription qu'en a donné Coppens jusqu'à la Causa 10, il n'apparaît pas directement sous ce sigle.[18] C'est sous celui de 'Aub.' qu'il apparaît dans cet apparat, quand son nom n'est pas écrit en toutes lettres.[19] Pour être sûre qu'il s'agissait bien du même maître, une comparaison entre les gloses le citant dans

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cités j'ajouterai simplement cette référence prise (fol.124ra) à la glose sur le c.Experientie (C.11 q.1 c.15) *s.v. provincie tue*: 'etiam si clericus laicum conveniat, debet eum convenire coram suo iudice nisi sit de re ecclesiastica vel crimine ecclesiastico vii. q.ii. c.i. Secus est tamen de consuetudine Parisius (sic), ar. extra de foro competenti c.ult. (1 Comp.2.2.7=X 2.2.5). Nota quod intentione rei habet quis duplex forum scilicet ubi res est et ubi habet domicilium'.

[17] Ils sont peu nombreux ; même Huguccio, très largement cité par *Ecce vicit leo* et *Animal est substantia* ne l'est pas autant ici. Voici un exemple qui a trait à un maître parisien; il concerne Petrus Brito, l'auteur de l'apparat *Ecce vicit leo*. La citation figure (fol.77va) sur le canon *Nullus episcopus gravamen* (C.1 q.1 c.124) *s.v. restituat*: 'ar. quod nichil debet accipi pro restitutione officii. Sed nonne cuilibet ius redimere licet? p.br dicit quod executio non potest redimi quia spiritualis est, quia sententia suspentionis licet iniuste lata tenet xi. q.iii. Si episcopus (c.4) talis beneficium redimere licet hanc rationem non adverso. Credo quod si iniuste quis suspensus est redimere ius suum potest nec episcopo restituendo cum officio aliquid debui sed tantum impedimentum executionis tollens sicut si ingenuus de facto manumittatur non est libertus nichil enim ei confertur co. de ingenuis manumissis l.iii. (Cod.7.14.3). Potest ergo ius suum redimere'. Dans *Animal est substantia* (Coppens, *Trans-cription* 1409) Petrus Brito n'ait pas nommément cité mais son opinion est rapportée sous la référence 'quidam dicunt'.

[18] A l'exception d'une seule fois sur la C.3 q.9 c.15 *s.v. potuerunt* dont la glose, dans la version donnée par le manuscrit de Bamberg, se termine par .a. Ce sigle est absent in fine de cette glose dans les autres manuscrits utilisés par Coppens (*Transcription* 2260).

[19] Avec nombre de variations, comme il est encore courant au début du XIIIe siècle. Sur la dénomination de ce maître, cf. Emile Christian Coppens, 'L'auteur d'*Animal est substantia*: Une hypothèse', *Mélanges en l'honneur d'Anne Lefebvre-Teillard* (Paris 2009) 289-298 à 295 n.20.

Douai 592 et celles contenues dans *Animal est substantia* s'imposait. Sur les onze gloses citant 'Aub.' ou Aubertus dans *Animal est substantia* publiées par Coppens, je n'ai pu trouver que très rarement leurs correspondantes dans Douai 592.[20] Je ne puis en effet offrir qu'un seul exemple. C'est celui des deux gloses respectives sur le d.a.c.1 de la D.11 ad v. *Quod vero* dont voici des extraits significatifs:[21]

> In precedenti distinctione dictum erat quod lex contraria canoni nullius erat momenti; in hac distinctione dicitur quod consuetudo contraria iuri scripto non est tenenda. Est autem consuetudo tacita conventio ff. de legibus l. Sed ea (Dig.1.3.35), ad idem viii. di. Que contra (c.2). Consuetudo omnes illos ligat inter quos approbata est et qui in eam consenserunt ; tamen consuetudo laicorum clericos non ligat extra de regulis iuris c.ult. (1 Comp.5.37.13=X 5.41.11). Circa consuetudinem varie sunt opiniones. Placentinus et eius sequaces dixerunt quod consuetudo legi vel canoni contraria nullius momenti est nec potest abrogare legem in eadem di. c.iiii. et c.In hiis rebus (c.5). Lex autem de novo condita bene abrogat precedentem consuetudinem ff. de sepulcro violato l.iii. § Divus [Hadrianus] (Dig.47.12.3.5). Videtur tamen quod consuetudo non abrogat legem ff. de legibus l. De quibus (Dig.1.3.32) ; potest dici quod consuetudo non abrogat legem nisi tacitus vel expressus principis consensus interveniat, quoniam ille solus potest abrogare qui potest condere xxv. q.i. § his ita (C.25 q.2 d.p.c.21§1). Ne sit contra quod diximus clericos non teneri consuetudinem laicorum nisi in causa consensciunt extra de regulis iuris c.ult. (1 Comp. 5.37.13=X 5.41.11). **Magister .a.** dicit quod ubi pactum potuit valere contra legem ibi consuetudo potuit legem abrogare et hoc ex hac ratione : quoniam lex pro communi utilitate statuta est di.iiii. Est autem (c.2), in aut. de restitutionibus et ea que parit [un blanc=undecimo] in fine (Auth. 4.6= Nov.89). Non est ergo contra mentem legis observare quod omnibus est utile. Patet ergo quod licet lex consuetudo quomodo videantur contraria quantum ad superficiem animi, tamen [non] sunt contraria quia tendunt ad eiusdem finem viii. q.i. In scripturis (c.9), supra di.v Ad eius (c.4). Quando ergo utilior est consuetudo, lex cedit ei nec videtur abrogari.

[20] A cause de leur arasement partiel pour une d'entre elles (C.1 q.7 c.2), complet au profit de la Glose ordinaire pour six autres. Dans trois autres enfin (C.1 q.1 c.54 ; C.1 q.3 c.7; C.8 q.1 c.5) A n'est pas cité dans les gloses correspondantes du manuscrit de Douai.

[21] Douai, BM 592 fol.5va.

> In precedenti distinctione dictum est quod lex contraria canoni nullius est momenti. In hac distinctione dicitur quod consuetudo iuri scripto contraria non valet. Notandum ergo quid dicitur consuetudo. Consuetudo sic potest describi : consuetudo est tacita conventio ff. de legibus l. Si ea (Dig.1.3.35) Ad idem viii. di. Que contra mores (c.2). De consuetudine varie fuerunt opiniones. Placentinus et eius sequaces dixerunt quod consuetudo canoni contraria nullius est momenti et ita non potest legem abrogare, infra eadem c.iiii. et c.In his rebus (c.5) et supra i. di Consuetudo (c.5). Etiam in lege habemus quod lex de novo lata abrogat consuetudinem, ff. de sepulchro violato l.iii. §Divinis (*sic*; Dig. 47.12.3.5). Set nonne consuetudo videtur legem abrogare vel canonem cum papa canonem abrogat tacito consensu vel expresso, ff. de legibus l.De quibus (Dig.1.3.32)? Secundum hanc opinionem dicendum quod non facit consuetudo set tacitus consensus principis qui hoc scit et videtur approbare; set potest melius intelligi lex illa quando populus condebat leges quia solus potest abrogare legem qui potest eam condere xxv. q.i. §Is ita (post c.21). **Petrus Peverellus et Aubertus** dicebant quod ubi pactum potest valere contra legem ibi consuetudo potest legem abrogare quia leges pro communi utilitate introducte sunt iii. di. Est (c.2), aut. De restitutione et ea que parit mense undecimo in fine (Auth.4.6=Nov.39). Et ita non est contra mentem legis facere quod communiter omnibus utile est. Immo licet consuetudo videatur legi contraria cum ad eundem finem tendant lex et consuetudo v. di. Ad eius (c.4) et viii. q.i. In scripturis (c.9).[22]

La parenté entre les deux extraits est évidente même si l'auteur de notre 'lectio' ne mentionne pas Pierre Peverel[23] et fait de plus référence au titre *De regulis iuris* de la *Compilatio prima*, référence absente d'*Animal est substantia* Magister .a. et Aubertus apparaissent bien ici comme une seule et même personne.

Pour tenter de confirmer cette identification, j'ai relevé les gloses citant *magister .a.* dans le manuscrit de Douai 592, et cherché si elles avaient leurs correspondantes dans *Animal est substantia.*[24] Compte tenu de la configuration de notre manuscrit,

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[22] Coppens, *Transcription*192.

[23] Qu'il cite deux fois par ailleurs, de manière très significative, sur la C.xv. q.iv. d.a.c.1 et c.2, cf. infra Annexe n° I. Sur Pierre Peverel, cf. en dernier lieu, A. Lefebvre-Teillard, 'Un maître parisien : Pierre Peverel, *BMCL* 36 (2019) 209-242.

[24] Magister Aub' n'étant cité dans *Animal est substantia* qu'une seule fois sur la première partie du *Décret*, mon investigation systématique n'a débuté qu'avec la Causa 1 questio 1 (fol.67vb).

ces citations se sont avérées peu nombreuses: dix au total.[25] Une seule d'entre elles confirme l'identité entre magister .a. et Aub'. Elle figure à la causa 27 q.1 c.42. Dans ce canon *Viduis ad v. preterimus ne sexus fragilis*, le manuscrit de Douai raporte l'opinion de magister .a. dans le cas où une femme se marie alors qu'elle avait fait un vœu simple de continence:[26]

> Item aliqua vovit simpliciter, potmodum contraxit, mortuus est vir eius, tenetur ne continere? Quidam dicunt quod non quia ruptum fuit ex toto votum per sequens matrimonium et obligatio semel extincta non tenuisse, de consecratione di.iiii. Queris (c.129) xxiii. q.iiii. Si illic (c.29), ff. de solutionibus l.Qui res § Aream (Dig. 46.3.98.8). Alii dicunt quod tenetur continere et **magister .a.** consentit illud : ex natura enim voti tenetur quis ad non exigendum xxx. q.i. De eo (c.5) xxxiii. q.iii. Antiquissimi (= q.2. c.19 in fine); sopitur enim tantum et non extinguitur votum per sequens matrimonium et obligat ad non exigendum, ad non reddendum vero non obligat, extra de conversione coniugatorum, Quidam intravit (1 Comp. 3.28.3=X 3.32.3).

Le vœu avait été mis en sommeil (sopitur) mais non éteint. C'est cette interprétation de magister .a. que l'auteur d'*Animal est substantia* rappellera, sous le nom d'*Aub'*, sur ce même canon *ad v. non tam deterreri*:[27]

> Sed queritur utrum illa que post votum simplex contraxit potest compelli, viro mortuo, redire ad votum et dicit h. (Huguccio) quod sic quia sublato impedimento debet fieri quod dicebatur ar. xxx. q.i. De eo (c.5) et extra de convertione coniugatorum, Ex parte (1Comp.3.28.7bis)[28]. Alii dicunt quod non quia dicunt quod per matrimonium solutum sit vinculum voti simplicis, unde licite potest petere debitum et reddere nec viro mortuo tenetur redire ad votum quia obligatio semel extincta non reviresit xxiii. q.iiii. Si illic (c.29), ff. de solutionibus l. Qui res § aream (Dig. 46.3.98.8)

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[25] Peut-être onze si l'on compte la glose commençant de manière tout à fait inhabituelle par .a. et qui figure sur le canon Canonica (C.11 q.3 c.107). Cette 'anomalie' est peut-être due au fait qu'elle suit une longue glose citant magister .a. sur le c.106.

[26] Douai, BM 592 fol.219va Cf. le texte complet en Annexe II n°7.

[27] Bernkastel-Kues, Sankt Nikolaus Spital 223 (K)fol. 296ra.

[28] JL 15732 décrétale d'Urbain III insérée dans certaines collections de la *Compilatio prima*, cf. Gérard Fransen, 'Les diverses formes de la Compilatio prima' *Scrinium lovanensis: Mélanges historiques Etienne van Cauwenberg*, (Université de Louvain, Recueil de travaux d'histoire et de philologie 24; (Louvain 1961) 245. Elle est présente dans plusieurs manuscrits parisiens de la *Compilatio prima* dont la citation est extraite. Elle sera reprise par Alain (3.17.1=X 3.32.9).

et quod non peccant maritando, habet argumentum supra eadem, Nuptiarum (c.41). Aub' dicit cum huguccio quia illa qui contraxit post votum simplex continentie, mortuo viro tenetur redire ad votum.

Même lorsqu'elles ne citent pas magister a., toutes ces gloses confirment néanmoins la parenté entre notre 'lectio' et ce dernier apparat, particulièrement avec sa version contenue dans le manuscrit de Bernkastel-Kues, Sankt Nikolaus Spital 223 (=K). En voici deux exemples.

Le premier est tiré des gloses respectives sur le canon *Prohibentur accusare* (C.2 q.1 c.14) dans le manuscrit Douai:[29]

Tales etiam in ius vocari non possunt, ff. de in ius vocando l.ii. (Dig. 2.4.2), contra i. q.i. Iubemus (c.126), aliud contra co. de dignitatibus, l.Iudices (Cod.12.1.12). Potest dici quod de ante commissis non potest conveniri dum sunt in ammistrationem sicut nec legatus, ff. de accusationibus l. Hos (Dig. 48.2.12) ; hu. (Huggucio) dicit quod temporales conveniri possunt si perpeturi ad expressum est in contra ff. de iniuriis l.Nec magistratibus (Dig. 47.10.32). **Magister a.** dicit quod minor magistratus conveniri potest, maior autem qui habet potestatem mittendi in carcerem non potest et hanc discretionem sumit a duobus legibus ff. de in ius vocando l.ii. (Dig. 2.4.2), ff. de iniuriis l.Nec magistratibus (Dig. 47.10.32), tamen lex dicit quod omnes magistrati sub episcopo loci possunt conveniri in aut. ut differentes iudices §Si tamen (Auth.coll. 6.15= Nov.86 ch.4).

s.v. *sine fraude*: 'id est sine pena ut ff. De redihibitoria l. Cum autem § excipitur (D.21.1.23.2).

Animal est substantia K s.v. *propter magistratum*:[30]

Quidam ita legunt quod hanc determinationem 'sine fraude' referunt ad hoc verbum 'evocari' et glosant 'sine fraude' id est sine pena quia fraus dicitur pena ff. [de edicilio edicto] Cum autem §Excipitur (Dig. 21.1.23.2). Et hoc ideo erat quia milites terribiles erant aliis et quando bene administrant aut non, poterant vocari quando male poterant ut illic. Ego autem intelligo plane sicut littera videtur dicere ita quod hec determinatio 'sine fraude' determinet illud participium 'agentes'.

s.v. *sine fraude in ius*: contra i. q.i. Iubemus (c.126). Ibi quod nullo modo possint vocari. Solutio : quidam sunt minores iudices qui non habent cohercitionem, non possunt mittere in carcerem; sunt alii qui habent cohercitionem et possunt mittere in carcerem et tales non poterant vocari in ius. Ita distinguit lex ff. de in ius vocando l.ii. (Dig.2.4.2) et ff. de iniuriis, Nec magistratibus (Dig. 7.10.32). Ita erat olim, postea constitutum

[29] Douai 592 fol.86vb s.v. *propter magistratum*.
[30] Coppens, *Transcription* 1569-1570.

fuit ut possent conveniri de his que commiserant in administratione in aut. ut differentes iudices §Si tamem (Nov.86 ch.4).

Le second exemple est tiré des gloses sur le canon *Debent* (C.11 q.3 c.106), *ad verbum causam* dont voici les extraits.

Manuscrit Douai:[31]

sine qua nemo excommunicari debet ii. q.i. Nemo (c.11) supra; qui absolvitur causam excommunicationis debet dicere et de absolutione litteras habere extra de officio ordinarii Ex parte (1 Comp.1.23.7=X 1.31.5). Similiter testis causam testimonium debet dicere ii. q.i. Inprimis (c.7) . . . Item qui cautionem super contractu recipit debet exprimere causam contractus alias ei probatio contractus incubit ff. de probationibus l.Cum de indebito in fine (Dig. 22.3.25.4). Item qui recusat iudicem, causam recusationis debet dicere, extra ti. Prudentiam (Gilb. 2.19.11=X 2.28.41). Similiter qui appellat, ar. co. de appellationibus l.ult.(Cod. 7.62.39), extra ti. de sententia et re iudicata Quod [ad] consultationem (Gilb. 2.18.3=X 2.27.15). **Magister .a.** dicit quod non credit quod appellans causam teneatur dicere cum sufficiat dicere 'appello' ff. de appellationibus l.ii. (Dig. 49.1.2) et appellationi frustatorie deferatur extra ti de appellationibus Cum sit (1 Comp.2.20.5=X 2.28.5). Patet quia lex unam causam dixerit, aliam tamen proponere potest ff. de appellationibus l.iii. (Dig. 49.1.3). Sed quare secus est in recusatione ? Solutio: appellatio iniquitatem sententie continet ff. de minoribus l.Prefecti (Dig. 4.4.17), patet [quod] in recusatione non transfertur modo iurisdictio, immo nisi iusta sit causa recusationis, remittitur ad recusatum causa. Item iudex causam sententie debet exprimere co. de iudiciis l.Properandum §[un blanc= Illo] (Cod. 3.1.13.9) ; sententia simpliciter dicta tenet quia ea que fiunt a iudice rite acta presumitur, extra ti. de sententia et re iudicata Sicut (Gilb.app.9=Bern. 2.17.7=3 Comp. 2.18.6=X 2.27.16).

Animal est substantia s.v. *causam*:[32]

quia sine causa nemo debet excommunicari ii. q.i. Nemo (c.11), ii. q.vi. Quisquis probatus (c.19). Similiter quando aliquis absolvitur a domino papa, in litteris absolutionis debet continere excommunicationis causam, extra de officio ordinarii Ex parte (1Comp.1.23.7=X 1.31.5) .Nota quod causa in [quibus] casibus semper est exprimenda, puta in testimonio, nam testis assignare debet circumstancis et causam, ii. q.i. Inprimis (c7), [iiii. q.iii.]* §Item in criminali, illa particula 'sola attestationem' (d.a.c.3 et c.3 §30). Item qui cautiones scribit sicut pupillus tabellio debet inserere rationem cautionis ut ff. de edendo l.Si quis §Edere (Dig. 2.13.6.7). In contractibus enim causa debet scribi alioquin creditor honerat se probationibus, ff. de probationibus, Cum de indebito in fine (Dig.

[31] Douai 592 fol.132rb s.v. *causam*.

[32] B fol.83ra

22.3.25.4). Item recusans causam debet recusationis probare, extra t. de recusationibus (*sic*) c.iii. (Gilb.2.18.3=X 2.27.15) ; ar. videtur quod qui appellat causam appellationis debet assignare, extra t. de sententiis, Quod ad consultationem (Gilb.2.18.3=X 2.27.15) et co. de appellationibus l.ult. (Cod. 7.62.39). Contra ff. de appellationibus l.iii. (Dig. 49.1.3) ubi dicitur si appellans rerum causam appellationis assignat, appellationis nichilominus potest aliam assignare et ff. de appellationibus l.ii. (Dig. 49.1.2) ubi dicitur sufficit si dicitur 'appello'. Ratio diversitatis inter appellantem et recusantem hec est quia in verbo appellandi satis exprimitur causa quia appellatur a sententia iniqua, sed in verbo recusationis non continetur causa quia pluribus de causis potest recusari iudex. Et potest esse causa propter quam procedet. Item qui iudicat debet exprimere causam quare sic iudicat co. de iudiciis [l.] Properandum §Illo.(Cod. 3.1.13.9). Hodie tamen iudices [nostri]* hoc non faciunt, tamen tenet sententia et si causa non exprimat, extra t. de sententia et re iudicata Sicut nobis (Gilb.app.9=Bern.2.17.7=3 Comp. 2.18.6 =X 2.27.16) imo pro sententia habetur quandoque ratio sententie ut ff. de negotiis gestis l.Si autem (D.3.5.8).

* ajout in K f°122 ra.

Cette parenté entre notre 'lectio' et *Animal est substantia* dont on trouvera en annexe encore quelques exemples, est indéniable. Pourquoi alors magister .a. n'est-il pas cité dans la plupart des gloses correspondantes d'*Animal est substantia*? La réponse à cette question n'est pas simple. Elle est faite d'hypothèses plus que de certitudes. Il se peut que cette absence de concordance résulte d'une utilisation différente par nos deux auteurs d'une 'lectio', aujourd'hui perdue, faite par magister .a. C'est très probablement le cas. Cela expliquerait à la fois la concordance relevée sur la D.11 c.1 et sur la causa 27 q.1 c.42 et son absence sur les autres gloses correspondantes.[33]

Nos deux 'lectures', si proches temporellement et intellectuellement, ont néanmoins une autre différence dans leurs références à notre magister. 'Magister .a. dicit', 'secundum magister a.': le lecteur, dans Douai 592, rapporte simplement l'interprétation donnée par magister a.[34] L'auteur d'*Animal est substantia* va un peu plus loin. Il approfondit ce que lui apporte la

[33]Y compris l'absence de magister .a. dans les gloses de Douai 592 qui correspondent aux trois gloses citant Aub' ou Aubertus dans *Animal*, supra n.20.

[34] Comme on pourra le constater dans les gloses citées ci-dessus et en Annexe.

'lectio' de magister .a. et n'hésite pas éventuellement à s'en démarquer: 'distinguit Aubertus', 'non credit Aub', 'Aliter dicit Aub', 'ad idem Aub.'[35] On peut également remarquer qu'il est dans l'ensemble beucoup plus prolixe dans ses développements que notre lecteur de Douai.

Terminons par quelques certitudes: magister .a. a bien lu le *Décret*. Il n'est pas l'auteur de notre 'lectio' ni celui de l'apparat *Animal est substantia*, puisqu'il est cité par les deux, mais il est proche de leurs auteurs, en particulier du second qui le cite abondamment.[36] Notre magister .a. est bien enfin cet Aubertus, Aubericus ou Albericus cité par *Animal est substantia*.[37] Il n'y a alors qu'un maître en droit civil et canonique qui porte ce nom, c'est Albericus Cornutus. Plusieurs siècles plus tard, la *Gallia christiana* avant d'en retracer la carrière ecclesiastique, en dressera ce bref portrait:[38]

> Genere nobilis, Albericus, frater Galteri Senonensis archiepiscopi, in ecclesia parisiensi a teneris enutritus, juris canonici et civilis Luteciae professor.

Chacun de ces traits mériterait un commentaire. Ils le seront dans une prochaine étude que j'espère pouvoir consacrer à Albericus Cornutus.

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[35]Exemples fournis par les gloses sur la Causa 1 (Coppens, *Transcription* 1431,1444,1484,1397).

[36] Rédigé avant 1209; Coppens, 'L'auteur' écrit qu'il a trouvé 'jusqu'alors vint huit références à 'Aubertus, Aubericus ou Albericus'.

[37] Ibid. Comme l'avait transcrit Weigand, *Eheschliessung* 299, on trouve même dans K fol.201ra un *Aubericutus* (avec un trait au dessus du t de t^9; peut-être l'abréviation mal reproduite d'*Aubericus cornutus*, son nom et surnom).

[38] GC 8 col.1159.

Annexe

I. Exemple de deux gloses citant Pierre Peverel dans Douai 592 et dans *Animal est substantia* sur C.15 q.4 d.a.c.1 s.v. *quod uero*:[39]

> In diebus festivis non debent cause tractari nisi forte de consensu partium secundum legem ff. de feriis l.Si feriatis (Dig. 2.12.6) sed illud potest intelligi de diebus messium vel vendimiarum. In diebus dominicis etiam de consensu partium, **secundum p.pun**, cause tractari non debent quia istud introductum fuit favore Dei non partium. Nota tamen quod hoc stabit in casu quia causa insignis latronis bene potest tractari die dominico et in hoc casu nulle ferie observantur.

C.15 q.4 Placita (c.2) s.v. *precipuis festis*:[40]

> que sunt ista festa habetur de consecratione di.iii. c.i. Quandoque tamen testationes debent ammitti puta testis mens gravatur infirmitate . . . in quantum milites et clerici et persone que talibus non indulgent possunt vocari unus tempore temporalium feriatum quidam dicunt quod sic. **p. pul**. dicit quod non quia tantum modo excipiuntur cause fiscales c. de feriis, l.Publicas (Cod. 3.12.5) preterea lex generaliter loquitur.[41]

On retrouve dans *Animal est substantia* sur le d.a.c.1 *s.v. quod vero*, ces mêmes citations de Pierre Peverel dans une longue glose qu'avait publiée Coppens dans son article sur Pierre Peverel:[42]

> Sed queritur: si partes consentiant quod his diebus feratur sententia, utrum valeat sententia? Et dicunt quidam quod sic. **Magister pp**. dicit quod non, quia ferie in favorem Dei introducte sunt, unde homines ille favori non possunt renuntiare cum pro se non sit introductum . . . Sed queritur utrum milites et clerici in temporalibus feriis possunt vocari in ius? Dicunt quidam quod sic, cum laborent, ff. de feriis l.i. (Dig. 2.12.1). **Magister pp**. dicit quod non, quia lex loquitur generaliter et preterea in causis talium desiderantur testes, forte rustici qui non possunt avocari ab operibus suis in feriis. Preterea lex dicit quod in his feriis cause publice possunt tractari, Cod. de feriis, Publicas (Cod. 3.12.5).

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[39] Douai 592 fol.49rb.

[40] Ibid. fol.49va.

[41] Sur les variantes du surnom Peverel bien illustré ici, cf. notre étude 'un maître parisien' supra n.21, 212n.12

[42] Emile Christian Coppens, 'Pierre Peverel, glossateur de droit romain et canoniste ?', *La cultura Giuridico-canonica medievale: Permesse per un dialogo ecumenico*, edd. Enrique de León, Nicolás Álvarez de las Asturias (Pontificia Università della Santa Croce, Monografie giuridiche 22 ; Milano 2003) 303-394 à 385-386.

II. Gloses citant magister .a. dans Douai 592.

1.Fol.97vb, *ad verbum nos emendare* C.2 q.7 c.41 (*Nos si incompetenter*):

> Contra lxxxvi. di. Quando (c.4) ubi dicitur quod prelatus veniam a subditis petere non debet aliud contra ix. q.iii. Nemo (c.13) Solutio: verum est quod papa a nemine minutio iudicari potest. Quare in causa criminali, possit se papa subiicere alicui? Videtur quod sic nam se ipsum deponere potest xxi. di. Nunc autem (c.7). Alii dicunt quod non potest iudicari nisi a cardinalibus tamen lex dicit quod si maior subiiciat se minori, minor potest ei iudicium dicere, ff. de iurisdictione omnium l.Est receptum (Dig. 2.1.14) **Magister .a. dicit** quod quantum ad forum penale potest se subicere alias non, quia iudex suus esse non potest.

Animal est substantia (Coppens, *Transcription* 1943) contient *ad verbum emendare iudicio* une glose très proche:[43]

> Contra ix. q.iii. Nemo iudicabit primum sedem (c.13) et lxxxv. Quando (c.4) et x[c]vi. di. Denique (c.5) contra. Responsio: nolentem non potest aliquis iudicare primam sedem set volentem potest quia maior bene potest se subdere minori ut ab illo iudicetur ff. de iudiciis (*recte* de iurisdictione) Est receptum (Dig. 2.1.14).

2.Douai 592 fol.119rb *ad verbum: Quod autem archiepiscopus* d.a.c.1 C.9 q.3:

> iii. questio notandum [est] quod metropolitanus tractabit de quibus provincie negotiis: concilium convocare infra eadem questio c.i. et ii. de negotiis vero diocesis sue per se potest disponere ut episcopus, sic infra eadem questio Nullus primas (c.7) et Conquestus (c.8). Item metropolitanus autem non debet dampnare vel absolvere parochianum sui suffraganei nisi in tribus casibus: quando ad eum appelatur, extra de officio ordinarii Quesitum (1 Comp.1.23.2=X—) et quando episcopus est negligens, premissa monitione, infra eadem questio Cum simus (c.3), extra ti. de supplenda negligentia prelatorum, Quoniam (Gilb.1.7.1=X 3.8.5). Secundo : quando ecclesia vacat et clerici negligentes etiam in provisione pastoris eligendi, infra eadem questio Conquestus (c.8), xii. q.ii. Non liceat (c.20). Item quando bona fide dubitat an sua sit iurisdictio, extra de appellationibus, Si duobus (1 Comp. 2.20.7=X 2.28.7), simile ff. de officio presidis l.Si forte (Dig. 1.18.17). Sicut si quis nesciens mandatorem esse mortuum, postea implevit mandatum, actionem habet mandati, ff. Mandati l.Inter causas (Dig. 17.1.26). **Magister .a. dicit** quod metropolitanus habet iurisdictionem in diocesim suffraganei sui sed non habet executionem nisi in predictis casibus. Unam vero causam delegare potest, suffraganeo

[43] K fol. 88va.

> invito, extra ty. Pastoralis § Ex parte (Douai 649 fol.67va; Bern. 1.23.12= 3Comp.1.20.5=X 1.31.11)[44] vel non habere cum effectu sicut ff. de iudiciis l. ult. (Dig. 5.1.82).

Dans *Animal est substantia,* on retrouve dans la longue glose *ad verbum quod autem* transcrite par Coppens (*Transcription* 2724-2726), la même affirmation:

> Nam metropolitanus iurisdictionem habet per totam provinciam set executionem non, nisi in casibus predictis.

Il reprend cette distinction in fine avec la même référence au § *Ex parte* de la décrétale *Pastoralis*:[45]

> tamen extra t. Pastoralis § Ex parte videtur dici quod metropolitanus nullam habet iurisdictionem in subditos suffraganei sui et hoc verum est quo ad executionem nisi scilicet in casibus prenotatis.

3.Douai 592 fol.132ra, *ad verbum Ignoranter* C.11 q.3 c.103 (*Quoniam multos*) :

> Facti que in peritissimos fallit ff. de iuris et facti ignorantia l.ii. (Dig. 22.6.2). Iuris autem ignoranti non excusat nisi in quibusdam casibus ff. de iuris et facti ignorantia l.ult.(Dig. 22.6.10) Utrum quilibet de populo excommunicatus sit, queri potuit? Et videtur nam qui possidet gregem possidet qualibet gregis ovem ff. de usucapionibus l. Rerum mixtura (Dig. 41.3.30 § 2) et que accedunt gregi legato, legata est semper ff. de legatis l.Grege legato (Dig. 30.I.21) de hoc supra eadem [causa] q.i. Nemo (c.1). **Magister .a.** dicebat quod quando capitulum excommunicatur, canonicus in eo quod canonicus tantum, excommunicatus est.

Dans *Animal est substantia,* sur ce même canon c'est *ad s.v. In terram excommunicatorum* que l'on retrouve, en plus développée, l'idée attribuée ci-dessus à *magister a*.:[46]

> ar. quod si quadam terra excommunicatur, omnes de terra excommunicantur. Diximus autem supra quod non debet populus excommunicari propter infames qui sunt de populo . . . Similiter si excommunicatur collegium, non enim excommunicatur quilibet de collegio tamquam privata persona sed bene excommunicatur tamquam unus de collegio, ar. ff. de adquirenda possessione, Qui universitas (Dig. 41.2.30) edes possidet non singulas res possidet, unde excommunicato capitulo alicuius ecclesie, non communicare alicui eorum in his que spectant ad ecclesiam nec

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[44] On remarquera que la référence 'extra ty' pour 'Pastoralis § Ex parte' est ici donnée sans indication du titre dans lequel elle s'insère. Cette référence est sans doute prise à une des copies figurant dans plusieurs manuscrits de l'école parisienne dont Douai 649 dont j'indique ici la référence.

[45] K fol.110ra.

[46] B fol.82vb-fol.83ra.

communicare alicui in mensa in ecclesia sed in aliis potest ei communicari tamquam privata persona.

4.Douai 592 fol.146ra, *ad verbum Quod vero elemosine* d.a.c.1 C.14 q.5:

Notandum quod ex illicite quesitis non potest fieri elemosina secundum quosdam propter illud in deuteronomio 'honora deum de tua iusta substantia'; ad idem i. q.i. Non est putanda (c.27). Potest dici quod ex illicite quesitis que subiacent repetitioni non potest elemosina fieri, extra de usuris, Tua nos (1 Comp. 5.15.11=X 5.19.9) nec de hiis que metu aut dolo extorquentur, licet ab eo a quo extorquetur repeti non possunt, ut si quis alium interficiat ut ei succedat ; que enim scelere querentur fisco aplicari debunt, ff. de iure fisci l.Lucius (Dig. 49.14.9). Similiter nec de eo que acceptum est ut alius interficeretur unum, Iudas xxx. argenteos proiecit dicens 'peccavi tradens sanguinem iustum'. Idem potest dici de simoniace quesitis in aut. de episcopis §Pre omnibus (Auth.9.6, Nov.123 ch.2 §1). De usitate quesitis que non subiacent repetitioni potest elemosina fieri ut de meretricio; meretrix enim turpiter facit quod sit meretrix sed non turpiter accipit cum meretrix sit, ff. de condictione ob turpem causam l. Idem (Dig. 12.5.4) Et sic quidam dicunt quod nec de hiis potest elemosina fieri propter illud in deuteronomio 'non offeres lucrum pro stabula in domo domini', sed istis videtur observare quod habes infra, eadem questio, Qui habetis (c.14). Item queritur aliquis: multa que sunt non est modo solvendo, potest ne elemosinam facere ? Videtur quod non quia potius creditoribus reddere debet, non enim mentiri licet xxii. q.ii. Primum (c.8) ; **magister .a.** dicit quod de usuraria pecunia potest fieri elemosina si solvendo est usurariis, secus dicit in sponsalibus quoniam eadem restituere tenetur.

Sur ce même texte, *Animal est substantia*, toujours plus prolixe, offre un nouvel exemple de parenté:[47]

Hic intervenitur v. questio in qua queritur an ex male aquisitis possunt fieri elemosine? Nota ergo quod de male acquisitis in quibus non transfertur dominium, non possunt fieri elemosine ut in rapina et re furtiva; sed in istis rebus male adquisitis in quibus tansfertur [dominium], questio est: an possunt fieri elemosine ut de usura et de adquisitis ex meretricio? Et dicunt quidam quod meretrix non potest facere elemosinam de hiis necnon generaliter quando recipiendo aliquid committitur mortale peccatum, de elemosina fieri non possunt ut si quis dicat: 'dabo tibi c. si committas homicidium', de his non potest fieri elemosine et hoc dicitur de quadam glosa super Matheum, super illum locum de Iuda: 'peccavi tradens sanguinem iustum', nam eius qui dat talem pecuniam repetere non potest nec homicidia retractare, nam que scelere adquirentur fisco adquirentur ff. de iure fisci l.Lucius in fine (Dig. 49.14.9); inducent etiam argumentum

[47] K fol.134va.

ad hoc infra, eadem questio, Elemosina (C.14 q.5 c.7) et alias auctoritates scilicet ‘honora Deum de tua substantia et laboribus iustis’, i. q.i. Non est putanda (c.27), item in deuteronomio: ‘non offeres mercedem pro stabula’ Item Ysayas: ‘non accipies mercedem meretricis aut precium sanguinis, ad idem x. q.iii[i]. [un blanc=Meretrices c.11] ubi dicitur quod oblationes meretricium non sunt recipiende; sed hoc intelligimus in publica et hoc ad ipsarum confusionem ut verecundia mortale peccante desistant. Sed tamen secreta oblationes earum recipiende sunt. Item notandum [est] quod earum que restitui oportet : quedam restituenda sunt in specie, alia in genere. De hiis autem que restituenda sunt in specie elimosina fieri non possit sed de his que restituenda sunt in genere elemosina fieri possint et quoniam usure restituende sunt in genere de fenebre pecunia possunt fieri elemosine. De causa usurarius remaneat ibi solvendo; nam non possumus dicere quis denariorum sit fenebris quia qua ratione unus et quilibet? Et non peterat fenerator quia illud vel alterum non restituit aliquam. Auctoritates ergo illas sic intelligimus: nullus illicite debet acquirere ut largiatur pauperibus vel bonum faciat.

5.Douai 592 fol.169rb, *ad verbum pueros* d.p.c.6 C.20 q.1:[48]

Consentientes et doli capaces secundum Huguccio sed quoniam dubitari potest quando aliquis sit doli capax, dicit **magister .A.** quod sive sint doli capaces sive non, semper in xiiii. anno exire possunt et habent accensum Marcelli pape infra eadem questione Illud (C.20 q.1 c.10); ad idem extra de regularibus, Ad nostram (1 Comp. 3.27.8=X 3.31.8) extra ti. Qui matrimonium accusare non possunt, Insuper (Gilb.4.12.3=X 4.18.4). Sed queritur cum sponsalia post septennium contrahantur extra de sponsalibus, Iuvenis (1 Comp. 4.1.18=X 4.1.3), ff. de sponsalibus l.In sponsalibus (Dig. 23.1.14), quare non eodem modo per votum poterit quis obligari? Solutio: nec in sponsalibus, nec in voto obligatur quis cum effectu ante xiiii. annum extra de desponsatione impuberum, Puella (1 Comp 4.2.11=X—) vel dicatur quod vinculum sponsaliorum exire cum nam invicem a contra-hentibus remitti potest extra de desponsatione et matrimonio, Preterea (1 Comp. 4.1.16=X 4.1.12).

Dans *Animal est substantia*, il n’y a pas de glose corres-pondante *ad verbum pueros.*[49] C’est sur le d.a.c.1 de cette même *questio* 1 *ad verbum Quod intra annos*, qu’on retrouve les idées exprimées ci-dessus par magister .a. Elles figurent in fine d’un long plaidoyer, mené à l’aide du droit romain, en faveur du libre choix

[48] Le c.7 étant une palea absente du corps du texte, le dictum *Ex his* suit le c.6.
[49] Juste sur l’adjectif ‘obligatos’, cette courte glose dans K fol.153vb: ‘verum est usque ad pubertatem tantum non ultra’.

du clerc régulier de rester ou de sortir du monastère lorsqu'il atteint l'âge de quatorze ans:[50]

> i. questio. Introducte sunt iste opiniones quod dicunt quod aliquis ante xiiii. annos potest obligari: sunt contra artem et iura antiqua et etiam nova et contra consuetudinem, nam infans de arte non potest aliquo modo obligare se nec civiliter nec naturaliter, ff. de verborum obligationibus l.i. (Dig. 45.1.1) ; bene obligatus naturaliter non civiliter et hoc usque ad xiiii. annum completum ff. de novationibus l.i. (Dig. 46.2.1) preter quam maleficio in quo bene obligatus statim post vii. annos et per hoc soluta est obiectio Hugucionis quod potest se infans post vii. annos obligare diabolo et hoc per maleficium; sed ex contractu non potest obligari et hoc quia in contractu exigitur consensus et discretio quam non habet versum xiiii. annum, ff. de iudiciis, Cum pretor (Dig. 5.1.12), xv. q.i. §Illud (c.2= Dig. 47.10.3). Sed obligatio in malo tamen contraxit ex facto singulo nec exigitur ibi consensus vel discretio, sed voluntas tantum et certum quod sciat quod interdictum [est], ff. de furtis, Impuberem (Dig. 47.2.23), unde si volui percutere Seium et percussi Titium teneor Titio quia nec volui nec fuerit ibi discretio, sed voluntas crimini, unde patet quod discretio non exigitur post pubertatem ut obligatur et civiliter et naturaliter ff. de verborum obligationibus, Puberes (Dig. 45.1.101). Sed tamen quia non habet adhuc plenam discretionem, sed adhuc de facili alicui restituere usque ad xxv. annum completum ff. de minoribus (Dig. 4.4.[l. non indiquée]). Si iurata autem vel ubi matrimonio post xiiii. annos contracto, non restituitur quia ibi constat quod non leditur, unde sicut ibi constat quod leditur ipso iure dicitur illesus co. in quibus causis non est necessaria restitutio l.ult. (Cod. 2.40.5). Ita ubi constat quod non leditur non restituitur in talibus quando noletur et ita illa opinio est contra artem et contra iura antiqua ut infra, eadem questio, Illud (C.15 q.1 c.10) et contra nova [iura], extra de regularibus, Ad nostram (1 Comp.3.27.8= X 3.31.8) et extra ii. qui matrimonium accusare non possunt, In super (Gilb.4.12.3=X 4.18.4), contra consuetudinem est quia non admittatur hodie ante xiiii. annum et ideo quod sive sit doli capax sive non, sive intret spontanea voluntate sive a parentibus tradatur, non obligatur cum effectu ante xiiii. annum tunc datur ei optio Marcelli pape, infra eadem questione Illud (c.10).[51]

6.Douai 592 fol.209va *ad verbum Quod autem*, d.a.c.1 C.25 q.2:

> Queritur utrum per sequens privilegium priori derogatur? Ad cuius evidentiam notandum [est] quod quodam est privilegium cui derogari non

[50] K fol.153va.

[51] On a ici un nouvel exemple de l'utilisation, y compris dans *Animal est substantia*, de l'expression extra ii. pour désigner la *Collection* de Gilbert cf. Lefebvre-Teillard, 'La diffusion de la collection de Gilbert' 89.

potest scilicet privilegium romane ecclesie quam preest omnibus ecclesiis xxiiii. q.i. Manet (c.5). Hoc enim privilegium datum est ei a Domino xxi. di. Quamvis (c.3) et xxii. di. c.i. et ii. Bene prescribitur contra romanam ecclesiam c. annis xvi. q.iii. c.ult. (c.17). Privilegiis aliarum ecclesiarum bene derogatur . . . Item hoc intelligendum est quando utrumque est speciale vel utrumque est generale nisi autem unum est speciale aliud generale; speciale derogat generali, extra de rescriptis c.i. (1 Comp.1.2.1= X 1.3.1), quidam tamen dicunt quod non derogat nisi speciale faciat mentionem de generali et in hac opinione est **magister .a.** Alii dicunt quod derogat licet non faciat mentionem de ipso ar. ff. de regulis l.In toto (D.50.17.80). Probabilius videtur secundum **magistrum .a.** Alii dicunt quod derogat licet non faciat aut quod non derogat nisi faciat mentionem de ipso quoniam ea que facta sunt non revocantur nisi de ipsis expressim fiat mentio, extra de rescriptis Ceterum (1 Comp.1.2.3=X 1.3.3) et hoc est ratio quoniam ea que facta sunt infinita sunt, unum memoratum teneri non possunt nam facta vero sunt infinita et ideo memor esse non potest co. de veteri iure enucleando l.ii. §Si quis autem in tanta (Cod. 1.17.2.14). Iura vero finita sunt ff. de iuris et facti ignorantia l.ii. (Dig. 22.6.2). Unum papa presumitur esse memor omnium et habere omnia in scrinio pectoris sui, co. de testamentis l.Omnium (Cod. 6.23.19). Notandum [est] autem quod si novum privilegium possit stare cum veteri, non revocat illud et vetus interpretari debemus per novum, ff. de legibus l. Non est novum et duabus sequentibus (Dig. 1.3.26 et 27-28). Item si vetus actio competat et nova introducatur per legem, nova non tollit veterem sicut ea stare possit, ff. de actionibus et obligationibus l.Quotiens (Dig. 44.7.41) et ex hoc colligitur. Solutio: eius quod dicitur extra ti. Pastoralis §Quoniam (Douai 649 fol.67vb; Bern.1.4.3=3Comp. 1.2.3=X 1.3.14) ubi habemus quod singulare rescriptum valet contra particulare et si non faciat mentionem de illo et hec est ratio quoniam potest esse unum cum illo; contra autem universale non valeret nisi faceret mentionem. Ius autem illa in toto corpore iuris est cum intelligenda est de iuribus et non de factis. Amitteretur autem privilegium multis modis.

Dans *Animal est substantia* ce même texte fait l'objet d'une longue glose un peu différente mais dans laquelle on retrouve le recours aux mêmes textes de droit romain pour étayer le propos, comme en témoigne cet extrait:[52]

Hic erat secunda questio: Utrum sequenti privilegio monasterium derogaretur precedenti vel cuiusdam baptismale ecclesie? Notandum [est] quod ea que sunt facti non revocat dominus papa nisi in posteriori fiat mentio precedentis. Rescriptum aut factum dicitur esse, extra de rescriptis, Ceterum (1 Comp. 1.2.3=X 1.3.3), nam quia si memor esset, dominus papa prioris rescripti non concedit contrarium, facta vero sunt

[52] K fol.187ra.

infinita et ideo memor esse non potest co. de veteri iure enucleando l.ii. §Si quis in tanta (Cod. 1.17.2.14), ratione antea condendo non oportet fieri mentionem de primo quia intellige dominus papa habere omnia in pectore suo co. de testamentis l.Omnium (Cod. 6.23.19), iura enim finita sunt et cognita ff. de iuris et facti ignorentia l.ii. (Dig. 22.6.2) si primo constituit unam legem, postmodum aliam, si simul possunt stare posterior trahit ad se priorem ff. de legibus, Non est novum (Dig. 1.3.26). Si vero simul stare non possunt priori per ultimam derogatur ff. de actionibus et obligationibus l.Quotiens (Dig. 44.7.41) Tamen rescriptum posterius bene revocat prius, non facta mentione de priori quia speciale derogat generali, extra t. Pastoralis § Quoniam (Douai 649 fol.67vb; Bern.1.4.3=3Comp. 1.2.3=X 1.3.14) . . . Idem de privilegiis dicimus quod de rescriptis dictum est et est ratio quia facta sunt similiter privilegia et infinita sunt nec potest dominus papa ad memoriam revocare.

7.Douai 592 fol.219va *ad verba: preterimus ne sexus fragilis* C.27 q.i. c.42 (*De viduis*):

Si intelligatur de voto sollempni exponatis ne prout ; si non de sollempni iungatis ne et ut firmatis prout et quam pro non, ut faciat ad propositum magistri intelligendum est de voto simplici. Queritur post votum simplex non potest aliquis de iure contrahere matrimonium, potest ne cogi ab ecclesia ne contrahat ? Videtur quod sic per excommunicationem quoniam pro quolibet mortali [pecato] potest quis excommunicari xxii. q.i. c.ult. (c.17). Tamen contracto matrimonio absolvetur et ita videtur quod propter minorem contumaciam potius absolvatur extra de sponsalibus et matrimonio Ex litteris (1 Comp 4.1.9=X4.1.10) Item aliqua vovit simpliciter, potmodum contraxit, mortuus est vir eius, tenetur ne continere ? Quidam dicunt quod non quia ruptum fuit ex toto votum per sequens matrimonium et obligatio semel extincta non tenuisse, de consecratione di.iiii. Queris (c.129) xxiii. q.iiii. Si illic (c.29), ff. de solutionibus l.Qui res §Aream (Dig. 46.3.98.8) Alii dicunt quod tenetur continere et **magister .a.** consentit illud: ex natura enim voti tenetur quis ad non exigendum xxx. q.i. De eo (c.5) xxxiii. q.iii. Antiquissimi (q.2. c.19 in fine); sopitur enim tantum et non extinguitur votum per sequens matrimonium et obligat ad non exigendum, ad non reddendum vero non obligat, extra de conversione coniugatorum, Quidam intravit (1Comp. 3.28.3=X 3.32.3). Patet votum cum matrimonio potest incipere ergo et ante contractum cum matrimonio potest permanere. Item ante carnalem copulam licet matrimonium sit contractum tenetur quis ad non reddendum extra ti. de conversione coniugatorum, Carissimus (Gilb.3.19.1=X 3.32.11) et ante carnalem copulam, licet matrimonium sit contractum, tenetur quis ad non reddendum transeundi ad religionem extra de conversione Coniugatorum, Ex publico (1 Comp.3.28.7=X 3.32.7). Videtur ergo cum aliquis uxorem primo cognoscit post votum quod peccet quoniam facit se impotenti reddendi voti de cetero infra eadem [causa]

q.ii. Sunt qui in fine (c.19). Sed contra videtur extra de conversione coniugatorum, Quidam intravit (1 Comp. 3.28.3=X 3.32.3) ubi dicitur quod ille qui ab uxore retineatus fuit a religione, ea mortua non tenetur intrare. Solutio: secus est quando votum ante matrimonium libere emittitur, secus quando post, quoniam durante matrimonio non potest quis vovere de alieno. Ad obiecta respondemus quod non est extincta obligatio sed tantum sopita. Est enim duplex impedimentum tollende obligationis: unum naturale, aliud accidentale. Naturale tollit et perimit, accidentale vero non solvit sed sopitam reddit; de naturali habes exemplum: aliquis promisit quemdam Titio, ille interum sine dolo malo promissoris manumissus est, quod obligatio perempta est dicitur ff. de verborum obligatione l.In stipulantem (*recte* Inter stipulantem, Dig. 45.1. 83) §iii. Inst. de inutilibus stipulationibus §iiii. (Inst. 3.19.4). Accidentale est impedimentum difficultas persolvi, tale impedimentum non perimit obligationem ff. de verborum obligatione l.Continuus §Illud (Dig. 45.1.137.4). Hec distinctio colligitur ex lege.

Voici sur ce même canon, le début de la longue glose[53] dans laquelle l'auteur rappelle sous le nom d'Aub', l'interprétation donnée ci-dessus par magister .a.:[54]

s.v.*non tam deterreri*: ut scilicet desperatorem facere videtur // ut xxv. di. §Criminis (d.p.c.3 § 4) hic dicitur quod sunt amonende que votum simplex emiterint. Compelli tamen possunt quare mortaliter peccant si non reddunt quia versum est indebitum, quia post votum ipsarum velle nubendi, mortale est ut supra eadem [questio] Nuptiarum (c.41) et ideo excommunicari possunt argumentum xi. q.iii. Nemo (c.41) et xxii. q.i. c.ult. (c.17) nam quamdiu illa vovit potens est nubere id est quamdiu non contraxit cum aliquo, potest cogi argumentum xiiii. q.vi. Si res (c.1). Sed postquam se fecit in potentia reddere et non debet cogi, nam natus est actio// et ff. de dolo, Nam is (Dig. 4.3.6) Sed ex quo post votum contraxit debet iniungi ei penitentia et absolvi. Et est // [casus ?] specialis in quo magis contumax absolvitur sicut est quando aliquis iuravit quod aliquam duceret, potest excommunicari si velit aliam ducere, tamen si duxerit, absolvitur, extra de sponsalibus, Ex litteris (1 Comp 4.1.9=X 4.1.10). Sed queritur utrum illa que post votum simplex contraxit potest compelli, viro mortuo, redire ad votum et dicit h. (Huguccio) quod sic quia sublato impedimento debet fieri quod dicebatur ar. xxx. q.i. De eo (c.5) et extra de convertione coniugatorum, Ex parte (1 Comp.3.28.7bis). Alii dicunt quod non quia dicunt quod per matrimonium solutum sit vinculum voti simplicis, unde licite potest petere debitum et reddere nec viro mortuo

[53] Le bord interne du folio 296r pris dans la reliure rend problématique la lecture, sur microfilm, de l'incipit de chacune des 27 lignes qui la composent en ra, c'est pourquoi je n'en donne ici que ce qui précède la référence à Aub'.
[54] K fol.296ra.

tenetur redire ad votum quia obligatio semel extincta non reviresit xxiii. q.iiii. Si illic (c.29), ff. de solutionibus l.Qui res §Aream (Dig. 46.3.98.8) et quod non peccant maritando habet ar. supra eadem Nuptiarum (c.41). **Aub'** dicit cum Huguccio quia illa qui contraxit post votum simplex continentie, mortuo viro tenetur redire ad votum.

8.Douai 592 fol.237va *ad verbum Secundum namque in penis* C.32 q.7 c.16 (*Quid in omnibus*):

Id est in penalibus prohibitionibus vel dicatur quod anima sua habet peccatum ut beneficium et huius corpus vero fornicationem ut fornicator et adulterium. Heresis vero primum in penis optinet locum fornicationi. In prima enim tabula, tria precepta continentur* in secunda vii.* Item que (*sic*) committatur fornicatio vel adulterium. In secunda tabula continetur fornicatio **secundum magistrum .a.** benitum et bene se expedicat dicendo quod inter publica crimina primum est enim lese maiestatis cui perficatur enim hereseos vi. q.i. §Verum (d.p.c.21). Secundo loco ponitur adulterium.

* cf. Exode ch.20 et Deutéronome ch.5.

Pacta sunt servanda: Canon Law and the Birth and Dissemination of the Legal Maxim[*]

Piotr Alexandrowicz

Introduction

The 'pacta sunt servanda' maxim is nowadays a common saying, which, apart from its presence in legal scholarship, can easily be found in various press releases or even heard in ordinary speech. It conveys the simple message that promises or contracts should be kept, and it is one of the legal maxims best recognized outside the hermetic legal bubble. Obviously, the practical significance of the rule of law behind these three words is a broadly debated issue within the topic of freedom of contract. The meaning of 'pacta sunt servanda' was different in various legal orders and evolved over the course of time. What seems to be a still undeveloped issue, however, is the very origin of these three words put in a row.

This paper has two aims concerning only selected issues from the vast history of freedom of contract and the contribution of medieval canon law towards it. The first objective of this paper is to offer an elaboration on the author(s) and date(s) which should be linked to the landmark of the formulation of the 'pacta' maxim within canon law jurisprudence. To reach this objective, firstly a brief overview of the discovery of freedom of contract in medieval canon law will be presented, and this will be followed by a study on the evolution of the legal formulas developed by the canonists. The second objective is to outline the nature and significance of

[*]I would like to thank Tymoteusz Mikołajczak for sharing with me his initial research outcomes on the 'summaria' to c.*Antigonus*, Orazio Condorelli for the elucidation on the date of composition of *Commentaria* of Antonio de Butrio, and other scholars and anonymous reviewers who provided me with their comments on this paper.

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one of the important means of dissemination of the canonists' doctrine, i.e. the famous 'summarium' from the Decretals: 'pacta quantumcunque nuda servanda sunt' (X 1.35.1). As a consequence, it is beyond the scope of this paper to examine the history of freedom of contract or the growing significance of the 'pacta sunt servanda' maxim in modern civil law jurisprudence.[1] The study will focus only on the 'pacta' maxim but obviously there were other relevant canon law adages which were of importance for contract law, such as those linked to the linguistically parallel concept of 'fides servanda' (e.g. frangenti fidem fides non est servanda, fidem frangenti fides frangitur).[2]

The principle: 'pacta sunt servanda'

In very general terms, contract law can be governed by one of the two models. In the first, contractual nominalism, the state provides the protection of parties' rights in courts only when they have concluded agreements listed in the statutes. In the second, contractual freedom, the state declares that it will protect all agreements which meet the general criteria specified in statutes, such as good faith, accordance with local customs, or consistency with legal provisions. The history of contract law in Western legal tradition is a movement from contractual nominalism (evolving over centuries) to contractual freedom (with its various limitations).

[1] My first preliminary remarks on this subject were given in the short annex to the monograph Piotr Alexandrowicz, *Kanonistyczne uzasadnienie swobody umów w zachodniej tradycji prawnej* [Canonistic Justification of Freedom of Contract in the Western Legal Tradition] (Poznań 2020) 281-286.

[2] Friedrich Merzbacher, 'Die Regel Fidem frangenti fides frangitur und ihre Anwendung', ZRG Kan. Abt. 68 (1983) 339-362; Rafael Domingo, Javier Ortega, Beatriz Rodríguez-Antolín, Nicolás Zambrana, *Principios de Derecho Global 1000 reglas y aforismos jurídicos comentados* (Cizur Menor 2006) no.372, 138; no.380, 139; no.391, 142; Andreas Thier, 'Von der gehaltenen und der gebrochenen fides: Zur fides in den Vertragskonzeptionen der Kanonistik seit dem 12. Jahrhundert', *Das Mittelalter* 20 (2015) 327-343.

The first model was typical for ancient and medieval Roman law.[3] Only selected types of agreements (nominate contracts-contractus) which were entered into with the application of specified norms provided the parties with full protection. Over the course of time this group of agreements was enlarged and came to include also innominate contracts and certain types of informal agreements (pacta) which, for various reasons, also gave rise to a claim (while typically a party to the 'pactum' was given only passive protection, namely exception). The flexible contract of stipulation provided the parties with an additional tool for addressing a very wide range of services which may be transmitted through contracts. Nevertheless, Roman contract law moved towards freedom of contract, but it never reached it and remained a model founded within the framework of contractual nominalism. Medieval Roman law accepted the same model, adding several innovations and new conceptualisations which, however, did not shift the very nature of this model of contract law.[4]

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[3] See e.g. Györgi Diósdi, *Contract in Roman Law: From the Twelve Tables to the Glossators* (Budapest 1981) 26-147; Reinhard Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (Oxford 1996); Andreas Thier, '§ 311 I. Rechtsgeschäftliche und rechtsgeschäftsähnliche Schuldverhältnissse', *Historisch-kritischer Kommentar zum Bürgerlichen Gesetzbuch*, vol. 2.2, ed. Mathias Schmoeckel, Joachim Rückert, Reinhard Zimmermann (Tübingen 2007) 1512-1516; Lihong Zhang, *Contratti innominati nel diritto romano: Impostazioni di Labeone e di Aristone* (Milano 2007); *Le dottrine del contratto nella giurisprudenza romana*, ed. Alberto Burdese (Padova 2011); Д. Полдников, *Формирование учения о договоре в правовой науке Западной Европы (XII- XVI вв.)* (Москва 2016), 26-62.

[4] See e.g. Pietro Vaccari, 'Pactum vestitur contractus cohaerentia: La concezione dei patti aggiunti nella dottrina dei glossatori', *Conferenze romanistiche tenute nella R. Università di Pavia nell'anno 1939 a ricordo di Guglielmo Castelli* (Milano 1940) 217-239; reprinted in Pietro Vaccari, *Scritti di storia del diritto privato* (Padova 1956) 233-54; Hermann Dilcher, 'Der Typenzwang im mittelalterlichen Vertragsrecht', ZRG Rom. Abt. 77 (1960) 270-303; Italo Birocchi, *Causa e categoria generale del contratto: Un problema dogmatico nella cultura privatistica dell'età moderna*, vol. 1 : *Il Cinquecento* (Torino 1997) 45-54, 63-67; Raffaele Volante, *Il sistema contrattuale del diritto comune classico: Struttura dei patti e individuazione del tipo: glossatori e ultramontani* (Per la storia del pensiero giuridico moderno 60, Milano 2001) 99-194.

The new approach was developed for the first time within the Western legal tradition by the jurisprudence of late medieval canon law. The subtleties of canon law of agreements in the Middle Ages have been profoundly described.[5] It is also often stated that the canonists developed the principle of freedom of

[5] See e.g. Lothar Seuffert, *Zur Geschichte der obligatorischen Verträge* (Nordlingen 1881); C. Karsten, *Die Lehre vom Verträge bei den italienischen Juristen des Mittelalters: Ein Beitrag zur inneren Geschichte der Reception des römischen Rechtes in Deutschland* (Rostock 1882); Adhémar Esmein, *Le serment promissoire dans le droit canonique* (Paris 1888); François Spies, *De l'observation des simple conventions en droit canonique* (Paris 1928); Jules Roussier, *Le fondement de l'obligation contractuelle dans le droit classique de l'Église* (Paris 1933); Melchiorre Roberti, 'L'influenza cristiana nello svolgimento storico dei patti nudi', *Cristianesimo e diritto romano*, ed. Melchiorre Roberti et al. (Milano 1935) 85-116; Pio Fedele, 'Considerazioni sull'efficacia dei patti nudi nel diritto canonico', *Annali dell'Università di Macerata* 11 (1937) 115-200; Raoul Naz, *Pacte*, DDC 6.1181-1184; Alfred Söllner, 'Die causa im Kondiktionen- und Vertragsrecht des Mittelalters bei den Glossatoren, Kommentatoren und Kanonisten', ZRG Rom. Abt. 77 (1960) 240-259; Piero Bellini, *L'obbligazione da promessa con oggetto temporale nel sistema canonistico classico: Con particolare riferimento ai secoli XII e XIII* (Milano 1964); Klaus-Peter Nanz, *Die Entstehung des allgemeinen Vertragsbegriffs im 16. bis 18. Jahrhundert* (München 1985) 46-56; Zimmermann, *Law of Obligations* 542-544; Peter Landau, 'Pacta sunt servanda: Zu den kanonistischen Grundlagen des Privatautonomie', *Ins Wasser geworfen und Ozeane durchquert: Festschrift für Knut Wolfgang Nörr*, ed. Mario Ascheri et al. (Köln-Weimar-Wien 2003) 457-474; reprinted in *Europäische Rechtsgeschichte und kanonisches Recht im Mittelalter: Ausgewählte Aufsätze aus den Jahren 1967 bis 2006 mit Addenda des Autors und Register versuchen* (Badenweiler 2013) 761-780; Fabio Scigliano, 'Spunti per una riconsiderazione del principio canonistico ex nudo pacto oritur actio', *Studi Urbinati, A - Scienze giuridiche, politiche ed economiche* 58 (2007) 123-155; Wim Decock, *Theologians and Contract Law: The Moral Transformation of the Ius Commune (ca. 1500-1650)* (Leiden-Boston 2013) 122-130; Полдников, *Формирование учения о договоре* 71-97, 154-168, 200-219; Dmitry Poldnikov, 'Origins of General Concept of Contract in Western European Legal Science (12th through 16th Centuries)', *Journal on European History of Law* 7 (2016) 53-59; Agnieszka Kacprzak, 'La regola 'pacta sunt servanda' e la nascita della libertà contrattuale', *Zeszyty Prawnicze* 19 (2019) 203-240; Alexandrowicz, *Kanonistyczne uzasadnienie* 23-98.

contract.[6] Peter Landau even claimed that 1188 was the year of birth of 'pacta sunt servanda', as presumably in this year two canonists, Bernardus Papiensis and Huguccio, produced their works which were crucial for later canonical developments in the field of contract law.[7] This statement seems to be slightly too clear-cut, as generations of canonists were required to consolidate this new approach. The crucial point which eased the departure of canonists from Roman principles were the sources they had at hand. The ancient canons of local councils from Spain and Carthage, the excerpts of the writings of the Church Fathers and the ancient and medieval papal letters, all furnished canonists with a multitude of source texts linked to the Christian principles demanding avoidance of lies and perjury and keeping one's promises. The canonists left behind the formal requirements of Roman law necessary for establishing valid contracts and used the concept of 'causa' to secure the protection of the parties to informal agreements, at least at the ecclesiastical forum. The canonists extended the moral obligation to fulfil one's promises and avoid lies to the juridical obligation to keep agreements which were lacking in formality but contained the necessary cause. Obviously, there were some points of contention between the scholars, but they did not centre on the justification of the new approach to contract law but rather on the practical tools which should be applied to assure its implementation. Somewhere between the second half of the twelfth century and the second half of the thirteenth century within canon law jurisprudence the doctrine which we may call contractual freedom was developed, as at this time the textual sources of the new approach and legal conceptualisation built on their authority were already established.

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[6] See e.g. Henri Roland, Laurent Boyer, *Adages du droit français* (Lyon 1986) no.199, 716; Richard H. Helmholz, 'Contracts and the Canon Law', *Towards a General Law Of Contract*, ed. John Barton (Berlin 1990) 50; Anthony Jeremy, 'Pacta sunt servanda: The Influence of Canon Law upon the Development of Contractual Obligations', *Law & Justice: Christian Law Review* 144 (2000) 4; Jean-Philippe Lévy, André Castaldo, *Histoire du droit civil* (Paris 2010) 814.

[7] Cf. Landau, 'Pacta sunt servanda' 467.

The formula: From Pax servetur, 'pacta' custodiantur to the 'pacta' maxim

The canon law jurisprudence developed a new approach to contract law which was encapsulated in the phrase 'pacta sunt servanda'. Let us now examine how this particular phrase was introduced within medieval jurisprudence and how these words became the standard adage expressing contractual freedom in the Western legal tradition.

First, we can note that linguistically similar phrases were present in ancient Roman law (the famous declaration from the praetor's edict: 'pacta conventa . . . servabo'[8]) and in Roman literature (e.g. Cicero's words: 'pacta et promissa semperne servanda sint'[9]), but it is established that the Romans did not elaborate this maxim, nor did they develop the freedom of contract in its modern meaning, i.e. the general theory of contract and the principle of actionability of all agreements. For this reason, we should not automatically link similar phrases, or even phrases that contain the 'pacta' maxim of medieval civil lawyers verbatim, with the concept of contractual freedom as they appeared within the framework of Roman law. However, the writings of these lawyers should not be overlooked, as their adherence to Roman principles did not entail that their writings lack novelty. We can mention one example, namely the work of Pierre de Belleperche, who provided the readers of his *Lectura Institutionum* with the phrase 'pacta sunt servanda'.[10] He used it in the passage dedicated to the contract of sale (Facit lex quae dicit quod pacta sunt servanda), and in response to the arguments of Placentinus and Jacques de Révigny (Ad primum in quo dicit quod pacta sunt servanda, responde),[11] and in a reference to the natural law on agreements (nihil tam naturale est quam pacta servare).[12]

[8] Dig. 2,14,7,7.
[9] Cicero, *De officiis* 3.24.92; see also Cicerco, *De officiis* 1.10.32.
[10] Cf. Domingo, Ortega, Rodríguez-Antolín, Zambrana, *Principios de Derecho Global*, no.725, 225-226.
[11] Petrus de Bella Pertica, *Lectura Institutionum* (Lugduni 1536) lib. 3 § *De his autem quae scripta* (sic), no.4-5, 295-296.
[12] Ibid. lib. 1, § *ius naturale*, no.3, 66.

Nevertheless, it should be mentioned that some authors link the 'pacta' maxim with Roman law in general, and leave aside the contribution of later jurisprudence (canon law included).[13]

It is a popular approach to connect this phrase with the school of natural law from the early-modern period. However, Hugo Grotius arguably did not use these words and it was only Samuel Pufendorf who proclaimed this maxim.[14] He entitled 'pacta servanda sunt' one of the paragraphs of his *De iure naturae et gentium* dedicated to 'fides'.[15] Still, the word order was not exactly the same as that commonly adopted today and he did not refer to these words as a rule of law—they rather served him only as a title for a couple of pages. Even later the significance and popularity of the 'pacta' maxim grew rather slowly.

The credit for the introduction of 'pacta sunt servanda' into the Western legal vocabulary go to the late medieval canon law jurisprudence.[16] The doctrine of the actionability of all agreements was shaped by canonists on the margin of the first *capitulum* of the title *De pactis* from *Liber extra*, i.e. c.*Antigonus* (X 1.35.1). This ancient decision from the council of Carthage in 348 was first introduced to late medieval canon law by Bernardus Papiensis in his *Breviarium extravagantium* (*Compilatio prima* 1.26.1). The dispute between bishops was settled by the conciliar fathers with a catchy adage: 'Pax servetur, pacta custodiantur'. This is presumably the deepest root of the 'pacta' maxim as it touches two important linguistic elements (pacta and servo, similar to the

[13] See e.g. Fernando Reinoso-Barbero, 'Paroemia et regulae iuris romanorum: Desde el ius commune a la jurisprudencia de la Unión Europea', *GLOSSAE: European Journal of Legal History* 13 (2006) 615-616.

[14] The closest phrase was probably 'promissa servanda'. Cf. Hugo Grotius, *De iure belli ac pacis libri tres, in quibus ius naturae et gentium, item ius publici praecipua explicantur* (Amsterdami 1646) lib. 2, cap. 11, no.1, 219-220.

[15] Samuel Pufendorf, *De iure naturae et gentium libri octo* (Londini Scanorum 1672) lib. 3, cap. 4, no.2, 309, 311. Cf. Richard Hyland, 'Pacta Sunt Servanda: A Meditation', *Virginia Journal of International Law* 34 (1993-1994) 421-426.

[16] Helmut Coing, 'Common Law and Civil Law in the Development of European Civilization-Possibilities of Comparisons', *Englische und Kontinentale Rechtsgeschichte: Ein Forschungsprojekt*, edd. Helmut Coing, Knut Wolfgang Nörr (Berlin 1985) 36; Helmut Coing, 'Kanonisches Recht und Ius Commune', *Proceedings Berkeley 1980* 510, 513-514.

praetor's words).[17] It lacks, however, the third significant linguistic attribute, i.e. 'gerundivum'.[18] This sentence was rediscovered only in the late Middle Ages ca. 1190 by Bernardus, therefore this date is an initial point in the search for the late medieval origin of the 'pacta' maxim. Nonetheless, one caveat should be added—since the scope of the source material of late medieval canon law jurisprudence is very broad, the following arguments are by no means definitive or unmistakable, as the research focused on most influential canonists and the passages of their works which were typical 'sedes materiae' of contract law.

Tancredus was presumably the first to use phrases which eventually led to the formulation of the 'pacta' maxim. He supported the theological argument first developed by Huguccio, with the statement 'mortaliter peccet non servando pactum'.[19] From the linguistic point of view we should note that he used here 'gerundium' instead of 'gerundivum' and the expression was built on negation. It was more a warning for a party breaking the contract, rather than a general incentive to keep contracts. At another point he noted 'pacta legitima custodienda',[20] which also resembles the 'pacta' maxim. Consequently, these two phrases were repeated and petrified in *Glossa ordinaria*. Bernard of Parma reiterated Tancredus' gloss—as he often did—and stated that 'mortaliter peccat recedendo a pacto' and 'pacta legitima custodiantur'.[21] It seems that these statements naturally grew from the junction of the praetor's declaration and the Carthage council's ruling.

Alongside these words from the Gloss, many canonists came close to the 'pacta' maxim in their commentaries to c.*Antigonus*.

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[17] Cf. Landau, 'Pacta sunt servanda' 458.

[18] On the role of 'gerundivum' and Carthage as a place of faithlessness both in case of council of 348 and in the famous words of Cato see an original approach in Hyland, 'Pacta Sunt Servanda'.

[19] Tancred, 1 Comp. 1.26.1=X 1.35.1, Vatican Borgh. 264, fol.12rb, s.v. *contra pacis placita*.

[20] Ibid. fol.12va, s.v. *pacta custodiantur*.

[21] Bernardus Parmensis, *Glossa ordinaria* (Romae 1582), X 1.35.1 s.v. *pacta custodiantur*.

As far as the thirteenth century is concerned, two relevant jurists should be mentioned. Firstly, Goffredus de Trano wrote:[22]

> omne pactum quod servatum non exigit animae detrimentum servandum est ut dicimus in iuramento.

Interestingly, the phrase again expressed the eschatological consequences of the moral-theological sanction for breaching an agreement. Goffredus' words, in an abridged form, are as follows: 'omne pactum . . . servandum est'—which means that here only 'numerus pluralis' was lacking from the 'pacta' maxim we are looking for. Even closer was Hostiensis, who in various places expressed an idea similar to the one hidden behind the 'pacta' maxim. The most important were not the examples from *Lectura* to c.*Antigonus* but rather his comments on X 1.43.9, where he wrote: 'pacta quantumcunque etiam nuda secundum veritatem evangelii sunt servanda'.[23] In this slightly different context, i.e. discussing the role of the Scripture and Christian morals in favour of the actionability of all agreements, we may say that he indeed claimed that 'pacta . . . sunt servanda'. The last step was therefore to express the maxim more briefly as a general opinion.

Despite the fact that many canonists referred to the principle of actionability of all agreements when discussing c.*Antigonus*, they did not regularly make use of similar phrases. An example of yet another expression close to the 'pacta' maxim worth mentioning is found in the words of Johannes Andreae who in the mid-fourteenth century abbreviated the opinion of the ordinary gloss and wrote: 'nota pacta servanda'.[24] This was particularly important for two reasons. Firstly, his *Novella* was a very influential work, so we can assume that such a formula proposed by Johannes was eagerly reiterated by the later canonists. Secondly, in the sixteenth century at the latest, passages from *Novella* were added to printed *Glossa ordinaria* as a concise supplement or elucidation. One early example of such a practice

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[22] Goffredus de Trano, *Summa super titulis Decretalium* (Lugduni 1519) ad X 1.35 fol.61ra, no.9.

[23] Hostiensis, *Lectura* (Argentini 1512) X 1.43.9 fol.114vb, s.v. *indistincte*. For more excerpts from Hostiensis see Hyland, 'Pacta Sunt Servanda' 416-419.

[24] Johannes Andreae, *Novella* (Venetiis 1612) X 1.35.1 fol.272va no.6.

was the inclusion of the words 'pacta servanda' on the margin of *Liber extra*, between the 'summarium' of the ordinary gloss and its contents in the edition of Paris 1511.[25] The more recognized approach put the words of Johannes on the margin between the 'casus' and 'glossa', as was done e.g. in *Editio Romana* from 1582. The words 'pacta servanda' were therefore known from the mid-fourteenth century as an epitome of the gloss, and at least from the sixteenth century they served as an abbreviated description of the gloss to c.*Antigonus*.

We may, for example, add to Johannes words taken from Henricus Bohicus (tale pactum . . . nullatenus est servandum)[26] or from Baldus' commentary (pactum est omnino servandum), however in the latter 'pactum' meant 'pactum vestitum' by the sanction of canon law.[27] These were phrases that were only accidentally close to the 'pacta' maxim and it seems that the fourteenth-century canonists did not reach it. In the jurisprudence from the threshold of the fifteenth century, phrases close to the 'pacta' maxim appeared regularly. Petrus de Ancharano, while referring to the opinion of the gloss, wrote 'pacta sint servanda' and 'pacta regulariter sunt servanda'.[28] Thus, here again the abbreviation of doctrinal consensus created the opportunity for composing some catchy adages. Franciscus Zabarella was further from the 'pacta' maxim; the closest he came was probably in these

[25] Edd. Lodovico Bolognini, Jean Chappuis, Thielman Kerver, Jean Petit, Jean Cabiller.

[26] Henricus Bohicus, *Commentaria* (Venetiis 1576) X 1.35.8 fol.146, no.11: 'Si secundo modo, scilicet, quin pactum est turpe ex parte utriusque, scilicet, tam stipulantis seu recipientis, quam etiam ex parte promittentis seu praestantis, tunc tale pactum (etiam si iuramentum interveniat) nullatenus est servandum'.

[27] Baldus de Ubaldis, *Ad tres priores libros Decretalium Commentaria* (Augustae Taurinorum 1578) X 1.35.1 fol.122ra, s.v. *pacta custodiantur*, no.5: 'Sed ubi habet causam extrinsecam, ut liberalitatis, pacis et concordiae, tunc pactum est omnino servandum ut hic propterea istud non est pactum nudum, sed vestitum roborae canonicae sanctionis, unde tu canonista addis ad vestimenta pactorum unum vestimentum quod appellatur vestimentum roboris'.

[28] Petrus de Ancharano, *Commentaria* (Bononiae 1581) X 1.35.1 fol.315-316, no.3-4.

words from his commentary: 'pactum quoddam licitum et servandum sive sit iuramentum sive non'.[29]

The search carried out indicates that the exact words of the 'pacta' maxim were written for the first time by Antonius de Butrio. He began his commentary with a short summary of the contents of the chapter, which was his standard approach and the typical organisation of commentary to the legal sources.[30] The words opening his commentary to c.*Antigonus* were none other than 'pacta sunt servanda'. In his view, they were the most adequate summary of the 'ratio' of the conciliar canon. To them he added *h.d.* (*hoc dicit*) which introduces the observation that this formula was expressed by Antigonus and accepted by the council.[31] Thus, again the abbreviation of doctrinal consent to the actionability of naked agreements created the opportunity for coining this adage. It is acknowledged that Antonius' *Commentaria* were being written ca. between 1389 and 1408, i.e. between the beginning of his lectures on decretal law up till his death[32]. For this reason, we can assume that 'terminus ante quem' of the first occurrence of the maxim 'pacta sunt servanda' within canon law is 1408.

Obviously, the bare fact that Antonius put these particular three words in a row does not indicate any kind of doctrinal turning point. It was just another little contribution to the already established and mature canonical doctrine. However, from our point of view it was not without iconic significance. To show that

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[29] Franciscus Zabarella, *Lectura* (Lugduni 1558) *ad rubricam* X 1.35 fol.296rb: 'Est autem duplex pactum quoddam licitum et servandum sive sit iuramentum sive non . . . quoddam illicitum et non servandum'.

[30] Andrea Errera, 'Alle origini della scuola del commento: Le additiones all'apparato accursiano', *Studi di storia del diritto medioevale e moderno*, ed. Filippo Liotta, 2 (Bologna 2007) 93-10; Andrea Padovani, 'Tenebo hunc ordinem: Metodo e struttura della lezione nei giuristi medievali (secoli XII-XIV)', TRG 79 (2011) 380-382.

[31] Antonius de Butrio, *Commentaria* (Venetiae 1578) X 1.35.1 fol.94rb: 'Pacta sunt servanda. h.d. primo ponitur perfectum dictum Antigoni. Secundo ibi: universi illius dicti per concilium approbatio'.

[32] Cf. e.g. Orazio Condorelli, 'Antonio da Budrio', DGI 1.80-83; Orazio Condorelli, 'Antonio da Budrio e le dottrine conciliari al tempo del concilio di Pisa', RIDC 27 (2016) 82-86.

it was indeed not seen by the canonists themselves as any breakthrough, we can just take a look at slightly later 'summaria' to notice other phrases resembling the 'pacta' maxim. Johannes de Imola placed the exact maxim within a longer sentence (Pax et 'pacta sunt servanda' alias quis potest excommunicari. h.d.[33]) and Panormitanus gave it a slightly longer form (Pacta quantumcunque nuda servanda sunt), which was important for another reason discussed below.[34] It seems that many similar phrases were developed by later canonists but they did not assign a value of *Regula iuris* to the 'pacta' maxim itself. For them this adage and similar ones were simply the most adequate summary of the canonical doctrine of the actionability of all agreements which grew from the interpretation of c.*Antigonus*.

An additional inquiry should be mentioned here as it seems justified to search for summarizing formulas of this kind in works dedicated to extracting the essence from the legal sources. The texts which may be labelled as 'pragmatic writings', like abbreviations, epitomes, manuals for the confessors, etc. may prove helpful in the investigation of the origins of the 'pacta' maxim[35]. However, 'abbreviationes' to the Decretals were not very popular[36] and it seems unlikely that in works of this kind we can find brief formulations of the maxim, as is proved e.g. by the examination of the exemplary leading pragmatic writings of

[33] Johannes de Imola, *Commentaria* (Lugduni 1547) X 1.35.1 fol.232rb.
[34] Nicolaus de Tudeschis, *Commentaria* (Venetiis 1591) X 1.35.1 fol.137vb, no.1.
[35] See Christoph H.F. Meyer, 'Putting Roman and Canon Law in a Nutshell: Developments in the Epitomisation of Legal Texts between Late Antiquity and the Early Modern Period', *Knowledge of the Pragmatici: Legal and Moral Theological Literature and the Formation of Early Modern Ibero-America*, ed. Thomas Duve, Otto Danwerth (Leiden 2020) 40-88; Christoph H.F. Meyer, 'Römisches und kanonisches Recht kurz und bündig: Zur Epitomierung lateinischer Rechtstexte zwischen Spätantike und Moderne', *Rechtsgeschichte - Legal History* 28 (2020) 31-66.
[36] See Kuttner, *Repertorium* 434; Meyer, 'Römisches und kanonisches Recht' 41.

Bernardus Parmensis,[37] Gulielmus Durandus,[38] Angelus Carletus de Clavasio.[39]

'Summarium' to X 1.35.1: the dissemination of the 'pacta' maxim

One of the important factors that strengthened the influence of late medieval canonists' doctrine, which was encapsulated in the 'pacta' maxim, was the 'summarium' of c.*Antigonus* in *Liber extra*, which states: 'pacta quantumcunque nuda servanda sunt'. What is more, the significance of this factor is commonly overrated as it is often erroneously claimed that the year 1234, i.e. the year of promulgation of the Decretals, was the year when the 'pacta' maxim was first introduced into the Western legal tradition[40]. Not only did *Liber extra* not contain the literal expression of this adage, but more importantly there were no 'summaria' in the work as it was prepared by Raymond of Peñafort. Hence, there are two points that require clarification. Firstly, when were the actual 'summaria' incorporated to the Decretals? Secondly, what was the origin of the 'summarium' to c.*Antigonus*?

The canonists' formulations that came close to the 'pacta' maxim would probably not have gained much significance if they had not been petrified in the 'summaria' to the *Decretals*. The short summaries to each chapter of the compilation were firstly selected by the editors and printers of the late fifteenth century incunabula to attract buyers.[41] This novelty rapidly became a

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[37] Bernardus Parmensis, *Casus longi* (Lovanii 1484) X 1.35.1 sine numero: 'Nota quod pacta servari debent'.

[38] Guillelmus Durandus, *Repertorium aureum iuris canonici* (Rome 1474) De pactis rubrica sine numero.

[39] Angelus Carletus de Clavasio, *Summa Angelica de casibus conscientialibus*, (vol. 2; Venetiis 1578) s.v. *pactum*, p.202 no.4: 'si non habuit animum obligandi non tenetur sub poena mortalis pecati ad pactum nudum servandum, nisi subesset causa quae ad hoc obligaret de necessitate praecepti'.

[40] Cf. e.g. *Lateinische Rechtsregeln und Rechtssprichwörter*, ed. Detlef Liebs (München 1983) 150; Zimmermann, *The Law of Obligations* 543; Kacprzak, 'La regola 'pacta sunt servanda'' 204.

[41] See Piotr Alexandrowicz, 'The History and Normative Significance of 'summaria' in Liber extra' (forthcoming).

standard fashion for printing the Decretals. There were at least two editions of printed 'summaria': the edition of Girolamo Chiari of 1489 (Battista Torti, Venice) and the edition of Jean Chappuis of 1501 (Ulrich Gering, Berthold Rembolt, Paris). They served as a source of 'summaria' for various other editions of Liber extra. However, in both of them the 'summarium' to X 1.35.1 was the same: 'pacta quantumcunque nuda servanda sunt'[42]. From 1489 onwards, 'summaria' were added to the Decretals (thanks to the innovation of Girolamo Chiari), and in particular from this moment onwards this 'summarium' to c.*Antigonus* was also regularly repeated.

The scarce literature on 'summaria'[43] indicates that there were several authors whose works were most often used by the editors as a source for summaries to *Corpus Iuris Canonici*: Bernardus de Montemirato (Abbas antiquus), Johannes Andreae, Antonius de Butrio, Domenicus de Sancto Geminiano and Nicolaus de Tudeschis (Panormitanus). These authors usually began their commentaries with a presentation of the case which stood behind the canon (casus brevis or casus longus). Initially these were separate genres of legal literature, but later they were incorporated to the more complex ones, such as commentaries. The 'summarium' to c.*Antigonus* was not arranged by the editor or

[42] Landau, 'Pacta sunt servanda' 458 noted only generally that 'Im Liber Extra wurde das Kapitel daher von der späteren Kanonistik mit der Rubrik "Pacta quantumcumque nuda servanda sunt" versehen'. It seems, however, that this phrase is not a *rubrica* to X 1.35.1 but rather 'summarium'.

[43] Anacletus Reiffenstuel, *Ius canonicum universum clara methodo iuxta titulos quinque librorum Decretalium in quaestiones distributum, solidisque responsionibus, et de obiectionum solutionibus dilucidatum*, (6 vol. Venetiis 1735) *Prooemium* 1.15, § 6 no.106-107; Georg Phillips, *Kirchenrecht*, vol. 4 (7 vol. Regensburg 1851) 4.427-428; Johann Friedrich von Schulte, *Die Lehre von den Quellen des katholischen Kirchenrechts: mit vorzüglicher Berücksichtigung der Rechtsentwicklung in den dt. Bundesstaaten* (Giessen 1860) 360-361; Schulte, *Quellen* 2.24; Franciscus Laurin, *Introductio in Corpus Iuris Canonici cum appendice brevem introductionem in Corpus Iuris Civilis continente* (Friburgi Brisgoviae et Vindobonae 1889) § 93, 159-160; Alphonse van Hove, *Prolegomena* 360; Alfons M. Stickler, *Historia* 248. For the literature overview see Alexandrowicz, 'History and Normative Significance'.

publisher but it was taken from the available literature, usually from 'casus breves' or the other initial remarks of renowned canonists. Abbas Antiquus did not provide any note of this kind[44] and Domenicus was an important source of 'summaria' to *Liber Sextus* not to the *Liber extra*. The remaining three authors offered different initial remarks on c.*Antigonus*:

> Johannes Andreae:[45] Se summat et divisio patet.
>
> Antonius de Butrio:[46] 'pacta sunt servanda'. h.d. Primo ponitur perfectum dictum Antigoni. Secundo ibi: universi illius dicti per concilium approbatio.
>
> Panormitanus:[47] Potest primo generaliter summari sic. Pacta quantumcunque nuda servanda sunt. Vel aliter sic. Iudex ecclesiasticus provides servanti pactum contra non servantem. Dividitur. Nam primo ponitur dictum Antigoni episcopi. Secundo approbatio Concilii, ibi, dixerunt universi.

The 'summarium' to X 1.35.1 was taken directly from Panormitanus where it was part of his summary of the canon from Carthage (the remaining part of his summary was also often reiterated, e.g. in *Editio Romana* before the gloss)[48]. It seems that while writing these words, Panormitanus possibly had at hand Hostiensis' *Lectura* on X 1.43.9, where Henricus de Segusio wrote: 'pacta quantumcunque etiam nuda secundum veritatem evangelii sunt servanda' (the passage has been discussed above).[49]

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[44] Bernardus de Montemirato, *Super quinque libris Decretalium lectura aurea certe ac brevi resolutione iuris ambagens enodans*, in: *Perillustrium doctorum tam veterum quam recentiorum in libros Decretalium aurei commentarii* (Venetiis 1588) X 1.35.1 fol.46va.

[45] Johannes Andreae, *Novella* (Venetiis 1612) X 1.35.1 fol.272va.

[46] Antonius de Butrio, *Commentaria* (Venetiae 1578) X 1.35.1 fol.94rb.

[47] Nicolaus de Tudeschis, *Commentaria* (Venetiis 1591) X 1.35.1 fol.137vb, no.1.

[48] In consequence it proves that Hyland was wrong in linking the source of 'summarium' with Hostiensis (still, he very accurately linked the addition of 'summaria' with late fifteenth-century printed editions of the Decretals); Hyland, 'Pacta Sunt Servanda' 416.

[49] *Lectura* (Argentini 1512) X 1.43.9 fol.114vb, s.v. *indistincte*.

Therefore, we may add to the timeline of the dissemination of the 'pacta' maxim the date 1436, i.e. presumably *terminus ante quem* Panormitanus finished his *Lectura* on the Decretals.[50] Several decades later his summary became the source of the 'summarium' to c.*Antigonus*, which served for centuries as a brief presentation of the attitude of canon law towards all agreements and supported the growth of the popularity of the 'pacta' maxim. All the relevant printed editions of *Liber extra* contained this 'summarium' (with a minor exception of the edition of Emanuel González Téllez who did not include 'summaria' in his work) and it is very likely that for many authors who were not canon law experts this brief sentence served as the most relevant source of knowledge on the canon law doctrine of the actionability of all agreements.

This case study also proves that 'summaria' are a valuable source of information on the history of canon law jurisprudence. Scholars attribute to 'summaria' four functions: normative, interpretative, didactic and epistemic.[51] Therefore we may claim that this 'summarium' provided the adequate description of c.*Antigonus* (normative function). The general provisions of this chapter should be read as a legal basis for protecting the parties of informal agreements (interpretative function). This 'summarium' serves also as a tool for easy comprehension of the 'ratio' of X 1.35.1 (didactic function) and proves that at the end of fifteenth century the doctrine of the actionability of all agreements was commonly accepted among canonists and that c.*Antigonus* served as its main source (epistemic function).

Conclusions

There are two main conclusions resulting from this short investigation. Firstly, 'pacta sunt servanda' appeared in canon law jurisprudence in its exact form for the first time in the *Commentaria* of Antonius de Butrio. However, it did not carry the

[50] Kenneth Pennington, 'Nicholaus de Tudeschis (Panormitanus)', *Niccolò Tedeschi (Abbas Panormitanus) e i suoi Commentaria in Decretales*, ed. Orazio Condorelli (Roma 2000) 9-36.
[51] See Alexandrowicz, 'History and Normative Significance'.

weight indicating that this maxim should be understood as a rule of law. Both earlier and later canonists used very similar phrases to express the core message of canonical doctrine, therefore we can see the first use of the 'pacta' maxim as an expression of established jurisprudential consensus regarding the duty to keep agreements. Secondly, the other important indicator of this consensus was the addition of the 'summarium' to c.*Antigonus*: 'pacta quantumcunque nuda servanda sunt'. The original author of this sentence was Panormitanus (inspired by Hostiensis) and as a 'summarium' it was first introduced in print in 1489, and later continuously repeated. We may again emphasize that in the modern era the 'pacta' maxim slowly gained popularity as a rule of law, but tracing the whole career of these three words and identification of rationales behind their popularity demands a separate study.

More importantly, it seems justified to attribute the authorship of the 'pacta sunt servanda' maxim completely to the late medieval canon law jurisprudence. Despite the fact that it first appeared around the fourteenth and fifteenth centuries, the idea that supported this maxim had been present in canonical doctrine as early as in the second half of the thirteenth century. What Antonius de Butrio did was not to proclaim a new *Regula iuris* but rather a new, fresh, short and catchy encapsulation of the established doctrine. What supports this claim is the fact that over centuries hardly anyone linked Antonius with the 'pacta' maxim. Only the constant reiteration of these words resulted in their promotion to one of the foremost principles of Western law and this, by no means, happened in medieval jurisprudence. The fact that similar phrases were present in ancient Roman law or in the writings of civil lawyers of the late Middle Ages does not indicate that the concept of contractual freedom was present there. For this reason, the origin of the 'pacta' maxim should be linked with the late medieval canon law jurisprudence.

Finally, just as we do not hesitate to state that 'the canonists discovered the freedom of contract' (keeping in mind, of course, that this statement always requires a series of addenda), we can admit that 'the canonists formulated the 'pacta sunt servanda'

maxim'. In both cases these legal discoveries or developments resulted from the work of generations of canonists, even if we may sometimes identify the precise authors of particular milestones. The acknowledgement of canonists' achievements is not hindered by the fact that today contractual freedom and the 'pacta' maxim are understood in a very different way.

Poznań.

‘They Should be Decapitated’: The *Glossa ordinaria* to X 5.6 and 3.33 on Jews and Saracens

Yanchen Liu

Introduction

In the beginning of his book, *Foreigners and Their Food: Constructing Otherness in Jewish, Christian, and Islamic Law*, David Freidenreich invokes a hypothetical scenario in which two Christian clergymen, a rabbi, and a Sunni/Shi’i imam walk into a restaurant.[1] Until recently an inconceivable scenario, as the author himself points out, it nonetheless is an interesting introduction to his historical study of dietary norms within these religious traditions. Indeed, as Freidenreich shows, the permission or prohibition of interreligious commensality (the sharing of a meal) is a topic that attracts not only modern readers but also drew the attention of ancient and medieval religious authorities and intellectuals. This article, however, will demonstrate that this issue, however interesting, is not a central concern in the *Decretales Gregorii IX* (hereafter *Decretales*) and its *Glossa ordinaria* (hereafter *Glossa*). In the eyes of the thirteenth-century institutional Church and especially its legal scholars, commensality, within the frame work of Christian, Jewish, Muslim relations, was less important than other legal subjects.

This article discusses selected glosses from Bernard of Parma’s *Glossa ordinaria* (hereafter *Glossa*) on two titles in Pope Gregory IX’ *Decretales*: *De iudaeis, sarracenis, et eorum servis* (X 5.6) and *De conversione infidelium* (X 3.33). My analysis, on one hand, explores the main concerns of the *Glossa* as a key legal-educational text treating Jews and Muslims in the thirteenth-century legal landscape.[2] On the other hand, I investigate how the

[1] David M. Freidenreich, *Foreigners and Their Food: Constructing Otherness in Jewish, Christian, and Islamic Law* (Berkeley 2011) 3.

[2] Scholarly literature on medieval non-Christians from the legislative perspective is abundant. See the bibliography in Christoph H. F. Meyer, ‘Non-Christians in the Normative Culture of the Catholic Church between Antiquity

Glossa forms and conveys its judicial thinking about these marginal non-Christian groups not only through its comments but also its carefully selected Romano-canonical allegations.

To trace the development of judicial thoughts in the *Glossa*, this article will use selected medieval manuscripts to establish the base text for examination.[3] The fact that Bernard continued to work on the *Glossa* from its first publication was noticed as early as Johannes Andreae (†1348), and mentioned by premodern scholars including Guido Panciroli, Mauro Sarti, and Ireneo Affò. However, it was not until 1945 that Stephan Kuttner and Beryl Smalley—through examining thirty Vatican manuscripts of the *Glossa* and Oxford Bodleian lat. th. b. 4, the earliest dated manuscript (1241) known to that point—mapped out an influential

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and the Modern Era: A Select Bibliography', *Max Planck Institute for European Legal History Research Paper Series*, no. 2020-15 (Frankfurt am Main 2020). To this bibliography one may add Mark R. Cohen, *Under Crescent and Cross: The Jews in the Middle Ages* (2nd ed. Princeton 2008); Freidenreich, *Foreigners and Their Food*; David Nirenberg, *Communities of Violence: Persecution of Minorities in the Middle Ages* (Princeton 1996). Christoph Meyer has also recently produced an overview of non-Christians in the history of canon law, see Christoph H. F. Meyer, 'Nichtchristen in der Geschichte des kanonischen Rechts: Beobachtungen zu Entwicklung und Problemen der Forschung', *Rechtsgeschichte-Legal History* 26 (2018) 139-60. Besides this overview, three relevant articles that particularly discuss Jews and/or Muslims in the *Decretales* should be noted: Stefan K. Stantchev, '"Apply to Muslims What Was Said of the Jews:" Popes and Canonists Between a Taxonomy of Otherness and *Infidelitas*', *Legal History Review* 32 (2014) 65-96; David M. Freidenreich, 'Muslims in Western Canon Law, 1000-1500', *Christian-Muslim Relations: A Bibliographical History* (The History of Christian-Muslim Relations 14; Leiden-Boston 2011) 3.41-68; John A. Watt, 'Jews and Christians in the Gregorian Decretals', SCH 29 (1992) 93-105.

[3] No print editions preserved the *Glossa* as it existed in thirteenth- and early fourteenth-century manuscripts, not to mention the traces of Bernard's gradual additions to it over more than twenty years from (at least) 1239 to 1263 or even 1266. The 1582 *Editio Romana* provides by far the most accessible text of the *Glossa* for scholars. However, the *glossae* thus printed was a product of nearly 350 years of additions and alterations to the texts composed by Bernard, and thus contains layers of content that must be treated with caution and separately from Bernard's original composition. See Gabriel Le Bras, "Pour une nouvelle édition de la glose ordinaire des Décrétales de Grégoire IX', RHD 44 (1966) 241.

four-redaction hypothesis: 'first redaction 1234-c. 1241; second 1243-1245; third 1245-c. 1253; final 1263-1266'.[4] Using the markers of dates employed by Kuttner and Smalley to establish these redactions, this article has consulted the following manuscripts: Florence, Laur. Plut.3 sin.9 (earliest extant manuscript of the *Glossa*, dated 1239) and Vat. lat. 11158, representing the pre-1243 redaction; Vat. lat. 1365, representing redaction between 1243 and 1245; Vat. lat. 1383, representing redaction between 1245 and 1253; Munich, BSB lat. 26301, representing the redaction between 1263 and 1266. While there are few significant variants among the different redactions of the *Glossa* on X 5.6, a comparison of the redactions on X 3.33.2 demonstrates that the earliest redaction of the *Glossa* has been enlarged at several places to contain more legal allegations and to cover more topics. One of the insertions added between 1243 and 1245, more importantly, adds a new dimension to the original *Glossa*. This will be discussed below in the section on custody of children. The base manuscript used for all the glosses' transcriptions in this essay is Florence, Laur. Plut.3 sin.9. Later additions, when appear, are enclosed by < > and followed by explanations in the footnotes.

Before examining specific glosses, I begin with a brief summary of X 5.6 and X 3.33. It first should be noted that these two titles certainly do not cover all canonical contents concerning

[4] Stephan Kuttner and Beryl Smalley, 'The "*Glossa Ordinaria*" to the Gregorian Decretals', EHR 60 (1945) 101. Strictly speaking, Kuttner and Smalley carefully indicated that 'Bernard, therefore, must have prepared and published *at least* [emphasis added] four versions of his *Ordinaria*'. Ibid, 100. In 2013, Bertram claimed that 'the subdivision of the development of the *Ordinaria* initially proposed by Kuttner and Smalley requires a terminological and factual revision', and that the *Glossa* of Bernard went through so many additions before 1263 that it is unnecessary to pinpoint the stages of its development. See Martin Bertram, *Kanonisten und ihre Texte (1234 bis Mitte 14. Jh.): 18 Aufsätze und 14 Exkurse* (Education and Society in the Middle Ages and Renaissance 43; Leiden 2013) 525: '[d]ie von Kuttner und Smalley zunächst vorgeschlagene Gliederung der Entwicklung der *Ordinaria* erfordert eine zugleich terminologische und sachliche Revision'. However, it should be noted that the chronology given by Kuttner and Smalley still stand and is valuable for charting the evolution of the judicial thinking in the *Glossa*.

Jews and Saracens in the *Decretales*.[5] Treatments of various concerns associated with these groups occasionally appear in other places within the *Decretales*. Such canons include X 4.21.2, where Pope Lucius III warned that Christian wives who have been captured by Saracens should not remarry before their first spouse's death is proven; X 5.17.4, in which Pope Alexander III assigned monetary and caning punishments to Saracens who abduct (rapiunt) Christian women and boys;[6] X 3.30.16 and 5.19.18, both of which require Jews to pay tithes, and others. However, the two titles selected for this article, consisting of 21 canons in total and the accompanying *Glossa*, specifically focus on our subjects.

X 5.6, containing 19 chronologically arranged canons ranging from the late sixth-century Council of Mâcon (581) to Pope Gregory IX's letters, covers a series of topics concerned with Jews, Muslims, and pagans.[7] The two tables below show the canons where these groups and topics are discussed:

Targeted Groups (specifically mentioned)	Canon(s) in X 5.7
Jews only	1, 2, 3, 4, 7, 8, 9, 13, 14, 19
Saracens (Muslims) only	6, 11, 12, 17
Pagans[8] only	10

[5] 'Saracen' and 'Muslim' are used as synonyms in this article. On the historical understanding of the word 'Saracen', see John Tolan, 'Jews and Muslims in Christian Law and History', *The Oxford Handbook of the Abrahamic Religions*, edd. Adam J. Silverstein, Guy G. Stroumsa, and Moshe Blidstein (Oxford-New York 2015) 172-174.

[6] Notably, this canon was later employed by some thirteenth-century inquisitors to justify the use of torture in the prosecution of heresy. See Henry Ansgar Kelly, 'Judicial Torture in Canon Law and Church Tribunals: From Gratian to Galileo', CHR 101 (2015) 782.

[7] A more detailed table of these canons' contents can be found in Stantchev, '"Apply to Muslims What Was Said of the Jews",' 75.

[8] The word 'pagan (paganus)' in X 5.6 can cause confusion, as it denotes different non-Christian groups across these canons. In this table, I have used this word from the canons. However, it should be noted that in X 5.6.10, the word 'pagan' is referring to the northern European, non-Abrahamic religious groups that were the target of the northern/Baltic crusades; in X 5.7.16 and 18, nevertheless, 'pagans' seems to be synonymous with 'Saracens'. The *Glossa* to these canons reflects this flexibility accordingly. On the relationship between the concepts 'Saracens' and 'pagans', see Benjamin Z. Kedar, '*DE IUDEIS ET SARRACENIS*: On the Categorization of Muslims in Medieval Canon Law'

Both Jews and Saracens	5, 15, (and 16 and 18, see note 8)
Both Jews and Pagans	16
Jews, Saracens, and Pagans	18

Themes	Canon(s) in X 5.7
Slaves/servants/serfs/etc.	1, 2, 5, 8, 13, 19
Trading military supplies/equipment/etc.	6, 11, 12, 17
Construction/Renovation of synagogues	3, 7
Holding public office	16, 18
Closing doors/windows on religious holidays	4
Protection of Jews	9
Distinguishing dress	15
Food/commensality	10
Physical attack on clergymen	14

Since the two canons under X 3.33 both treat interreligious marriages between Christians and Jews or Muslims, it is safe to conclude that the ownership and manumission of Christian slaves as well as the commercial relations with Muslim enemies were the major concerns of the *Decretales* regarding non-Christians. The glosses to X 5.7 and 3.33 follow this pattern. However, the ordinary glosses, with their own judicial concerns (that is, differing from those of the canons) expressed through the comments and allegations, also address practical and technical issues not covered by the canons.

In the following sections, I will first analyze how the ways in which the *Glossa* deals with Jews and the Muslims are similar or different. Next, I will show how the *Glossa*, when addressing issues pertaining to the enslavement of non-Christians, brings the

Studia in honorem eminentissimi cardinalis Alphonsi M. Stickler, Rosalio Castillo Lara (Studia et textus historiae iuris canonici 7; Roma 1992) 207-213 (reprinted in B. Z. Kedar, *The Franks in the Levant, 11th to 14th Centuries* (Collected Studies, 423; Aldershot; Brookfield 1993)); John Tolan, *Saracens: Islam in the Medieval European Imagination* (New York 2002) 105-134. David Freidenreich notes that '[t]he equation of Saracens and pagans is commonplace within medieval Christian legal discourse'. Freidenreich, 'Muslims in Western Canon Law, 1000-1500' 43.

discussion into an almost non-religious framework with a central concern for the protection of business interests. Then, focusing on the glosses to a case concerning the custody and conversion of a young Jewish boy, I show that the *Glossa* not only delves into the Roman familial law origin of the canon under discussion, but also extensively employs Roman property law on the matter of custody. Moreover, the *Glossa* also introduces exceptions to the papal decision in the canon, thus in effect at times speaking for the non-Christian side. The final section focuses on how the *Glossa* hides its concerns through deliberately selected allegations from the Romano-canonical traditions rather than through exposition.

From those qui foris sunt to hostes: The Understanding of Jews and Muslims

Unlike the *Glossa ordinaria* to Gratian's *Decretum*, Bernard's *Glossa* does not refer to Jews and Muslims as neighbors, nor does it encourage love or esteem for them.[9] Therefore, in the most general sense, how does the *Glossa* situate Jews and Muslims in the canonical world? To some extent, it reflects the 'conflation of non-Christians' or 'convergence of legal attitudes toward non-Catholics' in the legislative realm, as described in studies by Stefan Stantchev and David Freidenreich.[10] Indeed, some canons in X 5.6 can be interpreted as manifestations of this tendency. Compared with canons X 5.6.1, 2, 8, 13, and 19, which are all primarily concerned with prohibiting Jews from having Christian servants, X 5.6.5 is the first canon in X 5.6 that is concerned with

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[9] *Glos. ord.* to De pen. D. 2 c. 5, s.v. *participes*: 'Ergo Iudei et Sarraceni proximi nostri sunt et diligendi a nobis ut nos, et verum est'. On this gloss see James A. Brundage, 'Intermarriage Between Christians and Jews in Medieval Canon Law', *Jewish History* 3 (1988) 26. For a recent discussion about the treatment of Judaism and Islam in the *Decretum*'s Causa 23, together with the decretists' commentaries on it, see Anna Sapir Abulafia, 'Engagement with Judaism and Islam in Gratian's Causa 23', *Jews and Christians in Medieval Europe: The Historiographical Legacy of Bernhard Blumenkranz*, ed. Philippe Buc et al. (Religion and Law in Medieval Christian and Muslim Societies (RELMIN) 7; Turnhout 2016) 50-53.

[10] See Stantchev, '"Apply to Muslims",' 66 and 71. See also Freidenreich, 'Muslims in Western Canon Law, 1000-1500' 53-60 and 65-68.

'*Iudaei sive Sarraceni'*.[11] Similarly, the Fourth Lateran Council ruling (c. 68) in X 5.6.15, concerning the wearing of distinguishing dress, was addressed to 'Iudaeos seu Sarracenos.'[12] Further, in terms of the prohibition against holding public offices, both X 5.6.16 and 18 point to Jews and Saracens. No canon specifically addresses the distinction between Jews and Muslims.[13]

The *Glossa* in one case also merges ecclesiastical treatments of these two groups. On the above-mentioned X 5.6.5, which begins with an injunction that Jews and Muslims must not keep Christian slaves in their houses,[14] *glos. ord*. s.v. *permittantur* provides a rather comprehensive summary of canonical rulings concerning these non-Christians.

X 5.6.5 *glos. ord*. s.v. *permittantur*

Transcription	Translation
permittantur	*let it be permitted*
Sed quid ad nos de his qui foris sunt: ut ii. q. i. Multi (C.2 q.1 c.18) xlv. di. Qui sincera (D.45 c.3)? Solutio: de hiis qui foris sunt non iudicat ecclesia, ut penam spiritualem intelligat. In casibus tamen iudicat de eis, qui repellit Iudaeos a communione <Christianorum>, [15]	But what is that to us regarding those who are outside [the Church], as [in] ii. q. i. Multi [and] xlv. di. Qui Sincera? Solution: the Church is not judging regarding those who are outside, as it would impose the spiritual penalty. However, in some cases it (i.e. the Church) judges

[11] X 5.6.5: 'Iudaei sive Sarraceni neque sub alendorum puerorum suorum obtentu, nec pro servitio vel alia qualibet causa Christiana mancipia in domibus suis permittantur habere. Excommunicentur autem qui cum eis praesumpserint habitare'.

[12] X 5.6.15: 'In nonnullis provinciis a Christianis Iudaeos seu Sarracenos habitus distinguit diversitas'.

[13] Note that such a canon does exist in Gratian's *Decretum*, i.e., the famous *Dispar nimirum* from Pope Alexander II (C.23 q.8 c.11). This will be discussed below in this article.

[14] X 5.6.5: 'Iudaei sive Sarraceni . . . Christiana manicipia in domibus suis permittantur habere'.

[15] As mentioned above, in this article's transcriptions of the ordinary glosses, texts enclosed in < > are contents that are not found in the earliest manuscript of the *Glossa*, i.e. Florence, BM Laur. Plut.3 sin.9. Here 'Christianorum' is not in this manuscript and Vat. lat. 11158, both of which represent the pre-1243 redaction(s) of the *Glossa* according to Kuttner and Smalley. It appears on Vat.

xxviii. q. i. Sepe (C.28 q.1 c.12), nec ab eis corrumpantur, ut ibi et infra e. ad hoc (X 5.6.8) et hic, repellit enim a legitimis actibus, ii. q. vii. Alieni (C.2 q.7 c.23) et ab officiis publicis. liiii. di. Nulla officia (D.54 c.14) et infra e. Cum sit (X 5.6.16) et c. plt. (X 5.6.18), et ne possint emere Christiana mancipia, infra e. c. ult. (X 5.6.19) et liiii. di. Fraternitatem (D.54 c.15). Item non permittit eos facere novas synagogas. infra e. Consulvit (X 5.6.7). Item quod in diebus lamentationum non exeant in publicum. supra e. c. proxi. (X 5.6.4) et infra e. In nonnullis (X 5.6.15). Item quod solvant decimas de terris <quas colunt. supra de deci. De terris (X 3.30.16)> [16] et ne Christiana mancipia circumcidant. liiii. di. Nulla (D.54 c.14), ne ex testamento Christiani aliquid capiant, et ille Christianus est excommunicandus etiam post mortem. xxiiii. q. ii. Sane profertur (C.24 q.2 c.6), excedentes verberibus subiciuntur. infra de raptoribus. In archiepiscopatu (X 5.17.4). …	concerning them: it excludes Jews from the community <of Christians>, [see] xxviii. q. i. Sepe, lest they [Christians] would be corrupted by them, so that thereupon and [see] infra e. ad hoc and here, for it excludes [them] from legal actions, [see] ii. q. vii. Alieni and from public duties. [See] liiii. di. Nulla officia and infra e. Cum sit and c. plt., and lest they would be able to acquire Christian slaves (mancipia), [see] infra e. c. ult. and liiii. di. Fraternitatem. Likewise, it [the Church] does not permit them to build new synagogues, [see] infra e. Consulvit. Likewise, on the days of lamentation they should not go out in public, [see] supra e. c. proxi. and infra e. In nonnullis. Likewise, they should pay off the tithes from the lands <that they cultivate, [see] supra de deci. De terris>, and they should not circumcise Christian slaves, [see] liiii. di. Nulla, nor should they seize any [property] from the testament of a Christian [with the result that] the Christian will be excommunicated even after death,[17] [see] xxiiii. q. ii. Sane profertur, the transgressors (*excedentes*) are subjected to whipping, [see] infra de raptoribus. In archiepiscopatu. …

Such a summary of Church laws concerning Jews was common among canonistic writings during the twelfth and the thirteenth

lat. 1365, fol.553r, which represents the redaction produced between 1243 and 1245, as well as selected manuscripts representing later redactions and the 1582 *Editio Romana*.

[16] This addition appears in Vat. lat. 11158, but not in Florence, BM Laur. Plut.3 sin.9. It is therefore unclear whether it was simply omitted by the scribe of the latter, or indicates that the latter reflects an even earlier redaction of the *Glossa*.

[17] This is a confusing statement that awaits further investigation. It appears in all selected manuscripts of the *Glossa*, together with the 1582 *Editio Romana*.

centuries.[18] However, one must note that this gloss, commenting on a verb (i.e. permittantur) whose subject is 'Iudaei sive Sarraceni', addresses *both* Jews and Muslims as 'qui foris sunt' (1 Cor. 5:12-13). What follows is a merger of specific canons on either Jews or Muslims, many of which come from X 5.6 itself, into a full set of stipulations. This integration of directives to a large extent turns out to be a somewhat crude application of canonical regulations on Jews to Muslims: they are to be expelled from the Christian community, they cannot take legal actions,[19] hold public offices, own Christian slaves (mancipia), build new synagogues,[20] nor show themselves in public on religious holidays. The transgressors (excedentes) among them will be subject to flogging.

An investigation of the allegations, most of which are aimed at Jews, also reveals the *Glossa*'s reliance on the canonistic tradition concerning Jews. One allegation, however, indicates otherwise. The gloss invokes X 5.17.4, an instruction assigning the punishment of whipping to Muslim 'excedentes'.[21] The application of canons originally concerning Muslims to Jews is rare: indeed, none of the canons from X 5.6 that specifically deal with Muslims are invoked in this gloss. Those canons' central concern is commercial communication with Muslims during times of war. Thus, they were understandably not as relevant to Jews. Under

[18] See Watt, 'Jews and Christians in the Gregorian Decretals', 94 and footnote no. 1.

[19] For a discussion of the concept of 'actus legitimi' in the medieval canonical tradition concerning Jews, and the conflation of heretics and Jews on this restriction, see Walter Pakter, *Medieval Canon Law and the Jews* (Abhandlungen zur rechtswissenschaftlichen Grundlagenforschung 68; Ebelsbach 1988) 201-207.

[20] It is hard to imagine that the glossator would be ignorant of the difference between synagogues and mosques. However, here he did not specify the latter.

[21] X 5.17.4: 'In archiepiscopatu tuo *dicitur contingere* quandoque, *quod* Sarraceni mulieres Christianas et pueros rapiunt, et eis abuti praesumunt, et quosdam etiam, [*quod auditu est terribile*,] interdum occidere non verentur…. *Super quo utique* Consultationi tuae taliter respondemus, quod tales, in iurisdictione tua exsistentes, pecuniaria poteris poena mulctare, et etiam flagellis afficere ea [*tamen*] moderatione adhibita, quod flagella in vindictam sanguinis transire minime videantur'.

such circumstances, the citation of X 5.17.4, in which the 'excedentes' are Saracens who abduct Christian women and boys, may seem surprising. No canon in the *Decretales* nor in Gratian's *Decretum* assigns this punishment to Jews, or even hints at Jews committing such crimes. In fact, Gratian, in one *dictum* citing Paul, specifically rejected the idea of flogging those 'qui foris sunt'.[22] One possible explanation is that the *Glossa* here embodies the anxiety stemming from twelfth- and thirteenth-century blood libel cases, and thus conflates the two groups, subjecting both Muslims and Jews to the same accusation and associated punishment. After all, the *Glossa* appeared during the thirteenth century, a period when Jews were increasingly 'charged with innumerable forms of hostility toward Christianity, Christendom, and individual Christians'.[23]

But importantly, this canonical conflation of laws concerning Muslims and Jews is only one side of the story. Canons in the *Decretales* dealing with the trading of arms or providing military service specifically target Muslims and Christian merchants, while showing no interest in applying similar regulations to Jews.[24] Such differentiation was made visible earlier, in Pope Alexander II's

[22] C.23 q.4 d.p.c.16: 'Sunt quaedam, que salubri tantum ammonitione sunt corripienda non corporalibus flagellis sunt animadvertenda . . . De his, qui non sunt nostri iuris, ait Apostolus in epistola prima ad Corinthios: "Quid enim mihi attinet de his qui foris sunt iudicare? de his enim Dominus iudicabit".' See also Pakter, *Medieval Canon Law and the Jews* 47-48.

[23] Jeremy Cohen, *The Friars and the Jews: The Evolution of Medieval Anti-Judaism* (Ithaca 1982) 244.

[24] It should be noted that the papal prohibition against Christians trading war materials with Muslims would escalate into a full embargo of trading with ports controlled by the Mamluk Sultanate during the next century. Within a decade of Bernard's death, King Jaime I of Aragon was following the papal exhortation and banned, although the embargo not enforced seriously, trading activities with the Mamluk's territories in 1274. Significantly, the Duchy of Candia under the governance of Venice, after issuing a general decree following this papal injunction in 1323, further extended such prohibition to Jewish merchants in the next year. See Olivia Remie Constable, *Trade and Traders in Muslim Spain: The Commercial Realignment of the Iberian Peninsula 900-1500* (Cambridge Studies in Medieval Life and Thought, 4th Series, 24; Cambridge-New York 1994) 257; Eliyahu Ashtor, *Levant Trade in the Later Middle Ages* (Princeton 1983) 13-14 and 44-45.

famous statement *Dispar nimirum* (C.23 q.8 c.11). With the intention of discouraging Christian soldiers from harming Jews,[25] this papal letter argues that Saracens—unlike Jews, who 'are prepared to serve (servire parati sunt)'—persecute Christians. Thus, it is lawful to fight them.[26] More importantly, in line with this canonical tradition, the ordinary glosses to X 5.6 reveal two key differences between Jews and Muslims with respect to their relations with Christians: (1) whether they are considered to be enemies (hostes), and (2) what kind of enemies they are.

The dialectical discussion of whether the Jews are enemies appears in a gloss to another renowned papal statement, *Sicut Iudaei* (X 5.6.9).[27] In this canon, which contains a list of

[25] This relatively protective approach towards Jews in terms of personal safety could be traced back to Romans 11 and, particularly in the Late Antiquity, Augustine of Hippo. A brief discussion of the latter is available in Kristine Utterback, Merrall Price, and Kristine Utterback, *Jews in Medieval Christendom: Slay Them Not* (Études sur le Judaisme medieval 60; Leiden 2013) 1-4.

[26] C.23 q.8 c.11: 'Dispar nimirum est Iudeorum et Sarracenorum causa. In illos enim qui Christianos persecuntur et ex urbibus et propriis sedibus pellunt iuste pugnatur; hii ubique servire parati sunt'. For an influential discussion of the medieval canonistic reception of this canon, together with a translation of this text, see Peter Herde, 'Christians and Saracens at the Time of the Crusades: Some Comments of Contemporary Medieval Canonists', SG 12 (1967) 364-368. See also Anna Sapir Abulafia, 'Engagement with Judaism and Islam in Gratian's *Causa* 23' 50-53. On the historical context of this letter concerning the so-called 'Crusade of Barbastro', see Joseph F. O'Callaghan, *Reconquest and Crusade in Medieval Spain* (The Middle Ages; Philadelphia 2003) 25. See also Henri Gilles, 'Législation et doctrine canoniques sur les Sarrasins', *Islam et chrétiens du Midi: XIIe-XIVe s.* (Toulouse 1983) 197. For an overview of the image of Jews in canonical collections compiled during the late eleventh and early twelfth centuries, especially the unpublished ones, see John Gilchrist, 'The Perception of Jews in the Canon Law in the Period of the First Two Crusades', *Jewish History* 3 (1988) 9-24 (reprinted in John Gilchrist, *Canon law in the Age of Reform, 11th-12th Centuries* (Collected Studies 406; Aldershot-Brookfield 1993) XII.

[27] For a discussion of the development and expansion of this important papal text on Christian-Jewish relations, see Solomon Grayzel, 'The Papal Bull *Sicut Judeis*', *Studies and Essays in Honor of Abraham A. Neuman, President, Dropsie College for Hebrew and Cognate Learning, Philadelphia*, edd. Bernard D. Weinryb, Solomon Zeitlin, Meir Ben-Horin, and Abraham A. Neuman (Leiden 1962) 243-280.

regulations preventing Christians from harassing or harming Jews, Pope Clement III forbade attacks against Jewish cemeteries on pain of excommunication.[28] It is concerning this issue that the *Glossa* contemplates whether Jews should be regarded as 'hostes' of Christians.

X 5.6.9 *glos. ord*. s.v. *coemeterium*

Transcription	Translation
coemeterium Ar. contra. ff. de sepul. vio. Sepulcra (Dig. 47.12.4). Solutio. Sepulcra hostium religiosa non sunt, ut ibi dicitur: nec illud infringens incidit in edictum. Iudaei vero non imputantur hostes, xxiii. q. viii. Dispar (C.23 q.8 c.11), licet sint hostes fidei nostrae, infra e. Etsi Iudaeos (X 5.6.13).	*cemetery* [See] the counterargument in ff. de sepul. vio. Sepulcra. Solution. Graves of enemies are not religious, as it is said [in the allegation]: nor is violating it part of the edict. The Jews, however, are not considered as enemies, [see] xxiii. q. viii. Dispar, even though they are enemies of our faith, [see] infra e. Etsi Iudaeos.

Although the *Glossa* initially invokes here a *lex* from the *Digest*[29]as a counterargument, claiming that enemies' graves *can* be violated, it apparently aims at highlighting a principle: while sanctity determines whether a grave can be legitimately violated, the status of enmity determines the sanctity of the grave. In other words, according to the *Glossa,* the prohibition against attacking a Jewish cemetery ultimately does not derive from the belief that it is religious, but from the understanding that 'Jews . . . are not considered as enemies'. Notably, the support invoked by the gloss

[28] X 5.7.9: 'Ad hoc malorum hominum pravitati et avaritiae obviantes, decernimus, ut nemo coemeterium Iudaeorum mutilare aut invadere audeat, sive obtenptu pecuniae corpora humata effodere'. Such cases might not be uncommon during the early and high Middle Ages. One of Pseudo-Bede's homilies mentions Saint Macarius hitting a skull of a deceased Jew with his cane in a Jewish cemetery. See Bernhard Blumenkranz, *Juifs et chrétiens dans le monde occidental, 430-1096* (Collection de la Revue des Études Juives 41; Paris 2006) 92-93 and footnote 111.

[29] Dig. 47.12.4: 'Sepulchra hostium religiosa nobis non sunt: ideoque lapides inde sublatos in quemlibet usum convertere possumus: non sepulchri violati actio competit'.

is Alexander III's *Dispar nimirum* mentioned above. Thus the *Glossa* is comparing Jews with Saracens as persecutors of Christians in this gloss on a canon that *does not mention Saracens at all*. Admittedly, the *Glossa* emphasizes to its readers that in terms of faith, Jews are still 'hostes'—a concept that does not appear in the invoked allegation from Pope Innocent III (X 5.6.13, *Etsi Iudaeos*).[30] Put simply, according to the *Glossa*, Jews are indeed 'enemies of our faith,' but not enemies *compared with Saracens*.

Even though we will have to wait for another century to hear a jurist describe them as 'like beasts deprived of all reason', Saracens, in contrast to Jews, are clearly deemed enemies by the *Glossa*.[31] Both X 5.6.6 and X 5.6.17 legislate against trading with Saracens, or more specifically, against Christians who provide military supplies to Saracens.[32] X 5.6.6 *glos. ord*. s.v. *ferrum* cites

[30] X 5.6.13: 'Alia in super contra fidem catholicam detestabilia et inaudita committunt, propter quae fidelibus est verendum, ne divinam indignationem incurrant, cum eos perpetrare patiuntur indigne quae fidei nostrae confusionem inducunt'. For a recent discussion of this canon in relation to canons from the Fourth Lateran Council concerning Jews, see Anna Sapir Abulafia, 'The Fourth Lateran Council through the Lens of Jewish Service', in Marie-Thérèse Champagne and Irven M. Resnick, *Jews and Muslims under the Fourth Lateran Council: Papers Commemorating the Octocentenary of the Fourth Lateran Council (1215)* (Religion and Law in Medieval Christian and Muslim Societies 10; Turnhout 2018).

[31] We read this in Oldradus de Ponte's (†1335) *Consilia*, translated in Norman P. Zacour, *Jews and Saracens in the Consilia of Oldradus de Ponte* (Toronto 1990) 51. However, it should be noted that the use of animal metaphors to describe Saracens had already appeared in the works of Christian writers such as Eulogius and Alvarus in the ninth century. See Tolan, *Saracens* 99. Similar metaphors against Jews also exist in Peter the Venerable's *Adversus Iudeorum inveteratam duritiem*, see Peter the Venerable, *Against the Inveterate Obduracy of the Jews*, trans. Irven M. Resnick (The Fathers of the Church, Mediaeval Continuation 14; Washington, D.C. 2013) 211-212. See also Davide Scotto, '"I Invite You to Salvation:" Judaism and Islam in Peter the Venerable's Soteriological Thinking', *Soteriologie in der frühmittelalterlichen Theologie*, edd. David Olszynski and Ulli Roth (Archa Verbi. Subsidia 17; Münster 2020) 256.

[32] For a discussion of the historical context of X 5.6.17, its original form as constitution 71 of the Fourth Lateran Council, and a gloss on it by Hostiensis,

X 5.6.17, and—similarly to what X 5.6.9 *glos. ord.* s.v. *coemeterium* does to X 5.6.13—invokes the concept of 'hostes' while the allegation itself does not.

X 5.6.6 *glos. ord*. s.v. *ferrum*

Transcription	Translation
ferrum Ut infra eodem Ad liberandam (X 5.6.17), ubi de hoc totum habes, quod hic dicitur haec ad hostes transferri non debent. C. quae res expor. non debeant. l.ii. (Cod. 4.41.2), et illi sunt decapitandi, ut hic, et C. de commerciis. Mercatores (Cod. 4.63.4), ff. de pub. et vec. Cotem (Dig. 39.4.11.pr.).[33] ...	*iron* As [in] infra eodem Ad liberandam, where you have everything about this, that in this case it is said that these things should not be transferred to enemies. [See] C. quae res expor. non debeant. l.ii., and they should be decapitated, as in this case, and [see] C. de commerciis. Mercatores, ff. de pub. et vec. Cotem.

Significantly, the *Glossa* is more aggressive than canons X 5.6.6 and X 5.6.17 themselves concerning the punishments for Christians who trade with Saracens. This attitude is not only demonstrated in the gloss's comment, but also is implied through the Roman law allegations. Against these Christians, the two canons decree excommunication and anathematization, confiscation of goods, and enslavement upon capture. By contrast, the gloss advises capital punishment. It is surprising for a *canonistic* commentary to suggest this penalty.[34] As a matter of fact, all supporting allegations invoked by the *Glossa* here come from the Roman law tradition on trading with enemies. Two out of three *leges* cited punish this crime with the death penalty.

More importantly, examining one of the allegations reveals the reason for the gloss' assignment of capital punishment for

see Uta-Renate Blumenthal, 'A Gloss of Hostiensis to X 5.6.17 (*Ad liberandam*)', BMCL 30 (2013) 89-122.

[33] Dig. 39.4.11.pr.

[34] Nevertheless, it should be noted that such advice, though uncommon, is not unique among canonical writings. Vincentius Hispanus, for instance, also advocated the death penalty for Christians teaching Saracens to build military equipment. See Herde, 'Christians and Saracens at the Time of the Crusades' 371.

Christians. In Cod. 4.41.2, trading military supplies with barbarians is regarded as 'most like 'proditio' (proditioni proximum)'.[35] As the crime of treason (proditio) is a subspecies of *crimen maiestatis*,[36] this transgression of trading with Saracens warrants comparison with the crime of heresy. Pope Innocent III in X 5.7.10, *Vergentis in senium*, linked heresy with *crimen maiestatis* and commented that the former is worse than the latter.[37] One may interpret the Pope's words as a veiled endorsement of the death penalty for heretics. Nonetheless, the *Glossa* on heresy is rather cautious about sending heretics to secular courts out of the concern that they may be subjected to death. In X 5.7.9 *glos. ord*. s.v. *audientia* it even directly comments, 'the Lord does not wish the death of a sinner'.[38] Yet in *glos. ord*. s.v. *ferrum*, capital punishment, as the cost for trading with 'hostes', is unambiguously highlighted and reinforced through Roman law authorities.

One key difference that might explain this is that Bernard, with all his emphasis on mercy in the *Glossa* to X 5.7, did not perceive heretics as actual 'hostes' at war with Christians. On the other hand, he was quite insistent on highlighting the state of war between Christians and Muslims. For the *Glossa*, the connection

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[35] Cod. 4.41.2: 'Perniciosum namque romano imperio et proditioni proximum est barbaros, quos indigere convenit, telis eos, ut validiores reddantur, instruere'.

[36] See entries 'Crimen maiestatis' and 'Proditio' in Adolf Berger, *Encyclopedic Dictionary of Roman Law* (Transactions of the American Philosophical Society, New Series, Volume 43, Part 2; Philadelphia 1953) 418 and 655.

[37] X 5.7.10: 'Cum enim secundum legitimas sanctiones, reis laesae maiestatis punitis capite, bona confiscentur eorum, filiis suis vita solummodo ex misericordia conservata: quanto magis, qui aberrantes in fide Domini Dei filium lesum Christum offendunt, a capite nostro, qui est Christus, ecclesiastica debent districtione puniri, et bonis temporalibus spoliari, cum longe sit gravius aeternam quam temporalem laedere maiestatem'.

[38] X 5.7.9 *glos. ord*. s.v. *audientia*: 'Bene credo quod debet recipi, quia Dominis non vult mortem peccatoris'. Here the *Glossa* is possibly inspired by a decretal from Innocent III to King John of England in 1215: 'Under the inspiration of Him who does not wish the death of a sinner but a conversion that the sinner may live, has now had a change of heart', *Selected Letters of Pope Innocent III Concerning England (1198-1216)*, edd. Christopher R. Cheney and William H. Semple (Medieval Texts; London-New York 1953) 212.

between treason and trading arms to Muslims is more substantial. It is important to note that many canonical writings during the late twelfth and early thirteenth centuries by influential canonists such as Alanus Anglicus and Laurentius Hispanus actually emphasize toleration toward Muslims when war is not being waged.[39] Such sympathetic comments do not appear in the *Glossa* to X 5.6. By contrast, in the last two glosses to X 5.6.11, the glossator repeatedly emphasizes that truce does not mean peace.[40]

Outside the Interreligious Framework: Money and the Order of Business

A central theme of X 5.6, as the title *De iudaeis, sarracenis, et eorum servis* suggests, is (Christian) 'servi' kept by Jews and Muslims. It is also one of the issues that originally pertained solely to Jews and was only later applied to Saracens. Only one canon (X 5.6.5, canon 26 of the Third Lateran Council) of six on this subject mentions Saracens. Furthermore, as John Watt notes, the word 'servus' in the canons under this title can have different meanings: a slave, a serf on the farm, or a servant in a home.[41]

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[39] Herde, 'Christians and Saracens at the Time of the Crusades' 364-65. See also Freidenreich, 'Muslims in Western Canon Law, 1000-1500' 53. It should be added, however, that Alanus approved applying conditional compulsion, such as confiscation of property and whipping, to convert Muslims. See Benjamin Z. Kedar, 'Muslim conversion in canon law', *Proceedings Berkeley 1980* 328 and fn.32.

[40] X 5.6.11 *glos. ord*. s.v. *post treugam*: 'Treuga est securitas personis et rebus ad tempus concessa. supra. de treuga. c. i. (X 1.34.1) Et qui facit treugam non facit pacem, nec desistit a guerra, nisi ad tempus: qui distulit, non in totum destitit. et ii. q. iii. §. Notandum (C. 2 q. 3 d.p.c. 8). et ff. de iudic. Destitisse (Dig. 5.1.10)'. X 5.6.11 *glos. ord*. s.v. *non absolvit*: 'Nec etiam a periurio: quia licet treuga sit facta, non tamen pax, et ita non extitit condictio, unde incidit in symoniam sententiam et in periurium, et sic treuga non est pax'. It is also worth noting that Guillelmus Redonensis (William of Rennes), a mid-thirteenth-century commentator on Raymond of Peñafort's *Summa de casibus poenitentiae* and a contemporary of Bernard, claimed that it is lawful to abduct Muslim children and convert them to Christianity during period of truce. See Kedar, 'Muslim conversion in canon law' 330.

[41] See Watt, 'Jews and Christians in the Gregorian Decretals' 94 and 103-105.

These canons, in summary, decree that Jews (and Muslims) should not keep Christian slaves and/or house servants, and that if a non-Christian slave or servant wishes to become a Christian he/she should be granted freedom. Furthermore, both X 5.6.1 from the sixth-century Council of Mâcon and X 5.6.19 from Pope Gregory IX—the first and the last canons of X 5.6—mandate that a 12-solidi[42] ransom to be given to the Jewish owner for the manumission of the Christian slave or servant.[43]

Monetary compensation for Jewish owners caused various problems for the medieval Church. Innocent III's correspondence reveals that, at least occasionally, this canonically-set ransom amount was often not paid by secular rulers. Moreover, this provision that 'servi' wishing to convert be freed enraged Jewish (and Christian!) owners, who aggressively sought the payment from the local clergy.[44] My examination of the *Glossa* on this

[42] The exact monetary value and purchasing power of a 'solidus' during the time of Gregory IX and Bernard needs further investigation, especially since the monetary systems across the Latin West during the thirteenth century underwent significant changes. See Philipp Robinson Rössner, 'From the Black Death to the New World (c. 1350-1500)', *Money and Coinage in the Middle Ages*, ed. Roy Naismith (Reading Medieval Sources 1; Leiden-Boston 2018) 151-175 at 162-163. The *Glossa* on this (X 5.6.19, *glos. ord*. s.v. *XII solidis*), apparently being aware of this situation, suggests that physical locations and local customs would determine the currency conversion (Sed de qua moneta dabuntur? Respondeo, illa, quae est in usu in loco illo).

[43] X 5.6.1: 'Praesenti concilio sancimus, ut nullum Christianum mancipium Iudaeo serviat, sed datis XII. solidis pro quolibet bono mancipio, ipsum quicunque Christianorum, seu ad ingenuitatem seu ad servitium, licentiam habeat redimendi'. X 5.6.19: 'Nulli Iudaeo baptizatum vel baptizari volentem emere liceat vel in suo servitio retinere. Quodsi quem, nondum ad fidem conversum, causa mercimonii emerit, et postmodum factus sit vel fieri desideret Christianus, datis pro eo XII. solidis ab illius servitio protinus subtrahatur'.

[44] See Watt, 'Jews and Christians in the Gregorian Decretals' 95, and Kedar, 'Muslim conversion in canon law' 327 and fn.27. During the period under discussion we have both notarial evidence revealing Muslim slaves in Mediterranean Europe converting to Christianity and correspondence evidence showing the Christian monastic masters and crusader lords might impede their Muslim slaves converting to Christianity, which was at least partially due to monetary reasons. See Kedar, 'Muslim Conversion in Canon Law' 326-327 and Olivia Remie Constable, 'Muslims in Medieval Europe', *A Companion to the*

matter will reveal more practical issues concerning this canonical regulation: does the payer keep the ransomed slave, if he should be a Christian? What if there are no payers willing to ransom the slave? More importantly, it will show that the *Glossa* prioritizes the business aspects of the case over religious concerns—even to the extent of seemingly speaking for the non-Christians.[45]

X 5.6.1 *glos. ord*. s.v. *ad servitium*

Transcription	Translation
ad servitium Non tamen erit servus illius, <sed> restituet ei <pretium> [46] et erit omnino liberatus. ar. Instit. de noxa. act. § Dominus (Inst. 4.8.3). Vel si non potest habere statim pretium, serviat ei tantum quod servitium compensetur cum pretio, et postea eat liber quo vult. C. de capti. et postli. l. ult. (Cod. 8.50.20), xxxvi. q.i. De raptoribus (C.36 q.1 c.3) . . . Quid si nullus emptor appareat? Nihilominus erit liber, et hostiatim quaerat pretium. ff. de manu. l. iiii. § Si quis autem, [47] aut pro pecunia operas praestet, ut dicitur in l. praedicta. C. de capt. l. ult. (Cod. 8.50.20), scilicet v. annis, ut ibi dicitur.	*concerning service* However, he will not be the slave of him [who frees him], <but> he will restore <the payment (pretium)> to him and [then] he will be entirely free. [See] the argument [in] Instit. de noxa. act. § Dominus. Or, if he cannot have immediately the money, he should serve him to the extant that the servitude would compensate for the price, and afterwards he should go freely where he wants. [See] C. de capti. et postli. l. ult., xxxvi. q. i. De raptoribus . . . What if no buyer appears? He will be free, nonetheless, and he should search for money [to pay the price] door to door. [See] ff. de manu. l. iiii. § Si

Medieval World, edd. Carol Lansing and Edward D. English (Oxford-Chichester 2009) 327.

[45] It should be noted that Rufinus, as Walter Pakter points out, already in his *Summa decretorum* claimed that Jewish owners selling their Christian slaves deserve payment because of equity (ex equitate), and a similar argument appears in the *Summa 'Tractaturus Magister*'. See Walter Pakter, *Medieval Canon Law and the Jews* 141. However, the *Glossa* does not express nor makes reference to this principle.

[46] While 'sed' and 'pretium' are not in Florence, BML Plut.3 sin.9, as demonstrated here, they appear in Vat. lat. 11158 (155v) and other selected—i.e., later—versions of the *Glossa*.

[47] Other selected texts of the *Glossa* read 'suis autem', which points the reader to Dig. 40.1.4.10.

	quis autem, or, he could offer labor in exchange for the money, as it is said in l. praedicta., [i.e.] C. de capt. l. ult., namely for five years, as it is said there.

In the first place, the *Glossa* relies heavily on the Roman law tradition regarding slaves to deal with these issues. It invokes Roman *leges* in a relatively direct rather than analogous manner. It thus seems that Roman slavery law, or at least many of its principles, was still current in the thirteenth century. According to the gloss, the ransom must be reimbursed to the payer, or paid through servitude that is sufficient to cover the ransom. Moreover, the requisite length of servitude offsetting monetary payment was set at five years. All this derives from a *lex* in the Justinianic *Codex*, Cod. 8.50.20, on the issue of ransoming captives from barbarians.[48] Roman citizens captured by barbarians should be redeemed and set free; but this does not mean that such rescue is free—there are business rules which need to be abided by. The *Glossa* applies this Roman law principle (from the original context of Roman citizens and barbarians) to the canonical issue of Christians enslaved by non-Christians. Thus, it is one thing that Christians should be not subjected to non-Christian masters on religious grounds. It is another that the business norms and financial needs of the parities require protection.

What if no one is willing to pay for the release of the slave? This is a common concern among the decretalists.[49] On the one

[48] Cod. 8.50.20: 'No one shall retain, against their will, persons of the various provinces, no matter their sex, legal status, or age, whom barbarian cruelty had driven away through the constraint of captivity; rather, if they wish to return to their own property, they shall be free to do so . . . the ransomed should rightly either repay the purchase price to the buyers or requite the benefit by obedient labor and work for five years while retaining their free status if they were so born'. *The Codex of Justinian: A New Annotated Translation, with Parallel Latin and Greek Text Based on a Translation by Justice Fred H. Blume*, edd. and trans. Bruce W. Frier et al. (3 vols. Cambridge-New York 2016) 3.2215-2217.

[49] See Walter Pakter, *De his qui foris sunt: The Teachings of the Medieval Canon and Civil Lawyers Concerning the Jews (Ph.D. Thesis)* (Baltimore 1974) 107.

hand, the *Glossa* instructs that the slave should still be freed. On the other, however, the freedman is to be responsible for raising the ransom, either by his own payment or offering his labor to a third party in return for advance of the ransom. This situation is, notably, different from that in X 5.6.19 (which is possibly why the *Glossa* does not invoke it as an allegation here). In that canon, Pope Gregory IX orders that if the master of the slave does not sell the slave within three months, he must free the slave and forego compensation.[50]

By comparison, the *Glossa* seems to offer greater protection, or is at least less dismissive, of a non-Christian master's financial situation. This concern can also be seen in the Roman law allegation invoked by the gloss here. The *Glossa* points its readers to a *lex* on the release of slaves in the *Digest*, Dig. 40.1.4.10. In the cited text, the law instructs that if a slave ransoms himself with his own money, even if he does not pay the full amount, he can still be released—on the condition, however, that, he labors or earns money to cover the payment.[51] The gloss in this case, therefore, is not assessing the situation from the perspective of Christian and non-Christian relations as are the canons, but from the standpoint of protecting financial interests.

This concern for orderly business dealings and the interests of the transacting parties, even if they are non-Christians, appears also in the ordinary glosses to X 5.6.19. In *glos. ord*. s.v. *causa mercimonii*, the glossator emphasizes that as long as the non-Christian master—'a Jew [or] a pagan'—put his slave up for sale within three months, the former should not be defrauded.[52] Clearly, Bernard was concerned with the possibility that there might be no purchaser capable of paying the ransom. The comment in the following gloss, X 5.6.19 *glos. ord*. s.v. *XII solidis*, again raises

[50] X 5.6.19: 'Si autem infra iii menses ipsum venalem non exposuerit, vel ad sibi serviendum emerit eundem, nec ipse vendere, nec alius audeat comparare, sed nullo dato pretio perducatur ad praemia libertatis'.

[51] Dig. 40.1.4.10: 'Suis autem nummis redemptus etsi totum pretium non numeravit, ex operis tamen ipsius accesserit aliquid, ut repleri pretium possit, vel si quid suo merito adquisierit, dicendum est libertatem competere'.

[52] X 5.6.19 *glos. ord*. s.v. *causa mercimonii*: 'In quo casu non fraudabitur ex toto Iudaeus sive Paganus, dummodo infra tres menses illum venalem exponat'.

this issue, and refers the reader to X 5.6.1—apparently *glos. ord*. s.v. *ad servitium* just analyzed—instead of the canon itself.[53] The *Glossa* does not support simply removing the Christian slave from his non-Christian owner without compensation.

This emphasis on protecting commercial interests and financial rights—even those of non-Christians—is only found in the glosses, not in the canons of X 5.6 themselves. The protection is indeed limited: the canonical principle that non-Christians cannot own Christian slaves apparently could not be refuted. Moreover, with a view to defending Christians' business interests, the *Glossa* also warns Christian redeemers against potential deceit by the Jewish owners of slaves:

X 5.6.19 *glos. ord*. s.v. *si autem infra tres*

Transcription	Translation
si autem infra tres Eo ipso quod non exposuit ipsum infra tres menses venalem, praesumitur quod non mercimonii emerit, sed ad serviendum sibi, unde nullo pretio dato perducetur ad premium libertatis, … Et si alius eum comparet, talis emptio non valeret, et nihilominus erit liber nullo pretio dato, si scienter emit illum; si ignoranter, agat ad pretium sive ad interesse contra Iudaeum, qui ipsum decepit. ff. de contrahenda. empt. Liberi hominis (Dig. 18.1.70) …	*[if] within three months* Based on the fact that he (i.e. the Jewish master) has not put him (i.e. the slave) up for sale within three months, it is presumed that he did not buy [the slave] for the purpose of business, but to serve himself, in which case, with no price having been given, he (i.e. the slave) will be led to the gift of liberty, … And if another person buys him, such purchase should not be valid, and nonetheless he (the slave) will be free with no price having been given, if he buys him knowingly; if ignorantly, he should look to the Jew for the price [paid for the slave] and the interest [thereon] (*agat ad pretium sive ad interesse*), who has deceived himself. [See] ff. de contrahenda. empt. Liberi hominis

[53] X 5.6.19 *glos. ord*. s.v. *XII solidis*: 'Quid si non sit qui solvat illos xii. solidos? De hoc dictum est supra. e. c. i.'

One principle upheld by both X 5.6.19 from Pope Gregory IX and the *Glossa* is that, again, the non-Christian master has to put up the slave (baptized or wishing to be baptized) up for sale within three months. Failing to do so would mean that the master wants to keep the slave to serve himself, in which case the slave should be released with no compensation. But Bernard raises a new scenario. What if someone ransoms a slave, who indeed has been owned by a Jewish owner to serve himself? The gloss surprisingly passes over the guilt of the Jewish owner for not releasing the slave freely. Rather, it focuses on the issue of commercial fraud. Dig. 18.1.70, invoked by Bernard in this gloss, concerns the transaction between a purchaser and a vendor with respect to a freeman. The law claims that such a transaction can be valid when either both the purchaser and the vendor are ignorant of the slave's actual status as a freeman, or only the vendor knows of it. If the purchaser knows, however, the transaction will be nullified.[54] Bernard thus reminds the Christian redeemer that should he purchase the slave 'scienter' (i.e. knowing that the Jewish master owns the slave illicitly), the purchase will be invalidated and the slave liberated. However, he deviates from the Roman law cited, mandating that if the Jewish vendor does not notify the purchaser about the situation, the latter will be entitled to sue the former for the price paid for slave, with interest.

Furthermore, we can detect the *Glossa*'s concern for protecting monetary interests from technical application of the canonical decree by examining another topic discussed in *De Iudaeis*. X 5.6.16 is canon 69 of the Fourth Lateran Council. It forbids Jews from holding public office, prohibits Jewish officials from having interactions with Christians, orders properties acquired by them during their term to be reclaimed and used to care for the Christian poor, and finally, instructs them to be

[54] Dig. 18.1.70: 'Liberi hominis emptionem contrahi posse plerique existimaverunt, si modo inter ignorantes id fiat. Quod idem placet etiam, si venditor sciat, emptor autem ignoret. Quod si emptor sciens liberum esse emerit, nulla emptio contrahitur'.

deposed.[55] The *Glossa* on this canon focuses on a technical issue: why does the reclaimed property not return to the previous owners?

X 5.6.16 *glos. ord*. s.v. *usus pauperum*

Transcription	Translation
usus pauperum Sic ergo pauperibus restituitur, quod iniuste extortum est: ut supra de immuni. ecclesiarum, Quia (X 3.49.8). Si vero officium licitum est, tunc si vellet, posset dare pauperibus <quod> iniuste extortum est. xiiii. q. v. Non sane (C.14 q.5 c.15). Sed contra videtur, quod restituendum sit illis, a quibus est extortum, et non pauperibus. infra de homicid. Sicut dignum. §Eos (X 5.12.6.§5), de usuris Cum tu (X 5.19.5), Eam (*recte* Ea)te (X 2.24.22) et supra de decimiinvokeds Tua (X 3.30.25-26), xix. di. Quoniam.[56] Hoc ideo fit in hoc casu: quia nescitur a quibus extortum sit.	*the use of the [Christian] poor* Thus, therefore, what was unjustly extorted is restored to the poor: as [in] supra de immuni. ecclesiarum. Quia. But if the office has been permitted, then if he (the bishop?) wants, he could give to the poor <what> has been unjustly extorted. [See] xiiii. q. v. Non sane. But on the contrary, it seems, that what is to be restored should be [given] to those from whom it was extorted and not to the poor. [See] infra de homicid. Sicut dignum §Eos, de usuris, Cum tu, Eam te, and supra de decimis, Tua, [and] xix. di.Quoniam. This happens thus in this case because it is unknown from whom it (i.e. the property) had been extorted.

This gloss does not concern the Jewish officials mentioned in X 5.6.16, but rather the distribution of the confiscated property to Christians. Once more, it demonstrates a consideration for pragmatic economic concerns. By invoking X 3.49.8—another canon from the Fourth Lateran Council, which forbids prelates

[55] X 5.6.16: 'nos propter transgressorum audaciam in hoc generali concilio innovamus, prohibentes, ne Iudaei publicis officiis praeferantur…. Officiali vero huiusmodi tamdiu Christianorum communio in commerciis et aliis denegetur, donec in usus pauperum Christianorum secundum providentiam dioecesani episcopi convertatur quicquid fuerit a Christianis adeptus occasione officii sic suscepti, et officium cum pudore dimittat, quod irreverenter assumpsit. Hoc idem extendimus ad paganos'.

[56] "18. distin" in the 1582 *Editio Romana*, which is correct, i.e., D.18 c.7.

taking from their subjects more than what is due[57]—the gloss equates the property taken by Jewish officials with the excessive money prelates extorted from their Christian subjects. In other words, the *Glossa* understands the money in question simply as 'unjustly extorted, instead of 'extorted by non-Christians'. Readers of the gloss are thus placed in a business framework, rather than one contending with interreligious conflict.

More importantly, a quick examination reveals that the *Glossa* here actually does not employ an entirely supportive allegation for the canon. X 3.49.8 orders the transgressing prelate both to restore what he extorts illegally *and* donate an equal amount of money to the poor.[58] It does not contradict X 5.6.16 per se because, again, these two canons address different targets. But the *Glossa*, by employing it as an allegation, juxtaposes the two to pave the way for its challenge to the canon: the money should be restored to its previous owners. The subsequent long list of allegations from canonical traditions on usury, tithes, etc.—again, none of which deals with interreligious issues—testifies to the *Glossa*'s major concern. The acknowledgement at the end of the gloss is more of an instruction in terms of the practice of the law: restore whatever has been taken by the Jewish officials to its previous owners when the latter can be identified. In summary, the *Glossa*'s treatment of the money extorted by Jewish officials does not consider the 'religious origin' of the money. Rather, its discussion of distributing it among Christians, upon investigation, reveals that it is concerned with protecting monetary interests when applying the provisions of the canon in practice.

[57] X 3.49.8: 'Quia plerique praelati, ut procurationem aut servitium aliquod impendant legato vel alii, plus extorquent a subditis quam solvant, et in eorum damnis lucra sectantes quaerunt praedam potius quam subsidium in subiectis, id de cetero fieri prohibemus'.

[58] X 3.49.8: 'Quod si quis forte praesumpserit, et sic extorta restituat, et tantundem cogatur pauperibus elargiri'.

Roman and Canon Law Intertwined: Custody and Conversion of a Jewish Boy

Another section in the *Decretales* that reveals its concern with non-Christians is X 3.33, *De conversione infidelium*. While the heading *per se* may imply a comprehensive legislation on conversion, it contains only two canons, and treats conversion within marriage. X 3.33.1, a letter from Pope Celestine III, concerns the marriage between Muslim converts to Christianity and Christian women, especially widows. The pope decrees that in such cases, as long as a convert does not plot the death of a Christian woman's Christian husband, even if he, while still a Muslim, kills the husband on the battlefield and marries the widow, the marriage is still valid.[59] X 3.33.2 offers an even more interesting case in which a Jewish husband, after converting to Christianity, appealed to the bishop's court for the custody of his four-year-old son so that he could raise him as a Christian. The mother, however, remained Jewish and argued that the boy should stay with her since the child at that point needed more maternal than paternal care. Pope Gregory IX decreed that custody belongs to the father. But more importantly, Gregory offers three reasons for this decision, only one of which concerns religion: (1) a son should be 'under the authority of a father'; (2) a son after the age of three must be raised by his father; and (3) the Jewish mother in this case might lead the boy into Judaism.[60]

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[59] On the historical background and content of this canon, See Kedar, 'Muslim conversion in canon law' 324-325.

[60] X 3.33.2: 'Cum autem filius in patris potestate consistat, cuius sequitur familiam, et non matris, et apud illas in etate tali quis non debeat remanere personas de quibus possit esse suspicio, quod saluti uel uite insidientur illius, et pueri post triennuim apud patrem non suspectum ali debeant et morari, materque pueri, si eum remanere contigerit apud ipsam, posset illum aducere ad infidelitatis errorem, in fauorem maxime xristiane fidei respondemus, patri eundem puerum assignandum'. For a recent discussion of this case, see Kenneth Pennington, 'Gratian and the Jews', BMCL 31 (2014) 119-120, also published in Paola Maffei and Gian Maria Varanini, eds., *Honos alit artes: Studi per il settantesimo compleanno di Mario Ascheri: La formazione del diritto comune: Giuristi e diritti in Europa (secoli XII-XVIII)* (Reti Medievali E-Book 19.1; Firenze 2014) 402-403. For Bernard's comments regarding the age of the child and 'patria potestas', see Pakter, *Medieval Canon Law and the Jews* 320. This

The *Glossa* to this title in general reveals the same tendency to focus more on legal technicalities outside the interreligious framework as did the glosses to X 5.6 analyzed above. The glosses to X 3.33.2, on the one hand, encompass the Roman familial and property law traditions embodied in the thirteenth-century canonical understanding of marriage and family. On the other hand, they also reveal the *Glossa*'s legal thinking concerning conversion within interreligious families.

Compared with the relatively straightforward text in X 3.33.1, the pope's reasoning in X 3.33.2 might confuse its modern readers. What exactly does 'under the authority of the father (in patris potestate)' mean? What role does the boy's age—which is specified in both the description of the facts and the legal reasoning—play in this case? Furthermore, can the decision on the child's conversion in X 3.33.2, which was a reply to a specific inquiry from bishop Berthold of Teck of Strasbourg on May 16, 1229, be understood as a universal order?[61] These are the main concerns of the glosses to this canon.

In the first place, the *Glossa* cited a variety of Roman law texts to support the father. Again, none of these *leges* concerned his religious conversion. The *Glossa* repeatedly cites one section of the Justinian's *Institutiones* that illuminates the origin of Gregory IX's phrase concerning the authority of the father in the family: Inst. 1.9, *De patria potestate*. It straightforwardly claims that children born of lawful marriages are under the authority of the father.[62] The same allegation also appears in *glos. ord.* s.v. *ad*

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canon does not treat the issue of potential divorce of Jewish convert husband-Jewish wife couples, which had been dealt with by Pope Clement III in 2 Comp. 3.20.1. On the latter, which is not included in the *Decretales*, see Kedar, 'Muslim conversion in canon law' 321-322.

[61] See Potth. 1.722, no. 8399; Lucien Auveray, ed., *Les Registres de Grégoire IX* (Bibliothèque des écoles françaises d'Athènes et de Rome, 2e série, 9; Paris 1896) 1.182-183, no. 298. For a more recent edition and bibliography of this decretal, see Shlomo Simonsohn, ed., *The Apostolic See and the Jews, Documents: 492-1404* (Studies and Texts/Pontifical Institute of Mediaeval Studies, 94; Toronto 1988) 128-129.

[62] Inst. 1.9.1: 'In potestate nostra sunt liberi nostri, quos ex iustis nuptiis procreaverimus.… Qui igitur ex te et uxore tua nascitur, in tua potestate est'.

fidem catholicam, *glos. ord*. s.v. *legitima conuictio,* and *glos. ord*. s.v. *in patris potestate*. In fact, *glos. ord*. s.v. *in patris potestate* serves as a focal point in constructing a coherent jurisprudential theory for the general authority of the father in a family. It integrates definitions of family from the *Institutiones* (Inst. 1.9), the *Codex* (Cod. 8.47.5[63] and 6.38.5), and the *Digest* (Dig. 26.4.1, 50.1.1, and, in post-1243 redactions of the *Glossa*, 50.16.195 also). Furthermore, *glos. ord*. s.v. *post triennium* claims that a son more than three years old is to be with his father. According to one of the allegations (Cod. 8.46.9), in such cases a child more than three years old can legally demand paternal support.[64]

But more importantly, Bernard not only showed the Roman law origin of the papal statement, but also set the discussion into a more complicated juridical framework based on the will and status of the son:

X 3.33.2 *glos. ord*. s.v. *ad fidem catholicam* (= *glos. ord*. s.v. *perducendus* in the 1582 *Editio Romana*)

Transcription	Translation
Circa hoc distingue aut filius a nullo detinetur aut ab aliquo <si ab aliquo, et tunc>[65] uolens aut inuitus. Primo casu petere possum per officium iudicis. ff. de exhi. liberis. l.iii. § Hoc autem (Dig. 43.30.3). Si ab alio uolens detinentur, potest peti rei vendicatio,[66] adiecta causa de iure	Regarding this case, determine whether the son was not kept [by anyone], <or was kept by someone, [and if so, whether]> willingly or unwillingly. In the first case I can proceed through the service of a judge. See ff. de exhi. liberis. l.iii. § Hoc autem. If he is detained

[63] Note that it was Cod. 8.48.5 in the medieval vulgate version of the Justinian Codex, as Cod. 8.10.14 was a separate title by then. For the vulgate version of the *Corpus iuris civilis* I have consulted the edition that was printed by Horace Cardon in Lyons in 1604 and digitized by the Harvard Law Library, which is available at http://amesfoundation.law.harvard.edu/digital/CJCiv/CJCivMetadata.html#ed.

[64] Pakter points out that '[B]y Constantine's day only the residual core of the original p.p. [patria potestas], consisting of a moral obligation to protect the interests of the minor child, and the rights of the parents to that child, remained'. Pakter, *De his qui foris sunt*, 289.

[65] This section appears in BSB lat. 26301 (fol.156r), representing the post-1263 redaction(s) of the *Glossa*, and also in the 1582 *Editio Romana.*

[66] 'vendicat' in the 1582 *Editio Romana*

quiritum cognitione praetorea[67] ff. de rei. ven. l.i. §i. (Dig. 6.1.1) quod ius proprie romanorum est. Inst. de patria. po. §i. (Inst. 1.9.1) In tertio casu locum habet interdictum de liberis exibendis, vt ff. de liberis. exhi. l.i. Resposa (Dig. 43.30.1) et ff. de rei. ven. l.i. §i. (Dig. 6.1.1)	willingly by another, he can be petitioned by *rei vindicatio*, the stipulation suggested by law of citizens with the praetorian cognition. See ff. de rei. ven. l.i. §i., which is the Roman personal law. See Inst. de patria. po. §i. In the third case, the situation holds the *interdictum de liberis exhibendis*, therefore see ff. de liberis. exhi. l.i. Resposa and ff. de rei. ven. l.i. §i.

The *Glossa* asks its readers to determine whether the boy is not currently under any parental control, or is being detained willingly or unwillingly, by someone. But one must note that the underlying focus of this excerpt is not the boy's will. As a matter of fact, whether willingly or unwillingly, the son will ultimately be assigned to the father, according to the gloss. The most significant point is that Bernard here discusses the issue by mixing principles and terminology of Roman familial law and Roman property law (as he points out in the comment). To deal with the possibility that the son is controlled willingly by his mother, he recommends to the father a Roman property action through which the owner (thus analogically the father) can lawfully sue the possessor (the mother) of a thing (the son)—'rei vindicatio'[68]—with the matching allegation of Dig. 6.1.1. If, on the other hand, the boy is retained unwillingly by the Jewish mother, Bernard initially invokes the 'interdictum de liberis exhibendis' from Roman law,[69] through which a person held by another against the will of his/her father can be legally released upon the latter's request. What immediately follows, importantly, is the allegation of Dig. 6.1.1 concerning 'rei vindicatio', which claims that this legal action can be applied to all movable, living

[67] 'praetoria' in the 1582 *Editio Romana*

[68] See entry 'Rei vindicatio' in Berger, *Encyclopedic Dictionary of Roman Law*, 672-673.

[69] See entry 'interdictum de liberis exhibendis' in Berger, *Encyclopedic Dictionary of Roman Law* 510.

or nonliving things.[70] In other words, Roman familial and property legal principles were intentionally interwoven by Bernard here to create a legal basis for the papal decision.

With respect to the conversion of the son, it seems that Bernard took some time to complete his full text on this matter. Age and free will seem to be the key principles that guide Bernard on this issue. I have mentioned above with *glos. ord*. s.v. *post triennium* that the age of the boy is used to decide whether he should be with his father. In *glos. ord*. s.v. *ad infidelitatis errorem*, translated below, age is closely associated with the issues of conversion and custody. In the comment, the gloss claims that if the boy is less than three years old, the father can use his 'potestate patris' to convert his son; if, on the other hand, the son is more than three and he himself is willing to become a Christian, he could be taken away from the mother. The third possibility, however, is curiously implied in an obscure way in the allegation: X 5.6.9, the famous papal bull *Sicut Iudaei*. What if the boy is more than three years old and unwilling to convert? X 5.6.9 instructs that no one should force Jews to convert to Christianity against their will. It does not, however, mention the issue of age. Bernard seemed to have been concerned about this matter regarding age, free will, and conversion from the first redaction of the *Glossa* represented by Florence, Laur. Plut.3 sin.9, as his addition to X 3.33.2 *glos. ord*. s.v. *ad fidem catholicam* (X 3.33.2), composed between 1243-1245 demonstrates.

X 3.33.2 *glos. ord*. s.v. *ad infidelitatis errorem* and *glos. ord*. s.v. *ad fidem catholicam*

Transcription	Translation
ad infidelitatis errorem	*toward the error of infidelity*
Hac de causa etiam si esset minor triennio et pater uellet eum perducere ad fidem, cum sit in eius potestate patri debuit assignari in	Concerning this case, indeed, if the son was less than three years old, and the father wished to lead him toward the Faith, since he was

[70] Dig. 6.1.1: 'Quae specialis in rem actio locum habet in omnibus rebus mobilibus, tam animalibus quam his quae anima carent, et in his quae solo continentur'.

fauorem fidei xristiane, cum alias si esset maior et proclamaret[71] se uellet[72] fieri Christitianum, debeat de manibus illorum eripi. ar. infra de iudaeis. Sicut iudaei. (X 5.6.9)	under his (i.e. the father's) authority, he ought to be assigned to the father into the custody the Christian faith. Otherwise, if he (i.e. the son) was more than three years old, and proclaimed that he wished to become a Christian, he should be rescued from their hands. See the argument infra de Iudaeis. Sicut iudaei.
ad fidem catholicam	*toward the Catholic faith*
<Et nota quod filius conditionem patris vel matris conuersi ad fidem sequi debet. xxviii. q.i. Iudaei (C.28 q.1 c.10). Et in hoc casu filius infans non doli capax sequitur meliorem conditionem. Alias si doli capax esset, non deberet baptizari nisi sponte. xxiii. q.v. Ad fidem (C.23 q.5 c.33), xlv. dist. De Iudaeis (D.45 c.5). Ber.>[73]	<And note that the son must follow the option of the father or the mother who converted to faith. See xxviii. q. i. Iudaei. And in this case the infant son, who is not *capax doli*, follows the better option. Otherwise, if he was *capax doli*, he must not be baptized unless willingly. See xxiii. q. v. Ad fidem, [and] xlv. dist. De Iudaeis. … Ber.>

While the issue of custody occupies in the *Glossa*'s argumentation in *glos. ord*. s.v. *ad infidelitatis errorem*, in this post-1243 addition Bernard focuses on religion—notably, all allegations here come from Gratian's *Decretum* rather than Justinian's collections—and free will. Firstly, the addition supports Gregory IX's statement 'into the custody of the Christian faith (in fauorem fidei xristiane)' by acknowledging that the son must convert to Christianity as long as one or both of his parents have done so. But Bernard immediately complicates (or even perhaps challenges) this simple formula, invoking another Roman law concept, 'capax doli'.

[71] 'proclamet' in the 1582 *Editio Romana*

[72] 'velle' in the 1582 *Editio Romana*

[73] This section enclosed in < >, lacking in Florence, BM Laur. Plut.3 sin.9, appears in selected manuscripts representing redactions after 1243—i.e., Vat. lat. 1365 (fol.516r), Vat. lat. 1383 (fol.158v), and Munich BSB lat. 26301 (fol.156r)— together with the 1582 *Editio Romana*.

Considering the following comment in the gloss, its original meaning, '[a] person capable of perceiving the fraudulent character of his action',[74] was retained in Bernard's time. As a matter of fact, decretists' writings before Bernard were already employing this concept to treat the conversion issue of half-Jewish children.[75] The four-year-old son in this specific case is to be baptized because, the *Glossa* emphasizes, he is not 'capax doli'.

More importantly, Bernard connected this concept to the importance of free will in one's decision to convert. Two canonical allegations here, one from Augustine and one from the Fourth Council of Toledo, though lacking the term 'capax doli', stress free will and that force should not be employed to convert non-Christians. In sum, this addition addresses the third possible scenario that is implied and left unsolved in *glos. ord*. s.v. *ad infidelitatis errorem*. Even if the son is more than three years old and unwilling to be baptized, as long as he is not yet 'capax doli', he can be forced to follow 'the better option', i.e., Christianity. But in the end, it is equally important, if not more so, to remember that the *Glossa* invokes 'auctoritates' from both the *Decretum* and the *Decretales* to emphasize the factors of age and free will in cases of conversion. While Gregory IX in X 3.33.2 simply decrees that the boy should convert 'in favorem maxime xristiane fidei', the *Glossa* is eager to draw its readers' attention to the canonical tradition of preventing forced conversion.

Finally, in addition to this emphasis on prohibiting forced conversion, the *Glossa* also reminds its readers about three noteworthy exceptions in the application of X 3.33.2. These are spelled out in the following *glos. ord*. s.v. *ad fidem catholicam*. First, while the case in question pertains to a four-year-old boy, Bernard notes that in cases where a son is less than three, his mother should take custody of him. Significantly, the *Glossa* apparently takes this claim for granted and invokes no allegation

[74] Entry 'capax doli' in Berger, *Encyclopedic Dictionary of Roman Law* 380.
[75] See Pakter, *De his qui foris sunt* 292.

supporting it. It thus seems that such a rule was commonly accepted in Bernard's time.[76]

X 3.33.2 *glos. ord*. s.v. *ad fidem catholicam* (*=glos. ord*. s.v. *perducendus* in the 1582 *Editio Romana*)

Transcription	Translation
Mater tamen habet quandocumque exceptionem contra maritum, puta si est minor triennio cum apud eam tunc debeat educari, uel etiam si iudicatum esset in contrarium ff. de liberis. exhi. l.i. (Dig. 43.30.1) Et in alio casu etiam [77] habet exceptionem ob nequitiam patris ut sine diminutione patrie potestatis apud eam filius moretur. ff. de eo. deinde. § Etiamsi maxime (Dig. 43.30.3.5). <Quandoque tamen sequitur deteriorem conditionem, scilicet matris, si serua sit xxxii. q.iv. c.ult. (C.32 q.4 c.15) Ber.>[78]	The mother, nevertheless, always can invoke an *exceptio* (i.e. a defense) [79] against the husband, namely, if the child is under three years of age, since at that time he should be under her care, even though it had been adjudicated otherwise. See ff. de liberis. exhi. l.i. And in another situation, she also has an *exceptio*, on account of the wickedness of the father, so that she could retain the son with her without diminution of paternal authority. See ff. de eo. deinde. § Etiamsi maxime. <However, under certain circumstances he [i.e. the son] follows the inferior option [i.e. Judaism], namely the mother's, if she was a slave. See xxxii. q.iv. c.ult. Ber.>

Second, the *Glossa* invokes a *lex* from the Roman law tradition that the Jewish mother could employ to win custody. She could, according to Dig. 43.30.3.5, demonstrate that the father is morally problematic, and thus she should be awarded custody. Lastly, regarding conversion, the *Glossa* points out one situation to which Gregory IX's decision may not apply: if the mother is a slave. This,

[76] Hostiensis, *Decretalium commentaria* (4 vols. Venetiis 1581), 3.124r, X 3.33.2 *Ex literis* v. *post triennium*: 'Haec est ratio: quia iste filius, ut supra dixi, erat maior triennio, & sic debebat morari apud patrem, ante triennium vero apud matrem: quia magis eget lacte, quam pane'.

[77] 'etiam' missing in the 1582 *Editio Romana*

[78] This section appears in selected manuscripts representing post 1243 redactions of the *Glossa*, and also in the 1582 *Editio Romana*.

[79] See entry 'Exceptio' in Berger, *Encyclopedic Dictionary of Roman Law* 458-459.

according to Isidore (C.32 q.4 c.15, cited in the gloss), gives the child slave status. Thus, the son should thus remain in Judaism.

Arguments in the Allegations: The Use of Force and the Ownership of Synagogues

Similar to the glosses to other titles of the *Decretales*, the *Glossa* to X 5.6 and X 3.33 also occasionally embeds its own judicial concerns—digressing from the canons under discussion—in the allegations. This final section of this article will investigate two such concerns.

Our previous examination of the *Glossa*'s treatment of slave trading by non-Christians, custody of children, as well as non-coerced conversion might at times imply that the *Glossa* is attempting to be protective of infidels. This is not the case. Rather, what the glosses try to achieve in general are practical integrations of legal traditions; any protection of individual rights is essentially incidental. In other words, Bernard was respectful of the Romano-canonical resources that he consulted, and often struggled to guarantee the rights they afforded, no matter the beneficiary. It is apparent that he wanted to prevent thoughtless and injudicious application of canons in the *Decretales* through his *Glossa*, a textbook for future lawyers. But it would be wrong to assume that Bernard held any pluralistic approach to non-Christians as marginal religious groups. As he himself stated clearly in one of his comments to X 5.6.2, 'the severity or the rigor of law ought to be preserved, but this is with the hatred of those Jews'.[80]

X 5.6.9 *glos. ord.* s.v. *invitos* is a good example. This canon, as mentioned above, is the papal bull of Pope Clement III, *Sicut Iudaei*. This bull, repeatedly promulgated by more than a dozen popes throughout the High and Late Middle Ages, legislates against Christians who might harm Jews in various ways. It

[80] X 5.6.2 *glos. ord*. s.v. *severitate*: 'Et ar. quod iuris severitas sive rigor servandus est, sed hoc est in odio illorum Iudaeorum'. See also Pakter, *Medieval Canon Law and the Jews* 141. Here Pakter argues that Bernard suspended his general preference for 'aequitas' when dealing with Jews. However, our examination above of Bernard's treatment of the commercial considerations in ransoming Christian slaves owned by non-Christian masters proves otherwise.

forbids Christians from wounding or killing Jews, stoning them on their holidays, and destroying their graves, among other things. The very first injunction stipulates that no one should force Jews to convert against their will.[81] Put simply, this is a comprehensively protective canon. The beginning of *glos. ord*. s.v. *invitos* also suggests that conversion to Christianity should not be effected through force.

X 5.6.9 *glos. ord*. s.v. *invitos*

Transcription	Translation
Hoc ideo dicit, quia nullus ad fidem cogendus est. xxiii. q.v. Ad fidem (C.23 q.5 c.33) et xlv. di. De Iudaeis (D.45 c.5). Quia si simpliciter absolute compellantur, non reciperent caracterem; sed si conditionaliter compellantur, bene recipiunt, et consulendi sunt, ut fidem sic susceptam observent, ut supra de bap. Maiores (X 3.42.3) <§ item quaeritur.>[82] et xlv. di. De Iudaeis (D.45 c.5), et ff. de ritu nuptiarum. Si patre (Dig. 23.2.22), et C. de e. t. Nullus.[83] <Ber.>	Therefore it says this, that no one should be compelled to the Faith. [See] xxiii. q.v. Ad fidem and xlv. di. De Iudaeis. Since if they are compelled completely *absolute*, they would not receive the character; but if they are compelled *conditionaliter*, they receive [it] well, and they should be advised, so that they would observe the faith received in such a way, as [in] supra de bap. Maiores <§ item quaeritur.> and xlv. di. De Iudaeis, and ff. de ritu nuptiarum. Si patre, and C. de eodem titulo Nullus. <Ber.>

However, as this gloss demonstrates, Bernard digresses from the canon's prohibition against forced conversion, raising and approving the possibility of baptism forced 'conditionaliter'.[84] To 'support' the canon, the *Glossa* invokes two allegations previously

[81] For a recent summary of high medieval papal attitudes toward forced and voluntary conversion, see Rebecca Rist, 'The Medieval Papacy and the Concepts of "Anti-Judaism" and "Anti-Semitism",' *Authority and Power in the Medieval Church, c. 1000-c. 1500*, ed. by Thomas W. Smith (ES 24; Turnhout 2020) 95-102.

[82] This addition appears in 1582 *Editio Romana* only.

[83] 'C. eo. tit. nullus' in the 1582 *Editio Romana*. Possibly Cod. 1.9 (*De iudaeis et caelicolis*).14

[84] This is when a person consents to be baptized to avoid punishment.

employed at the end of X 3.33.2 *glos. ord*. s.v. *ad fidem catholicam*: C.23 q.5 c.33 and D.45 c.5. These two allegations both stress, admittedly, that no one should force Jews to convert. Nonetheless, to support his approval of baptism forced 'conditionaliter', Bernard invoked X 3.42.3, D.45 c.5 (again!), and Dig. 23.2. But a close reading of these texts makes clear that only one of them, X 3.42.3, actually addresses this issue.[85] By contrast, both X 3.42.3 (immediately after validating baptism forced 'conditionaliter') and D.45 c.5 order that once converted, these former Jews must be *forced* to remain in the faith. Similarly, through the Roman marriage law, Dig. 23.2.22, Bernard compares the situation under discussion to compelled marriage of a son by his father. In this *lex*, the marriage is judged to be legally binding (and therefore not be dissolved)—even if the son was not able to exercise his free will when he was married.[86] In fact, even the first allegation of this gloss (C.23 q.5 c.33), after forbidding forced conversion, claims that those relapsing after conversion should be punished by painful caning.

In other words, what Bernard tried to advocate through these allegations was different from what the canon itself calls for: the use of force against Jewish converts is permissible if it keeps them within the Christian faith. This contrast between the canon and the *Glossa* here is neatly embodied in the very last allegation of the gloss, Cod. 1.9.14. The first half of this Roman law text is similar to X 5.6.9, a list of injunctions against people harming Jews. The second half, however, warns against Jews under these protections becoming arrogant or even doing violence to the Christian religion.[87] Based on Gratian's *Decretum*, Bernard of Pavia's

[85] On this canon and the influential distinction between baptism forced *absolute* and *conditionaliter*, see Watt, 'Jews and Christians in the Gregorian Decretals' 99-100.

[86] Dig. 23.2.22: 'Si patre cogente ducit uxorem, quam non duceret, si sui arbitrii esset, contraxit tamen matrimonium, quod inter invitos non contrahitur: maluisse hoc videtur'.

[87] Cod. 1.9.14: 'Nullus tamquam iudaeus, cum sit innocens, obteratur nec expositum eum ad contumeliam religio qualiscumque perficiat: non passim eorum synagogae vel habitacula concrementur vel perperam sine ulla ratione laedantur, cum alioquin, etiam si sit aliquis sceleribus implicitus, idcirco tamen

Summa Decretalium, and Raymond of Peñafort's *Summa de casibus poenitentiae*, Benjamin Kedar argues that, from the mid-twelfth century on, canonists grew less reluctant 'to use harsh means for furthering infidel conversion'.[88] The *Glossa* not only demonstrates this tendency, but also tries to highlight for its readers the legitimate use of force to keep converts in the Church.

Another case in which the *Glossa* reveals more of its own emphasis in the allegations than in the comments concerns synagogues. Two canons, X 5.6.3 (from Pope Gregory I) and 7 (from the Third Lateran Council), under the title *De Iudaeis, Sarracenis, et eorum servis*, focus on this issue. They instruct that Jews should not be allowed to build new or larger synagogues, but only retain or rebuild old ones. The *Glossa* clearly knows the Roman law origin of these canons and invokes the precise *lex* in the Justinianic *Codex* on this matter, Cod. 1.9.18,[89] to support both canons. More importantly, an examination of the remaining allegations in the *Glossa* to X 5.6.7 demonstrates that it seems to embody a deeper understanding of the actual 'ownership' of synagogues.

X 5.6.7 *glos. ord*. s.v. *rehedificent* and *glos. ord*. s.v. *exaltent*

Transcription	Translation
rehedificent	*they might rebuild*
Sic supra eodem Iudei (X 5.6.3), C. de Iudae. l.ult. (Cod. 1.9.18), quia aliud est tueri quod positum est, et aliud novum facere. ff. de usu fruc.	Thus [see] supra eodem Iudei, C. de Iudae. l.ult., because it is one thing to preserve what has been set up, and another to build a new one. [See] ff.

iudiciorum vigor iurisque publici tutela videtur in medio constituta, ne quisquam sibi ipse permittere valeat ultionem. Sed ut hoc iudaeorum personis volumus esse provisum, ita illud quoque monendum esse censemus, ne iudaei forsitan insolescant elatique sui securitate quicquam praeceps in christianae reverentiam cultionis admittant'. For a brief overview of Jews in Roman law, see John Tolan, 'Jews and Muslims in Christian Law and History'167-168.

[88] Kedar, 'Muslim conversion in canon law' 329.

[89] Cod. 1.9.18.1: 'Illud etiam pari consideratione rationis arguentes praecipimus, ne qua iudaica synagoga in novam fabricam surgat, fulciendi veteres permissa licentia, quae ruinam minantur'.

Usufructuarius <novum.> (Dig. 7.1.44)[90] *exaltent* Non enim licet cuilibet possessori transformare possessionem, puta usufructuario. ff. de usu fruc. aequissimum § Sed et colores (Dig. 7.1.13.7 (Sed si aedium)) <B.>	de usu fruc. Usufructuarius <novum.> *elevate* For it is not lawful for anyone to transfer [*transformare*] the possession to the possessor, namely the usufructuary. [See] ff. de usu fruc. aequissimum § Sed et colores <B.>

Neither Dig. 7.1.44 in *glos. ord*. s.v. *rehedificent* nor Dig. 7.1.13.7 in *glos. ord*. s.v. *exaltent* treats synagogues or Christian-Jewish relation at all. The comment in *glos. ord*. s.v. *exaltent* at first glance also might confuse readers with its abrupt discussion of usufruct and transfer of possession. These two allegations claim that a usufructuary is not legally allowed to change the arrangement of the house of which he has been bequeathed the usufruct.[91] Bernard's comment indicates that he does not see these texts merely as analogies, but rather reads them literally as applicable to the question of the ownership of synagogues. But if he considered Jews as the usufructuaries of the synagogues, who did he consider to be the legal owner(s)? Also noteworthy is that in Dig. 7.1.13.7, the example given for a house's usufructuary is a son. Could it be that the owner and benefactor of synagogues, according to the *Glossa*, is the Christian Church? This seems to be

[90] Dig. 7.1.44. Among the selected texts of the *Glossa*, Florence, Laur. Plut.3 sin.9 is the only one that does not contain this addition.

[91] Dig. 7.1.44: 'Usufructuarius novum tectorium parietibus, qui rudes fuissent, imponere non potest, quia tametsi meliorem excolendo aedificium domini causam facturus esset, non tamen id iure suo facere potest, aliudque est tueri quod accepisset an novum faceret'. Dig. 7.1.13.7: 'Sed si aedium usus fructus legatus sit, Nerva filius et lumina immittere eum posse ait: sed et colores et picturas et marmora poterit et sigilla et si quid ad domus ornatum. Sed neque diaetas transformare vel coniungere aut separare ei permittetur, vel aditus posticasve vertere, vel refugia aperire, vel atrium mutare, vel virdiaria ad alium modum convertere: excolere enim quod invenit potest qualitate aedium non immutata. Item Nerva eum, cui aedium usus fructus legatus sit, altius tollere non posse, quamvis lumina non obscurentur, quia tectum magis turbatur: quod Labeo etiam in proprietatis domino scribit. Idem Nerva nec obstruere eum posse'.

the implication, though indeed a radical one.[92] The glosses here cannot take us further, but this question deserves further investigation.

Conclusion

Both Jews and Muslims are among those *qui foris sunt* and *hostes*, according to the *Glossa*. On the one hand, the ordinary glosses on X 5.6, as the canons themselves, reflect the general tendency of applying Church laws concerning Jews to Muslims. In the meantime, X 5.17.4, only targeting Muslims who abduct Christian women and boys, does get used by the *Glossa* as an allegation to treat both Jews and Muslims. Fear over Jews disturbing public life in violent ways—which is visible only in the *Glossa*—might derive from the vivid contemporary accusations of blood libel cases against Jews.[93] But on the other hand, the *Glossa* treats Jews and Muslims as enemies of different kinds. Jews are only deemed to be enemies in the religious sense, which does not seem to concern the *Glossa* much: contemporary theological works such as Thomas Aquinas' *Summa contra Gentiles* elaborate on that. Muslims, by contrast, are enemies in both a religious and a military sense, and the *Glossa* underscores this. Religious discussion of the Islamic faith in the Middle Ages is very limited. Yet stricter than the relevant canons, and drawing support from the Roman law on treason, the *Glossa* suggests death penalty for Christians providing military supplies to Muslims.

With respect to one of the main themes of X 5.6, i.e. prohibiting Jews and Muslims from owning Christian slaves, the principle found throughout the ordinary glosses is less of a religious matter than a pragmatic issue. What is at stake is protection of business interests. Concern for proper monetary or labor compensation for a master or a person who pays for a

[92] It is worth noting here that in 1081, Pope Gregory VII claimed that subjecting Christians to the authority of Jews is to 'exalt the synagogue of Satan'. *The Correspondence of Pope Gregory VII: Selected Letters from the Registrum*, ed. Ephraim Emerton (Records of Western Civilization; New York 1990) 178.

[93] See Albert Ehrman, 'The Origins of the Ritual Murder Accusation and Blood Libel', *Tradition: A Journal of Orthodox Jewish Thought* 15 (1976) 85-88.

manumission emerges clearly in the glosses and their allegations. Similarly, the pre-1243 redaction(s) of the *Glossa* uses mainly Roman family and property law to resolve a custody case involving a Jewish boy, his mother, and his Christian father (a convert from Judaism) in X 3.33.2. Only in the redactions produced after 1243 does the *Glossa* add a religious dimension to the discussion, invoking canonical allegations from Gratian.

Finally, it is of paramount importance to emphasize that a full analysis of the *Glossa* demands an understanding of the allegations. In several of instances under consideration here, upon interrogation, the allegations reveal different emphases than the canons and their glosses. For example, although X 5.6.9 protected Jews, students in medieval law schools consulting the ordinary glosses and studying their allegations would be led to texts in the canonical tradition that advocate the use of force to keep converted Jews in the Church. Stephan Kuttner repeated that admonition constantly: in order to understand the thought of the jurists one had to read their texts and follow the allegations that they cited to understand their thought completely. It was and is very good advice for scholars.

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‘Qui totum sibi vendicat quod scripserat esse suum’: The Limits of Papal *dominium* from a Fictitious Letter of 1307

Gabriele Bonomelli[1]

The following paper discusses a Latin letter that purportedly fell from the sky during a session of the parliament of Carlisle in 1307. The author of the letter bitterly reproached the attempts of the pope to interfere in English economic and politic affairs through the appointment of his candidates to English benefices, the so-called ‘*provisores’*. The letter is transmitted in the chronicle of Walter of Guisborough and develops its opposition to the pontiff’s policy by delving into some key concept of medieval thought: the nature and limitations to the pope’s political and economic ‘dominium’ .

The aim of this paper is to assess this fictitious epistle’s contribution to a debate that had deep roots in medieval legal thought. After a brief survey on England’s political context at the turn of the fourteenth century, we will show how the author of the letter defended the rights of the English Church against the widening of the pope’s ‘dominium’ over the goods of the Christians. The paper will follow the evolution of the theory of papal ‘dominium’ from Augustine to Gilles of Rome to assess how this letter developed some interesting aspects of the reflexion on the nature of papal ‘dominium’ that would later be used by leading intellectuals such as William of Ockham and Marsilius of Padua to limit the pontiff’s prerogatives during the debate over apostolic poverty. In conclusion, an investigation of the fortune of the letter in Early Modern England will be presented in order to assess the peculiar reception of this text by Protestant intellectuals.

[1] I express my deepest gratitude to Prof. Isabella Lazzarini (Università del Molise) and Prof. Barbara Bombi (University of Kent) for their useful remarks and suggestions to this research.

England and provisores at the eve of the fourteenth century

The Treaty of Paris, signed in 1259 between Henry III and Louis IX, halted the military conflict between England and France for a few decades. The war was resumed in 1294 after the refusal of Henry's successor, Edward I (1272-1307), to pay the feudal homage to the French king: the conflict was over in 1299 with the marriage between Edward and Philip IV's sister Margaret, coupled with the promise of a further marriage between Edward's son (the future Edward II) and Isabella, the French king's daughter. England was not in conflict with France alone: Edward I invaded Scotland in 1296 and deposed king John Balliol, who had been elected a few years earlier with Edward's favor. This started a series of wars—or rather rebellions, from the English viewpoint—that dragged on for almost the whole fourteenth century and in which France was also occasionally involved as an ally of the Scots. This troubled military situation was further aggravated by one of the major Welsh rebellions between 1296 and 1297.[2]

Military conflicts were not the only destabilising factor for England in these years. Since 1258 the clergy and the barons had presented Henry III and Edward I with numerous issues that needed to be reformed: there was a widespread sentiment that the crown was progressively limiting the autonomies that *Magna Charta* had granted in 1215. The parliaments that assembled during the reign of Edward I (an era in which these assemblies were becoming a stable political institution)[3] were the stage for continuous complaints that focused especially on the excessive

[2] See Seymour Phillips, *Edward II* (New Haven 2011) 76-95 and Michael Prestwich, 'England and Scotland during the Wars of Independence', *England and her Neighbours, 1066-1453: Essays in Honour of Pierre Chaplais*, edd. Michael Jones and Malcolm Vale (London-Ronceverte 1989) 181-197. For a closer look at the military and political relations between France and England in these years see Malcolm Vale, 'England, France and the origins of the Hundred Years War', *England and her Neighbours* 199-216.

[3] On the evolution of parliament in this period see Gerald Harris, 'The Formation of Parliament, 1272-1377', *The English Parliament in the Middle Ages*, edd. Richard Davies and Jeffrey Denton (Philadelphia 1981) 29-60.

taxation caused by the need to finance the wars in Scotland.[4] The same complaints occupied the troubled years of Edward II's reign until his deposition in 1327.[5] The financial crisis was the most pressing issue. The constant warfare had worsened the highly indebted situation of the crown: it is estimated that Edward I left debts for around £200,000 at his death in 1307 (especially to Italian bankers).[6] Nonetheless, the king was able to take advantage of the political situation of the beginning of the 14th century to restore the English finances: the clash between Boniface VIII and Philip IV put the English sovereign in a favorable position in the eyes of the pope, who in 1301 allowed him to keep half of the incomes of a tithe that was levied for the crusade. A few years later, in 1305, another event helped restore the English finances. On June 5th in Perugia the conclave elected the archbishop of Bordeaux Bertrand de Got to the papal see with the name of Clement V.[7] As a Gascon he was subject to both Philip IV and Edward I and had had excellent relations with the English king in the previous years: Clement thus represented an excellent opportunity for the normalisation of the relations between the two kingdoms.[8] The pope immediately granted Edward the right to retain a part of the incomes of a new crusade tithe for the following

[4] Michael Prestwich, *Edward I* (Berkeley 1988) 518-540.

[5] Phillips, *Edward II* 138-157.

[6] Prestwich, *Edward I* 534-537. The English crown's largest creditors were the Frescobaldi of Florence, who between 1297 and 1310 lent around £150,000 to Edward I and his son, of which only £125,000 were returned.

[7] The conclave lasted for eleven months and was the stage of double-dealings to elect a candidate who would meet the favor of the king of France. Such negotiations are summarized in Gian Luca Potestà, *Dante in conclave. La lettera ai cardinali* (Milano 2021) 75-90.

[8] The context of relations between Edward I, II and Clement V is summarized in Barbara Bombi, *Anglo-Papal Relations in the early Fourteenth Century: A Study in Medieval Diplomacy* (Oxford 2019) 134-153. For the earlier stages see Sophia Menache, *Clement V* (Cambridge Studies in Medieval Life and Thought, Fourth Series Cambridge 1998) 6-12, who explains how Bertrand de Got had already been involved in diplomatic missions to England with the aim of signing a peace agreement in 1294. See also Patrick Zutshi, 'The Letters of the Avignon Popes (1305-1378): A Source for the Study of Anglo-Papal Relations and of English Ecclesiastical History', *England and her Neighbours* 259-275.

seven years.[9] If this contributed to the restoration of the English finances, the new tax (which affected the ecclesiastics directly) also contributed to the exacerbation of the widespread discontent of the English ecclesiastics towards the holy see.

The election of Clement V also brought political advantages to the English sovereign. As a second embassy to Avignon was underway, the pope consented to the suspension from office of Edward's greatest opponent within the kingdom, the archbishop of Canterbury Robert Winchelsey.[10] Edward I, therefore, benefited in these years from an altogether good situation, as he could enjoy the incomes of a rich tax without being held responsible for its imposition by those who had to pay it.[11] However, the pontiff's generosity came with a price. The same embassy that obtained Winchelsey's suspension could not oppose the papal decision to reserve to the apostolic see the incomes of the first year of all the English benefices that would be vacant during the following three years. These benefices would have been assigned to candidates chosen directly by the pope, the so called 'provisores', who were often high prelates that resided outside England and that would never cross the Channel to take possession of their benefices.[12] This was not the first time that the apostolic see reserved the fruits

[9] The first quarter of the fourteenth century was 'that golden age of Anglo-papal fiscal relations, when obliging popes levied clerical tenths for the king's use to the tune of about £ 230,000', quoted from Pantin, *The English Church in the Fourteenth Century* (Toronto 1980) 127.

[10] Clement V also favored Edward I in other important matters: he granted papal dispensation for consanguinity for the planned marriage between the king's son and Isabella of France, he agreed to the canonisation of Thomas Cantilupe as well as to the election of an Englishman as cardinal and revoked the bull *Clericis laicos* of 1296: see Bombi, *Anglo-Papal* 137-14, Menache, *Clement V* 58, Prestwich, *Edward I* 540. The Archbishop of Canterbury, who came back to England in 1307, would become a leading figure in the following years until his death (1314) in polarising the clash between bishops and the crown: see K. Edwards, 'The political importance of the English bishops during the reign of Edward II', EHR 59 (1944) 311-347.

[11] Prestwich, *Edward I* 532-533 calculated that the income of this tax, together with the one granted by Boniface VIII, yielded the crown around £70,000 between 1301 and 1307.

[12] William Lunt, *Financial Relations of the Papacy with England to 1327* (Cambridge Massachusetts 1939) 488.

of English benefices: Clement IV had paved the way in 1265 with the bull *Licet ecclesiarum* and the papacy implemented this practice around Europe throughout the fourteenth century.[13] The nomination of provisors was one of the ways in which popes interfered in English ecclesiastical and political affairs and finds its place within a broader history of attempts of the holy see to control the English Church. Since the Investiture Controversy in the eleventh century the popes tried to control the administration of the English ecclesiastical patrimony and the appointments of ecclesiastics, as well as to reserve the appeals of all legal cases, thus delegitimising the crown's jurisdiction. This practice had borne considerable fruits over time: by the middle of the thirteenth century the papacy was deeply embedded in the English political affairs. Things began to change with Edward I, who since the 1280s encouraged clergymen to rely on the English courts to settle their cases instead of appealing to Rome.[14] This was the political and economic background in which Clement V ordered the reservation of English benefices in 1305. Let us now assess the impact that this decision had on England during the years 1306-1307 and see how the peculiarities of the English political context fostered the writing of a fictitious letter against papal provisors.

The reservation of benefices was officially announced on 1st February 1306 and its collection was entrusted to William Testa, who set to work from June. The complaints of the clergy as well as of the barons (Clement's decision, in fact, prevented the nobility from nominating their own beneficiaries) were brought forward in the last parliament of the reign of Edward I, summoned in Carlisle in the spring of 1307 to discuss issues related to the war with

[13] A detailed historical account of these aspects can be found in J. Robert Wright, *The Church and the English Crown 1305-1334: A Study Based on the Register of Archbishop Walter Reynolds* (Studies and Texts 48; Toronto 1980) 5-14. See also Lunt, *Financial relations* 494 for the use of this practice in the years after Clement V's pontificate.

[14] A summary in Daniel Gosling, *Church, State, and Reformation: the use and interpretation of* praemunire *from its creation to the English break with Rome* (Leeds 2016) 19-26.

Scotland.[15] The papal legate, Cardinal Peter of Spain, joined the parliament from March: his official task was to implement the marriage agreement between the future Edward II and Isabella of France, but his efforts were in vain.[16] The discussion of the issue of 'provisores' proved to be the real core of the parliament, which focused on the dreadful consequences of the English ecclesiastical patrimony being drained to the benefit of foreign nations: a chronicler epitomised this sentiment with the assumption that one of the reasons why the cardinal legate was in Carlisle was to plunder the English Church.[17] When the parliament was in session, a document divided into seven points was presented to king Edward. The complaints referred to the (alleged) abuses connected with the activities of the papal collector William Testa and underlined the disastrous consequences of the papal interferences for the English Church, the sovereign and the whole kingdom.[18]

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[15] Prestwich, *Edward I* 505-506. The parliament was summoned during the winter pause of one of the many military campaigns against Scotland that had to deal with the self-proclamation of Robert Bruce as king in March 1306. The war should have been resumed on July 6th, but the death of Edward I on the following day delayed the hostilities: see Phillips, *Edward II* 109-117. The writs of summons for the parliament were sent out on November 3rd and the assembly, originally scheduled for January 20th, opened on January 25th after the last representatives had arrived: see *Parliament Rolls of Medieval England, 1275-1504*, edd. Chris Given-Wilson, Paul Brand, Seymour Phillips, Mark Ormrod, Geoffrey Martin, Anne Curry and Rosemary Horrox (16 vols. Woodbridge 2005) 2.129.

[16] Negotiations for this marriage had been dragging on since 1299 and continued again in January 1307 and even during the celebration of mass on the wedding day: Phillips, *Edward II* 119.

[17] *Flores Historiarum, AD 1265 to AD 1326*, ed. Henry Luard (London 1890) 136: 'Circa festum cathedrae sancti Petri venit quidam cardinalis Sabiensis, magister Petrus Hispanus, missus a latere Papae in Angliam ad perficiendum ordinatum matrimonium inter primogenitum regis Angliae Edwardum et filiam regis Franciae Isabellam; et ad Anglicanas ecclesias depilandum'. See also Peter Linehan, 'The English mission of cardinal Petrus Hispanus, the Chronicle of Walter of Guisborough, and news from Castile at Carlisle (1307)' EHR 117 (2002) 605-621.

[18] The document is edited in *Parliament Rolls* 528: 'A nostre seignur le roi prient contes, barons, et tote la communaute de la terre aide et remedie des oppressions southescrites qe lapostoille fait faire en ceste roialme, en abbessement de la foi Dieu et anyntissement de lestat de Seinte Eglise en

William Testa was summoned to Carlisle to respond to such accusations: after his hearing, the parliament suspended his activity and ordered him to return what he had collected until then.[19] Moreover, a statute was issued which forbade for any 'censum' paid by the ecclesiastics to be taken outside the kingdom.[20] This was the first of a series of statutes (the so called 'Statutes of Provisors' or *Praemunire*) that were issued by parliaments throughout the 14th century to limit the interferences of the pope in economic matters concerning the English Church.[21] The kings did not always implement these statues to their fullest:[22]

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roialme, et a desheritezon et prejudice du roi et de sa coroune et des autres bones gentz du dite roialme, et en offens et destruction de la lei de la terre, et a graunt damage et enpoverissement du poeple, et en subversion detut lestat du roialme, et encountre la volente et lordenement des primes foundours'. Gosling, *Church* 28 and Lunt, *Financial relations* 489 also discuss this point.

[19] *Parliament Rolls* 532: 'Super quibus oppressionum, gravaminum, et extorsionum, et injuriarum articulis, prefatus magister Willelmus Testa, quatenus ipsum contingunt, in pleno parliamento predicto allocutus, convictus extitit, nec inde se potuit aliqualiter excusare, nisi tantum quod dixit quod auctoritate domini pape premissa fuerat executus'.

[20] *Parliament Rolls* 460: 'Considerans igitur prefatus dominus rex . . . ordinavit et statuit ne quis abbas, prior, magister, custos, seu quivis alius religiosus, cujuscumque condicionis seu status aut religionis existat, sub potestate et dicione sua constitutus, censum aliquem per superiores suos abbates, priores, magistros, custodes religiosarum domorum vel locorum, impositum vel inter se ipsos aliqualiter ordinatum, extra regnum et dominium suum sub nomine redditus, tallagii, aporti, seu imposicionis cujuscumque, vel alias nomine escambii, vendicionis, mutui, vel alterius contractus quocumque nomine censeatur, per se vel per mercatores aut alios, clam vel palam, arte vel ingenio deferat vel transmittat, seu deferri faciat quoquo modo, nec eciam ad partes exteras se divertat causa visitacionis aut alio colore quesito, ut sic bona monasteriorum et domorum suarum extra regnum et 'dominium' predictum adducat'.

[21] This legislation would see an ending point 1393 with the 'Statute of *Praemunire*'. The Statute of Carlisle was considered, throughout the Fourteenth century, the precedent on which subsequent enactments should be based, but only in later centuries was it included as a fundamental step in the process of limiting Roman interference in the English Church: see Gosling, *Church* 8. For the development of this legislation in the fourteenth century see 27-57.

[22] In this period the statutes had no legislative force if they had not gone through a process that required the assent of the sovereign's council and the promulgation by the king himself. It was only with Edward III that the assent

in fact, once the parliament of Carlisle was over, Edward I imposed only minor obligations on William Testa, after which he was allowed to continue the collection of English revenues. It is clear that the king was not in the political and financial position to oppose the choice of the papal 'provisores'.[23] Michael Prestwich affirmed that during this parliament «a vigorous defence of the English Church and the rights of English patrons and benefactors» took place,[24] although the immediate effects of the statute had only minor consequences on the papal provision of English benefices.

The Epistola Petri between papal oppressions and the need to defend the regnum

During the parliament of 1307 the petition of the barons and the ecclesiastics was not the only document that denounced the climate of financial and political oppression in which the English Church laid because of the papacy. The fourteenth-century chronicler Walter of Guisborough reported that before the petition was presented:[25]

> In predicto parliamento cum multi multa loquerentur de oppressionibus domini papa quas inceperat in ecclesia Anglicana, ecce quasi subito in

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of parliament became fundamental in the implementation of statutes as normative documents: see Harris, 'The formation' 45-47.

[23] The only condition which Edward I imposed on William Testa work was that he should not levy the fruits of the abbeys and priories: Lunt, *Financial relations* 490. The statute of 1307 was not officially revoked, and as early as 1316 Edward II referred to it to prohibit certain monks to export coin outside the kingdom: see Gosling, *Church* 29. Documents are in *Parliament Rolls* 535-536.

[24] Prestwich, *Edward I* 552.

[25] The passages from the letter are quoted from the modern critical edition: Harry Rothwell, *The Chronicle of Walter of Guisborough, previously Edited as the Chronicle of Hemingford or Hemingburgh* (London 1957) 371-374. The text was also printed in *Chronicon domini Walteri de Hemingburgh* (Londini 1849) 254-259 and in Melchior Goldast, *Monarchia sancti romani imperii* (Hanoviae 1611) 11-12, who dated it to 1250. Pantin, *The English* 75, and Prestwich, *Edward I* 552 also mention the letter. According to the HLF, ed. Barthélemy Hauréau (Paris 1869) 25.82 the target of the letter would be the Cistercians, 'les ministres les plus zélés et les plus puissants de la suprématie romaine'.

> pleno consilio descendit talis cedula quasi celitus emissa, legebaturque statim audiente rege cardinale universis prelatis et aliis qui convenerant

This is not the first letter that was purportedly written by a heavenly sender and that found its way to England. The first was reported in the chronicle of Matthew Paris under the year 1109 and its aim was similar to that of the letter of 1307: to speak against the interferences of the Roman Church in England.[26] The second exemplar of heavenly letter was an invective written in the name of Christ dated 1253 that reproached King Henry III and the ecclesiastics for condemning to death Peter of Pontefract, a prophet that warned them against their misbehaviours.[27] The 'salutatio' of the letter that appeared in Carlisle informs us that this was sent by a certain *Petrus filius Cassiodori* (hence the title that we have chosen for the letter: *Epistola Petri*):[28]

> Ecclesie nobili anglicane in luto et latere ancillate, Petrus filius Cassiodori miles catholicus pugil Christi devotus salutem et iugum abicere captivitatis et bravium accipere libertatis

The epistle was read in the presence of the king and of cardinal Peter of Spain, which suggests that it was delivered after March. No official documents of the parliament mention this letter, yet this is hardly surprising, as one considers the nature of this document. It is impossible to know whether the letter circulated during the parliament or whether it was later added to the chronicle: Harry Rothwell, while editing the chronicle, has argued that this section of the chronicle had not been written by Guisborough himself, but by one (or more) continuators.[29] The specification of the celestial origin of the letter is interesting and draws the attention to the elements through which fictitious letters revealed their nature of fictions: although *Petrus* may appear to be

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[26] *Matthaei Parisiensis monachi sancti Albani, Chronica majora*, ed. Henry Luard (London 1964) 135-136. The letter is also mentioned in Helen C. Feng, *Devil's Letters: Their History and Significance in Church and Society, 1100-1500* (Ph.D. Northwestern University1982) 26.

[27] The invective was recently edited in Frédérique Lachaud, Elsa Marguin-Hamon, 'Mouvement réformateur et mémoire de Pierre de Wakefield en Angleterre au milieu du XIIIe siècle: L'"invective contre le roi Jean ",' *Archives d'histoire doctrinale et littéraire du Moyen Âge* 85 (2018) 149-201.

[28] Rothwell, *The Chronicle* 371.

[29] Ibid. xxxi argued that Guisborough contributed up to 1305 at the latest.

a genuine sender—we shall return on this point at the end of this paper—we are told that the letter fell from the sky, which dissipates any doubts on its fictitious nature.

The English Church is the addressee of the *Epistola Petri*, whose 'salutatio' speaks of it as being 'humiliated and treated like a servant'.[30] It is important that *Petrus*, here, qualifies as a 'miles': this reveals an interest of the author for the subject of war that will be further developed throughout the text. It is beyond the scope of this paper to take into account the overlap between war and religion in the Middle Ages, but we believe that the use of 'miles' is interesting because it recalls the 'clericalisation' of the military profession that developed from the eleventh century onwards (especially on the impulse of pope Gregory VII). As Carl Erdmann has shown, this led to a double shift in the use of such terminology: words like 'miles' started to be used in purely ecclesiastical contexts, while others like 'militia Christi' or 'militia Petri', originally limited to religious contexts such as the blessings before the battles, gradually found their place among warfare terminology.[31] *Petrus* is therefore a layman, but above all he is a 'miles', a fighter who spurs his public to resist for the freedom of the Church.

The 'exordium' of our letter reports a biblical passage that refers to the state of decadence of the Church (Lam. 2:13). This is the theme around which the *Epistola Petri* is developed:[32]

> Comparabo te cui vel assimulabo te, filia Jerusalem? Cui exequabo te, virgo filia Syon? Magna est enim contricio tua velut mare, sola facta es sine solacio tota die merore confecta

To insert a passage from the Bible in the 'exordium' in order to explicit the theme of the letters was a widespread practice in the Middle Ages: this is a teaching that is found in every manual of *ars dictaminis*, the discipline that regulated the correct writing of

[30] The passage recalls Idt. 5:10: 'in luto et latere subiugasset eos'.
[31] On this aspect see Carl Erdmann, *Die Entstehung des Kreuzzugsgedankes* (Stuttgart 1965) 51-85, especially 71 where he analyzes 'welche Einwirkungen auf den Kriegerstand ausgeübt wurden, wieweit der Kriegsberuf selbst verkirchlicht wurde'.
[32] Rothwell, *The Chronicle* 372.

letters.[33] The *Epistola Petri* goes on and lists the burdens through which the English Church was being oppressed by her enemies, the 'principes . . . romani', here assimilated to the enemies of Christ, the Pharisees (Matt. 23:2):[34]

> Nam scribe et pharisei super cathedram Moysi sedentes, principes tui Romani hostes . . . in tuis et tuorum ministrorum humeris imponunt onera, et, ultra quam decet, te constituunt sub tributo, que libera fueras ab antiquo

The English Church has always been free from paying tributes, but Roman interferences have now distorted this pristine condition. The real target of the letter is the pope, who, *Petrus* says, should be elected to deal with matters concerning the faith instead of 'ad spolias et rapinas', and also not 'pro annuis censibus imponendis, nec pro necandis hominibus'.[35] *Petrus* insists on how the English Church is treated without regard by the pope, who 'in nullo tamen tibi paternitatis genere hoc ostendit' and who is accused of serving both God and the Devil:[36]

> quis enim credat se simul et semel posse servire Deo et Mammone ac sue voluntati placere seu carnis et sanguinis revelacionibus inherere et offere munera Christo digna?

The choice of the name of the Devil is of foremost importance: 'Mammone' is a specific (and intentional) reference to avarice.[37] *Petrus* does not limit himself to a harsh reprimand of the misbehaviours of the pope. The letter can be read on a subtler level of interpretation, for which we must pay attention to some specific choices of terminology such as the Devil's name or the use of 'miles', whose aim is to reinforce the accusations and clarify *Petrus' status*. The pope, the letter goes on, does not have the

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[33] Fundamental on this point is Florian Hartmann, *Ars dictaminis: Briefsteller und verbale Kommunikation in den italienischen Stadtkommunen des 11. bis 13. Jahrhunderts* (Thorbecke 2013) 13-15: 'Mit einem Sprichwort oder eine Ergebenheitsbekundung den Empfänger freundlich stimmend, sollte das *exordium* bereits auf das Anliegen des briefes hinweisen'. See also Martin Camargo, *Ars dictaminis ars dictandi* (Turnhout 1991) 23.

[34] Rothwell, *The Chronicle* 372.

[35] Ibid.

[36] Ibid. 372-373.

[37] Riccardo Parmeggiani, 'Luoghi e nomi del diavolo', *Il diavolo nel Medioevo: Atti del XLIX convegno storico internazionale. Todi, 14-17 ottobre 2012* (Spoleto 2013) 450-477, 466.

necessary qualities to take care of Christ's flock. In fact, the pontiff is doing everything in his power to deprive Christians of all their goods: he scatters the good shepherds and puts mercenaries (his relatives) in their stead (another clear reference to a biblical passage, Io. 10:12):[38]

> Vide, inquam, facta inaudita, nuncupativi filia patris tui, qui bonos pastores a caulis ovium amovet, et suos nepotes, consanguineos et parentes, nonnullos literas ignorantes, et alios velut mutos et surdos, ovium earundem non intelligentes balatum, nec de morsibus curantes, velut mercenarios vellera auferentes et metentes semina aliorum, non ut prosint sed ut praesint, constituit pro eisdem

This list of complaints revolves around the issue of fiscal oppression: Clement V is attacked because he 'trahit quod libet' from the English Church, and what is more is that 'nec tamen reputat se contentum, si partem rerum tuarum decimam scilicet a te sumat' (the pope is even compared to Nebuchadnezzar in his misbehaviour: 'quod egerat enim ille, agit et iste'). Everybody pities the state in which the English Church lays.[39] Hence, *Petrus* asks that God himself intervene to put an end to this dreadful situation: he should listen to the lament of the English people against the hardness of heart of the pope, who is constantly at work to confiscate the property of Christians and occupy it after their death, which is exactly what Clement V intended to do with the 'provisores' over the following three years.[40]

Some key elements have already surfaced in this brief analysis and require a closer look. As we are almost at the end of the *Epistola Petri*, it is interesting to give a final look at the theme of 'militia' before we delve into the specific argument of this essay. In the final lines of his letter, *Petrus* moves his economic and political invective on another level, the military one: the oppressions that he listed were not only undermining the 'status' of the English Church, but also that of the 'regnum'. More

[38] Rothwell, *The Chronicle* 373.

[39] Ibid.: 'Compatiantur tibi, filia, omnes transeuntes per viam, quia non est dolor sicut dolor tuus'.

[40] Ibid.: 'Afflictionem populi tui, eiusque gemitum, audi Domine, vide Domine et descende, quia cor dicti viri super cor Pharaonis est nimium induratum . . . quia quorumcunque christianorum bona sub nomine tituli de intestatis confiscat, omnia post decessum occupare intendit'.

specifically, the ability of the English kingdom to defend itself against external enemies was threatened: England would not be able to respond adequately to the danger of an invasion because of the continuous drain of financial resources to the benefit of foreigners. Here is the passage that introduces this fundamental discourse:[41]

> Animadvertat itaque militia anglicana, qualiter a retroactis temporibus Franci, in regno Angliae suae concupiscentiae oculos dirigentes, machinabantur illud suae subjicere potestati. Sed quod in ipsis hactenus defuit, est timendum ne suppleat dicti viri nova conjecturatio novi hostis; quia, regni deficiente thesauro, et ipsius destructo sacerdotio, efficietur vere regnum impotencius contra hostes

It is now clear why *Petrus* identified himself as a 'miles' in the 'salutatio': he is someone who holds dear the military defence of the English kingdom (and of its Church: he is 'miles catholicus et pugil Christi devotus')[42] against foreign enemies. This passage reveals even more interesting aspects. In the first place, the theme that the *Epistola Petri* is developing would be at the centre of English political reflexion in the following decades: William Ockham wondered whether it was lawful for the sovereign to withhold ecclesiastical revenues in emergency situations, especially in the case of an imminent military threat. This fostered a heated debate that lasted throughout the fourteenth century and that was closely intertwined with the publication of the *Statutes of Provisors* (John Wyclif, definitely in favor of this eventuality, was another major figure in this debate).[43] Another interesting aspect is that the petition presented to the sovereign during the parliament

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[41] Rothwell, *The Chronicle* 374.

[42] It is interesting to note that the definition 'pugil Christi' was also used in these years by Ubertino da Casale in the fifth book of his *Arbor vitae* to exalt king Philip IV of France: see Potestà, *Dante in conclave* 95.

[43] Stephen Lahey, *Philosophy and Politics in the Thought of John Wyclif* (Cambridge Studies in Medieval Life and Thought 4th Series 54; Cambridge 2003). Takashi Shogimen, 'Wyclif's ecclesiology and political thought', *A Companion to John Wyclif: Late Medieval Theologian*, ed. Ian C. Levy (Brill's Companions to the Christian Tradition; Leiden 2006) 199-240. Bernhard Töpfer, 'John Wyclif—mittelalterlicher Ketzer oder Vertreter einer frühreformatorischen Ideologie?', *Jahrbuch für Geschichte des Feudalismus* 5 (1981) 89-124. On this see also Pantin, *The English* 127-129.

of 1307 made no specific reference to a military threat in relation to or as a consequence of the impoverishment of the kingdom.[44] The aforementioned petition focused exclusively on the economic consequences of papal interferences, while the *Epistola Petri* goes beyond it by connecting this aspect to the increased risk of invasion as a consequence of the exportation of the incomes of ecclesiastical benefices: the new enemy of the aforementioned passage (the pope) is lurking in the same way that an old enemy (France) had done before. It is likely that it was thanks to the anonymous and fictitious nature of our letter that its author could draw attention to the possibility that both France and Scotland (the 'hostes' at the end of the last passage) could take advantage of the situation and subject England to their 'potestas': although the passage seems to focus on the new enemy in Avignon, *Petrus* is well aware of the other threats to the kingdom.

This passage is, therefore, a warning directed to the sovereign and the barons not to lower their guard in a moment when there seemed to be a community of intentions between the sovereign, the clergy and the nobility for the defence of the freedom of the English Church and of the prerogatives of the crown. This harmony was possible because all of them, as we have seen, had a role in the choice of beneficiaries as well as in the collection of ecclesiastical revenues.[45] The only way out of this dreadful situation, the *Epistola Petri* continues, is an alliance between the king and the 'potentes' of the kingdom who endowed the English

[44] The petition presented to Edward I makes only a general mention of the 'subversion detut lestat du roialme': see *Parliament rolls* 528.

[45] Gosling, *Church* 19: 'by the fourteenth century, the king, pope, prelates of the church and lay magnates all had a hand in the promotion of clergy to English benefices'. See also *Parliament Rolls* 528-529: 'si ceste chose soit soeffert . . . le roi et les autres lais avoes en temps des vacacions lour presentementz perdront'. This climate of harmony continued during the first years of Edward II's reign: he proved conciliatory towards one of his father's greatest enemies, the Archbishop of Canterbury Robert Winchelsea, whom he called back from exile as early as 1307. Nonetheless, only a few years later the archbishop would be at the head of the bishops' opposition to Edward's policies: on all this see Edwards, 'The political importance' 314-325.

Church with huge benefices and who are now required to defend her against the pope:[46]

> Ne igitur tu, filia, tuique sacerdotes, in miseriam deducamini longiorem, expedit ut pro tua et eorum salute, rex tuus christianissimus et regni potentes, qui amplissimis beneficiis vos dotarunt [...] resistant conjecturationibus, conspirationibus, arrogantie, praesumptioni atque superbie dicti viri

This epistle thus conveys a sense of harmony between secular and religious authorities in fighting the oppressions of the pontiff, who is the most fearsome threat precisely because he can pave the way for other enemies of England. It is by means of a 'novo dominii genere' that the pope intends to drain all the wealth out of the English Church, and once he has done that he will throw off the mask of 'simplicitas' and subvert the entire kingdom:[47]

> per praemissa et alia imposita per eundem, totalem pecuniam Anglicanam novo dominii genere emungere jam compellit, ne, dissimulata in hac parte simplicitas, regni huius subversionem afferat velut tuam

We have seen that it was believed that Cardinal Peter of Spain had come to Carlisle 'ad Anglicanas ecclesias depilandum'.[48] *Petrus* makes use of an equally evocative verb ('emungere') to indicate how the presence of papal 'provisores' was depriving the island of its resources. One should, nonetheless, be careful in assuming that the king stood as a defender of the liberty of the English Church by blindly opposing the 'provisores' chosen by Avignon. It is true that the *Statutes of Provisors* put a stop to this practice, but this was the result of political and economic factors that were not fostered by the (alleged) damage that the appointment of 'provisores' caused to the English finances. Scholars have shown how, until at least the pontificate of Clement VI (1342-1352), the system of 'provisores' was systematically exploited by the English

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[46] Rothwell, *The Chronicle* 374. In the petition of the barons it was also pointed out that the English Church had been endowed with vast benefices, the fruits of which the pope now wished to keep for himself (*Parliament Rolls* 528.): 'et certeynes possessions, qe amontent a les deux parties du roialme, soient par les ditz foundurs assignetz as prelatz pur sustener les chages susditz; et des tieles possessions . . . la vint lapostoille, en apropriant a lui la seignurie des tieles possessions, come il feut meismes avoe'.

[47] Rothwell, *The Chronicle* 374.

[48] Luard, *Flores Historiarum* 136.

sovereigns, who could influence the pope's choice towards candidates that they would later use as diplomats and envoys to the curia. As Barbara Bombi has put it, the appointment of 'provisores' to English benefices was exploited to stipend English proctors in Avignon and 'to secure a network of protégés and friends at the papal curia'.[49]

We have reached the 'conclusio' of this short letter, where *Petrus* turns again directly to God and asks him to make the pontiff come to his senses to stop his vicious behavior. Three other biblical passages (Jer. 22:2 and 22:30 and Psalm 108) close the *Epistola Petri*: together, they form the 'sanctio negativa', another key-element in Medieval letters whose role was to stress the punishment that would fall upon the addressee if they didn't comply with the letter's demands. In this case it is the pope who is threatened with the divine punishment that one reads in the quoted Psalm:[50]

> Avertat nempe virtutum Dominus de corde viri illius velamen, sibique cor contritum et humile largiatur, et agnoscere eum faciat vestigia veri Dei, per quae a suis tenebris eruatur, et premissos labores sinistros dimittere compellatur [...] Quod si perterritus ex hiis dictis non destiterit ab inceptis, et restitutionem non fecerit de perceptis, psallent pro eo extunc nequiter indurato Psalmum centesimum octavum illi cui omnia sunt aperta singuli singulis diebus clara voce in Christo devotissimi 'Deus laudem' etc.

The lack of a date should not come as a surprise: many other fictitious letters don't have this section or present fictitious dates. This is related both to the copying process and to the intent of the authors of such letters. In the case of the *Epistola Petri* it is also likely that the chronicler decided to omit this part as it would have been redundant in the narration. The text ends with the *incipit* of Psalm 108, but the addition of 'etc' to summarise the biblical passage makes us wonder whether the letter actually closed so abruptly. We will shed light on this aspect at the end of this paper, with some brief remarks on the Early Modern reception of the *Epistola Petri*.

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[49] Bombi, *Anglo-papal* 95.
[50] Rothwell, *The Chronicle* 374.

Dominium and property rights in the Epistola Petri and in the medieval political and legal thought

Now that we have analysed the text of the letter, let us come back to some key elements that we have only mentioned in passing. The *Epistola Petri*, in its sharp condemnation of the dreadful consequences of the pontiff's interference in the English ecclesiastical patrimony, reflects on the very nature of the 'officium' of the bishop of Rome: what allows him to act this way?

> Nonne debet in oculis omnium mirabile reputari, quod ubi Christus per se et Petro regibus iussit solvi tributum, ipse vero regna et regnorum principes, contra voluntatem Ipsius cuius se dicit esse vicarium, qui a se regna et mundi iudicia abdicavit, suae subjicere nititur ditioni, dominio sui stili, qui totum sibi vendicat quod scripserat esse suum?

This passage inserts a political argument within an economic framework on the obligation to correspond a tribute to Rome and makes use of a very specific terminology: that of 'dominium'. The pope claims a 'dominium' over all creation, despite the fact that Christ had renounced his temporal 'dominium'. But how could this claim be put into action? *Petrus* develops this point within the framework of the pope's pretence to vindicate 'dominium' over the goods of the Church and, consequently, over their fruits. This allows him to connect the pope's political 'dominium' (one could speak of 'iurisdictio' in this sense)[51] to the claim that the pontiff possessed an economic 'dominium', that is a right of ownership, over every good, ultimately not limited to those of the English Church.[52] The pope needs only decree—in written form: an interesting critique of the hypertrophy that direct papal legislative activity was developing in spite of other forms of canon law—that something belongs to him for him to possess 'dominium' over it. But how is political 'dominium' intertwined with its economic counterpart? How does claiming a property right affect the way in which sovereignty is conceived? This problem has deep roots in medieval political thought, but we shall

[51] The reference work for 'iurisdictio' is Pietro Costa, *Iurisdictio: Semantica del potere politico nella pubblicistica medievale (1100-1433)* (Milano 1969).

[52] For the terminology see Joseph Canning, *Ideas of Power in the late Middle Ages, 1296-1417* (Cambridge 2011) 31.

limit our analysis to those aspects that can help us understand the discourse in the *Epistola Petri*.

During the eleventh and the twelfth century a significant development of legal thought was underway, which reached a high level of sophistication by the thirteenth century.[53] Brian Tierney has demonstrated how the vocabulary pertaining to natural rights (which law experts in the Middle Ages considered subjective rights and no longer, as the Roman tradition, natural laws imposed by a higher authority), had evolved since the twelfth century, especially thanks to the contribution of the canonists.[54] Law experts began to discuss on which were the immutable rights of the individual that could not be amended by human legislators: such rights were protected by natural law, and this was superior to positive law (to which canonists variously referred to as *ius gentium*, *ius civile*, *ius humanum*). The first fundamental right that was isolated was property:[55] no human authority could amend it. In practice, exceptions were gradually granted to sovereigns, thus allowing them to alienate the private property of their subjects: all they had to do was demonstrate the existence of a just cause.[56] A

[53] Kenneth Pennington, *The Prince and the Law, 1200-1600: Sovereignty and Rights in the Western Legal Tradition* (Berkeley-Oxford 1993) 132.

[54] Brian Tierney, 'Origins of Natural Rights Language: Texts and Contexts, 1150-1250', *History of political thought* 10 (1989) 615-646.

[55] Pennington, *The Prince* 124. Tierney, 'Origins' 627-628.

[56] The vagueness of this definition led to numerous abuses by sovereigns, which fostered heated debates among law experts, divided between those who protected private property in absolute terms, those who allowed some exceptions and those who supported the emperor's claim to be *dominus mundi*. The issue complicated itself as the juridical reflexion (often expressed in single *consilia* requested by sovereigns) started to be closely interconnected with certain dynamics of political power that also affected the law experts. Baldo degli Ubaldi is an interesting example in this regard: he initially argued that the 'princeps' could dispose of private property even without a just cause, while later, in a 'consilium' for Giangaleazzo Visconti, he partly dismantled this position and admitted the need for just cause, but did so with obscure arguments that prevented him from undermining the authority of the Signore of Milan. On this see Pennington, *The Prince* 203-218, while the scholar discusses the absolutist positions of law experts Jacques de Revigny and Riccardo Malumbria (24-31 and 114-115). On Baldo's position a long debate arose between Pennington and Joseph Canning, as the latter emphasized the absolutist element

famous anecdote dating back to the era of emperor Frederick I gives us the extent to which the issue of a sovereign that could exercise 'dominium' over individual property was perceived to be a threat for his subjects' liberty:[57]

> Cum dominus Fredericus imperator semel equitaret super quodam suo palafredo in medio dominorum Bulgari et Martini, exquisivit ab eis utrum de iure esset dominus mundi. Et dominus Bulgarus respondit, quod non erat dominus quantum ad proprietatem. Dominus vero Martinus respondit, quod erat dominus. Et tunc dominus imperator, cum descendisset de palafredo, super quo sedebat, fecit eum presentari dicto domino Martino. Dominus autem Bulgarus hec audiens, dixit hec elegantia verba: "Amisi equum, quia dixi equum, quod non fuit equum.

Bulgarus' attitude inhibited the sovereign's freedom of action in the field of individual property. The fact that Barbarossa rewarded Martin instead exemplifies the issue on which jurists would be debating over the following centuries: if a sovereign could amend the first inalienable right sanctioned by the *ius naturale*, then there would have been no way of limiting the prince's power in any other field. This problematic was not only limited to civil law: Saint Augustine was the first to address the nature of private property in the specific, thus becoming an 'auctoritas' for later thinkers. According to the Church father, the 'dominium' of the individual over property was only a consequence of the Fall, and therefore derived from sin: all the property was held in common in the prelapsarian state, where, just as there was no 'dominium' of man over man, there also was no 'dominium' of man over property. Augustine applied to property the same reasoning he developed about authority: property could only come from God and must be administered exclusively by those who have his grace.

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of Baldo's doctrines on property. See Joseph Canning, 'Baldus de Ubaldis and the Language of Power in the Ius commune', *Proceedings Syracuse 1996* 591-601, to which Pennington replied in 'Was Baldus an Absolutist? The Evidence of his Consilia', *Politische Reflexion in der Welt des späten Mittelalters*, ed. Martin Kaufhold (Boston 2004) 305-319. On the dependence of Baldo and other jurists on their patrons see Robert Swanson, *Universities, Academics and the Great Schism* (Cambridge 1979) 18.

[57] MGH, SS 18.607. See Pennington, *The Prince* 16, who points out how this anecdote was probably backdated to this period but was originally a discourse between the jurists Azo and Lothar, questioned by emperor Henry VI.

Only God holds true 'dominium' over things and persons, and those who are entitled with 'dominium' on earth possess it imperfectly and only by virtue of God: all other forms of 'dominium' that do not come from God are not justified and must be considered unjust and, ultimately, a sign of tyranny.[58] Nearly every medieval thinker agreed on the original state of ownership and possession was sanctioned by the *ius naturale*: private property was what Thomas Aquinas called a human addition to *ius naturale*.[59] Nevertheless, the necessity of the existence of private property in a post-lapsarian society was unanimously acknowledged.[60] This debate over private property rights collided with the

[58] Lahey, *Philosophy* 30-31. Pennington, *The Prince* 124.

[59] Lahey, *Philosophy* 35. Tommaso D'Aquino, *La somma teologica* II-ae (Bologna 2014) 661 (q. 66, a. 2): 'Unde proprietas possessionum non est contra ius naturale; sedi iuri naturali superadditur per adinventionem rationis humanae'.

[60] Lahey, *Philosophy* 32-40. Thomas Aquinas was the 'auctoritas' on this point: the Dominican stated that the *ius naturale* decreed the communion of goods in the only sense that it did not assign any specific property to anyone. See Brian Tierney, 'Public Expediency and Natural Law: A Fourteenth-Century Discussion on the Origins of Government and Property', *Authority and Power: Studies on Medieval Law and Government Presented to Walter Ullmann on his Seventieth Birthday*, edd. Brian Tierney and Peter Linehan (Cambridge 1980) 167-182, 176. The struggle between the existence of natural law and the need for private property is also visible in Gratian's *Decretum*, as Tierney, 'Origins' 629-630 shows. The scholar quoted a passage from the introduction of Huguccio's *Summa* in which the decretist made the common possession of goods compatible with the existence of private property: 'Cum dicitur iure naturali omnia sunt communia . . . is est sensus . . . iure naturali, id est iudicio rationis approbante omnia sunt communia, id est tempore necessitatis indigentibus communicanda. Naturali enim ductu rationis approbamus nobis tantum necessaria retinere, reliqua proximis indigentibus debere distribuere' (Tierney, 'Origins' 641. The passage is taken from Admondt SB 7 fol. 2va). William Ockham also reflected on this point: see Brian Tierney, 'Natural law and Canon Law in Ockham's Dialogus', *Aspects of late Medieval Government and Society: Essays Presented to J.R. Lander*, ed. Jack Rowe (Toronto 1986) 3-24. Ockham's position on 'dominium' in the prelapsarian state is well explained in Jürgen Miethke, *Ockhams Weg zur Sozialphilosophie* (Berlin 1969) 467-477. The thought of Durando di S. Porziano was also capital in this regard: in the treatise *De legibus* he underlined the concept of 'expedientia', which is at the basis of private property (see Tierney, 'Public expediency' 178).

reflections of civil law experts: if property was a consequence of sin, then the claim of its juridical immutability collapsed. The first inalienable right of individuals would thus be included within ordinary legislation, which would make it amendable by human legislators.[61]

Scholars stress that the hierocratic turn to the discussion on papal 'dominium' over individual goods started with the writings of the Augustinian canon Aegidius Romanus (c. 1247-1316). A closer examination reveals that it was under pope Innocent IV (1243-1254) that ideas about the possession of goods by the Church moved its first steps towards the vision of the pontiff as their lord (dominus). Before the great canonist Sinibaldo Fieschi was elected pope, the general principle according to which the 'dominium' of an ecclesiastical property resided within the local community was widely accepted. Innocent IV, who relied on a corporatist vision of the Church that would have had a great impact on the development of the so-called conciliar theory, was the first to affirm that the 'dominium' of goods belonged to the mystical body of the Church, that is to what he called the 'aggregatio fidelium': from this followed that the pope, as the head of the 'aggregatio', was the 'dispensator' of its properties.[62] This did not

[61] Pennington, *The Prince* 125, traces the evolution of this thought: Azo and Accursius argued that, although private property was not a natural right, it was established in the Ten Commandments and, therefore, was a precept of divine law.

[62] Brian Tierney, *Foundations of the conciliar theory: the contribution of the medieval canonists from Gratian to the Great Schism*. *New Enlarged Edition* (Studies in the History of Christian Thought 81. Leiden-New York-Köln 1998) 128-129, 151-152. This idea would later be taken up by Ockham: see Miethke, *Ockhams Weg* 458-466. The treatise *De schismate* (1403-1408) written by the Italian canonist and later cardinal Francesco Zabarella, is fundamental in assessing the reception of the corporative theory of the Church within the context of the evolution of the conciliar theory. The only edition available is still that of Simon Schard, *Syntagma tractatuum de imperiali iurisdictione, authoritate et preeminentia, ac potestate ecclesiastica* (Argentorati 1609) 235-248. An exhaustive treatment of Zabarella's ecclesiology is made by Tierney, *Foundations* 220-237, Walter Ullmann, *The Origins of the Great Schism: A Study in Fourteenth-Century Ecclesiastical History* (London 1948) 191-231, Giuseppe Alberigo, *Chiesa conciliare: Identità e significato del conciliarismo* (Brescia 1981) 84-90.

mean that the pontiff could claim ownership of these goods, but only that he could administer them. Canonists would soon extend this theory and claim that the pope had a right of proxy over Church properties. The issue of 'dominium' over ecclesiastical property reached its peak during the clash between the mendicant orders and the secular masters that broke out in the mid-13th century and that led to the spread of the antimendicant rhetoric.[63] The Franciscan theory of the 'usus pauper' and the attribution to the pontiff of the 'dominium' of all the goods of the Order (decreed by Nicholas III with the bull *Exiit qui seminat* in 1279)[64] fostered the attacks of the secular masters and led to some interesting outcomes that we can only briefly mention. Although in direct contrast to each other, the Franciscan Thomas of York and the secular theologian Gerard of Abbeville both agreed that prelates were simple 'procuratores' of the 'bona ecclesiastica'. The former—as Roberto Lambertini has shown—did so 'per diminuire la forza della iurisdictio esercitata dai prelati', while the latter intended to rebut Thomas' accusation that seculars were less perfect than mendicants because of their possession of

[63] The bibliography on this clash is vast: some useful studies are Gert Melville, 'Duo novae conversationis ordines: Zur Wahrnehmung der frühen Mendikanten vor dem Problem institutioneller Neuartigkeit im Mittelalterlichen Religiosentum', *Die Bettelorden im Aufbau: Beiträge zu Institutionalisierungsprozessen im mittelalterlichen Religiosentum*, edd. Gert Melville, Jorg Oberste (Munster 1999) 1-23. Sita Steckel, '"Gravis et clamosa querela" Synodale Konfliktführung und Öffentlichkeit im französischen Bettelordensstreit 1254-1290', *Ecclesia disputans: Die Konfliktpraxis vormoderner Synoden zwischen Religion und Politik*, edd. Christoph Dartmann, Andreas Pietsch, Sita Steckel (Oldenbourg 2015) 159-202. Sita Steckel, 'Rewriting the Rules: The Secular-Mendicant Controversy in France and its Impact on Dominican legislation, c.1230-1290', *Making and Breaking the Rules: Discussion, Implementation, and Consequences of Dominican Legislation*, ed. Cornelia Linde (Oxford 2018) 105-130. Guy Geltner, 'Brethren Behaving Badly: A Deviant Approach to Medieval Antifraternalism', *Speculum* 85 (2010) 47-64.

[64] The first step towards the attribution to the papacy of the 'dominium' over the goods of the Franciscans was made by Innocent IV with the bull *Ordinem vestrum*: see Janet Coleman, 'The Two Jurisdictions: Theological and Legal Justifications of Church Property in the Thirteenth Century', SCH 24 (1987) 75-110, 82.

ecclesiastical goods.[65] The 'dominus' of the ecclesiastical goods was, for the Franciscan, the pope: he could choose to entrust them to whomever he saw fit. Gerard, on the other hand, stressed that Christ was the sole 'dominus' of the 'bona ecclesiastica', while the pontiff maintained only special prerogatives in their administration.[66] Two opposing views lead to quite similar conclusions, but what is important is that they bring us straight to the thought of Aegidius Romanus on the matter of papal 'dominium' .

The treatise *De ecclesiastica potestate* was written by Aegidius to defend Boniface VIII in the clash between the pontiff and the French king Philip IV.[67] The Augustinian canon took the hierocratic theory of the papacy to the extreme: his political model was firmly hierarchical, with the pope at the top, to whom Aegidius attributed nearly unlimited powers. The pope delegated some of his powers to the lower levels of this hierarchical structure: among them the Augustinian theologian included property rights.[68] Aegidius was the first to create an explicit link between 'dominium' over property and 'dominium' over persons (iurisdictio, potestas) and to place both among the prerogatives of the pontiff.[69] According to Aegidius it was the Church—that the theologian intended as the clergy and not as the broader 'aggregatio fidelium' of Innocent IV—that possessed complete 'iurisdictio' and the rights over property which would then be granted to Christians. What is important is that the Church always maintained the most complete form of possession of such

[65] Roberto Lambertini, *Apologia e crescita dell'identità francescana (1255-1279)* (Roma 1990) 25-35, for the critics of Gerard of Abbeville 65-71.
[66] Lambertini, *Apologia*, 33, 68.
[67] The edition in Aegidius Romanus, *De ecclesiastica potestate*, ed. Richard Scholz (Aalen 1961) 35-140, where one reads (35): 'agitur de ecclesie potestate quantum ad hec temporalia'. For a summary of the political thought of Aegidius Romanus see Roberto Lambertini, 'Political Thought', *A Companion to Giles of Rome*, edd. Charles Briggs, Peter Eardley (Leiden 2016) 255-274.
[68] Lambertini, 'Political Thought' 267-271.
[69] Canning, *Ideas of Power* 31. Lahey, *Philosophy* 43.

rights, that she could reclaim and give to others at any time.[70] Only the just (in the Augustinian sense of 'iustificatus') could exercise a just 'dominium' , and the 'plenitudo potestatis' allowed the pontiff to dispense imperfect forms of 'dominiun' to lower ecclesiastics and lay people according to his wish.[71] These hierocratic claims were rebutted by later authors, and debates on this issue influenced some of the major thinkers of the fourteenth century.[72]

England was particularly sensitive to the issue of papal 'dominium' over ecclesiastical property, and the *Epistola Petri* is, in this respect, a source of fundamental interest to assess the different forms in which this sensitivity was expressed. The letter, in fact, epitomizes how Clement V had applied the principles of Aegidius to the English ecclesiastical properties. The pope appointed himself (in place of the 'congregatio fidelium') 'dominus' of the 'bona ecclesiastica': he was no longer a mere 'universalis dispensator'[73] and this provoked the complaints of the English Church. But the *Epistola Petri* provides even more interesting elements. If we go back to the passage at the beginning of this paragraph, we see how *Petrus* claimed that Christ

[70] Here lies the difference between the 'dominium' universale and particulare: 'quod ecclesia in temporalibus habet dominium universale, ceteri vero particulare', quoted from Lahey, *Philosophy* 42. The text in Robert Dyson, *Giles of Rome's on Ecclesiastical Power*: *A Medieval Theory of World Government*: *A Critical Edition and Translation* (New York 2004) 190.

[71] Aegidius also stressed how this justified the expropriation of the property of those who do not possess Grace: see Canning, *Ideas of Power* 37, Lahey, *Philosophy* 41-44, Aubrey Gwynn, *The English Austin Friars in the Time of Wyclif* (London 1940) 59-75.

[72] The first to quote Aegidius Romanus' treatise to rebut this point was John Quidort, who referred to the theory that no one is allowed to interfere in matters regarding property rights: the pope does not own any property, not even that of the Church (whose 'dominium' lies with the 'congregatio fidelium'), and he can only administer them as 'rector/dispensator': see Canning, *Ideas of Power* 55-56, Tierney, *Foundations* 167-169, Mario Fois, 'L'ecclesiologia del concili-arismo', AHP 42 (2004) 9-26. An overview of the positions of the various authors on this issue is in Tierney, 'Origins' 616-625. Specific on Wyclif is Gwynn, *The English* 59.

[73] The definition is of John Quidort and refers to the role of the pontiff: see Tierney, *Foundations* 167.

renounced—'abdicavit'—to his temporal 'dominium' : this had voided the pope's claims to temporal sovereignty. Christ's abdication to temporal 'dominium' remained at the centre of the debate on 'dominium' in the following decades and surfaced during the dispute on evangelical poverty that opposed pope John XXII (1316-1334) to a fringe of Franciscans.[74] Between 1329 and 1332 the so-called Michelists (supporters of the Franciscan minister general Michele da Cesena) had taken shelter by the emperor Ludwig IV (1328-1347), the reference point for the opposition to John XXII. These Franciscans supported the Bavarian in his clash with the papacy by writing treatises and juridical 'consilia' from the Franciscan monastery of Munich.[75] They followed the poverty theories developed by some of their brothers (the so-called spirituals) in the last decades of the thirteenth century and stressed that Christ had not possessed any 'dominium' over goods, but had only enjoyed their 'usus pauper'.[76] On 16th November 1329 John XXII published the bull

[74] For an exhaustive synthesis of the dispute and its repercussions on the Franciscan order see Miethke, *Ockhams Weg* 348-427. See also the introduction in Nicolaus Minorita, *Chronica* (New York 1996) 1-53. Mainly focused on Ockham's role in the dispute is Takashi Shogimen, *Ockham and Political Discourse in the late Middle Ages* (Cambridge Studies in Medieval Life and Thought 69; Cambridge 2007) 36-74.

[75] Eva Wittneben, *Bonagratia von Bergamo: Franziskanerjurist und Wortführer seines Ordens im Streit mit Papst Johannes XXII* (Studies in Medieval and Reformation Thought 90; Leiden-Boston 2003) 285. On the activity of the Franciscans in Munich see Hilary Selton Offler, 'Meinungsverschiedenheiten am Hof Ludwigs des Bayern im Herbst 1331', DA 11 (1954-1955) 191-206, Hilary Selton Offler, 'Zum Verfasser der "Allegaciones de potestate imperiali" (1338)', DA 42 (1986) 555-619, Charles Brampton, 'Ockham, Bonagratia and the emperor Lewis IV', *Medium Aevum* 31 (1962) 81-87.

[76] On this see Lambertini, *Apologia*. David Burr, *Olivi and Franciscan Poverty: The Origins of the Usus pauper Controversy* (The Middle Ages; Philadelphia, 1989) and Giulia Barone, *Spirituali*, *Dizionario degli Istituti di perfezione* (Roma 1988) 2034-2040. The first strong defence of evangelical poverty was expressed by the Minister General Michele da Cesena during a Franciscan assembly gathered in Perugia in 1322, from which a harsh document was published against the statements of John XXII: see Attilio Bartoli Langeli, 'Il manifesto francescano di Perugia del 1322: Alle origini dei fraticelli "de opinione",' *Picenum Seraphicum* 11 (1974) 204-261. The Franciscans

Quia vir reprobus to rebut the *Appellatio minor* hanged by the Michelists to the doors of the cathedral of Pisa the previous year.[77] The papal bull, however, went beyond the countering of the Franciscans' claims. In order to demonstrate the groundlessness of their theory on evangelical poverty, the pope argued that Christ possessed a fully temporal 'Regnum et universale 'dominium' ' that was later transmitted to the apostles and, eventually, to himself. Moreover, John affirmed that Christ also possessed 'dominium' over goods 'Et nihilominus habuit 'dominium' rerum aliquarum temporalium'.[78] The pontiff also stressed that Christ had never abdicated this 'dominium' , nor could he have done so in any way: the exact opposite of what the *Epistola Petri* asserted.[79] This blunt claim of John XXII not only inflamed the dispute on apostolic poverty, but moved it on a political level:[80] if the Franciscans wanted to support their thesis, they needed to demonstrate that Christ had not held a temporal 'dominium universale', from which followed that the pontiff could not vindicate this prerogative for himself either.[81] In this respect it is

confirmed their accusations in Pisa the following September 18th by issuing the so-called *Appellatio in forma maiore*: see Jürgen Miethke, *Ai confini del potere: Il dibattito sulla* potestas *papale da Tommaso d'Aquino a Guglielmo d'Ockham* (Padova 2005) 279-281 (the text in Minorita, *Chronica* 227-424).

[77] The *Quia vir reprobus* is published in *Bullarium Franciscanum* (N.S. 4 vol. in 5 par. Romae 1989) 5.408-449. The *appellatio* in Minorita, *Chronica* 429-456. This was the last of a series of bulls issued to settle the controversy over Franciscan poverty. The others were: *Ad conditorem canonum* (8th December 1322), *Cum inter nonnullos* (12th November 1323), *Quia quorundam* (10th November 1324), edited in Jacqueline Tarrant, *Extravagantes Johannis XXII*, (Città del Vaticano 1983) 228-287.

[78] Eubel, *Bullarium* 442.

[79] Ibid. 442-443.

[80] Miethke, *Ockhams Weg* 400 talks about 'eine politische Akzentuierung' of the conflict in these years.

[81] A detailed analysis of the refutation of the main arguments of *Quia vir reprobus* in the works of the followers of Michele da Cesena is carried out by Roberto Lambertini, 'Il mio regno non è di questo mondo: Aspetti della discussione sulla regalità di Cristo dall'Improbacio di Francesco d'Ascoli all'Opus Nonaginta Dierum di Guglielmo d'Ockham', *Filosofia e teologia nel Trecento*, ed. Luca Bianchi (Louvain-la-Neuve 1994) 129-156. Some remarks also in Roberto Lambertini, 'Dalla propaganda alla teoria politica: Esempi di

possible to isolate another similarity between this dispute and what we read in the *Epistola Petri*. A Franciscan pamphlet of 1330, the so-called *Appellatio monacensis*,[82] written as a reply to John XXII's claims on apostolic poverty, refers to the thesis of the role of prelates as simple 'procuratores' of the goods of the Church that was first laid out by Innocent IV.[83] The *Appellatio* affirmed that Christ did not leave any 'rerum ecclesiasticarum domini' and that Christ himself did not possess any temporal 'dominium' .[84] This is very close to what the *Epistola Petri* had already affirmed more than twenty years earlier: the pope could not consider himself 'dominus' of the ecclesiastical properties because he was not entrusted with this prerogative by virtue of his position as vicar of Christ. The only difference is that the *Epistola Petri* argued from the thesis of the 'abdicatio' of Christ, while the *Appellatio* preferred to avoid this issue and denied straightforwardly that Christ possessed any temporal 'dominium'. It was another leading exponent of this fringe of Franciscans, William of Ockham, who discussed the issue of evangelical poverty in his *Tractatus contra Benedictum* (1337) following the argument of Christ's abdication to what the philosopher called 'iurisdictionem coactivem':[85]

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una dinamica nello scontro tra Giovanni XXII e Ludovico IV di Baviera', *La propaganda politica nel Basso Medioevo: Atti del XXXVIII Convegno storico internazionale (Todi, 14-17 October 2001)* (Spoleto 2002) 289-313.

[82] The text in Minorita, *Chronica* 624-866. For a summary of its contents see Felice Accrocca, 'Ancora sul caso del papa eretico: Giovanni XXII e la questione della povertà: A proposito del ms. XXI del convento di Capestrano', AHP 32 (1994) 329-341.

[83] The same arguments had already been used by Bonagrazia da Bergamo in 1322 in a protest against the bull *Ad conditorem*: the jurist referred precisely to the positions of Innocent IV on 'dominium' , see Miethke, *Ockhams Weg* 379-385.

[84] Lambertini, *Il mio regno* 152: 'papa et ceteri episcopi qui succedunt in loco apostolorum... non sunt rerum ecclesiasticarum domini sed procuratores... ergo nec apostoli fuerunt rerum ecclesiasticarum domini sed procuratores et dispensatores et per consequens Christus non recommendavit regnum et 'dominium' temporale sed spirituale'.

[85] The passage is quoted from Costa, *Iurisdictio* 298-299. Most of Ockham's discussion on evangelical poverty is concentrated in his *Opus nonaginta dierum*: see Shogimen, *Ockham and Political* 51-74.

> Papa non habet *iurisdictionem coactivam* maiorem, quam habuerit Christus, cuius est vicarius; sed Christus non habuit in quantum homo mortalis *iurisdictionem coactivam*; tum quia *iurisdictio coactiva* sine divitiis vel adiutorium habentium divitias convenienter exerceri non potest et per consequens inutiliter retinetur, Christus autem omnes divitias ad *iurisdictionem coactivam* necessarias, quo ad Deum, penitus abdicavit victu et vestitu contentus. Adiutorio etiam divitum ad eandem iurisdictionem exercendam minime utebatur, ergo *iurisdictionem coactivam* in quantum homo mortalis non habuit. Tum quia ipso testante ministrare venit, non ministrari, ergo non venit *iurisdictionem coactivam* exercere, ergo eam non habuit.

Another intellectual who found shelter by Ludwig IV in these years, Marsilius of Padua, allegedly added '*marginalia'* to his *Defensor Pacis* (completed in 1324) in which he expressed the same idea of Christ's renunciation to the *'dominium universale'* and the consequent groundlessness of the pontiff's universalist claims.[86]

This opposition notwithstanding, the theory of papal 'dominium' over ecclesiastical properties would prove very hard to refute. In the following decades pope Clement VI (1342-1352) included spiritual goods (the merits of the saints) in the 'treasure' of the Church in addition to material properties, all of which were entrusted to the administration of the pontiff.[87] During the 15th century other attempts were made to reform papal 'dominium' and the appointment of provisors. The Council of Basel (1429-1449) tried to regulate the assignment of benefices in the attempt to limit papal provision.[88] The Council fathers, making use of the theories that we have summarised, stressed that the pontiff could not be considered 'dominus beneficiorum' and, consequently, that he could not dispose of ecclesiastical benefices as it pleased him. This reform, eventually, failed: by that date not even a Council had

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[86] Kerry Spiers, 'Pope John XXII and Marsilius of Padua on the Universal Dominium of Christ: A Possible Common Source', *Medioevo: Rivista di storia della filosofia medievale*, 6 (1980) 471-478.

[87] On this see Diana Wood, *Clement VI: The pontificate and ideas of an Avignon pope* (Cambridge 1989) 32-34.

[88] On late medieval reforms and councils in general, see Johannes Helmrath, 'Reform als Thema der Konzilien des Spätmittelalters', *Christian unity: The Council of Ferrara-Florence 1438/39 -1989,* ed. Giuseppe Alberigo (Leuven 1991) 75-152.

the power to change a practice that had been in use for so long. It is therefore clear how these issues were of fundamental importance for Christianity even almost 150 years after the letter of Carlisle raised its voice and more than a century after the debate on evangelical poverty had opposed the biggest mendicant order to the pope. The clash over the extension of the papal 'plenitudo potestatis', as well as of the pontiff's economic and political 'dominium' , remained at the core of the political debate of the later Middle Ages.[89]

The question from which our discourse started has now been answered: the connection between 'dominium' and 'iurisdictio' lies in this multifaceted reconstruction of juridical and theological reflexion. As Roberto Lambertini has efficaciously summarised: [90]

> Il punto nevralgico della connessione tra difesa della tesi pauperista e teoria politica ruota attorno alla questione delle prerogative temporali di Cristo.

It has become clear how the *Epistola Petri* encompasses a wide range of political and economic issues: the author who hid behind *Petrus* did not limit himself to denounce what Matthew Paris, in reference to the heavenly letter of 1109, described as 'romanorum enormitates', but made clever use of a specific terminology of power that would be at the core of later debates on the pontiff's prerogatives.[91] Our aim is not to advance the hypothesis that the theory of the abdication of Christ to the temporal 'dominium' was first advanced by the *Epistola Petri*: the circulation of these ideas is a very complex matter that deserves specific studies.[92] Moreover, it is unlikely that this fictitious letter was known to the Michelists. What is important is to have underlined the stratification of a complex debate on the nature of papal

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[89] For this discussion see Orazio Condorelli, *Principio elettivo, consenso, rappresentanza: Itinerari canonistici su elezioni episcopali, provvisioni papali e dottrine sulla potestà sacra da Graziano al tempo della crisi conciliare (secoli XII-XV)* (I Libri di Erice 32; Roma 2003) 110-124.

[90] Lambertini, *Dalla propaganda* 308.

[91] *Matthaei Parisiensis Chronica* 135.

[92] Spiers, 'Pope John XXII' 473 proved that the *Quia vir reprobus* drew on a document that stemmed from the Paris *Studium* of 1323 which demonstrated the presence, in Christ, of 'dominium universale'.

'dominium' , whose implications resurfaced a decade later at the core of a new debate over the prerogatives of the pontiff, a debate which we find again at the Council of Basel. The *Epistola Petri* does not contain all the aspects of this articulated discussion in a few lines. Its aim is to denounce the pope's claim to rights that did not pertain to his 'officium': in doing so the letter refers to the ideal of the 'ecclesia primitiva', a point that is common in many other fictitious letters and that was fairly widespread in the Middle Ages. Therefore, one should not be surprised by the similarities between the *Epistola Petri* and the reflexion of the spiritual Franciscans. Nonetheless, it is interesting to note that the letter of Carlisle was the first document to epitomize the implications of the overlap between economic and political issues within the broader context of the opposition to the universalist claims of the papacy.

A further aspect is the propagandistic nature of this letter, which is tightly bound to the intent of its author. Guisborough's reference that the *Epistola Petri* was delivered during the parliament of Carlisle is crucial, because it was from this assembly that the history of the *Statutes of Provisors* began, together with the attempts of the English sovereigns to curb (or, better, to exploit in their favor) the presence of foreign 'provisores'. The *Epistola Petri* is written against a specific person, the pope, in defence of the English Church and the king. The letter is not only a document that contains high-level political and economic speculations on the nature of the papal 'dominium' : *Petrus* reveals his literary skills in relating his discourse to the contemporary situation, which was presented in the context of the French and Scottish military threats. In doing so the letter encompasses the two main topics of the parliament of Carlisle: the military defence of the kingdom and the fiscal oppressions of the papacy. The *Epistola Petri* is, therefore, a document with a propagandistic intent in light of its content, which is direct and sometimes harsh. This intent is also clear with regard to the time and place in which the letter was delivered, the best for its message to be heard by those who had the power to assimilate it and translate it into immediate political action. All this testifies even more to the self-consciousness of our author in

making use of a fictitious letter to tackle one of the most crucial political issues that fourteenth-century England was facing.

The reception of the Epistola Petri in Protestant England

If the *Epistola Petri* doesn't seem to have had any direct effect on the issue of 'provisores', it is nonetheless interesting to see how the letter was evaluated by its readers. In order to do so we shall look at the fortune of the *Epistola Petri* in the Early Modern era, when three Protestant intellectuals exploited its text to underline the oppressions that the English Church had suffered at the hands of the papacy. The first of them was John Bale (1495-1563), who reported the *Epistola Petri* in his *Acta romanorum pontificum* in the section between the pontificate of Boniface VIII and that of his successor, Benedict XI. Bale transmitted the text of the letter in English and introduced it with the following heading:[93]

> An Epistle of Peter Cassiodorus to the Englishmen, reprouinge the extreame robbery, filching and slauerye whereby the Popes spoyled this lande about the yeare of our Lord 1302 to moue them to shake of the bondage of the Popes tyrannye, taken out of an ould booke in S. Albons Church

No reference is made to either the parliament of Carlisle or Guisborough's chronicle (even though Bale was familiar with this work),[94] and the letter is reported under the date 1302. Apart from this, the English text follows the original Latin closely. The reference to the manuscript of St. Albans Abbey is also important: we shall come back to this in a moment. In the following years Bale was working on his *Catalogus*, in a section of which he presented a list of prodigies and events suspiciously close to heresy or superstition. It is here that we find another brief mention of our letter, now in Latin:[95]

> Circa annum Domini 1302 Petrus Cassiodorus, Italus, vir nobilis et christiane eruditus, monitorie scripsit ad Anglorum ecclesiam, ne amplius fuerant, sed omnino a se reijciat, Romanorum pontificum iugum ac tyrannidem. Libellus incipit: Cui comparabo te

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[93] John Bale, *Acta romanorum pontificum* (Basileae 1558) 388-344.

[94] Bale was one of the first to report the variant 'Walter Hemingburgh' for the name of the chronicler: see Rothwell, *The Chronicle* xxiv.

[95] John Bale, *Scriptorum illustriuum Maioris Brytannie, quam nunc Angliam et Scotiam uocant, catalogus* (Basileae 1559) 359.

This time Bale did not include the text of the letter, which is again dated 1302. Two interesting additions were made to the heading in the *Acta*: *Petrus* would be an Italian (perhaps because of his patronymic?) and the letter, as we can infer from the quoted *incipit*, would be written in Latin. If Bale knew the Latin text, that he introduced with nearly the same words that he used for the English one, then the most logical explanation is that he was responsible for the English translation in the *Acta*. Therefore, the text in the St. Albans manuscript must have been in Latin. Considering the close adherence of the English translation to the letter in the chronicle of Walter of Guisborough, one can reasonably assume that the Latin text was also adherent to the latter. The *Epistola Petri* surfaced again in 1570, as another Protestant scholar, John Foxe (1516-1587), included it in the second edition of his mighty *Acts and monuments*, this time within the framework of the parliament of Carlisle:[96]

> Duryng the whiche Parliament afore specified, as men were talkyng many thynges of the Popes oppressions, whiche he began in the English church, in the full of the Parliament: sodenly fell down, as sent from heauen, among them a certaine paper, with this superscription

It is evident that this passage is a plain translation of the introduction in the chronicle of Walter of Guisborough: Foxe, therefore, knew the chronicle, but he presented the text of the *Epistola Petri* in the exact same form that we have seen in Bale's *Acta*.[97] The only difference between the two lies in Foxe's greater adherence to some aspects mentioned in the fourteenth-century chronicle: the year 1307 and the letter's descent from the sky (while no mention is made of *Petrus*' alleged Italian origin). The St. Albans manuscript is also quoted in a marginal note: 'ex vetusio chronico Albanensi'.[98] Since the *Acts and monuments* were written in English, the decision to report the letter in English

[96] John Foxe, *The Actes and Monuments of these Latter ad Perilous Dayes* (London 1570) 462-464.

[97] In the commentary to this section the editors claim that Bale's version, compared to what Foxe read in the chronicle, was 'sharper in its denunciations of the papacy'. We must disagree on this point, as Bale's translation never strays from the original text.

[98] Foxe, *The Actes* 462.

is not surprising: Foxe must have realized that the two texts (Bale's and Guisborough's) were the same, therefore he simply copied Bale's translation. The history of the modern fortune of the *Epistola Petri* has one last stage: in 1668 the letter was included in the historical compilation of William Prynne (1600-1669) concerning the papal usurpations against English sovereigns. Here we read, under the year 1302:[99]

> I shall cloze this year with this memorable Epistle of Petrus Cassiodorus, a Noble Italian Knight, written to the English Church about this time, exhorting them to cast off the yoak of the Popes Roman Tyranny, and rapines, and redeem their ancient liberties.

The Latin description that we read in Bale's *Catalogus* is here translated into English. Prynne also used Bale's *Acta*, as this additional introduction before the text of the letter makes clear:[100]

> Petri Cassiodori ad Anglos Epistola, super extrema Angliae expilationis per Papam, circa Annum Domini 1302, ut Romani tyrannidis jugum excuterent; Ex vetusto Codice ad fanum Sancti Albani descripta

It is as if Prynne was translating Bale's Latin heading (from the *Catalogus*) into English, and the English one (from the *Acta*) into Latin, which generates a chaotic stratification of titles. This, however, does not change the point that we want to make here: all three authors are connected to each other and the *Epistola Petri*, from Bale onwards, has also been transmitted in an English translation. The interesting aspect of Prynne's work is that the text of the fictitious letter is, for the first time, the Latin one, the same that we read in Guisborough's chronicle. Prynne must have had knowledge of this chronicle, yet nonetheless, he repeated Bale's heading with the year 1302 and the mention of the St. Albans manuscript. The presence of the Latin text in Prynne's work and the latter's knowledge of Bale's *Acta* close the circle on the nature of the text that Bale must have read in the St. Albans manuscript: this must have been a copy of Guisborough's chronicle.[101] If we

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[99] The text in William Prynne, *An Exact Chronological History and Full Display of Popes Intolerable Usurpations upon The Antient Just Rights, Liberties, of The Kings, Kingdoms, Clergy, Nobility, Commons of England and Ireland* (London 1668) 914-916.

[100] Prynne, *An Exact* 914.

[101] The manuscripts of this abbey have been studied by Richard Hunt, 'The library of the abbey of St. Albans', *Medieval Scribes, Manuscripts and*

consider that this abbey was, between the thirteenth and the fourteenth centuries, the centre of English chroniclers (Roger Wendover, Matthew Paris and Thomas Walsingham came from here) it is reasonable to assume that an exemplar of Guisborough's work was preserved in the abbey.[102] It is likely that the year 1302 was already present in this copy due to a mistake of the copyist (the numbers two and seven could be easily misunderstood). It may also have been a copying error committed by Bale, but this matters little: what is important is that this error was passed on throughout the printed tradition dependent on the latter's work, except in Foxe's *Acts*: he knew the chronicle and was more careful in contextualising the *Epistola Petri*. Such effort of contextualisation makes the *Acts and monuments* the only one of the three printed works that emphasises the heavenly nature of this letter. The two other writings give the idea that the letter appeared out of nowhere and attribute it to a real (that is, historical) person. This *Petrus* of alleged Italian origins, however, remains an obscure figure: one could assume that Bale added this reference to emphasize that even those who lived in the heart of Christendom stood up against the oppressions of the papacy. Both Bale and Prynne were probably not interested in the provenance of the letter and treated our document as some kind of anecdote, while Foxe was more attentive and followed the chronicle of 1307.

Let us now compare how these authors dealt with the transmission of the *Epistola Petri* by recalling how the fourteenth-century chronicle presented the 'salutatio' (Foxe's *Acts* copy Bale's text and are not included in the comparison):[103]

Bale, *Acta:*[104]	Prynne, *An exact:*[105]	Guisborough, *Cronica*
To the noble Church of Englande seruing in	Ecclesiae nobili Anglicanae in luto et	Ecclesie nobili anglicane in luto et

Libraries: Essays Presented to N. R. Ker, edd. Malcolm Parkes, Andrew Watson (London 1978) 251-277, where Bale's research into the abbey's patrimony is also highlighted.

[102] John Taylor, *TheUse of Medieval Chronicles* (London 1965) 6-8.

[103] Rothwell, *The Chronicle* 371.

[104] Bale, *Acta* 388.

[105] Prynne, *An Exact* 914.

claye and bricke as þe Iewes did in times past vnder the tyrannie of the Egiptians: Peter the sonne of Cassiodore a catholike Souldiour and deuoute champion of Christe, sendeth greeting and wishinge to caste of the yoke of bondage, and to receiue the reward of libertie	latere ancillatae, (as the Jewes did in times past under the Aegyptians) Petrus filius Cassiodori, Miles Catholicus, Pugil Jesu Christi devotus, salutem, et captivitatis jugum abjicere, et bravium accipere libertatis	latere ancillate, Petrus filius Cassiodori miles catholicus pugil Christi devotus salutem et iugum abicere captivitatis et bravium accipere libertatis

Bale, in his translation of the Latin 'salutatio', added 'as þe Iewes did in times past under the tyrannie of the Egyptians'. Foxe followed him closely while Prynne, although he must also have had the Latin text at hand, inserted Bale's addition in brackets, albeit with a slight modification, as the reference to tyranny was omitted. But where did this addition come from? The answer allows us to retrieve some more information about the manuscript of St. Albans. We believe that this passage was a marginal note of the manuscript that the copyist (or someone else) must have added with the intention of providing a parallel to what the letter was saying. Bale reported it into his text, where it fit perfectly since the *Epistola Petri* was presented in English. It is impossible to ascertain whether Bale was also responsible for the translation of this note, or whether it already appeared in English in the manuscript (though the second scenario is more likely). As Prynne decided to translate Bale's heading, this marginal note stood out as a later addition to the original text. Although Prynne probably had Guisborough's chronicle in front of him, he did not pay attention to the fact that these words did not pertain to the Latin text: he decided to leave them in English and simply isolated them in brackets. This further testifies to the lack of attention that Prynne must have paid to the original form of the *Epistola Petri*: the mixture of Latin and English titles translated from his model, the fact that he did not correct the wrong date, and the integration in the text of a marginal note (written in another language) make

it clear that he was working with secondary sources and that he had no direct knowledge of the St. Albans manuscript.
One last point can be made from the analysis of the reception of the *Epistola Petri* in Early Modern England, for which we must turn to the last lines of the letter, where the opening of Psalm 108 was quoted to remember Clement V of the divine punishment he will face if he doesn't stop his misbehaviour towards the English Church:[106]

Bale, *Acta*	Prynne, *An exact*
And if he being terrified by these words do not leaue of from this which he beginneth, and doth not make restitution of those thinges which he hath receyued: then let all and singular parsons singe for him being indurat, to him that seeth al thinges, the Psalme 108. Deus laudem etc.	qui si perteritus ab his dictis non destiterit ab inceptis, et restitutionem non fecerit de praeceptis, psallent pro eo extunc nequiter corde indurato, Psalmum centesimum octavum, illi cui omnia serviunt, aperte singuli singulis diebus in Christo devotissimi dicimus laudem.
For truly as fauoure, grace, and beneuolence, remitteth and neglecteth many thinges: so againe the gentle benignitye of man beinge to much oppressed and greued, seekinge to be deliuered and freed from the same, striueth and searcheth to haue the truth knowen, and casteth of that yoke by all meanes possible that greeueth him. etc. Haec Cassiodorus.	For truly as favor, grace, benivolence permitteth and neglecteth many things, so again the gentle benignity of man being too much oppressed and grieved seeketh to be delivered and freed from the same, striveth and searcheth to have the truth known, and casteth off that yoke by all means possible that grieveth him

Both these passages lead us to believe that the letter continued after the quotation of the *incipit* of Psalm 108. An interesting difference between the two is the addition of 'Haec Cassiodorus' at the end of Bale's English section. It is impossible to ascertain whether these words came from the St. Albans manuscript or whether it was Bale who added them, but (just as with the

[106] As in the previous case, Foxe's *Acts and monuments* closely follow Bale's *Acta*, therefore we have not included it in the comparison.

aforementioned marginal note) the first scenario seems more likely: why should Bale have inserted a Latin passage after he translated the whole text into English? In any case, these words mark the end of the message transmitted by *Petrus*. Bale, the only one who worked directly on the manuscript and who knew where the text of the letter ended, must have copied another marginal note or a comment placed under the text. Prynne reported it, and in doing so he revealed, once again, the alien nature of this passage. Right after this section all the modern printings report the same passage in which the modern editor becomes the narrator and expresses his doubts on the effects that the *Epistola Petri* had on its addressees:[107]

> What effecte this letter wrought in them, to whom it was directed, is not in story expressed. This by the sequeal may be coniectured, that no reason nor perswasion could preuaile, but that the Pope retayned here still his exactions, whatsoeuer was said or written to the contrarye notwithstandinge.

Prynne has the same comment, with a minor addition at the beginning:[108] 'What effect (writes Mr. Fox) this Letter wrought in them'. Prynne is thus making clear that he was not reading this passage from Bale's *Acta*, but from Foxe's *Acts and monuments*, the only one who correctly contextualised the *Epistola Petri*. Notwithstanding his knowledge of this work, Prynne did not pay the same attention as Foxe in presenting the letter. It is not clear why he did not quote Bale's works, which he certainly knew: evidence of this are the literal translation of both the heading with the reference to the manuscript of St. Albans as well as the specification on the Italian provenance of *Petrus*. It could be argued that he wanted to hide his original source, thus attributing the discovery of the text in the manuscript of St. Albans to himself, even though he probably read the Latin text from another copy of the chronicle of Guisborough (as did Foxe). It is clear that Prynne's work was influenced by a poor methodology that relied on secondary sources and that did not distinguish between the text and its later interpolations. It is not surprising that he did not understand that Foxe's clarifications served to better contextualise

[107] Bale, *Acta* 344.
[108] Prynne, *An Exact* 916.

the letter: Prynne relied on Bale, who was only interested in the content of the *Epistola Petri*.

What can be inferred from the presence of the *Epistola Petri* in these printings? It is evident that all three are related to each other: this means that the letter was not known independently of Bale's account or Guisborough's chronicle. Nonetheless, the interest in its text in early modern England is indicative of the different attitudes towards a fictitious letter. If Bale and Prynne did not care to settle the *Epistola Petri* within its historical context and treated it more as an anecdote ('this memorable Epistie', as Prynne called it)[109] or even with scepticism,[110] still they wondered what effects it might have had on the issue of 'provisores'. Even after the letter was stripped off of its main characteristic (its nature of fictitious document) and after it was treated as a correspondence between *real* persons, its polemical attitude and the strength with which it tackled fundamental issues of religious policy remained evident: the *Epistola Petri* intended to awaken the consciences of Christians and rouse indignation against the misbehaviours of the pontiff towards the English Church. That such an interesting and peculiar letter had, originally, fallen from the sky, must have been an element that, to the eyes of Bale and Prynne, could not cope with the claims that it put forward and with the erudition of its author as it could have even weakened the strength of its arguments: perhaps it was for this reason that the letter was presented as a genuine document against papal oppressions.

Nonetheless, this rise of interest in the *Epistola Petri* during a period in which English intellectuals strived to demonstrate the misbehaviours of the papacy and the Catholics is a further proof of the strong impact that this letter must have had on its readers: to quote Bale's description, the person that hid behind *Petrus* really was a 'vir eruditus' that stood against one of the most hated

[109] Prynne, *An exact* 914.

[110] Bale, *Catalogus* 358 opens the appendix in which the letter is mentioned with a reference to Bernard of Luxembourg, author of the *Catalogus haereticorum* (1522), as his source.

papal practices and did so by delving into some of the most crucial themes of fourteenth-century political and legal reflection.

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‘Publice utilitati fructificare desidero’: Brevi riflessioni sul costituzionalismo dantesco nel primo libro della Monarchia

Cecilia Natalini

Premessa

Il problema dantesco del costituzionalismo, entro il cui recinto si delinea il potere, appare caratterizzato da un moto di originalità capace di sospingere il Medioevo oltre se stesso e di imprimere un segno indelebile nella pubblicistica tra i secoli XIII e XIV. A fare da sfondo alle riflessioni che seguono non sarà dunque l’apprezzamento generico della cultura giuridica di Dante, ma l’apporto concettuale foriero di accenti per così dire ‘diversi sed non adversi’ rispetto al pensiero medioevale lentamente e faticosamente sviluppato dalla dottrina di *ius commune*, da Accursio a Baldo.[1] Dante stesso suggerisce la chiave di lettura giuridico-pubblicistica della *Monarchia* laddove afferma: [2]

[1] Dopo gli studi di Ernst H. Kantorowicz, della metà del 1900, fino alle recenti ricerche di Justin Steinberg, la questione della cultura giuridica dantesca appartiene al passato, tanto da essere stata recentemente definita come una disputa ‘convenzionale’ da Diego Quaglioni, ‘The Poet-as-Judge’, *Il pensiero politico* 48 (2015) 501. Il Quaglioni punta l’attenzione su un aspetto fondamentale della tesi del Kantorowicz, a seguito della quale l’indagine sull’apporto di Dante allo sviluppo delle dottrine giuridiche medioevali diviene un vero e proprio problema di metodo per la ricerca dantesca: ‘Fu però Kantorowicz a sottolineare che la nostra difficoltà, con Dante, sta nel fatto che egli, nel riprodurre ad ogni pagina le conoscenze generali del suo tempo, offre su ogni questione una prospettiva sorprendentemente nuova, a tal punto che ogni prova della sua dipendenza da altri scritti serve solo a sottolineare la novità del suo atteggiamento e delle sue soluzioni’ (Quaglioni ibid.). Sul problema di fondo che soggiace a queste considerazioni, cioè a dire sull’idea dantesca di ‘ius’ e ‘lex’ e sulla relazione del pensiero dantesco con lo *ius commune*, rinvio alle recentissime considerazioni di Diego Quaglioni, ‘The Law’, *The Oxfrord Handbook of Dante*, edd. Manuele Gragnolati, Elena Lombardi, Francesca Southerden (Oxford Handbooks; Oxford 2021) 257-269.

[2] *Monarchia* 1.1.3. La traduzione italiana dei passi della *Monarchia* citati nel presente studio è quella di Diego Quaglioni: Dante Alighieri, *Monarchia*, edizione commentata a cura di Diego Quaglioni (I meridiani; Milano 2015), già in Dante Alighieri, *Opere*, edizione diretta da Marco Santagata, *Convivio*,

> Stia pur certo infatti di essere ben lontano dal proprio dovere chi, imbevuto di pubbliche dottrine, non si cura di apportare alcunché alla cosa pubblica . . . Ripensando dunque spesso fra me e me queste cose, perché un giorno non mi si venga a rinfacciare la colpa di aver tenuto nascosto il mio talento, desidero non solo accrescerlo, ma farlo fruttare per la pubblica utilità, additando verità che altri non hanno ricercato.

Questo passo, tratto dal I libro della *Monarchia*, introduce il tema su cui si incentra tutta l''inquisitio' sviluppata nell'opera, cioè a dire il fondamento giuridico del potere temporale che, per il Poeta, è da ricercare nel diritto umano.[3] Nella elaborazione teorica della 'causa imperii' Dante non può che passare attraverso la questione cruciale dell'origine e dei limiti del potere del 'princeps'. Proprio a tal riguardo egli si inserisce, innovandolo, in quel dibattito della scienza giuridica medioevale che egli invero affronta con spirito già umanistico, alla maniera cioè del giurista 'activus'.

Il problema medioevale del fondamento del potere

Da Accursio a Baldo la trattazione del problema dei limiti al potere scaturisce dalla complessa relazione tra il 'princeps' e le 'leges', per come essa è tramandata nel *Corpus iuris civilis*: la massima ulpianea tradita in Dig. 1.3.31[4] asserisce la 'solutio a legibus' del 'princeps', ma *Digna vox* (Cod. 1.14.4)[5] dà credito piuttosto alla sottomissione del 'princeps' alle 'leges'.[6] La dottrina medioevale

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Monarchia, *Epistole*, *Egloge*, a cura di Gianfranco Fioravanti, Claudio Giunta, Diego Quaglioni, Claudia Villa, Gabriella Albanese ('I Meridiani'; Milano 2015).

[3] *Monarchia* 3.10.7 in fine: 'Imperii vero fundamentum ius humanum est'.

[4] Dig. 1.3.31: 'Princeps legibus solutus est: Augusta autem licet legibus soluta non est, principes tamen eadem illi privilegia tribuunt, quae ipsi habent'.

[5] Cod. 1.14.4: 'Digna vox maiestate regnantis legibus alligatum se principem profiteri: adeo de auctoritate iuris nostra pendet auctoritas. et re vera maius imperio est submittere legibus principatum. et oraculo praesentis edicti quod nobis licere non patimur indicamus'.

[6] *Digna vox* (a. 429) compare quasi due secoli dopo la massima ulpianea e scaturisce in seno al particolare contesto giuridico e religioso teodosiano. Tuttora particolarmente efficace, al riguardo, è la rapida valutazione di Francesco Calasso, *Gli ordinamenti giuridici del rinascimento medievale* (2nd. ed. Milano 1965) 50-52 circa le differenti origini dei due frammenti giustinianei, dai quali deriva la difficile questione interpretativa posta dalle fonti del *Corpus iuris civilis* con riguardo alla relazione tra il 'princeps' e le 'leges'.

tenta una soluzione alla disarmonia delle fonti giustinianee mediante il ricorso a considerazioni di natura prevalentemente morale, secondo le linee ripercorse da Diego Quaglioni che, di Accursio, scrive:[7]

> Il Glossatore, pur dichiarando che la sottomissione alle leggi doveva essere interpretata come volontaria (digna est si dicat se velle), aveva però mostrato un evidente imbarazzo intorno ad una proposizione che appariva affatto falsa in quanto contraddetta dall'opposto principio scolpito in D. 1, 3, 31 (sed quomodo est digna vox, cum sit falsum?), affacciando l'opinione, subito però proclamata erronea, secondo la quale il testo giustinianeo avrebbe permesso al principe di mentire (alii dicunt quod hic permittitur mentiri [...] quod non placet) e andando perfino a suggerire che la sottomissione dell'*imperium* alle leggi, e non il contrario, si dovesse intendere come dovuta a ragioni d'onore e di convenienza (quasi dicat: maior est honor, et maior est convenientia, cum imperium sit de fortuna).

La *Magna Glossa*, dunque, interpreta *Digna vox* (Cod. 1.14.4) tenendo a riferimento principalmente la 'maiestas' imperiale (maior est honor). Quest'ultima diviene concetto assorbente l''auctoritas' del testo teodosiano.[8] La dignità della carica è connaturata alla grandezza imperiale e condiziona la 'voluntas principis' al rispetto delle leggi tutt'al più sul piano personale, allorché il 'princeps' voglia riconoscersi obbligato: digna est si dicat se velle. Ma la Scuola del Commento incrina la tesi accursiana e distingue ulteriormente. Scrive, al riguardo, ancora Diego Quaglioni:[9]

> Cino da Pistoia, agli inizi del XIV secolo, prendeva le distanze dalla Glossa, smentendone l'interpretazione e sostenendo il principio della sottomissione del principe alla legge 'de honestate', perché l''honestas' (cioè l'onore) non è altro che il vincolo sacrale del diritto o il 'sacramento del potere': Verum est quod princeps est solutus legibus . . . quia leges ab eo sunt a quo ipsarum pendet auctoritas . . . et ideo non possunt eum ligare, quatenus non possit contrafacere . . . tamen ipse dicit se ligatum, non tamen est verum: ita dicit glossa hic. Sed non bene intelligit, salva reverentia sua. Dico ergo, quod Imperator est solutus legibus de

[7] Diego Quaglioni, 'Dal costituzionalismo medievale al costituzionalismo moderno', *Annali del Seminario giuridico dell'Università di Palermo* 52 (2007/2008) 55-67 a 60.

[8] In questo modo la glossa accursiana fissa il canone interpretativo della 'Digna vox', destinato a pesare fino alle soglie della modernità, come dimostra, ibid. 56-67.

[9] Ibid. 60-61.

> necessitate; tamen de honestate ipse vult ligari legibus, quia honor reputatur vinculum sacri iuris.[10] Inoltre, contro l'argomento che la sottomissione volontaria alle leggi sarebbe una diminuzione di quella 'maiestas' che al contrario l'imperatore è obbligato ad accrescere (augere), Cino allega l'argomento opposto di una superiore 'dignitas' del potere vincolato all''honestas' (quia dignitatem suam ob hoc non minuit imo auget . . . unde honor est esse in tali ligamine), rigettando nuovamente l'opinione della Glossa: Ulterius procedo, hic dicitur, quod maius est imperio, etc. Quæro quare sit maius? Dicit glossa quia imperium est a fortuna. Circa istud videtur quod etiam male dicat glossa, quia imperium est a Deo... set verum est quod de fortuna est.

Da qui si fa strada l'aspirazione di Cino ad avvicinare il vincolo morale, insito nella discendenza dell'impero da Dio, al vincolo giuridico. La sottomissione del 'princeps' alle leggi, per quanto non sia necessitata, non si collochi cioè sul piano coercitivo del diritto (Imperator est solutus legibus de necessitate), è però connaturata alla 'dignitas' imperiale che rende 'augustus' il reggitore: si tratta sì di un vincolo morale (de honestate), ma quest'ultimo, proprio perché tale, non resta ―come in Accursio― nella volontaria disponibilità del reggitore (si dicat se velle). Al contrario, obbliga l'imperatore al rispetto della sacertà della carica (honor est esse in tali ligamine). Tant'è che Cino sente l'esigenza di tornare sull'opinione della Glossa e di additare la sola interpretazione che permette di accettarne il contenuto, laddove essa dichiara la discendenza dell'impero 'a fortuna':[11]

> Sed verum est quod de fortuna est vt Henricus sit Imperator, vel Martinus, quia 'si Fortuna volet' etc. (Giovenale, *Satire*, VII, 197), ut hic dicunt versus. Et isto modo intellexit gl. bene procedit, alias non.

Vero è che la carica imperiale è terrena, dipende cioè dalla sorte, così che oggi è imperatore Enrico, domani Martino. Ciò tuttavia, secondo Cino, non contraddice l'istituzione divina della stessa.[12]

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[10] Cino da Pistoia, *Commentaria* (Venice 1493) a Cod. 1.14.4 fol.17va.

[11] Ibid.

[12] Il tema della discendenza dell''imperium a fortuna' meriterebbe una considerazione a sé. Basti in questo luogo ricordare che esso aveva trovato una significativa chiarificazione nell'ambito della predicazione di Alano di Lilla (1128ca.-1203) secondo il quale il 'principatus' è 'honos' terreno (honos non est naturae, sed fortunae), è soggetto cioè alla mutevolezza degli eventi terreni. Rinvio, sul punto, a Cecilia Natalini, *Vestire a modo altrui: Dal* sumptus *medioevale al* luxus *d'età moderna tra diritto e morale*, (Collana della Facoltà

Con questo significato deve essere accolta l'asserzione accursiana. Come ha scritto Kenneth Pennington, Cino 'relied almost exclusively on a contract's origins in natural law to bind the prince to it'.[13] Qualcosa è cambiato dai tempi di Accursio. La dottrina tomista, naturalmente, ha fatto il suo corso. Se il 'princeps' 'è *legibus solutus* rispetto al carattere coercitivo della legge, non lo è però rispetto alla *vis directiva* di questa, alla quale si sottomette volontariamente'. [14]

Supportato dalla riflessione teologica del suo tempo, Cino introduce la possibilità di concepire l''honestas' come requisito rilevante sul piano del diritto. Sembra essersi avviato, a questo punto, il lento processo di formazione della coscienza del principe che precede, nell'orientarla, la 'voluntas', ed è perciò destinata a valere in ambito pubblicistico.

La 'potestas' del principe tra morale, teologia e diritto

Sulla 'voluntas' moralmente obbligata alle 'leges' insiste Bartolo, allievo di Cino. A distanza di una generazione il suo allievo Bartolo, il rappresentante esemplare di un'intiera stagione del pensiero giuridico medievale, ne ripeteva la dottrina, estendendo ad ogni forma di potere il principio della sottomissione all'*æquitas*:[15]

> Breviter h[oc] d[icit]. Aequum, et dignum est principem legibus vivere, et quemlibet habentem Imperium . . . Opp[onitur] quia in veritate Princeps est solutus legibus . . . Sol[utio]. Fateor quod ipse est solutus legibus, tamen æquum, et dignum est quod legibus vivat, ita loquitur hic, unde ipse submittit se legibus de voluntate, non de necessitate.

Anche Bartolo rigetta l'obbligo giuridico della sottomissione alle leggi: questa sottomissione non si compie 'de necessitate' (non de necessitate). Tuttavia esiste una dimensione equitativa del diritto

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di Giurisprudenza dell'Università degli Studi di Trento, 25; Napoli 2020) 56. Per l'inquadramento generale del pensiero di Cino intorno al concetto di 'imperium' come 'honor' cf. Kenneth Pennington, *The Prince and the Law, 1200-1600* (Berkeley-Los Angeles-Oxford 1993) 86-87.

[13] Cf. Pennington, *The Prince* 129.

[14] Cf. Diego Quaglioni, '"Regimen ad populum" e "regimen regis" in Egidio Romano e Bartolo da Sassoferrato', BISM 87 (1978) 211.

[15] Quaglioni, 'Dal costituzionalismo medievale' 61-62.

che riconduce la 'voluntas principis' nell'ambito di ciò che è buono ed equo, giacché è cosa equa e degna che il principe viva secondo le leggi (æquum, et dignum est quod legibus vivat). Si uniscono, in questo argomentare, gli echi tomisti, cui si è accennato, con la tradizione giuridica fissata nella lezione della glossa accursiana: ciò che è sempre buono ed equo è lo *ius naturale*.[16] Da questo punto d'osservazione sembra affacciata, in Bartolo, l'idea di un vincolo, imposto al 'princeps', di natura inviolabile perché discendente da una dimensione del giuridico più alta rispetto a quella dello *ius civile*. Per diritto naturale, cioè, il 'princeps' è sottoposto alle leggi, il diritto naturale costituisce la fonte del limite posto alla 'potestas' del principe.

Questa impostazione interpretativa risulta sostanzialmente immutata in Baldo in cui, peraltro, l'opposizione tra la regola fondamentale del 'vivere secundum leges' e quella della titolarità della 'potestas absoluta' dà luogo non più ad una aporia da risolvere mediante la separazione tra differenti sistemi di conoscenza, ancorché tendenti a convergere: la morale e il diritto. Per l'allievo di Bartolo, conviene piuttosto procedere ad una 'distinctio' concettuale, esplicativa dell'unico 'genus' rappresentato dal potere del principe. Ciò è possibile perché Baldo affronta la questione dal lato del concetto nuovo della sovranità: [17]

> Anche Baldo parla del vincolo dell'*honestas* . . . ma egli dichiara la natura 'divisa' della sovranità in ragione della distinzione tra la dimensione astratta del potere (vale a dire la *potestas absoluta*, il potere privo di vincoli di natura giuridica) e la dimensione concreta del suo esercizio (la *potestas ordinaria* o *ordinata*, sottomessa all'obbedienza alle leggi): 'Princeps debet vivere secundum leges, quia ex lege eiusdem pendet authoritas. . . Intellige, quod istud verbum, debet, intelligitur de debito honestatis, quæ summa debet esse in Principe, sed non intelligitur præcise, quia suprema et absoluta potestas Principis non est sub lege: unde lex ista habet respectum ad potestatem ordinariam, non ad potestatem absolutam.

Quando Baldo discute 'de debito honestatis', egli considera sì la sottomissione del 'princeps' alle leggi quale comportamento moralmente dovuto; non però alla vecchia maniera, cioè con

[16] Accursio, *Glossa ordinaria* a Dig. 1.1.6 s.v. *iuri communi*: 'Id est iuri naturali quod semper est bonum et aequum, vel gentium de quo modo dixerat, quae sunt communia primum omnibus animalibus, secundum omnibus hominibus'.
[17] Quaglioni, 'Dal costituzionalismo medievale' 62.

riguardo alla ‘maiestas’ imperiale, ma con specifico riguardo all’‘auctoritas’: all’‘auctoritas’ deve essere ricondotto l’elemento morale della sottomissione del principe alle leggi. Da qui Baldo ricava la distinzione tra il potere effettuale (potestas ordinaria o ordinata) e il potere in senso astratto (potestas absoluta). In altre parole, l’‘honestas’ del principe diviene l’elemento autoritativo da cui sgorga la legittimità del potere fattuale: ‘Princeps debet vivere secundum leges, quia ex lege eiusdem pendet authoritas’. Come a dire che, se non sottoposto alle leggi, il potere del ‘princeps’ diviene carente e persino privo di autorevolezza. L’‘auctoritas’ dunque, la quale comporta la ‘subiectio legibus’, è elemento costitutivo del potere ed è da ricercare non in un sistema esterno all’ordinamento giuridico, ma nell’ordinamento stesso: nelle leggi.

Nonostante Baldo ridisegni, nel modo appena illustrato, la questione della ‘subiectio legibus’, si deve riconoscere che la scuola del Commento non compie il passo decisivo verso la teorizzazione ‘de necessitate’ della sottomissione del ‘princeps’ alle leggi. La logica giuridica non può concepire il vincolo del sé con sé, e ciò si dimostra senza difficoltà se soltanto si riflette sull’impossibilità di accordare tutela alla volontà sottesa al vincolo giuridico contratto con se stessi: come potrebbe darsi che l’obbligato potesse citare in giudizio se stesso al fine di ottenere il soddisfacimento dell’obbligazione assunta a favore di se medesimo? Nella nostra fattispecie, si realizzerebbe l’assurdo che il volere soggettivo e personale del ‘princeps’ sarebbe vincolato al volere dichiarato attraverso le leggi. Fin tanto che la dottrina tiene a riferimento la ‘lex’ come espressione della ‘voluntas principis’ non può darsi alcun vincolo giuridico nella relazione ‘princeps-leges’, per il fatto che si contrapporrebbero due differenti volontà procedenti non da due soggetti ma da uno. La questione, in fine del sec. XIII, era stata al centro della trattazione teologica tomista, sunteggiata da Diego Quaglioni in queste rapide ed efficaci battute: [18]

> Sarà sufficiente ricordare qui il celebre luogo della *Summa theologiae* (Ia IIæ, q. XCVI, a. 5, ad 3), nel quale Tommaso d’Aquino († 1274) discute

[18] Ibid. 63.

> il punto cruciale dell'indipendenza del *princeps* da vincoli giuridici positivi, sostenendo che se in senso proprio 'nullus cogitur a se ipso', cioè nessuno può obbligare giuridicamente se stesso verso se stesso ed essere così principio alla limitazione del proprio potere in senso giuridico, tuttavia si deve affermare che il *princeps*, pur libero dall'aspetto coattivo delle leggi, è moralmente legato alla loro osservanza.

Tommaso, per il quale 'il diritto, ossia il giusto, è un'opera adeguata agli altri secondo una certa eguaglianza',[19] ha ben chiaro che l'obbligazione giuridica scaturisce sempre dalla relazione tra 'volontà altre'. Perciò un soggetto può vincolare se stesso sul piano morale ma non 'stricto iure'. Da qui consegue che se il 'princeps' vive secondo le leggi lo fa soltanto perché ritiene di volerlo fare, come già aveva dichiarato Accursio, o perché sa di doverlo fare, come ritenuto da Cino in poi. Nulla di più. Il 'princeps' non potrebbe sottomettersi giuridicamente alle leggi neppure se volesse perché ciò significherebbe vincolare giuridicamente se stesso: ciò che non è contemplato dal diritto.

In definitiva, da Accursio a Baldo 'non esiste giustificazione del potere che non sia giustificazione di ordine morale-religioso (la 'buona volontà' del principe di obbedire alla legge che egli stesso ha posto, in conformità ai precetti di un ordinamento superiore, divino-naturale)'.[20]

Il 'princeps' dantesco: 'dominus' e 'minister'

In questo percorso evolutivo che Diego Quaglioni segue per segnare le tappe fondamentali del più ampio problema del passaggio dal costituzionalismo medioevale al costituzionalismo moderno, l'apporto del pensiero dantesco si colloca a pieno titolo ed alza una voce straordinariamente originale. Colpiscono i tratti peculiari con cui Dante argomenta fermamente e singolarmente, nel I libro della *Monarchia,* circa i caratteri di quella 'potestas

[19] Riporto il passo nella traduzione di Diego Quaglioni, *La giustizia nel Medioevo e nella prima età moderna* (Bologna 2004) 69.

[20] Cf. D. Quaglioni, 'Crisi dell'aristotelismo e ragion di Stato: Il "Memoire sur la pacification des troubles" di Etienne de la Boëtie (1561)', *Aristotelismo politico e ragion di Stato: Atti del convegno internazionale di Torino 11-13 febbraio 1993*, cur. Artemio E. Baldini (Fondazione Luigi Firpo. Centro di studi sul pensiero politico. Studi e Testi 4; Firenze 1995) 279.

principis' che la dottrina teologico-giuridica tra i secoli XIII e XIV comincia a distinguere in assoluta e vincolata, fino a giungere alla 'divisio' baldesca tra la 'potestas absoluta', implicante la 'solutio a legibus', e la 'potestas ordinaria' o 'ordinata' da cui discende l'obbligo morale della sottomissione del 'princeps' alle 'leges'. In Dante, tal genere di 'interpretatio' presenta elementi nuovi. Si ponga mente, in proposito, a quanto si legge in *Monarchia* 1.12.12:[21]

> Di qui risulta anche che, benché il console o il re rispetto ai mezzi siano signori degli altri, rispetto ai fini sono invece ministri degli altri, e più di chiunque altro il Monarca, che senza dubbio alcuno deve essere considerato il ministro di tutti.

In questo passaggio spicca l'impiego puntuale dei termini 'dominus' (signore degli altri) e 'minister' (ministro degli altri) i quali identificano rispettivamente l'assolutezza del potere e la ordinazione del potere a qualcos'altro. Siffatta doppia articolazione certamente ricorda, da un lato, il pensiero di Egidio Romano e di Tolomeo da Lucca,[22] d'altro lato prefigura la doppia 'potestas' di Baldo. C'è però una riflessione puntuale riguardante non il 'princeps', ma i soggetti a lui sottoposti. Dante riprende la più antica tradizione medioevale che, parallelamente all'idea schiettamente romanistica del 'princeps dominus', tramanda il concetto cristiano del 'princeps missus a Deo', riproposto, nella *Monarchia*, attraverso il concetto del 'princeps minister'. [23] Egli

[21] *Monarchia* 1.12.12, ed. Quaglioni 116-119.

[22] Cf. Quaglioni, 'Regimen ad populum' 209-214.

[23] La questione, di origine agostiniana, trova eco in alcune fonti altomedioevali legate all'ambiente della scuola di Chartres, nella quale si va profilando il concetto di 'funzione' appartenente esclusivamente all'uomo, nella sua qualità di creatura divina. Un esempio interessante è offerto da un passaggio delle *Note super Johannem* di Gilberto Porretano dove l''hominis ministerium' è spiegato attraverso l'esempio dell'edificio costruito per volontà e per ordine del ricco, ma eseguito concretamente dal carpentiere: 'alter auctoritate sola et jussu alter ministerio': il passo è edito da Marie-Dominique Chenu, *La teologia nel XII secolo*, trad. it. Paolo Vian (2nd. ed. Milano 2016) 52 nota 85. Del resto è conosciuta la circolazione delle opere del Porretano, soprattutto del *Liber sex principiorum*, citato in *Monarchia* 1.11.4, attribuito erroneamente nel Medioevo al Porretano, cf. 'Magister Sex Principiorum', *Enciclopedia Dantesca* (6 vol. 2nd. ed. Roma 1984) 3.767a.

coniuga la doppia identità giuridica del reggitore 'dominus'-'minister' e, così facendo, fa luce sulla questione nuova della 'politia' (costituzione politica), la quale consente di prospettare il problema della relazione tra il potere imperiale e le leggi in maniera più complessa, rispetto alla dottrina giuridica sviluppata da Accursio fino a Baldo.[24] La 'politia' dantesca non tiene conto soltanto della relazione 'princeps-leges', ma anche della relazione 'princeps-cives'. Nel paradigma del potere Dante inserisce i 'cives':[25]

> I cittadini infatti non sono tali per i consoli, né la nazione per il re, ma al contrario, i consoli sono tali per i cittadini e il re per la nazione.

Questi 'cives' hanno 'dignitas' propria, rappresentano—come diremmo con linguaggio odierno—uno degli elementi costitutivi dello Stato.[26] Dunque, l'insieme dei tre elementi fondanti la costituzione politica, 'princeps', 'leges', 'cives', è la cornice dentro cui trova assetto la riflessione dantesca 'di natura costituzionale'[27] circa il potere imperiale, colonna portante

[24] In particolare Filippo Cancelli, 'Tolomeo da Lucca', *Enciclopedia Dantesca* 5.622, evidenzia la diversità del concetto di 'politia' dantesca, rispetto al pensiero di Tolomeo da Lucca, il quale aveva affacciato la distinzione tra 'regimen politicum' (o politia), inteso come potere condizionato e subordinato alle leggi; e 'dominium regale', secondo cui il re domina ed è arbitro delle leggi.

[25] *Monarchia* 1.12.11, ed. Quaglioni 116-117.

[26] Anche per questo aspetto Dante sembra sviluppare temi appartenenti alla prima decretistica. Sembra rielaborata l'intuizione di Stefano Tornacense che, nell'introdurre la propria *Summa* al Decreto di Graziano, riconduce l'esistenza del 'sacerdotium' e del 'regnum'—entrambi soggiacenti alla reggenza divina—a due popoli: 'In eadem civitate sub eodem rege duo populi sunt, et secundum duos populos duae vitae, secundum duas vitas duo principatus, secundum duos principatus duplex iurisdictionis ordo procedit. Civitas ecclesia; civitatis rex Christus; duo populi duo in ecclesia ordines: clericorum et laicorum; duae vitae: spiritualis et carnalis; duo principatus: sacerdotium et regnum; duplex iurisdictio: divinum ius et humanum', *Die Summa über das Decretum Gratiani*, ed. Friedrich von Schulte (Giessen 1891, rist. anast. Aalen 1965) 1; Cf. Herbert Kalb, *Studien zur Summa Stephans von Tournai: Ein Beitrag zur kanonistischen Wissenschaftsgeschichte des späten 12. Jahrhunderts* (Forschungen zur Rechts- und Kulturgeschichte 12; Innsbruck 1983) 114.

[27] *Monarchia* 1.12.11, ed. Quaglioni 118, in app., s.v. *monarcha necessitatur*. Per quanto l'importanza dei 'cives', nella costituzione dell'ordinamento, sia argomento in circolazione nella seconda metà del secolo XIII —basti pensare a certi passaggi del *Difensore della pace* di Marsilio da Padova— l'argomentare

dell'idea 'of the human race as one "civilitas".'[28] A questo riguardo si deve porre attenzione non tanto sulla qualificazione del 'princeps' come 'dominus' (benché il console o il re rispetto ai mezzi siano signori degli altri, etc.): il principe è padrone del mondo nel senso che può usare dei mezzi a sua disposizione senza limiti di sorta. Si deve altresì porre attenzione sull'esperienza fattuale del potere, messa a punto in Dante attraverso la figura del 'princeps minister'. Quest'ultima locuzione è utilizzata nella *Monarchia* in senso giuridico proprio: per distinguere il 'nuntius'-'minister' dal 'vicarius',[29] per sottolineare cioè che il nunzio realizza una volontà non sua ma di chi lo manda. Il 'princeps' dunque è portatore, sulla terra, non della propria 'voluntas' ma della volontà divina. Le 'leges' pertanto sono il frutto non della 'voluntas principis' ma della 'voluntas Dei'.

La costruzione così articolata in cui il principe è sì 'dominus mundi' ma è anche 'nuntius', permette a Dante di formulare in maniera originale, rispetto alla dottrina di diritto comune, l'intera questione della natura del vincolo di sottomissione del principe alle 'leges'.

La 'politeia' dantesca

Nella *Monarchia*, la questione della 'subiectio legibus' è affrontata non a partire dall'interrogativo se il 'princeps' voglia o debba 'vivere secondo le leggi', come si osserva da Accursio a Baldo, ma dal lato dell'intervento del 'princeps' sul sistema dello *ius civile* quale si realizza nell'atto del 'dare leges'. Ciò avviene perché la responsabilità del reggitore tracciata da Dante con riferimento alla 'Dei voluntas' inverte la direzione con cui i giuristi medioevali tratteggiano la relazione tra il 'princeps' e le 'leges':[30]

> I cittadini infatti non sono tali per i consoli, né la nazione per il re, ma al contrario, i consoli sono tali per i cittadini e il re per la nazione; perché

dantesco si caratterizza specificamente sul piano del diritto, è cioè finalizzato alla creazione di un ordinamento costituzionalmente garantito.

[28] Claude Lefort, 'Dante's Modernity: An Introduction to the Monarchia', ed. Christiane Frey et alii (Berlin 2020) 4.

[29] Ampia disamina sul punto nell'ed. Quaglioni 395-398 (in app.).

[30] *Monarchia* 1.12.11, ed. Quaglioni 116-117.

> come la costituzione politica non è stabilita per le leggi, ma al contrario le leggi sono stabilite per la costituzione politica, così coloro che vivono secondo la legge, non vivono in ordine al legislatore, ma piuttosto questi a quelli.

È necessario seguire puntualmente il fraseggio dantesco: vero è che il legislatore vive in ordine a coloro che vivono secondo la legge. Al contrario, è falso affermare che coloro che vivono secondo la legge, cioè i 'cives', vivono ordinati al legislatore. Così Dante approda alla teorizzazione della responsabilità di natura pubblicistica del reggitore nei confronti della 'civitas'. A riprova si osservi che il perseguimento del buon fine 'de lege condendo' non identifica una giusta causa di natura impulsiva, del medesimo genere della 'certa scientia' che i giuristi medioevali prevedono quale clausola derogatoria dello *ius civile*. Il fine su cui si incentra la tesi dantesca rappresenta piuttosto una causa finale,[31] all'origine di una obbligazione di risultato, dunque necessitata, in ragione dell'alterità tra la 'voluntas principis' e la 'Dei voluntas' che il reggitore deve attuare per il bene della comunità, in tanto in quanto 'nuncius' di Dio. Questo concetto trova rispondenza nel Convivio dantesco, in particolare nel luogo in cui 'l'Imperatore . . . esercitando . . . la più alta funzione pubblica è anch'egli un "ufficiale" e non un autocrate'.[32] Ciò significa che egli è responsabile con riguardo all''ars' di cui è interprete, la quale consiste in 'scrivere, mostrare e comandare'; è responsabile cioè non soltanto in ragione della dimensione equitativa del sistema giuridico, fondata sui princìpi divini, ma anche nei confronti dei 'cives' che prestano consenso al reggitore degno di fede e di obbedienza.[33] L'idea del 'princeps', 'executor iustitiae' secondo il sintagma in circolazione tra il XII e il XIII secolo, viene

[31] Sul punto cf. ed. Quaglioni 118, in app., s.v. *monarcha necessitatur*.

[32] Così G. Fioravanti, nel commento a Convivio 9.9, Dante Alighieri, *Opere* 621.

[33] L'identificazione del 'princeps' in colui che è degno di fede e di obbedienza rinvia al complesso concetto di 'auctoritas' che Dante, in linea con l'etimo precedentemente proposto da Uguccione da Pisa, fa derivare dal greco 'autentin' piuttosto che dal latino 'augere'. Sul punto cf. lo studio classico di Philip Toynbee, *Dante Studies and Researches* (Methuen-London 1902) 101-102.

rielaborata da Dante con riferimento alla responsabilità giuridica di natura pubblicistica che lega il 'princeps' ai 'cives'. Si può affermare cioè che la 'necessitas' dantesca sia termine-concetto usato nella Monarchia 'sub specie iuris', alla maniera dei giuristi.[34] Attraverso questa riflessione Dante giunge ad un passo dalla formulazione dell'idea di sovranità: al monarca spetta il governo di tutti 'per prius et immediate', quella del monarca è 'cura suprema'.[35] Proprio la dimensione fattuale del potere, non invece quella astratta, pone le basi per il concetto moderno di sovranità: il 'princeps' che detiene il più alto grado di giudizio (cura suprema), nei confronti dei 'cives', è sovrano. La condizione perché ciò possa realizzarsi è che sia mantenuta retta la relazione dialettica tra il potere (voluntas principis) e la giustizia (Dei voluntas), che rappresentano gli elementi estremi del rapporto dal quale scaturisce l'obbligazione, per il 'princeps', di sottomettersi alle 'leges':[36]

> la giustizia trova opposizione nel potere; poiché essa infatti è una virtù che si esercita nei confronti degli altri, senza il potere di attribuire a ciascuno quel che è suo, come si potrà operare conformemente ad essa? Da ciò è evidente che quanto più il giusto sarà potente, tanto più la sua giustizia sarà ampia nel suo operato.

C'è una relazione di proporzionalità diretta tra il potere e la giustizia (quanto più il giusto sarà potente, tanto più la sua giustizia sarà ampia nel suo operato) attraverso la quale si realizza la condizione necessaria perché il 'princeps' possa operare rettamente e possa essere ritenuto, dai sudditi, degno di fede e di obbedienza. Si presenta in questo modo 'il doppio volto della

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[34] In generale, sul significato filosofico di 'necessitas' nel Medioevo, cf. Michele Rak, 'necessità', *Enciclopedia Dantesca* (2nd. ed. Roma 1984) 4. 28-30.

[35] Cf. *Monarchia* 1.11.16, ed. Quaglioni 100-101. Sulla dantesca suprema 'iurisdictio' temporale—intesa come sovranità—e la cultura giuridica dei secoli XIII-XIV cf. Diego Quaglioni, 'Dante e la tradizione giuridica romana nel libro II della Monarchia', *L'antichità classica nel pensiero medievale: Atti del Convegno della Società italiana per lo studio del pensiero medievale (S.I.S.P.M.). Trento, 27-29 settembre 2010*, a cura di Alessandro Palazzo (Fédération Internationale des Instituts d'Études Médiévales: Textes et Études du Moyen Âge, 61; Porto 2011) 253-266.

[36] *Monarchia* 1.11.7, ed. Quaglioni 88-91.

sovranità' —per usare di nuovo le parole di Diego Quaglioni— un volto che si mostra nel lato attivo del potere e nell'obbedienza da parte di chi il potere lo subisce.[37] Considerata per questo aspetto ben si vede la differenza con la dottrina messa a punto successivamente da Bartolo. Per il giurista il monarca è nient'altro che 'dominus', ha cioè la condizione di re, gli altri 'regimina unius', invece, sono retti da ministri.[38] Diversamente per Dante anche il monarca 'dominus' è 'minister', e lo è nel massimo grado.

(segue) Verso la modernità

Tra queste righe della *Monarchia* è implicita la chiara reinterpretazione dantesca dell'antica questione accursiana della 'convenientia',[39] la quale suggerisce e raccomanda al 'princeps' la 'subiectio legibus'. Va osservato, a tal proposito, che il problema della 'convenientia', come proposto nella glossa accursiana, raccoglie un'eco isidoriana, svelata apertamente in quel passaggio della D.9 del *Decretum*, tratto dalle *Sententiae* di Isidoro di Siviglia (D.9 c.2), che così recita:[40]

> [D.9 c.2]: Iustum est, principem legibus obtemperare suis. Tunc enim iura sua ab omnibus custodienda existimet, quando et ipse illis reuerentiam prebet. Principes legibus teneri suis, nec in se conuenit, posse damnare iura, que in subiectis constituunt. Iusta est enim uocis eorum auctoritas, si quod populis prohibent, sibi licere non patiantur.

Il glossatore ordinario, nel riecheggiare evidentemente il linguaggio dei suoi tempi, tradito attraverso le fonti canonistiche,

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[37] Diego Quaglioni, *La sovranità* (Biblioteca essenziale Laterza; Roma-Bari 2004) 19-44 (in particolare 20-21).

[38] Quaglioni, 'Regimen ad populum' 215.

[39] Cf. sopra §1.

[40] Il passo isidoriano che compone il c.2 della D.9 mostra evidenti assonanze con il testo della *Digna vox* anche per il modo con cui esso si conclude: 'Iusta est enim uocis eorum auctoritas, si quod populis prohibent, sibi licere non patiantur'. Questo testo, presentato dall'ed. Friedberg come *palea*, era tradito già da Burcardo, da Ivo di Chartres e dall'autore della *Collectio Tripartita* (cf. ed. Friedberg, app. a D.9 c.2 n.11), ma ometteva l'inciso 'nec in se convenit', presente soltanto in Isidoro (cf. ed. Friedberg, app. a D.9 c.2, n. 12) e destinato a divenire pietra angolare della dottrina medioevale, come dimostrato dalla scelta interpretativa della *Magna Glossa* (cf. sopra nel testo). Ciò lascia intravvedere il lento emergere della questione giuridica della sottomissione del 'princeps' alle 'leges' negli ambienti canonistici di età grazianea.

aveva decisamente circoscritto l' 'interpretatio', si era cioè concentrato sulla coerenza morale (convenientia) del comportamento del 'princeps'. Dante, invece, va oltre e coglie appieno la dimensione 'costituzionale' dell'impianto grazianeo dal quale egli, implicitamente, risulta attratto. A dimostrazione di ciò si dovranno innanzitutto rileggere le considerazioni esposte dal *Magister decretorum* nel *dictum* introduttivo del canone isidoriano:

> [D.9 d.a.c.1] Quod autem constitutio naturali iuri cedat multiplici auctoritate probatur.

Ogni costituzione umana deve soggiacere allo *ius naturale*. Perciò, il 'princeps' deve sottostare alle 'leges' non per le ragioni che saranno maturate in ambito civilistico: non cioè ―come dirà Accursio― 'per ragioni d'onore e di convenienza'; non per un moto della propria volontà moralmente orientata (si dicat se velle) e non perché abbia l'obbligo 'de honestate' di osservare leggi dalle quali è 'solutus', secondo le tesi sviluppate da Cino in poi. Deve egli invece ad esse sottostare perché tutti i 'cives' riconoscano di dover fare altrettanto, cioè di dover custodire le leggi, come recita il c.2 della D.9 (Tunc enim iura sua ab omnibus custodienda existimet, quando et ipse illis reverentiam prebet).

Poiché nelle 'leges' sono riposti i princìpi dello *ius naturale* (constitutio naturali iuri cedat), la coerenza (convenientia) del reggitore ―cioè a dire la 'reverentia' prestata alle leggi da lui stesso poste― diviene il fondamento dell'ordinamento civile: non è forse, questa del *Decretum* grazianeo, la tesi dantesca?[41]

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[41] Dante 'individua nell'impero il luogo geometrico della realizzazione della legge umana. E questo gli serve a spiegare perché Cristo si sia incarnato in quel tempo e come da questo sia scaturita la storia dello sviluppo dell''humana civilitas' basata sulla normazione e sulle regole di un diritto che è, in prima istanza, un diritto di natura e solo dopo ragione scritta come del resto Dante ricavava dal *De officiis* di Cicerone, cf. Claudia Di Fonzo, *Dante: Tra diritto, teologia ed esegesi antica* (Napoli 2012) 45. Se Cicerone, dunque, è riconosciuto come la fonte del pensiero dantesco circa la relazione tra il diritto divino naturale e il diritto umano, si deve aggiungere che il modo 'ciceroniano' di presentare la questione è quello tramandato nel Medioevo giuridico attraverso il *Decretum* grazianeo. Il problema della ricezione ciceroniana da parte del *Magister Gratianus* è studiato da C. Larrainzar, 'La mención de

Così disegnato, il vincolo del 'princeps' alle leggi diviene totale: tanto per ciò che concerne il vivere secondo le leggi, quanto per ciò che concerne l'attività di creazione dello *ius civile*. Il possibile debito grazianeo del pensiero dantesco,[42] congruente con il giudizio critico espresso dal Poeta sul *Magister decretorum*, contrapposto all'esperienza del *ius decretalium*, consente di leggere il testo della *Monarchia* in una prospettiva tale da proiettare il Medioevo verso quella modernità che i medievali stessi non furono del tutto pronti a concepire. Quando Dante infine afferma che 'il monarca è necessitato dal fine che si propone nel dare le leggi' (Monarcha necessitatur a fine sibi prefixo in legibus ponendis), egli segna la via per la teorizzazione del principio dello 'stato di diritto' in cui la sottomissione del potere alle leggi è costituzionalmente originata ed obbligatoria (necessitatur).[43] È cioè la costituzione politica (politia), formata di 'dominium' e 'ministerium', con il significato a questi attribuito nella *Monarchia*, ad imporre la 'subiectio legibus':[44]

> Simile al capo di una immensa comunità religiosa, il *Monarca* di Dante, proprio perché ha il compito di imporre agli altri le leggi che li conducono al loro fine, non è altro, in realtà, che il loro servo.

Ciò autorizzerà Bodin, a distanza di oltre due secoli, a considerare limite invalicabile della sovranità 'les bornes sacrees de la loy de Dieu et de nature'. Tant'è che pare di poter ripetere, per il monarca

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Cicerón entre las 'auctoritates' canónicas', REDC 71 (2004) 93-118, ora *Anneus* 7 (2010, ma 2016) 97-120.

[42] Sul ritorno di Dante al diritto canonico di età grazianea cf. Quaglioni, 'The Law' 263-264.

[43] Edward Peters, 'The Frowning Pages: Scythians, Garamantes, Florentines, and the Two Laws', *The Divine Comedy and the Enciclopedia of Arts and Sciences. Acta of the Symposium, 13-16 November 1983, Hunter College, New York*, edd. Giuseppe C. Di Scipio, Aldo Scaglione (Amsterdam-Philadelphia 1988) 287-288 avverte, in Dante, il senso gerarchico della relazione tra la giustizia e le leggi: 'human justice, positive law, then, stands lowest in a hierarchy that ascends through natural law and revelation (divine law) to the eternal law. That hierarchy defines and identifies the justice in human law and limits its freedom (or, to put it in Dante's terms, gives it the freedom to align itself with the natural, divine, and eternal laws)'.

[44] Così Étienne Gilson, *Dante e la filosofia*, trad. it. Sergio Cristaldi (Di fronte e attraverso 163; Milano 1987) 167.

dantesco, quanto è stato scritto del potere sovrano elaborato da Bodin:[45]

> Si può dire che il limite essenziale del potere del re stia nella sua condizione di suddito; all'infuori del suo ambito di competenza, quello della legge civile, ossia del potere di comando che gli è proprio, egli viene a scontrarsi col potere di un superiore di fronte a cui deve arrestarsi. Anch'egli, insomma, deve sottostare a una sovranità estranea, di cui la sua non è che un riflesso.

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[45] Cf. M. Isnardi Parente, 'Introduzione', Jean Bodin, *I sei libri dello Stato* (Torino 1964) 1.32.

Usury and Restitution in Late Medieval Episcopal Statutes: A Case Study in the Local Reception of Conciliar Decrees

Rowan Dorin and Raffaella Bianchi Riva

Sometime before 1282, the archbishop of Cologne Siegfried II von Westerburg promulgated a set of synodal statutes for his diocese.[1] Among the eighteen articles was one 'On Manifest Usurers', which began by spelling out the canonical sanctions against manifest usurers as set forth at the Third Lateran Council in 1179, accompanied by a succinct definition of what made a usurer 'manifest'. The article then turned to the matter of usurious restitution, insisting that the decree (constitutio) issued by Pope Gregory X at the Second Council of Lyon be observed.[2] Rather than paraphrase its provisions, the article quoted verbatim nearly the entire decree, from its opening words (Quamquam usurarii…) to its penultimate phrase. Manifest usurers were thus to be denied church burial unless they had made full restitution of their usurious gains, or else provided an appropriate security (cautio). Clerics who violated this prohibition were to be suspended from office, and they were likewise barred from hearing confession or granting absolution to usurers who had failed to make appropriate satisfaction for their wrongdoing. Absent from Siegfried's statutes, however, was any mention of the Lyonese decree's dramatic concluding sanction, which nullified *ipso iure* the testament of any manifest usurer who failed to adhere to its

[1] Cologne (D 1275x1282) c.14, in *Concilia Germaniae*, edd. Johann Friedrich Schannat and Joseph Hartzheim (11 vols. Cologne 1759-1790) [hereafter CG] 3.657-671, at 668-669. Here and below, the letter preceding the issuing date of the statutes indicates whether these were diocesan (D), provincial (P), or legatine (L). For the dating of the Cologne statutes, see the forthcoming edition by Heinz Wolter: *Die Synodalstatuten der Kölner Kirche im Spätmittelalter 1261-1523* (Vienna-Cologne-Weimar 2022). We are grateful to Dr. Wolter for sharing a copy of his edition in advance of its publication.

[2] Lyon II c.25 (COGD; COD[3] c.27); later VI 5.5.2.

specified restitution procedures. Whatever the reason for this omission, it meant that *Quamquam usurarii* as it was enshrined in the synodal statutes of Cologne differed in an important respect from the decree's text as codified and commented in learned contexts.[3]

In itself, this discrepancy might not seem especially noteworthy. After all, bishops who sought to integrate the church's general law into their local legislation faced the dual challenge of streamlining it to align with local priorities and simplifying it to make it accessible to local audiences.[4] The Cologne case was somewhat unusual, however, inasmuch as its drafters did not merely simplify the text of the conciliar decree. Instead, they selectively excised a passage from what was otherwise a faithful recopying of its text. Moreover, this excision reflected a broader pattern in the local reception of *Quamquam usurarii* during the late thirteenth and fourteenth centuries. While roughly one hundred surviving diocesan statutes and provincial canons issued in this period betray the influence of the Lyonese decree, only thirty of these explicitly transmit its testamentary nullification clause.[5] Other elements of *Quamquam usurarii* fared even worse in terms of their local dissemination: the Cologne statute was among a mere handful to reference the decree's provision concerning the liability of those tasked with estimating the amount to be restituted.[6] Even more striking is the fact that most late medieval prelates ignored *Quamquam usurarii* entirely when

[3] The omission is found in all of the extant manuscript copies of the statutes and their *editio princeps*; see especially Xanten SA B 2 (*Liber Albus*) fol. 121rv; and *Statuta Ecclesiae Coloniensis* (Cologne 1478) ad loc.

[4] See Richard H. Helmholz, 'The Universal and the Particular in Medieval Canon Law', *Proceedings Munich 1992* 641-669.

[5] The quantitative arguments here and below are based on the systematic analysis of roughly 1400 texts of local ecclesiastical legislation issued during the thirteenth and fourteenth centuries; these account for nearly 98% of the known material surviving from this period. Transcriptions of nearly all of these statutes can be accessed via the online open-access *Corpus Synodalium* database; see https://corpus-synodalium.com/.

[6] According to the decree, if the receiver of a *'cautio'* knowingly underestimated the probable sum needed for the restitution of *incerta*, he was held liable for the shortfall (ad satisfactionem residui teneatur).

drawing up anti-usury statutes for their dioceses and provinces. Although the conciliar fathers who had gathered at Lyon in 1274 had furnished clerics with new weapons to fight the scourge of Christian moneylending, few bishops chose to brandish them within their local legislative traditions.

While much has been written concerning the church's teachings on usury and their impact on medieval economic practices, the enforcement of the canonical sanctions against usurers has proven a more elusive target.[7] Only rarely do the surviving records of the twelfth to fourteenth centuries reveal bishops and local clergy across Latin Christendom taking direct measures against accused Christian usurers, whether by imposing excommunication, ordering exhumation, or distributing restituted sums.[8] In part, this reflects the widespread loss of medieval ecclesiastical court records, and likewise of the sorts of fiscal accounts that might show restitution efforts at work. There are certainly exceptions: narrative accounts of bishops and preachers rousing townsfolk against local moneylenders; lists of notorious

[7] The modern literature on the topic of usury is vast. For an overview of canonistic developments, see Gabriel Le Bras, 'Usure: La doctrine ecclésiastique de l'usure à l'époque classique (XIII^{e}-XV^{e} siècle)', *Dictionnaire de théologie catholique* (Paris 1950) 15.2336-2372; together with Thomas P. McLaughlin, 'The Teaching of the Canonists on Usury (XIIth, XIIIth, and XIVth Centuries)', *Mediaeval Studies* 1 (1939) 81-147, and 2 (1940) 1-22. For the evolution of canon law concerning Jewish lending (which we do not discuss here), see Stefan Schima, 'Die Entwicklung des kanonischen Zinsverbots: Eine Darstellung unter besonderer Berücksichtigung der Bezugnahmen zum Judentum', *Aschkenas* 20 (2010) 239-279.

[8] Notable studies include Richard H. Helmholz, 'Usury and the Medieval English Church Courts', *Speculum* 61 (1986) 364-380; Andrea Czortek, *Chiesa e usura a Città di Castello nel XIII secolo* (Città di Castello 1998); Massimo Giansante, *L'usuraio onorato: Credito e potere a Bologna in età comunale* (Bologna 2009); David Kusman, *Usuriers publics et banquiers du prince: Le role économique des financiers piémontais dans les villes du duché de Brabant (XIII^{e}-XIV^{e} siècle)* (Turnhout 2013); Sylvie Duval, 'Les testaments, l'usure, les statuts: L'exemple de Pise au XIV^{e} siècle', *Statuts communaux et circulations documentaires dans les sociétés méditerranéennes de l'Occident (XII^{e}-XV^{e} siècle)*, ed. Didier Lett (Paris 2018) 115-133; and the studies gathered in *Male ablata: La restitution des biens mal acquis (XII^{e}-XV^{e} siècle)*, edd. Jean-Louis Gaulin and Giacomo Todeschini (Rome 2019).

usurers whose names were posted on the doors of their parish churches; disputes over the boundaries of secular and ecclesiastical jurisdiction concerning usurers and their activities; and other scattered sources. But it is hard to determine to what extent these signal unusual bursts of ecclesiastical zeal (as the laments of rigorist observers might suggest), and to what extent they instead offer glimpses into more widespread practices. In short, as Giancarlo Andenna observed three decades ago, 'we know little about the concrete pastoral actions that were taken against usurers at the level of individual dioceses and parishes'.[9]

In the absence of other relevant sources, scholars have often turned to episcopal lawmaking as a proxy for episcopal action in the repression of usury. In many cases, this evidentiary leap is surely justified. Yet the relationship between legislation and enforcement was often tangled, as evidenced by a fourteenth-century bishop of Cambrai who promulgated stringent sanctions against Christian usurers, only to be denounced a year later for maintaining cozy relations with professional moneylenders.[10] In light of the latter denunciation, it suddenly becomes clearer why his statutes had restated the sanctions that the Third Lateran Council had imposed on usurers, while leaving unmentioned the penalties that more recent councils had imposed on the authorities who sheltered them. If the bishop of Cambrai obviously lacked the authority to abrogate the church's general law, he nevertheless wielded considerable power when it came to shaping local awareness of its tenets.

As these examples from Cologne and Cambrai suggest, late medieval bishops (and those who drafted statutes on their behalf)

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[9] Giancarlo Andenna, ''Non remittetur peccatum nisi restituatur ablatum' (c.1, c.XIV, q. 6): Una inedita lettera pastorale relativa all'usura e alla restituzione dopo il secondo concilio di Lione', *Società, istituzioni, spiritualità: Studi in onore di Cinzio Violante* (2 vols; Spoleto 1994) 1.93-108.

[10] David Kusman, 'Quand usure et Église font bon ménage. Les stratégies d'insertion des financiers piémontais dans le clergé des anciens Pays-Bas (XIII^{e}-XV^{e} siècle)', *Bourguignons en Italie, Italiens dans les pays bourguignons (XIV^{e}-XVI^{e} s.)* (Neuchâtel 2009) 205-25, esp. 205-209. For the sanctions, see Cambrai (1323) c.1, in CG 4.286-288 (here dated erroneously to 1324).

enjoyed enormous flexibility in choosing how to incorporate the church's general law into their local legislation—assuming that they sought to issue such legislation at all. Although this point may seem obvious, it has attracted little attention among scholars of late medieval canon law. Most studies of the local reception of conciliar decrees have embraced a binary approach: do the diocesan and provincial statutes from a given region show the influence of a certain canon (or council), or not?[11] Editorial conventions further reinforce this approach, insofar as a proper *apparatus fontium* need only indicate the relevant sources, without getting into the details of how exactly these were reused or reworked. Yet there is surely a significant difference between a diocesan statute that conveys all of *Quamquam usurarii*'s substantive provisions, and one that merely asserts the necessity of restitution in order for a usurer to receive church burial. If late medieval canon law is understood to be more than just a matter of codified texts and their associated commentaries, then these details—messy though they might be—cannot simply be passed over in silence.

This article therefore starts from the point where most previous studies have stopped. It explores how late medieval bishops invoked, transformed, or ignored *Quamquam usurarii* in their diocesan statutes and provincial canons, revealing the uneven dissemination of its provisions and the regional variation in its reception. In some cases, particularly in northern Italy, bishops sharpened the decree's penalties or elaborated on its restitution procedures. More frequently, the drafters of local ecclesiastical legislation excised the decree's most controversial elements (as in the Cologne example discussed above) or tweaked its wording to maximize episcopal discretion. To focus only on the reception of

[11] For a classic example of this approach, see Louis Boisset, 'Les conciles provinciaux français et la réception des décrets du II[e] Concile de Lyon (1274)', *Revue d'histoire de l'Église de France* 69 (1983) 29-59; and more recently, Anne J. Duggan, 'Conciliar Law 1123-1215: The Legislation of the Four Lateran Councils', HMCL 2.318-366. For a notable exception, see Stefanie Unger, *Generali concilio inhaerentes statuimus: Die Rezeption des Vierten Lateranum (1215) und des Zweiten Lugdunense (1274) in den Statuten der Erzbischöfe von Köln und Mainz bis zum Jahr 1310* (Mainz 2004).

Quamquam usurarii, however, would risk overstating its novelty and significance within the broader landscape of late medieval episcopal anti-usury legislation. The first section of this article therefore explores the importance of earlier legal experimentation for the drafting of *Quamquam usurarii*. The second section discusses the drafting of the decree itself; here, hitherto-unnoticed evidence from local legislation allows us to build on Stephan Kuttner's seminal discovery of the draft version of the Lyonese decrees. The remaining sections first consider the decree's reception in provincial and diocesan statutes from across late medieval Latin Christendom, then offer a more detailed examination of how northern Italian bishops responded to it in their statutes.

Beyond providing insights into the development and dissemination of the medieval church's economic teachings, this article aims to demonstrate the importance of systematic comparison in exploring the relationship between the universal and the particular in late medieval canon law. It is likewise meant to reveal the value of local ecclesiastical legislation as a locus for studying contemporary interpretations of conciliar decrees. Just as the writings of canonists reveal controversies among those chiefly responsible for interpreting these new laws, so do the editorial choices of bishops reveal the concerns—and responses—of those chiefly responsible for enforcing them.

Thirteenth-Century Antecedents and Innovations

The evolution of the medieval church's canonical sanctions against Christian usurers is well known. Gratian's *Decretum* hewed closely to late antique tradition in adopting a restrictive definition of usury (quicquid sorti accidit usura est) and focusing on the punishment of clerical usurers.[12] Thereafter, a series of conciliar decrees established new penalties for lay offenders and those who abetted their wrongdoing. Particularly influential was the decree *Quia in omnibus*, which was promulgated at the Third Lateran Council in 1179 and subsequently included in the *Liber*

[12] See especially C.14 q.3 c.1-4 and C.14 q.4 c.1-12.

Extra.[13] On pain of suspension, it prohibited clerics from offering communion to manifest usurers, accepting their oblations, or granting them ecclesiastical burial 'if they died in this sin (*si in hoc peccato decesserint*)'. In addition to these sanctions, a stream of papal decretals and canonistic commentaries offered ever more elaborate reflections on what constituted usury, who was to be reckoned a usurer for the purposes of the canonical sanctions, and how restitution ought to be made.[14]

In the wake of *Quia in omnibus*'s promulgation, Alexander III sought to clarify the restitution procedures by which usurers might escape the decree's sanctions. In response to an inquiry from the archbishop of Salerno, the pope invoked Augustine's dictum: 'Non remittetur peccatum, nisi restituatur ablatum'.[15] Since usury was held to be a form of theft, and absolution for theft required the restitution of the stolen goods (or the equivalent), it followed that usurers had to make restitution of their usurious gains in order to atone fully for their sin.[16] The pope accordingly declared that usurers were bound to make restitution for any usurious profits to the borrowers or their heirs; if these were no longer alive, the sum could be donated to the poor. If the usurers were too poor to make full restitution, they were obliged to sell off any property that they had acquired through their usury in order to make up the shortfall, but they were otherwise freed from the prohibition on ecclesiastical burial. In a separate decretal addressed to the bishop of Piacenza, the same pope established that if a usurer failed to make appropriate restitution, his heirs could be compelled to do so as successors to the obligations of the deceased.[17]

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[13] Lateran III, c.23; later X 5.19.3.

[14] See X 1.41 (*De in integrum restitutione*) and X 5.19 (*De usuris*), with their attendant commentaries. It should be noted that these questions also attracted the attention of theologians; for a lucid overview with further references, see Odd Langholm, *Economics in the Medieval Schools. Wealth, Exchange, Value, Money and Usury, according to the Paris Theological Tradition, 1200-1350* (Leiden 1992).

[15] X 5.19.5. The dictum is drawn from Augustine, *Epist.* 153.

[16] See, among other texts, C.14 q.6 c.1; X 5.17.2.

[17] X 5.19.9.

Although these and other related decretals sparked lively debates among canonists and theologians, little of the resulting ruminations found their way into the diocesan statutes and provincial canons that were beginning to proliferate in the early decades of the thirteenth century.[18] Many of these local statutes simply offered restatements of the sanctions set forth in *Quia in omnibus* (though often with no mention of its oblations ban). Others simply offered generic condemnations of usury, or insisted on the excommunication of usurers without offering any further details. Some sought to augment episcopal discretion, as in a 1269 provincial canon of Sens that allowed bishops to impose additional penalties on clerics who violated the provisions of *Quia in omnibus*, beyond the suspension specified in the decree.[19] Occasionally one finds other flashes of innovation: a 1231 provincial canon of Tours required accused usurers to publicly abjure their wrongdoing and undergo canonical purgation, while the same Sens council of 1269 also forbade clerics from both renting houses to foreign moneylenders and affixing their seals to contracts that smacked of usury.[20]

In a league of their own are the statutes that Robert de Courson issued in 1213-1214 in his capacity as papal legate to France, which insisted that the wives of unrepentant usurers beg for their food and clothing rather than derive any benefit from the wrongdoing of their husbands. (Only if they were afflicted with leprosy or driven to the brink of starvation could they accept food from their husbands.) As for the usurers themselves, the legate

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[18] For twelfth-century treatments, see especially Karl Weinzierl, *Die Restitutionslehre der Frühscholastik* (Munich 1936); and *idem*, 'Das Zinsproblem im Dekret Gratians und in den Summen sum Dekrets', *SG* 1 (1953) 551-576. For the emergence of debates over the so-called *male ablata* in the mid-thirteenth century, see the essays gathered in *Male ablata*, op. cit. For the proliferation of local ecclesiastical legislation, see Rowan Dorin, 'The Bishop as Lawmaker in Late Medieval Europe', *Past & Present* no. 253 (2021) 45-82, at 47-49.

[19] Sens (P 1269) c.3, in Mansi 24.3-8, at 4-5.

[20] Château-Gontier (P Tours; 1231) c.29, in *Les conciles de la province de Tours*, ed. Joseph Avril (Paris 1987) 140-155, at 152; and Sens (P 1269) c.2, in Mansi 24.4.

insisted that their corpses be left for street dogs to devour while demons carried off their impenitent souls to divine judgment.[21] Less dramatic, but more relevant to the developments to be discussed below, was another provision in Courson's legatine statutes: if a usurer expressed contrition and made satisfaction for his usury to the best of his ability, and his bishop was willing to testify to this fact, then upon the usurer's death his testament was to be executed faithfully.[22] Given that this particular statute was issued in Rouen, it might well have been Courson's response to the Norman custom by which the chattels of deceased usurers escheated to the fisc.[23] To forestall disputes with secular authorities over whether the deceased qualified as a usurer, Courson's statute established episcopal discretion rather than formal legal procedure as the basis for posthumous exoneration. In any case, it is significant as the only known instance before *Quamquam usurarii*'s promulgation in which local ecclesiastical legislation explicitly called into question the validity of a usurer's testament.

Regarding usurious restitution, most early thirteenth-century ecclesiastical statutes simply bundled together usury with other examples of sinful gain and insisted on the necessity of restitution without further details. This was true, for example, of the enormously influential early thirteenth-century Parisian statutes attributed to Bishop Eudes de Sully, which warned priests that in cases of theft, usury, fraud and the like, the sinner had to return their gains before any further penance could be imposed, since (again quoting Augustine) remission required restitution.[24] The subsequent popularity of Eudes's statutes meant that this provision

[21] Paris (L aft. 1213) c.5.5 & 5.10, in Mansi 22.844-857, at 850-852.

[22] Rouen (L 1214) c.3.36, in *Concilia Rothomagensis provinciae accedunt dioecesanae synodi,* ed. Guillaume Bessin (2 vols.; Rouen 1717) 1.110-126, at 126.

[23] *Coutumiers de Normandie*, ed. Ernest-Joseph Tardif, (2 vols. Rouen 1881-1903) 1.40 (*Très ancien coutumier* §1.49) and 2.52-55 (*Summa de legibus* §1.2.19).

[24] Paris (D 1200x1208) c.34, in *Les statuts synodaux français du XIII^e^ siècle*, edd. Odette Pontal and Joseph Avril (6 vols.; Paris 1971-2011) 1.52-93, at 64.

found its way into episcopal legislation from Mainz to Lisbon, with echoes still to be found well into the fourteenth century.[25]

Another influential thirteenth-century French collection, the so-called *Synodal de l'Ouest* (first issued for Angers ca. 1218), likewise lumped usury together with other sins requiring restitution, while offering more procedural detail. Expanding on Eudes's formulation, the statutes added that if restitution could not be made to the original owner, then it ought to be made to their immediate family or rightful heirs. If no such recipient could be located, then ecclesiastical guidance (consilium ecclesie) should be sought.[26] Robert de Courson, for his part, simply ordered usurers to make restitution to their victims, adding that if these could not be located, bishops were to distribute the sums to the local poor.[27]

Across the Alps, the earliest local ecclesiastical legislation governing the restitution of usury was similarly vague. In 1211, the papal legate Gerardo da Sesso issued statutes for the province of Milan that restated the penalties of *Quia in omnibus*, adding that these could not be lifted unless the wrongdoers made full and sufficient satisfaction through the restitution of their usury. While the statutes cited recent papal decretals in specifying how usury was to be computed, they offered no further details about the mechanics of restitution.[28]

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[25] Among many attestations, see Mainz (P ca.1209) c.13, in Peter Johanek, 'Die Pariser Statuten des Bischofs Odo von Sully und die Anfänge der kirchlichen Statutengesetzgebung in Deutschland', *Proceedings Cambridge 1984* 327-347, at 345-347; Lisbon (D ca.1240) c.7, *Synodicon Hispanum*, edd. Antonio García y García et al. (15 vols.; Madrid 1981-<2020>) [hereafter SH] 2.285-297, at 289; and Meaux (D ca.1346) c.16, in *Thesaurus novus anecdotorum*, edd. Edmond Martène and Ursin Durand (5 vols.; Paris 1717) 4.891-914, at 895. Eudes's formulation also spread widely in England, via the intermediary of Richard Poore's diocesan statutes for Salisbury (D 1217x1219); see *Councils and Synods, with other Documents Relating to the English Church*, 2: *A.D. 1205-1313*, edd. Frederick M. Powicke and Christopher R. Cheney (Oxford 1964) 1.57-96, at 74 (c.44).

[26] Angers (D 1216x1219) c.107, in *Statuts synodaux* 1.138-239, at 212.

[27] Paris (L 1213) c.2.7, in Mansi 22.817-844, at 827.

[28] Milan (L 1211) c.13, in Nicolò Sormani, *Gloria de' santi milanesi che ne' più torbidi secoli produssero l'ordine de' chierici regolari*… (Milan 1761) 214-

Two decades later, the papal legate Goffredo da Castiglione issued new statutes for the province of Milan that marked an important development in restitution procedures. Promulgated in Lodi in 1229, the statutes restated the burial ban on usurers and insisted that even those exempt from episcopal jurisdiction (such as the Templars and Hospitallers) had to enforce the canonical penalties set forth in *Quia in omnibus*. Regarding restitution, if a usurer's victims could easily be located (commode inveniri), restitution was to be made directly to them. Otherwise, the usurer could arrange for postmortem restitution, with the priest receiving a form of security (cautio) and the heirs swearing under oath that they would make the necessary restitution.[29] While the notion of using a 'cautio' to ensure restitution had roots in earlier canon law, the Lodi legatine statutes of 1229 mark its earliest attestation in local ecclesiastical legislation against usury.[30] The Lodi statutes were likewise noteworthy in formally allowing restitution to be carried out by the usurer's heirs, an issue that had been left undiscussed in earlier statutes.

Subsequent ecclesiastical legislation from both the province of Milan and the patriarchate of Aquileia testifies to the continuing importance of the 'cautio' as an element in northern Italian restitution norms. Within the province of Milan, the most extended discussion is to be found in the statutes that Bishop Sigebaldo Cavallazzi promulgated for his diocese of Novara in 1257, which both renewed Goffredo da Castiglione's earlier legatine statutes and added new provisions.[31] In the preceding years, Cavallazzi

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222, at 216; the reference is presumably to X 5.19.1 and X 5.19.8, both of which had been included in the *Compilatio prima* (as 5.15.1 & 5.15.10, respectively).

[29] Lodi (L 1229) cc. 16 and 18, in Mansi 24.882-886, at 885-886. On this text, see Andenna, ''Non remittetur peccatum', 96-97.

[30] For canonistic antecedents, see Eugenius III's decretal *Super eo vero* (Comp. I, 5.14.5; X 5.17.2) and Innocent III's *Suscitata super diversis* (Comp. IV, 1.17.1; X 1.41.6)

[31] Novara (D 1257), in Carlo Salsotto, 'Per la storia della chiesa novarese. Gli statuti del vescovo Gerardo (1209-1211), con le aggiunte del vescovo Sigebaldo (1249-1268)', *Bollettino storico per la provincia di Novara* 44 (1953) 20-35, at 32-33. The statutes that Salsotto attributed to Gerardo were in fact issued by the legate Goffredo in 1229; see Antonio Olivieri, 'Le costituzioni di Gerardo da

had already been insisting that usurers make restitution according to the terms of the Lodi statutes.[32] His new statutes declared that in order to obtain ecclesiastical burial, manifest usurers had to deliver an appropriate 'cautio' to the bishop (or his vicar) and the cathedral chapter. It was emphasized, moreover, that the usurer's body could not be buried until after the bishop and chapter had received written confirmation of the security (instrumentum ipsius cautionis). This marked a noted tightening from the legatine provision, whereby the 'cautio' could simply be delivered to a priest. In the Novara statutes, by contrast, only priests living outside the city were permitted to receive the 'cautio' (presumably a concession to the difficulties of rural travel and communications), but even then they were to transmit the 'cautio' as quickly as possible to the bishop, his vicar, or the chapter. These restrictions presumably reflected episcopal fears that priests were proving too lenient in the handling of restitution, such that greater oversight was needed.

The 'cautio' also features in the diocesan statutes that Bishop Goffredo da Montanaro issued for Turin in 1270. One of its provisions forbade prelates and priests from granting either communion or ecclesiastical burial to usurers unless they first provided a pledge or guarantee (pignoraticiam uel fideiussoriam caucionem) for restitution. Goffredo also mandated that the usurer was to make restitution 'within the limits of his possibilities (secundum facultates ipsius)'—a phrase that was perhaps drawn from Alexander III's response to the archbishop of Salerno (X 5.19.5), and which was soon repeated in the language of *Quamquam usurarii*.[33]

Within the sprawling patriarchate of Aquileia, which extended from Como to the Istrian peninsula, the earliest substantive discussion of usury appears in statutes promulgated by

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Sesso: gli statuti sinodali novaresi e i decreti emanati in qualità di legato apostolico', *Scrineum Rivista* 1 (2003) 139-174, at 158.

[32] This is shown by the direct reference to Cavallazzi in a Novara *'cautio'* of 1252; see *Historiae patriae monumenta*, t. 1: *Chartarum* (Turin 1836) 1414-1415.

[33] Turin (D 1270) c.3.16, in *I decreti sinodali torinesi di Goffredo di Montanaro (a. 1270, a. 1286)*, ed. Giuseppe Briacca (Turin 1985) 137-152, at 146.

Patriarch Berthold von Andechs sometime before 1251. Whether independently or under the influence of Goffredo da Castiglione's 1229 legatine statutes, Berthold likewise emphasized the necessity of the 'cautio', insisting that usurers could receive neither absolution nor ecclesiastical burial unless they provided a pledge or guarantee (pignoraticia uel fideiussoria) that sufficed for the full restitution of their usury.[34] This statute was subsequently reissued verbatim for the suffragan diocese of Concordia during the bishopric of Alberto da Colle (1257-1268), and then reconfirmed by his successor Fulcherio di Zuccola in 1275.[35]

A much more detailed treatment of usurious restitution appears in the statutes issued by Bishop Raimondo della Torre in 1262 for the diocese of Como, another suffragan of Aquileia. These forbade priests and prelates from absolving usurers (or those reputed as such) unless the usurers had first repaid their usury and provided a 'cautio' in case any further restitution of usury and other 'male ablata' was necessary. The 'cautio' was to be given to the confessor, who was to record the names and whereabouts of those to whom restitution was owed. If a usurer arranged for his heirs or legatees to make restitution, they were to take an oath in front of the confessor promising to fulfill this obligation. Raimondo further ordered that these formalities were to be recorded in writing, with copies of the resulting *instrumentum* to be given to anyone who might seek restitution of usury or other 'male ablata'.[36]

Within the local ecclesiastical legislation of northern Italy, the middle decades of the thirteenth century therefore witnessed

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[34] The dating of the statutes is uncertain, though they must have been issued between 1218 and 1251. They survive only in a later compilation; see Aquileia (1338) c.1.6, in Giorgio Marcuzzi, *Sinodi Aquileiesi, ricerche e ricordi* (Udine 1910) 350-367, at 351.

[35] Concordia (D 1257x1268; reissued 1275), in Pordenone, Archivio storico diocesano, Codice della catena, fol. 12r-14r. On this text, see Luca Gianni, 'Vita ed organizzazione interna della diocesi di Concordia in epoca medievale', *Diocesi di Concordia, 388-1974*, ed. Antonio Scottà (Padua 2004) 205-321, at 225-230. We are grateful to Paola Sist for providing images of this manuscript.

[36] Como (D 1262) c.16, in *Carte di S. Fedele in Como*, ed. Santo Monti (Como 1913) 227.

increasing attention to the 'cautio' as a prerequisite for the burial of usurers. Different dioceses, however, adopted various procedures in terms of who was eligible to receive the 'cautio' and the roles to be played by the usurers' heirs or legatees. In the case of Novara, the elaboration of the 'cautio' procedures seems to have reflected episcopal concerns over clerical complicity or laxness, while the Como statutes were particularly focused on ensuring that the usurers' victims could claim the restitution to which they were entitled.

Elsewhere in Italy, contemporary ecclesiastical legislation said very little about usury. Somewhat surprisingly, the extant statutes from Tuscan dioceses systematically ignored the topic.[37] The 1266 statutes of Città di Castello (in nearby Umbria) merely stated that priests were to deny usurers absolution and other sacraments unless they made restitution.[38] The mid-thirteenth-century statutes of the suburbicarian diocese of Velletri insisted on the necessity of restitution of usury and other illicit gains, without offering further details.[39] Only the diocesan statutes of Nepi (northeast of Rome) offered detailed provisions, barring usurers from receiving absolution even on their deathbeds unless they fulfilled various conditions. They or their heirs had to appoint the bishop to make restitution, and the usurers' wrongdoing was to be announced publicly by a crier or the priest such that their victims

[37] See in particular the statutes of Siena (D 1227), Lucca (D 1253), and Pisa (D 1258), edited respectively in Michele Pellegrini, *Chiesa e città: Uomini, comunità e istituzioni nella società senese del XII e XIII secolo* (Rome 2004), Appendix A, 474-478; Paolino Dinelli, *Dei sinodi della diocesi di Lucca* (Lucca 1834) 53-58; and Enzo Virgili, 'Il sinodo dell'arcivescovo Federigo Visconti (1258)', *Bollettino storico pisano* 44-45 (1975-76) 475-483.

[38] Città di Castello (D 1266), in *Memorie ecclesiastiche e civili di Città di Castello*, ed. Giovanni Muzi (7 vols.; Città di Castello 1842-1844) 2.154-157: '. . . nisi libros, cartas et male ablata omnino reassignent'.

[39] Velletri, Archivio capitolare, Antiquum breviarium manuscriptum, fol. 1r-4r, at 1v-2r. These are dated to the first half of the thirteenth century in Enzo Petrucci, 'Vescovi e cura d'anime nel Lazio (sec. XIII-XV)', *Vescovi e diocesi in Italia dal XIV alla metà del XVI secolo. Atti del VII Convegno di storia della Chiesa in Italia (Brescia, 21-25 settembre 1987)*, edd. Giuseppina de Sandre Gasparini et al. (2 vol. Rome 1990) 1.429-546, at 468-472. We are grateful to Arnaud Fossier for sharing with us his transcription of this text.

might claim restitution within a certain timeframe. If the victims could not be located (i.e. if the usury was *incerta*), the bishop was to direct the usurious gains to pious purposes or the needs of the poor. Clerics who knowingly granted ecclesiastical burial to usurers in defiance of these provisions faced not only suspension (as per *Quia in omnibus*) but also a substantial fine.[40] As in the Novara statutes, the bishop was given a prominent role in the handling of restitution, but there is notably no mention of a 'cautio' or similar security.

For all that bishops in many northern Italian dioceses embraced the 'cautio' as an appropriate means of assuring postmortem restitution for usury, there is little evidence of similar enthusiasm elsewhere in western Europe. Two exceptions bear noting. In 1230, one year after Goffredo da Castiglione first introduced the notion of the 'cautio' in his legatine statutes for Milan, Bishop Durand de Beaucaire promulgated a similar provision for the southern French diocese of Albi. After repeating Eudes de Sully's restitution clause and imposing the penalties of *Quia in omnibus* on all usurers (not just those reckoned as 'manifest'), the Albi statutes declared that the penalties could only be evaded if the usurers or their heirs provided pledges (bonos dederint fideiussores) that would allow for satisfaction of the usury. To whom such pledges were to be given, however, was left unstated.[41]

Three decades later, in 1261, the archbishop of Mainz Werner von Eppstein issued a lengthy compilation of provincial canons. Two of the articles restated earlier condemnations of usury, one derived from Eudes de Sully's restitution provision (which had been reissued for Mainz in 1209), and the other hearkening back to a statute issued by Werner's predecessor, Gerhard I von Daun-Kirberg. The statutes also restated the penalties of *Quia in omnibus*, adding that notorious usurers were not to be absolved unless they had first made satisfaction for their usury to the extent

[40] Rome, Biblioteca Casanatense 109 fol. 1-18v, at 14rv. The statutes survive in a compilation from 1435 (or later), but were likely issued in the mid-thirteenth century; see Petrucci, 'Vescovi e cura d'anime' 464-467.
[41] Albi (D 1230) cc. 44 and 60, in *Statuts synodaux*, 2.8-33, at 24, 30.

possible, or had provided their heirs with enough to satisfy it on their behalf. They were to provide guarantees (fideiussores) or an appropriate security (idonea praestita cautione) for the restitution of any outstanding usury, with the archbishop or his archdeacon responsible for the distribution of any *incerta* to the poor or to pious causes. The archbishop was concerned, however, that the stupidity or wickedness of priests might lead them to treat restitution as a matter of convenience rather than of the salvation of souls, and he accordingly insisted that the absolution of usurers was a matter reserved to him alone.[42] Here one sees once again the same centralization of episcopal control (and the associated fears of priestly complicity) that characterized the roughly contemporary statutes from Novara and Nepi, and which also found support among contemporary canonists.[43] More significant is the Mainz statutes' mention of the 'cautio': however exceptional, it is proof that the concept and terminology were not limited to northern Italy.

Contemporary learned and professional opinion toward the 'cautio' was mixed. In his treatise *Flos testamentorum* (com-posed after 1255), the Bolognese master of *ars notariae* Rolandino dei Passaggeri drew on both theory and practice in enthusiastically embracing the notion that usurers might leave legacies with which restitution could be made after their deaths, while also paying special attention to the solutions that would ensure the salvation of the usurers' souls. It was preferable for them to specify those to whom restitution was owed, if not in their testaments, then in a separate document to be given to their confessor. Failing that, they could leave it to their heirs or legatees to make restitution to those who could demonstrate that they had paid usurious interest, or even leave a legacy to the poor for the salvation of their soul.[44]

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[42] Mainz (P 1261) cc. 8, 25, 44, in CG 3.596-615, at 597-598, 603, 610.

[43] For instance, Hostiensis (*Commentaria* ad X 5.16.6) held that the restitution of 'male ablata' should be handled by bishops, 'ne per simplices sacerdotes inbursentur, sive sibi approprientur'.

[44] Rolandinus, *Flos testamentorum*, in *Summa totius artis notariae* (Venice 1546), rubr. *De legatis factis pro restitutione illicite acquisitorum*, fol. 260v-216r. On this topic, see Giovanni Chiodi, 'Rolandino e il testamento', in

Other mid-thirteenth-century writers were less convinced of the merits of such postmortem restitution. Glossing a decretal of Innocent III, the canonist Bernardo da Parma rejected the notion that providing security in one's testament was sufficient for the remission of sin.[45] The canonist Manfredi da Tortona came to a similar conclusion in his short treatise on the restitution of 'male ablata', the earliest such text to survive.[46]

Such hesitation found concrete normative expression in the influential statutes that the canonist Pierre de Sampson composed for the diocese of Nîmes in 1252, which were subsequently reissued for numerous other dioceses in southern France. Amidst their detailed discussion of restitution, the Nîmes statutes emphasized that the sinner was bound to make amends for his own wrongdoing, such that merely ordering one's heirs to make restitution was insufficient for remission.[47] So even as a number of northern Italian bishops (and a handful of their transalpine episcopal confrères) were willing to equate 'restitutio' and 'cautio restitutionis' for the purpose of granting ecclesiastical burial to usurers, most canonists and bishops proved wary of solutions that diminished usurers' responsibility to make amends during their lifetimes. Canonistic 'quaestiones' from the years preceding the Second Council of Lyon in 1274 similarly attest to the uncertainty around appropriate restitution procedures.[48] With the promulgation of *Quamquam usurarii*, however, the licitness of the

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Rolandino e l'ars notaria da Bologna all'Europa, ed. Giorgio Tamba (Milan 2002) 459-582, esp. 493-495.

[45] *Gl. ord.* to X 5.19.14 § *Restituerit.*

[46] Giovanni Ceccarelli and Roberta Frigeni, 'Un inedito sulle restituzioni di metà Duecento: l'opusculum di Manfredi da Tortona', *Male ablata*, 25-50, at 45 (c.IV).

[47] Nîmes (D 1252) cc. 47-56, in *Statuts synodaux*, 2.264-453, at 308-313. Beyond its widespread adoption in southern France, manuscript copies survive in collections from Dublin to Wrocław (*Statuts synodaux*, 2.240).

[48] See the *quaestio* 'Quidam usurarius positus in extremis' (dated 1272) in Orazio Condorelli, 'L'usuraio, il testamento, e l'Aldilà: Tre quaestiones di Marsilio Mantighelli in tema di usura', *Medieval Church Law and the Origins of the Western Legal Tradition: A Tribute to Kenneth Pennington*, edd. Wolfgang P. Müller and Mary E. Sommar (Washington D.C. 2006) 211-228, esp. 225-227.

'cautio'—along with many other procedures surrounding the restitution of usury—would be firmly established in canon law.

The Drafting and Revision of Quamquam usurarii

As part of the preparations for the Second Council of Lyon, Pope Gregory X invited dozens of bishops and prelates across western Christendom to share their concerns and reform proposals.[49] He then appointed a small commission to review the responses and draw up a plan for the council.[50] Although the three extant responses make only passing mention of usury, an eyewitness to the council later reported that many prelates had urged the council to consider the issue.[51]

Thanks to Stephan Kuttner's fortuitous discovery of a draft version of the conciliar decrees, it has long been known that they underwent a process of revision.[52] The exact timing of the

[49] Gregory X, 'Dudum super generalis' (11 March 1273), in *Les registres de Grégoire X (1272-1276) et de Jean XXI (1276-1277)*, edd. Jean Guiraud and Léon Cadier (Paris 1892-1906) 91-92, n° 220.

[50] The commissioners were evidently all mendicants, among them Bonaventure (the former Franciscan Minister General); the archbishop of Rouen, Eudes Rigaud OP; and the bishop of Tripoli, Paolo da Segni OP. See *Chronica XXIV generalium ordinis minorum* (Analecta Franciscana 3; Quaracchi 1897) 353.

[51] Burkhard Roberg, 'Die *lectura* des Franciscus de Albano aus dem Jahr 1276 über die *constitutiones novissimae* Papst Gregors X', AHC 31 (1999) 297-366, at 304-305; and 33 (2001) 26-79, at 60. For other mentions of usury in the preparatory documents, see Bruno von Schauenberg (Bishop of Olomouc), 'Relatio Episcopi Olmucensis in Alemannia ad Papam super deliberandis in concilio', in *Analecten zur Geschichte Deutschlands und Italiens*, ed. Constantin Höfler (Abh. bayerischen Akad., Ser. 3, Bd. 4, Abt. 3b; Munich 1846) 18-28, at 28; Gilbert de Tournai, 'Collectio de scandalis ecclesiae. Nova editio', ed. P. Autbertus Stroick, *Archivum franciscanum historicum* 24 (1931) 33-62, at 59-61; and Humbert of Romans, 'Opusculum tripartitum', in *Concilia omnia tam generalia, quam particularia*, ed. Pierre Crabbe, 2nd ed. (3 vols.; Cologne 1551) 2.967-1003, at 1001 (§III.5). For a detailed discussion of these three texts, see Burkhard Roberg, *Das Zweite Konzil von Lyon [1274]* (Paderborn 1990) 89-126.

[52] Stephan Kuttner, 'Conciliar Law in the Making: The Lyonese Constitutions (1274) of Gregory X in a Manuscript at Washington', *Miscellanea Pio Paschini. Studi di storia ecclesiastica* (2 vols.; Rome 1948-1949) 39-81. Two copies of this draft version are known: Washington D.C. Catholic University 183; and Sankt Florian, SB XI 722, fol. 22v-29v, 32r-36v.

revisions remains somewhat murky; some decrees were evidently altered in the course of the council's proceedings, while other changes might have been made over the subsequent months. Three of the decrees were evidently not presented to the council at all. These were instead added to the roster sometime between the council's conclusion in late July 1274 and the formal promulgation of its decrees on November 1 of that year.[53]

The council's anti-usury decrees seem to have undergone the most significant changes, with the single decree of the initial draft being split into two in the promulgated version. The first decree, *Usurarum voraginem*, renewed the penalties of *Quia in omnibus* and imposed new sanctions on foreign usurers and those who harbored them. Here the most notable substantive revision was the narrowing of the decree's purview to foreign usurers, given that the initial draft had referred only to the more general category of manifest usurers.[54]

As for what became the second decree (*Quamquam usurarii*), it is in fact possible to discern an intermediate stage in its revision process, falling between the initial draft version identified by Kuttner and the final promulgated text. Two copies of this intermediate version have so far been identified. The first is found in a late thirteenth-century collection of the Lyonese constitutions, to which the final promulgated version of the decree has been appended as a marginal note.[55] The second survives in a fourteenth-century compilation of the diocesan statutes of

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[53] See Burkhard Roberg's editorial introduction to the decrees, in COGD 2.1.253-54.

[54] These would become Lyon II, cc. 24-25 (COGD; COD[3] cc. 26-27); later VI 5.5.1-2. On the first of the two decrees, see Rowan W. Dorin, 'Canon Law and the Problem of Expulsion: The Origins and Interpretation of *Usurarum voraginem* (VI 5.5.1)', ZRG 130 Kan. Abt. 99 (2013) 129-161.

[55] Châlons-en-Champagne (formerly Châlons-sur-Marne), BM 63, fol. 169r. This manuscript is listed as *Ch* in the critical apparatus to the COGD edition of the decrees, but the editor appears to have relied on the version of the decree that was added in the margins by a later hand, rather than the intermediate version preserved in the main text. The significance of this manuscript as a 'vorauthentische Sammlung der Lyoner Konstitution' was first noted by Peter Johanek, 'Studien zur Überlieferung der Konstitutionen des II. Konzils von Lyon (1274)', ZRG 96 Kan. Abt. 65 (1979) 149-216, at 181.

Tournai, which included a verbatim transcription of the intermediate version within a longer chapter on usury. The compilation survives only in an eighteenth-century printed edition, and the sole known manuscript copy of the earlier statutes of Tournai was presumably destroyed in 1940.[56] It seems likely that this chapter was originally issued sometime in the years following the Second Council of Lyon, with the drafter working from a copy of the conciliar decrees made prior to their final revision and promulgation. Sometime in the fourteenth century, this chapter was then incorporated into a lengthy compilation that drew heavily on earlier diocesan statutes from Tournai, as well as provincial canons of Reims. It remains to be seen whether other extant ecclesiastical statutes from the later Middle Ages similarly drew on (and thus preserved) the working drafts of conciliar decrees. At the very least, however, the Tournai statutes demonstrate that the circulation of such preliminary or unauthorized conciliar texts could leave a lasting imprint on local legal norms.[57]

Thanks to the survival of this intermediate version, it is possible to analyze the successive stages of the revision process beyond what was already established by Kuttner.[58] In the earliest draft version (which survives in two manuscripts), the portion of the decree that would eventually become *Quamquam* was introduced as an addition to the sanctions specified in the first part (presenti quoque adicimus sanctioni . . .). This opening remained unchanged after the first round of revisions, with the division of the original decree into two parts evidently occurring at a later stage in the drafting process.

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[56] Tournai (D before 1366) c.XIV, in *Summa statutorum synodalium cum praevia synopsi vitae episcoporum Tornacensium*, ed. Jacques Le Groux (Lille 1726) 1-80, at 64-66. For a description of a now-lost manuscript containing Tournai's diocesan statutes from the late thirteenth and early fourteenth centuries, see the communication by Charles-Joseph Voisin in the *Bulletin de la société historique et littéraire de Tournai* 14 (1870) 65-67.

[57] For the consequences of such textual instability in an earlier period, see Danica Summerlin, *The Canons of the Third Lateran Council of 1179: Their Origins and Reception* (Cambridge 2019).

[58] Kuttner, 'Conciliar Law' 69-73.

The first substantive clause declared that manifest usurers could not secure ecclesiastical burial simply by ordering restitution in their wills.[59] Rather, burial was to be refused until either restitution had been made (at least to the extent that the usurer's means allowed), or an appropriate pledge (plenarie satisfactum) had been offered. If possible, the pledge was to be given directly to those to whom restitution was due (or someone capable of acting on their behalf). If the usurer's victims were not present, the pledge was instead to be given to the Ordinary, his vicar, or the rector of the parish where the usurer lived, in the presence of some trustworthy local persons. The Ordinary could also commission a notary (servus publicus) to receive the pledge (here dubbed a 'cautio').[60] The text of this entire clause remained essentially unchanged from the initial draft through to the promulgated version.

Having addressed the issue of who was to receive the pledge/'cautio', the decree now turned to the determination of its value. If the amount of the usury to be restituted was openly known, then it was to be expressed in the 'cautio'. If the amount was uncertain, both the first draft and intermediate version of the decree made the Ordinary responsible for determining it. If the Ordinary knowingly underestimated the probable amount, he would be required to make restitution of the shortfall (ad satisfactionem residui teneatur). This clause again remained almost unchanged throughout the revision process, save for one important detail: in the promulgated version, the Ordinary was no longer uniquely responsible for determining the sum to be

[59] For the purposes of this summary, we have hewed closely to Norman Tanner's English translation, as given in *Decrees of the Ecumenical Councils* (2 vols.; London-Washington D.C. 1990) 1.329-330.

[60] For the interpretation of the term 'servus publicus', see *Gl. ord.* to VI 5.5.2 ad loc.; and Gian Paolo Massetto, 'La rappresentanza negoziale nel diritto comune classico', *Agire per altri: La rappresentanza negoziale processuale amministrativa nella prospettiva storica*, ed. Antonio Padoa Schioppa (Naples 2010) 393-493, esp. 417-422.

restituted. Instead, this task fell to whoever was receiving the 'cautio'.[61]

The initial draft of the decree concluded with the sanctions on clerical transgressors, declaring that all religious and any others who violated the decree's provisions in granting confession, absolution, communion, or burial to a manifest usurer were to suffer the sanctions set forth at the Third Lateran Council (i.e. the suspension specified in *Quia in omnibus*). Given that the Lateran decree had said nothing explicit about either confession or absolution, this marked an escalation of its penalties. Perhaps this sparked some concern during the council's deliberations, since the first revision of the decree shortened this section such that the threatened penalties fell only on those who transgressed the burial ban.[62]

The first revision appended a further provision. Unless the manifest usurers had first made satisfaction for their usury or provided an appropriate 'cautio', nobody was to assist in their testaments, hear their confession, or offer them absolution. Notably, this new provision did not specify any penalties for transgressors. The revised version of the decree therefore maintained the prohibition on granting confession and absolution to usurers who had failed to make appropriate restitution, but unlike in the draft, this was no longer explicitly punishable with suspen-

[61] Burkhard Roberg omits this phrase (i.e. *alioquin aliam recipientis cautionem huiusmodi arbitrio moderandam*) from his reconstruction of the conciliar version (COGD 2.1.349), but since variations of it appeared in both of the draft versions (here restricted to the Ordinary) as well as the promulgated version, it seems likely that some form of it was maintained in the conciliar version as well. Of the manuscripts that Roberg uses to establish the text of the conciliar version, nineteen contain *Quamquam usurarii* as a distinct decree. Of these, six specify that the Ordinary was to make the determination (as in the earlier draft and the intermediate version), six grant this role to the recipient of the 'cautio' (as in the promulgated version), and seven apparently omit the phrase altogether.

[62] Châlons-en-Champagne BM 63 fol. 169rb: 'Omnes autem religiosos et alios qui manifestos usurarios contra presentis constitutionis formam ad ecclesiasticam admittere ausi fuerint sepulturam pene predicti concilii statuimus subiacere'.

sion. This softened version was preserved unchanged in the promulgated text.

The first revision of the decree evidently concluded with this provision.[63] It was only at a later stage of the drafting process (likely accompanying the decree's devision into two separate texts) that the eventual final clause was added, invalidating the testaments of manifest usurers that failed to fulfill the decree's conditions. Such testaments, declared the decree, were *ipso iure* null and void. Prior to the Second Council of Lyon this dramatic sanction had been essentially reserved for traitors and heretics, and it is hardly surprising that subsequent commentators felt obliged to defend its legitimacy against concerns over papal jurisdictional overreach.[64]

No explicit evidence survives concerning the authorship of the council's anti-usury decrees, nor of the internal debates that led to their subsequent modification. It seems clear, at least, that the drafters were familiar with the broad landscape of existing practices in northern Italy, and especially the 'cautio' as formulated in the 1229 legatine statutes for Lombardy. Here it is worth noting which aspects of local legislation the drafters of *Quamquam usurarii* did not embrace. Unlike in some local statutes, the decree did not require repentant usurers to list the names of those owed restitution, nor did it mandate that usurers' heirs take an oath regarding their duty to make restitution. The decree likewise made no mention of a written 'instrumentum', as

[63] This is suggested by the absence of this clause from the Châlons manuscript. The testamentary nullification clause is included in the Tournai diocesan compilation, but this might well reflect a later addition, especially since this text shows traces of other subsequent emendations (most notably the awkward repeated insertion of *alienigenas* into the first part of the text in order to align it with the promulgated version of *Usurarum voraginem*).

[64] See for instance Durand's commentary on the decree, in which he addresses the concern 'quod Papa non possit tollere iura Imperatorum vel Regum et per consequens, nec cassare testamenta laicorum nisi in terris Ecclesiae': *In sacrosanctum Lugdunense concilium sub Gregorio X Guilelmi Duranti cognomento Speculatoris commentarius* (Fano 1569) fol. 97v, § *non valeant*. Baldo degli Ubaldi addresses a similar question ('An capitulum Quamquam habeat locum in foro Caesaris?') in one of his *consilia*; see *Consiliorum sive Responsorum Baldi Ubaldi Perusini* (5 vols.; Venice 1580) 3.35v-36r (n° 128).

had the statutes of Novara and Como. Such details were presumably left to the discretion of local actors, especially where notaries were involved.

More interesting is the comparatively limited role of bishops in the decree's provisions. *Quamquam usurarii*'s drafters did not award bishops sole responsibility for the distribution of *incerta*, as in the statutes of Nepi and Mainz. Nor did they limit the receipt of the 'cautio' to the bishop alone, as had the Novara diocesan statutes of 1257, though the decree's phrasing (allowing the 'cautio' to be given to the Ordinary, his vicar, or the local parish rector) at least seems to have favored the role of the secular clergy over the mendicant orders. One clause in the initial draft had ascribed a unique role to bishops (at least in their capacity as Ordinaries)—namely, that the Ordinary estimate the uncertain usury and be liable for any deliberate shortchanging of this amount. This first revision broadened this clause, however, assigning the responsibility (and liability) for estimation to whoever received the 'cautio'.

This estimation and liability clause was one of the decree's novel elements, in comparison to earlier anti-usury legislation, and as the following sections will show, it was frequently omitted from local reworkings. The decree's final sanction of testamentary nullification was another innovation. Given its severity, it is hardly surprising that no bishop had previously sought to impose such a penalty within his diocese on the strength of his own authority. Perhaps it is equally unsurprising that even after *Quamquam usurarii*'s promulgation, many bishops opted to omit this sanction in their local reworkings of the decree. It is to these omissions and reworkings that we now turn.

Silences and Omissions, 1274-1400

Roughly two hundred diocesan and provincial statutes survive from the last quarter of the thirteenth century, while almost nine hundred can be dated to the fourteenth century. Just under one-quarter of these statutes—around 250—feature substantive

provisions concerning usury and its associated penalties.[65] (To put this in perspective, marriage appears slightly more often, while simony appears slightly less.) Of these, roughly one hundred betray the direct or indirect influence of *Quamquam usurarii*. Put otherwise, less than ten percent of the extant statutes from the late thirteenth and fourteenth centuries transmit any part of the the decree's language, procedures, and penalties; and even among those statutes that specifically address the topic of usury, only forty percent bear the decree's imprint.

These proportions are noticeably higher if one looks only at the extant legislation from northern Italy; there roughly twenty percent of late thirteenth-century statutes show some influence of the decree, and this proportion rises steadily over the first half of the fourteenth century.[66] Moreover, unlike elsewhere in Europe, a clear majority of Italian statutes that include substantive usury provisions show some engagement with *Quamquam usurarii*. Since we will look more closely at the northern Italian evidence in later sections, the focus of this and the following section will instead be on the evidence from elsewhere in western Europe.

Many bishops drew on earlier traditions rather than incorporate new canonical legislation into their statutes. Eudes's Parisian statutes continued to exercise great influence, with drafters echoing both its general condemnation of usury and its Augustinian dictum on the necessity of restitution for remission.[67] The Mainz provincial compilation of 1310 simply repeated verbatim the restitution provision that Archbishop Werner von Eppstein had issued in 1261.[68] Particularly common are statutes that hewed exclusively to the penalties set forth in *Quia in omnibus*, notwithstanding more recent developments in canon

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[65] Another fifty extant statutes contain generic condemnations of usury but no substantive provisions.

[66] For the purposes of this discussion, we take northern Italy to include Tuscany and Umbria as well as the regions to the north.

[67] For example, Aosta (D 1280) c.21, in Robert Amiet, *Le pontifical d'Emeric de Quart*, *Varia liturgica* (Aosta 1992) 196-208, at 200; Soissons (D ca.1300) c.45, in *Statuts synodaux* 4.289-307, at 296 (note the further discussion of usury at c.96, on p. 303).

[68] Mainz (P 1310) c.4.20 (tit. *De usuris*), in CG 4.174-223, at 214-215.

law. The 1295 diocesan statutes of Eichstätt, for instance, simply called for the Lateran penalties to be enforced against usurers, and said nothing about the new restitution procedures established at Lyon. When Bishop Berthold von Zollern issued new statutes for the diocese in 1354, he simply copied this existing provision.[69]

As the Eichstätt example suggests, it was not simply the use of pre-1274 models that facilitated the subsequent absence of *Quamquam usurarii* in local legislation. Especially noteworthy in this regard are the statutes that Simon de Brion (the future Pope Martin IV) issued at Bourges in 1276, in his capacity as papal legate to France. The fifteenth chapter strictly forbade religious and others from administering sacraments or ecclesiastical burial to excommunicates or manifest usurers on pain of interdict, but nowhere did it mention the new regulations that *Quamquam usurarii* had set forth—even as other chapters showed the clear stamp of the Lyonese decrees.[70] Ten years later, a new set of provincial canons promulgated for Bourges appended a 'cautio' requirement to its repromulgation of this legatine provision, but other local statutes—such as those issued for the dioceses of Saintes and Limoges—simply echoed Simon de Brion's prohibition on the burial of usurers without elaborating further.[71] If the inclusion of the 'cautio' in the Bourges canons of 1286 suggests an effort to update the province's internal legislation in accordance with new canonical norms, the absence of *Quamquam usurarii* from the diocesan statutes of Saintes and Limoges can be interpreted simply as the outcome of their dependance on the same shared legatine source. Had Simon de Brion opted to reference

[69] Eichstätt (D 1295) c.21, in Josef Georg Suttner, 'Die Synodalstatuten des Bischofs Reimboto', *Pastoralblatt des Bisthums Eichstätt* 32 (1885) 62-79, at 73-74; and Eichstätt (D 1354) c.26, in *idem*, 'Versuch einer Concilien-geschichte des Bisthums Eichstätt', *Pastoralblatt des Bisthums Eichstätt* 1 (1854) 15-224, at 85.

[70] Bourges (L 1276) c.15, in Mansi 24.165-180, at 176-177. For other chapters showing the influence of Lyon II, see cc. 1 (on elections), 6 (on coerced absolutions), and 16 (on reprisals against ecclesiastical penalties).

[71] Bourges (P 1286) c.1.17, in Mansi 24.625-648, at 636; Saintes (D aft. 1276) c.13, in *Statuts synodaux* 5.64-65; Limoges (1285x1290; renewed 1295) c.31, in *Statuts synodaux* 6.91-98, at 97.

either the 'cautio' or any of *Quamquam usurarii*'s other provisions, these would presumably have spread more rapidly into the later diocesan legislation that used his statutes as a model.

In some cases, however, the absence of *Quamquam usurarii* appears to be a much more conscious—and conspicuous—omission. At the time of the Second Council of Lyon, Guillaume Durand was a distinguished canonist, an experienced curial administrator, and a trusted advisor to Gregory X. Whether or not Durand was involved in the redaction of the council's decrees (as has often been claimed), he subsequently composed one of the earliest and most thorough commentaries on them.[72] Despite his considerable familiarity with *Quamquam usurarii*, Durand omitted any mention of its provisions in the lengthy and systematic diocesan compilation that he promulgated for the diocese of Mende during his tenure as bishop.[73] This is all the more striking given that the first part of the compilation (the so-called *Instructiones*) includes a 6000-word discussion of restitution—amounting almost to a small treatise on the topic—in which Durand repeatedly addressed the topic of usury. In the second part of his compilation (the so-called *Constitutiones*), Durand set forth the penalties falling on usurers, but here he drew exclusively on *Quia in omnibus*, with no trace of *Quamquam usurarii* beyond an generic insistence on restitution (which anyway already featured in the earlier Lateran decree). The penalties falling on clerics who violated either of these conciliar decrees likewise went unmentioned.[74]

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[72] For a discussion of its dating and composition, see Leonard E. Boyle, 'The Date of the Commentary of William Duranti on the Constitutions of the Second Council of Lyons', BMCL 4 (1974) 39-47; and Martin Bertram, 'Le commentaire de Guillaume Durand sur les constitutions du deuxième concile de Lyon', *Guillaume Durand, Évêque de Mende (v. 1230-1296): Actes de la Table Ronde du CNRS, Mende 24-27 mai 1990*, ed. Pierre-Marie Gy (Paris 1992) 95-104.

[73] Mende (D 1292-1293; revised 1294-1295), in *Statuts synodaux* 6.209-311.

[74] *Instructiones*, c.6 (esp. 6.27); and *Constitutiones*, c.10.2, in *Statuts synodaux* 6.250-264, 345. The penalties of *Usurarum voraginem* also go unmentioned, as noted in Joseph Avril, 'Les instructions et constitutions de Guillaume Durand, évêque de Mende', *Guillaume Durand, Évêque de Mende*, 73-95, at 85.

The absence of *Quamquam usurarii* from Durand's compilation is not easily explained. It was not one of the Lyonese decrees that had elicited openly critical responses from Durand in his previous writings, even if he acidly noted that the pope ought to enforce it within the curia.[75] Nor can the omission simply be attributed to a reliance on local traditions antedating the Second Council of Lyon, as in some of the cases discussed above. For one thing, Durand drew on other decrees from the council as well as a range of more recent material in crafting his compilation.[76] Moreover, as noted above, the 1286 provincial canons of Bourges included a reference to the 'cautio', thus establishing an internal legal precedent—and elsewhere in his compilation Durand cited these provincial canons explicitly.[77] (Here it is worth recalling that the diocese of Mende was a suffragan of Bourges.) Perhaps Durand felt that *Quamquam usurarii*'s provisions were irrelevant to the needs of his diocese, but this cannot be easily reconciled with the attention that he lavished on the general topic of restitution, as well as the numerous provisions concerning testaments scattered through his *Constitutiones*. Moreover, an influential codification promulgated for the neighboring diocese of Rodez in 1289 included both the testamentary nullification clause and the penalties for clerical transgressors, suggesting that other prelates in the region considered elements of the Lyonese decree to be worthy of local transmission.[78] Whatever Durand's reasoning, we are left with the rather perplexing phenomenon of a learned canonist-turned-bishop promulgating a lengthy diocesan compilation that simply ignored the recent disciplinary

[75] Durand, *In sacrosanctum Lugdunense concilium…commentarius*, fol. 90v: 'Debuit a se ipso dominus papa incipere et hanc constitutionem in sua curia facere observari'. For Durand's sharp criticism of the post-conciliar decree *Licet canon* (later VI 1.6.14), see Leonard E. Boyle, 'The Constitution *Cum ex eo* of Boniface VIII: Education of Parochial Clergy', *Mediaeval Studies* 24 (1962) 263-302.

[76] *Constitutiones*, c.10.7 (*Statuts synodaux* 6.347-38), citing the Lyonese decrees *Absolutionis* (COGD c.17; COD[3] c.20) and *Quicumque* (COGD c.20; COD[3] c.31).

[77] *Constitutiones*, c.6.2, in *Statuts synodaux* 6.336.

[78] Rodez (D 1289) c.15.15, in *Statuts synodaux* 6.115-205, at 172.

innovations of a general council. And although Mende was a rather unimportant diocese within the broader ecclesiastical landscape of western Christendom, the subsequent dissemination of Durand's compilation meant that this same omission continued to be replicated elsewhere in Europe well into the fifteenth century.[79]

In light of the Stubbs-Maitland debate over the binding nature of papal law in England, it bears noting that no trace of *Quamquam usurarii* can be found in the extant corpus of late medieval English provincial and diocesan legislation.[80] It was not among the Lyonese decrees that Archbishop John Peckham promulgated at the highly contentious 1279 Council of Reading, and its penalties likewise went unmentioned in Peckham's 1281 provincial canon on the execution of testaments.[81] The handful of English diocesan statutes promulgated over the following century similarly ignored the decree. The absence of *Quamquam usurarii's* testamentary nullification clause is particularly noteworthy in light of the English church's extensive interest in—and jurisdiction over—wills and testaments. Unlike in many parts of the Continent (especially those with a robust notarial tradition), the English clergy played an important role in the drawing up of wills and testaments. Moreover, from at least the early thirteenth century onward, disputes concerning their validity and enforcement were ordinarily heard in the church courts.[82]

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[79] See, for example, Amiens (D 1455) c.7.2, in *Actes de l'Eglise d'Amiens*, ed. Jean-Marie Mioland (2 vols.; Amiens 1848) 1.28-78, at 70; this repeats verbatim Durand's discussion of the canonical penalties for usury.

[80] For the Stubbs-Maitland debate, see especially Charles Donahue Jr., 'Roman Canon Law in the Medieval English Church: Stubbs vs. Maitland Re-Examined after 75 Years in the Light of Some Records from the Church Courts', *Michigan Law Review* 72 (1974) 647-716.

[81] Reading (P 1279), in *Councils and Synods*, 2.2.828-857; and Lambeth (P 1281) c.21, in *Councils and Synods*, 2.2. 892-918, at 913-914. On Peckham's conciliar activities, see also Decima L. Douie, *Archbishop Pecham* (Oxford 1952) 95-104.

[82] See Michael M. Sheehan, *The Will in Medieval England from the Conversion of the Anglo-Saxons to the End of the Thirteenth Century* (Toronto 1963) esp. 176-181; Brian E. Ferme, *Canon Law in Late Medieval England: A Study of William Lyndwood's* Provinciale *with Particular Reference to Testamentary Law* (Rome 1996) 56, 60-65, and 88-89; and Richard H. Helmholz, 'Deathbed

Given that under long-standing English custom the chattels of deceased manifest usurers escheated to the Crown, perhaps it seemed unnecessary to insist on the invalidity of their testaments. But this hardly explains the broader disregard for *Quamquam usurarii*'s restitution clauses and their accompanying sanctions for clerical transgressors. Looking beyond normative texts, there is also little evidence indicating that *Quamquam usurarii*'s provisions were locally enforced via the English church courts.[83] All of this might be seen as reflecting a more general reticence in English ecclesiastical legislation regarding the punishment of Christian usurers. *Quia in omnibus* had not been among the ten Lateran III decrees that Archbishop Hubert Walter incorporated into the canons of his 1200 Council of Westminster, and the decree's prohibitions on the granting of communion and burial to manifest usurers appear in only a handful of thirteenth-century diocesan statutes.[84] (All of these also watered down considerably the decree's sanctions on noncompliant clerics.) In this light, it is perhaps unsurprising that both *Quamquam usurarii* and its companion decree *Usurarum voraginem*—which together reaffirmed and augmented the canonical penalties on usurers—were once again greeted with silence in English ecclesiastical legislation. Whatever the sanctions that the church's general law imposed on usurers, thirteenth-century English bishops showed little appetite for affirming them in their local statutes.

England was not the only part of Latin Christendom where the extant episcopal legislation ignored *Quamquam usurarii.* Of the

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Strife and the Law of Wills in Medieval and Early Modern England', *Planning for Death: Wills and Death-Related Property Arrangements in Europe, 1200-1600*, edd. Mia Korpiola and Anu Lahtinen (Leiden 2013) 239-257, at 240-242.

[83] See generally Helmholz, 'Usury and the Medieval English Church Courts' 364-380.

[84] For the English reception of Lateran III's decrees, see Danica J. Summerlin, 'Hubert Walter's Council of Westminster of 1200 and its use of Alexander III's 1179 Lateran Council', *The Use of Canon Law in Ecclesiastical Administration, 1000-1234,* edd. Melodie H. Eichbauer and Danica J. Summerlin (Turnhout 2018) 121-139, esp. 130-131. For the prohibitions on communion and burial, see Salisbury (D 1217x1219) c.19, in *Councils and Synods* 2.1.57-96, at 66-67; this was subsequently reissued for the dioceses of Canterbury and Durham.

fifty extant diocesan statutes and provincial canons issued for Bohemian dioceses before 1400, not one bears any trace of the decree.[85] Iberia represents another void; with the exception of a handful of references in the abundant ecclesiastical legislation from the province of Tarragona, the Lyonese decree left little trace in the surviving diocesan statutes and provincial canons issued in the peninsula during the late thirteenth and fourteenth centuries.[86] In Scandinavia, it was not until the fifteenth century that *Quamquam usurarii* left a mark on the extant ecclesiastical legislation.[87] This makes for a sharp contrast with the dioceses of Flanders and Brabant, whose late thirteenth-century bishops incorporated most (or in some cases, all) of *Quamquam usurarii*'s procedures and penalties into their local legislation. Northern Italy offers an even more marked contrast. Much of this discrepancy can obviously be explained by the economic differences across regions; it is hardly surprising that bishops in highly commercialized parts of Europe showed much greater engagement with developments in the canon law of usury than did their counterparts elsewhere. But the example of England—which was hardly a commercial backwater in the late thirteenth century—indicates the limits of such tidy explanations, and as will be discussed further below, the decree's Italian reception was also more complex than such broad-brush comparisons might suggest.

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[85] *Pražké synody a koncily (předhusitské doby)*, edd. Jaroslav Polc and Zdeňka Hlediková (Prague 2002); and *Synody a statuta Olomoucké diecéze období středověku*, ed. Pavel Krafl (Prague 2003).

[86] One exception is found in Tarazona (D 1354), c.56 (in SH 14.242-352, at 314), but the compilation was an almost word-for-word reissue of the 1289 Rodez compilation. For two fifteenth-century invocations of *Quamquam usurarii*'s provisions that likely derive from earlier (now-lost) statutes, see Osma (D 1444) c.125, in SH 12.13-160, at 74; and Cartagena (D 1475; held in Murcia) c.91, in SH 11.227-318, at 303.

[87] See Skara (D 1411) c.34, in Jaako Gummerus, *Synodalstatuter och andra kyrkorättsliga aktstycken från den svenska medeltidskyrkan* (Uppsala 1902) 66-69, at 69; and especially the 1436 provincial council of Uppsala (held at Söderköping), for which see Sigurd Kroon, 'Provinsialkonsiliet i Söderköping år 1436', *Scania* 17 (1946) 271-282, at 278.

Reception and Reworkings, 1274-1400

For the drafters of local legislation who sought to incorporate *Quamquam usurarii* in some fashion, there were three broad possibilities. The most straightforward—though least common—was to transcribe the entire text of the decree into one's statutes, as Siegfried von Westerburg claimed to do in his diocesan statutes for Cologne.[88] (As noted above, his rendering silently omitted the decree's final clause, but it *presented* itself as a complete rendering.) Exemplary in this regard were the statutes issued by Bishop Ramón Despont for the diocese of Valencia in 1296, in which a summary of *Quamquam usurarii* was followed by the full text of the decree itself, so that its details might be properly enforced.[89] Four other instances have so far been identified for the period 1274-1400, two of them in Italy.[90]

Another approach—almost as rare as the first—was to order that the decree be observed, without actually stating its provisions or penalties.[91] Occasionally this was accompanied by a requirement for the local clergy to possess personal copies of the decree.[92] In another instance, the bishop ordered that the decree's

[88] Cologne (D 1275x1282) c.14, in CG 3.668-669: 'Circa usurarios autem . . . seruetur constitucio Domini Gregorii Pape X. Concilii generalis, que est talis'.
[89] Valencia (D 1296) cc. 35-36, in SH 12.730-756, at 753-754.
[90] Regensburg (D ca.1310), tit. *De usuris*, in Munich BSB lat. 6905, fol.1rb-8va, at 6rv; Tournai (D bef. 1366) c.XIV, in *Summa statutorum* 64-66. The two Italian examples are discussed below.
[91] These are largely confined to the decades immediately following *Quamquam usurarii*'s initial promulgation. See Rouen (P 1279; held in Pont-Audemer) c.3, in *Concilia Rotomagensis provinciae* 1.149-161, at 150; Huesca (D 1280; held in Barbastro) c.22, in SH 14.31-49, at 47; Salzburg (P 1288) c.13, in Peter Johanek, *Synodalia*: *Untersuchungen zur Statutengesetzgebung in den Kirchenprovinzen Mainz und Salzburg während des Spätmittelalters* (Habilitationsschrift, Univ. Würzburg, 1978) Bd. 3, Anh. 2, 107-130, at 125-126; Vienne (P 1289) c.66, in Louis Boisset, *Un concile provincial au treizième siècle: Vienne 1289* (Paris 1973) 320; and Lyon (P 1298) c.18, in *Statuta synodalia dioecesis Lugdunensis* (Lyon 1485?) fol. 45v. We are grateful to Peter Johanek for allowing us to consult his study.
[92] Sées (D aft. 1280) c.3, in Paris, BNF lat. 10402, fol. 127r-140r, at 133v; Lisieux (D 1321, renewing earlier statutes), in Paris, BNF lat. 15172, fol. 137r-152r, at fol. 142v.

text be read out at each synod.[93] Otherwise, it was left unstated how exactly anyone was to become acquainted with its contents.

The third approach—and by far the most common—was to mandate particular elements of the decree without incorporating it fully. Quite typical of the ecclesiastical legislation issued north of the Alps are the diocesan statutes that Archbishop Werner von Eppstein issued for Mainz in 1274/1275. (These are likely also the earliest surviving statutes to draw on *Quamquam usurarii*.) The archbishop first ordered that 'the statutes of the Lateran and Lyonese councils concerning usurers be firmly observed'. Unless usurers made satisfaction for their gains or else were careful to make appropriate arrangements for such satisfaction, clerics were forbidden—on pain of suspension—to admit them to communion, receive their oblations, grant them ecclesiastical burial, or assist in their testaments.[94] Much of *Quamquam usurarii* is invoked here—but much is also absent, including all of the procedural details governing the 'cautio', the prohibition on hearing usurers' confession or granting them absolution, and the decree's final testamentary nullification clause.

Many later statutes embraced a similar framing of the Lyonese decree, reducing it to a generalized requirement for usurers to make restitution in order to receive ecclesiastical burial, sometimes with another provision or two added in. Sometimes this simplification was taken so far that *Quamquam usurarii*'s imprint becomes only barely perceptible. The 1277 provincial council of Trier, for example, simply ordered usurers to make restitution upon pain of the penalties set forth in *Quia in omnibus*, and it is only the chronological proximity to the Second Council of Lyon that makes clear the motivating influence.[95]

As an early counter-example, one might look to the diocesan statutes that Bishop Étienne Tempier issued for Paris around 1278.

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[93] Noyon (*Ordo synodi*, 1274x1312), in *Statuts synodaux* 4.276-278, at 278.

[94] Mainz (D 1274/1275) c.14, in Johanek, *Synodalia*, Bd. 3, Anh. 2, Nr. 1, 71-106, at 87.

[95] Trier (P 1277) c.10, in *Statuta synodalia ordinationes et mandata archidioecesis Trevirensis*, ed. Johann Jacob Blattau (9 vols. Trier 1844-1859) 1.14-30, at 25-26.

Tempier had attended the Second Council of Lyon, and his statutes reflected a careful effort to rework *Quamquam usurarii* in more compact form. To receive ecclesiastical burial, manifest usurers had to make restitution to the extent that their means allowed; noncompliant clerics were to be severely punished. Unless the usurers made satisfaction for their usury or provided an appropriate 'cautio', they were not to receive confession or absolution, nor were clerics to assist in their testaments, which anyway would be considered invalid.[96] With the exception of the detailed procedures for the 'cautio', Tempier's reworking encompasses every substantive element of *Quamquam usurarii*, and yet is only one-third as long as the original decree. But such concise comprehensiveness was far from the norm over the decades to come.[97]

One discrepancy between Tempier's statute and the conciliar decree is worth noting. As discussed earlier, the decree had ordered that clerical transgressors were to be punished with suspension (the penalty set forth in *Quia in omnibus*). Tempier's statute, however, said simply that such clerics would be 'severely punished (graviter punientur)', thus leaving the details of the punishment to his discretion. Although this was a rather minor change, it aligns with a more general trend toward augmentating episcopal authority that one finds in contemporary provincial and diocesan legislation.[98] Some prelates opted to impose even harsher sanctions for clerical noncompliance. In the legatine statutes that he issued at Würzburg in 1287, for instance, Cardinal Giovanni Boccamazza imposed an *ipso facto* sentence of interdict on any

[96] Paris (D 1277x1279) cc. 6-7, in *Statuts synodaux* 5.176-79.

[97] For other non-Italian statutes that similarly encompass most or all of *Quamquam usurarii*'s provisions without simply transcribing the decree itself, see: Autun (D 1286) cc. 51 & 99-101, in *Thesaurus novus anecdotorum*, 4.467-480, at 473, 480; Reims (D ca.1330) cc. 5.3-4, in *Les actes de la province ecclésiastique de Reims*, ed. Thomas Gousset (4 vols.; Reims 1842-1844) 2.534-575, at 553-554; Cologne (D 1371) c.7, in *Synodalstatuten der Kölner Kirche*, n°137; Regensburg (D 1377) c.32, in *Oberhirtliche Verordnungen und allgemeine Erlasse für das Bisthum Regensburg, vom Jahre 1250-1852*, ed. Joseph Lipf (Regensburg 1853) 2-15, at 12.

[98] Dorin, 'Bishop as Lawmaker' 58-63.

church that failed to exhume the body of a manifest usurer who had failed to make proper restitution before burial.[99]

As the above-cited examples suggest, the vast majority of bishops across most of western Europe (excluding Italy) chose to omit any details about restitution procedures in their local reworkings of *Quamquam usurarii*. This was not a uniform trend, with some bishops opting instead to alter or elaborate on the decree's procedures. A late thirteenth-century diocesan compilation for Arras, for example, insisted that the children and heirs of usurers be similarly compelled to make restitution.[100] A century later, the 1377 diocesan statutes of Regensburg emended *Quamquam usurarii*'s provisions such that it was no longer the estimator who was responsible for any shortfalls, but rather the usurer's heirs.[101] And a fifteenth-century compilation for the province of Gniezno declared that where the restitution of *incerta* was concerned, if the sums were sufficiently small it was permitted for the archdeacon, rector, or confessor to direct them to pious uses without further episcopal oversight.[102] On the whole, however, *Quamquam usurarii*'s detailed provisions regarding the calculation and consignment of the 'cautio' met a similar fate to its testamentary nullification clause, being largely excluded from local renderings of the decree.

The Reception of Quamquam usurarii in Northern Italy, 1274-1294

Over the two decades immediately following *Quamquam usurarii*'s promulgation, its reception in Italian ecclesiastical legislation was not markedly different from elsewhere in Europe.[103] Some bishops ignored the decree entirely, choosing

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[99] Würzburg (L 1287) c.23, in CG 3.724-737, at 730-731.

[100] Arras (D 1280/1290) c.84, in *Statuts synodaux* 4.183-209, at 201.

[101] Regensburg (D 1377) c.32, in *Oberhirtliche Verordnungen*, 12.

[102] Gniezno (P 1420; held at Wieluń and Kalisz) c.5.9, in *Statuty synodalne wielunsko-kaliskie Mikolaja Traby z r. 1420*, edd. Jan Fijałek and Adam Vetulani (Krakow 1951) 103.

[103] For general discussions of northern Italian ecclesiastical legislation, see Richard C. Trexler, 'Diocesan synods in late medieval Italy', *Vescovi e diocesi in Italia* 1.295-335; and Andrea Tilatti, 'Sinodi diocesane e concili provinciali

either to reproduce existing norms or simply sidestep the topic of usury altogether. Among those who embraced the new decree in their statutes, one quoted its text in full, while others both emphasized particular provisions and called generally for its enforcement. As elsewhere, those bishops who summarized or reworked the decree generally said little about its specific procedures regarding the 'cautio', and they systematically avoided any explicit mention of *Quamquam usurarii*'s testamentary nullification clause.

The decree's earliest attestation is found in Giovanni degli Avvocati's 1275 diocesan statutes for Como, whose section on usury included the complete texts of *Quia in omnibus*, *Usurarum voraginem*, and *Quamquam usurarii*. Appended to these conciliar decrees was a revised version of the 'cautio' provision that degli Avvocati's episcopal predecessor Raimondo della Torre had issued for the diocese in 1262. Where the earlier Como statutes had directed the 'cautio' to be given to the confessor, the 1275 version now allowed it to be given to the parish priest, the bishop's vicar or specially-designated representative, or even 'alicuius religiosi et aprobati viri'—a broadening that aligned with *Quamquam usurarii*'s more expansive approach.[104]

Elsewhere in the patriarchate of Aquileia there seems to have been little episcopal interest in updating the existing statutes concerning usurious restitution. In 1275, the Bishop of Concordia Fulcherio di Zuccola simply reconfirmed the 'cautio' requirement first promulgated by Patriarch Berthold von Andechs at least a quarter-century earlier, making no effort to revise it in light of the new Lyonese decree.[105] Seven years later, Raimondo della Torre—now patriarch of Aquileia—issued a provincial canon that generally forbade clerics from granting burial to excommunicates unless they made appropriate satisfaction. While the wording of

in Italia nord-orientale fra Due e Trecento: Qualche riflessione', MEFR 112 (2000) 273-304.

[104] Como (D 1275) c.12, in *Carte di S. Fedele in Como*, 260-267, at 264-265. Because of the fragmentary nature of the surviving copy, it is impossible to determine precisely the other differences between the 1262 and 1275 statutes.

[105] Concordia (D 1275), in Pordenone, ASD, Codice della catena, fol. 12r-14r.

this provision contained faint echoes of *Quamquam usurarii*, it made no direct reference to usury, nor did it otherwise invoke the Lyonese decree or any of its substantive provisions.[106]

Within the province of Milan, the early reception of *Quamquam usurarii* was likewise confined to individual dioceses rather than the province as a whole.[107] As noted already, only a few years before the Second Council of Lyon, the long-serving bishop of Turin Goffredo da Montanaro had ordered usurers to provide a pledge or guarantee in order to receive communion and burial. Perhaps unsurprisingly, he was among the first northern Italian prelates to embrace the new decree in his local legislation, citing it explicitly in his 1286 diocesan statutes. On pain of excommunication, he forbade anyone from serving as a notary or witness to usurers' testaments unless they made restitution according to the decree's provisions. This marked a sharpening with regards to the conciliar sanctions, which had only threatened suspension for clerics. Bishop Goffredo also ordered more generally that *Quamquam usurarii* be faithfully observed within the diocese. Notably, he did not explicitly spell out its restitution provisions, nor did he mention the decree's testamentary nullification clause (or even its burial prohibition, for that matter).[108]

The statutes issued in 1290 for the nearby diocese of Ivrea likewise insisted that usurers make restitution according to *Quamquam usurarii*, here stating explicitly that this was necessary for the usurers to receive ecclesiastical burial. And while the details of the decree's provisions once again went unmentioned, the statutes addressed this problem by ordering all parish priests within the diocese to keep a copy of the decree in their churches,

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[106] Aquileia (P 1282, reissued in 1307) c.9, in Mansi 24.427-438, at 437.

[107] Archbishop Otto Visconti of Milan (who had himself been present at the Second Council of Lyon) made no mention of the decree in his 1287 provincial canons; see *Gli atti dell'arcivescovo e della Curia arcivescovile di Milano nel sec. XIII: Ottone Visconti (1262-1295)*, ed. Maria Franca Baroni (Milan 2000) 227-234, n° 266.

[108] Turin (D 1286) cc. 4 & 7, in *I decreti sinodali torinesi*, 153-156.

on pain of unspecified episcopal sanctions (sub pena nostro arbitrio auferenda).[109]

Elsewhere on the Italian peninsula, there are few extant diocesan or provincial statutes from the two decades following the Second Council of Lyon. (There are none at all for the regions of Tuscany or Umbria, for instance.) Amidst these scattered survivals, only one drew on *Quamquam usurarii*. In 1286, the archbishop of Ravenna Bonifacio Fieschi (who had been present at Lyon) held a provincial council at Forlì together with seven suffragan bishops. Among the resulting canons was one ordering the decree to be strictly observed within the province. In addition, it forbade notaries from being present when usurers were drawing up their testaments, unless the usurer's parish priest was also present. The priest had to confirm that the decree's provisions had been carried out before the testament could be drawn up. Any notaries who did otherwise were to be excommunicated. Parish priests, moreover, were all to have copies of the decree lest they fall into error, and bishops were instructed to explain its tenets to their clergy in their annual synods.[110]

The parallels between these late thirteenth-century Italian statutes and those found elsewhere in Europe have already been noted. But it is also worth highlighting two characteristics that set these early Italian examples apart from their transalpine counterparts, and which would persist in later legislation. The first is the recurring insistence that all parish clergy have copies of the decree. Such demands were not unknown elsewhere, but they appear with relatively greater frequency in the Italian statutes from both the late thirteenth century and afterward.[111]

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[109] Ivrea (D 1290) c.23, in Ivrea, Archivio storico diocesano, x/6, HM. 3240302. For a transcription, see Guido Alfonsi, 'Ricerche sulle costituzioni sinodali del vescovado di Ivrea (secoli XI-XV)' (unpublished *tesi di laurea*, Univ. di Torino 1982) 132-144 (n° 3), at 137-138. We are grateful to the author for allowing us to consult his study.

[110] Ravenna (P 1286; held at Forlì) c.6, in Mansi 24.616-626, at 621-622.

[111] In Verona, priests were to receive a copy of *Quamquam usurarii* (along with four texts) directly from the bishop's notary; see Verona (D 1298x1305) c.17, in Verona, BC, Codex 789 (*olim* 793), fol. 62r-93v. For a transcription, see Mariaclara Rossi, 'Linee dell'episcopato di Tebaldo, vescovo di Verona (1298-

More significant is the recurring focus on the role of the notary in the drafting of testaments, and more specifically their imposition of sanctions on notaries who failed to comply with *Quamquam usurarii*'s demands.[112] In the decree, the notary (or servus publicus) features only as a potential receiver of the 'cautio', and sanctions for noncompliance were limited to clerical transgressors. That so many Italian bishops saw fit to threaten notaries with excommunication underscores their central importance within the ordinary processes of testaments and restitution in late medieval Italy.[113]

Less obviously, the inclusion of notaries among those facing sanctions for noncompliance might also reflect the wariness of many Italian bishops toward the decree's automatic invalidation of the testaments of manifest usurers. Here it seems significant that the latter penalty is almost never mentioned explicitly in any of the late medieval statutes threatening noncompliant notaries with

1331). Con un'appendice di documenti inediti' (unpublished *tesi di laurea*, Univ. di Verona, 1986) 224-302, esp. 238-239. We are grateful to the author for providing us with a copy of her study.

[112] For other examples of such sanctions, see Pavia (D 1297) cc. 33-36, in *Concilia Papiensia, constitutiones synodales et decreta dioecesana*, ed. Giovanni Bosisio (Pavia 1852) 141-165, at 157-161; Fiesole (D 1306) tit. *De usuris* and its reissue for Florence (D 1310) tit. *De usuris*, in Richard C. Trexler, *Synodal Law in Florence and Fiesole, 1306-1518* (Vatican 1971) 181-289, at 203 and 278-279; Aquileia (P 1335; held in Udine), c.6, in *I Protocolli di Gabriele da Cremona, Notaio della Curia Patriarcale di Aquileia (1324-1336, 1344, 1350)*, ed. Andrea Tilatti (Rome 2006), 389-395, at 392; Padua (D 1339) c.20, in Mansi 25.1132-1144, at 1139.

[113] See, for example, Massimo Giansante, 'Male ablata: La restituzione delle usure nei testamenti bolognesi fra XII e XIV secolo', RIDC 22 (2011) 183-216, at 200. On the broader importance of notaries within Italian ecclesiastical structures, see Giorgio Chittolini, ''Episcopalis curiae notarius': Cenni sui notai di curie vescovili nell'Italia centro-settentrionale alla fine del medioevo', *Società, istituzioni, spiritualità*, 1.221-232; Mariaclara Rossi, 'I notai di curia e la nascita di una 'burocrazia' vescovile: Il caso veronese', *Vescovi medievali*, ed. Grado Giovanni Merlo (Milan 2003) 73-164; *Chiese e notai (secoli XII-XV)* (Verona 2004); Gian Maria Varanini and Giuseppe Gardoni, 'Notai vescovili del Duecento tra curia e città (Italia centro-settentrionale)', *Il notaio e la città. Essere notaio: I tempi e i luoghi (secc. XII-XV)*, ed. Vito Piergiovanni (Milan 2009) 239-272.

excommunication.[114] Rather than insist on the church's unilateral authority to invalidate testaments (a claim that met with considerable opposition from some Italian communal authorities), bishops could instead assert their unquestioned authority to discipline those who abetted sinful behavior.[115] Not only would clerics who assisted in testaments face sanctions (either suspension, as in the decree; or excommunication, as in some of the episcopal statutes), but so too would the notaries who drafted or witnessed them—thus increasing an unrepentant usurer's risk of dying intestate.

The Reception of Quamquam usurarii in Northern Italy, 1295-1400

The end of the thirteenth century witnessed a sharp uptick in the promulgation of diocesan and provincial statutes in Italy, along with a corresponding increase in references to *Quamquam usurarii* and its provisions. The reasons for the broader surge in Italian episcopal legislation remain to be determined; here it suffices to note three important shifts in the local reception of the Lyonese decree and the formal norms governing usurious restitution.

First, there is a clear push toward concentrating power within the hands of the bishop or his representatives. Although *Quamquam usurarii* had allowed priests to receive the 'cautio' from a penitent usurer in the presence of some local 'fidedigni', many fourteenth-century Italian statutes imposed stricter episcopal oversight, forbidding priests to receive a 'cautio' without the express permission of the bishop or his vicar. Some statutes offered exceptions to this general prohibition: if the usurer was on

[114] For an exception, see Adria (D 1314, held at Lendinara) c.117. This text survives in an authenticated copy of 1505, held in the Archivio storico diocesano in Rovigo. We are grateful to Marco De Poli for providing us with images of a transcription made by Mons. Alberino Gabrielli in 1966.

[115] For examples of secular-ecclesiastical conflicts over testamentary matters in the wake of *Quamquam usurarii*'s promulgation, see Richard C. Trexler, 'Death and Testament in the Episcopal Constitutions of Florence (1327)', *Renaissance Studies in Honor of Hans Baron,* edd. Anthony Molho and John A. Tedeschi (Florence 1971) 29-74; and Duval, 'Les testaments, l'usure', 115-133.

the point of death, for example, or if the priest lived outside the city (thus making it hard to secure episcopal permission in a timely fashion). In such cases, however, the *'cautio'* was usually to be delivered to the bishop within a short timeframe to ensure that it fulfilled the necessary requirements.[116] Presumably such restrictions were a response to the continuing challenge posed by widespread evasion of the decree's demands (often with clerical complicity), of which there is ample contemporary documentation.[117] In addition, many statutes insisted on the bishop's exclusive jurisdiction over the administration of restitution—yet another perennially contentious issue in late medieval Italy.[118]

Second, bishops began to mandate ever more elaborate restitution procedures and 'cautio' requirements, of a length and complexity utterly unrivalled elsewhere in Europe. (A handful of Italian statutes held to the more limited formulations characteristic of the thirteenth century, but these were decidedly exceptional.[119]) In general, these more detailed discussions sought to limit loopholes and bolster accountability, thus ensuring the fulfilment of usurers' legal obligations as well as their moral repentance. In some cases, this involved clearly defining what made someone a 'manifest usurer' for the purposes of punishment.[120] Some also included long lists of questions that notaries were to put to those undertaking restitution, in order to ensure that no wrongdoing was left unaccounted for.[121] Many statutes included full transcriptions

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[116] Aside from the sources cited in n.112, p.39 above, see also Siena (D 1336, drawing on earlier material) c.98, in 'Le costituzioni del vescovado senese del 1336', ed. Vincenzo Ricchioni, *Studi senesi* 30 (1914) 100-167, at 156; Perugia (D 1300x1320) c.11, in Mansi 25.639-648, at 643.

[117] See, for instance, Andenna, 'Non remittetur' 100; and Condorelli, 'L'usuraio, il testamento' 222.

[118] Richard C. Trexler, 'The Bishop's Portion: Generic Pious Legacies in the Late Middle Ages in Italy', *Traditio* 28 (1972) 397-450.

[119] For example, Genoa (D 1375) c.54, in Domenico Cambiaso, *Sinodi genovesi antichi* (Genoa 1939) 59-87, at 72.

[120] This was also a staple of canonistic discussions; see McLaughlin, 'Teaching of the Canonists [pt. 2]' 12-13, with further references.

[121] See, for example, Aquileia (P 1339), tit. *De forma cautionis*, in Labbé-Cossart, *Sacrosancta concilia*, 15.533-550, at 543-545. This provincial canon was subsequently reissued for the dioceses of Padua (D 1360) c.24, in *Sinodo*

of the 'cautio' formulas to which usurers were to subscribe, which could run to more than a thousand words.[122] And anticipating what would soon be established as general law (via the decree *Ex gravi* of the Council of Vienne), some statutes issued around the turn of the century required repentant usurers to deliver their account books to the bishop or his representatives for review.[123]

Third, instead of drawing directly on the text of *Quamquam usurarii*, drafters increasingly turned to other local legislation for inspiration. Not only did models circulate widely across dioceses and provinces, but diocesan statutes from one province could even inspire the provincial canons of another. One therefore sees both a convergence of concerns and a standardization of norms between ecclesiastical jurisdictions, extending far beyond the decree's dictates.[124] Portions of the 'cautio' regulations issued for Modena in 1320, for instance, were taken up into later legislation for the dioceses of Ferrara and Rimini.[125] The bishop of Rimini Francesco

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inedito di Pilleo Cardinal Prata vescovo di Padova e notizie della di lui vita (Padua 1795) 124-178, at 148-149; and Trent (D 1344) c.39, in Luciana Eccher, 'Le costituzioni sinodali di Nicolò da Brno (1344)', *Studi trentini di scienze storiche (Sezione prima*) 85 (2006) 129-163 and 187-316, at 310-311.

[122] For especially detailed examples, see Pavia (D 1297) cc. 34-35 (*Concilia Papiensia*, 158-160), which offered different formulas for the restitution of *certa* and *incerta*; and Modena (D 1320) c.15, in Matteo Al Kalak, 'Il più antico sinodo modenese: Considerazioni e problemi sulla Chiesa e la società del Trecento', *Mem. Accad. Modena*, ser. 8, 7 (2004) 181-248, at 239-242.

[123] Pavia (D 1297) c.35, op. cit.; Novara (D 1298) c.7.1, in *Gli statuti sinodali novaresi di Papiniano della Rovere (a. 1298),* ed. Giuseppe Briacca (Milan 1971) 259-262; Acqui (D 1308) c.18, in *Monumenta Aquensia*, ed. Giovanni Baptista Moriondo (2 vols.; Turin 1790) 2.52-70, at 60-61. This requirement became even more common after the 1317 promulgation of the Vienne decree *Ex gravi* (Vienne c.29; Clem. 5.5.1).

[124] It bears noting that this phenomenon was hardly limited to Italy. To return to the opening example, *Quamquam usurarii*'s testamentary nullification provision eventually found its way into the internal legislative tradition of Cologne via the wholesale recopying of a suffragan's diocesan statute: Cologne (D 1298x1303) c.9, in *Synodalstatuten der Kölner Kirche*, n°6; drawn verbatim from Liège (D 1288) c.11, in *Les statuts synodaux de Jean de Flandre, évêque de Liège (1288),* ed. Joseph Avril (Liège 1995) 135-136.

[125] See Modena (D 1320) c.15, op. cit.; and Ferrara (D 1332) c.46, in Mansi 25.901-934, at 923. The Rimini statutes survive in a compilation from 1477: Rimini, Archivio storico diocesano, cc. 102 (*Statuta episcopatus Ariminensis*),

Silvestri also issued stringent statutes of his own concerning usury and restitution, which he subsequently reissued for Florence in 1327 following his translation to the Tuscan see. (The Florentines proved less receptive than had the Riminesi, and they successfully appealed to the papacy to quash some of Cingoli's statutes relating to testaments and burial.)[126]

A particularly illuminating example of interregional circulation and borrowing is offered by the extended afterlife of the Novara diocesan statutes of 1298. In drafting these statutes, Bishop Papiniano della Rovere drew extensively on the compilation that Guillaume Durand had recently issued for Mende. But where Durand had entirely ignored *Quamquam usurarii* (as noted above), the bishop of Novara embraced both its *'cautio'* requirement and its threat of testamentary nullification in the opening paragraph of his chapter on usury, though without explicitly citing the decree. He renewed the penalties of *Quia in omnibus,* then threatened suspension for clerics who granted absolution, confession, or communion to usurers, or who participated in their testaments or burial. (Perhaps unwittingly, he thus restored the full roster of clerical sanctions set forth in the earliest draft of *Quamquam usurarii*, which had been watered down during the decree's subsequent revisions.) So far as restitution was concerned, della Rovere laid out detailed regulations concerning the calculation of *certa* and the estimation of *incerta*, the inspection of the usurer's account books, the oaths to be taken by the usurer and his heirs, and the steps to be taken if a repentant usurer died before providing the appropriate security. The 1257 diocesan statutes of Novara had insisted that the 'cautio' be given only to the bishop (or his vicar) and the cathedral chapter, but the 1298 statutes now extended this role to the rector of the usurer's parish church or, in his absence, a notary. This broadening

fol. 4r-34, with the Modenese borrowings at fol. 26r-30r. We are grateful to Federica Giovannini for providing us with images of this manuscript.

[126] For the vociferous Florentine response to Cingoli's statutes, see Trexler, 'Death and Testament' 37-39. Since the Rimini manuscript went missing during the Second World War and did not resurface until 1985, the significance of the Rimini statutes for the history of Florentine ecclesiastical legislation went unnoticed by Trexler and has not subsequently been noted.

was presumably a concession to the language of the Lyonese decree, but della Rovere still found a way to maintain episcopal oversight: anyone wishing to receive a 'cautio' or grant burial to a usurer first had to seek permission from the bishop or his vicar, on pain of excommunication. (This applied only to those residing within the city of Novara itself; as in the 1257 statutes, allowances were made for those living further afield.) Finally, the bishop ordered all parish priests to possess, read, understand, and publicize his statute, lest they otherwise suffer divine and episcopal retribution.[127]

Della Rovere's statutes evidently began circulating beyond Novara, since the opening portion of his chapter on usury subsequently reappeared in the diocesan statutes of Alba, a hundred kilometers to the south. When it came to the 'cautio' regulations, however, the redactor of the Alba statutes broke with the Novarese model and provided his own lengthy provisions, along with two sample 'cautio' formulas.[128]

Of greater importance was the subsequent reuse of the Novara statutes across the Po River. In 1310, the bishop of Bologna tasked a local canonist (perhaps Guido da Baisio) with the redaction of new statutes for his diocese. The resulting section on usury was nearly a verbatim copy of della Rovere's text, aside from two major changes: the restitution regulations became even more elaborate, and under certain emergency conditions parish priests could receive the 'cautio' without first securing episcopal permission.[129]

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[127] Novara (D 1298) Pars II (*Constitutiones*) c.7.1, in *Statuti sinodali novaresi*, 259-262. For della Rovere's use of Durand's compilation, see ibid. 37.

[128] Alba (D 1325) tit. *Quod usurarii non absolvantur donec de restitutione ussurarum legiptimam prestiterunt cautionem*. A photocopy of the surviving manuscript is held in Alba, Archivio storico dei vescovi, cart. 2600, raccoglitore 69 (with the 1325 statutes at pp. 1-48). We are grateful to Arnaud Fossier for sharing with us his images of this text.

[129] Bologna (D 1310) c.54, in Leandro Novelli, 'Costituzioni della chiesa bolognese emanate nel sinodo diocesano del 1310 al tempo del vescovo Uberto', SG 8 (1962) 449-552, at 520-522. Novelli's attribution of the statutes to Guido da Baisio is plausible but remains unproven.

In 1317, a modified version of the Bologna statute was reissued for the entire province of Ravenna. This added even more provisions to the restitution procedures, while relaxing the penalties for those who failed to secure episcopal permission before receiving the 'cautio'; they henceforth faced a fine rather than excommunication.[130] This provincial version was then taken up into local diocesan statutes within the province, again undergoing minor modifications along the way.[131] Yet it is worth noting that some suffragan dioceses (i.e. Modena and Rimini) preferred to chart their own path, developing their own cluster of shared norms rather than following the provincial lead.

Meanwhile, the Bolognese reworking of the Novara statutes swiftly made its way back to the province of Milan. In July 1311, the archbishop of Milan Cassone della Torre held a provincial council at Bergamo, at which he issued a statute on usury that was nearly identical to the one issued for Bologna the previous year. The most significant modifications involved the redaction of a separate statute on the liability of the usurers' heirs and guarantors (replacing a much shorter clause in the Bologna version) and the addition of a final clause that threatened excommunication for secular officials who enforced the repayment of usury, thus anticipating a measure that would be introduced at the Council of Vienne later that same year. The archbishop also introduced two subtle changes that brought his statute closer to the original text of *Quamquam usurarii*: unlike in both the Novara and Bologna versions, parish priests were not required to secure episcopal permission to receive a 'cautio', and those who buried usurers without first securing a 'cautio' were to be suspended rather than excommunicated. Cassone did threaten excommunication, however, for parish priests who failed to acquire a copy of his statute within four months, or who failed to recite it twice a year to their parishioners.[132]

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[130] Ravenna (P 1317; held at Bologna) c.15, in Mansi 25.599-628, at 613-616.
[131] Piacenza (D 1337) c.44, in *Statuta varia civitatis Placentiae* (Parma 1860) 535-555, at 548-551.
[132] Milan (P 1311; held at Bergamo) cc. 24-25, in Mansi 25.475-514, at 498-501.

Cassone's provincial canon left its mark on the statutes of some (though not all) of Milan's suffragan dioceses.[133] At some unknown date it was added to the diocesan statutes of Alba, whose norms on usury and restitution thus constituted a rather awkward mixture of original provisions, della Rovere's 1298 statute for Novara, and the doubly-reworked version of this same statute that Cassone promulgated for the province of Milan.[134] Cassone's canon was also taken up in the statutes of the suffragan diocese of Asti, though the redactor of the latter quietly excised its repeated prohibition on receiving usurers' oblations.[135] As mentioned above, this penalty was among those set forth in *Quia in omnibus*; it was also regularly dropped from local reworkings of the decree in other parts of Europe. Given that the Astigiani were among the most prominent and successful professional moneylenders of this era, however, one can reasonably wonder whether this quiet emendation was meant to facilitate their continued donations to local ecclesiastical institutions.[136] The local influence and prestige of the leading Astigiani moneylending families might also be visible in another modification to the Milanese exemplar: the redactor of the Asti statutes added that 'if by lay pressure (si per laycalem potentiam) or any other reason' a manifest usurer was given church burial without first making appropriate restitution, the church was to lie under interdict until the body was removed,

[133] The fourteenth-century diocesan statutes of Ivrea show no influence of the Novara-Bologna-Bergamo tradition in their anti-usury provisions; see Ivrea (D 1320) c.4, in Ivrea, ASD, x/6, HM. 3140000; and Ivrea (D 1368) cc. 4-6, in Ivrea, ASD, x/6, HM. 368/479, fol. 1r-18r. That said, a diocesan statute of 1314 ordered the local clergy to observe (and possess copies of) the provincial canons of 1311. For transcriptions of these texts, see Alfonsi, 'Ricerche', 117, 123, 154-158.

[134] For the additions to the Alba statutes (which were added no later than 1438), see Alba, ASV, cart. 2600, racc. 69, pp. 70-75.

[135] Asti (perhaps 1316 or 1328, but possibly later) cc. 81-82, in *Constitutiones sinodales que observari debent in civitate et diocesi asten.* (Asti 1539).

[136] On Astigiani moneylenders, see Renato Bordone and Franco Spinelli, *Lombardi in Europa nel Medioevo* (Milan 2005). For their relations with the local church, see Ezio Claudio Pia, *La giustizia del vescovo. Società, economia e Chiesa cittadina ad Asti tra XIII e XIV secolo* (Rome 2014).

while those responsible for the burial (whether clerical or lay) were subject to excommunication.

The extant evidence therefore reveals that Papiniano della Rovere's reworking and elaboration of *Quamquam usurarii* made its way from the diocesan statutes of Novara to those of Alba and Bologna. From Bologna it entered the provincial canons of both Milan and Ravenna, then spread to the statutes of many of their respective suffragans. Needless to say, this is a far cry from the elegant descending model envisioned in the Lateran IV decree *Sicut olim*, by which annual provincial councils would transmit knowledge of new decrees to suffragan bishops, who would in turn convene annual synods for the instruction of their clergy.[137] It was possible, of course, for councils and synods to publicize norms without publishing statutes. Moreover, the promulgation of provincial canons for Milan and Ravenna did lead to the subsequent adoption of many elements of *Quamquam usurarii* in the statutes of their suffragans. But that process did not unfold until nearly four decades after the decree's initial promulgation, and more than a dozen years after its codification in the *Liber Sextus*. Furthermore, the provincial canons that were being adopted at the diocesan level were not drawn directly from the decree itself; rather, they were reworkings of a diocesan reworking that was itself derived from an earlier diocesan reworking issued a quarter-century after the Second Council of Lyon.

Each of these borrowings involved modifications to the language and provisions of its model, thus mirroring in microcosm the fate of the Lyonese decree itself. Yet only those already familiar with the decree would have been able to detect its spectral presence in these statutes, for not one of the iterations explicitly invoked *Quamquam usurarii*. None called for the decree's general observance, nor did any of them present themselves as supplementing or modifying the decree's pro-visions. And unlike those earlier bishops who had ordered their clergy to possess copies of the Lyonese decree, della Rovere and his successors insisted on the possession of their own episcopal statute.

[137] Lat. IV c.6; later 4 Comp. 5.1.5=X 5.1.25.

This silence highlights the importance of della Rovere's editorial choices in choosing which elements of *Quamquam usurarii* to include or ignore in his diocesan compilation, especially given how many of these choices persisted in all subsequent iterations of his statute. As an example, della Rovere's detailed provisions regarding the 'cautio' had passed over *Quamquam usurarii*'s requirement that the receiver be held liable for any knowing underestimation, and no later redactor saw fit to reincorporate it. Conversely, della Rovere *did* specifically mention the decree's testamentary nullification sanction, and it featured in all later iterations of his statute. The widespread dissemination of this sanction into the legislative traditions of Milan and Ravenna is especially noteworthy given that most Italian bishops studiously avoided broadcasting it in their statutes. Of the thirty surviving fourteenth-century statutes issued for Tuscan and Umbrian dioceses, for example, not a single one explicitly asserts the invalidity of usurers' testaments, even as these same statutes otherwise transmitted many elements of the Lyonese decree.

In Italy as elsewhere, episcopal statutes that bear a *prima facie* resemblance to *Quamquam usurarii* could thus encode a variety of subtle (and sometimes not-so-subtle) changes. In some cases, these signaled the individual concerns of a single issuing authority; in others, they reflected the cumulative effects of successive rounds of episcopal editorial invention, taking place across wide distances and over the span of years or decades. Only very rarely did bishops opt to incorporate the text of the decree wholesale into their local statutes, nor do we find many attempts to replicate faithfully the decree's penalties and provisions in a more concise form. In Italy especially (but not exclusively), adaptation and elaboration were the rule rather than simplification—and the patterns of such adaptation and elaboration were hardly random. In the final phases of revising *Quamquam usurarii* for promulgation in 1274, the decree's drafters had diminished the role of the Ordinary and added the testamentary nullification provision. In reworking the decree in their own local statutes, many Italian bishops found ways to reverse the former change or ignore the latter.

Caveats and Conclusions

Further research is needed to determine how far the variations in local statutes resulted in corresponding variations in local practices. It seems plausible that priests who heard *Quamquam usurarii*'s testamentary sanction recited annually in synods were more likely to announce it to their parishioners than those who did not, and that this in turn had some bearing on its potential observance. The same could be said of all of the decree's other provisions, not to mention the many local elaborations and reworkings thereof. That said, episcopal statutes were not the only means of disseminating familiarity with canonical requirements. Moreover, the fact that most Italian bishops did not include *Quamquam usurarii*'s testamentary nullification provision in their statutes does not necessarily mean that they failed to enforce it in their courts.[138] The converse is also true: the fact that bishops *did* include a particular provision in their statutes should also not be interpreted as evidence of subsequent enforcement. (A recent study on the enforcement of English diocesan statutes concerning marriage has clearly established this point, even as evidence from French dioceses shows otherwise.[139]) It is also worth remembering that many statutes have disappeared altogether, such that one cannot fully reconstruct the complete legislative tradition of most provinces and dioceses in Italy—nor of those elsewhere in Europe, for that matter.

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[138] As an example, although none of the surviving diocesan statutes from Pisa cites *Quamquam usurarii*'s testamentary nullification provision, it was nevertheless invoked in the episcopal court in cases from the end of the fourteenth century; see Duval, 'Les testaments, l'usure' 131. Contemporary *consilia* also attest to numerous cases concerning the intestacy of manifest usurers in the cities of central and northern Italy.

[139] Charles Donahue, Jr., 'Thoughts on Diocesan Statutes: England and France, 1200-1500', *Canon Law, Religion and Politics: Liber Amicorum Robert Somerville*, edd. Uta-Renate Blumenthal, Anders Winroth, and Peter Landau (Washington D.C. 2012) 253-271, at 259-262.

Bearing in mind these limitations, we can nevertheless draw two broad conclusions based on the evidence presented above. The first concerns the ecclesiastical campaign against usury in the high and late Middle Ages. In the century following the promulgation of *Quamquam usurarii*, most episcopal legislation on usury ignored it entirely. This was less true in northern Italy, but even there it took decades for the decree's procedures and penalties to be incorporated into provincial and diocesan statutes. Whatever the reasons for this muted or delayed response, it is clear that the medieval episcopate as a whole did not enthusiastically seize upon this opportunity to threaten usurers with the heightened sanctions that canon law now imposed. Studies of medieval ecclesiastical responses to usury have generally highlighted particularly zealous figures or especially innovative texts; a more accurate rendering must set these against the much duller landscape of widespread episcopal complacency and indifference.

Furthermore, even where bishops used provincial and diocesan legislation as a vehicle for informing local clergy of *Quamquam usurarii*, only rarely did this legislation convey all of the decree's principal provisions. It bears reminding that such selectivity was not driven simply by the need for brevity; a few enterprising bishops managed to condense the decree's text down to a few compact sentences, while many Italian prelates produced statutes on usury that ran to thousands of words without ever mentioning key elements of the decree. Rather, the uneven transmission of the decree's provisions generally reflects either the conscious choices of bishops (and their drafters), or the consequences of their dependence on intermediary models.

This leads to our second conclusion, concerning the reception of conciliar decrees (and of the church's general law more broadly) in local episcopal legislation. As noted above, this topic has usually been approached in a binary fashion, with scholars tallying up invocations or echoes of conciliar decrees in subsequent provincial canons and diocesan statutes. Such an approach too easily glosses over the editorial interventions of bishops in highlighting or excising contentious provisions, sharpening or softening penalties, elaborating or simplifying pro-

cedures, and so forth. This approach also risks underestimating the mediating influence of borrowed models, which could both spur the spread of new norms (as in the case of Papiniano della Rovere's 1298 statutes for Novara) or hinder it (as did the persistent appeal of pre-1274 compilations).

In considering the reception of conciliar decrees, it is therefore crucial to determine not only whether or not the influence of a particular decree can be discerned in subsequent episcopal statutes, but also *which* elements of the decree were embraced and the pathways by which this occurred. Moreover, the careful comparison of influential models with their subsequent reworkings—a task made easier by the steady progress of critical editions as well as new online resources—can reveal otherwise invisible evidence of episcopal priorities and local concerns. The interpretation of canon law was not something that occurred only in universities, the curia, and the courts; it is visible too in what bishops emphasized—and omitted—in their statutes. Even if the motivations behind particular choices cannot always be reconstructed firmly, the systematic and comparative analysis of these choices can deepen our understanding of what Gabriel Le Bras eloquently characterized as the 'dialectic of the universal and the particular in late medieval canon law.[140]

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[140] Gabriel Le Bras, 'Dialectique de l'universel et du particulier dans le droit canon', ASD 1 (1957) 75-84.

In Coena Domini: A Hierocratic Weapon or a Pastoral Staff?

Stefan Stantchev and Benjamin Weber

The *In Coena Domini* bull was a major topic of contention between Protestant polemicists and Catholic apologists from the early sixteenth century until the bull's formal abrogation through Pius IX's *Apostolice sedis* in 1869.[1] The bull consisted of a list of 'ipso iure' (also known as latae sententiae) excommunications befalling the perpetrators of specific sins; absolution was reserved to the pope. These excommunications 'took effect immediately as the crime was committed;' in other words, 'a person who committed certain defined acts incurred the sentence of excommunication automatically'.[2] Not requiring a tribunal's sentence or a priest's explicit excommunication, 'ipso iure' cases were self-triggered, automatic sanctions that placed the burden of the deed squarely on the conscience of the transgressor. Examples of sins covered by the bull include heresy, violence against the clergy, the imposition of new tolls, or the export of weapons to presumed enemies of the faith. For Pope Julius II (1503-1513), the bull was published annually on Holy Thursday, the day commemorating the establishment of the community of Christ, 'for the purity and unity of the Christian religion'.[3] For Martin

[1] On the abrogation, John Prior, 'In Coena Domini', Charles G. Herbermann et al., edd., *The Catholic Encyclopedia* (New York 1910) 7.717-8.

[2] On excommunication, Geneviève Bührer-Thierry and Stéphane Gioanni, edd., *Exclure de la communauté chrétienne: Sens et pratiques sociales de l'anathème et de l'excommunication, IVe-XIIe siècle* (Turnhout 2015), Christian Jaser, *Ecclesia Maledicens: Rituelle und Zeremonielle Exkommunikationsformen im Mittelalter* (Tübingen 2013), Richard H. Helmholz, *The Spirit of Classical Canon Law* (Athens GA 2010 [1996]) 366-93 at 383, Elizabeth Vodola, *Excommunication in the Middle Ages* (Berkeley 1986) at 28-99, as well as Emilie Rosenblieh, 'Les cas réservés et le pouvoir de dispense du pape au temps de la crise conciliaire', RDC 65 (2015, 2) 313-33, Lester K. Little, *Benedictine Maledictions: Liturgical Cursing in Romanesque France* (Ithaca NY 1993).

[3] 'ad retinendam puritatem religionis christianae et ipsius unitatem, que in coniunctione membrorum ad unum caput, Christum videlicet, eiusque vicarium,

Luther, by contrast, the document was the ultimate expression of the pretensions of assertive popes who '…by their wanton, worthless bulls and letters keep the world subjugated to their tyranny'.[4] Luther, moreover, called the sentence of excommunication itself a tool whereby 'the pope tries to be God'.[5] Accordingly, early modern canonists dedicated entire treatises on the subject explaining and defending the bull.[6] In the context of its suppression by Catholic princes throughout Europe in 1768-81,[7] the Venetian theologian Tommaso Antonio Contin (1723-96) wrote a major treatise echoing Luther's take: through the Holy Thursday bull Rome 'exploited the stupid ignorance of the people' to establish 'universal despotism'.[8] Despite the suppression of the bull's publication, fear of its content persisted into modernity. Nineteenth-century Anglicans, who provided the best English

principaliter consistit', Laertio Cherubini and Angelo Cherubini edd., *Magnum Bullarium Romanum* (Lyon 1655) 1.516.

[4] Helmut Lehmann, ed., *Luther's Works* (Philadelphia, 1955-86) Vol. 44, 162.

[5] In 'Defense and Explanation of All the Articles' (1521) In Helmut T. Lehmann ed. *Luther's Works* 32, *Career of the Reformer* 2 (Philadelphia 1958) 66. On papal power, see Kenneth Pennington, *Pope and Bishops: The Papal Monarchy in the Twelfth and Thirteenth Centuries* (Philadelphia 1984).

[6] Pierre Rebuffi, *Bulla Coenae Domini Pape Pauli III*, in idem, *Praxis Beneficiorum* (Lyon 1599 [1537]) on the author see Howell A. Lloyd, 'Constitutional Thought in Sixteenth-Century France: The Case of Pierre Rebuffi', *French History* 8 (1994) 259-275; Martin de Azpilcueta, *Operum Martini ab Azpilcveta doct. Navarri* (Rome, 1590) 1.469-94, on the author see Vincenzo Lavenia, 'Martín de Azpilcueta (1492-1586): Un profilo', *Archivio italiano per la storia della pietà* 16 (2003) 15-148, Wim Decock, 'Martín de Azpilcueta', *Great Christian Jurists in Spanish History*, edd. Rafael Domingo and Javier Martínez-Torrón (Law and Christianity; Cambridge 2018) 116-132, Mario Altieri, *De censuris ecclesiasticis* (Rome 1620) 1.446-56; Juan Luis López, *Historia Legal de la Bula llamada in Coena Domini* (Madrid 1768) on the author see Antonio Muro Orejon, 'El doctor Juan Luis Lopez, Marquis del Risco, y sus commentarios a la Recopilacion de Indias', *Anuario de historia del derecho espaniol* 17 (1946) 785-864; Tommaso Antonio Contin, *Riflessioni sopra la bolla In Coena Domini* (Venice, 1769) Paolo Preto, 'Contin, Tommaso Antonio', DBI 28 (1983) https:..www.treccani.it.enciclopedia.tommaso-antonio-contin_%28Dizionario-Biografico%29. (last accessed 9 Jun 2021).

[7] Prior, 'In Coena Domini'.

[8] Contin, *Riflessioni* 25.

translation and explanation of the bull's clauses, dreaded the 'full and unrestricted development of Popery within the British Empire' arguing that as of 1848 the bull's content remained upheld by the Irish clergy as an active expression of the 'usurpation and tyranny of Rome'.[9] Despite all the excitement that the Holy Thursday bull caused from the sixteenth to the nineteenth century, modern students of medieval and early modern history have largely ignored the subject.

Scholarly views of the Holy Thursday bull's past are typically based on John Prior's brief if well-researched entry in the early twentieth-century *Catholic Encyclopedia*. Prior focused on the bull's later clauses, its suppression, and its abrogation. Prior traced the medieval origins of the bull to a verbal ritual that took place in Saint Peter's on Maundy Thursday, on the one hand, and to the publication of lists of censures by regional councils such as those of York in 1195 and London in 1200, on the other hand. As for the bull itself, Prior was careful not to commit to an origin year: the document 'appeared in the fourteenth century'. Although Prior specified that 'under Urban V (1363) the list contained seven cases', Urban's bull was used merely as an example.[10] A year later, Eugène Varney published Bishop Bérenger Frédol's major early fourteenth-century treatise on excommunication, accompanied by an introduction that offers a history of the sanction. As Prior, Varney did not commit to a specific origin date. However, Varnay offered a much earlier first extant copy, a document dating to the pontificate of Gregory IX (1227-41).[11] Following the logic of the work he edited, Varnay connected the history of the Holy Thursday bull to the much broader issue of 'reserved cases'. Yet, it was Prior's encyclopedic entry that became commonly cited. Similarly well-known, Emil Göller's work on the papal

[9] N.A., *In Coena Domini translated into English with A Short Historical Introduction* (London 1848), N.A. *Papal Diplomacy and the Bull 'In Coena Domini'* (London 1848) 3-4.
[10] Prior, 'In Coena' 718.
[11] *Le 'Liber de excommunicatione' du cardinal Bérenger Frédol*, ed. Eugène Vernay (Paris 1912) XLIV-XLV.

penitentiary offered insightful remarks coupled with a mis-dated and mis-printed early fourteenth century bull.[12]

The *In Coena Domini* bull has since been the subject of little scholarly discussion. One-liners that assume its content and tenor to be common knowledge are rather common. They do attest to the bull's relevance not only in early modern Europe, but also throughout the Americas.[13] María Tausiet has taken the extra step of consulting the work of a well-informed canonist, thereby offering the most precise reference to the bull's early history among studies in early modern history.[14] Among medievalists, Lester Little has aptly noted the bull's relationship to earlier anathemas.[15] Elena Brambilla has indirectly exposed the interconnections between reserved cases in the canon law and reserved cases in the Holy Thursday bulls within the ambit of a broader examination of late medieval penitential practices.[16] Émilie Rosenblieh has studied reserved cases in the fifteenth century.[17] Christian Jaser has offered a major study on the rituals and ceremonies of excommunication, including those accompanying the *In Coena Domini* bull.[18] In a series of works centered on the question of papal authority and symbolism, Agostino

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[12] Emil Göller, *Die Päpstliche Pönitentiarie von ihrem Ursprung bis zu ihrer Umgestaltung unter Pius V* (2 vol. Rome 1907-1911) see below for detail.

[13] For example: Antoinette Sutto, 'Lord Baltimore, the Society of Jesus, and Caroline Absolutism in Maryland, 1630-1645', *Journal of British Studies* 48 (2009) 631-652, Marta Wójtowicz-Wcisło and Maciej Czuchra, 'The Crisis of the Union of the Throne and the Altar: the Bourbon Reforms of the Church in New Spain in the Eighteenth Century', *Politeja* 10 (2008, 2) 119-48, Antonine Tibesar, 'The King and the Pope and the Clergy in the Colonial Spanish-American Empire', CHR 75 (1989) 91-109, Gerald P. Fogarty, 'Property and Religious Liberty in Colonial Maryland Catholic Thought', CHR 72 (1986) 573-600.

[14] María Tausiet, 'The Wayward and Excommunicated in Counter-Reformation Spain', *History* 88 (2003) 437-450, at 441.

[15] Lester K. Little, 'The Separation of Religious Curses from Blessings in the Latin West', *Memoirs of the American Academy in Rome*, 51-2 (2006-7) 29-40 at 36.

[16] Elena Brambilla, *Alle origini del Sant'Uffizio. Penitenza, confessione e giustizia spirituale dal medioevo al XVI secolo* (Bologna, 2000).

[17] Rosenblieh, 'Les cas réservés'.

[18] Jaser, *Ecclesia Maledicens*.

Paravicini Bagliani has examined a large body of archival, narrative, and art historical sources thereby offering the most significant contemporary contributions to the study of the bull's early history.[19] Yet, the bull itself is not the primary focus of any of the aforementioned studies and thus no coherent picture of its medieval history has emerged.

Accordingly, a variety of origin dates of the bull's annual publication have been offered: the thirteenth-century, 1254, 1363, and even 1581.[20] Such variations reflect the fact that each author has pinpointed one or another facet of a broader and more complex story while none has brought its various strands together. The lack of consensus reflects the lack of discussion as well as the fact that no primary source or even group of sources solves the puzzle on its own.

Therefore, this inquiry studies the extant papal registers and major canonistic commentary in order to: 1. offer a reconstruction of the bull's origins and trajectory until the close of the Middle Ages and thereby 2. show the relationship between the bull and the reserved cases found in the canon law. Although the acerbic sixteenth century polemic surrounding the *In Coena Domini* bull raises tantalizing questions of social and cultural history, these cannot be fruitfully addressed until the fundamental questions about the bull's history have been answered. What are the origins of the *In Coena Domini* bull? What is the document's relationship

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[19] Agostino Paravicini Bagliani, *Il trono di Pietro, l'universalità del papapto da Alessandro III a Bonifacio VIII* (Rome 1996) idem, *Le chiavi e la tiara: immagini e simboli del papato medievale* (Rome 1998) idem, *Boniface VIII: un pape heretique?* (Paris 2003) idem, 'Bonifacio VIII, la loggia di giustizia al Laterano e i processi generali di scomunica', *Rivista di storia della Chiesa in Italia* 59 (2005, 2) 377-428, idem, 'Bonifacio VIII, l'affresco di Giotto e i processi contro i nemici della Chiesa. Postilla al Giubileo del 1300', *Mélanges de l'École Française de Rome. Moyen Âge*, 112 (2000) 459-83.

[20] For example: Little, 'Separation of Religious Curses', 36, Wójtowicz-Wcisło and Czuchra, 'The Bourbon Reforms', 121 n. 9, Brian R. Hamnett, 'The Counter Revolution of Morillo and the Insurgent Clerics of New Granada, 1815-1820', *The Americas* 32 (1976, 4) 597-617 at 608, Edward G. Farrugia, 'Vatican I and the Ecclesiological Context in East and West', *Gregorianum* 92 (2011, 3) 451-69, S. J. Miller, 'A Phase of the Catholic Enlightenment', *The Catholic Historical Review* 63 (1977, 2) 225-48, at 233 n. 18.

to the body of canon law? What contexts shaped the bull? Have medievalists overlooked an important development? This inquiry will take us through the extant papal registers, on the one hand, and the most influential canonistic commentary, on the other hand.[21]

The Hierocratic Weapon Hypothesis

There are three important aspects of Maundy Thursday bull's early history on which early modern commentators agreed. First, that the document originates in a verbal disciplinary ritual, simply called *processus*. Indeed, Johannes Andrea (†1348) gloss to a decision found in the Clementine Constitutions, a compilation of papal decretals published by John XXII in 1317, speaks of the three annual ceremonies.[22] These took place in Rome on Holy Thursday, on Ascension Day, and on November 18, the day

[21] On papal letters see Atria Larson and Keith Sisson, 'Papal Decretals', *A Companion to the Medieval Papacy: Growth of an Ideology and Institution*, edd. Atria Larson and Keith Sisson (Leiden 2016) 158-173, Patrick Zutshi, 'Petitioners, Popes, Proctors: the Development of Curial Institutions, c.1150-1250', *Pensiero e Sperimentazioni Istituzionali nella 'Societas Christiana' (1046-1250): A proposito della XVI Settimana internazionale di studi medievali del Passo della Mendola (26-31 agosto 2004)*, ed. Giancarlo Andenna (Milan 2007) 265-93, idem, 'The Personal Role of the Pope in the Production of Papal Letters in the Thirteenth and Fourteenth Centuries', *Vom Nutzen des Schreibens: Soziales Gedächtnis, Herrschaft und Besitz im Mittelalter*, edd. Walter Pohl and Paul Herold (Vienna 2002) 225-236, and Gérard Fransen, 'Les décrétales et les collections de décrétales', *Typologie des sources du moyen âge occidental*, ed. Léopold Genicot (Turnhout 1972) 12–44. On canon law in the period, Atria Larson, *Master of Penance: Gratian and the Development of Penitential Thought and Law in the Twelfth Century* (Washington D.C. 2014), *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 Kenneth Pennington (Washington D.C. 2008), James A. Brundage, *The Medieval Origins of the Legal Profession: Canonists, Civilians, and Courts* (Chicago 2008), Anders Winroth, *The Making of Gratian's Decretum* (Cambridge 2000), Richard H. Helmholz, *The Spirit of Classical Canon Law* (Athens GA 2010 [1996]), Manlio Bellomo, *The Common Legal Past of Europe, 1000-1800*, trans. Lydia G. Cochrane (Studies in Medieval and Early Modern Canon Law 4; Washington D.C. 1995), Jean Gaudemet, *Les sources du droit canonique* (Paris 1993).

[22] See Gaudemet, *Les sources du droit canonique* 129.

commemorating the dedication of the basilicas of Peter and Paul. As indicated in a commentary by Johannes de Anania (†1457), however, by his time the ritual was already taking place exclusively on Holy Thursday. Subsequently, the commentators agree, popes began to publish the 'processus' following the model of Roman praetors. Second, early modern authorities agree that the bull's origins lie in the history of excommunications by the force of law alone and that the number of these snowballed over time resulting in 'pene innumerae', as the major Iberian canonist Martín de Azpilcueta (†1586) put it. Finally, the jurists agree that the excommunications contained in the bull were binding on all Christians.[23]

In general, early modern Catholic jurists stuck to practical questions regarding the bull's applicability in their own day. Although canonists and polemicists offer some references, none provides reliable clues about the bull's origins. López's *Historia legal* cites a letter by Boniface VIII that in fact simply mentions the existence of a 'processus' taking place three times a year.[24] Mid-nineteenth century Anglican pamphlets also point to Boniface's reign and indeed locate the origin of the bull in his 1299 *Fuit olim*.[25] Yet, what *Fuit Olim* did was to make transgressors of trade prohibitions subject to inquisitorial authority.[26] Boniface VIII has earned the reputation of a pope who asserted papal authority in a most paroxysmal manner.[27] Connecting the bull's origin to Boniface' pontificate, however, was simply a function of most authors' inductive method: the time of Boniface VIII was as far as easily available references led them.

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[23] Clem. Lib. 2.1.1; Rebuffi, *Bulla Coenae Domini*, 309, Altieri, *De censuris* 1.447, Contin, *Riflessioni* 63. On the explosion of 'ipso iure' cases: Martin de Azpilcueta, *Operum* 1.470, Altieri, *De censuris* 1.446, Contin, *Riflessioni* 73.

[24] López, *Historia legal* 4, Extrav. Comm. 3.1.1.

[25] *Papal Diplomacy and the Bull 'In Coena Domini*', 6.

[26] *Les Registres de Boniface VIII*, edd. Georges Digard, Maurice Faucon, Antoine Thomas, and Robert Fawtier (4 vol. Paris 1884-1939) 2.557-560 no.3354.

[27] On hierocratic ideas, see Keith Sisson, 'Popes over Princes: Hierocratic Theory', *A Companion to the Medieval Papacy* 121-132.

Tommaso Contin, by contrast, displayed a rather strong interest in the origins of the document and turned the presumed connection between the *In Coena Domini* bull and papal assertiveness into the cornerstone of his lengthy treatise. Theologian by education, Contin opted for a deductive approach, setting out to demonstrate the invalidity of the Holy Thursday bull through a longue durée excursus spanning the times from Jesus to the last decades of Venice's independence. Crucially, Contin focused his search for the bull's origin on the figure of the most famous reformist pope, Gregory VII (1073-1085). Genuine or not, the famous *Dictatus Papae* corresponds to Gregory's ideas, argues Contin. The 'true origin of the bull *In Coena*', therefore, lay in what Contin saw as Gregory's desire to control both the ecclesiastical and the terrestrial sphere. In Contin's history, the *Dictatus Papae* served as the template for the bull. Gregory convinced the church to deploy the sentence of excommunication whenever it encountered opposition; Emperor Henry IV became the first to be subjected to ecclesiastical yoke in the new fashion.[28] The outcome, Contin echoes Luther, was nothing less than the construction of an 'arma spaventosa' for the establishment of ecclesiastical despotism founded on the fear of excommunication and jeopardizing the workings of even sophisticated political systems.[29] It is likely, Contin admits, that the turbulent times of the Avignon papacy interrupted the tradition. While Martin V revitalized pontifical despotism in the 1420s, the Council of Basel found some of Eugenius IV's excommunications exaggerated; lay rulers thus began to turn a deaf ear to excommunications aimed at papal usurpation of princely rights.[30] Having tested universal despotism, however, the popes would simply not let go of their favorite weapon, continues Contin.[31]

Thus Contin produced a powerful argument that 1. located Maundy Thursday bull's origin at a critical juncture in the history of the Roman Church and 2. read this historical episode as the

[28] Contin, *Riflessioni*, 31-4, 47, 50-1.
[29] Ibid. 6, 53-4.
[30] Ibid. 56, 59-62, 64, 68.
[31] Ibid. 70.

attempt of zealous reformers to establish a papally-led Christendom. Founded upon human ambition and politics—Contin warns of the bull's consequences—it can destroy the European political order and result in the excommunication of each and every Christian by way of one or another of its expansive clauses thereby reducing the Church of Christ to the Roman curia alone.[32] Is there any evidence to support the assumptions on which Contin's captivating exposition is build?

A document of disputed nature, possibly dating to 1075, the *Dictatus Papae* reads like a manifesto (or a summary of a legal compilation, or a list of headings for a legal compilation), a program for action that begins with a couple of categorical statements that seek to establish a strong bond between Christ and the Roman pontiff and the primacy of the Roman Church over other Christian churches.[33] The majority of its subsequent entries focus on establishing the fulness of powers of the pontiff within the church at the expense of bishops and church councils.[34] Finally, a few disjointed statements loudly proclaim the disciplinary power of the pope over the emperor including his ability to depose an emperor. Inter alia, the *Dictatus Papae* bans cohabitation with those excommunicated by the pontiff, but, contrary to Contin's assertions, offers no obvious link to the later Holy Thursday bulls. Rather, the connection established by Contin is a conceptual one: the *Dictatus* is a political program while the Holy Thursday bull is the weapon deployed by popes and canonists for its fulfillment.

Contin's is an alluring picture because it offers a straightforward and teleological explanation of complex and not fully documented historical developments. Moreover, it fits rather well with one of the major interpretations of the high medieval

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[32] Ibid. 309-311.

[33] On the document in context see Jehangir Yezdi Malegam, 'Pro-Papacy Polemic and the Purity of the Church: The Gregorian Reform', and Atria Larson, 'Popes and Canon Law', *A Companion to the Medieval Papacy* 51 and 147, respectively, as well as the literature cited therein.

[34] On the nature and balance of powers within the church, see Pennington, *Popes and Bishops*.

church reform movement. Commonly associated with the work of Walter Ullmann, this interpretation emphasizes the hierocratic tendencies of reformers.[35]

Key to Contin's criticism (as to Luther's) was the teleology resulting from the rhetorical conflation of readers' perception with authorial intent: popes and canonists carefully devised a powerful weapon in order to subjugate the world to their tyranny. The assumptions of a grand plan and intentionality square well with modern expectations of the mechanics of political power (plans, agendas, strategies) and thus appear 'natural', that is, inherently familiar and therefore convincing to modern readers. It is important, however, to clearly distinguish between the less important (inherently problematic if not entirely unknowable) authorial intentions of a text and the much more relevant (and always multiple) ways in which a text is received by its audience. Multiple contexts, personalities, and the inner logic of legal scholasticism, not a grand plan for concerted political action shaped the developments in which the Holy Thursday bull originates. Although it was not chronologically the earliest, the most relevant process was the emergence and evolution of 'ipso iure' excommunications and it is with this subject that our inquiry begins.

The Trajectory of Ipso Iure Excommunications in the Canon Law

As Luther well understood, the Holy Thursday bull was an offshoot of the history of 'ipso iure' excommunications at large and, specifically, of cases the absolution from which was reserved to the papacy:[36]

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[35] See Walter Ullmann, *Medieval Papalism: The Political Theories of the Medieval Canonists* (London 1949) and Francis Oakley, 'Celestial Hierarchies Revisited: Ullmann's Vision of Medieval Politics' *Past and Present* 60 (1973) 3-48. See also Dominique Iogna-Prat, *Ordonner et exclure: Cluny et la société chrétienne face à l'hérésie, au judaïsme et à l'islam*: *1000-1150* (2nd ed. Champs 553; Paris 2004). On the related debates, Larson and Sisson, *A Companion to the Medieval Papacy*.

[36] In 'To the Christian Nobility of the German Nation, Concerning the Reform of the Christian Estate', *Luther's Works* 44: *The Christian in Society*, ed. Helmut T. Lehmann (Philadelphia 1966) 162.

> The reserved cases should also be abolished. They are not only the means of extorting much money from the people, but by means of them the ruthless tyrants ensnare and confuse many tender consciences, intolerably injuring their faith in God.

These 'reserved cases' or 'powers refer to those actions that only the pope can take'.[37] The cornerstone of the eventual list of automatic excommunications was the extensively studied *Si quis suadente*, a canon of the Second Lateran Council (1139), which excommunicated whoever would raise a violent hand upon a cleric.[38] Moreover, 'the offender was further bound to present himself at the papal court before he could be absolved, unless in imminent danger of death'.[39] Thus *Si quis suadente* established not only the practice of imposing automatic excommunications by the force of law, but also of reserving (some) absolutions to the papacy. *Si quis suadente* germinated a vast amount of canonistic commentary and prefigured the transfiguration of early medieval anathemas into the high and late medieval 'ipso iure' major excommunications.[40]

There was, however, no simple, linear development from this 1139 canon to the eventual emergence of a bull containing a selection of reserved cases. Gratian resisted the novel form of excommunication; its slow acceptance has been attributed to measures taken against heretics in the second half of the twelfth century.[41] The period extending between the compilation of Gratian's mid-twelfth century *Decretum* and Gregory IX's *Decretals* (1234) marked in fact a high point of legal creativity as individual jurists took it upon themselves to collect and make sense of an ever-increasing number of papal letters and synodal

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[37] Larson, 'Pope and Canon Law', 154 for an overview, 154-156.

[38] Vodola, *Excommunication* 28-29. On councils in the period see Danica Summerlin, 'Papal Councils in the High Middle Ages', *A Companion to the Medieval Papacy* 175-196.

[39] Katherine Christensen 'The 'Lost' Papal Gloss on Si quis suadente (C.17 q.4 c.29): John of Salisbury and the Canonical Tradition in the Twelfth Century', BMCL 18 (1988) 1-12 at 1.

[40] See Vernay, *Liber de Excommunicatione du Bérenger Fréedol*, XXXVI-XLVIII, Vodola, *Excommunication* 28-29, Helmholz, *Spirit of the Classical Canon Law* 383-389, Little, *Benedictine Maledictions* 32.

[41] Vodola, *Excommunication* 29-35, 78.

decisions that touched upon all facets of human activity. Bernard of Pavia's (†1213) *Summa Decretalium* featured a short section on excommunication. Bernard subjects to 'ipso iure' excommunications only three categories of transgressors: those who raise a violent hand against clerics (C.17 q.4 c.29 *Si quis suadente*), those who commit sacrilege, break into churches (C.17 q.4 c.21 *Quisquis*), and those who set churches on fire (C.23 q.8 c.32 *Pessimam*). In addition, Bernard also introduces the first of what would be a series of ambivalent cases, accepted by some, rejected by others: the excommunication against archers and crossbowmen who practice their art against Christians (which would become X 5.15.1 *Artem*).[42] In the process, Bernard's work, the exact dating of which is unclear, missed a novel 'ipso iure' case (or perhaps the work was written earlier), one that dated to the winter of 1187-1188 and concerned trade with Saracens (*Quod olim*).[43]

The contexts of church reform movement and aristocratic violence loom large behind Bernard's selection. Bernard's three unequivocal instances of 'ipso iure' cases represent an attempt of the Church to defend its most basic rights, indeed the very cornerstones of ecclesiastical freedom. Although ecclesiastical liberty would remain a central concern well beyond the late eleventh and early twelfth centuries, the specific contexts of rudimentary violence against ecclesiastical persons and property featured in the early 'ipso iure' cases were somewhat anachronistic by Bernard's time. Disputes between ecclesiastical and lay powers, especially in the world of the Italian 'comuni', had evolved well beyond the simple matter of setting churches on

[42] Ernst-Adolph Laspeyres, ed., *Bernardi Papiensis Summa Decretalium* (Regensburg 1860, reprinted Graz 1956) 272-274. On Bernard and his work, Kenneth Pennington, *Bio-Bibliographical Guide to Medieval and Early Modern Jurists* at:
https:..amesfoundation.law.harvard.edu.BioBibCanonists.Report_Biobib2.php?record_id=a061 (last accessed 23 March 2021.

[43] See Stefan K. Stantchev, *Spiritual Rationality: Papal Embargo as Cultural Practice* (Oxford 2014) 50-52.

fire.[44] The two other twelfth century canons, the sporadically accepted *Artem* and *Quod olim*, reflected, by contrast, an attempt to regulate the relations between laymen and as such prefigured a major thrust of thirteenth-century 'ipso iure' cases.

Although each originated in its own specific context, all cases collected by Bernard addressed general problems that were endemic and structural in nature and that affected the entirety of twelfth-century Christendom. Thus by the 1190s, a very short list of 'ipso iure' excommunications, extracted from their original contexts, became universally valid canons and an integral part of a new genre, one that flourished over the subsequent decades. Thereafter, legal commentaries would feature a section dedicated to excommunication, complete with an explanation of what constitutes major and minor excommunications, what cases are subject to the sentence by the force of law itself, who has the power to absolve excommunicates, and so on.

In 1234, the Dominican Raymond of Peñafort completed the corpus commissioned by Pope Gregory IX, which theoretically integrated and superseded earlier compilations of canon law.[45] Book V dealt with a bouquet of sins and in the process included a large number of canons that placed under 'ipso iure' excommunication a variety of transgressors, including heretics, disobedient Jews, or exporters of prohibited things to Saracens. At the same time, its lengthy Title 39, *On the Sentence of Excommunication*, made of sixty canons, did not seek to bring together all the various instances in which 'ipso iure' excommunications applied. Instead, the section begins with a list of twenty-six canons regarding violence against clerics that pre-date Innocent III's pontificate (1198-1216). Expanded to cover absolution and communication with excommunicates, the issue of violence looms large in the

[44] See for example, Maureen Miller, 'From Episcopal to Communal Palaces: Places and Power in Northern Italy (1000-1250)', *Journal of the Society of Architectural Historians* 54 (1995) 175-185.

[45] On Raymond's method see Stephan Kuttner, 'Raymond of Penafort as Editor: The 'Decretales' and 'Constitutiones' of Gregory IX', BMCL 12 (1982) 65-80; see Edward Reno, *The Authoritative Text: Raymond of Penyafort's editing of the Decretals of Gregory IX (1234)* (Ph.D Columbia University 2011).

canons from Innocent's pontificate as well (c.27-48). Only the final section of Title 39 (c.49-60) truly expands the subject matter. Most notably, X 5.39.49, drawn from a letter sent by Pope Honorius III (1216-1227) to the Bishop of Bologna, excommunicates heretics and whoever violates ecclesiastical liberties, including legislators of offending statutes: this issue would loom large in subsequent lists of 'ipso iure' cases.

Thus the task of producing a workable list of offenses meriting excommunication through the force of the law fell upon jurists who worked within three distinct genres of interest: commentaries on the law, penitential manuals, and treatises dedicated specifically to the issue of excommunication. Around the time he presided over the redaction of the *Liber extra*, Raymond of Peñafort also composed his influential *Summa de paenitentia*. Raymond's treatise reads as a synthesis of early decretalist efforts on the subject and served as a foundation of the emerging tradition.

In line with the strong focus on heresy since the outset of the Albigensian Crusade in 1208, Raymond of Peñafort began his list of (as he puts it) seventeen cases of 'ipso iure' major excommunications with short and clear in its components though not necessarily coherent or mathematically accurate list: 1. those who succumb to heresy, 2. those who invent new heresies, 3. believers, helpers, and defenders of heresy.[46] Closely related to the first three was Raymond's fourth case, which echoes the first dispositions of *Dictatus Papae*: excommunicated are those who deny that the Roman Church is the Head or assert it is not to be obeyed. Innocent IV simply labeled this group as 'schismatici'.[47] Having dealt with those who altogether reject the Roman Church in four cases, Raymond turns to ecclesiastical liberty in another four (no.5-8), citing the three canons compiled by Bernard of Pavia as well as a more recent addition stemming from the context of relations between church and *communi* in Italy and centered on

[46] Raymond of Peñafort, *Summa de Paenitentia*, edd. Xaverio Ochoa and Aloisio Diez (Rome 1976) 746-747.

[47] Ibid. 747, Innocent IV, *Commentaria Innocentii Quarti…super libros quinque decretalium* (Frankfurt 1570) fol.546rb-546va to X 5.38.1.

taxation. Continuing to narrow down from the general to the particular—from the church's place on earth, to its separation from the laity, to the functioning of the papal government—Raymond's next two cases of 'ipso iure' excommunications concern improper papal elections and the falsification of papal letters (no.9-10). Raymond then concludes the list of thirteenth cases that he treats as obvious and certain with the excommunications of: no.11 those who deliver prohibited items to Saracens or generally aid Saracens, no.12 those who deal with the citizens of Bologna in prejudice of the students (an issue of rents), and no.13 ecclesiastics who attend lectures on civil law or medicine. Then, Raymond transitions to two cases that he claims are accepted by some commentators but not by others: no.14 those who aid excommunicates in their crime and 15. those who exercise the art of crossbowmen or archers against Christians. Finally, Raymond adds a 'new case:' no.16 aimed at legislators who promulgate statutes contrary to ecclesiastical liberty.[48] Raymond's seventeenth and final case is found in the section on absolution: it concerns those who knowingly receive in the divine services people excommunicated by the pope.

Separately from the cases of major excommunication, Raymond also lists nine cases of minor excommunication that he considered inflicted 'ipso iure': those who communicate with excommunicates, those who commit sacrilege, notorious fornicators and simoniacs, recipients of lay investiture, whoever aids an excommunicate in his crime, those who practice the art of crossbowmen or archers against Christians, public usurers and prostitutes, those who die in tournaments, and notorious criminals.[49] In this section, Raymond reminds the reader that some consider those who aid excommunicates in their crime and crossbowmen to be subject of major excommunication without however reconciling his own numbering of the various cases.[50]

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[48] Ibid. 747-750.

[49] Ibid. 758-759.

[50] See also the consilia in Riccardo Parmeggiani, *I consilia procedurali per l'inquisizione medievale (1235-1330)* (Bologna 2011).

Raymond of Peñafort's penitential work shows how Bernard of Pavia's few cases of 'ipso iure' excommunications swelled to more than two dozen, subdivided between cases resulting in major excommunication and such leading to minor excommunication. Raymond's list of the former fused together existential concerns that dated back to the origins of the church like heresy with much newer and narrower ones, notably university education and relations with Italian city governments. As the list swelled, any conceptual coherence that may have been present in Bernard of Pavia's short selection was lost.

While excommunications by the force of law represented one of the two pillars of the later *In Coena Domini* bulls, the other was reserving the absolution from these cases to the papacy. Already Bernard of Pavia had noted that those excommunicated 'ipso iure' for raising a violent hand against clerics can only be absolved 'summi pontifices auctoritate'.[51] Raymond agreed, but he also provided a list of eight exceptions to this rule.[52] While relaxing the absolute nature of the provision, Raymond noted the expansion of the principle's applicability by putting together a list of six reserved cases: those who raise a violent hand against clergymen, arsonists, those who break into churches, those who knowingly communicate with people excommunicated by the pope and admit them to services (officiis), falsifiers of papal letters, and those who aid excommunicates in their crimes.[53] Thus Raymond de Peñafort bequeathed to posterity a list of reserved cases that was about one quarter the length of his list of 'ipso iure' cases. As Bernard of Pavia's short list of 'ipso iure' cases, so Raymond of Peñafort's limited one of reserved cases focused on structural problems in the relations between the church and lay society. These sought, above all, to ensure ecclesiastical liberty.

Thus Raymond de facto offered a means of distinguishing between the gravity of sins. In principle, this should have facilitated the work of preachers and confessors tasked with teaching these precepts to the laity. Yet, while Raymond

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[51] *Bernardi Papiensis Summa Decretalium* 273.
[52] *Raymond of Peñafort, Summa de Paenitentia* 751-752.
[53] Ibid.762-763.

enumerates all 'ipso iure' cases prominently at the outset of his section on excommunication, his short list of reserved cases is buried in the midst of a discussion of the fine points of individual canons. This should caution us not to ascribe to Raymond later perceptions and therefore a diagnosis (a bloated list of 'ipso iure' cases) coupled with a medicine (a short list of reserved cases). In line with contemporary scholarship, Raymond of Peñafort carefully collected relevant information and commented upon the legal aspects of individual canons. His penitential work did seek clarity and practicality, but it did not result in an overarching theory of 'ipso iure' cases in general or of reserved cases in particular.

Pope Innocent IV and Henry of Susa (Hostiensis), the two most influential mid-thirteenth century authorities, upheld the model provided by Raymond of Peñafort.[54] Innocent IV follows Raymond with minor variations and expansions.[55] By contrast, Hostiensis dramatically elongates the list of numbered sins to which 'ipso iure' major excommunication applied. Raymond of Peñafort, writing within a genre demanding clarity, had proceeded from general to narrower dispositions. Hostiensis, by contrast, working within a genre suited chiefly to the classroom, sought completeness and clarification of the various instances in which one or another rule applied. The resulting expansion of 'ipso iure' cases was a two-fold process. On the one hand, Hostiensis breaks down some of the existing crimes into their constituent parts.

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[54] On Innocent, see Alberto Melloni, *Innocenzo IV: La concezione e l'esperienza della cristianità come regimen unius personae* (Genoa 1990). See also Kenneth Pennington, 'Innocent IV, pope', NCE 7 (2002) 473-476 and John A. Kemp, 'A New Concept of the Christian Commonwealth in Innocent IV', *Proceedings Boston 1963* 155-159. On Hostiensis see Kenneth Pennington, 'Henricus de Segusio (Hostiensis)', in idem, *Popes, Canonists, and Texts 1150–1550* (Aldershot 1993) XVI, idem, *The Prince and the Law, 1200–1600: Sovereignty and Rights in the Western Legal Tradition* (Berkeley 1993) 48–77. Now see the essays by Kathleen G. Cushing and Pennington on Innocent IV and Hostiensis in *Law and the Christian Tradition in Italy: The Legacy of the Great Jurists*, edd. Orazio Condorelli and Domingo Rafael (London-New York 2020) 70-97.

[55] Pope Innocent IV, *Commentaria Innocentii Quarti…super libros quinque decretalium* (Frankfurt 1570) 546r-546v.

Sometimes, as with schismatics, papal elections, and falsifications of papal letters, he simply expands a single entry into two. Elsewhere, the articulation of crimes becomes even more pronounced. The crime of raising a violent hand against clerics is covered by three entries instead of one and, reflecting the political realities in Italy, the instances in which urban governments impinge on ecclesiastical liberties surge to as many as eight. Furthermore, Hostiensis adds cases not found in Raymond, such as the recently introduced excommunication against those who kill a Christian by way of assassins, those who rob shipwrecked Christians, clergymen who accept gifts from usurers, or ecclesiastics who condemn to death and mutilation (Table 1, Hostiensis, no.26-32).[56] Thus by the mid-thirteenth century a list of 'ipso iure' excommunications was prominently featured in leading legal commentaries. Whereas Bernard of Pavia's late twelfth-century work had introduced three unequivocal cases, Hostiensis' mid-thirteenth century *Summa* featured thirty to thirty-three (depending on what text was consulted and how they were counted). As Bernard of Pavia's short list of 'ipso iure' cases, so the extended one of the 1250s reflected first and above all structural problems that originated in specific contexts but that were both pervasive and recurring.

For all the differences of detail, neither Innocent IV, nor Hostiensis significantly altered Raymond of Peñafort's structure of exposition or his list of reserved cases. Innocent IV recognized five of Raymond's six cases, omitting the one regarding those who knowingly accept people excommunicated by the pope.[57] Although Hostiensis expanded Raymond's list of numbered 'ipso iure' excommunications by about fifty percent, he appended only one reserved case to the latter's list (which he nevertheless re-ordered).[58] Since Innocent IV and Hostiensis elaborated within the structure of Raymond's exposition, the list of reserved cases, already buried in the midst of Raymond's discussion, came to occupy an even less pronounced place in the extended word count

[56] Henry of Susa (Hostiensis) *Summa* (Aalen 1962) 290r-290v.
[57] Innocent IV, *Commentaria* 550v-551r.
[58] Hostiensis, *Summa* 294r.

that marked their writings. Thus, as of the 1250s reserved cases remained a footnote to the broader issue of 'ipso iure' excommunications. The image they create is one of a Roman Church working in unison to counter a variety of challenges stemming from the laity's proclivity to sin. Contrary to the picture that Luther would see in the sixteenth century, the papacy itself does not yet loom large in mid-thirteenth century evidence on the subject of 'ipso iure' cases. Popes and bishops alike carried the responsibility to absolve transgressors.

The approach championed by Raymond of Peñafort was eclipsed by Bérenger Frédol's (†1323) early fourteenth century *Liber de excommunicatione*. In 1298, Boniface VIII published a major addition to Gregory IX's *Liber extra* which became known as the *Liber sextus*. The *Sextus* revoked all decretals issued between the two compilations that were not included in the latter. Thus the *Sextus* brought up to date the body of canon law, including its title on excommunications. Title 11 of its Book V added twenty-four new canons to the sixty featured in the *Liber extra*.[59] In keeping with the latter's logic, these canons offered no lists of transgressions meriting a sentence by the force of law, but rather focused on the mechanics of excommunication and on interdict. It was individual jurists who synthesized and reorganized the content of the corpus so as to elucidate particular issues. Bérengar's *Liber* updated the lists of 'ipso iure' excommunications found in the works of Raymond of Peñafort, Innocent IV, and Hostiensis in light of the content of the *Sextus* while also adding his own touch in the process. While the list of 'ipso iure' cases expanded dramatically, their arrangement denoted a much more explicit vision of the relations between clergy and laity.

Liber de excommunicatione's main section features a whopping 101 cases of 'ipso iure' excommunication analytically subdivided by its author into four distinct groups. Through the manner in which it groups and labels the various cases, *Liber de excommunicatione* constructs a grand vision of Christendom's internal order and the church's preeminence within it that does not

[59] VI 5.11.

emerge from thirteenth-century examples. The first group of sentences contains a highly articulated list of twenty offenses against God and the faith such as 1. heretics and their 2. followers, 3. supporters, 4. defenders, and 5. protectors. Similarly, the papal embargo on trade with Saracens is subdivided into 1. those who sell weapons, iron, or timber for the construction of galleys, 2. those who sell galleys or ships to Saracens, and 3. those who serve on Saracen naval vessels. This level of definition, even if not necessarily consistent from one subject matter to another, more than a veritable explosion of new canons, is what produced Bérengar Frédol's elongated list of 'ipso iure' cases. Following deeds directly offending God is the list of crimes against his Vicar on Earth and the Roman Church. The section begins with a case against those who deny that the Roman Church is the Head and proceeds to deal with irregular papal elections, those who cause schism with the Roman Church, those who accept in communion people excommunicated by the pope, and so on. The third section of Bérenger Frédol's work expands the subject matter beyond the papacy and turns its attention to forty cases of infringements of ecclesiastical liberty at large. First in the list is the excommunication of those who raise a violent hand against clerics. Among the plethora of other cases is an excommunication of any emperors, princes, or urban governments who tax churches or the clergy. The final, fourth group of excommunications is comprised of twenty-one general cases. This list starts with the issue of the rents of students in Bologna and includes cases like the employment of assassins to kill Christians or the despoilment of shipwrecked Christians.[60]

While 101 cases may seem no trivial matter, soon enough the legislative activities of Clement V and the Council of Vienne resulted in the *Liber septimus*, which gained popularity as the Clementine Constitutions (*Clementinae*). These expanded the *Liber de excommunicatione* by a further sixty cases. Unlike the presentation of cases drawn from the *Sextus*, the newer additions

[60] Fredol, *De Excommunicatione* 25-42.

read indeed as an appendix and feature primarily canons of disciplinary nature concerning the clergy itself.[61]

Thus by the 1320s, the original list of three or four 'ipso iure' cases composed by Bernard of Pavia ca.1190 had swollen to 161. More important than the question of numbers is that of content. The short list of three unambiguous cases selected by Bernard of Pavia was marked by their defensiveness—they concerned the basic safety of ecclesiastical persons and property. By contrast, the cases compiled by Bérengar Frédol reflect the intellectual buildup of the thirteenth century. Loosely resembling the ordering of Raymond of Peñafort's short list of 'ipso iure' excommunications, the pyramidal structure of Bérengar Frédol's exposition articulates a hierarchical vision of Latin Christendom at a time when the papacy itself was suffering massive setbacks in the temporal realm. Harkening back to the tenor of the *Dictatus Papae*, the list of cases seeks to establish that 1. the Pope is God's representative on Earth, 2. that the Roman Church enjoys complete independence from any and all lay powers, 3. that the Roman Church has a responsibility for the spiritual well-being of Christendom at large, and, most far-reaching, 4. that as part of this process, the Roman Church employs excommunication to correct a variety of pervasive and lasting social ills ranging from student rents to the killing of fellow Christians, issues of political economy like trading with the enemy, and matters of basic humanity like the treatment of shipwrecked Christians. The result was a vision of the Roman Church as in charge of Christendom. The church usurps to itself all jurisdiction by reason of sin'—as Cinus of Pistoia (ca. 1270-1336) critically put it.[62] The proliferation of automatic excommunications, meanwhile, squared poorly with one of the four 'principal themes' the emerge from the classical canon law on the subject, namely that 'excommunication was the most serious sanction of the canon law and not to be invoked lightly'.[63]

It would seem, then, that the works of later polemicists were essentially right and that by the early fourteenth century automatic

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[61] Ibid. 60-67.
[62] In Bellomo, *Common Legal Past of Europe* 76.
[63] Helmholz, *Spirit of the Classical Canon Law* 375.

excommunications were being developed and deployed as a weapon of ecclesiastical intervention within all facets of Christian society. Alternatively, it can be tempting to argue the opposite: that whereas early modern polemicists saw in the expansion of reserved cases a weapon deployed by a papacy on the offensive, it was rather a tool employed defensively by a church suffering numerous and well-publicized setbacks. Yet, either conclusion would share the fundamental assumption of a monolithic, fully centralized church the various components of which acted synchronically in an attempt to turn a well-known grand plan into reality. Moreover, such interpretations would ignore the mechanics of high medieval scholastic inquiry and writing: its propensity for expansive readings would not be reversed until the sixteenth century.[64]

For all the comprehensiveness of Bérengar Frédol's lists, the work does not establish a link between the 'ipso iure' cases of the law and the Holy Thursday disciplinary processes, does not display an interest in abbreviating the lists of excommunications in a manner that would facilitate the systematic delivery of their contents to the laity, and, crucially, does not dedicate but a lonely short paragraph to the issue of reserved cases.[65] At best, Bérenger Frédol's work contains the components and the sketch but certainly not the functional weapon of hierocratic dominance that critics accused popes and canonists of constructing. The very length of the lists of excommunications compiled by Bérenger and the method of breaking down existing cases into ever more minutely refined constitutive parts are reflective of a scholastic drive for precision and comprehensiveness. Its monumentality and tediousness run counter to the needs of preachers and confessors: treatises like Bérenger's can be used as the foundation of effective means of mass communication, but they cannot themselves serve this function.

Thus for early modern polemicists to be right about the course of high medieval developments, we need to identify the systematic

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[64] For an example of a restrictive approach superseding expansive readings of a Holy Thursday bull case see Stantchev, *Spiritual Rationality* 203-206.
[65] Frédol, *De excommunicatione* 107 and Table 1 below.

delivery of the tenor of 'ipso iure' cases to the laity in a rhetorically effective manner, i.e. we need to find early examples of the Holy Thursday bull itself. What this inquiry has so far revealed, however, is that as of ca.1320 major canonistic works had not established a firm connection between the verbal rituals taking place on Holy Thursday and the 'ipso iure' cases that proliferated on the pages of legal compilations between ca. 1190 and ca. 1320. If the Holy Thursday bull existed as a document, it was not yet relevant enough to be worth discussing.

Nevertheless, by the time Bérenger Frédol produced his masterful compendium, the papal chancery had already experimented with the kind of effective rhetorical device based upon 'ipso iure' cases that would later worry and inflame reformers. Having outlined the rise of 'ipso iure' cases from the late twelfth to the early fourteenth century, we need to elucidate the other thread of which the Holy Thursday bull was to be woven: the disciplinary processes of the Roman curia.

The Holy Thursday Processus as a Pastoral Staff

The early modern Holy Thursday bulls that infuriated papal critics were lists of 'ipso iure' excommunications reflecting recurring papal concerns with the internal order of Christendom and the spiritual state of the papal flock. The other side of the coin was the viewpoint of popes and canonists. Popes and canonists were guided by the maxim that people are to be led, not followed.[66] Their approach can be summarized as the development of measures of safeguarding the flock and leading it towards salvation, as a figurative pastoral staff.[67] In addition to offering a list of de-contextualized warning signs with no expiration, the Holy Thursday bulls did on occasion ostracize individuals and communities embroiled in conflict with the papacy. Logically, the latter's historically contingent nature awarded such ad hoc excommunications no place in canonistic commentary. Yet, such cases were at the forefront of papal concerns and thus featured prominently in judicial rituals held in Rome, and particularly in

[66] See Helmholz, *Spirit of the Medieval Canon Law*.
[67] Stantchev, *Spiritual Rationality* Chapter 3.

the Lateran, on annual basis. These occurred three times a year: on Holy Thursday, on Ascension Day, and on the day commemorating the consecration of the major Roman basilicas (November 18).

Tommaso Contin's supposition that Holy Thursday disciplinary rituals should be linked to the dramatic days of papal-imperial confrontations may not be entirely out of place. In 1102, Pope Pascal II (1099-1118) excommunicated Emperor Henry IV (1054-1105-1056) on Holy Thursday.[68] Antipope Anacletus II (1130-1138) did the same to Innocent II (1130-1143) in 1130, while the latter similarly excommunicated Conrad III (1138-1152).[69] In 1160, Alexander III excommunicated Frederick I (1152-1190) on March 24, 'publicly lighting the candles in front of a great number of people, lay men as well as clerics', while Otto IV (emperor in 1209-1215) was banished from the Church on Holy Thursday 1211.[70] Finally, the earliest extant papal letter to attest to the existence of an annual ritual, as Paravicini-Bagliani points out, was sent by Honorius III to Frederick II (†1250) in 1226.[71] Honorius' letter highlights an issue that would feature regularly in the later Holy Thursday bulls, namely the sufferings of those traveling to and from the papal see.[72]

Three years later, in the midst of Raymond's work on the *Liber Extra* and on *De paenitentia*, Pope Gregory IX promulgated one of the more famous thirteenth-century bulls. Eugéne Vernay

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[68] Uta-Renate Blumenthal, *The Early Councils of Pope Paschal II, 1100-1110* (Toronto 1978) 20-21, idem, 'Pascal II and the Roman Primacy', in idem, *Papal Reform and Canon Law in the 11th and 12th Centuries* (Aldershot 1998) no.XI 74.

[69] Cesare Baronius, *Annales Ecclesiastici* (37 vol. Bar-le-Duc 1869) 18.419-421, *ad annum 1430* § 12, 16-20.

[70] PL 200.92, Potth. 1.363 n.4212.

[71] Honorius III's chancery still had access to now lost twelfth-century papal registers, Uta-Renate Blumenthal, 'Papal Registers in the Twelfth Century', *Papal Reform and Canon Law*, no.XV 136.

[72] Paravicini Bagliani, 'Bonifacio VIII, la loggia di giustizia' 380 and n.18. An early mention of the process occurring in the Lateran on Holy Thursday is found in Ekkehardus, Chronicon Universale, MGH SS 6 ad annum 1102, 223-224 at: https:..www.dmgh.de.mgh_ss_6.index.htmno.page.223.mode.1up (accessed 23 March 2021).

considered the document the first extant Holy Thursday bull.[73] The bull has been dated by the editors 'around August 20' because it is inserted in between letters issued in the summer or 1229.[74] Yet, the undated bull follows a letter written to the bishop of Utrecht dated April 10. Moreover, it is common for papal registers to feature bulls out of chronological order. Considering that in 1229 Holy Thursday fell on April 12, it is just as likely that the bull was published not in the summer, but rather in result of an *In Coena Domini processus*. Its content, indeed, places it within the context of papal-imperial relations.

The most famous of the bull's contexts was Gregory IX's conflict with Emperor Frederick II. The emperor had already been excommunicated in 1227 for yet another failure to fulfill his long-standing crusading vows. Then the excommunicated Frederick II had finally departed on the long-planned crusading effort, one that had thus become a contradiction in terms. This expedition led to the recovery of Jerusalem thanks to a truce with Sultan Al-Kamil of Egypt (1218-1238). Since the pact did not allow either the city's fortification or the expulsion of its Muslim inhabitants, it was bitterly resented by the Patriarch of Jerusalem. In Italy, papal-imperial relations degenerated into the so-called 'war of the keys': Frederick's regent, Rainald of Spoleto, attacked the papal states at the end of 1228. In response, Gregory IX summoned an army under his legate Jean of Brienne, the former king of Jerusalem evicted by Frederick, with the aim of attacking Sicily. However, Frederick II's return to Italy in June 1229 marked the end of papal military success in the Italian south.[75]

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[73] Vernay, *Liber de excommunicatione du Bérenger Fréedol* XLIV-XLV.

[74] Archivio Segreto Vaticano, Reg. Vat. 14 fol.133v-134v, Potth. 1.726, Lucien Auvray, *Les registres de Grégoire IX, recueil des bulles de ce pape publiées et analysées d'après les manuscrits originaux du Vatican* (Paris 1896) 1.202-204 no. 332.

[75] On these developments see David Abulafia, *Frederick II: A Medieval Emperor* (Oxford 1988) as well as Guy Perry, *John of Brienne: King of Jerusalem, Emperor of Constantinople (c. 1175-1237)* (Cambridge 2013) 141-149 and Graham Loud, 'The Papal 'Crusade' against Frederick II in 1228-1230', *The Papacy and the Crusades* ed. Michel Balard (Farnham 2011) 91-104.

The papacy, moreover, also faced the conclusion of the Albigensian Crusade in the south of France, which paved the way for inquisitorial activities in the region. On Holy Thursday 1229, the count of Toulouse, Raymond VI swore that he would persecute heretics in his lands and in October the council of Toulouse set the basis of the juridical persecution of heretics.[76] Last, but not least, Greek Orthodox challengers continued to threaten the existence of the Latin Empire of Constantinople, established in 1204 in result of the Fourth Crusade.[77]

Accordingly, Gregory IX's bull first excommunicates and pronounces anathema on behalf of God (excommunicamus et anathematizamus ex parte dei omnipotentis) on all 'heretics'. The expression 'excommunicamus et anathematizamus' was featured in Lateran IV's famous stipulation on heretics (X 5.7.13) as well as in that council's crusading decree *Ad liberandam*.[78] Innocent III's powerful words put an end to earlier attempts to distinguish between excommunication and anathema, which treated the latter as the greater penalty, an 'eternal death'. Although such distinctions were 'perennially revived', they typically 'foundered' for they threatened marginalizing the excommunication itself.[79] The opening expression 'excommunicamus et anathematizamus' would become a defining feature of the late medieval Holy Thursday bull.

Similarly consequential were the bull's subsequent words excommunicated are all 'hereticos, cazaros, paterenos, pauperes de Lugduno, Arnaldistas, Speronistas, et Passaginos et omnes alios quocumque nomine censeantur et omnes fautores, receptatores, et defensores eorum'—which derive from Lucius III's famous *Ad abolendam* (X V.7.9). This opening disposition fuses a perennial, recurrent problem (heretics) with instantiations of

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[76] On the Albigensian crusade see Mark Pegg, *A Most Holy War: The Albigensian Crusade and the Battle for Christendom* (Oxford 2008).

[77] See Donald Queller and Thomas Madden, *The Fourth Crusade: The Conquest of Constantinople* (Philadelphia 1997) and John V. A. Fine, *The Late Medieval Balkans* (Ann Arbor 1987).

[78] Stantchev, *Spiritual Rationality* 58-61. On the Fifth Crusade, James Powell, *Anatomy of a Crusade, 1213-1221* (The Middle Ages; Philadelphia 1986).

[79] Vodola, *Excommunication* 14-16.

heresy specific to the context of the bull (Cathars, Poor Men of Lyon, and so on). Gregory IX's wording found its way into the *Liber extra* as X 5.7.15. It is therefore not surprising that later papal bulls repeated the words.[80] Thus Gregory IX's letter established the opening words and dispositions of the Holy Thursday bull as we know it from the fourteenth century.

Much of Gregory IX's letter focuses on the problem of Frederick II. In addition, the letter excommunicates Theodore Comnenus, ruler of Epirus until 1230 and a scion of a major Byzantine aristocratic family as well as those who delivered horses, weapons, iron, and timber to this prominent challenger to Latin rule in Constantinople and the Balkans.[81] In between these dispositions, which related to major political events of concern to the papacy, the bull also excommunicates those who export horses, arms, iron, or timber to Saracens, those who falsify papal letters, those who impose new tolls, and those who despoil travelers to and from the papal see.[82] Whether Gregory IX's letter was published on the date of the Holy Thursday 'processus' or not, its ad hoc cases show a close relationship to twelfth century precedents, while its 'ipso iure' cases clearly prefigure subsequent Holy Thursday bulls.

Thus by the 1230s, penitential works, annual rituals held in Rome, and, at least on one occasion, a papal letter, all subjected to a 'tough medicine' in the form of temporary delivery to the devil a wide variety of challengers to the authority of the papacy. This fusion of structural pronouncements (against heretics, counterfeiters, contrabandists, and so on) and ad hoc decisions relating to current events (Frederick II, Theodore Comnenus) was featured in many subsequent Holy Thursday bulls. It is the wording of Gregory IX's bull, and not its uncertain publication date that make

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[80] The entire letter was eventually published in *Annales Ecclesiastici* (Cologne 1693) 13, a.1229, no.37, 363.

[81] Fine, *Late Medieval Balkans* 112-124.

[82] Archivio Segreto Vaticano Reg. Vat. 14 fol.133v-134v. *Registres de Grégoire IX*, no. 332, Göller, *Die päpstliche Pönitentiarie*, 249-50 and Jaser, *Ecclesia Maledicens*, 382-5 offer analysis of the bull with limited attention to political contexts.

its promulgation an important instance of the Holy Thursday bull's history.

Yet, although the Holy Thursday bulls follow in all their major features Gregory IX's 1229 letter, the latter is exceptional throughout the preserved thirteenth-century material. Papal letters produced throughout the subsequent decades abandoned the clarity and brevity of Gregory's bull and focused on current events and on ad hoc excommunications that read more like legal documents aimed at making a winning case in front of a judge rather than such designed for swift and effective delivery to assemblies of poorly educated faithful. Considering the overall volume of preserved letters, it is unlikely that a document of major relevance was simply lost to history. It is plausible that Gregory IX's letter was an unusual written version of the disciplinary 'processus' typically held at the Lateran on Holy Thursday, Ascension Day, and on November 18.

Maundy Thursday, in any case, remained an important occasion for papal disciplinary action throughout the thirteenth century. In 1244, the date marked the conclusion of a peace between Innocent IV and Frederick II. A decade later, Innocent IV excommunicated Conrad during an *In Coena Domini processus*.[83] In 1264, Pope Urban IV issued a bull that started with the words *Excommunicamus et anathematizamus*, which—the broadly phrased and inaccurate editorial summary notwithstanding—aimed specifically at those who supplied imperial forces with victuals, weapons, horses, and anything else useful for a military campaign.[84] This ad hoc bull, however, was published right in the middle of summer and not on any of the feasts related to the 'processus'.

From the time of Pope Clement IV (1265-1268), a continuous record of bulls related to the tri-annual 'processus' exists. Paravicini Bagliani has offered a complete list of these bulls

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[83] Paravicini Bagliani, 'Bonifacio VIII, la loggia di giustizia' 393-394.

[84] *Les Registres d'Urbain IV (1261-1264)*, edd. Jean Guiraud and Suzanne Clémencet (4 vol. Paris 1901-1958) Appendix II no.2992. *Ut per litteras apostolicas, les lettres des papes des XIIIe et XIVe siècles* (Turnhout 2014) no.2992 [henceforth: UPL].

without, however, taking into consideration their targets.[85] This sequence of bulls displays some of the elements of the later Holy Thursday bull. On Holy Thursday 1268, Clement IV published *Dudum et apostolice*, a bull addressed *Ad certitudinem presentium et memoriam futurorum* and aimed at Conradin, the last offshoot of the Hohenstaufen dynasty. The bull ordered all faithful to withdraw any form of support by using the typical feudal formula 'auxilium, consilium vel favorem'. Separate bulls published as part of the same 'processus' excommunicated by name high-ranking supporters of Conradin[86].

Clement IV's 'processus' against imperial sympathizers was renewed for years. The result was the (re)production of sequences of verbose bulls, rather than a single, clear-cut, and powerfully worded document akin to the contents of the Holy Thursday bull. For example, on Maundy Thursday 1272, Pope Gregory X issued separate bulls aimed at the citizens of Siena, Pisa, Pavia, and Verona as well as at two individuals accused of attacking ecclesiastics on their way to Rome. These bulls were re-issued on Ascension Day and then again 'in festo Dedicationis' on November 18.[87] At this time, bulls published as part of the annual processus neither began with the words 'ad perpetuum rei memoriam', nor continued with 'excommunicamus et anathematizamus'. The expansion of measures, however, remained an ad hoc provision incorporated within an 'ad hominem' process.[88] In turn, Pope Nicholas IV used 'ad perpetuam rei memoriam' in his well-known bull *Olim*, which proclaimed a complete halt of trade with Saracens in the wake of Latin defeat in the Holy Land.[89] This, too, was an ad-hoc bull, however, and it was published in the

[85] Paravicini Bagliani, 'Bonifacio VIII, la loggia di giustizia' 415-7.
[86] UPL no.690-698.
[87] *Les registres de Gregoire X (1272-1276) et de Jean XXI: Recueil des bulles de ces papes*, edd. Jean Guiraud, Eric Cadier and G. Mollat (Paris 1892-1960), no.162-166, 182-185, 203-206.
[88] *Les registres de Martin IV (1281-1285):Recueil des bulles de ce pape*, ed. Félix Olivier-Martin (Paris 1901-1935) no.482, 571.
[89] *Les Registres de Nicolas IV (1288-1292)*, ed. Ernest Langlois (2 vol. Paris 1886-1888 reprinted 1905) no.6784-6788, Stantchev, *Spiritual Rationality* 120-123.

middle of summer of 1291. As far as we can tell, it was with Boniface VIII (1294-1303) that the various strands of the later medieval Holy Thursday bull came back together for the first time since Gregory IX's 1229 bull.[90]

Boniface VIII's Pontificate: a Turning Point?

Boniface VIII has earned a reputation as one of the most assertive popes in the history of the church: the pope who pushed the concept of papal 'plenitudo potestatis' and the ideal of papal primacy within Christendom to their extremes. Boniface's pontificate was part of a new 'noticeable trend towards a confrontation with political reality, and in particular with questions of power'.[91] Works written in support of the papal position loudly supported hierocratic principles.[92] Commonly reprinted today in sourcebooks of medieval history, Boniface's *Unam Sanctam*, issued on 18 November 1302 in the context of the pope's bitter conflict with King Philip IV of France (1285-1314), is often considered as the most paroxysmal affirmation of papal power.[93] In fact, as James Muldoon argues, Boniface's position is best explained as:[94]

> an elderly man with a lifetime of experience in the law. *Unam sanctam* reflects the impatience of age and the practiced smoothness of years of teaching and studying the law. The French were treated to a basic summary of papal teaching on the Church-State problem prepared for recalcitrant schoolboys by an old master, a master irritated by their lack of knowledge.

On the one hand, Boniface VIII 'angrily denied holding the extreme position on the relation between the two powers . . . attributed to him'.[95] On the other hand, he was keen at representing papal power visually, through his three-crown tiara and elaborate

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[90] On Boniface, see also Chiara Frugoni, *Due papi per un giubileo: Celestino V, Bonifacio VIII e il primo Anno Santo* (Milan 2000).
[91] Canning, *Medieval Political Thought* 135.
[92] Sisson, 'Popes over Princes' 122-123.
[93] Paravicini Bagliani, *Boniface VIII* 327-336, idem, *Il trono di Pietro* 172-174.
[94] James Muldoon, 'Boniface VIII's Forty Years of Experience in the Law', *The Jurist* 31 (1971) 477.
[95] Ibid. 449.

ceremonies.[96] From a spiritual point of view, Boniface insisted on the role of Rome as unique dispenser of spiritual rewards though the Jubilee proclaimed for the year 1300. From a geographical point of view, the Jubilee highlighted Rome's role as navel of Christendom. Faced with the proximity of his bitter Roman rivals the Colonna to the Lateran palace, Boniface spent at first more time at the Vatican than had been usual (and then had the Colonna buildings destroyed). Although the resulting symbolism may thus have been incidental, the Lateran was the palace of the bishop of Rome whereas the Vatican was linked to St Peter's heritage and thus the pope's role as universal pastor. Boniface popularized in papal letters the opening formula *Ad perpetuam rei memoriam* (introduced under Innocent IV), which he used at the beginning of many letters to indicate the eternal value of papal decisions.[97] In short, while Boniface VIII's hierocratic tendencies may have been fully consistent with and delimited by existing jurisprudence, they were commonly exaggerated by contemporaries and the pope himself certainly displayed a pronounced penchant for theatricality and symbolism.

Boniface VIII devoted unusual attention to the traditional disciplinary ceremonies accompanying Holy Thursday, Ascension Day, and the day commemorating the major Roman basilicas. Two papal ceremonials offer details on the rituals. *Ordo* XIII, which was completed under Gregory X in 1273-1274 explains the structure of ceremonies. After a bull of excommunications was read, candles were lighted and then blown out by throwing them onto the ground. Once the ritual of ostracization was completed, one of (re)inclusion marked by the stray sheep's resubmission to pastoral guidance followed as the pope offered indulgences. Although *Ordo* XIV describes in greater detail and with more precision the ceremony and the *In Coena Domini* bull, it was reconstituted in the second half of the fourteenth century, which makes it difficult to understand which components predated

[96] On the subject in general, Paravicini Bagliani, *Le chiavi e la tiara*.
[97] Paravicini Bagliani, *Boniface VIII*, idem, *Il trono di Pietro* 174, Frugoni, *Due papi per un giubileo* 173-261.

Boniface VIII's pontificate and which postdated it.[98] In any case, as Paravicini Bagliani has argued, Boniface built a dedicated marble 'loggia di giustizia' at the Lateran in order to celebrate the general process in a most solemn fashion. Boniface celebrated the rite of the 'processus' twice a year in 1295-1297, 1299, and 1301 and on all three occasions in 1302. In 1300 and 1303, he held a 'processus' on Holy Thursday and possibly also on November 18. The ceremony took place in or in front of Saint Peter's in 1295-1297 and at the Lateran in 1299-1303.[99]

Although nothing is registered under Boniface's first Holy Thursday celebration as a pope, an 'ad perpetuam rei memoriam' bull that renewed the provisions against trade with Saracens was entered into a papal register under Ascension Day 1295. On the same day, the pope also issued an *Ad certitudinem presentium* bull against the authorities of Orvieto over local issues. On November 20, Boniface renewed these bulls while also excommunicating the Duke of Carinthia and the citizens of Pisa.[100] All these were elaborate, fully developed, and completely distinct, lengthy bulls. Only the date of the usual 'processus' against a variety of transgressors indicated their common origin in the ritual of exclusion. The bulls lack the simplicity and rhetorical effectiveness of either Gregory IX's 1229 bull or the subsequent Holy Thursday bulls. Nor did Boniface's early documents standardize the opening words of the 'processus' bulls. Although Boniface used the 'ad perpetuam rei memoriam' opening in a variety of letters, his disciplinary ones continued to, on occasion, display the 'ad certitudinem presentium' beginning, as was the case of bulls regarding Frederick of Sicily, the Colonna, and the Genoese in 1299-1300.[101] In 1296, Boniface's renewal of the trade restrictions begins with 'ad certitudinem' and then cites the usual

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[98] Marc Dykmans, *Le cérémonial papal de la fin du Moyen Âge à la Renaissance* (2 vol. Bruxelles-Rome 1977-1981), Paravicini Bagliani, 'Bonifacio VIII, l'affresco di Giotto' 469-476.

[99] Paravicini Bagliani, 'Bonifacio VIII, la loggia di giustizia' 410-412.

[100] *Les Registres de Boniface VIII* 1.263 no.778-779 (Ascension Day) 1.286 no.847-848 (Nov. 20).

[101] Ibid. 2.596-597 no.3419-3420, 2.925-926 no.3880.

text of the bull, including its 'ad perpetuam rei memoriam' beginning.[102]

Under 30 March 1301, the register of papal letters features a short and unusual 'ad perpetuam rei memoriam' bull. The document does not continue with the powerful and solemn 'excommunicamus et anathematizamus', but rather specifies immediately the targets of the 'processus—contra falsos et impios christianos' who deliver prohibited things to Mamluk Egypt. It then proceeds to a second target—Frederick II of Sicily—followed in short order by a third—the rival, 'schismatic' Colonna. Fourth in this rapid succession of not overly verbose sentences come the Genoese.[103] In November 1301, the 'processus' resulted in a nearly identical bull, except for the absence of the Genoese from its targets.[104] More than well-rounded documents, these bulls read like a shorthand of the verbal 'processus' held that spring and then again in the fall. Nevertheless, in 1301 these letters brought together multiple and distinct targets of ecclesiastical sanctions, some subject to 'ipso iure', others to ad hoc excommunications. These bulls feature clear, potentially effective rhetoric, presumably akin to that of the verbal 'processus' rather than to the verbose bulls typically produced by the papal chancery until that point. Two bulls dated 19 April 1302 took this development further.

The first of these bulls reiterates the form and the content of the 'processus' documents published in 1301, taking aim at contrabandists, Frederick of Sicily, and the Colonna. The second bull, however, harkens back to some of the content of Gregory IX's 1229 letter. Starting with 'excommunicamus et anathematizamus', the bull deals with 1. heretics, 2. pirates, 3. those who torment travelers to and from Rome, 4. contrabandists (again), and

[102] Archivio Segreto Vaticano, Reg. Vat. 48 fol.168v, *Les Registres de Boniface VIII* 2.597 no.1591.
[103] Reg. Vat. 50 fol.111v-112r, brief text in *Les Registres de Boniface VIII* 3.275 no.4327.
[104] *Les Registres de Boniface VIII* 3.324 no.4420.

5. falsifiers of papal letters.[105] It is the bull's third section that takes center stage in terms of word count and detail. The bull is thus clearly related to the Jubilee's context which had popularized travel to the Holy City well after the 'official' year of 1300. The bull strengthens the canonical protection of pilgrims by uttering it together with two well-established 'ipso iure' cases.

Taken together, the two bulls feature all components of the established Holy Thursday bull of later times. The pope acts authoritatively on behalf of God to ostracize sheep that have strayed from the path of salvation. An extended section on the safety of travel to Rome aside, the two bulls are short and effective pronouncements of the church's harshest sentence, suitable for mass delivery. Those violating prohibitions on trade are featured in both bulls, with the only distinction being highlighting Mamluk territories in the bull dedicated to current events. Thus, in 1302, a pair of papal bulls brought together all enemies of the church in documents whose brevity and clarity made adequate for wide dissemination. For the first time, the two bulls keep the 'ipso iure', structural cases largely distinct from the ad hoc ones related to hot issues of the day. Was Boniface's reign a turning point?

A letter from Arnau Sabastida, officer of King Jaime II of Aragon (1295-1327), suggests as much. The letter describes a Holy Thursday ritual held by Boniface VIII. In an example of the often twisted ways in which information was disseminated, the original message had traveled from Rome to Montpellier in the form of a letter whose recipient showed to a nephew of Arnau who then wrote a report to his uncle who, in turn, informed the king. Even the letter's date is uncertain. The end result is a text that highlights the centrality of the 'processus' during Boniface's reign as well as one way in which his attitude was perceived by others. During his sermon, the pope asks the audience three times whether it is faithful to the Church. On the third occasion, a cardinal stands up and confirms that the pope holds God's place on earth and that whatever the pope binds on earth will be binding in heaven. Having asserted the extraordinary nature of papal power, the ritual

[105] Reg. Vat. 50 fol.180v, *Les Registres de Boniface VIII* 3.651-654 no.5015-5016.

proceeds to reify the principle as the pope deposes all attending ecclesiastics only to re-confirm them in their offices on account of their faithfulness. Then, the ceremony moves from papal omnipotence within the church into portraying the relationship between pope and lay powers. Boniface walks away only to return dressed in luxury red velvet with golden spurs and a sword. He then asks the audience whether it believes he is the emperor; the audience replies affirmatively. 'I'm dressed this way', Boniface adds, 'con yo som sobre totes coses de la chrestiandat'. The sword is the one given by the Lord to Peter; one edge is for the heavenly power and the other, for the earthly power. The final act in the elaborate play features Boniface changing clothing again, this time into an unusual black outfit that expresses his sadness caused by disobedience to the church as well as a short statement proclaiming his readiness to root out such defiance.[106]

Paravicini Bagliani considers Sabastida's description broadly believable if misdated (to 1303 from 1302). This was certainly not the only report of Boniface parading with a sword.[107] Boniface, moreover, was known for his innovative, outsize three-sectional headdress, which presumably signified his priestly, royal, and imperial authority. The pope was reported to have exclaimed to German envoys 'I am Caesar, I am emperor!'[108] The ritual, furthermore, would seem to bring to their logical conclusions the ideals of the reform papacy: a pope omni powerful as Christ's deputy on Earth has full authority over everybody within the church and the right to correct lay powers as needed. Interrogating the veracity of Sabastida's report, however, would be a futile endeavor. What we can know is that a letter to a powerful king then in good relations with the papacy portrayed Boniface as a most assertive pope who used the *In Coena Domini* ritual to

[106] Heinrich Finke, *Acta Aragonensia: Quellen zur deutschen, italienischen, französischen, spanischen, zur Kirchen- und Kulturgeschichte aus der diplomatischen Korrespondenz Jaymes II. (1291-1327.)* (3 vol. Berlin 1908) 1.133-135.

[107] On the subject of swords and their meaning from a legal perspective see Muldoon, 'Boniface VIII' 451-474.

[108] Paravicini Bagliani, *Le chiavi e la tiara* 70, Frugoni, *Due papi per un giubileo* 215-218.

emphasize his role as Vicar of Christ and his extraordinary disciplinary power over any and all Christians.

Yet, no matter the importance that Boniface VIII may have ascribed to the *In Coena Domini* ritual, the textual evidence of his bulls does not ring in one tone with his alleged artistic and rhetorical expressions of exaggerated papal power. On the one hand, Boniface VIII was the pope who established 'ad perpetuam rei memoriam' as the starting words of the Holy Thursday bull and it is likely that his famous *Unam sanctam* was promulgated as part of one such 'processus' in 1302.[109] On the other hand, his 1302 bulls marked no turning point. On occasion of Holy Thursday 1303, Boniface's chancery reverted to the earlier practice. Contrary to Göller's claim that this represents the first 'true' *In Coena Domini* bull since 1229, the pope issued a longer bull aimed at those who obstruct travel to and from Rome and a shorter one aimed at contrabandists.[110] The former begins with 'excommunicamus et anathematizamus' while the latter starts with the usual 'contra illos falsos et impios christianos'.[111]

Yet again, as with 'ipso iure' cases, so with early examples of the Holy Thursday bull, early modern critics have a point. The figure of Boniface VIII certainly looms large in the bull's history. However, Jaser has surmised that the evolution of the bull in the fourteenth century is best seen as a chain of responses to current problems rather than as a theoretical affirmation of papal power.[112] Indeed, where critics saw a triumphalist papacy on the offensive, the popes likely saw themselves holding a last line of defense. This position harkens back to Paschal II's excommunication of Henry IV, which can be seen as one part of a larger process resulting in drawing a clear line in the sand between the orthodoxy of the Curia and a schism created by a crowned head.[113] In the context of lay

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[109] Paravicini Bagliani, 'Bonifacio VIII, la loggia di giustizia' 396, 409-410.

[110] Göller, *Die päpstliche Pönitentiarie* 250-252 offers the correct archival reference, but misdates the 1302 bull as 1303 and, moreover, the bull is misprinted. Jaser, *Ecclesia Maledicens* 385-386 follows Göller's work.

[111] Reg. Vat. 50 fol.374r-374v, *Les Registres de Boniface VIII* 845-847 no.5345-5346.

[112] Jaser, *Ecclesia Maledicens* 390-393.

[113] See Blumenthal, *Councils of Pope Paschal II* 20-22.

investiture, the reformers appeared as radical for it was their goal to turn upside down the status quo—because that status quo was in their eyes a world turned upside down. In turn, Gregory IX's bull was issued at a high point in Frederick II's fortunes. Similarly, Philip IV's actions functioned as an exogenous shock for Boniface VIII and his chancery. Boniface's bull appeared in the late stages of a confrontation he was clearly losing, not during the earlier years when the pope optimistically sought to take the fight to both the Colonna and Philip. It is therefore probably not coincidental that the disparate and typically tedious 'processus' bulls came together into shorter, comprehensive, and poignant documents precisely when popes found themselves under utmost duress.

As in the case of 'ipso iure' cases, so in that of Holy Thursday rituals, early modern critics rightly identified the tremendous political, social, and cultural potential of systematically deploying a rhetorically effective summary of excommunications across Christendom. Yet, for all the potential utility of a comparatively short and straightforward Holy Thursday bull, neither Gregory IX, nor Boniface VIII initiated its annual publication. What was later attributed to a grand plan was in fact the result of a slow and unpremeditated historical development.

The Popes of Avignon and the Emergence of the In Coena Domini Bull

Despite the precedents found in bulls of Gregory IX (1229) and Boniface VIII (1302), the first extant series attesting to an annual publication of the Holy Thursday bull is comprised of three letters of Pope Innocent VI (1352-1362) that span the triennium 1354-1356.[114] This leaves us with a half a century gap that poses significant interpretational challenges. The practice of ritually excommunicating enemies of the church on Holy Thursday, Ascension Day, and November 18 certainly persisted in the wake of Boniface VIII's death. On Holy Thursday 1309, in the context of the war of Ferrara (1308-1313), Clement V proceeded against

[114] Reg. Vat. 236 fol.61r-62r (1354) Reg. Vat. 237 fol.74r-75r (1355) and Reg. Vat. 238 fol.46r-47v (1356).

the Venetians.[115] The fate of the 'processus' under John XXII remains unclear. John sought to reestablish papal prestige and power, yet the large corpus of preserved and calendared papal letters contains no reference to the 'processus' that presumably would have been an instrument well-suited for the job.[116] His successors, however, certainly continued the tradition. Clement VI held a 'processus' to excommunicate Louis of Bavaria on Maundy Thursday 1343, and held another against the Archbishop of Milan on November 18 or 19, 1350.[117]

Lists of 'ipso iure' excommunications were also published after Boniface VIII's death. During the sole year of his pontificate, Benedict XI (1303-1304) condemned Christians breaking the embargo on Mamluk Egypt or harassing travelers to Rome.[118] The excommunications were issued in two separated bulls, however, and did not employ the phraseology used by Gregory IX and Boniface VIII. The first Holy Thursday bull containing 'ipso iure' cases from the Avignonese period was apparently issued by Pope Benedict XII (1334-42) in 1338. The letter features all five clauses that Boniface's 1302 bull shared with Gregory IX's 1229 letter, the clause specific to Gregory's bull (on the imposition of new tolls), the clause unique to Boniface's bull (on pirates), and a brand-new case, or rather a sub-case of an existing one, which was aimed at those who inflict violence against whoever travels to the Rota in the pursuit of justice.[119] At the same time, a statement found in a letter from 1340—'olim nonulli pontifices predecessores nostri' used to excommunicate *In Coena Domini* those who attack pilgrims coming to Rome—suggests not only that the bull was not annually published during Benedict XII's pontificate, but that the verbal *processus* itself may had fallen in

[115] UPL no.10425. For this conflict see Giovanni Soranzo, *La Guerra fra Venezia e la S. Sede per il dominio di Ferrara, 1308-1313* (Città di Castello 1905).
[116] Sylvain Parent, *Dans les abysses de l'infidélité: Les procès contre les ennemis de l'Eglise en Italie au temps de Jean XXII (1316-1334)* (Bibliothèque des Écoles Françaises d'Athènes et de Rome 361; Rome 2014) 546.
[117] UPL, no.172, 4805.
[118] Ibid. no.1101, 1102, Stantchev, *Spiritual Rationality* 124.
[119] Ibid. no.6357.

disuse.[120] The innovations of Boniface VIII—the construction of the Lateran's 'loggia di giustizia', as Paravicini-Bagliani has called it, and the Jubilee–had arguably created a close link between the judicial process and the Roman basilicas. The uncertain status of Avignon as papal residence prior to Benedict's reign might have led to a temporary discontinuity in the ritual. Known chiefly for his inquisitorial abilities and theological orthodoxy, Benedict XII was also the pope who transformed the episcopal palace in Avignon into a true papal residence, who considered Avignon a suitable new Rome, and who sought to reassert papal power within Christendom.

In turn, the pontificate of Clement VI (1342-52) seems to offer the ideal context for the establishment of the Holy Thursday bull as an annual accompaniment to the verbal disciplinary 'processus'. Diana Wood has argued that Clement upheld the reformist views of papal power in the strongest of terms.[121] For Etienne Anheim, Clement's pontificate has been seen as a period of 'necessary adaptation of the papal camp's discourse' so as to promote the continuity of theocratic authority amidst novel political realities.[122] Early in 1343, moreover, Clement proclaimed a Jubilee to be held in 1350 through a bull that explicitly portrays him as a continuator of Boniface. Well established in Avignon, the pope had probably no intention of traveling to Italy.[123] It would thus have been all the more suitable for him to (re)establish the disciplinary 'processus' in the new Rome. Moreover, if Avignonese popes held the view expounded by Julius II in later times—that the bull is published annually for the unity and purity of the Christian religion—then the context of the Black Death, which ravaged Avignon along with much of Europe during Clement's reign, provided the perfect backdrop for reminding Christians of what transgressions would have endangered their

[120] Ibid. no.715.
[121] Diana Wood, *Clement VI: The Pontificate and Ideas of an Avignon Pope* (Cambridge studies in medieval life and thought 14; Cambridge 1989) 19-42.
[122] Etienne Anheim, *Clément VI au travail: Lire, écrire, prêcher au XIVe siècle* (Paris 2014) 221.
[123] Wood, *Clement VI* 44.

souls' salvation.[124] Finally, the turbulent rise and fall of Cola di Rienzo in Rome offered yet another opportunity for the pope to publicly and vividly draw lines between faithful and stray sheep.[125] Did Clement VI's fascination with Boniface VIII and the Jubilee also led him to initiate the annual publication of the Holy Thursday bull?

On the one hand, there is more than context alone to suggest that this may have been the case. A letter sent by the papal chancery to the Archbishop of Lyon in 1350 asks the latter to favor the liberation of an inhabitant of Lyon who had been captured while travelling for the Jubilee. Dated November 19, the letter reminds that the sentence of excommunication against those who inflict violence upon travelers to Rome is announced annually on Holy Thursday—'in die Cene Domini apud A.S. publicantur'—and that the sentence had also been announced on the previous day (the day commemorating the consecration of the basilicas of Peter and Paul)—'et pridie publicati fuerunt'.[126] On the other hand, Clement's words, just as Benedict XII's a decade earlier, do not necessarily refer to the written version of the disciplinary 'processus' that we know as the Holy Thursday bull. Indeed, only a single letter with content matching that of the Holy Thursday bulls is contained in Clement's registers. Awkwardly dated to 22 July 1347, the document repeats the contents of Benedict XII's 1338 Holy Thursday bull. The vastness of preserved source material makes it unlikely that a particularly important sequence of documents was left out of the papal registers. There is no clear evidence that Clement went beyond the verbal 'processus'.

Clement VI pontificate may have brought together the contextual and ideological elements justifying a solemn insistence on the issuing of 'ipso iure' excommunications. However, the extant evidence suggests that it was Innocent VI (1352-62) who initiated the annual publication of the bull. Innocent initiated the

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[124] On the Black Death see Monica Green, *Pandemic Disease in the Medieval World: Rethinking the Black Death* (Kalamazoo 2015).
[125] On the subject see Ronald G. Musto, *Apocalypse in Rome: Cola di Rienzo and the Politics of the New Age* (Berkeley 2003).
[126] Archivio Segreto Vaticano Reg. Vat. 144 fol.166v, UPL no.40.

papal reconquest of Central Italy when he sent Cardinal Albornoz there in August 1353.[127] The next year, he promulgated an *In Cena Domini* bull, reissued in 1355 and 1356.[128] Innocent's bulls repeat the first seven clauses of those published by Benedict XII and Clement VI and add a new case: fittingly, this aimed at those who occupy lands belonging to the Roman Church. The record is not complete enough to allow us to adjudicate whether Innocent VI continued publishing the bull after 1356. Be that as it may, Innocent VI established the principle of annual publication.

Innocent VI's successors followed into his footsteps. *In Coena Domini* bulls were registered under Urban V's (1362-1370) first, third, fourth, sixth and eight year.[129] Gregory XI (1370-1378) published, at the very least, one bull in 1372 and another in 1376.[130] Jaser has noted the return of ad hoc excommunications during the Western Schism of 1378-1417 and the competitive use that rival chanceries made of the bull.[131] Indeed, Gregory XII (1406-1415) issued the bull in 1411 and 1413.[132] Remarkably, Alexander V (1409-1410), newly elected by the Council of Pisa, issued a Holy Thursday bull during his short pontificate.[133] Benedict XIII (1394-1417) issued the bull more regularly than any earlier pope: copies are preserved for the years 1404-1405, 1410-1415, and, after his deposition at Constance, 1419-1422.[134] This is ironic for Benedict (Pedro de Luna) was himself excommunicated by Martin V's (1417-1431) Holy Thursday bull and, thanks to the latter's inclusion in Antoninus of Florence's (1389-1459) influen-

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[127] Mollat, *The Popes at Avignon*, 44-51, 130-43.

[128] Archivio Segreto Vaticano Reg. Vat. 236 fol.61r-62r, Reg. Vat. 237 fol.74r-75r, Reg. Vat. 238 fol.46r-47v; UPL no.881, 1445, 2094.

[129] Archivio Segreto Vaticano Reg. Vat. 245 fol.122r-123r, Reg. Vat. 247 fol.248v, Reg. Vat. 248 fol.204r, Reg. Vat. 249 fol.95r, Reg. Vat. 250 fol.76r; UPL no.343, 1689, 2174, 2739, 3062.

[130] Archivio Segreto Vaticano Reg. Vat. 264 fol.107r; UPL no.731, 3781.

[131] Jaser, *Ecclesia Maledicens* 392-393.

[132] Raynaldus and Baronius, *Annales Ecclesiastici* 27 anno 1411, no.1; Valois, *La France et le Grand Schisme* 4.146.

[133] Reg. Vat. 339 fol.76v-78r (We are grateful to Clemence Revest for this reference).

[134] Noël Valois, *La France et le Grand Schisme d'Occident* (4 vol. Paris 1967) 3.371, 405, 4.148, 439.

tial commentary, Pedro de Luna's name became enshrined not as that of a pope who made ample use of the bull, but rather as a schismatic and a paradigmatic target of the bull's content.[135] All in all, during the great schism, the list of 'ipso iure' cases was not modified, but ad hoc excommunications against rival popes were included in the middle of the document.

Antoninus of Florence's Work: Point of Arrival and Link to Modernity

The work of Antoninus of Florence finally bridged together canonistic discussion of 'ipso iure' cases with the papal practice of issuing the Holy Thursday bull. Whether he was the first to do so or not, it was his work that linked the Holy Thursday bull's medieval and early modern traditions.[136] One of the most printed authors of the Renaissance, Antoninus composed both a major *summa* in Latin and a penitential manual that saw multiple Latin, Italian, and Spanish editions.[137] The former brings together the entire high medieval tradition of canonistic commentary and is composed in the high register typical of the genre. By contrast, the latter was written 'per quelli che non sanno troppo': a point that needs to be taken seriously.[138]

Atria Larson has painstakingly reconstructed the foundational role that Gratian's work on penance, embedded already into the first iteration of the *Decretum*, had on subsequent scholastic scholarship.[139] In effect, the image of the medieval history of penance that emerges from Larson's work is that of a tree in which pre-Gratian material forms the roots, Gratian's *Tractatus de Penitentia* the trunk, and the eventual penitential manuals, the crown (which is yet to become the subject of systematic scholarly

[135] See below. For Martin V's bulls: Reg. Vat. 353 fol.134r-135r, Reg. Vat. 354 fol.61r-62r, Reg. Vat. 355 fol.30v-32r, 262v-263v.
[136] On Antoninus see Piero Bargellini, *Sant'Antonino da Firenze* (Brescia 1980 [1947]).
[137] Antoninus of Florence, *Summa Theologica* (Graz 1959 [reprint of Verona 1740; written 1440-54]), idem, *Opera di Santo Antonino arcivescovo Fiorentino da lui medesimo composta in volgare* (Venice 1551).
[138] Antoninus, *Opera* fol.75v.
[139] Larson, *Master of Penance.*

examination). While the relationship between the explosion of simplified, practical manuals and the emergence of mass produced and relatively cheap paper from the second half of the thirteenth century is yet to be determined, there is no doubt that it was the printing press that lent Antoninus' work its outsize relevance in early modernity.

The *Opera*.*Operetta* was printed in a three-digit number of editions featuring different editorial interventions: the one used for this analysis was published in Venice in 1551. Authorial intent can only be determined at the broadest of levels: the rejection of Latin coupled with the use of an uncomplicated syntax and clear diction substantiate the claim that the work was meant as a manual for the instruction of priests. Given the extent of editorial interventions, however, each edition of the *Opera* attests to one among several ways in which Antoninus' work was disseminated. Given Antoninus' systematicity and the popularity of his works with printers, it is not surprising that early modern writers—casual references to Hostiensis or Johannes Andrea notwithstanding—read the early history of the Holy Thursday bull through Antoninus' works. Yet, Antoninus does not offer a history of the bull, but a rather static view grounded in the pontificate of Martin V. What his works allow us to determine is the point of arrival of the three interrelated components whose trajectories we have so far traced: 'ipso iure' excommunications, reserved cases, and the *In Coena Domini processus*.

Antoninus' learned treatment of the matter, which is featured both in his *Summa* and in the section printed separately as *Tractatus notabilis de excommunicationibus*, begins with definitions and subdivisions that summarize in a single column (the printed version features large folios, each containing two columns) the high and late medieval jurisprudence on the subject. Then Antoninus offers a historical trajectory of the explosion of 'ipso iure' cases in factual terms, without judgment or commentary. In conclusion to his opening page on the subject, Antoninus mentions

the existence of cases contained in the annual 'processus' held by the pope, without highlighting Holy Thursday as the occasion.[140]

Following his brief introduction, Antoninus proceeds directly with the list of major excommunications. The very scope of Antoninus' work reflects the explosion of relevant information over time. What Bernard of Pavia wrote on excommunication ca. 1190 is today contained in five standard print pages. The print version of Hostiensis' entire section on excommunication required nineteen large, folio-sized pages. Antoninus' section on major excommunication alone takes fifty-one folio pages. Whereas Raymond of Peñafort and Hostiensis had opted for lists of excommunications followed by a discussion of specific cases and exclusions, Antoninus integrates the latter into the former thus offering a completely different way of presenting the material. This approach turns Antoninus' list into a sequence of sub-sections or sub-chapters, some of which are rather extended. For example, the first, cornerstone case against those who raise a violent hand against clerics, takes a whopping six folio-sized pages as opposed to a few sentences in Bernard of Pavia's work. The entire list of major excommunications is comprised of seventy-one 'ipso iure' excommunications, a reduction in the overall count from Bérengar Frédol's 101 (or 161 counting those in the *Clementines*). Among these, Antoninus singles out a number of cases as reserved ones without grouping them together or even discussing them in any particular order. Some of the reserved cases aim at heretics and their supporters, laymen who impinge on ecclesiastical liberty and.or oppose church sanctions as well as contrabandists and falsifiers of papal letters. Others take aim at clergymen: these range from long-established ones, as the case of prelates who receive in the divine services people excommunicated by the pope, to more recent additions, such as a case against inquisitors abusing their powers.[141]

Having assembled the entire material pertaining to seventy-one major excommunications, Antoninus turns to a Holy Thursday bull published by Pope Martin V. This is included, in its entirety,

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[140] Antoninus, *Summa* 3, Title 24, fol.360v.
[140] Ibid. 3, Title 24, fol.360v-383v.

as c.72. Martin V's version in question is in fact a veritable copy of Gregory XI's 1372 bull. Antoninus offers no commentary other than pointing out the annual nature of the disciplinary process in which the bull originates. The bull begins with the standard 'ad perpetuam rei memoriam' followed by 'excommunicamus et anathematizamus' on behalf of 'dei omnipotenti'. The only addition compared to the pre-schism version of the document is a lengthy ad-hoc case concerning the followers of Pedro de Luna, formerly Benedict XIII. Reflecting the ideal of permanence of ecclesiastical functions and pastoral tools—and keeping with the scholastic approach to learning—the *Summa* lacks historicity and portrays the material as a body of systematized and elucidated eternal truths.[142]

By contrast, Antoninus' vernacular *Opera.Operetta* ditches the highbrow approach of scholasticism for the pragmatism of penitential manuals. The section on excommunication begins similarly to the one in the *Summa*. Then, rather than assuming any pre-existing knowledge of concepts or related laws, the *Opera* breaks down the effects of excommunication in more detail than the *Summa* all the while providing brief and clearly written treatment of the subject. As in the *Summa*, so in the *Opera*, the short introduction aimed at the effects of excommunication is followed by a list of all cases of major excommunication. While the *Summa* offers a detailed treatment of each case, the *Opera* quickly proceeds from each entry to the next. Furthermore, unlike the *Summa*, the *Opera* breaks the list down into reserved cases and non-reserved cases; the former is presented first.

For all its brevity and rhetorical effectiveness, the *Opera* retains one notable aspect of the *Summa*'s bookishness. Since the selection of cases as either reserved or non-reserved is predicated upon the original place of a case in the body of law, rather than its historical evolution, the result lacks coherence. First comes the list of fifteen 'scommuniche riservate al papa'. In this section clauses of common applicability such as those against heretics, falsifiers of papal letters, and contrabandists are mixed with much more

[142] Ibid. 3, Title 24, fol.383v-384r.

technical ones unlikely to involve the average priest that ostensibly made the book's intended audience. Cases in the latter group include the excommunication of clergymen who perform the Eucharist without permission from the parish priest, clergymen who absolve excommunicates from cases of the law over which they have no jurisdiction, and inquisitors who act in bad faith.[143]

Antoninus then follows with the 'many other cases of major excommunication' not reserved to the pope. This section is comprised of fifty-one cases. On the one hand, the list is predicated on each case's place in the body of law. On the other hand, it also accounts for the content of the Holy Thursday bull. Consequently, some cases are featured in the list of non-reserved excommunications yet are accompanied by notes like 'hoggi questa è Papale perche è in processu annuali'. Elsewhere, Antoninus highlights instances in which a normally non-reserved case becomes a reserved one.[144] Finally, as in the *Summa*, Antoninus turns to the Holy Thursday bull. Instead of reporting the content of a specific bull, the *Opera* lists ten of the eleven cases featured in the bull of Martin V that had been copied in the *Summa*. There are, however, two notable differences. First, the *Opera* version features the same cases in a different order and the single case against contrabandists and pirates is broken down into two. Second, this sixteenth-century print edition ditches the then obsolete ad hoc case against an-anti pope and adds instead Luther, his followers, and whoever reads his works or keeps copies of them without papal permission.[145]

Thus Antoninus' vernacular work, replete with sometimes extensive editorial interventions, turned an enormous body of law into a digestible set of guidelines for preaching and confession. Antoninus assumed the continuous validity of the entire list of 'ipso iure' cases. The Holy Thursday bull occupies a great deal more prominent place in the *Opera* than it does in the *Summa*. Nevertheless, for Antoninus, the Holy Thursday bull remained merely a written expression of the verbal 'processus' and a vehicle

[143] Antoninus, *Opera* fol.75v-78r.
[144] Ibid. fol.78r-82v [misprinted as 83].
[145] Ibid. fol.82v-83v.

that enunciated to the laity a selection of 'ipso iure' cases drawn from the entire body of law. Whereas polemicists like Contin began their historical analysis of the history of the Holy Thursday bull deductively and teleologically, Antoninus worked inductively and never identified the Holy Thursday bull as a particularly notable point of arrival of a legal tradition, let alone as the pope's preferred pastoral staff.

Papal critics read the Holy Thursday bull as a particularly strong expression of the canon law's disciplinary clauses, an affront on lay rulers, and a tool whereby popes usurp powers that belong to the church as a whole. Although the *In Coena Domini* bull did indeed have the potential to serve, depending on one's viewpoint, as either a highly effective pastoral staff or an 'arma spaventosa' of hierocratic dominance, it was simply the outcome of a lengthy historical development in which the logic of legal scholasticism arguably took center stage. Our conclusion may be rather boring when contrasted with the powerful rhetoric of Tommaso Contin (or Walter Ullmann), but it accounts for the tenor of extant documents, the mechanics of canonistic work, and for historical contexts. While in the 1570s Giorgio Vasari would paint an *In Coena Domini* bull in a highly suggestive scene representing Frederick II's excommunication at the hands of Gregory IX, the extant pre-sixteenth century evidence suggests that the bull may owe its notoriety chiefly to its early modern critics.[146]

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[146] Paravicini Bagliani, 'Bonifacio VIII' 404.

Table 1. *Composite List of Ipso Iure Cases*

Cno.=composite number
RP=Xaverio Ochoa and Aloisio Diez, edd. Raymond of Peñafort, *Summa de Paenitentia* (Rome 1976), 746-764.
HS= Henry of Susa (Hostiensis), *Summa* (Aalen 1962), 290r.v, 294r.
BF= Eugène Vernay, ed. *Le 'Liber de excommunicatione' du cardinal Bérenger Frédol* (Paris 1912), 25-42, 107.
BF.CN= *Bérenger Frédol*, casus novarum, ibidem, 60-67.
AF=Antoninus of Florence, *Summa Theologica* (Vol. III; Graz 1959 [Verona, 1740, written in 1440-54]), 340va-383va
R—author explicitly claims it as a reserved case

Reserved cases have exceptions, typically *in articulo mortis*.

Cno.	RP	HS	BF	AF	Excommunicated and Anathemized are: [COMPOSITE TEXT: sum total of the various commentaries]	Canon Law references
1	1-3	1-2	I, 1-15R	4-6 R	Heretics, inventors of new heresies, and their believers, 'receivers', defenders, helpers; Whoever provides ecclesiastical burial to the above; Advocates who defend heretics and notaries who write down instruments for them; Magistrates.who: of any title anywhere who fail to assist bishops or inquisitors in the prosecution of heresy; fail to deliver persons in the power of the bishop or inquisitors after having been requested to do so; do not punish those condemned for heresy by the bishop or inquisitor; prosecute cases of heresy; refuse enforcement; free people jailed for heresy without permission from the bishop or the inquisitor(s);	C.24 q.1 c.1-3 X 5.7. 8, 9, 11, 13 VI 5.2.2, 18

					impede the process or the sentencing by the bishop or the inqusitor; dare to oppose or impede the bishop or the inquistor in the aforesaid activity; Those who knowlingly aid and support such actions.	
2	4	3, 29	II, 1, 8-10	9-10	Schismatics or: Those who claim that the Roman Church is not the Head and needs not be obeyed or that it cannot promulgate canons such as the one on heretics; Those who are ordained by or have received benefices from schismatics (and are not willing to relinquish them).	C.7 q.1 c.6 D.19 c.5 X 5.8.1 VI 5.3.1
3	5R	4-6R	III, 1-6R II, 14-16 R	1-3 R	Whoever raises a violent hand against ecclesiastics; Whoever was capable of defending the ecclesiastical person but did not; Whoever detains a clergy member; Whoever had someone attack or detain an ecclesiastic; Whoever aids anyone in comitting any of the above; Whoever, even without ordering it, approves of the act; If an ecclesiastic submits, whoever was to injure him is excommunicated anyway; Those who attack, injure, or capture cardinals; Those who assist such people; Those who defend such people; Princes and magistrates who fail to enforce this constitution; Whoever detains a bishop, or beats a bishop, or expels a bishop from his see.	C.17 q.4 c.29 X 5.12.6 X 5.39.5, 6, 9, 29, 36, 47 VI 5.9.5 VI 5.11.23 Clem. 5.8.1
4	6	7-8 see	III,	26	Laics in general or specifically consuls and other magistrates of	X 3.49.4, 7 VI 3.23.3

		9-14	7-11		cities or any others with authority who impose or maintain.do not abolish burdens on clergymen and churches; Ecclesiastics who pay taxes on ecclesiastical revenues or goods; Those who seize or order the seizing of goods of churches or clergy stored in sacred places; Those who knowingly provide assistance in the above acts, publcily or clandestinely.	
5	7R	15R	III, 23R	11R	Those who set churches on fire.	C.17 q.4 c.14 C.23 q.8 c.32 X 5.39.19
6	8R,	15	III, 24R	12R	Whoever commits sacrilege.breaks violently into.despoils a church.	C.11 q.3 c.107 C.17 q.4 c.5 X 5.39.22
7	9	16-17	II, 2-4	48	Whoever claims to be a pope, having been elected by fewer than 2.3s of the cardinals; Whoever takes the title of pope having been elected by the third part of the cardinals; Whoever would accept such a person as a pope.	D.23 c.1 X 1.6.6
8	10R	18-19 R	II, 12-13R	13-16R	Those who falsify papal letters; Those who knowingly use false letters; Those who change even a letter or a period without having the authority to do so; Those who aid such people.	X 5.20.7
9	11	20	I, 16-18	30R	Those who deliver weapons, iron, and timber for the construction of galleys to Saracens; Those who sell galleys or ships to Saracens; Those who serve on their vessels or supply them with machines or provide them with other forms of aid in detriment of the Holy Land;	X 5.6.6, 11, 12, 17 Extrav. Com. 5.2.1

					Those who export anything to Mamluk Egypt; Those who visit the Holy Sepulcher without papal license.	
10	12	21	IV, 1	39	Masters and students who deal with the Bolognese in prejudice of students [to lease their rooms before their leases have expired by offering to pay more].	X 3.18.1
11	13	22-23	I, 19-20, III, 34-36	38, 52, 53	Any ecclesiastics who attend lectures on [civil] law or medicine; Monks who rashly abandon the habit of their order; Monks who attend any studies without permission; Professors who knowingly teach laws or medicine to monks who have abandoned their order.	X 3.50.3, 10 VI 3.24.1-2
12	14 R	25R	IV, 2R	35	Whoever aids an excommunicate in his crime.	X 5.39.29, 55
13	15	24	-	-	Those who exercise the art of crossbowmen or archers against Christians.	X 5.15.1
14	16	9-14	III, 15-22	17	Those who enact statutes that impinge on ecclesiastical liberty; Those who enforce them; Those who henceforth produce such statutes; Those who could have stopped their passing but did not; Those who write down such statutes; Magistrates enacting them; Whoever pronounces judgments based on them; Whoever writes down such judgments; Those who enforce practices that impinge on ecclesiastical liberties.	X 3.49.4, 7 X 5.39.49, 53

15	17R	27R	II, 11	32R	Whoever knowingly receives in the divine services a person excommunicated by the pope.	X 5.39.18
16		26	IV, 3-5	36	Whoever kills a Christian by way of an assassin or who aids such assassins.	VI. 5.4.1
17		28	IV, 7	31R	Those who capture or despoil the naval vessels of Romans or other Christians travelling for legitimate reasons, like trade; Those who rob shipwrecked Christians.	X 5.6.6 X 5.17.3
18		30	IV, 13-15 CN 5	33, 49	Clergymen who accept givings from public usurers or who provide ecclesiastical burial to public usurers; Ecclesiastics of rank lesser than bishop who allow foreigners to settle in their lands to practice usury; Those who do not expel manifest usurers from their lands; Those who rent out their houses for the excercise of usury.	X 5.19.3 VI 5.5.1 Clem. 3.7.1
19		31	IV, 9	46	Whoever is the vicar of another and carries himself against the tenor of *quoniam in plerisque* [which allows the bishop of a multi-lingual town to appoint another bishop as his vicar for a certain demographic in the same city, but which also demands that the latter be in all matters subordinate to the former as a city cannot have more than one bishop; nevertheless, the term 'bishop' is used for the vicar].	X 1.31.14
20		32	-		Ecclesiastics who condemn to death or mutilation.	X 3.50.5
21			III, 14	18	Those who forbid their subjects to sell or to buy from ecclesiastics or to grind their grain or bake their bread.	VI 3.23.5

22			II, 17-20R	43	Those who take an office or elect someone to office in the City [of Rome] against the constitution of Nicholas III [originates in Charles of Anjou's appointment as a senator] Those who accept such offices; Those who obey such people; Those who aid any of the above**.**	VI 1.6.17
23			III, 40	O 28	Those who cause discord during the election of an abbess.	VI 1.6.43
24			IV, 12	45	Those who commit fraud in the process of collecting testimony from women.	VI 2.1.2
25			III, 12-13	23	Those who impede ecclesiastical jurisdiction; Those who aid such people in doing so.	VI 3.23.4
26			IV, 10	37	Those who make their *conservatores* mingle into affairs other than manifest injuries or who extend their jurisdiction over what requires judicial inquiry.	VI 1.14.15
27			II, 5-7	40-41	Whoever sends letters to cardinals gathered in conclave; Lords and magistrates of cities where a conclave is held, who fail to observe its closure or who restrict the cardinals beyond what is stipulated; Lords and magistrates who, when notified of the pontiff's death, fail to take an oath to observe these rules.	VI 1.6.3
28			III, 29-30	21	Whoever grants reprisals against ecclesiastics or their properties; Whoever extends reprisals to ecclesiastics.	VI 5.8.1
29			III, 37	22	Whoever oppresses ecclesiastics or their relatives or	VI 1.6.12

					who despoils their churches or goods on account of not having their favorite elected to office.	
30			III, 38-39	19	Those who usurp the goods of vacant churches; Clergy, monks, and others who assist in the above.	VI 1.6.13
31			IV, 11	27	Those who extort absolution from.lifting of excommunication, suspension, or interdict.	VI 1.20.1
32			III, 25-26	20	Laymen who compel prelates to submit to them ecclesiastical rights or property; Laymen who take more than what their contract allows.	VI 3.9.2
33			III, 31-32R	24R	Whoever retaliates for a sentence of excommunication or interdict.	VI 5.11.11
34			III, 27		Those who belong to mendicant orders approved after Lateran IV, and who, after Lyon II, admit anyone, make acquisitions, or dispose of property without papal permission.	VI 3.17.1
35			III, 28	25	Those who exact tolls on ecclesiastics carrying their own belongings, i.e. carrying things for reasons other than commerce. The same applies to things carried on behalf of churches.	VI 3.20.4
36			III, 33		Those who extract violently or attack whoever takes refuge in a church.	C.17 q.4 c.10 X 5.39.22
37			IV, 8		Those who are hit by excommunications through the words ‘those who transgress are excommunicated’.	X 5.39.21
38			IV, 16-17	47	Those absolved from an ‘ipso iure’ excommunication ‘propter mortis periculum’, or another legitimate reason, by a	VI 5.11.22

					person other than the one by whom they were to be absolved, and who, having the danger passed, fail to present themselves to whoever had excommunicated them; Those who receive absolution from the apostolic see or its legate with the proviso that they would present themselves to their bishop to be assigned penance and who fail to do so.	
39			IV, 18-20	69	Those who dare to provide any glosses to the regula of Saint Francis, as per Nicholas III's *exiit qui seminat*, except for such explaining the grammer; Professors distorting the rule; Those who criticize the rule; Those who gloss or explicate anything beyond the letter of *Exivi de paradiso*.	VI 5.12.3 Clem. 5.11.1
40			IV, 21		Princes and judges refusing justice to clergymen and people of low status.	C.23 q.5 c.26
	BF. CN	AF			**CONTINUATION**	
41	1-2	50			Those who impede the sequestration of goods in certain cases [when a judgment is made against the current holder of a benefice].	Clem. 2.6.1
42	6-9				Monks who defraud the church with respect to tithes.	Clem. 3.8.1
43	15	58			Monks and canon regulars who leave and go to princely courts to do harm to their superiors.	Clem. 3.10.1
44	16	59			Monks who keep arms without permission from their abbot.	Clem. 3.10.1
45	17	44			Those who impede the visitations of nuns.	Clem. 3.10.2
46	18-20	42, 61			Beguines, Beghards, and those who take the life of the *fraticelli* as well as those who support them or advise someone to join the above. Excludes	Clem. 3.10.1 Clem. 3.11.1 Extrav. John XXII, 7.1 Extrav. Com. 3.9.1

			pious women that are neither guilty, nor suspect.	
47	21-23	34	Those who knowingly marry within prohibited degrees or who marry nuns.	Clem. 4.1.1
48	24-27	7R 8	Inquisitors or bishops who abuse their powers when prosecuting heresy; Inquisitors who extort money from churches.	Clem. 5.3.1 Clem. 5.3.2
49	28-32	29	Magistrates who pass statutes whereby anyone is required to pay usury.	Clem. 5.5.1
50	33-36R	54	Monks who administer sacraments without permission by bishop or priest.	Clem. 5.7.1
51	43-45		Temporal lords who detain ecclesiastics until these have resigned their benefices.	Clem. 5.8.2
52	46	60	Mendicants who buy or sell properties without papal permission.	VI 5.6.1
53	48-49	51	Clergy and monks who induce anyone to swear that they would choose to be buried at their church or, if they have already promised this, that they would not change their mind.	VI 3.12.1 Clem. 5.8.3
54	50-52	56	Monks who do not observe interdicts.	Clem. 5.10.1
55	53-57R	28R	Those who force prelates to violate the rules of interdicts and excommunications.	Clem. 5.10.2
56	58R	62R	Friars Minor who admit to divine offices those of the third order during an interdict.	Clem. 5.10.3
57	p.59	64	Those who cut cadavers to obtain the bones and bury them elsewhere.	Extrav. com. 3.6.1
58		55	Monks.mendicants who say anything, during a sermon or otherwise, that makes those who listen refrain from paying tithes.	Clem. 5.8.3
59		57	Religious who fail to inform penitents about their obligation to pay tithes.	Clem. 5.8.3
60		63R	Whoever signs a contract.makes a promise to obtain anything at the curia.	Extrav. com. 5.10.1
61		65-66	Simoniacs in ordination or benefices; Whoever fails to reveal simony of which they knew.	Martin V at Constance, Sessio 43, *De simoniacis*

62		67R	Those who receive or give anything for admission to a monastery.	Extravag. Com. 5.1.1
63		68	Those who dispute papal letters issued before the pope's coronation.	Extravag. Com. 5.10.4
64		70R	Clauses aimed to protect Franciscans and Dominicans from outside attacks.	Multiple
65		71	Mendicants who transition to a non-mendicant order without permission.	Extrav. Com. 3.8.1

Table 2. *In Coena Domini bulls: ipso iure excommunications*

TABLE KEY

A: Heresy and those who help heretics
B: Piracy and those who help pirates
C: Imposition of new tolls
D: Selling of weapons and war materials to Saracens and enemies of the faith
E: Falsification of apostolic documents
F: Violence against travelers to Rome, especially those bringing supplies to the Curia
G: Violence against travelers to Rome who seek justice and dispensations
H: Invaders of lands belonging to the Holy See
I: Violence against pilgrims to Rome
J: Hindering food supplies to Rome and the Curia
K: Refusal to pay the census due to the Holy See
L: Retention of money and goods collected for the Holy See
M: Conspiracy against the pope
N: Requiring taxes on churches or ecclesiastics
O: Preaching of abolishing indulgences

Date	Pope	Ipso Iure excommunications (following order of appearance)												
1229(undated)	Gregory IX	A	E	C	F	D								
19 Apr 1302	Boniface VIII	A	C	B	F	D	E							
9 Apr 1338	Benedict XII	A	B	C	D	E	F	G						
22 July 1347	Clement VI	A	B	C	D	E	F	G	H					

10 Apr 1354	Innocent VI	A	B	C	D	E	F	G	H						
30 Mar 1363	Urban V	A	B	C	D	E	F	G	H						
2 Apr 1366	Urban V	A	B	C	D	E	F	G	H						
25 Mar 1372	Gregory XI	A	B	C	D	E	F	G	I	H					
16 Apr 1394	Clement VII	A	B	C	D	E	F	G	H						
9 Apr 1410	Alexander V	A	B	C	E	D	J	F	G	I	H				
9 Apr 1411	Gregory XII	A	B	D	E	F	G	H							
9 Apr 1422	Martin V	A	B	C	E	D	J	F	G	I	H				
28 Mar 1426	Martin V	A	C	E	B	D	J	F	G	I	H				
29 Mar 1431	Eugenius IV	A	E	B	D	J	F	C	G	I	H				
29 Mar 1453	Nicholas V	A	E	B	D	J	F	C	G	I	H	K	L		
25 Mar 1456	Calixtus III	A	E	B	D	J	F	C	G	I	H	K	L		
26 Mar 1467	Paul II	A	E	M	N	B	D	J	F	C	G	I	H	L	O
19 Apr 1470	Paul II	A	E	M	N	B	D	J	F	C	G	I	H	L	
26 Mar 1471	Sixtus IV	A	B	C	E	D	J	F	G	I	H				

NOTES

Ius e Lex

Manlio Bellomo

Circola da secoli una convinzione, legata a una constatazione, granitica, fondamentale. Sappiamo e ripetiamo che i romani hanno fondato il diritto. È un'ovvietà. Però è una convinzione comunemente dimenticata, affondata nel subconscio, ed è quasi scomparsa.

È forse inutile ripetere che su quelle basi originarie si è sviluppata la scienza giuridica dell'intera Europa. Con i romani il diritto ha assunto i propri metri di giudizio e di calcolo: misure fisse, funzionali per i bisogni della prassi; misure che non si consumano nell'uso, come è proprio di ogni scienza; misure reiterabili secondo bisogni individuali e collettivi; misure delle quali si possa e si debba verificare la ripetitività. Senza di che non vi è scienza.

Bene. Mi continuo a chiedere, dopo tanti anni di attività scientifica e accademica, quale sia stata la grande 'invenzione' che ha consentito agli antichi romani di essere considerati i fondatori di una 'scientia iuris' mai prima pensata, e perciò mai prima esistita.

Ricomincio dagli anni della mia prima formazione universitaria, e non sembri strano. Ricomincio dai *Digesta* e dal *Codex* di Giustiniano, ultimi avamposti di un mondo che verso la fine del secolo VI andava sgretolandosi, quello romano del tardo Impero. Perché i *Digesta* e il *Codex*? Perché i primi hanno salvato quanto si poteva degli 'iura' e il secondo delle 'leges'.

'Ius' e 'lex': i due originari capisaldi di quella scienza nuova che dopo Giustiniano sarebbe scomparsa per oltre cinque secoli dall'orizzonte delle culture e delle società europee continentali, salvo casuali eccezioni: sarebbe scomparsa, come è noto, tra il sesto e l'undicesimo secolo.

Allo 'ius' i giuristi della Roma classica avevano demandato il compito di elaborare e di fissare le 'variae causarum figurae' che saranno catalogate a fini istituzionali da Gaio e poi da Giustiniano. Alla 'lex', invece, avevano affidato il compito di imporre specifici

precetti per l'azione quotidiana. Dello 'ius' erano responsabili i giuristi, della 'lex' i legislatori.

Le 'variae causae', o 'figurae', o 'categorie' secondo un moderno linguaggio, erano state pensate come stampi fissi in base a un calcolo ragionevole e razionale: se l'artigiano ha bisogno di un 'metro' per compiere un'opera di buon livello, 'a regola d'arte' come comunemente si pensa, perché il giurista, nell'azione quotidiana, non dovrebbe disporre di uno strumento funzionalmente analogo? Sulla base di questo elementare ragionamento nacquero le prime 'categorie' giuridiche, pensate secondo ragione e ragionevolezza. Variabili e moltiplicabili, certo, per cui nel tempo accanto all'usufrutto si pose il 'quasi-usufrutto', accanto al 'dominium' e alla 'locatio' l'enfiteusi etc. Però 'categorie' tutte marcate da una singolare qualità: essere destinate a costituire l'alfabeto essenziale non solo dello 'ius' ma anche, a valle, della 'lex'. Un alfabeto che consentiva di forgiare un linguaggio fondamentale, duraturo nel tempo, finché altra ragione e ragionevolezza non avessero voluto modificarlo, o finché un furore distruttivo non avesse voluto ignorarlo o cancellarlo.

Nella 'lex' si calavano le 'figurae' giuridiche, e le 'figurae' rendevano comprensibili i precetti singoli, occasionali, variabili, limitati nello spazio e anche nel tempo, duraturi tanto quanto dura una consuetudine, o quanto dura una legge finché non venga abrogata o sostituita. Si scendeva dunque di un gradino: dallo 'ius' alla 'lex'. E questa si avvaleva delle categorie proprie dello 'ius', e avvalendosene le incorporava come propria struttura portante.

Oggi pare un discorso difficile da descrivere e ancora più da capire, perché forse si è perduta la distinzione fra 'ius' e 'lex', e perciò si parla e si scrive di 'diritto legislativo', e per connessione si va alla ricerca di 'diritti locali', o di un presunto 'diritto patrio' regionale o nazionale: operazione sensata solo se si pensa alla 'lex' e non allo 'ius', perché lo 'ius' non può avere confini territoriali regionali e neppure nazionali o internazionali. Lo 'ius' ha bisogno di grandi spazi per respirare e vivere.

Nella realtà attuale emerge il dubbio che la originaria chiara distinzione si stia perdendo, e che forse si sia già perduta.

I dubbi scompaiono se prendo a caso un solo esempio. Scrive un collega, con accento magistrale, che 'il diritto è legato a un'epoca determinata e alla società a cui si riferisce'. Se qui, come appare evidente, il diritto è solo 'lex' la frase è di una banalità disarmante, e il giudizio è confermato dallo stesso autore, che continua e scrive: il diritto 'riguarda un presente che varia . . . necessariamente col tempo', per cui il giurista odierno deve percepire la 'relatività del diritto, sia nelle sue mutevoli espressioni legislative che nelle interpretazioni [delle leggi] attraverso il tempo'.[1] Dunque: diritto eguale a 'lex', e a null'altro; interpretazione come affare comaresco fra la 'lex' e l'interprete. Lo 'ius' è scomparso, e con esso è scomparsa la 'scientia iuris'.

'Leges', dunque, e solo 'leges'. Sperdute, scritte senza gli stampi delle categorie, stampi nei quali si siano calati e abbiano preso forma princìpi e valori. Leggi dunque slegate dai princìpi e dai valori, o addirittura a volte recalcitranti contro i princìpi e i valori. 'Leges' interpretabili 'ad arbitrium', proprio perché mancano di un linguaggio reiterabile, definito da una specifica scienza autonoma.

Se il diritto si esprime e si riduce alle 'leges' si aprono ovvie conseguenze.

Prima conseguenza: i giuristi rinunciano al loro compito peculiare, di produrre 'scientia iuris'. Rinunciano, cioè, alla loro personale responsabilità di offrire e imporre limiti all'irresponsabile volontà di ogni avventuroso legislatore.

Seconda conseguenza: dovremo chiudere le scuole di diritto, perché non c'è alcuna 'scientia iuris' da insegnare, e c'è solo una 'cognitio legum' e, al più, una 'interpretatio legum': basta perciò trovare dove che sia le singole e disperse 'leges', prenderne visione, e ciascuno le capisca come crede e sa, e come pensa o pretende di poterle interpretare. Da dimenticare le 'categorie' giuridiche, astratte, ingombranti frutti di pedanti intellettuali, e da dimenticare il 'sistema iuris', inutile, e anzi oppressivo, perché sarebbe un limite ingombrante al dilagante arbitrio del legislatore.

[1] Gian Savino Pene Vidari, *Recensione* a Pio Caroni, *La solitudine dello storico del diritto* (Milano 2009) in RSDI 84 (2011) 508.

Via la ‘scientia iuris’. Si è persa la memoria che le categorie, come le ‘leges’ nelle quali si calavano, e il ‘sistema iuris’ che le comprendeva, che il tutto, nell’insieme, costituiva l’unico argine contro l’anarchia e l’unico strumento utile per opporsi all’arbitrio del signore feudale e poi del principe, e oggi a chi si fa tiranno spudorato o felpato.

‘Leges’ e ‘interpretatio’ sono diventati i nuovi protagonisti della c.d. ‘scienza giuridica’. Nient’altro che questo. E perciò si comprende perché siano in gran parte scomparse intitolazioni che erano correnti fino a pochi anni fa: e dunque non faccia meraviglia se dalle ‘Facoltà di Giurisprudenza’ e dai ‘Dipartimenti di Giurisprudenza’ (di Iuris prudentia) si sia passati ai ‘Department of Law’.

Università di Catania.

Versions of a Legal *Repertorium* Related to the Works of Bartolus

Thomas M. Izbicki

The manuscript copies of works by the jurist Bartolus de Saxoferrato in North American Libraries receive little attention. Fifteen manuscripts, however, have been listed by Patrick Lally and myself.[1] The 'consilia' of Bartolus can be found together with those of others in certain of these manuscripts.[2] One manuscript containing 'consilia' of Bartolus, Cornell University *Consilia Legalia,* 4600 (formerly K.5) also contains two 'repertoria', indexes to legal literature with topics arranged alphabetically.[3] One of these, an incomplete work covering only A through I, listed by me as *Repertorium Bartoli*,[4] deserves further attention to indicate its full contents and its context in the history of the learned law. It indexes the prominent jurist Bartolus de Saxoferrato [DGI 1.177-180, DBI 6.640-669], but it also includes references to other writers on law.

Alphabetical legal 'repertoria' originated as part of a larger development of reference tools, producing by the thirteenth century indexing and the compilation of concordances.[5] Both

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[1] Thomas M. Izbicki and Patrick Lally, 'Texts Attributed to Bartolus de Saxoferrato in North American Manuscript Collections', *Manuscripta* 35 (1991) 146-155; Izbicki, 'Additional Texts Attributed to Bartolus de Saxoferrato in North American Manuscript Collections', *Manuscripta* 55 (2011) 205-212. See Orazio Condorelli, 'Bartolo da Sassoferrato (1313/14-1357', *Law and the Christian Tradition in Italy: The Legacy of the Great Jurists*, edd. Orazio Comdorelli and Rafael Domingo (Law and Religion; London-New York 2021) 160-178.

[2] Four manuscripts containing Bartolus' *consilia* are listed in the index to Izbicki, 'Additional Texts', 210. See also Julius Kirshner and Izbicki, '*Consilia* of Baldus of Perugia in the Regenstein Library of the University of Chicago', BMCL 15 (1985) 95-115.

[3] https://newcatalog.library.cornell.edu/catalog/5854408.This manuscript was digitized for the author by the staff of the Cornell libraries.

[4] Izbicki and Lally, 'Texts Attributed to Bartolus de Saxoferrato' 152.

[5] Mary A. Rouse and Richard H. Rouse, *Authentic Witnesses: Approaches to Medieval Texts and Manuscripts* (Notre Dame 1991).

canon and civil law developed such tools, some topical in arrangement but others arranged by letters of the alphabet indicating subjects.

In canon law, this process of providing access to a growing literature has a strong connection to the Gratian's *Decretum* and to the growing number of papal decretals. The great bulk of the *Decretum* especially needed forms of access and indexing. One approach was abbreviation. Many such treatments of the compilation survive.[6] An early and influential alphabetical guide to the *Decretum* was composed in the thirteenth century by Martinus Polonus, a Dominican. As papal decretals became more important, this *Margarita martiniana* was expanded into a *Martiniana aucta*. Martinus' work was the first of a series of alphabetical guides to canon law or to individual collections or commentaries.[7]

In the field of Roman law, the recovery of the laws compiled by the order of Justinian, especially to *Digest*, spawned a large literature, including authoritative commentaries. Even the feudal law, as represented in the learned law, received indexing. 'Repertoria' of Roman law are not common. Among those, one was attributed to Azo [DGI 1.137-139, DBI 4.774-781]. However, jurists compiled indexing of both laws, canon and Roman, usually in the form of an alphabetical guides. Their multiplication in the fourteenth and fifteenth centuries show the need jurists felt to provide guidance to the study of both interrelated laws with their burgeoning literatures.[8] At least one 'repertorium' overlapped

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[6] Kuttner, *Repertorium* 257-299.

[7] Thomas Kaeppeli, and Emilio Panella, *Scriptores Ordinis Praedicatorum medii aevi* (4 vol. Rome 1970-1993) 3.117 no. 2973.

[8] Numerous examples of legal 'repertoria' can be found in the Vatican manuscript collections; see Gero Dolezalek, *Verzeichnis der Handschriften zum römischen Recht bis 1600*, 4 vols. (Frankfurt: Max-Planck-Institut für europäische Rechtsgeschichte, 1972); *Catalogue of Canon and Roman Law Manuscripts in the Vatican Library*, ed. Stephan Kuttner and Reinhard Elze (2 vol. Vatican City 1986-1987), 1, 33-34, 330, 333, 2, 48-59, 142-143, 202, 268-269, 271-274, 276, 278-279, 300-302. A larger number can be found in the database Manuscripta Juridica, http://manuscripts.rg.mpg.de/, accessed on November 23, 2021.

disciplines entirely. Johannes Calderinus, the son-in-law of Johannes Andreae, compiled an index of biblical and legal sources, serving as a concordance to both.[9]

The *Repertorium* in the Cornell manuscript begins at p. 1A: ABBAS. ABBATIA. ABLATIUUS ABSOLUTUS. Quod Ablatiuus absolutus uerificatur de presenti. ff. de incen. rui. nau. [Dig. 47.9] per bar. It ends at p. 55A at v. INTELLIGI: et uer. repudiare et uer. actor in q. 32 et 6. Most of the contents focus on texts from the *Corpus Iuris Civilis*, with the large majority of these entries making specific references to the lectures of Bartolus. He is usually cited in the form 'per bar.'. There are a few exceptions, citations to 'per bartholum' (p.49B), 'per ba^{r}' (p. 49B);' per glo. et bar' (p. 37B), 'per bar. et bal.' (p. 7B). Also, in a few cases, *consilia* of Bartolus are cited briefly, usually identifying on as 'incipiente' with a word or two, e.g. 'incipiente pluries contingitur' (p. 5B). These are found at pp. 5B, 6B, 12B, 15A, 17A, 34B, 36B, with some of these texts identifiable.[10] One disputed question of Bartolus, 'Statuto lucane ciuitatis cauetur' (p. 9A), also appears.[11]

Bartolus (†1347), however, is not the latest jurist cited. One of the latest is Baldus de Ubaldis (†1400),[12] usually cited as 'per bal.' (e.g. pp. pp. 3B, 4B, 7A, 13B, 16A, 19A, 22A, 23A, 23B, 27B, 32B, 34A, 38B). There are other forms of citation to Baldus: 'per bal. de perusi.' (p. 36B), p. 2A, 'per bal. in lect' sua' (p. 2A), p. 34B, 'per bal. et iac. de are. et sali.' (p. 34B),[13] 'secundum bal.

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[9] DGI 1.1008-1012 (Johannes Andrea); Johannes Calderini DGI 1.386-388, DBI 16.606-608 at 607.

[10] These are identifiable in Bartolus de Saxoferrato, *Commentaria cum additionibus Thomae Diplovatatii aliorumque* excellentissimorum *doctorum*, 9 vols. (Venice 1526: anast. repr. 1996), 9, fol.54rb-va: Consilium, I 176 (5B), 'Pluries contingitur'; 9, fol.55va-b: Consilium I, 180 (17A), 'Si aliqua possessio'; 9, fol.19rb-va: Consilium I, 59 (17A), 'Commune spoletani'. Another consilium, 'Colonus de Spoleto' is mentioned in a commentary; see Bartolus, *Commentaria cum additionibus doctissimorum* (Basel 1588), 7B.

[11] *Opera omnia*, 9, fol.71ra-73rb: Quaestio I. This text is cited twice in the incunabulum under BANNUM.

[12] Kenneth Pennington, 'Baldus de Ubaldis', RIDC 35 (1997) 35-61.

[13] 'Sali.' may be Ricardus de Salicetto; see DGI 2.1678-1679, DBI 87.198-200.

de perusi.' (p. 36B), 'per bal. in lect' et reper''. (p. 40A), 'per ia. de are. et bal. (p. 48B)'.

Several other jurists, mostly somewhat older than Bartolus or roughly contemporary with him, are cited. One of the most frequently mentioned is Cinus Pistoriensis [DGI 1.543-546, DBI 92.791-796],[14] usually cited as 'per cy' or 'per Cy.' (e.g. pp. 1A, 4B, 7A, 13B, 20B, 23A, 23B, 27B, 30B, 31A, 32A, 33B, 44B, 45A). Additional references are made to 'per cy. et omnes' (p. 13A), 'et ibi Cy.' (p. 4B). Dinus de Mugello [DGI 1.769-771, DBI 88.785-787] is cited as 'per dy.' (pp. 13A, 23A), 'per dy. et bar.' (p. 13A), 'per glo. Dy.' & 'per cy. et per dy.'(p. 47A). Other citations, some referenced together with Bartolus, include mention of Florianus de S. Petro [DGI 1.880, DBI 90.112-113] (p. 24B), 'per dominum floria. de bono.' & 'per dominum Florianum' (p. 24B), 'per do. Flori. de bononia' (p. 40B);.Guillelmus de Cuneo,[15] 'ita no. gui. de cuni.' (p. 5A); Iacobus de Arena [DGI 1.1099-1101, DBI 37.243-250], pp. 3A 'per ia. de are.' (p. 3A), 'per iac. de ar.' (p. 2B), 'per iac. de are.' (p. 40A, 41B); 'per Iac. de are. et Bar.' (p. 4A, 30B), 'per Ia. de are et bar.' (p. 30B), 'per iac. de are. et bar. et cy.' (p. 41B). Iacobus de Belvisio [DGI 1.1102-1103, DBI 8.89-96], 'ia. de bello visu.' (p. 13A); Iacobus de Butrigariis [DGI 1096-1098, DBI 13.498-501], 'per bar. et per iac. de but.' (p. 5B), per bar. et Iac. but.' (p. 12B), 'per iac. but.' (p. 13B), 'per Iac. but.' (p. 26B); Iohannes Calderinus, 'per Io. Cald.' (p. 19A); Odofredus [DGI 2.1450-1452, DBI 38.700-705], 'per odo.' (p. 27B), 'per bar. odo. et cy.' (p. 34B); Oldradus de Ponte [DGI 2.1452-1453, DBI 79.191-194], 'per Oldra.' (p. 28B); Petrus de Bellapertica, [16]'per pet' de bella pertica' (p. 36B)). There also are references to the glosses of Accursius [DGI 1.6-9, DBI 1.116-121] on the *Corpus Iuris Civilis*, 'glo.' (pp. 5A, 5B, 37B, 50A). Also, two 'consilia' not by Bartolus are cited (p. 32A), 'in quodam consilio francisci d. francisci de arena Incipiente ludouicus quondam domini francisci'; (p. 9B), 'vide uero consilio domini nicholai de neapoli

[14] Also, 4B, 'et ibi Cy.'.
[15] *Thomae Diplovatatii liber de Claris iuris consultis, pars posterior* (Bologna 1968) 253-254.
[16] Ibid. 204-205.

quod incipit Circa questionem'.[17] A question not by Barolus also appears (p. 9B), 'per albericum de rosa. [Albericus de Rosate, DGI 1.20-23, DBI 1.656-657] in ultima parte suarum questionum statutorum'.

The compiler also cites canon law: Innocent IV [DGI 2.1872-1874, DBI 62.435-440], 'per bar. et per Inno. in c. Sicut' (p. 5A); *Liber* sextus (pp.12B, 18B, 24B); Johannes Andreae, 'Io. An.' (pp. 23A, 24B, 34B[18]). At p. 12B the compiler cites texts from the *Liber extra* and *Liber sextus*.

The manuscript which seems closest to the Cornell manuscript is: Biblioteca Universitaria de Barcelona Ms. I.169:

> ABBAS. ABBATIA. ABLATIVUS ABSOLUTUS. Quod Ablativus absolutus verificatur de presenti.– [YPOTHECA] . . . rem alienam per Bartholum. Finis. Explicit repertorium Bartholi de Saxoferrato per ipsummet compositum quedam per alios sumpsit adiecta excepto de commentis Bal. et quorundam aliorum et etiam per quemdam doctorem qui fuit heres Bal.

Note that the Barcelona manuscript attributes composition of the original to Bartolus with comments derived from the works of Baldus and others. It even attributes completion of the text to 'an heir of Baldus', unspecified.[19] The Leipzig manuscript, listed below, instead lists the *Repertorium* thus, 'Explicit repertorium domini Baldi'.[20] Both build on the occasional references to Baldus de Ubaldis within their texts.

There are, however, other manuscripts and at least one incunabulum (Naples 1477) with different, somewhat later versions, beginning and ending:

> [ABBAS. ABBATIA.] AB. Qualiter significat ista dictio ab [uide] ff. de duobus reis. l. Si [ex] duobus [Dig. 45.2.12] per Bar.– YPOTECA,

[17] Possibly Nicolaus Spinellus de Neapoli; see *Thomae Diplovatatii liber de Claris iuris consultis, pars posterior*, 289.

[18] 'et io. an. in prohemio VI.'

[19] Francisco Miguel Rosell, *Inventario general de manuscritos della Biblioteca Universitaria de Barcelona* (Madrid 1958), 3, 225-27.

[20] Emanuele Casamassima, *Codices operum Bartoli de Saxoferrato recensiti*: *Iter Germanicum* (Florence 1971), 86 no. 67.

> YPOTHECARIA … forma libelli in ypotecaria in l. ex sextante §. latinus de excep. rei iudi. [Dig. 44.2.30.1].[21]

The manuscripts are:

Leipzig, UB 1053;[22]

London, BL Arundel Ms. 464 fol. 1r-131v;

Madrid, BN 12090 fol. 86ra-158rb;[23]

Salamanca, Biblioteca de la Universidad Civil 2529 fol. 1r-286r. Addenda fol. 287-296;[24]

Vat. lat. 2363 fol. 3ra-52ra. Addenda, EXECUTIO–MUTUS, fol. 52ra-57vb. This copy is extensively annotated.

Vat. lat. 2637, fol. 113ra-166va.

The Vatican copies offer a title perhaps more useful than any others, because of the references to Bartolus' lectures: *Repertorium iuris precipue in lecturis Bartoli*.[25]

A printed version of the later text ca be found in: Bartolus de Saxoferrato, *Repertorium super omnibus lecturis*

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[21] The Leipzig manuscript and Vat. lat. 2637 fol.113ra add the words [ABBAS. ABBATIA] at the beginning. Both have the words [ex] and [uide]. Vat. Lat 2637, fol.166va ends, 'Forma libelli in ypotecaria uide ff. de pig. act. in l. rem alienam' This is the same as the ending of the Barcelona manuscript, to which the Naples ed ., Vat. lat. 2363, fol.52r and the Leipgiz copy add, 'Forma libelli in ypothecaria In eadem l. per eundem', except that the Leipzig version ends, after 'ypothecaria', 'vide in eadem l. per Bartholum de Saxoferrato'.

[22] Casamassima, *Iter Germanicum*, 86; *Katalog der Handschriften der Universitäts-Bibliothek zu Leipzig*, ed. R. Helssig (Leipzig 1905), 6, 3, 174-**1**75.

[23] Antonio Garcìa y Garcìa, *Codices operum Bartoli de Saxoferrato recensiti: Iter Hispanum* (Florence 1973), 71-72 no. 50, beginning with the rubric, 'Incipit lux cecorum' *in marg*.; ending 'et videndum in l. Gallus in principio de liberis et posthumis per Bartholum . . . supra in verbo sive per totum et supra in verbo differentia'.

[24] García y García, *Codices operum Bartoli de Saxoferrato recensiti: Iter Hispanum*, 86-87 no. 70. Text attributed here to Antonius Mincuccius, ending, 'in xiiii. q. Explicit repertatorium domini Bartoli de Saxoferrato totum completum de novo compilatum per alphabetum in villa Bonon'.

[25] DIGI.VATLIB.IT/VIEW/MSS-Vat.2363 & 2637. *A Catalogue of Canon and Roman Law Manuscripts in the Vatican Library* 2, 57, 202.; Kenneth Pennington, 'Baldus de Ubaldis' 48 n.66.

suis printed in Naples by Sixtus Riessinger and Francesco del Tuppo, 6.III.1477) [GW 3658].[26]

This later text shares some material with the shorter version. For example, the second significant entry in the later version:

> ABLATIVUS. [Quod] Ablativus absolutus licet sit preteriti temporis uerificatur in presenti. ff. de incen. rui. nau. l.ii. [Dig. 47.9.2] per Bar.

is slightly augmented, compared with the incipit of the earlier version as found in the Cornell and Barcelona manuscripts.

A sign that the compiler of the later version employed the earlier one can be found in connection with treatment of death sentences. The Cornell manuscript (p. 22B) has two entries under DAMNATUS AD MORTEM. Falling between the earlier version and the incunabulum, Vat. lat. 2363 fol.12va has the same two entries, as does Vat. lat. 2637 fol.122vb.[27]

> DAMNATUS AD MORTEM. Quod damnatus ad mortem et abiectis a minibus familie remanet seruus pene. ff. de pe. l. qui ultimo [Dig. 48.19.29] per bar. s. ver. capitalis in i. q. supra ver. congregatio i. q.
>
> Quod damnatus ad mortem fugiens peccat. [vide ff.] de pe. l. Relegati. [Dig. 48.19.4] per bar.

The latest version in the incunabulum divides these two texts into four entries under DAMNATUS:

> DAMNATUS. Quod damnpatus ad mortem & abiectus de minibus familie remanet seruus pene vide ff. de penis. l. qui vltimo [Dig. 48.9.29] per Bar.
>
> Circa hoc vide quod no. sub verbo capitalis pena in i. q.
>
> Et vide quod no. in sub verbo congregatio. in .ii. per Bar.
>
> Quod damnatus ad mortem fugiens peccat. Vide ff. de penis. l. Relegati. [Dig. 48.19.4] per Bar.

The text under GABELLA in the incunabulum usually differs little from that in the Cornell manuscript (pp. 48B-49A), except in individual words (e.g. Cornell's 'Quod in locatione' replaced with 'Quod in emptione'), until near the end. There is has (p. 49A) two concluding entries under GABELLA. The first of these reads:

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[26]. DIGI.VATLIB.IT/VIEW/MSS-Vat.2363 & 2637.

[27] The incunabulum is found at: https://proxy.europeana.eu/9200369/webclient_DeliveryManager_pid_11760914_custom_att_2_simple_viewer?view=http%3A%2F%2Fatena.beic.it%2Fwebclient%2FDeliveryManager%3Fpid%3D11761044%26custom_att_2%3Ddeeplink&disposition=inline&api_url=https%3A%2F%2Fapi.europeana.eu%2Fapi.

> Utrum debeatur gabella de vendicatione ad quam faciendam quis erat obligatus. ff. ad l. Fal. in l. [Si] pupillus in prin. [Dig. 35.2.21] per bar. eo. ti .l. Nesenius [Dig. 35.2.22] ff. ad l. Fal. In lege Fal. Non habetur [Dig. 35.2.45] et l. Cum ticio [Dig. 35.2.55] eodem lib. per bar.

Vat. Lat. 2363 fol. 22vb-23ra has the same first entry.[28] Other changes are found later. Vat. lat. 2637, fol. 135ra splits off from the earlier text, saying:

> l. Nesenius [Dig. 35.2.22] ponitur ibi questio de gabella. De gabella soluenda pro debitis annis. vide ff, ad l. fal. l. in leg. falcidiam (!) Non habetur [Dig. 35.2.45] & l. Cum titio. eodem titulo [Dig. 35.2.55] per bart.

There is a further difference at GABELLA in the printed text, where two entries are split by the Neapolitan printers to provide three:

> Si dicit statutum quod de quodlibet instrumento vel contractu ex quo alicui ius queritur soluatur gabella solute preterea solution. vtrum debeatur gabella de uendicatione ad quam faciendam quis erat obligatus. ff. ad l. Fal. l. Si pupillus in prin. [Dig. 35.2.21]per bar. eo .titulo l. Nesenius [Dig. 35.2.22] ff. ad l. Fal. l. in lege Fal. Non habetur [Dig. 35.2.45] et l. Cum ticio eo. ti. [Dig. 35.2.55] per bar.
>
> Ex eodem titulo l. Nensenius [Dig. 35.2.22]. ponitur alia q. de gabella.
>
> De gabella soluenda pro debitis annuis. vide ff, ad l. fal. l. in leg. falcidiam (!) Non habetur [Dig. 35.2.45] & l. Cum ticio. eodem titulo [Dig. 35.2.55] per Bar.

The section GABELLA in all versions ends with the entry: 'Si statutum dicat quod mansarii'.

The amount of material added later or omitted can be understood by comparing the later entries under the letter C. The short version has few entries in some disorder:

> (pp. 18B-22A) CONPROMISSUM – COPULATIUA – CORAM – CORRIGERE – CONSANGUINEUS – CONCENSUS – CONSILIUM – CONSUETUDO – CONSULTOR – CONTRATUS – CONPATER – CONTINUUS – CONSTITUTIO – CAUSA – CONSCIENTIA – CONTUMAX – CONPARERE – CONPETENS – CORPORALIS – CONPERATIO – CULPA – CUMULATIO – CURARE – CURATOR – CUM – CUSTOS.

An intermediate version, a little longer and more orderly, appears in Vat. lat. 2363 fol. 11ra-12va:[29]

> COMPROMISUM – COPULATIUA, COPULA, COPULARE – CORAM – CORRIGERE Siue EMENDARE –CONSANGUINEUS –

[28] DIGI.VATLIB.IT/MSS-Vat.2363.
[29] DIGI.VATLIB.IT/MSS-Vat.2363.

CONSENSUS – CONSILIUM –CONSUETUDO – CONSULTOR – CONTRACTUS –CONTINUUS – CONSTITUTIO – CONTROUERSIA – CAUSA – CONSCIENTIA – CONTUMATIA – CULPA, CULPABILIS –CUMULATIO – CURARE – CURATOR, CURA – CUM – CUSTOS.

Vat. lat. 2637 fol. 119vb-122vb[30] has yet another, much more augmented list:

COMPROMUSSUM – COMMUNIS, COMMUNICARE, COMMUNITER – CONCEPTUS, CONCIPERE, CONCEPTIO – CONCESSIO – CONCORDIA – CONCUBINA – CONDEMPNATIO, CONDEMNATUS – CONDITIO, CONDICIONALIS – CONDUCTOR – CONFEDERATIO – CONFESSIO – CONFINATUS, CONFIMA, CONFINACIO –CONFORMATIO – CONFISCACIO – CONIUNCTA –CONIUNCTIO, CONIUNCTUS, CONIUNGERE – CONSANGUINEUS – CONSENSUS – CONSCIENTIA – CONSILIUM – CONSTITUTIO – CONSUETUDO – CONSULTOR – CONTRACTUS – CONTROUERSIA – CONTUMATIA – CONUENTIO, CONUENTUS, CONUENIRE – COPIA, EXEMPLARE TRANSUMPTUM – COPULATIUA, COPULA, COPULARE – CORAM – CORRIGERE, EMENDARE – CREDULITAS – CREDITOR – CRIMINALIS –CRIMEN – CULPA, CULPABILIS – CUM – CUMULATIO – CURARE – CURATOR, CURA – CUSTOS.

The latest version, as found in the unpaginated Naples incunabulum, has these entries, nearly matching those in Vat. lat. 2637; however, it locates CONTRACTUS after CONTINUUS:

CONPRMOSISSUM – COMMUNICARE – CONCEPTUS, CONCIPERE, CONCEPTO – CONCESSIO – CONCORDIA – CONCUBINA – CONCLUSIO – CONDEMNATIO, CONDEMNATUS – CONDITIO, CONDITIONALIS – CONDUCTOR – CONFEDERATIO – CONFESSIO – CONFINATUS, CONFINITA, CONFINATA – CONFIRMATIO – CONFISCATIO – CONGREGATIO, CONGREGARE – CONIUNCTA PERSONA – CONIUNCTIO, CONIUNCTUS, CONIUNGERE – CONSANGUINEUS – CONSENSUS – CONSCIENTIA – CONSILIUM – CONSTITUTIO – CONSUETUDO – CONSULTOR – CONTINUUS – CONTRACTUS – CONTROVERSIA – CONTUMATIA – CONVENTIO, CONVENTUS, CONVENIRE – COPIA, EXEMPLARE TRANSUMPTUM – COPULATIVA, COPULA, COPULARE – CORAM – CORRIGERE SEU EMENDARE – CREDERES, CREDULITAS – CREDITOR – CRIMINALIS CIVILIS – CRIMEN, CRIMINOSUS – CULPA, CULPABILIS – CUM – CUMULATIO – CURARE, CURATOR, CURA – CUSTOS.

[30] DIGI.VATLIB.IT/MSS-Vat.2673.

There are other divergences. Several entries in the printed version include cross references within the *Repertorium* (e.g. FILIUS, FILIA, FILIATIO; HERES, HEREDITAS, HEREDITARIUM). More puzzling in the removal of Baldus de Ubaldis from among the references to jurists.[31] Others, including Cinus, Dinus and Iacobus de Butrigariis remain, as does Petrus de Bellapertica (under CONSANGUINEUS). An addition, under AUCTOR, is 'per Angelum', possibly Baldus' brother Angelus de Ubaldis [DGI 1.68.71, DBI 97.285-288]. Also, 'Guil. et Bar.' appear under CALCULUS.

Overall, the text represented by the Cornell and Barcelona manuscripts, provided a base from which later compilers worked, tinkering with the received texts but also adding numerous new entries. This produced much more detailed, and possibly more useful, legal reference tools. However, the Neapolitan printers reduced the number of useful references to jurists, especially when they removed Baldus de Ubaldis throughout their printed text. Study of other manuscripts of this *Repertorium* in its differing versions will cast further light on how reference tools were created for use by students and practitioners of *Ius commune* and adapted for further utility. Particularly, such an inquiry will reveal which topics the compilers thought most significant, a matter on which they evidently did not agree.

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[31] Baldus, however, is cited in both Vatican manuscripts: Vat. lat. 2363 e.g. fol.12va; Vat. lat. 2637 e.g. fol.122vb, 'per bal.'.

Kynast, Birgit. *Tradition und Innovation im kirchlichen Recht: Das Bußbuch im Dekret des Bischofs Burchard von Worms*. Quellen und Forschungen zum Recht im Mittelalter, 10. Ostfildern, Thorbecke, 2020. Pp. 541. €68.00. ISBN: 978-3-7995-6090-0.

John Burden

Interest in Burchard's *Decretum* is currently rising in the wake of several landmark works of recent decades. In the early 1990s, Hartmut Hoffmann and Rudolf Pokorny identified the original manuscripts of the *Decretum* copied at Worms cathedral.[1] Then, soon after 2000, two volumes of essays marked the millennial anniversary of Burchard's consecration as bishop of Worms.[2] Finally, in 2011, Greta Austin produced a major study of Burchard's life, goals, and editing methods.[3] In the meantime, scholars have also pursued several other lines of inquiry. Historians of culture and gender continue to recognize the *Decretum* as a key source for popular beliefs and customs in the Middle Ages.[4] Work on the manuscript transmission, especially in Italy, has picked up where Gérard Fransen and Hubert Mordek left off in the 1970s.[5] Finally, scholars

[1] Hartmut Hoffmann and Rudolf Pokorny, *Das Dekret des Bischofs Burchard von Worms: Textstufen-frühe Verbreitung-Vorlagen* (MGH Hilfsmittel 12; Munich 1991).

[2] Thomas T. Müller et. al., edd. *Bischof Burchard I. in seiner Zeit: Tagungsband zum biographisch-landeskundlichen Kolloquium vom 13. bis 15. Oktober 2000 in Heilbad Heiligenstadt* (Heiligenstadt 2001); Wilfried Hartmann, ed. *Bischof Burchard von Worms, 1000–1025* (Mainz 2000).

[3] Greta Austin, *Shaping Church Law around the Year 1000: The Decretum of Burchard of Worms* (Church, Faith and Culture in the Medieval West; Farnham 2009).

[4] Birgit Kynast, 'Das Dekret von Burchard von Worms (1000-1025) als Quelle mantischer Praktiken', *Mittelalterliche Rechtstexte und mantische Praktiken*, edd. Klaus Herbers and Hans Christian Lehner (Beihefte zum Archiv für Kulturgeschichte 94; Cologne 2020) 99-118; Andrea Maraschi, 'There is More than Meets the Eye: Undead, Ghosts and Spirits in the *Decretum* of Burchard of Worms', *Thanatos* 8 (2019) 29-51; Andrea Vanina Neyra, 'The Silence of the Night Interrupted: Diana and Her Company of Women According to Bishop Burchard of Worms: Considerations on the Practical Usefulness of the *Corrector sive Medicus*', *Sacri canones editandi: Studies on Medieval Canon Law in Memory of Jirí Kejr*, ed. P. O. Kraf (Ius canonicum medii aevi 1; Brno 2017) 40-63; Birgit Kynast, 'Der Blick eines mittelalterlichen Bischofs auf das weibliche Geschlecht: Frauen (und Männer) im Dekret Burchards von Worms', *Geschlecht in der Geschichte: Integriert oder separiert? Gender als historische Forschungskategorie*, edd. Alina Bothe and Dominik Schuh (Mainzer historische Kulturwissenschaften 20; Bielefeld 2014) 213-234.

[5] Kathleen G. Cushing, 'Law and Reform: The Transmission of Burchard of Worms' *Liber decretorum*', *New Discourses in Medieval Canon Law Research: Challenging the Master Narrative*, ed. Christof Rolker (Medieval Law and Its Practice 28; Leiden 2019) 33-43; Roger E. Reynolds, 'Penitentials in South and Central Italian Canon Law Manuscripts of the Tenth and Eleventh Centuries', *Early Medieval Europe* 14 (2006) 65-85. The most comprehensive list of *Decretum* manuscripts can be found in Kéry 133-155.

continue to debate the special role and function of Book 19, the penitential *Corrector*.[6] No less than four dissertations on the *Decretum* have appeared in the last two decades, including ones by Birgit Kynast and the present reviewer.[7] Happily, a major project is now underway in Mainz to produce a long-awaited critical edition of the *Decretum* under the direction of Ingrid Baumgärtner, Klaus Herbers, and Ludger Körntgen.[8]

Birgit Kynast's recent book, which focuses on the *Corrector*, advances our knowledge on several of the aforementioned fronts. It can be roughly divided into three parts. The first part (Chapters I-V) summarizes the latest scholarship on Burchard, the *Decretum*, and the *Corrector*. The second part (Chapter VI) surveys the contents of the penitential questionnaire (BU 19.5), a long list of crimes, sins, and penances which occupies much of Book 19.[9] The third and final part (Chapter VII) provides a detailed study of the questionnaire's penances for murder and violence. Kynast's main goal, like Greta Austin's, is to demonstrate that Burchard, contrary to the negative assessment of Paul Fournier, was a sophisticated legal thinker.[10] As we will see below, she is entirely successful, showing that Burchard seriously engaged with his sources (Tradition) and that he introduced novel opinions (Innovation). A study of the penitential questionnaire (BU 19.5) for this purpose is especially appropriate since—unlike the rest of the *Decretum*—Burchard actually composed much of it himself. This essay will highlight several of Kynast's successes and end with discussion about the function of the *Corrector*.

Kynast's first notable success is to provide an informative summary of the contents of, and recent scholarship on, Burchard's penitential questionnaire (BU 19.5). The questionnaire takes up about twenty folios in most manuscripts

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[6] John Burden, 'Reading Burchard's *Corrector*: Canon Law and Penance in the High Middle Ages', *Journal of Medieval History* 46 (2020) 77-97; Ludger Körntgen, 'Canon Law and the Practice of Penance: Burchard of Worms's Penitential', *Early Medieval Europe* 14 (2006), 103-117; Sarah Hamilton, *The Practice of Penance, 900–1050* (Royal Historical Society Studies in History, New Series 20; Rochester 2001) 38-44; Ludger Körntgen, 'Fortschreibung frühmittelalterlicher Busspraxis: Burchard's "Liber corrector" und seine Quellen', *Bischof Burchard I* 199-226.

[7] John Burden, 'Between Crime and Sin: Penitential Justice in Medieval Germany, 900-1200' (Ph.D. Diss.: Yale University, 2018); Birgit Kynast, 'Buße und kirchliches Recht: Das Bußbuch im Dekret des Bischofs Burchard von Worms' (Ph.D. Diss.: Johannes Gutenberg-Universität Mainz 2017); Andrea Vanina Neyra, 'El Corrector sive medicus de Burchard de Worms: una visión acerca de las supersticiones en la Europa' (Ph.D. Diss.: Universidad de Buenos Aires, 2010); François Gagnon, 'Le Corrector sive Medicus de Burchard de Worms (1000-1025): Présentation, traduction et commentaire ethno-historique' (Ph.D. Diss.: Université de Montréal, 2010); George House, 'Pastoral Eschatological Exegesis in Burchard of Worms' *Decretum*' (Ph.D. diss.: University of Exeter, 2008).

[8] https://www.adwmainz.de/en/projekte/burchards-dekret-digital/current-issues.html.

[9] All references to individual canons follow the 'sigla' and numbering of Fowler.

[10] Austin, *Shaping* 90-222; Greta Austin, 'Jurisprudence in the Service of Pastoral Care: The 'Decretum' of Burchard of Worms', *Speculum* 79 (2004) 929-959.

and contains 194 questions which range in size from a single sentence to a paragraph. The questions usually begin with a second-person singular verb such as 'fecisti' and usually end by prescribing an amount of penance in years or days. Penances involve fasting on certain days of the week and on liturgical feast days, but sometimes include other social and spiritual sanctions. For serious crimes and sins, punishment begins with a 'carena' (German for 'quadragesima'), a special forty-day period of intense penance. The questions are generally organized in order of severity. Serious offenses such as homicide, perjury, and adultery appear in the first part. Pagan practices, fornication, and superstition appear in the middle part. Minor violations of diet and religious observance appear at the end. While the first two-thirds of the questionnaire addresses crimes and sins committed by both genders, the final third focuses on offenses stereotypically associated with women such as infanticide and crafting potions.

The penitential questionnaire (BU 19.5) has long been recognized as an important source for the beliefs and practices of ordinary people in the Middle Ages. Still today, the wider appeal of the *Decretum* beyond specialists in canon law and penance is due mainly to its fascinating passages on witches, werewolves, magic, and illicit sex acts. Historians of culture and gender will find helpful the discussion in later chapters (VI-VII) on topics such as family, women, Jews, feuds, divination, and superstition. As these subjects come up in her analysis of the penitential questionnaire, Kynast summarizes their treatment by Burchard and his sources, often revealing interesting editorial interventions in the process. Kynast also pulls together much recent scholarship—mostly in German, but also in English and French—on these subjects. By assembling these works, many from diverse subfields and publications, Kynast has performed a great service which will ensure that the *Decretum* remains accessible to a wider scholarly audience. Those who are interested in these subjects but are daunted by the book's size should take advantage of the index.

Kynast's second notable success is more technical: the determination of Burchard's sources. For the original text, she uses the earliest Vatican, Frankfurt, Bamberg, and Würzburg manuscripts, the first three of which Hoffmann and Pokorny identified as products of the Worms scriptorium. The Vatican and Würzburg manuscripts contain the earliest version of the text while the Frankfurt and Bamberg manuscripts contain early revisions which align with basically all other *Decretum* manuscripts. Kynast also uses manuscripts to establish the text of Burchard's sources, focusing on versions close to what he must have used. Burchard's two main sources were Regino of Prüm's *Libri duo de synodalibus causis*, compiled in Mainz around 905, and the *Collectio Anselmo dedicata*, compiled in Lombardy between 882 and 896.[11] Burchard also consulted many other minor sources, and for penances he relied especially on the Bede-Egbert penitentials, Halitgar's penitential, Hrabanus Maurus's

[11] On Regino's collection and the *Anselmo dedicata*, see: Kéry 124-133; Fowler 70-74, 77-79.

letters, and the decrees of Carolingian councils.[12] Burchard's main source and model for the penitential questionnaire (BU 19.5) was a smaller questionnaire found in Regino's collection (RP 1.304). Regino, in turn, modelled his questionnaire on an even smaller one found in the Bede-Egbert 'mixtum' penitential.

With careful attention to detail, Kynast examines every question of the penitential questionnaire (BU 19.5). It was already known that Regino's questionnaire (RP 1.304) provides about a third of the material and that Burchard added the rest. It was also known that Burchard's additions often repeat texts and penances found in earlier books of the *Decretum*. For this reason, it has become common to describe the penitential questionnaire as a summary of the larger collection.[13] From here, Kynast takes the analysis of sources much deeper, thoroughly dissecting each question. Most questions can indeed be traced to Regino's questionnaire, to canons in other books of the *Decretum*, or to Burchard's other known sources. Kynast also draws attention to surprising sources including a second questionnaire in Regino's collection (RP 2.5) which describes how bishops should conduct visitations of churches and abbeys in their dioceses. Burchard included this text in full in Book 1 (BU 1.94) of the *Decretum*. Only rarely is Kynast unable to identify a source.

Kynast's effort is nothing short of herculean. Most canon law collections cite from only a few sources, allowing scholars to identify a canon's formal source by superficially comparing the texts. Previous work along these lines has identified one or two likely formal sources for most canons in the *Decretum*. What I have long suspected, however, and what Kynast's analysis seems to confirm, is that Burchard had access to an exceptionally large body of sources which contained many versions of basically every canon. Comparing and contrasting them, he often took bits and pieces from each. When identifying Burchard's source for any canon or question, we need to look for multiple sources. In a feat of philology, Kynast has compared every word of the questionnaire to multiple versions of many possible sources. Not only will her conclusions be invaluable for the critical edition currently underway, her methodology sets a new philological standard for canon law studies to aspire to.

Kynast's source analysis contributes to a third notable area of success: affirming the sophistication of Burchard's legal thinking. Greta Austin has shown that Burchard was no mere compiler of texts; he often modified the rubrics, inscriptions, and texts of his canons to resolve discrepancies and to follow certain editing principles.[14] These textual interventions, while more subtle than the blunt ideological statements of the reformers or Gratian's clever

[12] On Burchard's sources, see: Austin, *Shaping* 37-50; Hoffmann and Pokorny, *Das Dekret* 165-276. On the sources of Book 19, apart from the volume under discussion, see: Burden, 'Between' 57-70; Körntgen, 'Fortschreibung'.
[13] Körntgen, 'Canon Law' 103-117; Hamilton, *Practice* 43.
[14] Austin, *Shaping* 90-222; Austin, 'Jurisprudence'.

authorial *dicta*, were no less intelligent or sophisticated.[15] On the level of the text, Burchard was probably even *more* active than later canonists. Kynast's analysis of sources confirms this reality in rich detail. Some of Burchard's modifications may have been arbitrary, but most emerged through careful consideration of the canonical tradition and remarkable philological care.

In the later chapters, Kynast identifies many fascinating examples of substantive innovation. Burchard and Regino, for example, take different positions on the idea that all human life is sacred due to its creation in God's image. While Regino applies the principle only to Christians, Burchard extends it to peoples of all faiths (241-244, 339-344). This change can be seen most clearly in the penitential questionnaires (RP 1.304; BU 19.5): while Regino assigns lesser penances for killing Jews or pagans than for Christians, Burchard provides the same harsher penance in each case. Burchard also incorporates a more complex understanding of intent than Regino (Chapter VII). Regino makes only a binary distinction in his questionnaire between penances for homicide and for manslaughter, assigning a single penance for deaths which occur 'by accident' (casu), 'unwillingly' (nolens), or 'as vengeance for a family member' (vindicta parentum). Burchard instead subdivides this material into several questions which provide different amounts of penance based on these extenuating factors and others such as 'anger' (ira), 'greed' (cupiditas), 'habit' (consuetudo), 'pre-meditation' (industria), and 'negligence' (negligentia).

These examples and many others show that Burchard's legal thinking represents a leap forward from the Carolingian era. While Kynast does not say so explicitly, her findings seem to indicate that an important element of jurisprudence is present in the *Decretum*—technical legal terminology. Burchard used the aforementioned vocabulary of intent with precision and consistency, extrapolating from it a hierarchy of tiered penances based on the relative severity of the offense. Kynast shows too that Burchard employed words of status such as 'senior', 'dominus', 'servus', 'liber', 'sponsa', and 'uxor' with similar care (250-251). Of course, Burchard's era did not possess necessary aspects of jurisprudence such as institutions of higher legal learning, trained officials and specialists, or standardized procedures, commentaries, and principles of textual interpretation. Without these, legal historians will frown upon applying the word 'jurisprudence' to any pre-Gratian collection. But as Greta Austin first suggested, and Kynast now confirms, some element of jurisprudence seems to be present in Burchard's *Decretum*.

The only point on which I disagree with Kynast concerns the function of Book 19. Kynast rightly identifies strong public and episcopal tendencies throughout the collection, including many texts on bishops, diocesan administration, and synods. She knows that most manuscripts of the *Decretum*,

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[15] For a detailed comparison of the organizational methods of Burchard, Gratian, the compiler of the *Panormia* and Deusdedit, see: Stephan Dusil, *Wissensordnungen des Rechts im Wandel: Päpstlicher Jurisdiktionsprimat und Zölibat zwischen 1000 und 1215* (Mediaevalia Lovaniensia: Studia 46; Leuven 2018).

including Burchard's original copies from the Worms scriptorium, contain a long synodal 'ordo'.[16] She is also aware that Bishop Eberhard of Constance (1034-1046) wrote in his own copy of the *Decretum* that he found it useful for resolving synodal cases (19). In the bishop's words:[17]

> Synodal controversies often arise among us which are not easy to escape without the authority of this book. It allows our aides to give legal recourse, judgments, and instruction to their subjects based on consideration of canonical institution rather than their own personal decisions.

For these reasons, Kynast—much like Detlev Jasper—calls the *Decretum* 'a kind of synodal *vademecum*' for bishops.[18] She also readily admits that Burchard's main source, Regino's *Libri duo de synodalibus causis*, deals mainly with bishops and with the synodal cases mentioned in its title (56-57).

Kynast notes too that many of the canons in Book 19 seem to refer to a public penitential process overseen by the bishop (74-88). The late-antique rite of Ash Wednesday public penance is included (BU 19.26), as well as descriptions of the episcopal laying of hands for very serious offenses (BU 19.27). Other canons restrict the public reconciliation of sinners to the bishop (BU 19.440, 70, 100, 143) and emphasize that penance *must* be done 'publicly' for scandalous cases (BU 19.28, 36, 37). Kynast also points out that Burchard explicitly applies his description of penance at BU 19.9-10 to serious and public offenses (83). References to public order can be seen even in the rubric to the very first canon of Book 19, which reads: 'At which time priests of the people should compel those discording from canonical authority to peace, and delinquents to penance'.[19]

But at the same time, Kynast insists that Book 19, or at least parts of it including the opening liturgical 'ordines' (BU 19.2-4) and the penitential

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[16] The *ordo* usually appears before Burchard's preface or after Book 3. See the descriptions in: Kéry 133-155. See also the editions in: MGH Ordines, ed. H. Schneider (Hanover 1996).

[17] 'Inter quos hunc librum in nostra ecclesia maxime necessarium elaboravi, quia pro amplitudine episcopatus saepe oriuntur inter nos synodales controversiae, e quibus emergi non est facile absque huius libri auctoritate; praeterea ut nostri cooperatores pro intuitu canonicae institutionis non pro arbitrio propriae deliberationis iudicium, iura ac instructionem subiectis suis tribuere valeant'. Freiburg im Breisgau, Universitätsbibliothek, 7 (s. xi$^{2/4}$), 311va.

[18] Kynast, *Tradition* 19: 'Für den Bischof war es offenbar ein brauchbares Hilfsmittel bei der alltäglichen Arbeit, aber auch sein Nutzen als eine Art synodales Vademekum, wenngleich auch ein sehr umfangreiches, war hochgeschätzt'. As Detlev Jasper, 'Burchards Dekret in der Sicht der Gregorianer', *Bischof Burchard I* 167-198 at 170 puts it: 'Die hohe Akzeptanz des Rechtsbuchs lag sicher in seiner Brauchbarkeit für die Bistumsverwaltung, was auch dadurch zum Ausdruck kommt, daß in vielen Dekrethandschriften an verschiedenen Stellen ein Formular eingetragen wurde, wie in der Kirche vom Bischof eine Synode abzuhalten sei, wodurch die (wie man es nannte) 'Geschäftsordnung' einer Diözesansynode festgelegt wurde'.

[19] BU 19.1 (rubric): 'Quo tempore presbyteri plebium, canonica auctoritate discordantes ad pacem, et delinquentes ad penitentiam, compellere debeant'.

questionnaire (BU 19.5), should be associated with a separate process of priestly 'confessio'. For Kynast, as for others, the medicinal and spiritual language present in Book 19 indicates that Burchard's main goal was to privately heal souls rather than publicly discipline (73, 94-95). The opening prayers (BU 19.2-4), lists of vices and virtues (BU 19.6-7), and references to healing and contrition (BU 19.8, 32, 51, 65) are taken to indicate a process of voluntary correction (Buße) rather than obligatory punishment (Strafe).[20] Kynast envisions Book 19 mainly in the hands of parish priests hearing confessions, but also allows for its use in the education of young clergy (29, 39, 156).

How does Kynast resolve this apparent contradiction between a synodal *vademecum* for bishops and a priestly handbook for confession? She suggests, as have others, that different parts of Book 19 speak to different processes.[21] The opening 'ordines' and penitential questionnaire are said to refer to 'confessio' while other parts are said to refer to synodal courts (Sendgerichte).[22] She extends this distinction to Regino's collection, including his penitential questionnaire (RP 1.304) and visitation questionnaire (RP 2.5). She writes: 'One of the questionnaires, RP 1.304, belongs to the context of 'confessio'; the other, RP 2.5, belongs to the synodal court'.[23] And again, more fully:[24]

> The two questionnaires of Regino's synodal handbook can be distinguished by the context in which they belong. For RP 1.304 and its 38 questions, the process is

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[20] Kynast, *Tradition* 379: 'Eine Buße zu erfüllen meint primär die Abstragung einer geistlichen Schuld, einer Schuld, die man sich selbst, seiner Seele aufgeladen hat. Eine Strafe also nach außen gerichtete Satisfaktionsleistung im Sinne einer disziplinarischen Sanktion ist davon prinzipiell zu unterscheiden, allein aufgrund der primären Zielrichtung'. On this distinction and its role in the penitentials, see: Raymund Kottje, 'Buße oder Strafe? Zur *Iustitia* in den "Libri Paenitentiales"', *La giustizia nell'alto medioevo (secoli V–VIII)* (Settimane di studio del Centro italiano di studi sull'alto Medioevo 42; Spoleto 1995) 443-474.

[21] 'Buch XIX oder Teile davon sind also nicht dazu gedacht, primär eine möglichst lückenlose, vor allem bischöfliche Kontrolle oder eine Art "Strafgewalt" über die Gläubigen auszuüben. . . Buch XIX stellt somit eine Art Leitfaden dar, der dem Priester an die Hand gegeben werden soll, und zwar einem jeden Priester, gerade auch dem einfachen' (73). On the role of the *Corrector*, see: Burden, 'Reading'; Körntgen, 'Canon Law'; Hamilton, *Practice* 38-44. On the function of penitentials relative to canon law collections, see: Rob Meens, *Penance in Medieval Europe, 600-1200* (Cambridge 2014).

[22] Although scholars no longer endorse the strict 'Carolingian dichotomy' of public and private penance popularized by Bernhard Poschmann and Cyrille Vogel, the current leading voice on the penitentials, Rob Meens, can still speak of a 'borderline between canon law and penitential discipline'. Meens, *Penance* 141.

[23] Kynast, *Tradition* 372: 'Einer diese Frageteil, RP I 304 Int., gehört in den Zusammenhang der *confessio*, der andere, RP II 5, in den des Sendgerichts'.

[24] Kynast, *Tradition* 60: 'Beide Frageteile des Sendhandbuchs unterscheiden sich zunächst hinsichtlich des Kontextes, in den sie eingebunden sind: Für RP I 304 Int. ist das der Prozess der *confessio*, des Bekenntnisses der Sünden, mit 38 Interrogationes. Für RP II 5, das insgesamt 89 recht knapp formulierte Interrogationes enthält, bietet das bischöfliche Sendgericht den Rahmen'.

> 'confessio', the acknowledgement of sins. For RP 2.5, which contains 89 short questions, the episcopal synodal court served as the forum.

In Burchard's case, she supports this functional distinction by citing the claim, dating back to H. J. Schmitz in the late 1800s, that Book 19 often travelled independently from the rest of the *Decretum* (16-17).[25] Such a transmission pattern would seem to indicate that the *Corrector* was used differently than the rest of the collection. In an article which appeared while Kynast's book was in press, however, I argued that the evidence behind this claim is faulty.[26] Schmitz's manuscript descriptions give the false impression that many of them contain only texts from Book 19 when they actually also contain canons from other books of the *Decretum* and other legal sources. In the same article, I also introduced several abbreviations which either supplement Book 19 with canons from other books of the *Decretum* or integrate them into new hybrid forms. These abbreviations show that medieval compilers saw Book 19 as entirely compatible with the rest of the *Decretum* and read and used them together.

Kynast's findings also testify to the interconnectedness of Burchard's collection. She shows that Burchard crafting his penitential questionnaire (BU 19.5) in large part from canons found elsewhere in the *Decretum*. She also shows that he relied heavily on Regino's collection, including both his penitential (RP 1.304) and visitation questionnaires (RP 2.5=BU 1.94). For Burchard to cite from this last text, one so clearly dedicated to episcopal visitations, seems to me powerful evidence against associating Book 19—or parts of Regino's collection for that matter—with different penitential processes or contexts. It seems far more likely that Book 19 simply provides a penitential conclusion to, and summary of, the discussion of synods and episcopal administration begun in Book 1 and continued throughout the collection.

But why does Burchard refer to priests in Book 19? For several reasons. Bishops often delegated the power to judge cases to high-ranking clergy such as archdeacons.[27] Ordinary priests helped too by referring serious cases to episcopal judgment and by enforcing episcopal penances on the ground. They probably also judged certain minor penances on their own. Just as Burchard took pains to coordinate Book 19 with the rest of the *Decretum*, we too should try to understand confession not so much as a standalone process, but as a corrective mechanism within the context of episcopal diocesan administration.

The function of Book 19 is an important question, but it is by no means the central focus of Kynast's book. She has sought to show that Burchard was

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[25] Hermann Joseph Schmitz, *Die Bussbücher und das kanonische Bussverfahren* (Düsseldorf 1898, repr. Graz 1958) 393-402.

[26] Burden, 'Reading'.

[27] According to Bernold of Constance (around 1084): 'Beatus quoque Anshelmus Lucensis episcopus in episcopatu suo paucis presbiteris concessit, ut poenitentes susciperent, quamvis plurimos ubilibet ordinasset. Sic et alii hactenus episcopi in suis episcopatibus facere consueverunt, qui diligentiores canonum servatores esse voluerunt'. Bernold of Constance, *De excommunicatis vitandis, de reconciliatione lapsorum et de fontibus iuris ecclesiastici*. ed. Frederick Thaner (MGH LdL 2; Hanover 1892) 144.

a sophisticated legal thinker who introduced important innovations into the canonical tradition. To this end, she has surely succeeded. Her analysis of Burchard's sources and text proves that he reckoned with the works and ideas of his predecessors on a level matched by few medieval canonists even of later eras. In doing so, she has helped us to rethink the teleological narratives of papal reform and academic jurisprudence which still guide the history of medieval canon law. As we have seen, her research will be of great value to the editors in Mainz currently attempting to unravel the complicated textual history of the *Decretum*. And by summarizing Burchard's material on topics of culture and violence, and by synthesizing recent scholarship, she has ensured that his collection will remain accessible to a wider scholarly audience for years to come.

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Hill, Mark, and Richard H. Helmholz, edd. *Great Christian Jurists in English History*. Law and Christianity. Cambridge: Cambridge University Press, 2017. Pp. 372. $137.99. ISBN: 978-1-10719-055-9.

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Both of these volumes belong to the series Cambridge Studies in Law and Christianity and the sub-series Great Christian Jurists. In the latter, they belong with *Great Christian Jurists and Legal Collections in the First Millennium*, ed. Philip L. Reynolds and *Great Christian Jurists in Spanish History*, edited by Rafael Domingo and Javier Martínez-Torrón. In both countries treated, the versions of Christianity and legal systems in which jurists were involved differed.

Great Christian Jurists in French History covers the lives and thought of twenty-seven jurists, many versed in canon or Roman law, history of law, philosophy of law, or sociology of law. Several taught; but others practiced, serving as judges or as administrators. Each sketch concludes with Recommended Reading.

The collection begins with three canonists. Ivo of Chartres (Christof Rolker) became a bishop toward the end of the Gregorian Reform. He was active in both ecclesiastical and lay politics. Ivo was well versed in theology, especially thought on the sacraments. Ivo's name is associated with three canonistic collections: *Decretum*, *Tripartita*, and *Panormia*. The last mentioned, least likely to be Ivo's, diffused the methodological preface of the *Decretum*, helping systematize a heritage of often conflicting texts. Stephen of Tournai (Kenneth Pennington) was a glossator of Gratian's *Decretum*. Stephen's *Summa* displays both acumen and knowledge of legal processes. As Pennington notes, Schulte's edition of Stephen's text is badly flawed. However, Peter Landau's argument that the commentary on *De consecratione* was written by another author is not treated. Guillaume Durant (Orazio Condorelli) was well versed in procedural matters, composing the widely-circulated *Speculum iudiciale*. This text earned its author the nickname the Speculator. Durant, a bishop, composed an extensive interpretation of the mass.

The next two articles address medieval Roman law, taught at Orléans after Gregory IX forbade its teaching in Paris. Jacques de Revigny (Paul J. Du Plessis) was a pioneer of this *Ultramontane* school. However, the focus is on teaching methodology, with minimal attention to the role of Christianity in the creative interpretation of Roman texts. Closer to the theme of the volume is Pierre de Belleperche (Yves Mausen). Pierre served both church and crown. His service to Philip IV of France was is redolent of *Realpolitik* that it shows how far a jurist could depart from the Christian thinking of his day.

With Charles Dumoulin (Wim Decock) we come to Reformation rupture of Western Christendom. Dumoulin was born and died a Roman Catholic. However, outspoken promotion of his ideas led him to be at times Lutheran or Reformed. His Catholicism, when he returned to it, was Gallican and anti-papal, rejecting the Council of Trent. Dumoulin preferred custom and the 'old canons' of the primitive church to newer laws. Jean Calvin (John Witte Jr.) was Dumoulin's fellow student in law, However, he settled in Geneva as a Protestant pastor, polemicist and legislator. Calvin's ordinances for Geneva used civil power to restrain sin and move sinners to seek grace. Calvin promoted rights and liberty derived from natural law, a line of thought too easily forgotten in the negative image of Calvin's Geneva as a theocracy.

The Renaissance is crucial to Xavier Prévost's account of Jacques Cujas. Cujas sought to uncover law in its historical context. He was an incisive commentator but not a systematizer. Despite some resemblances of his thought to that of the Huguenots, Cujas never broke with Catholicism; and he avoided choosing sides in France's religious conflicts.

François Hotman (Mathias Schmoeckel) was a Calvinist. He also preferred customary law to Romanist theories. Hotman's *Francogallia* used ancient custom to limit sovereign power; he also gave an independent role to magistrates, allowing them to resist the king's will. Hugues Doneau (Christian Hattenhauer) was also a Calvinist and a partisan of the historical approach to law. He also aimed at a comprehensive understanding of law. In that context, he advocated a 'right of personality', including life and freedom.

Jean Bodin (Daniel Lee) was no believer in ancient custom. Despite a checkered career in royal service, he supported sovereignty. Kings could create magistrates to help them, but these subordinates could not resist royal actions. Bodin, more a 'politique' than a fervent Catholic, can be understood as counter to Hotman on magistrates. Even so, rulers, while immune from individual laws, were 'debtors to justice', respecting the interests of their subjects.

With Jean Domat (David Gilles) we come to Jansenism. Domat saw religion as the foundation of law. However, he also defended the use of reason, even against Blaise Pascal. Positive law, in his thought, combined reason and will. Domat was a Gallican. He also can be seen as promoting codification of French laws. Henri François d'Aguesseau (Isabelle Brancourt) served the crown as a lawyer. He was a Gallican Catholic who combined reason and religion, privileging Catholics against Jews and Huguenots. His attitude toward Jansenism was problematic, but he thought diversity of laws was based on sin. Robert-Joseph Pothier (Olivier Deschamps) tried to put Roman law into a rational order. He, like Domat, can be seen as advancing the cause of codification. Pothier quoted Jansenist writers, although he did not always agree with them. He was a Gallican who supported the expulsion of the Jesuits from France.

With Jean-Étienne-Marie Portalis (Nicolas Laurent-Bonne) we reach the time of Napoleon. Portalis was both a Gallican Catholic and a Freemason. He became involved in drafting the Civil Code. Portalis also administered the 1802

concordat with Pius VI, an agreement supporting Napoleon's regime. Portalis promoted tolerance, accepting civil marriages and divorce. He was, however, a foe of atheism and materialism.

With Alexis de Tocqueville (Mary Ann Glennon) we enter a period of shifting regimes and uncertainties whether a Catholic could accept a republic. Although a Catholic, Tocqueville accepted the Second Republic, losing power under Napoleon III. He accepted democracy, believing family and religion belonged together in the 'critical mass' of citizens.

Paul Viollet (Anne-Sophie Chambost) was involved in the struggles over democracy and religion under the Third Republic. Although raised a traditionalist, he wanted to reconcile church and republican state. Viollet opposed both anticlericism and antisemitism, while defending the rights of colonized peoples. His opposition to papal infallibility landed certain works on the Roman Index. Raymond Saleilles (Marco Sabbionetti) too faced papal conservatism in the Modernist Crisis. He accepted suffrage for the masses and individual rights, while rejecting rigidity in jurisprudence.

Maurice Hauriou (Julien Barroche) accepted separation of church and state, but opposed relativism and materialism. An expert in administrative law, Hauriou still accepted limits on the state. 'Majority power' was acceptable, but there was room for the competences of elites. Hauriou found support in Leo XIII's acceptance of the French republic. Léon Duguit (M. C. Mirow) saw law in a sociological, scientific light, rejecting its autonomy as a discipline. Thus, property law had a social context. This made Duguit acceptable to neo-Thomists and Catholic social theorists. He was suspicious of the 1802 Concordat as having Christianity service the French state.

With Paul Fournier (Brigitte Basdevant-Gaudemet and Rafael Domingo) we approach the scientific history of canon law. Fournier studied sources in their context, especially those from before Gratian's *Decretum*. This approach was continued by Fournier's student Gabriel Le Bras (Kathleen G. Cushing). Le Bras was interested in lived religion in his writings. He, in turn, taught Jean Gaudemet, the dedicatee of this volume.

The reputation of Georges Rippert (Frédéric Auren), a conservative, has suffered from his involvement in the Vichy regime. He opposed natural law theory but accepted the influence of Catholic moral thought on law. Rippert had no use for Masons, Jews or Bolsheviks. He also thought freedom was being sacrificed to equality. However, Rippert did not want to impose divine law. Angry at his treatment after the Second World War, Rippert withdrew from teaching. Jacques Maritain (William Sweet) took a different tack. Raised secular, he became a Roman Catholic. He leaned heavily on natural law known by reason. His idea of the person accepted human rights and equality before the law. What Sweet does not mention is Maritain's reaction against 'a passion for novelty' at the time of the Second Vatican Council in *The Peasant of the Garrone* (1966).

A cause for the canonization of Robert Schuman (Rafael Domingo) was opened recently. Raised in Alsace-Lorraine, he was an early advocate of

European unity. Schuman was no friend of French nationalism, which did not sit well with Charles de Gaulle. He did believe that democracy needs a positive approach to religion. Jean Carbonnier (Laetitia Guerlain) was an 'oppositional' Roman Catholic, who believed in separating church and state. Survival of religious minorities also drew his attention. Over all, Carbonnier wanted to restore credibility to law. That included modernizing family law, including by granting divorces.

Michel Villey (Luisa Brunori) was a Catholic opponent of modern thought. A dedicated student of Thomas Aquinas, he even rejected much of later Thomism, opposing Maritain on human rights. From Villey's standpoint, Western thought went astray with the Nominalists, whom he blamed for the idea of subjective rights and 'the religion of humanity'. Nor did Villey spare 'collectivists' like Marx, whom he accused of sacrificing the individual to the whole.

Great Christian Jurists in English History includes practitioners of common law and others relevant to English law. All articles are well annotated. The first jurist treated, Henry of Bratton (Nicholas Vincent), had a career in ecclesiastical circles with occasional roles as a royal judge. Whether Henry wrote the text called *Bracton* is controverted, but that text combined multiple sources in a sprawling synthesis. It was widely circulated and survives in 52 manuscripts. *Bracton* tried to balance the king's having his status from God with his having to live by the law.

William Lyndwood (R. H. Helmholz) was medieval England's greatest canon lawyer. His *Provinciale* compiled the constitutions of the province of Canterbury. The author wisely focuses on Lyndwood's glosses, which reveal his own thought. Those concerned with wills and debt show how Lyndwood used the principles of canon law to extend ecclesiastical jurisdiction in areas where it overlapped with the claims of common law.

Christopher St Germain (Ian Williams) moved to the contrary, questioning the legitimacy of church courts. In the time of Henry VIII, he embraced many traditional beliefs but rejected marriage and penance as sacraments. St Germain is noted for arguing that the Chancery should apply equity, helping common law achieve justice. However, the author argues that St Germain advanced a larger view of conscience, including as it applied to barristers. It seems likely that lay conscience was to replace the penitential forum of the Catholic clergy.

Sir Edward Coke (David Chan Smith) was a judge under Elizabeth I and James I. Coke defended the royal supremacy to support political stability and Protestantism. He thought the Jesuits spearheaded a conspiracy to overturn the monarchy and favor 'popery'. Coke resisted any expansion of the powers of the Anglican church courts. However, his limited view of royal prerogative cost him his judicial role under James.

Richard Hooker (Norman Doe) is better known as a theologian. The author demonstrates that Hooker held subtle opinions on lay and clerical laws. His writings accepted more sources of law than just the Bible. The laity, not just the monarchy, had a role in the making of English church laws. Episcopacy was

founded by God, but Roman Catholics were to receive communion in Anglican churches. Rejecting Puritan Biblicism and demanding loyalty of Catholics to the English church earned Hooker a reputation as defender of an Anglican *via media*.

John Selden (Harold J. Berman and John Witte, Jr.) collaborated with Coke in opposing James I and Charles I on prerogative. Selden was a historian of law. Because of his wide learning, he was able to bring together diverse legal systems. His idea of law was Positivist, tied to God as legislator. Selden also believed that common law evolved. However, it was the 'law of the land', and not just the law of King Charles.

Matthew Hale (David S. Sytsma) was a student of both law and theology. He brought religious insights to his legal writings, including his idea of what a judge should be. Hale had a complex history of theological thought, moving from strong Calvinism toward Arminianism; but he opposed atheism and Socinianism. His idea of the law built on both God and reason.

Lord Mansfield (Norman S. Poser) kept his Christianity private. However, there is evidence of it in his judicial record. Although he thought morality belonged in law, reflecting one's treatment of others, Mansfield treated worship as a private matter. Thus Dissenters, Roman Catholics and Jews, even an accused witch, benefitted from his tolerance. Only atheists did not benefit.

William Blackstone (Wilfrid Prest) was a teacher of law and a devout Anglican. His *Commentaries* achieved wide popularity as an overview of common law. Blackstone was a devoted Erastian with no sympathy for religious or political dissent. This contrasts with Mansfield's wide-ranging religious toleration. Lord Kenyon (James Oldham), who succeeded Mansfield in judicial office, also had no such flexibility. His instructions to juries supported traditional religion and morality as found in the existing laws. Kenyon went hard on immorality, adultery in particular, throughout his judicial career.

Two of the jurists represented do not belong among the practitioners of common law. Stephen Lushington (Stephen M. Waddams) was Dean of the Arches and last president of Doctors' Common, center of 'non-common' law. Trained in civil law, he took part in several cases heard before appellate tribunals. Lushington was no liberal Anglican; but he partnered with Dissenters in the campaign against slavery, showing his religious commitment most clearly. One notes too a tendency to back women affected by matrimonial cases. F. W. Maitland (Russell Sandberg) is best known as a historian of law. Admitting to a conflict between faith and reason, Maitland expressed himself as a dissenter from institutionalized religion. Whereas Bishop Stubbs treated the English church as free to reject Rome's canon law, Maitland found no evidence of such independence. Later scholars have qualified but not rejected Maitland's viewpoint; and scholars continue to consult his writings.

Roundell Palmer, Earl of Selbourne (Charlotte Smith) had ties in both the High Church and evangelical camps of Anglicanism. In Victorian times he opposed disestablishing the Irish Church, but he rejected penalizing Roman Catholics. Selbourne also accepted Jews and an atheist into Parliament. As

churchman and Lord Chancellor, he negotiated compromise solutions in difficult situations. Perhaps his greatest success was in judicial reform, including the handling of ecclesiastical appeals.

Lord Denning (Andrew Phang) brought faith to his role as in law in the twentieth century. He saw religion and law connected, and the latter as wedded to justice. Denning applied his idea of justice in many areas of law, including contracts and negligence. His hope, down to his retirement, was that justice would be done in the individual case but that this would promote fairness in future cases. This is a very different approach than that of many of his predecessors but useful in the present day.

Both books present a challenge to the reader. Each country underwent political and religious changes over the centuries. Thus, there is limited continuity of opinions among the jurists of either country. What is continuous is the effort to reconcile belief with political and social realities. These challenges are most obvious in France, its religious continuities fractured by the Reformation, the revocation of the Edict of Nantes, the Revolution, and the Dreyfus affair. However, England suffered discontinuity not just with the Reformation but also with the legal reforms of the nineteenth and twentieth centuries. Although these realities cause discontinuities, both books offer useful insights into the legal history of Western Europe, beginning in the Middle Ages.

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Domingo, Rafael, and Javier Martínez–Torrón, edd. *Great Christian Jurists in Spanish History*. Law and Christianity. Cambridge: Cambridge University Press, 2018. Pp. 382. $110.00. ISBN: 978-1-10844-873-4.

Kyle C. Lincoln

This volume is part of the *Cambridge Studies in Law and Christianity*'s 'Great Christian Jurists' series. It aims to provide an overview of national and regional approaches to 'Christian Jurists', a designation that aims to:

> illustrate the rich and enduring interactions between Christianity and law by examining the contributions that outstanding thinkers and practitioners have made over the centuries to legal ideals, institutions, and practice (p.1).

As a whole, the volume only treats those scholars that worked in Spain, rather broadly defined, in biographical (and sometimes bio-bibliographical. sketches, but has space for only twenty such portraits in the volume. While the reader of the BMCL might, on face, only find a few of the chapters especially useful for research and teaching purposes. The broad reach of the volume as a whole makes it important for students of Spanish law, its connected political and philosophical studies, and the historical impact of thinkers on these fields as an excellent reference contribution, especially given the relative infrequency with which Anglophone scholarship treats these developments, compared to French or English historical developments in the same periods.

The volume has twenty full studies between its covers, but they span some fifteen centuries. The Introduction lays out a broad overview of Spanish history—occasionally expanding beyond the bounds of the modern nation-state of Spain to include its administered territories—with a special focus on the legal and institutional developments that characterized their ages. Only six of these would fall into most medievalist's chronology for 'medieval', but the Introduction does pay proportionate attention to the divergent and overlapping legal traditions in the Christian Kingdoms of Iberia in a manner that provides the appropriate background. The early modern and modern periods of Iberian history are given more detail and more elaborate context, but this is to be expected, given the relative balance of the volume at large. The Introduction lays out six major claims at its conclusion to sketch 'the most salient Spanish contributions to Western legal culture': 1. 'consolidation of European legal culture after the collapse of the Western Roman Empire', 2. 'Expansion of Western legal culture to Latin America', 3. 'Consolidation and development of canon law', 4. 'Interaction between theology, philosophy and law', 5. 'Development of the idea of the law of nations', 6. 'Pioneering the human rights movement' (26-28). While the level of impact that the thinkers under study might be debated with respect to these six fronts, the work of this edited tome is commendable, and, even where the themes are further from the reader's grasp in individual chapters, the overall impression that the text makes is that Spanish legal history, especially with respect to the development

of lines of explicitly Christian thought, was a major influence on the development of law and legal thought generally.

The full rosters of the scholars examined in the volume is as complex and valuable as the roster of scholars that pen them. The first set of biographies offer a kind of appetizing sample of medieval Iberian legal history, but the scope of the volume places greater emphasis on later eras. Although they are excellent in their own rights, there is no chapter between Reynolds's piece on Isidore of Seville and Viejo-Ximénez's chapter on Raymond of Penyafort. While it seems completely fair to concede something of a lacuna, say from the eighth through the tenth centuries, because of the tumultuous political and military fortunes of the Christian kingdoms in the north, the gap is made all the more apparent to a medievalist reader. Regrettably, this absence is entirely understandable, given the macro-focus of the volume on biographies, the geographical scope of the volume, and the alignment of the subjects on a positive impact; these might exclude, respectively, Bernard of Sedirac (as a nebulous but pivotal force for Toledo's 'restoration' and putative liturgical reformer), Martin of Braga (qua Portuguese/Lusitanian luminary with a large impact on pastoral theology and conciliar canons., and Pelayo of Oviedo (as a forger but nonetheless interesting thinker about law and legal work). Still, the three biographies that would fit within medieval chronologies (for most readers) are of great quality. Reynolds's treatment of the life and work of Isidore of Seville, the first in the volume, is a solid contribution, and places the work of Isidore in a clear late Roman context, paying special attention to the specific (and influential. ways that Isidore defined key terms in a manner that shaped later discourse about law. In the chapter that follows, Viejo-Ximénez sketches the extensive career of Raymond of Penyafort through his academic appointments and his commissions from Rome. In doing so, he pays perhaps overmuch attention to the discourse *about* Penyafort and less time about some of his projects that could have exposed much more of his thought—the *Summa de Casibus* receives only a printed page—but this may have been due to editorial constraints more than lack of interest. O'Callaghan happened to be writing his chapter about Alfonso X about the same time as his work on *The Justinian of His Age* biography of Alfonso, and it shows: Alfonso's work is carefully described, his impact on later eras is traced with clarity and only the bibliographical suggestions seem to come up short in the chapter, no doubt due to word limits. These three chapters do a lot of work for medievalist readers, but it is a pity that they were not accompanied by another chapter that might have explored some of the same theological-juridical space as the others.

Late medieval and early modern legal thought receives many chapters in the body of the *Great Christian Jurists in Spanish History*, and the next ten chapters of the volume examine thinkers whose lives spanned from the fifteenth through the early eighteenth centuries. Although this extensive set of material makes the impact of the period as a formative part of 'Spanish' legal

history, the separate chapters remain focused on their subjects enough that they still stand on their own merit. The challenge, however, is that the large gulfs between Isidore and Alfonso X and then between Raymond de Penyafort and Francisco de Vitoria, the subject of the first of the early modern chapters, creates the impression that little of importance happened, even when most readers will know that a great deal did. Organizationally, this can be jarring, and the transition to the early modern period's flurry of legal thought, inspired and impactful as it was, is left to feel like something of a volume-within-a-volume in need of subdivisions. Still, the individual chapters are excellent reference chapters and make a useful contribution to the wider accessibility of a great number of scholars whose work is still understudied in English-language scholarship. The earliest tetrad of chapters in the early modern glut covers Francisco de Vitoria, Bartolome de las Casas, Martín de Azpilcueta, and Domingo de Soto, four thinkers who would profoundly shape the sixteenth century legal landscape of an enormously expansive Spanish Empire as it grew to encircle the globe but still base much of their thinking on the doings of Madrid. De Vitoria, as examined by Wagner, receives the kind of treatment that a thinker of his breadth deserves: there is considerable focus on de Vitoria's impact on international law, emerging theories of human rights, and (to the degree possible in an age of absolutist monarchs). the rights of self-determination. The only complaint that seems reasonable for Wagner's chapter is the limited number of direct quotations from de Vitoria (which might have offered a sense of his prose). but even that is a kind of silly criticism given the extensive corpus produced by de Vitoria. Pennington's treatment of Las Casas begins with the observation that 'there are few figures in European history whose convictions are still relevant for a number of the world's problems' and then draws a direct parallel between Las Casas and Francis of Assisi. The chapter is as typical of Pennington's work as it is illuminating on Las Casas's thought: then dives into the subject matter are deep, draw lasting connections, and show a thinker hard at work at some of the more pressing problems of the day. Better known to his contemporaries and followers as Doctor Navarrus, Martin de Azpilcueta focused on commentaries on Gratian and the *Liber Extra,* but he also had a major impact on practical theological concerns, penning a confessional manual that underlined the importance of taking pastoral concerns seriously and his opinions were considered in the drafting of the 1917 *Code of Canon Law*. In tracing Azpilcueta's thought and impact, Decock makes a strong, clear case that is undercut only by a too-short conclusion that could have tied these elements together better for the reader. He sees Azpilcueta's work as at the intersection of theology and canon law with respect to the ways that theory influence practice and practice shaped the explanation of theory. Benjamin Hill offers a chapter on Domingo de Soto, a contemporary and colleague of Azpilcueta and de Vitoria, and places him as one of the leading Thomist legal and economic thinkers of his era, paying special attention to his discussions of the role of poverty in the just society and the ways that the conquest of the

Americas reshaped Spanish understandings of these important questions. Because of de Soto's imprint on philosophical thought in the period of his activity and for centuries after, Hill's chapter overemphasizes this impact rather than placing him at the center of debates with his contemporaries, but de Soto's philosophy deserves extensive commentary in the volume, so an unfortunate but necessary trade-off had to be made to this effect. These four chapters make a real contribution as reference works and offer a good starting point for scholars wishing to expand their own understanding of the widespread legal discourse of the period.

Where de Soto and Las Casas and Azpilcueta and de Vitoria were representative of the early modern turn toward absolutism, the scholars that follow them in the volume present a kind of renovated discourse on the practice of governance and law in the latter part of the so-called 'Siglo de Oro'. The six chapters that span this enormously impactful period of Spanish history could have easily been the subject of their own massive volume, with a century of pages each to their examination. Indeed, the volume itself seems to lean heavily into its modern and contemporary bent in these chapters. Fernando Vazquez de Menchaca, as presented by Ruiz Rufino, is given a tight and precise treatment, with a useful balance between the subject's context and text in his chapter, but one is left with wondering about the impact of Vazquez de Menchaca in his own day. Of course, the suggestions for further reading, provide some of this but more in the body of the text would have been useful. Helmholz's treatment of Diego de Covarrubias y Leyva does a difficult task of presenting an example-driven treatment of a prolific scholar, complete with a tight and careful biographical treatment and strong bibliography; perhaps more could have been done to sketch the content of the titles produced by Covarrubias, but this could easily fill massive tomes and is excusable for its absence. Francisco Suarez's biographical treatment is equally impressive in the hands of Lagerlund, and the only fair criticism that might be levied is that, for the 28 volumes of Suarez's work, only three detailed examples are offered. As could be a refrain for this volume, one suspects editorial constraints are to blame. The treatment by Domingo of Tomas Sanchez is the third in a trilogy of chapters that have the same problems: an enormously productive scholar is hyper condensed and the reader is left wanting more. Judging from the page count, I suspect that Domingo cut his own chapter's length to give a little more room for his colleagues. Solorzano Pereira, one of the founding scholars of 'derecho indiano', offers a detailed and context-rich treatment of a scholar who was very much a product of and standard-bearer for the thought of his era. With strong examples, Mirow's treatment of Solorzano Pereira is superb. Witthaus's treatment of Gaspar Melchor de Jovellanos has the unenviable task of summarizing a polymath, and the precision of his presentation leaves one wanting more direct quotation for the reader taste the scholar's contributions more, but this, by the fourteenth chapter, is a common enough hunger in the text. One of the leading constitutionalists of the 1812 Spanish Constitution, Francisco Martinez Marina, is given one of the most useful treatments in the

whole volume by Aniceto Masferrer, whose tight prose and persuasive argument bring Martinez Marina into conversation with the reader. The short-lived, but highly influential, Juan Donoso Cortez, Marquis of Valdegamas, as presented by Beneyto, is a short chapter but presents a clear study of the Marquis of Valdegama's impact on his contemporaries, albeit with a too-brief bibliography to be too useful (especially on the use of Donoso Cortez's ideas by later fascist and autocratic thinkers). For the first and only appearance of a female figure in the volume, Paloma Duran y Lalaguna offers a sketch of Concepcion Arenal, a boundary breaking figure in Spanish legal thought but also an enormous influence on contemporary events and conversations. True to form for this tight volume, one is left wanting more from Arenal's work and more about her impact measured in her own day. As my favorite subway station, I was delighted to find an Alonso Martinez that Carlos Petit's description made tangible: a strong bibliography and careful impact calculus present a real historical figure, the superabundance of primary sources from the nineteenth century made the figure more present and accountable in the chapter, too. The Siglo de Oro and Spanish Enlightenment sections of the volume present a much different problem than the late medieval and early modern figures: more texts produced by historical figures means more texts needed to be unraveled in the chapters; 'brevitas tangit omniaque'.

There are only two chapters on modern jurists, but this seems understandable given the political tension in contemporary Spain around the twentieth century's messy history and the ways in which some of the contributions of figures might not have yet been measurable. Alvaro d'Ors, in Domingo's second chapter, reads too much like a panegyric and a celebration of the University of Navarra, but the works under scrutiny receive a fair and detailed presentation. Pedro Lombardia, too, received a thoughtful and clear treatment, but one that focused on both his national and international impact (on Spanish 'derecho eclesiastico del Estado' and on the 1983 *Codex Iuris Canonici*. in a manner that fit with the volume as a whole. The Civil War does not play a strong role in the two chapters about d'Ors and Lombardia, nor does the dictatorship. One wonders whether a chapter on a figure that presented a kind of counterpoint to the Franco regime in legal or juridical contexts would have drawn out the diversity of Spanish legal and intellectual thought more than was done in these two short chapters. The overall impact of just these two chapters also makes recalls the question of the balance of the project, laid out for the late antique and medieval jurists, and the overall schema by which the text was organized.

Taken as a whole, a volume should be judged by the skillfulness of its contribution, the novelty of its contributions, and the importance of those contributions. In all three of these putative categories, I would judge this tome a noteworthy success. It seems more than fair to label those few places where there were some causes for complaint, as above, the fault of page limits and the restraint that editing a volume must sometimes impose for the sake of a general readership. With respect to the goals that it laid out for itself, too, the

project seems to have hit its targets, but in some categories better than others and often the individual chapters address these themes more obliquely than would be typical in a single-author contribution. Given the nature of a reference volume like this, it seems fair to allow a broader indulgence for these elements. As an edited text, the limitations imposed often render the chapters included in the text a kind of 'first read' and the contributors, having provided supplementary bibliographers, have already indicated the many places where readers might search next. If the reader of this review is able to be so bold, I recommend that you write to your library's acquisitions office and have this volume ordered; if the others that might follow in its wake live up to its standard, order those too.

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McSweeney, Thomas. *Priests of the Law. Roman Law and the Making of the Common Law's First Professionals.* Oxford Legal History Series. Oxford: Oxford University Press, 2019. Pp. 304. $99.00. ISBN: 978-0-198-84545-4.

Sarah B. White

This book is Thomas McSweeney's very successful conversion of his PhD thesis, and a volume that contributes a great deal to the discussion of Roman law in England, the development of the Common law, and English legal history more broadly. McSweeney combines close, deeply analytical readings of the Common law treatise known as *Bracton* (written over a period from the 1220s to 1260s) within the wider context of the legal culture of England from the middle of the twelfth century through to the middle of the thirteenth, when *Bracton* was completed. His astute readings of the treatise are grounded in a thorough understanding of the authors of the work and the world in which they lived, allowing McSweeney to draw out some fascinating insights into how the writers of *Bracton* saw themselves and their role as 'priests of the law'.

McSweeney's book is very much tied to recent developments in the study of English legal history, focusing on legal cultures, interactions and exchanges between English and Continental legal traditions, and a more holistic view of law in the twelfth and thirteenth centuries. It is also, of course, connected to the long-running debate on the influence of Roman and canon law on the English Common law. In the over-arching theme of the book, McSweeney offers a fresh perspective on how the education and background of the authors of *Bracton* predisposed them to think of law and their place in it from a perspective that was deeply rooted in civilian and canonist traditions. His central argument is that the justices who wrote the treatise were the first actors in the history of the Common law to think of themselves as legal professionals, and in doing so, they drew on the model of the jurist—the Roman and canon law ideal of the legal expert (p.7). In formulating this argument, McSweeney focuses on the self-perception of the justices, not necessarily on their expertise, as the essential element. Roman law, he argues, allowed the authors of *Bracton* to imagine themselves as part of a 'universal endeavor . . . attaching universal significance to the mundane work of the English royal courts' and 'transform[ing] themselves into jurists of the universal law' (p.7).

This new approach directs the second and third themes of the book. The second concerns the development of the Common law in the first half of the thirteenth century. By this point, the Common law already had its own technical terminology, distinct from that of Roman and canon law, and it differed in substance and procedure as well. But, McSweeney argues, the higher-level questions about what the law *was* and who controlled it were more open to civilian and canonist influences than were the well-established doctrines and procedures. And this kind of high-level influence is what we can see at work in *Bracton*. This leads to the third theme, which is methodological. Rather than looking at the doctrines and procedures to demonstrate borrowings from Roman and canon law, McSweeney suggests looking at the Common law as an

'amalgam of practices', by which he refers not to the practices of litigants and justices in using the law, but rather the practice of reading and producing texts in the royal courts. The authors of *Bracton*, who had been trained in the schools to think of law as a textual endeavour, transplanted ways of doing and thinking about. In so doing, they saw the royal courts as part of a universal culture of law and reimagined their role as 'members of an order of jurists that spanned the Christian west' (p.8).

A central idea in McSweeney's work is this shift from looking at doctrines, laws, and even, to a certain extent, texts, to the people involved in their production and use. If Roman and canon law influenced the Common law, it was because there were people who wanted it to do so. And, for the justices who created *Bracton*, it was important to demonstrate that English law was *already* in line with Roman law on a higher-order plane (p.25). They saw in Roman and canon law a model for the work they were doing in the royal courts—a model that elevated that role to 'priests of the law', with the experience, knowledge, and indeed responsibility to shape legal thinking. Yet, this culture of textual production and self-identification as jurists envisioned by the authors of *Bracton* did not survive the thirteenth century, prompting the question of whether this mentality McSweeney identifies reached beyond the immediate circle of the justices he names.

McSweeney structures his book very clearly. After the Introduction, the book begins with a chapter on the lives of the three men who likely were involved in creating *Bracton*—Martin of Pattishall, William of Raleigh, and Henry of Bratton. The detail he provides on the three and the narrative he crafts are admirable, bringing the justices to life and highlighting their connections to each other. For this, he relies on the *Chronica majora* of Matthew Paris and the letters of Robert Grosseteste, along with the long-standing work of Paul Brand, Ralph Turner, Alan Harding, C.A.F. Meekings, and David Crook. While some of the story is not new, it is beneficial to have all the elements collected here, and it lays the groundwork for McSweeney's later arguments very well. The second half of this chapter focuses on the creation of *Bracton*, the manuscript tradition, dates of composition, phases of writing, and which sections the three justices might have produced. He also addresses the potential audience of the text, suggesting that due to the language, content, and assumed knowledge of the plea rolls, Roman law, and canon law, the people who could have made full use of *Bracton* must have been a very select circle (66).

Chapters two and three consider how the authors of *Bracton* thought about law and how the justices imagined a community of legal professionals centered around texts. Chapter two begins with a rather extended foray into the growth of legal education and the schools from the middle of the twelfth century to the time of *Bracton*. This chapter is essential for McSweeney's later arguments in that it establishes the idea of a universal, textual legal community upon which the authors of *Bracton* could draw. Thus, he goes to great lengths to make it clear that students learning canon and Roman law in England saw themselves as 'part of a community of scholars that spanned Latin Christendom', engaging

with and debating on universal law, that is, Roman and canon law (p.79). Texts were at the center of this legal community. This approach leads to the conclusion that the key divide in the legal community was between those who had some experience with Roman and canon law learning and those who did not, rather than between laymen and clerics—a divide that has often been studied. This seems to be essentially correct, but we run into a slight difficulty (as McSweeney points out) in that many men would have attended the schools for some length of time, but perhaps not long enough to warrant the title of *magister*. This makes the identification of those trained in the two laws very tricky, and there is the question of how much of an ideological impact this learning would have had on clerks who were not as inspired as the authors of *Bracton*.

The third chapter explains the role of Roman and, to a lesser extent, canon law in the *Bracton* treatise. While the Roman law elements of *Bracton* have long been identified since the days of F. W. Maitland's work on the topic (and thoroughly covered by Sir Henry Maine, G. E. Woodbine, J. L. Barton, Brian Tierney, Naomi Hurnard, Paul Hyams, Paul Brand, and many others), McSweeney's precise work on the topic underscores his broader argument with robust textual analysis and provides a necessary specificity to his work. The chapter also raises two important (although not entirely new) points about Roman law in *Bracton*. The first is that if *Bracton* represents the justices' attempt to reconcile their work in the royal courts with the law they had learned in the schools, it is not always a successful one. As McSweeney notes, 'Roman law and English law were not all that closely related; if they were cousins, they certainly weren't first cousins' (107). The second is the idea that the justices were not trying to reform English law along the lines of the two laws, but rather to show that English law was *already* in accord with the two laws, and the work of the justices was very much like that of the jurists (p.135). McSweeney's arguments for the novelty of what the justices attempted with *Bracton* recalls the questions about the importance of *Glanvill* (c. 1188-1190), an earlier treatise, which also seems to draw on the culture of the schools, debate among justices, and a Roman-canonical framework and ideas (at least in some places). McSweeney notes that the authors of *Bracton* drew on *Glanvill* as one of their sources and compares the use of Roman law ideas in the two texts, especially regarding possession, but one wonders whether the circle that produced *Glanvill* could have inspired some of the broader textual culture ascribed to the authors of *Bracton*.

Chapters four, five, and six consider how the authors of *Bracton* thought about the texts they produced and assimilated the practices of textual production learned from the schools with those they were familiar with from the royal courts. In chapter four, McSweeney states that the composition of *Bracton* was 'clearly a textual practice designed to emulate the textual practices of the great civilians and canonists' (p.137). With this argument in mind, he turns to the plea rolls and how the authors of *Bracton* excised the cases from their administrative context and used them much in the same way as the canonical

tradition used decretals. As in the rest of the chapters, McSweeney provides extremely thorough background information, in this case, about the methods of producing plea rolls and the creation of the collection known as *Bracton's Note Book.* He suggests that the cases in the *Note Book* were selected based on whether they illustrated certain points of law (p.153). This, he argues, is clear from the glosses on the text, which, although not as extensive as those in the Romano-canonical tradition, seem to highlight the principles the cases are meant to represent. The process he describes is indeed similar to what we see in decretal collections, although there are some differences as well. The *Note Book* is arranged chronologically rather than by subject, as one would expect from a decretal collection, for instance, and it is not always clear why certain cases were selected. That being said, the suggestion that the decretal collections provided some inspiration for the *Note Book* is appealing. If nothing else, McSweeney convincingly argues that we can read *Bracton* and the *Note Book* together as evidence of a textual practice based in the schools. This argument is strengthened in chapter five, and another connection is drawn with the practice of the schools in the form of dialectical reasoning—a method used to reconcile conflicting authorities. McSweeney focuses on a passage in *Bracton* marked as *'addicio'*, in which Bratton applies dialectical reasoning to Roman law texts (mainly from the *Digest*), following, it seems, the example of William of Drogheda, and inserting examples from the plea rolls (p.176-177). McSweeney admits that the *addicio* is the only part of *Bracton* in which the authors attempt to reconcile Roman law internally and in relation to English law. However, he argues that there are other indications of a schools-inspired approach in the citations of plea rolls cases, which are made by noting the first few words of a case, much in the same way as Roman and canon law sources (although the latter, of course, reference numbered sections of the texts as well, and it may that referencing by phrase in *Bracton* was a pragmatic approach to referencing unnumbered cases). Perhaps one of his most convincing arguments concerns the language used to introduce case references, namely *probatur*, *ut*, and *sicut*, which mirror what we see in the works of Tancred, Azo, and others (p.182-183). McSweeney is careful here, suggesting that these similarities 'imply' that the authors of *Bracton* attributed the same authority to plea rolls entries as they did to Roman law. Whether or not this is true, it seems likely that they were at least following a similar textual practice. Thus, chapters four and five showed how the justices based their work on Roman law models. Chapter six considers why they did this, arguing that in adopting these practices, the justices were suggesting that they themselves were authorities whose opinions were on par with those of civilian and canonist jurists (p.187). This chapter is more speculative than those preceding it, and McSweeney is fairly cautious in his claims. Although it is tempting to see the thinking of the justices who wrote *Bracton* and something systematic, we must keep in mind that these authors may have varied in how they understood the role of cases, and keep in mind that then men may not be representative of the wider circle in which they worked.

Chapter seven answers some of the questions that arise here, namely, whether this kind of legal thinking that McSweeney sees in the authors of *Bracton* appears elsewhere, and whether their desire to see themselves as jurists of a universal law influenced how they worked in the royal courts. To the first, McSweeney uses the text *Casus et Judicia* as evidence that *Bracton* was circulating among justices and clerks in the 1250s and that some of them were trying to emulate Raleigh and Bratton's method of reading plea rolls and extracting legal principles. There is the possibility that *Casus et Judicia* was in fact written by Bratton, but McSweeney argues that because the cases used in it are from the Bench, and Bratton sat as a justice not there but at the court *coram rege* at the time, that this must be the work of someone else. To the second, if we accept the argument in the following part of the chapter, namely, that Bratton worked to present himself in a certain way and shaped his court rolls to reflect his ideals, then we also have an answer to whether the justices put their ideals into practice in the courts. Bratton wanted his rolls to be read as the 'opinions of a great jurist' (238) and constructed them as such, including legal principles and Roman law concepts within the usual information on the cases.

A slight difficulty arises with the characterization of the audience for *Bracton*, which McSweeney seems to describe both as very narrow, restricted to the immediate circle around the authors (p.66, 96-97, 135, 201-204) and somewhat broader, including the justices and clerks of the royal courts (p.6). There is a tension between the idea that those who had some experience with the schools (which one may read from chapter two as being the majority of those working in the courts) were open to and even trained in this idea of a universal law and the role of the jurist as an important element of this, and the novelty and even exclusivity of the identity the authors of *Bracton* made for themselves. It may be that *Bracton* simply takes the ideas emanating from the schools one step farther—a step that not all justices and clerks were involved or interested in. Or, different parts of the treatise might have been useful and interesting to different groups, and it was only in the justices who wrote it that these ideals coalesced. It is very difficult to say how far these ideas might have permeated the wider group of justices and clerks, especially given that the vision of *Bracton*'s authors seems to have dissipated by the fourteenth century. The section in chapter seven on Bratton's rolls makes a good case for there having been some influence in the practice of the courts, but whether the combination of these rolls and *Bracton's Note Book* indicate that the authors saw cases and being on par with Roman and canon law 'consilia' remains speculative (as McSweeney indeed notes).

Overall, McSweeney's book makes a very strong and original contribution to the long-standing debate on Roman and canon law influence on the English Common law, offering a shift in perspective from the mere transfer of doctrine and rules to the formation of a legal and professional identity. He demonstrates that through the creation of *Bracton*, the justices and clerks in the circle of Martin of Pattishall, William of Raleigh, and Henry of Bratton tried to contextualize themselves within the universal law of the Latin West. They used

the framework of Roman law to understand their work in the royal courts, and, seeing themselves as jurists in the Roman sense, they created a text for the Common law that was influenced by the schools and brought new meaning to the material in the plea rolls (p.240). Whether one agrees with the approach or not, by framing the discussion in this way, McSweeney raises new points to consider and revives this fascinating area of scholarship. The book also provides thorough and up-to-date research on the lives of the justices; the development of legal learning in England; and the content, form, and manuscript tradition of *Bracton*, making it valuable to a much broader audience than those who are still embroiled in the Roman law influence debate. As such, it is a volume to which many scholars will turn, and rightly so.

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The project places the *Decretum Burchardi* at the center of fundamental, multi-perspective research. It makes the manuscript tradition accessible, develops a reliable critical edition, and examines the rich traces of reception in Germany, Italy, France and Spain. The innovative aspect of the project is the digital indexing as well as the reception-historical orientation, which gives an impression of the enormous dynamics of European legal cultures. Because the Europe-wide dissemination of the witnesses of transmission and reception as well as the cross-epochal impact of the collection require the integration of international cooperation partners in the project, the development of a digital working platform is at the center of the project. It serves as a digital resource for the preparation and internal and external availability of the various materials (manuscripts, catalogues, source editions, etc.) as well as the publication of an extended digital edition. In addition, it enables the exchange and bundling of the lively international research on sources and reception of medieval canon law and its digital offerings.

Carolingian Canon Law, https://ccl.rch.uky.edu.

A searchable, electronic rendition of works that maps the extent of variation in 'standard' legal texts known to Carolingian readers, and identifies particular points of variation. In addition to clarifying the textual history of medieval canon law, the project provides historical and bibliographic annotation of several hundred canons used by jurists before, during, and after the Carolingian period. Features include: a search engine for easy retrieval of unknown orthographical variants in the transcriptions; access to manuscript images with a simple interface for transcription and submission for publication on the CCL; search filters for searching by type of legal authority or genre; displays of multiple representations of the same canon for easy study of textual variation; interfaces for simple, direct publication of translations and annotations; private, personal workspaces for collecting material from the CCL for individual research.