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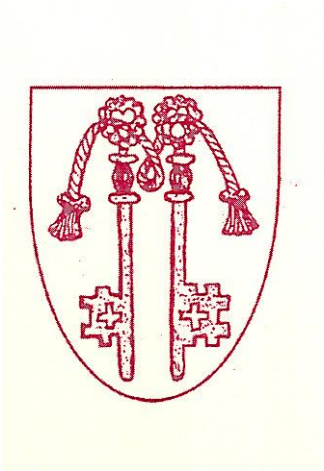

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Abbreviations

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*

CONTENTS

Qui était l'auteur de l'apparat au Décret *Animal est substantia*?

In memoriam Chris Coppens

Anne Lefebvre-Teillard

L'apparat au Décret *Animal est substantia* est, avec l'apparat *Ecce vicit leo*, l'un des grands témoins de l'enseignement du droit canonique tel qu'il était délivré à Paris au début du XIII^{e} siècle. Cet enseignement qui a débuté dès les années soixante du XIIe siècle, vit alors son plein épanouissement avant que la glose ordinaire ne vienne progressivement s'y substituer.[1] Cette période correspond essentiellement aux deux premières décennies du XIIIe siècle. C'est celle durant laquelle l'université de Paris se structure en se dotant de ses premiers statuts.[2]

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[1] Pour une rapide synthèse des travaux sur l'école parisienne depuis le célèbre article de Stephan Kuttner sur 'Les débuts de l'école canoniste française', SDHI (1938)193-204, (reprint in *Gratian and the Schools of Law 1140-1234* [London 1983] nVI), cf. Anne Lefebvre-Teillard, 'L'école de droit parisienne (fin XIIe-début XIIIe siècle)', ZRG Kan. Abt.105 (2019) 44-54. Un bel exemple de cette substitution progressive est fourni par le manuscrit BM Douai 592 dont la première couche est très proche d'*Animal est substantia*, cf. Anne Lefebvre-Teillard, 'A la recherche de magister A.: Notes sur le manuscrit 592 de la bibliothèque municipale de Douai', BMCL 38 (2021) 171-192, à 172-173. La substitution de la glose de Tancrède qui fait figure après 1215 de 'glose ordinaire' sur les trois premières compilations de décrétales, semble avoir été plus rapide que celle sur le Décret. On la trouve par exemple sur le texte de la *Compilatio secunda* (pas tout à fait conforme à celui de Jean de Galles) dans le second codex relié avec celui de la *Compilatio prima* dans St Omer BM 107 fol.119ra-166vb.

[2] La première mention explicite de statuts écrits par les maîtres eux-mêmes et jurés par les membres de l'université remonte à 1208-1209, cf. Jacques Verger, 'Que sait-on des institutions universitaires parisiennes avant 1245?', *Les débuts de l'enseignement universitaire à Paris (1200-1245 environ)* (Studia Artistarum 38; Turnhout 2013) 27-47 à 32. Le texte des statuts de 1215 octroyés par Innocent III et rédigés par son légat, le cardinal Robert de Courson, figure dans le *Chartularium Universitatis Parisiensis*, edd. Henricus Deniffle et Emilio Chatelain (Paris 1889) 1.78-79.

Découvert par Schulte au travers du manuscrit Bamberg SB can.42, *Animal est substantia* a été d'abord connu sous le nom de *Summa Bambergensis*.[3] Son caractère d'apparat s'est néanmoins assez vite imposé, grâce à la découverte de manuscrits où il figurait bien en marge du texte du Décret. On connaît à l'heure actuelle quatre manuscrits de cet apparat auquel Chris Coppens a consacré une grande partie de ses recherches. Outre le manuscrit de Bamberg, ce sont les manuscrits de Bernkastel-Kues, Sankt Nikolaus Spital 223, Luxembourg, Bibliothèque Nationale 139 et Liège, Bibliothèque de l'Université 127^{E}.[4] La transcription de cet apparat, fruit d'un long et persévérant travail n'a pu hélas être menée à son terme par Chris Coppens (†2015). Grâce à lui elle a été néanmoins publiée, avec toutes ses variantes, sur Internet jusqu'à la Causa X.[5] Cela rend le contenu d'*Animal est substantia* beaucoup plus accessible, même s'il faut encore recourir aux manuscrits pour connaître son contenu sur la suite du Décret.

Cet apparat commence donc à être mieux connu, mais qui en était l'auteur? Dès le début de ses recherches, la question avait préoccupé Chris Coppens, sans qu'il parvienne à la résoudre.[6]

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[3] Kuttner, *Repertorium* 206-207 où figure la référence à l'ouvrage de Schulte. Le manuscrit de Bamberg contient bien l'apparat *Animal est substantia* mais sans le texte du Décret, d'où le qualificatif de *summa* qu'on lui a d'abord attribué.

[4] D'après Chris Coppens les ms de Bamberg [B] de Bernkastel-Kues [K] découleraient d'un même manuscrit antérieur tandis que les ms de Liège [L] et Luxembourg [E] dépendraient à leur tour tantôt de B, tantôt de K, cf. Emile Chris Coppens, 'Pierre Peverel, glossateur de droit romain et canoniste?', *La cultura Giuridico-canonica medioevale*, edd. Enrique de Léon e Nicolas Alvarez de las Asturias (Pontificia Università della Santa Croce, Monografie giuridiche 22; Milano 2003) 303-394, à 310-311.

[5] PDF hosted at the Radboud Repository of the Radboud University, Nijmegen. Elle sera citée ci-après: Coppens, *Transcription* at https://repository.ubn.ru.nl/handle/2066/197926.

[6] Nous en avions à plusieurs reprises discuté ensemble et Chris avait émis une hypothèse dans l'étude qu'il m'avait dédiée, cf. Emile Chris Coppens, 'L'auteur d'*Animal est substantia*: Une hypothèse', *Mélanges en l'honneur d'Anne Lefebvre-Teillard* (Paris 2009) 289-298. Dans un courrier qu'il m'avait adressé en mars 1210, il reconnaissait lui-même la fragilité de son hypothèse.

Dans cette étude à sa mémoire, je voudrais présenter quelques éléments de réponse et avancer à mon tour un nom.

Le premier élément de réponse est issu d'une certitude: Il y a une dépendance marquée d'*Animal est substantia* à l'égard de l'apparat qui le précède: *Ecce vicit leo*. La chose avait déjà frappé Stephan Kuttner qui, dans son *Repertorium*, avait rapproché les deux textes.[7] Depuis, le même constat a été fait par tous ceux qui ont utilisé ces deux apparats pour leurs recherches.[8] Néanmoins il ne faut pas en exagérer la dépendance comme le montre en particulier le manuscrit de Bernkastel-Kues. Ce dernier a manifestement servi pour une 'lectio' du Décret sur plusieurs années. Son auteur enrichit le texte de départ par de nombreux ajouts que Chris Coppens a soigneusement noté sous la forme 'K2' voire 'K3'. Une glose située sur la C.2 q.4 dictum post c.3 ad s.v. *ministrorum* fait même référence au IVe concile de Latran.[9] On peut donc dire que d'une manière assez traditionnelle à cette époque, notre auteur fait sien l'enseignement de son maître tout en l'enrichissant progressivement. Il le fait en recourant beaucoup plus massivement que lui au droit romain, mais aussi en utilisant les collections de décrétales postérieures à la *Collectio* de Gilbert, en

[7] Kuttner, *Repertorium* 64-65.

[8] En particulier par Rudolf Weigand dans sa thèse *Die bedingte Eheschliessung im Kanonischen Recht* (Münchener theologische Studien 3 Kanonistische Abteilung 16; Munich 1963) 297-305. C'est à l'occasion de cette thèse que Rudolf Weigand a découvert le manuscrit 107 de la bibliothèque municipale de Saint Omer auquel je me réfèrerai ci- après.

[9] 'Habetur in novo Latheranensi concilio quod si aliquis allegaverit iudicem habere suspectum coram eodem causam suspicionis assignet, ipse cum adversario vel si adversarium non habet, cum iudice arbitros communiter eligant aut si communiter convenire non possunt eligant absque malicia, ipse unum et ille alium qui de suspicionis causa cognoscant. Etsi nequiverint in unam concordare sententiam, advocent tertium ut quod (illud) illi duo decreverint robur obtineat firmitatis. Sciant quod se electi ad id fideliter exequendum ex nobis in virtute obedientie sub ostentatione [attestatione?] divini iudicii districto precepto teneri. Causa vero suspicionis probata idonee persone committat negocium recusatus vel ad superiorem'.—Coppens, *Transcription* 1659, revue avec ms K [K2] fol.82va.) Cf. Lateran IV c.48.

particulier la *Compilatio romana* de Bernard de Compostelle.[10] Un maître auquel il emprunte beaucoup mais cite peu;[11] un maître enfin dont il n'hésite pas éventuellement à contredire l'interprétation, mais en utilisant, sans doute par respect, la formule 'quidam dicunt'.[12] L'auteur d'*Animal est substantia* a donc été l'élève de celui dont l'enseignement est consigné dans *Ecce vicit leo.* Or l'auteur de ce dernier apparat n'est autre que Petrus Brito abondamment cité par ses élèves dans leurs gloses à la *Compilatio prima*, comme j'ai eu plusieurs fois l'occasion de

[10] On est sur de cette utilisation lorsque la décrétale citée n'est présente que dans cette dernière ou bien est citée par référence à un titre sous lequel elle figure chez Bernard et sous un autre dans Alain l'Anglais.

[11] Mais qu'il cite néanmoins, ce qui exclut qu'*Animal est substantia* soit un remaniement de l'œuvre de ce dernier. Cf. à titre d'exemple les deux gloses transcrites par Chris Coppens (*Transcription* 1375 et 1378) sur la C.1 q.1 c.101 et c.114 où il figure sous la forme 'B' ou 'Bri'.

[12] En voici deux exemples. Le premier a trait à la fameuse question: la coutume peut-elle abroger la loi? Oui répond l'auteur d'*Ecce vicit leo* dans sa glose sur le dictum post c.3, de la distinctio 4, mais seulement 'ex consensu pape quo ad canones vel principis quo ad leges' (Sankt Florian Stiftsbibliothek XI.605 fol.2vb, s.v. *leges abrogate*). Même sans le consentement du prince répond l'auteur d'*Animal est substantia*: 'Quidam dicunt accedente consensu legislatoris quia cum contra consensum facimus, papa sciente et non contradicente, videtur assensum prebere. Tamen dicimus quod populus leges potest abrogare, non requisito consensu principis. Consensus principis generalis est quia propter utilitatem populi princeps leges condidit' (K fol.1vb s.v. *abrogate*; Coppens, *Transcription* 69).

Le second exemple a trait à une théorie également fameuse, celle des deux glaives. L'auteur d'*Ecce vicit leo* est partisan de la 'potestas divisa' comme le montre sa glose sur le canon *Omnes* (D.22 c.1) s.v. *terreni simul et celestis*: 'ergo data fuit ei potestas et iurisdictio: super clericos et laicos et sic videtur quod imperator ius gladii materiale a papa accipiat et hoc dicetur plenius xcvi. di. Cum ad verum (c.6). Non tamen credo quod ab eo habeat et ideo expono: "terreni" quo ad spiritualia quia super omnes habet potestatem quo ad spiritualia' (Sankt Florian Stiftsbibliothek XI.605 fol.9rb).

Dans sa longue glose sur ce même canon, l'auteur *d'Animal est* substantia interprète 'terreni' comme étant un 'argumentum quod imperator habet gladium materialem a domino papa', rappelant cependant que: "quidam dicunt quod papa tantum habet spiritualem et quod hic dicitur *terrenis simul et celestis*" tantum refert ad clericos et laicos in quibus papa ius habet quantum ad spiritualia' (K fol.12vb, Coppens, *Trancription* 432*).*

le souligner.[13] Sous son impulsion, la *Compilatio prima* est devenue alors la base d'un enseignement spécifiquement consacré au *ius novum*.[14] On a conservé plusieurs de ces manuscrits.[15] L'un d'entre eux doit particulièrement retenir notre attention car il va nous fournir plusieurs éléments pour l'identification de notre auteur. Il s'agit du manuscrit 107 de la bibliothèque municipale de St Omer.[16]

Ce manuscrit est un beau manuscrit de la *Compilatio prima* qui occupe les fol.3r-114v.[17] L'apparat Bernardus Papianus prepositus qu'il contient en marge, est constitué d'une première couche de gloses dans laquelle Petrus Brito est cité près d'une centaine de fois.[18] A cette première couche de gloses issue d'une première main, plusieurs mains successives ont apporté des compléments. Ces ajouts s'intègrent dans une même 'lectio' poursuivie sur plusieurs années, comme le montrent notamment certains signes de renvois posés non sur le texte de la décrétale concernée, mais sur celui d'une glose déjà présente.[19] La copie

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[13] Comme j'ai pu l'établir notamment grâce à un de ses élèves, cf. Anne Lefebvre-Teillard, 'Petrus Brito auteur de l'apparat Ecce vicit leo?', TRG 77 (2009) 1-21 et *Proceedings Esztergom 2008* 117-135.

[14] Elle est utilisée avant, notamment dans une *Summa questionum* conservée dans Douai BM 649 mais ne fait pas encore l'objet d'un enseignement spécifique, cf. Anne Lefebvre-Teillard, 'Un précieux témoin de l'Ecole de droit canonique parisienne à l'aube du XIIIe siècle: Le manuscrit 649 de la bibliothèque municipale de Douai', RHD 95 (2017) 1-57, ad 9-57.

[15] Dont on trouvera la liste dans notre étude: 'La lecture de la Compilatio prima par les maîtres parisiens du début du XIIIe siècle', ZRG, Kan. Abt. 91 (2005) 106-127; également paru dans *Proceedings Washington 2004* 223-250.

[16] Le manuscrit numérisé est disponible sur la bibliothèque virtuelle des manuscrits médiévaux:
https://bvmm.irht.cnrs.fr/sommaire/sommaire.php?reproductionId=18742.

[17] Il se termine en fol.118v. Il provient de l'abbaye bénédictine de St Bertin mais a été confectionné dans les ateliers parisiens comme les autres manuscrits cités dans l'étude ci-dessus. Il est néanmoins, par son ornementation, beaucoup plus beau que les autres, avec de larges marges, ce qui explique, en partie, la configuration des gloses qui y sont rapportées.

[18] Soit sous le sigle p b ou p.br, soit sous celui de p. soit sous celui de B.

[19] Pour illustrer la technique employée, je détaillerai dans le premier exemple donné ci-dessous au n.8-9 la manière dont ces différents compléments ont été apportés.

de cette *lectio* actuellement conservée aux archives départementales du Jura, confirme cette hypothèse: par l'intégration de ces ajouts dans le texte, elle montre que celui-ci formait bien un tout aux yeux des contemporains.[20] Or il y a entre cet apparat et *Animal est substantia* des liens indéniables qui sont autant d'éléments pouvant servir à l'identification de son auteur.

Le premier est l'utilisation intensive que ces deux apparats font du droit romain. Dès le début de ses recherches sur *Animal est substantia* Chris Coppens avait été frappé par cette utilisation intensive du droit romain par son auteur.[21] Pour ma part j'avais constaté que son utilisation encore modérée chez Petrus Brito, avait tendance à s'accroître chez ses élèves, en particulier chez l'auteur de l'apparat à la *Compilatio prima* contenue dans le manuscrit de St Omer.[22] Très souvent en effet sa leçon de droit canon se transforme en leçon de droit romain. Il ne se contente pas, comme d'autres maîtres, de donner une référence au droit romain à l'appui de sa glose, en la faisant suivre éventuellement d'un 'ubi dicitur' qui en résume d'une phrase la substance, il va plus loin. Il est fréquent en effet de le voir citer mot à mot des extraits du texte qu'il vise en le faisant suivre de la mention: 'verba legis' ou encore 'tota lex'. En voici un exemple où la mention 'tota lex' est exceptionnellement suivie d'une référence

[20] Sous la cote AD 12 F 17. C'est une copie sélective, comme je l'avais signalé dans 'Fils ou frère ? Sur le manuscrit 17 de Lons le Saunier (Archives Départementales du Jura)', BMCL 24 (2000) 54-64. Elle permet de restituer la teneur de certaines gloses qui dans le manuscrit de St Omer ont été partiellement rognées lors d'une reliure ultérieure. Elle a été faite avant les références aux *Compilationes tertia* et *secunda* qui, dans St Omer, ont été ajoutées en marge des gloses existantes. Il faut enfin prendre garde au fait que son auteur copie les gloses qu'il trouve en marge d'une décrétale, non en suivant au fur et à mesure l'ordre de mots glosés (qu'il n'indique pas) mais à la suite les unes des autres, telles qu'elles s'y présentent. Il faut donc avoir le manuscrit de St Omer sous les yeux, pour tirer correctement partie de cette copie.

[21] Emile Chris Coppens, 'Pierre Peverel, glossateur de droit romain et canoniste?' 303-394, à 310.

[22] Lefebvre-Teillard, 'La lecture' 242-244.

à l'auteur du texte romain, dans une glose sur la décrétale *Ceterum* (1 Comp. 2.20.9=X 2.28.9), s.v. *procedendum*:[23]

> ff de rei vendicatione, l.Officium (Dig. 6.1.9) contra ubi dicitur quod possum repetere rem a quocumque possessori qui habet copiam instituendi rem meam; ibi ponuntur hec verba: 'officium iudicis in hac actione erit ut iudex inspiciat an reus possideat. Nec ad rem pertinebit ex qua causa possideat: ubi enim probavi rem meam esse, necesse habebit possessor restituere qui non obicit aliquam exceptionem. Quidam ut Pegasus solam possessionem putaverunt hanc actionem complecti que locum habet [in] interdicto uti possidetis vel utrubi. Denique ait ab eo apud quem deposita est vel commodata vel qui conduxerit aut qui legatorum servandum causa vel dotis ventrisve nomine in possessione esset vel cui dampni infecti nomine non cavebatur quia hii omnes non possident, vindicari non posse. Puto eam ab omnibus qui tenent et habent restituendi facultatem peti posse'. **Tota lex, verba Ulpiani**. Ergo procedendum est sic contra procuratorem eius vel quemcumque detinentem rem meam et procedendum est contra detentorem ar. infra eodem Ex quorumdam (c.14), infra Qui filii sint legitimi, Causam (1 Comp. 4.17.4=X 1.29.17 et 2.14.3); tamen si dicat se possidere nomine eius qui iter arripuit, assignabitur ei dies ut eum qui se dominum gerit ostendat, c. Ubi in rem actio, l. Si quis (C.3.19.2), supra De dolo et contumacia (1 Comp. 2.10=X 2.14) in principio tituli. Sed esto quod autem iter arripuisset non in propria persona sed per nuncium, poterunt ne iudices procedere contra eum? Videtur quod non quia idem est si per nuncium exhiberat presentiam ac si in propria [persona] d.xv, Non debet § ult. (c.2 §2). Econtra si quis dicat expectare rescriptum domini pape non est subsedendum ii q.vi, Biduum (c.29) et Si autem (c.39) et nova decretalis determinat hic que dicit expresse quod sive in propria personna sive per nuncium iter arripuit, non est procedendum, Alexander III Ad hec (JL 13968, Gilb. Bx 2.19.18*; 2 Comp. 2.19.2=X 2.29.30); leges ergo contrarie abrogate sunt vel loquantur quando quis allegat se mississe nuncium sed tamen hoc non vult vel non potest probare.

L'auteur donne l'impression de profiter de cette lecture sur la *Compilatio prima*, moins solennelle que celle sur le Décret, pour diffuser le contenu des textes de droit romain auprès de ses élèves.[24] Mais est-il aussi l'auteur de l'apparat *Animal est substantia*?

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[23] St Omer 107 fol.39va.

[24] On retrouve néanmoins cette pratique dans le manuscrit B, au début de la glose d'*Animal est substantia* sur la première partie du Décret. Elle est présente à deux reprises dans la glose sur le d.a.c.1 de la di.11, cf. Coppens, *Transcription* 187-189, mais elle ne semble pas avoir perduré.

C'est en rapprochant les gloses contenues dans le manuscrit de St Omer 107 et celles contenues, sur le même sujet, dans *Animal est substantia*, qu'il est possible d'avancer sur ce point. Dans ce but voici trois exemples qui m'ont paru significatifs.

Le premier a trait au paiement de la dîme. Il est traité dans St Omer sur la décrétale *Pervenit* (1 Comp.3.26.2=X 3.30.5).[25] Une glose de la première main figure dans la marge en haut du fol.58va ad s.v. *cum integritate*:

> etiam de venatione, de miliera et fructibus arborum xvi q.vii Quicumque (c.4). Sed queritur utrum de male adquisitis debeant dari decime ut de precio scorti? Dicimus quod de omnibus illis in quibus transit dominium cum effectu et iuste possunt dari decime de precio scorti; non credimus quod debeant dari, licet meretrices turpiter non recipiant, tamen turpiter adquirunt et videretur ecclesia sic turpem quesitum approbare; culpa tamen inde fieri potest quia non datur domino directe sicut decime sed datur pro domino, unde 'honora dominum deum tuum de tuis iustis laboribus'. Idem de torneatoribus et de omnibus illis quorum contractus est inhibitus.

Un premier rajout est fait en marge du texte précédent par une deuxième main (proche de la première):

> Clericus ergo de venatione dare debet decimam licet ei sit interdictum venare ar. infra de clerico venatore c.i (1 Comp. 5.22.1=X 5.24.1).

Un deuxième rajout de cette seconde main est ensuite fait en marge d'une courte glose de la première main ad s.v. *lana*:[26]

> Item queritur an negociatores peccant non reddendo decimas ? Dicunt quod non, cum consuetudo sit in contrarium quod papa videt et non reprobat et consuetudo tacita [est] civium conventio ff. de legibus, Sed ea (Dig. 1.3.35). Sed contra: consuetudo non valet contra Vetus Testamentum; dicunt quod in Vetus Testamentum non est expressum de negociatore et iam dicebat gi. [Girardus] archidiaconus Parisiensis.

Un troisième rajout citant un certain magister a. dont nous reparlerons, est effectué par une troisième main immédiatement à

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[25] Le texte de la décrétale commence en bas du fol.58rb et continue pour sa plus grande part en fol.58va. Ce sont les gloses de ce dernier folio que je détaille ci-après pour illustrer la configuration des gloses contenues dans ce manuscrit.

[26] Elle-même située au milieu de la marge en va et ainsi conçue: 'nam lana in pecudum fructu continetur ff. de usuris, In pecudum (Dig. 22.1.28), unde versus in pecudum fructu lac lanaque fructus habetur'.

la suite à la 1ère glose ad s.v. *cum integritate* qu'elle complète ainsi:

> R. Quod a. dicit quod quilibet potest et debet dare decimam de omni eo quod adquirit in quo transit dominium ut quod non tenetur restituere, unde meretrix tenetur alioquin deformittas faceret causa melioris conditionis quod esse non debet ff de petitione hereditatis, 'si possessor ex hereditate inhonestos questus habuerit tenetur eos restituere' (Dig. 5.3.52), aliter ex inhonesta causa lucrum reportaret. Usurarius autem non tenetur dare decimam de pecunia fenebri quoniam eam restituere tenetur.

Enfin toujours en va mais juste au dessus du texte de *Pervenit*, un quatrième rajout est fait par une main proche de cette troisième main:

> Sed queritur de istrionibus, utrum debeant dare decimam? Ipsi enim venatores dicuntur lxxxvi. di. Qui venatoribus (c.8). R. Si detur eis propter adulationem non debet dare decimam quia fiscus debet illud occupare, que enim scelere adquiruntur fisco applicari debent quia succedit peccatoribus ff. de iure fisci, Lucius (Dig. 49.14.9). Si vero detur ei ne male dicat, ipse quidam male accipit sed ille bene dat et tunc competit ei repetitio per condictionem ex turpis causa, ff. de condictionem ob turpem causam l.ii. (Dig. 12.5.2) et ita nec in hoc casu tenetur dare decimam, sed tamen quia fiscus eos patitur melius est quod dent inde decimam quam quod retineant.
>
> Item queritur: aliquis negociator decedit insoluta decima de negociatione, tenetur ne eius heres? Videtur quia inde factus est locupletior; nullus autem debet locupletari aliena iactura ut ff De regulis iuris, Iure nature (Dig. 50.17.206), econtra si procederet obligatio in infinitum et multi hodie dampnarentur. Solutio: pp. dicit (*fin de la glose renvoyée par trois petits points en marge*) quod successor non tenetur quia non est ibi personalis obligatio sed lex est apposita ex cuius transgressione nihil redundat in successorem.

La presque totalité de ce qu'on peut lire ci-dessus, se retrouve en substance dans *Animal est substantia* sur la C.16 q.7 c.5, s.v. *Omnes decime*:[27]

> De illa que fit in venationibus expeditum est quoniam dari debet decima. Nam etiam clericus debet dare decimam de illa, licet non liceat ei venari, extra. De cohabitatione clerici et muliere c.i. (1 Comp. 3.2.1=X 3.2.1). Dicunt tamen quod non nisi de licite adquisitis danda est decima. Set de ystrionibus quid dicendum? Ipsi dicuntur venatores. Dicendum est quod quandoque bene detur ei, ipse tamen male accipit ut quando datur ei ne

[27] Bamberg SB can.42 fol.97va. Une partie de cette glose depuis 'Set de ystrionibus' jusqu'à 'iniuria alterius' avait été éditée par Chris Coppens dans 'Pierre Peverel, glossateur de droit romain et canoniste?' 387 addendum 84.

> ipse male dicat et tunc danti competit repetitio ff. de condictionem ob turpem causam l.ii. (Dig. 12.5.2). Unde tunc dico quod non debet inde dare decimam cum teneatur restituere. Quandoque autem datur ei causa adulationis quam facit et tunc debet fiscus ei auferre et succedere eis quoniam eis que scelere adquiruntur succedit fiscus ff. de iure fisci, Lucius (Dig. 49.14.9). Et ita nec in hoc casu debent dare decimam. Sed tamen quia fiscus patitur ipsas, melius est quod dent inde decimam quam quod retineant. Unde dico quod debent dare decimam. Sed cum negotiatores non dent decimas tenetur heredes antecessorum suorum dare decimam? Magister pp. dicit quod non quia ibi est personalis obligatio. Sed lex ei posita ex cuius transgressione nihil redundat in successorem, ff. de regulis iuris, Iure nature (Dig. 50.17.206) equum est neminem ditari vel iniuria alterius. Sed peccavit ne mortaliter negociatores qui non dant decimas? Dicunt quod non cum consuetudo sit in contra quam papa videt et non reprobat ff. de legibus Sed ea (Dig. 1.3.35). Sed contra: consuetudo non valet contra Vetus Testamentum; dicunt quod in Veteri Testamento non est expressum de negociatore.

Le deuxième exemple a trait à la notion de 'notoire' dont Petrus Brito avait donné une définition célèbre, y compris parmi les théologiens parisiens, mais avec laquelle l'auteur d'*Animal est substantia* n'est pas d'accord.[28] Il la critique sans en nommer l'auteur, dans sa glose sur Manifesta C.2 q.1 c.15 s.v. *Manifesta*:[29]

> id est notoria et notandum [est] quod ad hoc quod aliquod crimen sit notorium exigitur quod sit notum tote vicinie vel maiori parti infra eadem *In manifesta* [*male De manifesta* c.17] et dicunt quidam aliquid esse notorium per famam, sed contra: aliquis potest infamari de facto sicut et de uno quod ita sit hoc factum est notorium ergo est notum ergo

[28] Comme on le sait par le théologien Geoffroy de Poitiers dont les maîtres n'avaient pas voulu definir la notion de 'notorium' cf; Anne Lefebvre-Teillard, 'Magister B.', TRG 73 (2005) 9. Geoffroy reprend la définition donnée par Petrus Brito que voici: 'Quid autem sit notorium diverso diversa censiunt. Nos autem dicimus quod ad hoc quod aliquid sit notorium quatuor exiguntur: quod notum sit tote vicinie vel maiori parti ut infra eadem questio, De manifesta (In manifesta c.17). Item quod natura non respuat, non dico ius quia contra ius potest esse aliquid notorium sed non contra naturam, unde peccatum sodomitarum non fuit notorium…item exigitur quod aliqua vestigia facti appareant ut filii vel filie de fornicatione, sanguinis de homicidio…istis intervenientibus est notorium, tamen etiam in notoriis est sententia iudicis…' Cf. Lefebvre-Teillard, 'Petrus Brito auteur de l'apparat Ecce vicit leo?' 126-127.

[29] Bamberg SB can. 42 fol.51va.

> est verum, ergo aliquod factum est verum et scitum. Alii dicunt notorium esse de quo quis condempnatur per sententiam sed eadem obiectione potest inprobari quia de facto bene condempnatur quis tamen pro eis videtur facere decretalis extra ti. De cohabitatione clericorum et mulierum, Vestra (Gilb. 3.1.3=X 3.2.7) sed bene potest solvi, ideo dicimus esse notorium que se ingerit oculis omnium vel maioris partis et ita sit in veritate infra eadem § Quando (dict. post c.20). Utrum possimus eque opiniari per famam sicut et si sensu percepimus ? Questio est et credo quod non et in tali notorio non exigitur ordo iudiciarius quia talis ipso facto conficetur sed tamen ad hec necessaria est sententia, co. De iureiurando propter calumniam, l.ii. § Sin autem (Cod. 2.58(59).2.1) supra eadem questio, Nos in quemquam (c.1). Quidam tamen dicunt quod non di. xxxii. Nullus (c.5) set ibi aliud est quia enim ibi statim a iure suspensus debet evitari.

La même critique formulée de façon encore plus vive, figure dans St Omer 107 sur la décrétale *Consuluit* (1 Comp. 2.20.16=X 2.28.14) s.v. *notoria*:[30]

> Dicunt quidam quod notorium est illud quod probatur coram iudice per testes omni ex parte maiores et de quo est iam sententiatum arg. xv. q.v. c.ii. c.De penis, l.Qui sententiam (Cod. 9.47.16) ubi dicitur quando convictus est quis per testes vel confessus tunc potest sententiari; huic etiam opinioni concordat Lucius tertius extra Vestra duxit (Gilb. 3.1.1=X 3.2.7). Alii dicunt quod illud crimen quod omnes sciunt et de quo aliqua apparent vestigia vel argumenta ex evidentia sit certum, notorium est xxviii. di. Priusquam (c.4). Sed secundum istos homicidium (*sic!*),[31] simonia non possunt esse notoria cum non apparerint aliqua vestigia, non enim certari possunt. Alii dicunt et hanc opinionem credimus meliorem quod notorium est factum de quo constat toti vel maiori parti civitatis et iudici et quando reus non potest illud negare aliqua requisitione sufficienti quin semper habetur ratio prompta ad eum convincendum et hic omnia complectitur. Manifestum autem est quod a duobus vel tribus probari potest ff. de testamentis, l.Heredes (=Qui testamenta facere possunt et quemadmodum testamenta fiant, Dig. 28.1.21), ubi dicitur heres palam institui debet et apponit ibi lex quid est palam. R. non oportet ut ab omnibus sciatur sed a duobus vel tribus qui hoc probare possunt.

Le troisième et dernier exemple a trait à une question alors essentielle. Elle concerne le pouvoir juridictionnel de

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[30] fol.40rb.

[31] En parfaite contradiction avec ce qu'en disait Petrus Brito (cf. note précédente). Ce dernier parlait de 'peccatum sodomitorum' et Geoffroy de Poitiers de 'sodomiticum'. Manifestement le 'reportator' n'a pas osé ou voulu écrire 'sodomiticum' ou agit peut-être tout simplement par inadvertance.

l'archidiacre. L'archidiacre qui en général n'est pas prêtre et ne possède donc pas le pouvoir des clés, a-t-il le pouvoir d'excommunier? Non avait répondu Petrus Brito.[32] Sans le nommer, sa solution est écartée avec quelque embarras par St Omer et plus fermement par *Animal est substantia*:[33]

> Arg. quod archidiaconus non potest excommunicare quia solis sacerdotibus data est potestas ligandi et solvandi de penitentia d.i. Verbum (c.51). Sed contra infra de iure patronatus, Cum seculum (1 Comp. 3.33.16=X 3.38.13), sed illud intelligit de excommunicatis a sacerdote instituto archidiacono. Dicunt quidam quod habet ordinariam iurisdictionem et quod ab eo potest appellari arg. xxv. di. Perlectis (c.1) et quod in propria parte excommunicare potest si esset sacerdos, quia ad hoc ut aliquis excommunicet duo sunt necessaria claves, id est potestas illa sacerdotalis ligandi atque solvendi et iurisdictio. Alii plus procedunt dicentes quod etiam existens diaconus excommunicare potest arg. ff. de eo cui mandata est iurisdictio l.ult. § ult. (Dig. 1.21.5.1) quod iurisdictio sine modica cohercitione nulla est. Sed non est cohercitio in ecclesia nisi excommunicatio vel suspensio ergo hanc habet archidiaconus si habet iurisdictionem. Tamen dicunt alii quod in propria parte non potest excommunicare sed potest precipere ut excommunicatur. Sed queritur: utrum laicus possit excommunicare de mandato domini pape? Infra de officio et potestate iudicis delegati, Preterea (1 Comp. 2.1.6=X 1.29.5); nota etiam subdiaconus de mandato superioris potest excommunicare lxxiiii. di. Honoratus (c.8), infra de officio et potestate iudicis delegati, Sane quia nos (1 Comp. 1.21.16=X 1.29.11] et xciiii. di. Valde (c.1). Dicimus: potest excommunicare id est precipere ut excommunicetur, sicut dictum dominum archidiaconum secundum quidam.

Animal est substantia sur Perlectis (D.25 c.1) s.v. *iurgia*:[34]

> Est enim iudex ordinarius, extra. de iudiciis c.ii. (1 Comp. 2.1.2=X 2.1.2). tamen quidam dicunt quod archidiaconus non est iudex ordinarius nec potest cognoscere de causis nisi amicabiliter componendo vi. q.iii. Scitote (c.2). Credo quod archidiaconus sit iudex ordinarius. Sed quo modo potest iudex cohercere ? Iurisdictio enim nulla est sine aliqua cohercitione ff. de officio eius cui mandata est iurisdictio l.ult. (Dig. 1.25.5). Dicunt quidam quod archidiaconus potest clericos tantum suspendere, non excommunicare quia non habet claves, de penitentia di.i. Verbum (c.51), extra. de officio archidiaconi c.ult. (1 Comp.

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[32] Sur le canon *Perlectis* (D. 25 c.1) s.v. *iurgia*, Cf. Lefebvre-Teillard, 'Petrus Brito auteur de l'apparat Ecce vicit leo?' 120-122.

[33] St Omer fol.15rb sur *Archidiaconis* (1 Comp. 1.15.5=X 1.23.5) s.v. *sententiam*.

[34] Bamberg SB can. 42 fol.29ra, Bern-kastel-Kues St Nicholas 223 fol.15vb.

> 1.15.5=X 1.23.5), sicut dicitur quod abbatissa potest moniales suas suspendere, non tamen excommunicare. Unde dicunt quod per alium potest archidiaconus excommunicare et iniungere quod alium excommunicet, nam multa potest quis per alium quod per se non potest, sicut episcopus potest alium dare tutorem, ipse tamen non potest esse tutor et sic intelligunt illud capitulum lxxxviii. di. Episcopus (c.7). Tamen lex dicit quod per me non possum nec per alium, ff. de administratione rerum ad civitates pertinentium l.ii §i. (Dig. 50.8.2.1), unde credo quod archidiaconus excommunicare potest, extra. de appellationibus Reprehensibilis (1 Comp. 2.20.42=X 2.28.26) et extra. de iure patronatus Cum seculum (1 Comp. 3.33.16=X 3.38.13). Quod autem dicitur quod non potest iudicare nec ferre sententiam in clericos, verum est sententiam scilicet depositionis quam ad solum episcopum pertinet sicut pedaneus iudex; licet cognoscat de aliis causis non potest cognoscere de causa status Co. de pedaneis iudicibus l.ii (Cod. 3.3.2) et ff. de iurisdictione omnium iudicum Magistratibus (Dig. 2.1.13): permissa est modica castigatio in servos non tamen ultimum supplicium. Si autem opponatur quod non habet claves ergo non potest excommunicare, illud non valet: nam episcopus confirmatus tantum potest excommunicare, extra. c.(Celestinus), Transmissam (Gilb. 1.3.5=X 1.6.15) non tamen habet claves. Similiter subdiaconus delegatus potest excommunicare, non tamen habet claves lxxiiii. di. Honoratus (c.8). Talis enim litigatio pertinet bene ad iudicium sed remissionem pro peccato que habet fieri in foro penitentiali, illam non potest facere.

Le dernier élément de réponse que je voudrais avancer pour aboutir à l'identification de l'auteur d'*Animal est substantia* est, me semble-t-il, particulièrement convaincant. Il s'agit de la présence dans ce dernier apparat comme dans celui du manuscrit de St Omer 107, d'un certain magister a.[35] Dès le début de mes recherches sur l'école parisienne[36] j'avais été frappée par sa

[35] Dans *Animal est substantia* 'magister a.' figure sous le sigle 'Aub' lorsque son nom n'est pas écrit en entier avec nombre de variations, cf. Coppens 'L'auteur d'*Animal est substantia*' 295 n.20. Sous le nom 'd'Aubertus' il n'est cité qu'une fois sur la première partie du Décret (D.11 d.a.c.1); c'est à partir de la Causa 1 question 1 qu'il commence à être cité plus fréquemment. Il en va de même de Pierre Peverel en compagnie duquel il est cité sur cette D.11; ce dernier n'est en effet cité que deux fois sur cette première partie du Décret, comme le montre le relevé effectué par Chris Coppens dans 'Pierre Peverel, glossateur de droit romain et canoniste?' 358-359.

[36] Anne Lefebvre-Teillard, 'Magister A.: Sur l'école de droit canonique parisienne au début du XIIIe siècle' RHD (2002) 401-417, et in *Panta rei: Studi dedicati a Manlio Bellomo* (5 vol. Roma 2004) 3.499-514.

présence dans St Omer, car ce maître n'était pas cité par les autres apparats à la *Compilatio prima* de l'école.[37] Présence forte puisqu'il est cité cinquante cinq fois d'après mon dernier relevé. Présence toujours postérieure néanmoins à la première couche de gloses. Elle débute dès qu'intervient la seconde main, même s'il est plus fréquent que ce soit avec la troisième qu'apparaisse magister a., comme dans l'exemple du paiement de la dîme cité ci-dessus. Elle donne l'impression que l'auteur de notre apparat a utilisé une 'lectio' de la *Compilatio prima* faite, après la sienne, par magister a., pour enrichir sa propre 'lectio'. Il le fait à plusieurs reprises, essentiellement sur les trois premiers livres de la *Compilatio prima*.[38] Cette impression est renforcée par les différentes manières dont magister a. est cité. Il peut l'être in fine d'une glose de la première main, à laquelle est rajoutée une précision avec la mention 'ita dicit a.', ou encore une 'solutio' à la question qu'a suscité le texte glosé par cette première main. Il peut l'être, en dehors de la manière classique 'a.dicit', par un 'a. intelligit', 'a. distinguit', ou encore par un 'non credit a.'.[39] Cette

[37] Y compris dans l'apparat *Militant siquidem patroni* qui, comme notre apparat, utilise la *Compilatio romana* de Bernard de Compostelle; sur cet apparat qui nous apprend que Petrus Brito est devenu Petrus abbas, cf. notre étude 'D'oltralpe', observations sur l'apparat militant siquidem patroni' *Amicitiae Pignus: Studi in riccordo di Adriano Cavanna* (Milano 2003) 2.1311-1335. Seule figure dans Troyes BM 385 fol.72va, une glose siglée A. in fine et dont le caractère exogène est prouvé par le trait noir qui l'entoure entièrement.

[38] Sur les deux derniers livres, la première couche de gloses est dense, ce qui limite la place pour les ajouts. Néanmoins ils restent parfois consistants, surtout de la part de la deuxième main. On en trouve un qui cite a. sur le livre IV fol.74ra sur *De illis* (1 Comp. 4.1.4=X 4.5.3) sous forme d'un court rajout in fine et en marge d'une longue glose de la première main: 'sed hec solutio improbatur per capitulum extra. tit. eod. Veniens (Gilb. 4.1.4=X 4.1.15) ideo dicit a. quod ille iure suo utitur'. Deux autres un peu plus consistants figurent sur le livre V: l'un fol.95rb en marge de *Preterea* (1 Comp. 5.3.1=X 5.4.1) sans renvoi et sous forme de question; l'autre fol.103 va en marge de *Plures* (1 Comp. 5.15.1=X 5.19.1) sous une glose de la première main s.v. *vel aliud genus*. Tous les deux sont de la deuxième main.

[39] 'a intelligit hoc capitulum'(fol.44 ra sur Qua fronte (1 Comp. 2.20.41=X 2.28.25, *s.v. non est tradendum sepulture*); 'a. distinguit dicens' (fol.45rb sur

manière de citer magister a. n'est pas sans évoquer la manière dont Aub' est lui aussi cité dans *Animal est substantia.*[40] Magister a. peut l'être enfin sans renvoi spécifique, au travers d'une question ou d'une série de questions ajoutées en marge et dont la solution, souvent toute 'romaine', lui est attribuée.

Si à cette forte présence de magister a. on ajoute celle plus modeste mais néanmoins réelle de Pierre Peverel abondamment cité par ailleurs dans *Animal est substantia*, le cercle se resserre autour de notre auteur.[41] Il est très probablement le même que celui de l'apparat à la *Compilatio prima* du manuscrit de St Omer. Mais qui est-il? Avant de livrer un nom, il me faut faire une dernière remarque à propos de magister a. Ce dernier n'a pas seulement lu la *Compilatio prima,* il a également lu le Décret, comme je l'ai récemment prouvé grâce au manuscrit 592 de la bibliothèque municipale de Douai.[42] Très proche d'*Animal est substantia*, ce manuscrit m'a permis également d'établir que le magister qu'il citait sous le sigle a. était bien le même que le magister Aub.', Aubertus, Aubericus présent dans *Animal est substantia*.

A l'époque il n'y a à Paris qu'un maître en droit canon qui porte ce nom, c'est Aubericus ou Albericus Cornutus frère de Gautier Cornut, le futur archevêque de Sens. Gautier et son jeune frère Aubri, élevés dès leur jeune âge au sein de l'église

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de confirmationibus 1 Comp. 2.21.2=X 2.30.2, s.v. *falsam*); 'non credit .a' (sur *Referente* 1 Comp. 3.5.9=X 3.5.7 en marge sans renvoi).

[40] En voici quelques exemples issus de la Causa 1: 'distinguit Aub.' (q.2 c.8 s.v. *velit pro ipsa*, Coppens *Transcription* 1431); 'Aliter dicit Aub.' (q.3 c.7 s.v. *si quis alterum vendit*, Coppens *Transcription* 1443); 'non credit Aub.' (q.7 c.2 s.v. *non edificabis quia vir sanguinem*, Coppens *Transcription* 1484).

[41] Il est cité onze fois dans St Omer 107 et deux fois seulement dans l'autre apparat contemporain *Militant siquidem patroni*, cf. Anne Lefebvre-Teillard, 'Un maître parisien: Pierre Peverel', BMCL 36 (2019) 209-242, ad 220-221.

[42] Anne Lefebvre-Teillard, 'A la recherche de magister a: Notes sur le manuscrit 592 de la bibliothèque municipale de Douai', BMCL 38 (2021) 171-192. Le manuscrit de Bamberg fournit une preuve supplémentaire de cette lecture du Décret par Aub.'; au fol.82rb sur la C.11 q.3 c.96 (*Ita corporis*) dans une longue glose s.v. *probat,* on peut lire en effet: 'sed contra hug (Huguccio) sic exponit aub': nonne episcopus potest compelere monachum ad observationem? Ratio potest utique…'

parisienne,[43] tous deux qualifiés dès 1200 de magistri,[44] sont et resteront très proches l'un de l'autre.[45] Un Galterus chez qui 'la science de l'un et l'autre droit est d'une vigueur parfaite' écrit Guillaume le Breton, le 'biographe' de Philippe Auguste, in fine de sa *Philippide*:[46] 'Quo perfecta viget utriusque scientia legis'. Un Gauthier, poursuit Guillaume, 'Oh combien fidèle par la parole et l'action à tout le monde du droit': 'Quam toti mundo legis ore manuque fideli'.[47]

Un Gautier auquel, aux vues de tous ces éléments, on peut attribuer, sans un trop grand risque d'erreur me semble-t-il, la paternité d'*Animal est substantia*. Un Gautier qui par son usage intensif du droit romain a sans aucun doute importuné nombre de théologiens.[48] Peut-être a-t-il ainsi indirectement contribué à ce

[43] Comme on peut le lire à propos de leur 'obiit' respectif, dans le *Cartulaire de l'Eglise Notre Dame de Paris*, ed. Benjamin E.C. Guérard (Paris 1850) 4.50 pour Gautier et 4.172 pour Albericus. Ce sont les deux seuls des fils Cornut à avoir été ainsi élevés au sein de l'église parisienne.

[44] Dans un acte daté du mois de juin 1200 où ils se portent caution pour l'un de leurs cousins concernant une vente faite par ce dernier à l'abbaye de Saint Germain des Prés. L'acte débute ainsi: 'Universis Christi fidelibus presentes litteras inspecturis, magistri G. Cornutus et A. frater eius, salutem in domino' cf. René Poupardin (†1927), *Recueil des chartes de l'abbaye de Saint Germain des Prés des origines au début du XIIIe siècle*, t.2 revu et corrigé par Alexandre Vidier et Léon Levillain (Paris 1932) 183-184.

[45] Comme j'aurai l'occasion de le montrer dans une prochaine étude consacrée à ces deux frères et maîtres, à la fois hommes d'Eglise et serviteurs du Roi.

[46] Sur ces *Philippidos* écrits à la gloire de Philippe-Auguste et dédiés au prince Louis, le futur Louis VIII, cf. Dominique Boutet, *Formes littéraires et conscience historique aux origines de la littérature française (1100-1250)* (Paris 1999) 209. Sur l'intérêt que cette œuvre présente pour l'historien, cf. John W. Baldwin, *Philippe Auguste et son gouvernement* (Paris 1991) 16.

[47] Ces deux vers (704-705) sont écrits en 1220, alors que l'élection de Gautier au siège de Paris devenu vacant par la mort de Pierre de Nemours (devant Damiette en décembre 1219), contestée par une partie du chapître mais néanmoins approuvée par l'archevêque de Sens, a été refusée par Honorius III. Cf. *Œuvres de Rigord et de Guillaume le Breton, historiens de Philippe-Auguste,* ed. Henri François Delaborde (2 vol. Paris 1875) 2.374-375.

[48] Comme le suggère cette glose présente dans le manuscrit E sur D.8 c.1 s.v. *distribuit*: 'argumentum contra quosdam theologos qui nolunt ut leges coram eis allegantur et alibi habemus quod leges divinitus sunt per ora principum

que l'enseignement 'ex cathedra' du droit romain à Paris soit interdit en 1219 par Honorius III.[49]

Université de Paris II.

promulgate xvi. q.iii. Nemo (c.17), xcvi. Di. Cum ad verum (c.6)' (Coppens, *Transcription* 120).

[49] C'est la très fameuse décrétale *Super speculam* du 16 novembre 1219. Pour en saisir toute la teneur, il est préférable de consulter le texte entier qui a été édité dans le *Chartularium Universitatis Parisiensis*, edd. Henricus Deniffle et Aemilio Chatelain (Paris 1889) 1.90, plutôt que les extraits qui en figurent dans X 5.5.5 et X 5.33.28. Sur les raisons de cette interdiction qui a donné lieu à bien des explications contradictoires, cf. Emile Chris Coppens, 'Le droit romain à Paris au début du XIIIe siècle, introduction et interdiction', *Les débuts de l'enseignement universitaire à Paris* 329-343. Ce dernier pensait que ce sont surtout des raisons administratives et financières qui ont provoqué cette intervention d'Honorius III. Il est certain que le financement des études des clercs posait bien des problèmes à leurs évêques, comme nous l'avons relevé dans notre étude 'Texts and Parisian Context of the *Licencia Docendi* at the Beginnings of the Thirteenth Century', *Texts and Contexts in legal History: Essays in Honor of Charles Donahue*, edd. John Witte, Jr., Sara McDougall, and Anna di Robilant (Berkeley 2016) 159-177 ad 167-171. Néanmoins ces raisons étaient-elles suffisantes pour provoquer une telle interdiction?

Bidding Prayers: The Economic Vocabulary of Late Medieval European Christianity and the Experience of the Liturgy on the Eve of the Reformations[1]

Tyler Lange

Mutuum date, nihil inde sperantes.
Luc. 6:35

O sacramentum pietatis! o signum unitatis! o vinculum caritatis! Qui vult vivere, habet ubi vivat, habet unde vivat. Accedat, credat, incorporetur, ut vivificetur.
Augustine, *Tractatus in Johannem,* 26.13 (ad Jo. 6:50-52)

Culpae quantitas non mensuratur ex nocumento quod quis facit, sed ex voluntate qua quis facit, contra caritatem agens. Et ideo, quamvis poena excommunicationis excedat nocumentum, non tamen excedit quantitatem culpae.
Thomas Aquinas and Rainaldo da Piperno, *Supplementum ad Summam theologiae,* Q.21, a.3

Je deffens pareillement que nulle personne de quelque estat quil soit ne viengne a la table nostre seigneur Jesu crist ayant aulcune rancune ou haygne contre son prochain: ou se sentent estre en quelque aultre peche mortel secret ou notoyre Car en telle sorte prendre le corps de Jesu crist est recepvoir sa dampnation.
Priest's Manual, Saint-Eustache, Paris BNF Latin 1216, 1530s

[1] It is a rushed book whose conclusion is written six years after publication. The author pleads panic to publish quickly in the illusory hope of securing one of a diminishing number of tenure-track positions in a diminishing subfield, field, and discipline. This article crosses three historiographical contexts, examining an underutilized historical source to reevaluate the experience of Christianity on the eve of the Reformations and thereby to provide an alternate conclusion to *Excommunication for Debt* (2016). The author thanks Laurent Mayali, Wim Decock, and Albrecht Cordes, who provided institutional spaces where the project began; the colleagues whose work he cites; and Jeff Miner and Jesse Torgerson, who supplied formative comments.

Introduction

'Economy of salvation', 'treasury of merit', 'marketplace for merit', 'price of salvation', 'business of salvation', 'office of souls', 'management of poverty', 'accounting for the afterlife', 'moral economy or economies', 'passports to paradise', 'quantifiable religiosity' . . . [2]: theologians and historians since at

[2] The first two terms are conventional metaphors, although Tertullian's '*oeconomia salutis*' uses economy in its ancient meaning and the Church's treasury is not of wealth but of Christ's infinite, inexhaustible merit acquired on the cross. For the remaining terms, chosen from many possible titles in different languages: Wim Decock, *Le marché du mérite: Penser le droit et l'économie avec Léonard Lessius* (Brussels 2019); Giacomo Todeschini, *Il prezzo della salvezza: Lessici medievali del pensiero economico* (Rome 1994); Tyler Lange, *Excommunication for Debt in Late Medieval France: The Business of Salvation* (Cambridge 2016); Arnaud Fossier, *Le bureau des âmes: Écritures et pratiques administratives de la Pénitencerie apostolique (XIIIe-XIVe siècle)* (Bibliothèque de l'École française d'Athènes et de Rome 378; Rome 2018); Jacques Chiffoleau, *La comptabilité de l'au-delà: Les hommes, la mort et la religion dans la région d'Avignon à la fin du Moyen Âge, vers 1320-vers 1480* (Collection de l'École française de Rome; Rome 1980); Edward P. Thompson, 'The Moral Economy of the English Crowd in the Eighteenth Century', *Past & Present* 50 (1971) 76-136, whose title has been pertinently adopted by Laurence Fontaine, *The Moral Economy: Poverty, Credit, and Trust in Early Modern Europe* (New York 2014; French orig. 2009), and nuanced by Buchanan Sharpe, *Famine and Scarcity in Late Medieval and Early Modern England: The Regulation of Grain Marketing, 1256-1631* (Cambridge 2016); Robert N. Swanson, *Indulgences in Late Medieval England: Passports to Paradise* (Cambridge, 2007); Thomas Lentes, 'Counting Piety in the Late Middle Ages', in *Ordering Medieval Society: Perspectives on Intellectual and Practical Modes of Shaping Social Relations*, ed. Bernhard Jussen and trans. Pamela Selwyn (Philadelphia 2001) 55-91. 'Quantifiable religiosity' seems to me a more idomatic translation of 'gezählte Frömmigkeit'. On the deep history of the economic outlook more generally, although without necessarily accepting that Neoliberalism was born either in the second or fourth centuries AD, given the gaps in such ambitious intellectual genealogies, see Giorgio Agamben, *The Kingdom and the Glory: For a Theological Genealogy of Economy and Government*, trans. Lorenzo Chiesa and Matteo Mandarini (Stanford 2011; Ital. orig. 2007), and Dotan Leshem, *The Origins of Neoliberalism: Modeling the Economy from Jesus to Foucault* (New York 2016). Legendre, cited below, merits translation into English as much as Agamben. One might as well refer to Sylvain Piron, 'Le devoir de gratitude: Émergence et vogue de la notion d'antidora au XIIIe

least Tertullian have used 'economic' language to speak of God, salvation, and religious life. Recent contributions are no exception, whether the specific subjects are: Franciscan theologians as experts in valuation and shapers of the late medieval economic vocabulary, managing the finances of Franciscan convents; the operation of the Apostolic Penitentiary, confession and scandal, testamentary bequests funding masses, devotional indulgences, and popular piety; or governmental regulation of bread prices. Yet what do recent historians mean by using such language? For the most part, these accounts abandon former narratives of economic history in which lending, which existed in a separate, economic realm divorced from religious life, was Christianized at some point in the Middle Ages, hobbling it with the prohibition of usury from which the economy had to be liberated, most successfully in the Protestant territories of northern Europe. They do not, for the most part, revive old, anti-Catholic narratives of a commercialized, corrupt medieval Church. Instead, they, and in particular the studies of Giacomo Todeschini, Jacques Chiffoleau, and Chiffoleau's students on the 'economic vocabulary' and management practices of the Franciscan friars, offer a vision of economic life fully embedded in religious life. In fact, they show that there was no separate economic life to be disembedded from religious life because a religious language of economic ethics shaped economic life through the sermons and management practices of the friars. Franciscans became experts at valuation and valorized the circulation of economic goods, rather than hoarding or thesaurization, because the Franciscans had to manage daily life without legal property rights in accordance with St. Francis's

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siècle', in *Credito e usura fra teologia, diritto e amministrazione: Linguaggi a confronto (sec. XII-XVI). Convegno internazionale di Trento, 3-5 settembre 2001*, edd. Diego Quaglioni, Giacomo Todeschini, and Gian Maria Varanini (Rome 2005) 73-101, and to Decock, *Le marché du mérite* and *Theologians and Contract Law: The Moral Transformation of the Ius Commune (ca. 1500-1650)* (Leiden 2013), on the decisive impact of thirteenth- and fourteenth century theology via sixteenth- and seventeenth-century moral theology.

ideal of poverty, and because their subsistence—and salvation—depended on proper estimation of the necessities of life.

The intellectual and practical consequences of Franciscan poverty clarify the context of the excommunications for debt that I examined in *Excommunication for Debt in Late Medieval France*, and affirm the possible implications of the practice's apparent decline from the late fifteenth century. In short, it appears that excommunication for debt manifests popular adoption of the Mendicants' encouragement of economic circulation through caritative lending: excommunication for debt treated debt not as a crime per se, but as a crime when payment was delayed or deferred against the creditor's will. Our mistake is to imagine the creditor as an oppressor: because he or she had likely extended an interest-free sales credit, the defaulting debtor was potentially behaving in an immoral manner by breaking a promise and by impeding the circulation of goods, within this economic ethics. (The situation was different for usurious loans from Christian or Jewish moneylenders.) While Franciscans were most obviously arbiters of proper economic behavior as preachers and confessors, users of late medieval church courts were also arbiters of proper economic behavior each time they sought ecclesiastical sanction against a usurer or, more commonly, a defaulting debtor. Because the practice manifests popular understanding of the Mendicants' preaching, litigants' abandonment of the practice is a sign of the changing mentalities that mark the beginning of the Age of Reformations. What follows begins with recent work on the economic vocabulary of the late Middle Ages, proceeds to recent work on legal history, particularly the shifting nexus of church courts and auricular confession, and a somewhat longer examination of the conceptual and political stakes of the history of the liturgy, exploring how traditional historiographies of contempt for late medieval economic thought, penitential practice, and liturgy have been revised. It then takes up the text of bidding prayers, an underutilized historical source, to show how liturgical experience of excommunication for debt suggests new ways of understanding the sixteenth-century Reformations of Christianity.

Bidding prayers, used to justify and, in part, to model elements of the liturgical innovations implemented following the Second Vatican Council, are the key source that yokes together economic behavior, canon law and confession, and the liturgy as experienced by Christians on the eve of the Reformations.

The Economic Vocabulary of the Late Middle Ages

The relevant economic history speaks less to social history than to the history of how medieval theologians conceived of the realm of human behavior we describe as the economy. Early histories of the medieval economy focused on constructing price and wage series, like Jean Meuvret's price series for France, Henry Phelps Brown's and Sheila Hopkins' wage series for England, and Wilhelm Abel's broader study of agrarian trends, or on histories of banking such as Raymond de Roover's. English histories were often socially focused, like R. H. Tawney's *Agrarian Problem of the Sixteenth Century* (1912) or those of his followers in agrarian history. Continental histories until fairly recently tended to echo histories of banking that treated the Church's prohibition of usury as an obstacle to be overcome. Clément Lenoble and Valentina Toneatto have summarized how historians, in attempting to describe the relations between Christianity and modernity, generally tended to treat 'the economy' and 'religious life' or 'Christianity' as separate, independent categories of existence. In this world of oppositions—market and Church, lay and clerical, pursuit of profit and pursuit of salvation—'theologians moralized and christianized preexisting practices', thereby 'allowing for the discovery of the laws of the modern economy'.[3] Economic analysis is not, for this type of history, one lens for examining human behavior, but scientific insight into 'reality'. Alain Guerreau has similarly observed, echoing Bartolomé Clavero: 'ever prisoners of a sort of structural blindness, most present-day

[3] Clément Lenoble and Valentina Toneatto, 'Les "lexiques médiévaux de la pensée économique": Une histoire des mots du marché comme processus de domination et d'exclusion', *Annales: Histoire, Sciences Sociales*, 74 (2019) 25-41, at 30, with reference to the work of Giacomo Todeschini.

historians remain convinced that the medieval Church was a form of "religion", exterior to "social reality", which was exclusively located in "the economy" and "politics"'.[4] Examinations of economic thought, religious practice, debates over Franciscan poverty, and the management practices of the Mendicants have clarified that such a perspective severely distorts our understanding of the later Middle Ages.

It rather misses the point, in perhaps two ways, to seek out 'the origins of capitalism' or 'the origins of modern economic thought' in medieval merchants or medieval theologians. First, and obviously, entering numerical 'facts' into a spreadsheet or database strips away and obscures the time-bound presuppositions and rich contexts of 'raw', archival data, simplifying the way that historical sources draw attention to the multiple layers of mediation between past human experience and the present-day historian. It hides not just the judgments that intervened in the creation of an archival item but the judgments that intervene in data entry and cleaning. Secondly, it universalizes present perceptions of reality, which generally take a materialist, potentially biologically determinist tone, even as some seek emancipation from these material realities. This is perhaps most apparent in my generation's undue focus on concepts foreign to the Middle Ages such as 'domination' or 'inequality' (perhaps as foreign as 'emancipation' or 'capabilities'). If historians tend to agree that medieval economic

[4] Alain Guerreau, 'Avant le marché, les marchés: En Europe, XIIIe-XVIIIe siècles (note critique)', *Annales: Histoire, Sciences Sociales* 56 (2001) 1129-1175, at 1170. Of a slightly later period, Bartolomé Clavero has written in *Antidora: Antrolopologia católica de la economia moderna* (Università di Firenze Facoltà di Giurisprudenza Centro di Studi per la Storia del Pensiero Giuridico Moderno, Biblioteca 39; Florence 1991) 203: 'one understands nothing unless one begins from the assumption that, prior to freedom, prior to contract, prior to every juridical concept, is religion'. What Clavero refers to as 'religion' is quite distinct from how religion is understood in twenty-first-century Europe or North America. Similary, with respect to law, Clavero (192) notes that 'the law [or right, or moral precept] of friendship (*ius amicitiae*) was prior to any other body of law (*derecho*)', highlighting how difficult it is to explain continental concepts of *ius*, *directum*, and *lex* in English. Clavero's influence is clear throughout Fontaine's *Moral Economy*.

life and religious life were two sides of the same coin, their opinions of the Mendicants have differed. While Jacques Le Goff recognized the 'invention of purgatory' to be a momentous innovation, potentially accommodating commerce and Christianity by opening Heaven to merchants, he saw in Franciscan preaching against usury what his colleague Jean Delumeau called 'pastoral care by fear (*la pastorale de la peur*)', a retrograde attitude that he personally found intolerable.[5] In a different tone, at approximately the same time, Paolo Grossi redescribed Franciscan rejection of wealth as something innovative, but foreign to his conception of the Middle Ages. For Grossi, Franciscan theories of 'use of fact (*usus facti*)' (sc, as opposed to legal use) were a proto-modern, voluntarist, 'intrinsically autonomous cell that quickly became cancerous, and consequently corroded and demolished the medieval organism', because *usus facti* rested on 'law no longer understood as the secret rhythm of creation but as a will to dominate creation'.[6] If Le Goff and Delumeau represent lay or progressive Catholic attitudes to the medieval past, Grossi represents a more conservative Catholic attitude to the Middle Ages, albeit one far more nuanced than simplistic, polemical views of an idealized or demonized Middle Ages.[7]

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[5] Jacques Le Goff, *La naissance du Purgatoire* (Paris 1981) and *La bourse et la vie: Économie et religion au Moyen Âge* (Paris 1986); Jean Delumeau, *La peur en Occident: Une cité assiégée (XIVe-XVIIe siècle)* (Paris 1978), and *Le péché et la peur: La culpabilisation en Occident, XIIIe-XVIIIe siècles* (Paris 1983). For Le Goff's attitudes, see *Une vie pour l'histoire: Entretiens avec Marc Heurgon* (Paris 1996), esp. 'Souvenirs de jeunesse', 5-33; for Delumeau's attitudes, see Guillaume Cuchet, 'Jean Delumeau, historien de la peur et du péché', *Vingtième Siècle: Revue d'histoire* 107 (2010) 145-155.

[6] Paolo Grossi, 'Usus facti: La nozione di proprietà nella inaugurazione dell'età nuova', *Quaderni fiorentini per la storia del pensiero giuridico moderno* 1 (1972) 287-355, at 293 and 320. This pathbreaking study introduced Peter John Olivi and would in time help to erode Michel Villey's negative view of William of Ockham, even if it rests on an essentialist vision of unified medieval law.

[7] e.g. Michel Villey, *La Formation de la pensée juridique moderne, cours d'histoire de la philosophie du droit, 1961-1966* (Paris 1968; 2nd. ed 1975). On Villey's œuvre, see Brian Tierney, *The Idea of Natural Rights: Studies on*

Was late medieval economic thought and practice fundamentally antimodern or fundamentally modern and economically rational? The work of Pierre Legendre, Giacomo Todeschini, and Jacques Chiffoleau and his students helps us to bridge this gap. Since the 1970s, Todeschini has undermined assumptions that Christianity or the Church were originally and fundamentally hostile to wealth and worldly goods by examining how scholastic theologians, and particularly the Franciscans, spoke of wealth and exchange. In so doing, he participated in a revalorization of scholastic thought, which through the 1950s remained to some degree the province of ecclesiastical historians, whether actual clergy or committed believers working from a confessional perspective. The extraction of the texts of medieval theologians from the exclusive ambit of clerical historians in the realm of economic thought parallels the case for liturgical history, generally the preserve of clerical reformers or committed lay authors until the 1960s (if not later), and legal history, generally still the preserve of law faculties in Europe, despite incursions from *historiens des lettres*. Todeschini explains how the market came to be understood to be 'the sole fitting language for organizing day-to-day economic life' in his concluding comments to *The Merchants and the Temple*, assimilating the economy 'to Christian society, understood as the virtuous circulation of wealth. Participating in this system of relations and learning its rules coincided with . . . entry into a sacrality analogous to that of the Church'.[8] The Middle Ages therefore bequeathed a way of conceiving and of speaking about economic exchange that was neither modern nor antimodern but premodern. It valorized the circulation of wealth, the place of the merchant as expert of valuation, and the contribution of

Natural Rights, Natural Law, and Church Law, 1150-1625 (Atlanta 1997) 13-42; tacitly: Yan Thomas, 'Le sujet de droit, la personne et la nature: Sur la critique contemporaine du sujet de droit', *Le Débat* 100 (1998) 85-107; and, explicitly: Sylvain Piron, 'Congé à Villey', *L'Atelier du Centre de recherches historiques* 1 (2008) https://journals.openedition.org/acrh/314, paragraph 28.

[8] Giacomo Todeschini, *Les Marchands et le Temple: La société chrétienne et le cercle vertueux de la richesse du Moyen Âge à l'Époque moderne*, trans. Ida Giordano, with Mathieu Arnoux (Paris 2017; Italian orig. 2002) 379.

commerce to the city or collective. It devalued hoarding and the predatory lending of usurers and Jews, whom it excluded from the community of good, trading Christians.

'Charity (*caritas*)', the reciprocal love of the Deity and his creations, and his creations for each other, was a key term of this vocabulary, as Todeschini has shown. While others, including Anita Guerreau-Jalabert for the Middle Ages and Bartolomé Clavero for the early modern period, have discussed the pertinence of the term of *caritas* for discussing social relations and credit, Todeschini shows how this concept—and related terms such as 'the extent of charity (*caritatis latitudo*)'—structured the late medieval economic vocabulary. He argues that theologians reconceived of legitimate economic transaction around 1300, shifting from an emphasis on the equality of contractants to the 'plurality (*latitudo*)' of legitimate possibilities. For later medieval theologians, the market is the 'complex structure of debt and credit that, according to St. Thomas Aquinas, binds humans to God and to each other.' That is to say, 'the only "just" market is one constituted by a system of economic relations between friends and *fideles*, between those who, according to St. Thomas Aquinas, wove this social network designated by the key term of *caritas*' in which '*amicitia* [was] the civic version of *caritas*'.[9]

The perennial tension between spirit and letter (2 Cor. 3:6) made putting this economic language into practice challenging. While the Gospel (1 Cor. 6) and the *Decretum* (D. 90 c.7) urged Christians to avoid litigation, the institutional Church was constructed as a jurisdictional hierarchy of offices through borrowings from Roman law. Furthermore, as the following section will elaborate, this meant that moral guidance tended to be interpreted within a legal and judicial framework. Just as sin could be treated as crime in a church court, so interest could be

[9] Todeschini, *Les Marchands et le Temple* 276-77. Clavero is cited in n.4 above; see Anita Guerreau-Jalabert's tacit rejoinder to *Antidora*: '*Caritas* y don en la sociedad medieval occidental', *Hispania* 60 (2000) 27-62, and Piron's perceptive critique of Clavero's historically telescoped, Marxist perspective in 'Le devoir de gratitude'.

likened to a free gift motivated by charity, friendship, and fidelity. Clavero demonstrated that this language of *caritas*, *amicitia*, and *fidelitas* enabled early modern Catholic moral theologians to justify banking operations 'insofar as the ultimate result was a means of cultivating friendships, of extending thereby social ties (*vínculos sociales*).'[10] Anita Guerreau-Jalabert has taken issue with Clavero's positing of a gift–counter-gift relationship in relations of credit, clarifying that the gift is the effect of charity, not the means of creating it,[11] although she notes that this does not preclude a moral requirement of gratitude.[12] Clavero's pertinent citation of the seventeenth-century casuist Petrus de Oñate makes much the same point: Oñate justifies the reception of interest 'because friendship is owed every man of charity' and 'because the cash-loan itself is an act of friendship, and charity: therefore he rightfully demands, and asks for the borrower's reciprocal friendship'.[13] As Sylvain Piron has noted, connecting the authors examined by Clavero to their late medieval antecedents, the canonist Joannes Andreae explained that a lender might receive a free gift exceeding a loan's value, 'for it is licit that we receive what we may not seek (*Nam possumus licite recipere que tamen prohibemur petere*)'.[14] In conscience and in law, one could ask for friendship or gratitude, but not interest: the debt of gratitude or friendship is

[10] Clavero, *Antidora* 154.

[11] Guerreau-Jalabert, '*Caritas* y don' 36: 'caritas enim causa est et mater virtutum' and 'caritas mater omnium virtutum et radix, inquantum est omnium virtutum forma', from Peter Lombard, *Sentences* 3.23.9, and Aquinas, Ia IIae Q.62, a.4, respectively.

[12] Guerreau-Jalabert, '*Caritas* y don' 50, citing Aquinas, IIa IIae QQ.106-107: 'debitum gratitudinis ex debito amoris derivatur, a quo nullus debet velle absolvi'.

[13] Cited by Clavero *Antidora* 125: 'illa amicitia est omni homini ex charitate debita . . . mutuum est actus amicitiae, & charitatis: ergo suo iure exigit et exposcit reciprocam mutuatarii amicitiam'. Oñate continues (*De contractibus onerosis tomus tertius, secunda & ultima pars* [2nd. ed. Rome 1654], Tract. 30, sect. iv, not. 88, 2:236) 'quia pactum amicitiae non est pretio aestimabile: amor enim, & amicitia non est ex rebus quae in commercium hominum cadunt'.

[14] Cited in Piron, 'Le devoir de gratitude' n.62.

not legally but morally binding: it derives from an admirable, free moral choice that binds in conscience.[15] This seemingly clear distinction was blurred by the continuum, to be discussed in the following section, between sacramental confession and litigation in church courts. In the end, in the realm of freely given, interest-free credit, failing to observe the moral, natural, or religious obligation of gratitude was a failure of charity potentially meriting excommunication. As the Supplement to the *Summa Theologiae* advises, in a passage to which I shall return, one might be excommunicated for a temporal harm because 'the amount of guilt is not measured by the harm anyone does, but by the intention with which anyone acts against charity'.[16] Debt and gift—like tax and gift[17]—can be distinguished if it is clear whether an obligation arises from contract or friendship, which is not always the case:[18] Benedict Wiedemann has observed that the bulk of twelfth-century papal income came from discretionary payments made when a supplicant decided that he or she needed a privilege or a service.[19] One can view such payments as dues owed the papacy for a service: 'no payment, no pallium', or as

[15] There is a distinction, however, noted by Sylvain Piron, between Aquinas's discussion of such a gift and Domingo de Soto's: see, with respect to de Soto's mention of 'urbanitas' and 'civilitas', 'Le devoir de gratitude' 73-101. The addition of these two words is a sign of the shift in economic lexicon and popular senses of the proper remit of ecclesiastical justice noted in the conclusion of this article.

[16]Thomas Aquinas and Rainaldo da Piperno, *Supplementum ad Summa theologiae Thomae Aquinatis Opera Omnia* XII (Rome 1906), Q.21, a.3, 12:43.

[17] Alain Guéry, 'Le roi dépensier. Le don, la contrainte et l'origine du système financier de la monarchie française d'Ancien Régime', *Annales: Économies, Sociétés, Civilisations* 39 (1984) 1241–1269.

[18] As Piron observes ('Le devoir de gratitude' 20), paraphrasing Aquinas, IIa IIae Q.78, a.2 ad 2: 'Le contrat et l'amitié ne sont pas du même ordre'.

[19] Benedict G. E. Wiedemann, 'The Character of Papal Finance at the Turn of the Twelfth Century', EHR 133 (2018) 503-532. Clavero's exploration of the 'mentalidad antidoral' (and subsequent historiography) is not mentioned. More could be said here about avoiding the appearance of simony and obligations of charity, especially because this concerns a period prior to the shift in thinking about balance identified by Kaye and prior to academic discussions of Franciscan poverty.

gift and counter-gift: 'gift given, pallium given in return'. Such obligations were not legal, but natural or religious obligations, proceeding from the order that God had instilled in his creation and binding the consciences of his creatures.

The late Middle Ages were a crucial period for how that natural order was imagined. Aside from, but not unrelated to contemporaneous discussions of God's foreknowledge and omnipotence,[20] is the transformation that Joel Kaye recently identified in how scholastic theologians thought about balance between 1280 and 1360. Describing the relevance of a shift 'from a world of points to a world of lines', by which he means movement from conceiving of a world of arithmetical, punctual certitude to conceiving of a world of geometrical, linear ranges, Kaye invokes many of the same authors as Todeschini; these authors were all deeply involved in controversies over what constituted legitimate lending and over Franciscan poverty. Henry of Ghent († 1293), for instance, 'held that [because] equality in exchange was a requirement established by natural law, not merely, by human law, Pope Innocent IV's (r. 1243-1254) redefinition of the 'census' as a contract of sale did not, to his mind, render its essential inequality any more permissible'.[21] For Henry, there had to be arithmetical, 1:1 equality for exchange between buyer and seller to be licit. By contrast, Godfrey of Fontaines († 1306/9) 'argue[d] that the equivalence required has nothing to do with an actual numerical equality between the sum offered and the sum eventually received in return, but that it simply must represent a "fitting" and "sufficient proportionalization" of estimated benefits on the part of both

[20] Inter alia, Francis Oakley, *Omnipotence, Covenant, & Order: An Excursion in the History of Ideas from Abelard to Leibniz* (Ithaca 1984), and the bibliography in the second footnote of Massimiliano Traversino Di Cristo, 'The Classic Age of the Distinction between God's Absolute and Ordered Power: In, Around, and After the Pontificate of John XXII (1316-1334)', *Franciscan Studies* 76 (2018) 207-266.

[21] Joel Kaye, *A History of Balance, 1250-1375: The Emergence of a New Model of Equilibrium and its Impact on Thought* (Cambridge 2014) 103.

parties'.[22] Just values can only ever be a range estimated by experts, as Peter John Olivi (1248-1298) concluded:[23]

> The valuation of things in exchange can rarely or never be achieved except through the use of conjecture or probable opinion (*nisi per coniecturalem seu probabilem opinionem*), and it is never a precise point nor precisely measureable, but rather it falls within some fitting latitude (*sub aliqua latitudine competenti*), within which the understanding and judgment of men differ.

Kaye helps to contextualize the '*caritatis latitudo*' that Todeschini identifies as a core term of the scholastic economic vocabulary: we may now understand the 'extent of the love' binding Christians in the marketplace to be the 'range of appropriate economic transactions'. As Todeschini has demonstrated, the Franciscan theologians believed that lay experts, which is to say merchants or businessmen, most accurately reckoned that range. The place of laymen as arbiters of appropriate economic behavior helps to explain excommunication for debt, a practice driven not by clerical initiative but by lay demand.

Chiffoleau's student Clément Lenoble offers detailed insight into what this *caritatis longitudo* meant in practice by studying the accounts of the Franciscans of Avignon. Because they viewed Franciscan *usus pauper* as entailing the circulation rather than the thesaurization of goods and money, their 'renunciation of property and property rights, the choice of voluntary poverty, is anything but an economic or legal void'.[24] Lenoble describes an 'economy of poverty created by the renunciation of property' in which 'microcredit, pawnbroking, salaries, and pensions become, in fact, tools of the circulation of wealth and consequently of the construction of poverty and of the community of the faithful'.[25] Religion and institutions were not external to the economic and social world: there was no distinct economy to be moralized or society to be contained and disciplined. The Franciscans'

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[22] Ibid. 104.
[23] Cited in Kaye, *A History of Balance* 116.
[24] Clément Lenoble, *L'exercice de la pauvreté: Économie et religion chez les fransciscains d'Avignon (XIIIe-XVe siècle)* (Rennes 2013) 372.
[25] Ibid. 371.

accounts show them preaching the proper estimation of value with their words and with their behavior, thereby 'illuminating the close linkage between daily material life and the economy of salvation'.[26] True to the order's charism of preaching by deeds:[27]

> In the privacy and intimacy of confession, in preaching, in begging, in saying masses, in accounting, the friars taught the faithful how to be saved. Their manner of living, not only their advice or their sermons, was a vast sermon, modern and well-adapted to terrestrial exchange. It showed very concretely how participating in the circulation of goods and wealth within the Christian society could also make grace circulate.

Lenoble brings us back to what mattered to late medieval Christians: salvation. This is what is missing from Kaye's materialist perplexity at the 'dormancy' of dynamic ideas about equilibrium in medieval intellectual life for two centuries from the 1380s or so. While it is undeniable that late medieval elites were unnerved by price and especially by wage movements following the first visitation of the Black Death, generalizing Nicole Oresme's (perhaps justifiable) fear of mob rule and ascribing the 'failure' of later medieval thinkers to realize fully the insights of 1280-1360 to the authoritarianism of frightened elites is to minimize the most obvious cause of all: these ideas remained dormant because they were not pertinent to the concerns of late medieval theologians, which centered on the mechanics of grace and salvation. The bridge between that theology and economic life was canon law, the 'practical theology' that guided confessors as they helped Christians to navigate the shoals of economic and social life on their journey to their heavenly homeland. As Richard Helmholz has observed, 'the concern for '*salus animarum* . . . was an animating legal principle' of medieval canon law.[28] Yet late medieval canon law was not yet early modern moral theology, the 'second canon law' described by Pierre Legendre that emerged over the course of the sixteenth century.[29] It remained focused on the legality of actions

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[26] Ibid. 373.
[27] Ibid. 376.
[28] Richard Helmholz, *The Spirit of Classical Canon Law* (Athens 1996) 395.
[29] Pierre Legendre, 'L'inscription du droit canon dans la théologie: Remarques sur la Seconde Scolastique', in *Proceedings, Salamanca 1976* 443-454.

rather than parsing psychological intent and operated along a porous continuum which ran from the privacy of individual, sacramental confession to the public litigation of ecclesiastical tribunals without the neat, post-Tridentine bifurcation into the internal forum of confession and the external forum of church courts. Important guidance for moral life accordingly emerged from legal treatises on contracts. Lenoble and Toneatto clarify something implicit in Todeschini by noting how Ennio Cortese, Yan Thomas, and Emanuele Conte showed that treatises on contracts identified not exceptions to the condemnation of usury, as traditionally understood, but the norm itself by exploring 'extreme theoretical cases'.[30] Legal casuistry indicates the bridge from the first context of excommunication for debt, the history of the medieval economic vocabulary, to the second context, legal history. Specifically, property rights connected these contexts in two ways: first, they were the core of the dispute over the precise significance of what the Franciscans viewed as apostolic poverty; second, they were the core of the dispute because salvation depended upon the proper use of property rights—and *someone*, if not a friar or the Order of Friars Minor, holding them. Preaching was not the only way that theologians' economic vocabularies reached late medieval believers: the management of ecclesiastical resources and the operation of ecclesiastical justice—specifically in connection with the liturgy—were potent and ubiquitous pedagogical instruments.

Legal History

The Middle Ages was a world of normative competition, in one sense, rather than legal pluralism, as treatises on the 'differentiae' between Roman law and canon law or recognized disagreements between canon law and the English Common Law suggest.[31] But in another sense, there was fundamental harmony

[30] Lenoble and Toneatto,'Les "lexiques médiévaux de la pensée économique"' 38.

[31] Jean Portemer, *Recherches sur les 'Differentiae juris civilis et canonici' au temps du droit classique de l'Église* (Paris 1946) and, e.g., Charles Lefebvre,

resting on the goals of helping Christians achieve salvation and on preserving legitimate rights, especially property rights. These goals could be weighted differently in different laws, in different specific provisions, and in different cases, with one or the other receding into the background as jurists and judges balanced the demands of strict justice and of equity. Because this article is primarily concerned with ecclesiastical sanctions as a vehicle for the communal regulation of economic behavior, it will focus on the learned laws which structured how canonists applied theologians' economic vocabulary to the practice of Christian morality.

Roman law, as interpreted in the Middle Ages, provided an encyclopedic vision of the world compounded of persons wielding property rights of one sort or another, including legally protected possession of rights to land, to moveable goods, to persons or their services, to obligations, or to offices. Because, to use Pierre Legendre's Freudian term, Roman law had 'penetrated' classical canon law, decisively influencing not just the second redaction of Gratian's *Decretum* but succeeding commentaries on what became, along with collected papal decretals, an authoritative text until the issuance of the 1917 *Code of Canon Law,* the terms, concepts, and procedures of Roman law structured ecclesiastical administration and therefore provided the institutional carapace through which the sacraments were administered and believers guided to Heaven.[32] Property rights in fact provided both a language of administration and a language of morality. Did a bishop own or possess the legally defensible right to the subjection of an archdeacon or a parish church? Did a believer have a right to Easter communion following confession and absolution? Did a starving man have a right to steal food? Was it possible for a friar to legitimately consume a crust of bread without legally possessing the crust?

'La femme, l'enfant adultérin, le serf en droit canonique médiéval', *Ephemerides iuris canonici* 30 (1974) 108-115.

[32] Pierre Legendre, *La pénétration du droit romain dans le droit canonique classique de Gratien à Innocent IV (1140-1254)* (Paris 1964); Anders Winroth, *The Making of Gratian's Decretum* (Cambridge 2000).

Did consuming the crust in the absence of legal right imperil the friar's salvation? All these questions were real. The last two take us to the heart of the nexus of economic behavior, canon law, and salvation as they intersected in the controversy over Franciscan poverty. St. Francis of Assisi (1181/2-1226) and his followers adopted what they understood to have been the poverty of Christ and the Apostles by renouncing property rights and litigation. Yet still friars needed to eat, dwell, and clothe themselves. In addition, because the Church was structured by the application of Roman property law to ecclesiastical functions, their renunciation had potentially explosive consequences for the pope and bishops whose authority was theorized as the ownership or possession of rights over subordinate offices. Franciscan poverty raised fundamental questions of morality and law, most clearly whether and to what extent the two were identical, with respect to these two kinds of right.

The Roman-law terms of 'ownership (*dominium*)' and 'possession (*possessio*)' provided a vocabulary for ecclesiastical offices when extended beyond their classical meaning, for incorporeal rights could not be owned, only possessed. Along with mandates, the focus of Pierre Legendre's early work, the Roman language of property rights helped popes and canonists to knit together a continental and, in time, more than continental institution that was comprised of a congeries of legally distinct and semi-autonomous churches. Papal decretals referred to relations of subjection as relations of property rights by which fictive persons or offices held incorporeal rights: for instance, just as Alexander III (r.1159-1181) ruled that the Abbot of Winchester, as an office and not as an individual, had been delegated to hear a particular case,[33] so Innocent III (r.1198-1216) referred to prelates as possessors of administrative rights,[34] although this was impossible in Roman law, strictly taken. In canon law, rights such as the subjection of priests to their bishop, monks to their abbot, and serfs to their lord were treated as if they were real rights, permitting homage and ecclesiastical

[33] X 1.29.14.
[34] ad X 2.13.17, s.v. *parochialis*.

hierarchy to be explained and litigated in terms of Roman property law.[35] Bishops held, possessed, even owned property rights in subject institutions, perquisites, and persons. These rights were both moral and defensible in court.

Yet, at the same time as the penetration of Roman law into canon law facilitated the hardening and formalization of the Church's institutional carapace, and perhaps because of it, as Robert Brentano has observed,[36] the Friars rejected all this, ostensibly only for themselves, but by extension for all, because they explicitly modeled their form of life after their understanding of apostolic poverty. The crucial issue was what Franciscan poverty meant in legal terms. Nicholas III's (r. 1277-1280) bull *Exiit qui seminat* (1279) consecrated Franciscan *usus pauper*: property and possession of goods and buildings given to the friars remained with the donors, or, if the donors did not wish to retain these rights, with the Holy See: the friars had no legal right to what they ate, what they wore, or where they dwelt, only a 'simple use of fact (*simplex usus facti*)'. John XXII's (r. 1316-1334) bull *Ad conditorem canonum* (1322) upended this situation. Not irrationally, John observed that it was absurd to retain ownership of a crust of bread consumed by a friar: the friar's use of that crust, which he wholly consumed, had to be a legal use ('*usus iuris*'), else it be unjust. John doubtless had in mind the Roman law definition of use as 'without enjoyment (*sine fructu*)'. Jonathan Robinson has pertinently characterized John's mindset: 'for the pope this meant not so much that a law needs to be just to be valid, but that an action cannot be just if it is not also legal'.[37] John XXII viewed the world through the

[35] Legendre, 'L'inscription du droit canon dans la théologie' 494: Baldus ad X 2.26; Emanuele Conte, 'Framing the Feudal Bond', TRG 80 (2012) 481-495 and Marta Madero, "Penser la physique du pouvoir. La possession de la juridiction dans les commentaires d'Innocent IV et d'Antonio de Budrio à la décrétale *Dilectus*," *Clio@Thémis. Revue électronique d'histoire du droit* 11 (2016) 1-17: http://www.cliothemis.com/IMG/pdf/Varia_Madero.pdf.

[36] Robert Brentano, *A New World in a Small Place: Church and Religion in the Diocese of Rieti, 1188-1378* (Berkeley 1994) esp. 312.

[37] Jonathan Robinson, *William of Ockham's Early Theory of Property Rights in Context* (Leiden 2013) 44.

spectacles of the providential Roman law, as his reference to '*nudus usus*' in the first version of *Ad conditorem canonum* suggests.[38] In contrast to William of Ockham (†1347), he measured every action's morality by a legal yardstick. At once defending the proprietary framework of ecclesiastical institutions and manifesting his common-sense, canonical approach, John's bull *Cum inter nonnullos* (1323) condemned as heretical the assertion that Christ and the Apostles were personally *and* collectively poor because private property was God-given. *Cum inter nonnullos* also rejected Ockam's assimilation of 'right of use (*ius utendi*)' and 'right to litigate (*ius agendi*)'. Ockham could not imagine a legal right outside a courtroom, outside litigation. John could not imagine a moral right that was not legal. This misunderstanding reflected the ambiguity of canon law in late medieval Western Europe.

Yes, canon law was the law of the Church, but what did that mean? Clergy (including monks and nuns whose clerical status was dubious and including married clerics in minor orders so long as they had not married a second time), certain crimes, and ecclesiastical property (including offices and dues), in varying degrees, were all matters for canon law, if not everywhere and at all times. The mutual incomprehension of William of Ockham and Pope John XXII brings us, however, to a different source of ambiguity. The crystalline distinction between what would in a post-Tridentine world be called the internal forum (*forum internum*) and the external forum (*forum externum*), between sacramental confession and litigation in ecclesiastical tribunals, was much more of a continuum in the later Middle Ages. Johannes Teutonicus's maxim 'the Church judges not what is hidden (*Ecclesia de occultis non iudicat*, ad D.32 c.11 and ad C.32 q.5 c.23)' is often included, in both earnest and tactical histories, as an avatar of the freedom of the individual conscience, which it partly is, allowing for the fact that the legal subject to whom it refers existed in a moral and legal framework totally different from that of the modern rights-bearing subject,

[38] Ibid. 314-317.

as the example of the Mendicant's breadcrust suggests. Jacques Chiffoleau and his students have, over the same period that Todeschini has developed his insights around the economic vocabularies of late medieval theologians and preachers, enriched our knowledge of the secrets, which the Church (mostly) did not judge, of ill-repute and the *notorium*, of scandal, and of the legal institutions within which this vocabulary of conscience and guilt operated. They have primarily focused on the papacy, the increasingly papal French monarchy, and their institutions. Of '*Ecclesia de occultis* . . . ', Chiffoleau has has written: 'casuistry concerning the struggle against heresy and respect of the seal of confession demonstrates exceptionally well how a regime of exceptions might function in case of major dangers to the life of the Church'.[39] In short, and bearing in mind Helmholz's point about canon law's primary concern with saving souls, the heresy and scandals that might endanger the souls of the faithful motivated the creation of exceptions to the seal of confession that would allow for matters to pass from one forum to the other, from confession to an ecclesiastical tribunal. Taking a more pessimistic (if sometimes justified) perspective that canonists and particularly ecclesiastical judges such as inquisitors of the faith may have been primarily concerned to defend God's (and the pope's) majesty, Chiffoleau delineated a gray area between the 'entirely hidden (*omnino occultum*)', which belonged to sacramental confession, and the 'mostly hidden (*paene occultum*)', where the judge or inquisitor could exercise his sovereign judgment over the confessing Christian, determining whether the confession was sacramental or judicial.[40] If it were the former, it would be treated secretly and, ideally, end in absolution and satisfaction. If it were the latter, it would end in a canonical trial, whether the procedure was full or abbreviated. This gray area betweens 'sins purged through fraternal correction . . . to avoid scandal' and 'penal sanctions, where accusation is traditionally the primary form of action'

[39] Jacques Chiffoleau, '"Ecclesia de occultis non iudicat"? L'Église, le secret, l'occulte du XIIe au XVe siècle', *Micrologus* XIV (2006) 359-481, at 411.
[40] Ibid. 435.

brings Chiffoleau to two conclusions, one spoken openly, the other unspoken. First, '*Ecclesia de occultis* . . . ' is a 'cas limite'.[41] As Lenoble and Toneatto note of treatises on contracts: 'casuistry does not in fact consist in formulating exceptions to a general rule . . . but, on the contrary, in identifying the norm by means of extreme theoretical cases'.[42] What is 'entirely hidden (*omnino occultum*)' in fact identifies the norm that is the inverse of its apparent significance. Second, while one can follow these insights along the line toward the development of state, penal apparatuses via the confusion of sacramental and judicial confession,[43] Chiffoleau's remarks intimate a profound openness, in that hidden misdeeds could, in effect, be opened to public view, sanction, and reparation at the instance or request of other believers.

Julien Théry has elaborated from the first line of thought, examining how the category of excesses, enormities, and scandals facilitated the pontificalization of the French monarchy under Philip the Fair through his prosecutions of prelates.[44] Arnaud Fossier has elaborated the second line of thought, examining the 'gray area' between sacramental confession and litigation in church courts through the early operations of the Apostolic Penitentiary. This office both remitted sins and cancelled or pre-empted the usual penalties administered in confession. It administered the pope's dispensing power for those, for instance, who had married within the forbidden degrees of kinship or who, though bastards, sought priestly ordination, and permitted the absolution of sins only the pope could absolve, as well as facilitating the confessions of the pilgrims who thronged to Rome's basilicas. Its operations

[41] Ibid. 461.
[42] Cited in n.30.
[43] Mireille Vincent-Cassy, 'La confession des condamnés à mort: L'exception française du XIVe siècle', in *Vita religiosa e identità politiche: Universalità e particolarismi nell'Europa del tardo Medioevo*, ed. Sergio Gensini (San Miniato 1998) 383-401.
[44] In English, Julien Théry, 'A Heresy of State: Philip the Fair, the Trial of the "Perfidious Templars", and the Pontificalization of the French Monarchy', *Journal of Medieval Religious Cultures* 39 (2013) 217-238.

therefore lay precisely within the 'gray zone' between '*omnino*' and '*paene occultum*' delineated by Chiffoleau. Fossier's study of its earliest formularies confirms that crimes, defects, and sins were only kept secret within the forum of confession when the facts were hidden: 'The task of the Apostolic Penitentiary was to keep these facts "hidden" and thereby to anticipate and avoid the scandal that their publication would not have failed to stimulate'.[45] This secrecy saved souls in two ways: first, by absolving those who committed a reserved sin or required a papal dispensation; secondly, by simultaneously failing to scandalize other believers with examples of egregious, if forgiven sin. (In time, as Fossier does not fail to remark, this secrecy would protect clerical abusers.[46]) Fossier's study concludes in the fifteenth century, for good reason, where, from the 1430s supplications began to be systematically recorded even as the activities of the Minor Penitentiaries retained a 'deafening' archival silence.[47] In the fifteenth century, the categories of external and internal were reorganized. Rather than serving as a distant, remote extension of unrecorded sacramental confessions, administrative logic led to the registration of responses to supplications to the Major Penitentiary, which were formerly sent back to the supplicants or to whomever had been delegated to grant absolution for destruction after compliance. While the Minor Penitentiaries functioned as before, the Apostolic Penitentiary itself became bifurcated. Fossier identifies 'the disparity between writing and orality traced by the administrative and pastoral practices of the Penitentiary in the fifteenth century' with the 'duality of *fora* that Paolo Prodi associated with the early modern period,' showing how canon law grew more distinct from the moral theology that governed conscience.[48]

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[45] Fossier, *Le bureau des âmes* 500.
[46] Ibid. 19.
[47] Ibid. 505, although Patrick Zutshi questions the basis of this assertion in his review in the JEH 71 (2020) 169-171.
[48] Fossier, *Le bureau des âmes* 506-507. See too Wolfgang Müller, 'The Internal Forum of the Later Middle Ages: A modern Myth?', LHR 33 (2015) 887-913.

The reference to Prodi unlocks how this 'gray zone' relates to the liturgy, because it clarifies how sacramental practice changed at the end of the Middle Ages. Prodi has made key, pertinent observations about the interplay of conscience and law in the late Middle Ages and early modern period, which must nevertheless be nuanced on certain key points. From 1992 to 2009, Prodi published a trilogy investigating the history of Western public life, and the place of the individual in it, in three interlocking spaces or *fora*: politics, the law, and the market.[49] Prodi's reflections, like those of Legendre, depart from the present, in one case, from the crises in each forum consequent upon the collapse of Christian practice in Western Europe, and, in the other, from the defects (universalization of Western values, neglect of the fundamental psychological and cultural primacy of the natal heterosexual family) consequent upon the triumph first of Western legal and now Western economic rationality. Both are historians, Prodi a student of the great Hubert Jedin and Legendre a Lacanian legal historian. For both, the late Middle Ages is a key period, even if their work can sometimes tend to submerge late medieval transitions in a broader chronology of Western, Christian history that runs (perhaps) from the decisive twelfth-century shift in European legal culture to the present.

In 1976 Legendre read a paper to the Fifth International Congress of Medieval Canon Law, arguing that sixteenth-century moral theology was no longer simply a complement to canon law, as it had been in the Middle Ages, 'but a second canon law'.[50] As sacramental confession and litigation came to be more distinct in the sixteenth century (and, not unrelated, the remit of canon law proper was reduced, gently in Catholic lands and abruptly in Protestant lands), 'the divine legislator is accessible to us by two paths, by legal science and by the science of

[49] Paolo Prodi, *Il sacramento del potere: Il giuramento politico nella storia costituzionale dell'Occidente* (Bologna 1992); idem, *Una storia della giustizia: Dal pluralismo dei fori al moderno dualismo tra coscienza e diritto* (Bologna 2000); idem, *Settimo non rubare: Furto e mercato nella storia dell'Occidente* (Bologna 2009).

[50] Legendre, 'L'inscription du droit canon dans la théologie' 449.

examination of conscience'. By unifying these two sciences, in what Legendre calls the 'hypertrophy' of moral theology, early modern casuists provided a 'ready-made psychology ready for any purpose' that could be used to interpret human thoughts. To paraphrase Legendre in words that might all merit scare quotes, moral theology became a means for clergy to manage the consciences of the faithful on the basis of factual science. Legendre viewed this as a mark of the 'dogmatic system' and 'signature of a specific cultural system'.[51] He still views this dogmatic regime as characteristic of Western culture, even if it has been transmuted into Euro-American managerial government. While Legendre's Lacanian Freudianism prefers familial and reproductive imagery, terms such as 'penetration' and 'transmission', Prodi's favored biological metaphor of 'osmosis' may be as helpful in understanding the interplay of conscience, moral theology, canon law, secular law, economic vocabularies, religious culture, and popular dynamism around 1500. It may also help us think around excessive generalizations, often the consequence of measuring the past by a present-day yardstick, that view medieval believers either as virtual pagans, heedless of the Church's teachings, or as a cowed populace, oppressed not just by the fears of damnation encouraged by late medieval preachers but by the use of the Church's sacramental and judicial machinery as an engine of social control and oppression, rather than a mechanism internal to society responding to the informed demands of believers.

Prodi's treatment of the second forum of modern Western public life, the law, focuses on the potential tension between law and conscience. Prodi discerns a tendency at the end of the Middle Ages to equate positive law with the dictates of rational conscience, thereby eliding sins and crimes. While earlier casuists such as Henry of Ghent or Angelo da Chivasso (1411-1495), author of the widely used *Summa angelica* or *de casibus conscientiae*, 'held that disobeying a penal statute implied only liability to the legal punishment and not sin, Silvestro Mazzolini

[51] Ibid. 454.

da Prierio [1456/7-1527] countered this: every command of a [legal] authority should be obeyed on pain of sin: "*omne statutum superioris ligans ad penam ligat ad culpam*"'.[52] This collapsed the two registers noted earlier with respect to the natural but not legal obligation to gratitude and expressions of that gratitude. As a result, 'the practice of confession provoked an ever greater anxiety [at the end of the Middle Ages] because it could not resolve the problem of the dualism between ecclesiastical and civil positive law and conscience; the traditional practice of the sacrament [of confession] became powerless against the attempts of authorities to transform every sin into a crime and every crime into a sin'.[53] As the amount and reach of church and civil law grew, Protestants found one solution, the free choice to trust in God's promise of salvation, and Catholics another: 'the construction of a universe of norms outside of positive law but subject to the Church's *magisterium*',[54] the sixteenth-century moral theology which Legendre called the 'second' canon law. These solutions preserved the tension between law and conscience that animated medieval confessional practice by clearly distinguishing when sins were confessed in the internal forum and when crimes entailing sin were confessed or proven in the external forum: the former could be repaired with penance, the latter expiated through judicial punishment.

While Prodi looked forward across the early modern period to the modern crisis resulting, in his view, from the renewed

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[52] Prodi, *Una storia della giustizia* 201. Fifteenth-century papal propagandists such as Juan de Torquemada tended to equate submission to papal jurisdiction with orthodoxy: e.g. Johannes de Turrecremata, *Summa de Ecclesia* (c. 1440). While conciliarist theologians would likewise have assimilated the magisterium and papal jurisdiction, given the legalistic tenor of late medieval ecclesiology, they would likely have followed Ockham or Olivi in assigning the Church's indefectibility to the whole Church or a portion of its members, rather than to the pope in virtue of his office, as Torquemada did, without going so far as the Magister of Ockham's *Dialogus* (lib. 5 c. 35, cited from http://publications.thebritishacademy.ac.uk/pubs/dialogus/wtc.html): 'Ergo errante tota multitudine Christianorum habencium usum racionis possunt salvari promissiones Christi per parvulos baptizatos'.

[53] Ibid. 216.

[54] Ibid.

drive to collapse morality into positive law (or public-health guidance), I would like to pause around 1500. Prodi and others speak of the drive to equate crime and sin as an initiative of authorities in Church and State, which it was, but it was not only that. As the work of Todeschini and others remind us, the institutions of Church and State were not external to society. The practice of excommunication for debt shows that believers anticipated and perhaps drove the changes underlying the varied sixteenth-century Reformations of Christianity. In the last two centuries of the Middle Ages, believers' recourse to ecclesiastical sanctions that barred their fellow Christians from the means of salvation when they defaulted on their debts illustrates popular understanding of refusal to pay as a sin and a crime. As we shall see below, their apparent turn away from seeking the excommunication of debtors from the 1490s onward suggests that they no longer viewed defaulting on debt as a sin meriting public exclusion from the sacraments. It could remain a sin meriting private exclusion from the sacraments by one's confessor and a crime meriting harsh punishment by secular courts. Concerning the latter, the turn away from excommunication for debt precedes and may have motivated the emergence both of new forms of adjudication (such as the consular tribunals in France), new legal instruments, and newly harsh punishment of fraudulent bankrupts. Attitudes to economic crimes were shifting from focusing on capital sins such as greed to violations of the *Decalogue*: rather than focusing on crimes against the community such as usury or defaulting on charitable extensions of interest-free debt, early modern communities were taught to focus on crimes against property. Rather than protecting the circulation of goods, early modern law protected property.[55]

Excommunication for debt demonstrated that late medieval Christians shared the institutional Church's sense that there was precious little that was 'fully hidden (*omnino occultum*)'. Conscience, like believers themselves, existed in community, so

[55] Prodi, *Settimo non rubare*, which might be read in dialogue with Marie-France Renoux-Zagamé, *Origines théologiques du concept moderne de propriété* (Geneva 1987).

it was perfectly just for fellow believers to call out others for their sins, whether this took the form of ill repute (*fama*), denunciation to a Church court that initiated an office prosecution, or initiation of ecclesiastical sanctions. Yes, there was an element of convenience in securing minor, verbal credit implicitly or explicitly on membership of the sacramental community, in that most late medieval secular courts would not enforce verbal obligations and that excommunication of near neighbors may have been up to 99 percent effective, but this practice of convenience also manifested the internalization of the economic vocabulary taught by preachers and confessors. The porosity or permeability of sacramental confession and ecclesiastical litigation, and of canon law and secular law explains how concepts, habits, and practices could move by 'osmosis' between *fora* and between laws, ultimately between State and Church and vice versa. The liturgy, especially the weekly parish mass at which the community gathered in pursuit of salvation and to hear the priest's announcements, was the prime site in which all of these elements merged. The mass was both a ceremony of belonging, in that all Christians were expected to attend, and a ceremony of exclusion, in that the automatic or conscious working of the Church's jurisdictional power could bar a believer from the church and from the sacraments. Before taking up the question of popular manipulation of ecclesiastical sanctions, we need to examine the history of the liturgy and the understudied practice of bidding prayers.

History of the Liturgy

During her trial, when Joan of Arc was 'asked if she knew whether she were in a state of grace, she responded: "if I be not in a state of grace, may God put me there, and if I be in a state of grace, may God keep me there"'.[56] Pierre-Marie Gy pointed out

[56] Pierre-Marie Gy, 'La signification pastorale des prières du prône', *La Maison-Dieu* 30 (1952) 125-136, at 130, notes 15-16; for the Latin notes of Joan's vernacular interrogation, note 15: 'Interrogata an sciat quod ipsa sit in gratia Dei, respondit: 'Si ego non sim, Deus ponat me, et si ego sim, Deus me

that Joan's response paraphrased what are called bidding prayers for those in states of grace and of mortal sin, such as these fifteenth-century ones from the diocese of Meaux: 'We pray for those who are in a state of grace, that God keep them there until the end, and for those who are in a state of mortal sin, that God wish to impel them from it quickly'. One suspects that Joan was not the only fifteenth-century Christian to internalize the content of the prayers that parish priests read out in the vernacular each week across Europe.

In teaching medieval and early modern European history, it is difficult to convey to students just how pervasive liturgical time, elements, and experience were in daily life without seeming to overemphasize 'religion'. Eamon Duffy has noted that: 'Any study of late medieval religion must begin with the liturgy, for within that great seasonal cycle of fast and festival, of ritual observance and symbolic gesture, lay Christians found the paradigms and the stories which shaped their perceptions of the world and their place in it'.[57] Carol Symes has put it even more strongly: 'If we do not understand medieval liturgy, it is hard to imagine how we can understand any aspect of the Middle Ages'.[58] The liturgy was in the air which medieval people breathed. Time moved according to its dual rhythm of fixed and

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teneat in illa'; for the Meaux prayers, main text: 'Nous prierons pour ceux qui sont en état de grâce, que Dieu les y tienne jusques à la fin, et ceux qui sont en péché mortel, que Dieu les en veuille jeter hors hâtivement'. Gy also quotes a formula from Paris, BNF 1216, which belonged to Guillaume Houvet, vicar of Saint-Eustache in Paris in the early sixteenth century, and which diverges somewhat from the earlier texts discussed here. See too Louis Carolus-Barré, 'Jeanne, êtes-vous en état de grâce?', *Bulletin de la Société Nationale des Antiquaires de France, 1958* (1959), 203-208; Katharine J. Lualdi, '"Joan, are you in a state of grace?": Joan of Arc and Late Medieval Catechesis', *Proceedings of the Western Society for French History* 32 (2004) 1-15; and Chiffoleau, '"Ecclesia de occultis non iudicat"' 477-481.

[57] Eamon Duffy, *The Stripping of the Altars: Traditional Religion in England, 1400-1580* (New Haven 2005 [1st edn 1992]) 11.

[58] Carol Symes, 'Liturgical Texts and Performance Practices', *Understanding Medieval Liturgy: Essays in Interpretation*, edd. Helen Gittos and Sarah Hamilton (London 2018 [2016]) 239-267, at 267.

movable feasts.[59] Years—dated from the Incarnation of Christ—began at Christmas, on Lady Day (March 25), or on Easter, if not on January 1. Dates were given as the Thursday after Pentecost and so on. On Sundays and feast days, no work was permitted and attendance at mass, if not at other services, was expected. Lives moved with the liturgy: baptisms for newborns, churchings for new mothers, weddings, last rites, requiem masses and burial rites, benedictions and exorcisms of all sorts, the various grades of holy orders, and para-liturgicals such as the sacramentals whose use shaded into Christianized healing spells.[60] Attending mass probably more than one hundred times each year, the average medieval person was doubtless familiar with the gestures and audible portions of the mass. It is likely that we underestimate how much even the minimally formally educated understood of liturgical celebrations.[61] Demand for sacramentals, the mere existence of what is called 'popular religion', witchcraft, or even heresy confirm this. Microhistories of characters such as Carlo Ginzburg's Menocchio make 'religion' weigh too heavily, when in fact people may have been so habituated to it that they felt its weight no more than any of the other ostensibly (and, for the most part, retrospectively) oppressive structures—property, lordship, state, market, gender roles, sexual morality—that organized their lives. Indeed, they

[59] Éric Palazzo, *Liturgie et société au Moyen Âge* (Paris 2000).

[60] Bob Scribner, 'Cosmic Order and Daily Life: Sacred and Secular in Pre-Industrial German Society' and 'Ritual and Popular Religion in Catholic Germany at the Time of the Reformation', *Popular Culture and Popular Movements in Reformation Germany*, idem (London 1987) 1-16 and 17-47, and Eamon Duffy, *Marking the Hours: English People and Their Prayers, 1240-1570* (New Haven 2007).

[61] Virginia Reinburg has nuanced John Bossy's functionalist interpretation of the mass, elaborating disparate lay and clerical forms of participation: 'Liturgy and the Laity in Late Medieval and Reformation France', *Sixteenth Century Journal* 33 (1992) 526-547; John Bossy, 'The Mass as a Social Institution', *Past & Present* 100 (1983) 29-61; Duffy, *Stripping of the Altars*. For further differentiation of possible experiences, see the Experience of Worship Project: http://www.experienceofworship.org.uk/ and Sally Harper, Paul S. Barnwell, and Magnus Williamson, edd., *Late Medieval Liturgies Enacted: The Experience of Worship in Cathedral and Parish Church* (London 2016).

may have demanded those structures. Just as today's narratives of victimization by Foucaldian structures of power can occlude individual complicity in oppressive practices, so excommunication for debt reminds us that apparently abusive or oppressive practices were driven by widespread demand. It illustrates just how well late medieval Christians understood the Church's moral teachings and the workings of its courts, because they used the latter to enforce their understanding of the former through the liturgy. The idea of uncomprehending, poorly Christianized peasants sitting dumbly through Latin ceremonies they misunderstood or understood not at all is excessive, and probably reflects both Protestant and progressive Catholic denigration of the liturgical past.

Examining where the demand-driven practice of late medieval church courts intersected with the liturgy can help us to understand a puzzling aspect of late medieval religiosity: namely, how it could have been seen as an act of charity to denounce and ultimately to excommunicate a defaulting debtor. Jonathan Riley-Smith famously explained that crusading was understood to be an act of love; Christine Caldwell Ames explained that medieval Dominican friars likewise believed inquisition to be an act of love.[62] Just as it is hard for today's students to imagine a Crusade as orthodox Christian behavior, and just as one often hears that violent jihad does not represent 'true' Islam, so the denunciation of excommunicated debtors during the mass reminds us to bracket questions of the ultimate truth of a particular historical manifestation of a given faith and to ask instead how excommunication for debt could have been seen as an acceptable practice. Whether the Christianity revealed by excommunication for debt is attractive or repellant depends on the reader's taste. In the end, the content of the vernacular bidding prayers of the mass studied by participants in the twentieth-century Catholic Liturgical Movement furnishes an outstanding example of the neglected routine aspects of daily life so important for

[62] Jonathan Riley-Smith, 'Crusading as an Act of Love', *History* 65 (1980) 177-192; Christine Caldwell Ames, *Righteous Persecution: Inquisition, Dominicans, and Christianity in the Middle Ages* (Philadelphia 2009).

constructing a vision of the past that focuses more on how past humans understood their actions than on finding ammunition for present battles. It is time to turn the scholarship of the Liturgical Movement, not to the end of liturgical change but to the end of understanding how late medieval people lived their faith. The key, as Riley-Smith's and Caldwell Ames's studies suggest, is to understand what might strike us as a paradoxical liturgical enactment of the divine love that Todeschini argues structured late medieval economic vocabularies: 'The charity of St. Francis may now appeal to us more than that of the crusaders, but both sprang from the same roots'.[63] How might parishioners have experienced a liturgy of which the most significant vernacular portion concluded with a reading of those to be excluded at that moment from the congregation and potentially for all eternity from the number of the saved?

Bidding Prayers

Even if late medieval individuals did not think of economic life or of the market as a separate zone of social existence, they did account for their revenues and expenditures. The commonest form of late-medieval accounting is illuminating: charge-discharge accounts were not designed to balance out at any given instant, nor to provide a snapshot of financial health. They were designed to quantify the precise legal responsibility of an officer when the account was audited at the end of a fiscal year or term of office. Charge-discharge accounts are legal documents that justify a short, clear statement at the end: the receiver owes such an amount or is owed such an amount. Jacques Toussaert accused late medieval Flemings of seeking to count their faults in a 'perfect, complete ledger . . . like that of a notary or moneylender (*usurier*)' so as to permit their 'labelling', 'classification', and, presumably, liquidation once a year at their annual Easter confession and communion.[64] Toussaert's acute

[63] Riley-Smith, 'Crusading as an Act of Love' 192.

[64] Jacques Toussaert, *Le sentiment religieux en Flandre à la fin du Moyen Âge* (Paris 1963) 118, quoting Charles Péguy, *Le mistère des saints innocents* (Paris 1929) 27, sharing the sentiments of his teacher Gabriel Le Bras,

criticism cuts to the heart of how late medieval Christians approached their faith. Nor is it so far from Virginia Reinburg's observation that late medieval mass-books instructed believers to approach the mass as they did hierarchical transactions that, I would add, may well have included settling accounts with a lord or neighbor.[65] Believers sought to make a perfect register, not at any given instant, but at the annual and the final accounting. The periodicity of late medieval communion, prescribed and in effect limited to once per year for many, and the lack of haste of the excommunicated to be absolved unless death or Easter approached might reveal not tepid conformists, as Toussaert (much like his mentor Gabriel Le Bras) proposed, but Christians who had absorbed the lessons of the Church's sacramental and judicial machinery. The late medieval Church operated as a jurisdictional hierarchy in which judicial authorities opened and closed the gates of Heaven—through auricular confession, through devotional indulgences, through the operation of church courts—and thus in response to demand for enforcement of popular understanding of the Church's moral teachings. Late medieval Christians responded to the Church's pedagogy by focusing on their balance sheets—balance sheets on which a clean audit by the parish priest or ecclesiastical judge permitted admission to Easter communion or to Last Rites and the good death that gave a chance at Heaven—and on using church courts to open and to close the gates of Heaven to those whom they believed to merit salvation or damnation. In short, they used the procedures and sanctions of church courts and the liturgy to define their religious and economic communities—what Buchanan Sharp has called local moral economies.[66]

'Déchristianisation: mot fallacieux', *Cahiers d'histoire* [*publiés par les universités de Clermont-Lyon-Grenoble*] 9 (1964) 92-97.

[65] Reinburg, 'Liturgy and the Laity in Late Medieval and Reformation France'.

[66] Shannon McSheffrey, 'Jurors, Respectable Masculinity, and Christian Morality', *Journal of British Studies* 37 (1998) 269-278, and Ian Forrest, *Trustworthy Men: How Inequality & Faith Made the Medieval Church* (Princeton 2018), take the position that elites used church courts to enforce their morality and their class position. Sharp, *Famine and Scarcity in Late*

Excommunication for debt in the fourteenth, fifteenth, and sixteenth centuries has not been much studied. Lucien Febvre examined it a century ago as an element of class-based oppression, while others have examined it from a narrowly legal or formal perspective, without examining how its economic purposes colored its religious significance, and vice versa (as I attempted in *Excommunication for Debt in Late Medieval France*).[67] No one has yet investigated its precise nexus with the liturgy during the vernacular prayers and announcements read out in many places after the offertory during the mass.

John McManners has described bidding prayers, this *praeconium* or *prône* maintained in France into the twentieth century, as 'a communal occasion when the parishioners met their *curé* [parish priest], informally, but in the shadow of the sacrament of unity, to hear his explanations of the spiritual and secular business of their community'.[68] Amédée Gastoué

Medieval and Early Modern England, argues that these local moral economies were shaped by the Christian values of late medieval rulers and their courts, suggesting still further that late medieval popular culture bore the strong imprint of elite values, even if—as with excommunication for debt or grain riots—the popular interpretation or adoption of these values did not always accord with legislative or jurisprudential intention. Sharp, who contrasts local 'moral economies' with Edward P. Thompson's eighteenth-century 'Moral Economy' viewed as a class response to the spread of the market economy, posits that government action knit moral economies into a national moral economy by expanding measures against scarcity from the fourteenth to the early seventeenth centuries.

[67] Lucien Febvre, 'L'application du Concile de Trente et l'excommunication pour dettes en Franche-Comté', *Revue historique* 103 (1910) 225-247, and 104 (1910) 1-39. The phenomenon does not much feature in F. Donald Logan, *Excommunication and the Secular Arm in Medieval England: A Study in Legal Procedure from the Thirteenth to the Sixteenth Century* (Toronto 1968), and Elisabeth Vodola, *Excommunication in the Middle Ages* (Berkeley 1986), or at all in Christian Jaser, *Ecclesia maledicens: rituelle und zeremonielle Exkommunikationsformen im Mittelalter* (Tübingen 2013). Véronique Beaulande, *Le malheur d'être exclu? Excommunication, réconciliation et société à la fin du Moyen Âge* (Paris 2006), does not investigate the potential economic significance of the practice.

[68] John McManners, *Church and Society in Eighteenth-Century France* (Oxford 1998), 2:83.

lamented in 1929 that the *prône* was falling into desuetude and published a medieval text to prove that sixteenth-century printed *prônes* were not a response to Protestantism.[69] Yet, just as bidding prayers passed out of daily practice, participants in the Liturgical Movement grew interested: in the 1940s the Austrian Jesuit Joseph Jungmann identified bidding prayers as developments of the common prayer of the early church. Although older forms of common prayer in the mass had long been obsolete at Rome outside of the liturgy for Good Friday and are not well known for the Gallican liturgies, he conjectured that bidding prayers were a Frankish response to the imposition of Roman rites lacking the common prayers of the Gallican rite.[70] Jungmann's conjecture manifests the perennial Christian reflex by which innovation must be described as a return to normative apostolic origins. The purpose of such scholarship is clear from the titles of, say, Pierre-Marie Gy's 'The Pastoral Meaning of the Prayers of the *Prône*' (1952) or Jean-Baptiste Molin's and Thierry Maertens's *In Favor of Renewing the Prayers of the Prône* (1961)—and, of course, from the prayers of the faithful introduced into the revised Roman Missal under the influence of Jungmann and Gy, expert advisors (*periti*) at the Second Vatican

[69] Amédée Gastoué, 'Les prières du prône à Paris au XIVe siècle', *Les questions liturgiques et paroissiales* 12 (1927) 240-249. The text is actually fifteenth-century. The periodical was founded in 1910 by Dom Lambert Beauduin, considered by many within the Liturgical Movement to be its founder.

[70] Josef A. Jungmann, *Missarum solemnia: eine genetische Erklärung der römischen Messe* (2nd. ed.; Vienna 1949); trans. by Francis A. Brunner as *The Mass of the Roman Rite: Its Origins and Development* (New York 1951-1955) 482-490. Indicative of the Anglo-Catholic approach to studying common prayer are Frank E. Brightman, 'Common Prayer', *The Journal of Theological Studies* 10 (July, 1909) 497-528, and R. Hugh Connolly, 'Liturgical Prayers of Intercession', *The Journal of Theological Studies* 21 (1920) 219-232. See the necrologies of Brightman and Connolly on the affinity of Catholic and High Church Anglican historians of the liturgy: Herbert N. Bate, 'Frank Edward Brightman 1856-1932', *Proceedings of the British Academy* (1933) 345-350; Michael David Knowles, 'Dom R. H. Connolly 1873-1948', *Journal of Theological Studies* 49 (1948) 129.

Council.[71] Since then, bidding prayers have been studied from a linguistic angle and for their discourse of peace-making, but otherwise little attention has been paid to them.[72] However, while Gy's or Molin's and Maerten's studies of medieval bidding prayers were certainly motivated, and may have drawn unfounded connections to primitive Christian practices, they have a good deal to say about how the vast majority of believers in the medieval West may have experienced the mass.

Bidding prayers appear to share a similar origin as the 'Orate fratres': variable forms of a common practice originating in the Frankish heartlands during the Carolingian period were in the

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[71] Gy, 'La signification pastorale des prières du prône', published in a periodical founded in 1943 at the *Centre du pastorale liturgique* of Paris, institutional center of the Liturgical Movement; Jean-Baptiste Molin and Thierry Maertens, *Pour un renouveau des prières du prône* (Bruges 1961); see Molin's important summation of this research, illuminating about its aims, in the collection offered to one of the leaders of liturgical renewal at the Second Vatican Council: Molin, 'L'"*oratio communis fidelium*" au Moyen Âge en Occident du Xe siècle au XVe siècle', *Miscellanea liturgica in onore di Sua Eminenza il Cardinale Giacomo Lercaro, Arcievescovo di Bologna, Presidente del 'Consilium' per l'applicazione della costituzione sulla Sacra Liturgia* (Rome 1967), 2:313-468. See too by Molin: 'Les prières du prône au diocèse de Meaux', *Bulletin de la Société d'histoire et d'art du diocèse de Meaux* (1957) 337-342; 'L'*Oratio fidelium*: Ses survivances', *Ephemerides liturgicae* IV-V (1959) 310-317; 'Les prières du prône au Provins au XIVe siècle', *Bulletin de la Société d'histoire et d'archéologie de l'arrondissement de Provins* 114 (1960) 57-59, and 116 (1962) 45-54; 'Les prières du prône en Italie', *Ephemerides liturgicae* 76 (1962) 39-42; and 'Les intentions des prières du prône, éducatrices du peuple chrétien', *Crises et réformes dans l'Église: De la Réforme grégorienne à la Pré-Réforme, Actes du 115e Congrès national des sociétés savantes, 1990 (Avignon)* (Paris 1991) 107-114. Palazzo, *Liturgie et société*, does not specifically examine the *prône*.

[72] K. V. Sinclair, 'Les prières du prône de Poitiers: Le témoignage du manuscrit de Stockholm', *Romania* 114 (1996) 335-349, and 'La version messine des prières du prône et le psautier de Metz en français', *RB* 107 (1997) 149-162; Nicolas Offenstadt, *Faire la paix au Moyen Âge: Discours et gestes de paix pendant la Guerre de Cent Ans* (Paris 2007) esp. 371-372, nn 4-16. See too Nicholas Orme's remarks about bidding prayers in his *Going to Church in Medieval England* (New Haven 2021) 237-242 and now Uwe Michael Lang, *The Roman Mass: From Early Christian Origins to Tridentine Reform* (Cambridge 2022) 313-322.

nineteenth and twentieth centuries connected, factitiously if with the best of intentions, to the common prayer of the early Church.[73] This sleight of hand by liturgical scholars facilitated the realization of liturgical reforms that were portrayed as the logical outcome of a teleology similar to that whereby the Book of Common Prayer became the logical conclusion of medieval liturgical development in England: the renewed prayers of the faithful of the *novus ordo* mass were described as a revival of a truly ancient practice, not an innovation based on the transformation of a medieval development. Bidding prayers were prescribed by Regino of Prüm in his late ninth- or very early tenth-century canonical collection:[74]

> It is proper that on feast days or Sundays, after the sermon delivered to the people during the solemnities of the mass, that the priest admonish that, according to the apostolic prayer, all pray in common to the Lord for diverse needs, for kings and rulers of churches, for peace, for [sc, against] the plague, for the bedridden sick of the parish, for the recently deceased; during which prayers the people may individually pray the Lord's Prayer silently, while the priest solemnly prays the appropriate prayers by specific categories. After this, the holy sacrifice shall be celebrated. For the Apostle says: 'I desire therefore, first of all, that supplications, prayers, intercessions, and thanksgivings be made, etc.'.

This passed into Burchard of Worms's *Decretum* (2.70) and apparently thereafter into practice in Francia and in England, for there are Old English bidding prayers of precisely this form in

[73] The author plans to discuss this in a future article.

[74] Wilfried Hartmann, ed., *Reginonis Prumiensis Libri Duo de Synodalibus Causis et Disciplinish Ecclesiasticis* (Darmstadt 2004) 1.192, p. 110-113: 'Oportet, ut in diebus dominicis vel festis, post sermonem intra missarum solemnia habitum ad plebem, sacerdos admoneat, ut iuxta apostolicam institutionem orationem omnes in commune pro diversis necessitatibus fundant ad Dominum pro regibus et rectoribus ecclesiarum, pro pace, pro peste, pro infirmis, qui in ipsa parochia lecto decumbunt, pro nuper defunctis, in quibus singillatim precibus plebs orationem dominicam sub silentio dicat, sacerdos vero orationes ad hoc pertinentes per singulas admonitiones solemniter expleat. Post haec sacra celebretur oblatio. Ait enim apostolus (1 Tim. 2, 1): *Obsecro primum omnium fieri orationes, obsecrationes, gratiarum actiones etc*'.

early eleventh-century additions to the York Gospels.[75] For the continent, although the vernacular words of bidding prayers do not appear until much later, eleventh-century Latin templates suggest a common origin in Carolingian liturgical prescriptions.

Bidding prayers were not part of every mass, but, it seems, only of the main Sunday parish mass. Scant instructions often make it difficult to identify just when they were read. Some late medieval English missals provided for bidding prayers *in lingua materna* at the entrance procession. Missals elsewhere generally provided for bidding prayers following the Gospel, creed, or offertory. In France, the *prône* came after the offertory, between the censing of the altar and the priest's washing of hands. At Paris only the Neo-Gallican reforms of Archbishop François de Harlay, published in his successor's 1697 liturgical handbook, shifted the *prône* to immediately after the Gospel.[76] The *prône* was a moment when the often concurrent actions of priest, deacon, subdeacon, and acolytes ceased as the priest came to the door of the chancel or perhaps mounted the rood screen to address the people directly in the vernacular. True, there were other moments in the mass when the priest turned to the people, but generally only to say 'The Lord be with you (*Dominus vobiscum*)' or 'Let us pray (*Oremus*)' before turning back eastward to pray in a low voice. At the *prône*, and speaking primarily in the vernacular, the priest pierced the barrier between the separate lay and clerical experiences of the mass. In so doing, he taught medieval believers how to be Catholic Christians.

What did he say? The bidding prayers collected by Molin, drawn from across Europe and covering the tenth to the early

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[75] York Minster Ms. Add. 1 fol.161v; printed in Thomas F. Simmons, *The Lay Folks Mass Book* (London 1879) 62-63, and translated in Molin, 'L'"*oratio communis fidelium*"' 335-336.

[76] Gy, 'La signification pastorale des prières du prône' 132; Lang, *The Roman Mass* 316; *Rituale parisiense, auctoritate illustrissimi et Reverendissimi in Christo Patris D. D. Ludovici Antonii de Noailles . . . editum* (Paris 1697) 502-572; likewise, *Missale parisiense illustrissimi et reverendissimi in Christo patris Caroli-Gaspar-Guillelmi de Vintimille . . . editum* (Paris 1738) 18.

sixteenth centuries, hew closely to Regino's prescriptions of prayers:[77]

1) for rulers and prelates,
2) for peace,
3) against the plague,
4) for the sick, and
5) for the recently dead.

They intersperse vernacular intentions with Latin collects and in places indicate where and which prayers the people were to silently pray. Because online resources make many of the manuscripts cited in Molin's collection accessible, my discussion will rest on a fifteenth-century liturgical handbook from the Parisian parish of Saint-André des Arcs or Arts, close in time and place to those included in my previous study of excommunication for debt.[78] The text begins with general prayers and then enumerates at great length prayers for different social categories falling into Regino's first, second, and fourth categories, offering morality lessons to which I will return.[79] After these prayers for the physically and the morally sick, the vernacular prayers break for Latin psalms and collects from the Office, including the Litany of the Saints, Psalms 121 and 122 (in the Vulgate), and prayers against persecutors of the Church and from the mass in time of war. The general tenor is of prayer for peace and against the enemies of the Church and of those gathered at mass. The vernacular section recommences with the dead, Regino's fifth category: 'Then we pray God for the faithful dead of this world . . . ', ending with the command: 'Then pray:

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[77] See Molin's translations and collected texts, 'L'"*oratio communis fidelium*"', cited in n.71, which tellingly begin with the Latin provisions of the tenth- and eleventh-century Leofric missal, of Frankish origin, then continue with Regino of Prüm and the bidding prayers of the York missal, the earliest vernacular bidding prayers known. On the Leofric Missal, see Nicholas Orchard, ed., *The Leofric Missal, 1: Introduction, Collation Table, and Index; 2: Text* (Woodbridge 2002).

[78] Gastoué published a partial version: 'Les prières du prône à Paris au XIVe siècle' 245-248. The full manuscript, BNF Latin 1212, is available on the BNF's site: gallica.bnf.fr. The bidding prayers are on fol.40-44.

[79] BNF lat. 1212 fol.40-42.

Pater noster . . . '. The priest then took up portions of the Office for the Dead, while the congregation prayed its Our Fathers.[80]

The phenomenon of excommunication for debt indicates, in a less anecdotal fashion than Joan of Arc's interrogation, that parishioners listened quite attentively to the content of the *prône*, for the priest did not only bid prayers according to Regino's categories or recite collects from the office. Following the prayers for the dead, priests made announcements, including non-liturgical, often judicial texts.[81] Those from the Ritual of St. André-des-Arcs began with those ipso facto excommunicated:[82]

> We denounce as excommunicated all sorcerers, diviners, usurers, thieves, fraudulent tithe-collectors, those who sell with fraudulent prices and measures, those who assault priests or clerks, except in self-defense, and all those who maliciously retain the property and lawful dues of the Church or obstruct its justice. Such manner of people are accursed and excommunicated unless they repent.

Then, invoking the activity of church courts:[83]

> And in addition if there be in this church any under sentence of excommunication, we command them to depart immediately henceforth until the Holy Service is said.

Then he announced feasts and fasts, and banns of marriage and ordination. These matter-of-fact announcements delineated the community. Who was in? Prelates, princes, parishioners, and the

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[80] BNF lat. 1212 fol.42-43: from the Litany of the Saints ('Salvos fac servos tuos et ancillas tuas . . . Esto nobis, domine, turris fortitudinis a facie inimici'), Psalms 121 and 122 (in the Vulgate), and prayers against persecutors of the Church ('Ecclesie tue quesumus domine . . . ') and from the mass in time of war ('Hostium nostorum quesumus . . . '); 'Apres nous prierons dieu pour touz les loyalz trespassez de ce siecle . . . Si en dictes. Pater noster;' 'De profundis . . . Deus venie largitor . . . '.

[81] This practice continued until quite late in France: McManners, *Church and Society in Eighteenth-Century France*, 2:79, describes how the *prône* might include 'advertisements of leases to be renewed and seigneurial instructions to tenants' and potentially royal ordinances or other communications. See too Albert Mathiez, 'La lecture des décrets au prône', *La Révolution et l'Église: Études critiques et documentaires* (Paris 1910), 26-65, on the announcement of secular legislation during the *prône* before and during the Revolution.

[82] BNF lat. 1212 fol.43v. The Great Curse or list of ipso facto excommunications appears to have taken a more prominent place in early sixteenth-century missals printed for the English market.

[83] Ibid.

faithful departed. Who was excluded? Sorcerers, diviners, usurers, thieves, fraudulent tithe-collectors, fraudulent sellers, those who assaulted clerics, those who stole church property, and those who impeded ecclesiastical jurisdiction.[84] There was one final, implicit category: contumacious debtors who failed to pay when summoned or when a predetermined term had elapsed. The form and content of this text correspond to prior and contemporary synodal statutes. The 1428 statutes of Jacques du Châtellier, bishop of Paris from 1427 to 1438, command parish priests to denounce 'those excommunicated by our authority or that of our predecessors publicly on Sundays in their churches' and to expel them and their families from the church building.[85] The *prône* was a prime site for judicial announcements. For instance, the statutes of the diocese of Saint-Brieuc in Brittany of c. 1529, provide:[86]

> Those executing citations . . . shall say of which church they are pastors or chaplains and if the excommunication or other mandate be contained in the citation or if there be any parishioners executed in the following manner: "I, so-and-so, pastor or chaplain or curate of such a parish executed the present letters during the *prône* of the Sunday mass in the said place on a Sunday according to the above format on such parishioner or parishioners of the said place and afterwards published the present letters in the *prône* of the said mass and posted such a placard of citation".

A great many citations and mandates of excommunication—and consequent excommunications by default—flew around late medieval ecclesiastical circumscriptions.

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[84] The last was a hotly contested issue in fourteenth- and fifteenth-century Paris; see the cases collected in Jean Le Coq's casebook: *Questiones Johannis Galli*, ed. Marguérite Boulet-Sautel (Paris 1946), and Tyler Lange, 'The Birth of a Maxim: 'A Bishop Has No Territory', *Speculum* 89 (2014) 128-147.

[85] *Synodicon ecclesiae Parisiensis, Auctoritate Illustrissimi ac Reverendissimi D. D. Francisci de Harlay . . . editum* (Paris 1674) 55.

[86] Paris, BNF lat. 1458 fol.114r-v: 'Executores citacionum . . . dicant cuius ecclesie sunt rectores vel capellani et si excommunicacio vel aliud mandatum contineatur in citatione . . . modo sequenti Ego N. rector vel capellanus curatus talis parrochie executus fui presentes in prono misse dominicalis dicti loci die dominica tali juxta formam supra talem vel tales parrochianos dicti loci et ulterius publicavi presentes in prono dicte misse et apponatur tanta carta in citatione'.

There are two ways of examining the records of ecclesiastical tribunals: formally and serially. Formally, the texts are often quite short.[87] This was not much different from the records of excommunications in officialities' registers of excommunicates,[88] although monitions for written documents might be longer.[89] Such monitions provided an efficacious, inexpensive path to the excommunication of a debtor. Securing them seldom required the authentication of a written act by a court. Upon the elapse of a term of payment for a debt confessed to an officer of the court, the debtor would be automatically excommunicated. In places it appears that ecclesiastical notaries ratified contracts with a verbal warning to pay on pain of excommunication.[90] This helps to explain the frequency of

[87] e.g. AN Z[1o]4, insert (1420s-1430s): 'Cit[etis] in cur[ia] d[omi]ni archid[iaconi] par[isiensis] ad diem mercurii joh[ann]em execut[orem] joh[ann]is decrois commor[antem] in vico s[anc]ti honorati su[per requestam] girardi randati ord[inis] fr[atru]m pred[icatorum] quod justum r[espo]ns[urus] / Germanet'. One might argue whether to insert a 'fuerit' between 'justum' and 'responsurus', if that is indeed the correct reading. See too Archives départementales de la Seine-Maritime, Rouen (ADSM), G 5270, 77 (1433): 'Presbitero sancti jovinij jurisdictionis Rothomagensis martinus prepositi excommunicatus est pro judicato xlv s contra guillermum perrin alias le moullie lune port eucaristie xpi'. On the Officiality of Montivilliers, see Lange, *Excommunication for Debt* 145-209.

[88] ADSM G 5273 (1500): 'Parvus johannes celle excommunicatus pro judicato iiij s iij d contra chrestien durant de die xvj aprilis'. 1500 is the New Style year, beginning on January 1: until 1564 in Northern France (in a royal edict adopted by 1567), the year began on Easter.

[89] e.g. BNF lat. 18371 fol.55.

[90] In 1503 the vicar-general of the bishop of Langres authorized Pierre Boniol, tabellion and clerk of the officiality of Langres, to sign and to seal with the seal of the officiality of Langres 'testamenta, codicillos, dispositiones, extremas voluntatis obligationes, contractus vel quasi contractus aliasque renunciationes et acta coram ipso sponte facta . . . ac si in dicti domini officialis presentia acta et gesta fuisset' (Archives départementales de l'Yonne [ADY] H 2161 fol.205r). That authorization appears to have included capacities possessed by contemporary ecclesiastical tabellions including those to ratify contracts to pay arrears of rent accompanied with a verbal monition to pay on pain of excommunication: 'monitus viva voce et condempnatus auctoritate domini officialis lingonensis' (ADY H 2161 fol.205v). Warnings were often recorded, to take an examples of 1415 from Chartres (Archives

excommunications for debt in late medieval France revealed by serial investigation and confirms that admittedly late complaints refer to plausible abuses. Although it appears that ecclesiastical tribunals made no great income from excommunicating and absolving debtors, it does not appear that the practice was infrequent.[91] While it is hazardous to make inferences of this sort, in 1430s Paris excommunication may have touched approximately a quarter of households. Somewhat later, in 1496, the bishop of Orléans was accused of having his summoners sell blank citations for monetary gain;[92] and in 1525 the bishop of Angers was accused of having made a business (*marchandise*) of his diocese.[93]

Excommunication was an efficacious sanction.[94] With the threat of heresy dangling over those who failed to secure absolution within a year, there was an evident rush to be

départementales de l'Eure-et-Loir, Chartres G 816 fol.11v): 'Mercurii post sanctum clementem . . . [monicio, in margin] De J ponnette contra J le harengier reum monitus est de solvendo xxii s vi d pro decima in quaternorum vinee de tribus annis'. The fourteenth-century records of the diocesan officiality of Paris give a fuller form (Joseph Petit, ed., *Registre des causes civiles de l'officialité épiscopale de Paris, 1384-1387* [Paris 1919] 294): 'et fuit ter monitus de solvendo sub pena excommunicationis ex nunc prout ex tunc'. See, in general, Lange, *Excommunication for Debt in Late Medieval France* 53-62 and, concerning scribal shortcuts and potentially tacit elipses, Auguste Dumas, 'Dieu nous garde de l'"et coetera" du notaire', *Mélanges Paul Fournier* (Paris 1929) 153-169.

[91] On income from the practice, see Lange, *Excommunication for Debt* 76-102.

[92] AN X^{2a}61 fol.256v, 250v; Tyler Lange, *The First French Reformation: Church Reform and the Origins of the Old Regime* (Cambridge 2014) 94-99; Lange, *Excommunication for Debt* 28.

[93] AN X^{1a}4876 fol.148v-149v; Lange, *The First French Reformation* 167-72; Lange, *Excommunication for Debt* 28. The use of the word 'marchandise' suggests that the bishop's behavior had exceeded the proper boundaries of how gifts and counter-gifts were to be made and expected. Clavero might add here that the judicial fees paid to the judges of the Parlement of Paris by litigants were called 'spices (*épices*)', ostensibly as free gifts reflecting a natural obligation rather than legal requirements.

[94] Almost 99 percent of residents of the exemption of Montivilliers excommunicated by the Abbess's court between 1499 and 1530 appear to have been absolved: Lange, *Excommunication for Debt* 178.

absolved prior to Easter, revealed by the receipts for sealing absolutions.[95] But there was more to excommunications than immediate material efficacy: creditors knew that the contumacious would be denounced at the end of a series of prayers interspersing vernacular invitatories with collects or prayers taken from the Office and the Office of the Dead. Decades ago Natalie Zemon Davis reminded historians that early modern and late medieval communities, indeed, the Christian church, were longitudinal communities in which the dead were treated as an 'age group' of the family.[96] The form of bidding prayers, which echoes the two Mementoes of the mass, shows how ghosts, kin, and progeny were community members: the priest first urged those present to pray for the living, requesting a *pater* or silent prayer while he recited texts from the Office; then he urged prayer for the dead, requesting further silent prayer while he recited from the Office of the Dead; finally, he announced who was excluded from the community, and ordered them to leave, before continuing on with the sacrifice that would benefit only those contained within the community just delineated. Creditors consciously chose to exclude defaulters both from Christ's mystical body, the Church, and Christ's real body, the Eucharist.[97] Why?

Let us begin with two examples as a platform for returning to earlier discussions of the late medieval economic vocabulary and popular internalization of the Church's moral legislation. Eamon Duffy gives the endlessly citable (at least for me) example from early sixteenth-century London of a parishioner seizing the arm of her neighbor as she knelt for Easter communion and saying: 'I pray you let me speke a worde with you . . . for you have need to axe me forgyveness, before you

[95] Lange, *Excommunication for Debt* 91-93, 100-102, 138, 143.
[96] Natalie Zemon Davis, 'Ghosts, Kin, and Progeny: Some Features of Family Life in Early Modern France', *Daedalus* 106 (1977) 87-114.
[97] See the classic Henri de Lubac, *Corpus Mysticum: The Eucharist and the Church in the Middle Ages*, tr. Gemma Simmonds (South Bend 2007; French orig. 1944).

rescyve your rights'.[98] The general confessions that communicants recited prior to performing their Easter duties, that is, receiving the Eucharist annually as required by canon law,[99] were often accompanied by priestly admonitions to make peace with neighbors. A late fifteenth-century English example instructs the priest to warn:[100]

> I charge yow yf ther be eny man or woman, that beryth yn his herte eny wrothe or rancor to eny of his even-cristen [*fellow-christians*] that he be not ther howselyd, ther to the tyme that he be with hym un perfyte love & cheryte, for ho so [*whoso*] beryth wrethe or evyll wyll yn herte, to eny of hys even-cristen, he ys note worthy hys God to receyue; and yf he do, he reseyvyth his dampnacyon, where he schuld receyue his saluacion.

A general confession used in the Parisian parish of Saint-Eustache nearly contemporary to the quoted incident has the celebrant similarly admonish his parishioners:[101]

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[98] Cited in Duffy, *Stripping of the Altars* 95.

[99] The canon *Omnis utriusque sexus* of the Fourth Lateran Council of 1215 requiring annual confession and communion passed into the Liber Extra (X 5.38.12) and remains in the current Code of Canon Law in canons 920 (for obligatory annual communion) and 989 (for obligatory annual confession).

[100] William Maskell, *Monumenta ritualia ecclesiae Anglicanae. The occasional Offices of the Church of England according to the old use of Salisbury the Prymer in English and other prayers and forms with dissertations and notes* (Oxford: Clarendon Press, 1882; orig. 1847), 3.408-409, cited by Orme, *Going to Church in Medieval England* 283-284, n.449. Michael E. Cornett has dated Maskell's manuscript source, Harley MS 2383, which contains many texts appropriate to a priest's manual, to the third quarter of the fifteenth century ('The Form of Confession: A Later Medieval Genre for Examining Conscience' [Ph.D. dissertation, UNC Chapel Hill 2011] 636). See too Philip Durkin, 'Examining One's Conscience: A Survey of Late Middle English Prose Forms of Confession', *Leeds Studies in English* N.S. 28 (1997) 19-56. The 1549, 1552, and 1559 communion rituals of the Church of England contain similar forms of general confession, albeit with a novel understanding of their religious effect.

[101] BNF lat. 1216 fol.13v-14, cited as an epigraph to this article. On formulas of general confession, see too Nicole Lemaitre, 'Confession privée et confession publique dans les paroisses du XVIe siècle', *Revue d'histoire de l'Église de France* 69 (1983) 189-208; Mary C. Mansfield, *The Humiliation of Sinners: Public Penance in Thirteenth-Century France* (Ithaca 1995) 240-241; Amy Nelson Burnett, 'The Social History of Communion and the Reformation of the Eucharist', *Past & Present* 211 (2011) 77-119, at 86-87.

> I likewise forbid that any person of any estate whatsoever come to the table of our Lord Jesus Christ having any quarrel or hatred against his neighbor, or who feels himself to be in any other mortal sin, hidden or open, for to receive the Body of Jesus Christ in such a state is to receive one's damnation.

Duffy's parishioner probably believed herself to be acting charitably, saving her neighbor from damnation by taking Easter communion unworthily while in a state of enmity. Others chose to bar the unworthy from the Eucharist through procedural excommunications, doubtless for the good of their souls. After all, beyond being effective at securing repayment, were they not taught that excommunication was a medicinal punishment?[102]

Exhortations to worthy communion had a statutory basis in a canon of a widely circulated fifteenth-century English canonical collection:[103]

> We firmly command rectors and vicars, and other curates of churches, who are (insofar as possible) at peace with all, to admonish their parishioners that they be one body in Christ bound by unity of faith and the bond of peace, diligently pacifying enmities if they have arisen among their parishioners, building friendships, recalling quarrellers to concord, and, insofar as possible, not permitting that the sun set on the anger of their parishioners.

The canonist William Lyndwood glossed 'bond of peace' in the following manner:[104]

> That is, love of God and one's neighbor. For love is said to be a bond, because it joins two, namely, God and man, and man and his neighbors, and sets them at peace. Hence charity is called the bond of perfection in Colossians 3 and this because by charity all good things are joined lest they perish.

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[102] Richard H. Helmholz, 'Excommunication as a Legal Sanction: The Attitudes of the Medieval Canonists', ZRG Kan. 68 (1982) 202-218.

[103] William Lyndwood, *Provinciale (seu Constitutiones Angliae)* (Oxford 1679) 71–72. Lyndwood attributes the canon to Bishop Edmund [Rich], Archbishop of Canterbury from 1234 to 1240; it is in fact of Rich's contemporary Richard Poore, bishop of Salisbury 1217-1228, †1237. On Lyndwood and this canon, see Christopher R. Cheney, 'William Lyndwood's Provinciale', *The Jurist* 21 (1961) 405-434, at 415-416, and 'Legislation of the Medieval English Church', EHR 50 (1935) 193-224 and 385-417, at 400-402; for the original identification, Marion Gibbs and Jane Lang, *English Bishops and Reform, 1215-1272* (Oxford 1934) 65-67.

[104] Lyndwood, *Provinciale* 72, n.i.

Whether in England, France, or elsewhere, universal and local church law enjoined priests to keep Christ's members in charity, the pacifying love of God and neighbor that united Christ's body.[105] This is why the Wife of Bath was 'out of all charitee' when she was 'wrooth' that other women joined the offertory queue before she did.[106]

Furthermore, as noted earlier, Todeschini has demonstrated how the Mendicants taught '*caritatis latitudo*', what one might describe as the range of appropriate economic behavior. Excommunication for debt suggests that layfolk then applied those teachings through the mechanisms of church courts, acting as arbiters of who was in and who was out of charity. They turned the citations, monitions, and procedural sanctions of canonical procedure against the usurers and defaulting debtors who impeded economic circulation by stopping the circuit of caritative lending preached by the Mendicants. In fact, excommunication for debt, as much as the prohibition of usury or the restitution of unjust gains prescribed by moral theologians as a condition of absolution, confirms that they viewed economic activities through a religious lens. Religion was not an overlay on their reality; it was their reality. As Clavero notes: 'like the family, the economy was domestic for everybody. Singularizing the word made no sense. There was no economy. But neither did the law suffice nor occupy this space. An order of charity preceded it and guided it'.[107] Recognizing this, the denunciation and exclusion of defaulting debtors during the liturgy ceases to be nonsensical or cruel. Rather, it affirms the seamless whole of lives lived with an eye to achieving salvation and avoiding damnation. It may, although this is not certain, speak to lives perhaps less but certainly differently ethically compartmentalized

[105] See Jehangir Malegam, *The Sleep of Behemoth: Disputing Peace and Violence in Medieval Europe, 1000-1200* (Ithaca 2013) on discourses of peace.

[106] General Prologue 11.451-454: 'In al the parisshe wif ne was ther noon / That to the offrynge bifore hire sholde goon; / And if ther dide, certeyn so wrooth was she, / That she was out of alle charitee'.

[107] Clavero, *Antidora* 163.

than ours, as those practices of misogyny, social hierarchy, slavery, or religious intolerance that seem so worthy of condemnation to us, were not, or were not so clearly, marked as unethical or as impediments to salvation. In contrast, demand-driven excommunications for debt confirm that usury and failing to fulfill a promise to pay were understood to be obvious impediments to salvation.

Rainaldo da Piperno's Supplement to the *Summa Theologiae*, collated from Aquinas's other works, answers the question of 'whether someone ought to be excommunicated for a temporal harm' in the affirmative, because 'the amount of guilt is not measured by the harm anyone does, but by the intention with which anyone acts against charity'.[108] This summarizes points made in comments to Matthew 18 and to 1 Corinthians, as well as in his *Quodlibets*. Matthew 18 is of course the foundational text for the power of jurisdiction wielded by medieval church courts, and for the use of excommunication as a sanction for the contumacious.[109] Of it, Aquinas wrote:[110]

> But, though it seems true that all are required to correct, one might say that this duty belongs alone to prelates from their office and to others, in truth, from charity. Sometimes the Lord permits the good to be punished with the evil. Why? Because they did not correct the evil. Yet Augustine

[108] Cited in the epigraph to this article.

[109] Mt 18:15-18 (Douay-Rheims): 'But if thy brother shall offend against thee, go, and rebuke him between thee and him alone. If he shall hear thee, thou shalt gain thy brother. And if he will not hear thee, take with thee one or two more: that in the mouth of two or three witnesses every word may stand. And if he will not hear them: tell the church. And if he will not hear the church, let him be to thee as the heathen and publican. Amen I say to you, whatsoever you shall bind upon earth, shall be bound also in heaven; and whatsoever you shall loose upon earth, shall be loosed also in heaven'. Nicholas of Lyra understood the text through a metonymic understanding of 'tell the Church' as 'tell the bishop' reaching back to the third-century *Didascalia apostolorum*: *Biblia latina cum glossa ordinaria . . . cum postillis ac moralitatibus Nicolai de Lyra* . . . (Basel 1498), 5. n.p., littera h: 'Dic ecclesiae. Id est, praelato per denunciationem publicam: et tunc sunt testes inducendi ad facti probationem, qui prius fuerunt inducti ad fratris secretam correptionem'.

[110] *S. Thomae Aquinatis Doctoris Angelici Super Evangelium S. Matthaei Lectura, cura P. Raphaelis Cai, O.P. editio V revisa* (Turin/Rome 1951) 232-233, nos. 1517, 1523.

> says that sometimes we should cease {correcting} if you fear lest they not improve themselves on account of this correction, but abase themselves further. Likewise if you fear lest it result in the persecution of the Church, you do not sin. However, if you desist, lest you suffer temporal harm, lest you be bothered, and so on, you sin; Proverbs 9:8: "Rebuke a wise man, and he will love thee". "Go and tell him his fault between thee and him alone". And why? Because this correction is done of charity; for charity is love of God and one's neighbor . . . The nations are gentiles and infidels; publicans, who receive taxes, who are public sinners. Hence be they excluded by the Church's judgment, because they did not hear it. Hence a man can be excommunicated for contumacy alone.

It was a charitable duty to denounce sinners to church courts: if they failed to heed the Church, it was just that church courts apply the medicament of excommunication to encourage them back on the path to salvation.[111] Furthermore, Aquinas asked in his Quodlibets 'whether perjury be a graver sin than homicide'. Recognizing that one injured God and another man, he advised:[112]

> It is more serious to sin against God than against man. But perjury is a sin against God, homicide a sin against man. Therefore perjury is a more serious sin than homicide. But to the contrary: Punishment is proportioned to the fault, but homicide is punished more severely than perjury . . . It must be stated that in human judgment the quantity of punishment does not always correspond to the quantity of the fault, for sometimes a greater punishment is inflicted for a lesser fault, when more serious harm threatens men from the lesser fault. But according to God's judgment, the more serious fault is punished by the more severe punishment.

Aquinas reasoned on the basis of a charitable duty to admonish—thus to denounce to ecclesiastical tribunals—sinful fellow Christians for crimes 'against charity'. If charity was the 'form (*forma*)' and 'goal of the virtues (*finis virtutum*)',[113] then to act

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[111] Helmholz, 'Excommunication as a Legal Sanction'.

[112] *Sancti Thomae de Aquino Opera Omnia Iussu Leonis XIII P. M. Edita Tomus XXV Quaestiones de Quolibet Cura et Studio Fratrum Praedicatorum* (Rome/Paris 1996), Quodlibet 1, Q.9 a.2, 2:200-201. Translation from *Quodlibetal Questions 1 and 2*, trans. Sandra Edwards (Mediaeval Sources in Translation 27; Toronto 1983) 64-65.

[113] *Summa Theologiae*, IIa IIae, Q.23, discusses this: *Sancti Thomae Aquinatis Doctoris Angelici Opera Omnia Iussu Impensaque Leonis XIII P.M.* Edita,

against charity was to undermine the actualizing principle of all other virtues.[114] Excommunication for debt indicates that late medieval parishioners believed defaulting debtors to have acted against the love that bound them to God and to each other, and to constitute worthy targets both of the charitable duty of denunciation to a church court and of the excommunication consequent upon their contumacy.

At the conclusion of his *prône* on Easter Sunday, April 19, 1500, the parish priest of Montivilliers announced in the vernacular: 'Petitjean Celle was excommunicated for a debt of 4 s. 3 d. at the request of Chrétien Durant on April 16'. As many as eight others may have been excommunicated that week: the first pages of the relevant register are fragmentary. All these, if present, along with any other excommunicated parishioners whose names might have been repeated at this time, would have been ordered to leave the church. After their departure, the rest of the parishioners would have probably recited with the priest one of the lengthy formulas of general confession provided in rituals, missals, and statutes across Europe before making their annual communion, if they were not to do so in a separate service. How often would parishioners have heard bidding prayers followed by a list of those excommunicated? In Paschal Years 1499 and 1500 it appears that approximately sixty parishioners of Saint-Sauveur, the main parish of Montivilliers (in fact, the north aisle of the abbey church) were excommunicated each year, some more than once. Parishioners at Saint-Sauveur would, on average, have heard fresh denunciations every week of the year, not counting additional citations, monitions, banns, or even excommunications by prelates other than the Abbess of Montivilliers. In the first decade of the sixteenth century the Abbess of Montivilliers excommunicated between two and three hundred of her spiritual

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Tomus Octavus: Secunda Secundae Summae Theologiae a Quaestione I ad Quaestionem LVI (Rome 1905) 163-173, esp. 172-173. Following discussion of caritas in QQ. 23-27, Q. 29, a.3, p. 238 describes 'pax' as 'opus caritatis directe'.

[114] As Domingo de Soto wrote in the sixteenth century (cited in Clavero, *Antidora* 67): 'Plenitudo legis est dilectio, nam finis praecepti, caritas'.

subjects each year. Less populous rural parishes would have heard such announcements less often. We should not forget that excommunications tended to concentrate during Lent, a particularly efficacious time to pressure debtors who needed to perform their Easter duties.

Until around 1500, when creditors began to turn away from seeking remedies against debtors in church courts and when sacramental confession became better demarcated from church courts, debtors were legally *and* naturally (i.e., morally, or religiously) obligated to pay. Priests flouted mandates of excommunication when they doubted that any moral obligation justified a legal sanction: 'the admission of excommunicates to the Eucharist . . . was not rare' in fifteenth-century Paris, because 'it constituted less a lack of respect for the Eucharist than cocking a snook at whomever had requested the excommunication'.[115] Few contested the practice of punishing debtors with excommunication, rather the justice of its application in particular cases. Here again, we see ordinary layfolk and their parish priests using (or ignoring) canonical procedure to enforce their reckoning of just economic behavior. Because believers chose to engage the mechanisms of ecclesiastical justice, excommunication reveals how late medieval Christians defined their sacramental—which is to say, their economic—communities. The experience of the late medieval parish mass taught that paying debts, as much as lending without interest, was a charitable duty. Failing to pay debts when asked was grounds for barring the believer from the rituals of belonging and social peace that guaranteed a chance at salvation. Law certainly influenced religious practice, with ecclesiastical judges from the confessor to the official to the Apostolic Penitentiary opening and closing the gates of Heaven—at times in response to fellow Christians' legal actions—, but popular understanding of religious precepts shaped

[115] Jean-George Vondrus-Reissner, 'Présence réelle et juridiction ecclésiastique dans le diocèse de Paris (fin XVème-1530)', *Histoire, économie et société* 7 (1988) 41-53, at 42.

the activity of church courts, the liturgical activity of parish clergy, and, potentially, their fellows' access to the sacraments.

Charity, Debt, and the Reformations of Christianity

The sixteenth-century Reformations of Christianity, which profoundly reshaped how believers thought about the proper spheres of religious and secular authorities, about how to achieve salvation, and indeed about the place and functioning of their own parish communities within Christendom as a whole and within the eschatological drama heightened by the existence of competing claims to true religion, could only pull on the loose threads of the web of theology, social practices, and canonical procedure that facilitated lay enforcement of the range of proper economic behavior (*caritatis latitudo*) through excommunication for debt. The Reformations of Christianity questioned theories of salvation and the Church, the practices of church courts, and related economic vocabularies and ethics. Yet examining excommunication for debt, both specifically and in conjunction with other, contemporary developments, suggests that we may have put the cart before the horse in that broad-based popular innovations generally lumped under the category of 'the Reformation', whether Protestant or Counter- or Catholic, may have preceded Luther's insight about saving grace and his break with Rome.[116] The decline of the practice of excommunication for debt suggests that European Christians began to think about the Church in new ways—and, in fact, began to live the Church in new ways from approximately 1500.[117]

Understanding how and perhaps why believers anticipated 'Reformation' positions on the function of church courts with

[116] This accords with historiographical movements to recover a Catholic Reformation not directly connected to Counter-Reformation, and to extend the timeline for the transformation of Christianity from a 'body of believers' into a 'body of belief', as John Bossy proposed: *Christianity in the West, 1400-1700* (Oxford 1985).

[117] Lange, *Excommunication for Debt*; Véronique Beaulande-Barraud, 'Comptabilité et juridiction ecclésiastique: Les comptes de l'officialité épiscopale de Châlons, 1430-1530', *Comptabilités* 10 (2019) https://journals.openedition.org/comptabilites/2737.

respect to economic behavior requires taking medieval piety on its own terms with the aid of recent scholarship that moves us past what might be called three historiographies of contempt: contempt for late medieval economic thought, contempt for late medieval penitential practice, and contempt for late medieval liturgical practice. Contemporaneous developments suggest that litigants may have turned away from using canonical procedure to exclude defaulting debtors from the sacramental community as new ideas about the appropriate place of church courts, sacraments, and economic life spread. Singularly, these changes can be seen as continuous with late medieval developments. Together, they may mark the beginnings of the Reformations of Western Christianity. From the 1490s, it appears, litigants in France turned away from requesting the excommunication of debtors. From the 1490s, and decisively from the 1520s, the frequency of the *appels comme d'abus* that gave French parlements de facto appellate review of decisions in which church courts either exceeded their authority or gave erroneous judgments grew.[118] This movement required appellants: some were royal prosecutors, but some were private individuals or competing candidates for ecclesiastical office, all in effect conniving at the paring back of ecclesiastical jurisdiction. In 1539, the Ordinance of Villers-Cotterêts consecrated the narrower circumscription of ecclesiastical jurisdiction. Similarly, in England, from the 1490s, and again decisively from the 1520s and 1530s, threats of *praemunire* and novel applications of writs of prohibition gave royal courts effective review of the decisions of church courts through allegations that church courts had overstepped their bounds.[119] There too, private individuals had to

[118] Léon Pommeray, *L'officialité archidiaconale de Paris et sa compétence criminelle* (Paris 1933) 440-441; Anne Lefebvre-Teillard, *Les officialités à la veille du concile de Trente* (Paris 1973) 70; also Véronique Julerot, *'Y a ung grant desordre': Élections épiscopales et schismes diocésains en France sous Charles VIII* (Paris 2006).

[119] Robert C. Palmer locates the shift precisely in 1497, when the King's Bench under John Fyneux, CJ, began to use writs of prohibition in rather the same manner as the Parlement of Paris used *appels comme d'abus*, usurping the Chancellor's place in the granting of prohibitions: *Selling the Church: The*

connive at the paring back of ecclesiastical jurisdiction by requesting writs of prohibition. In parallel fashion, Robert Palmer argues that what he calls 'the reformation of the English parish in 1529', whereby new statutes empowered the prosecution of absentee rectors who leased out their parishes, 'dictated reliance on subjects to initiate litigation under the new statutes'. In other words, 'statute intruded to reorient the clergy by empowering the laity to enforce traditional expectations'.[120] New legislation enabled layfolk to enforce *caritatis latitudo*, but in a new vein that excluded clergymen from certain manners of managing ecclesiastical property. The expectations of economic behavior that the new statutes and novel uses of legal procedures empowered English layfolk to enforce reflected new ideals of clerical behavior—and perhaps more.

Dissatisfaction with what one might call Franciscan economics may well have been one of the motives for these changes: clergy and layfolk may have wanted their salvation to be less publicly tied to their economic behavior, and so turned away from recourse to the sanctions of church courts in matters of debt. Lenoble closes his study of the Franciscans by musing: 'what might it mean that their own mode of life, of ascesis and management—so near to that of merchants, yet which they proposed as a model for the laity—was integrated with their activity and status as intercessors?'[121] Because this provoked a compulsion to trade, to keep goods in circulation in this world, 'it is certainly no chance that, following Luther's break, Mendicant houses provided spearheads of Protestant reform'.[122] Those who had formerly modelled proper economic behavior turned harshly against that model once they adopted reformed perspectives on salvation, refusing the ethical, terminological, and behavioral elision of Christian morality and market behavior: 'Church' and

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English Parish in Law, Commerce, and Religion, 1350-1550 (Chapel Hill 2002) 25. See too, more generally, Sir John Baker, *The Oxford History of the Laws of England, Volume VI, 1483-1558* (Oxford 2003) 233-253.

[120] Palmer, *Selling the Church* 4.

[121] Lenoble, *L'exercice de la pauvreté* 380.

[122] Ibid.

'economy' were growing separate, at least conceptually. But were economic behavior and salvation growing apart?

The decline of excommunication for debt suggests that not only dissident Augustinian or Franciscan friars came to resist the close linkage of economic behavior and salvation, above all the fact that the community could, in effect, use the procedures of church courts to enforce its vision of proper economic behavior. Understanding how this may relate to the early Reformation upends traditional histories of the Middle Ages (if not the reappraisals of late medieval theology that have since the 1960s transformed its historiographical appraisal): rather than 'recognizing himself only through lineage, nation, party, corporation, family or some other communal form',[123] the young Martin Luther's tormented conscience exemplifies how the generalized semi-Pelagianism of late medieval practical piety made the individual all too conscious of his own agency. Could he ever do enough to merit the operation of God's promise? The move away from excommunication for debt would therefore amount to a turn away from what Heiko Oberman called a '*sola gratia*' and '*solis operibus*' theology of justification.[124] But was it a turn to Lutheran '*sola fide*' justification, or to Calvinist double predestination? That would be to claim too much, as the early modern confessions continued to be racked by intense, hard-fought disputes over the operation of divine grace. Options ranged from the laxist casuistry and optimistic estimates of human capacities to perform meritorious acts without *speciale auxilium* of Leonard Lessius and Luis de Molina, to the more equivocal solution of Trent, to the nearly necessitating Augustinianism of Michel de Bay (Baius), Cornelius Jansenius, or Antoine Arnauld and their eventual Dominican allies.[125] While

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[123] Jacob Burckhardt, *Die Cultur der Renaissance in Italien: Ein Versuch* (Basel 1860) 131: 'der Mensch aber erkannte sich nur als Race, Volk, Partei, Corporation, Familie oder sonst in irgend einer Form des Allgemeinen'.

[124] Heiko Oberman, *The Harvest of Late Medieval Theology: Gabriel Biel and Late Medieval Nominalism* (2nd ed. Grand Rapids 1967).

[125] On the sequelae of the debate *de auxiliis*, see Sylvio Hermann De Franceschi, *La Puissance et la Gloire. L'orthodoxie thomiste au péril du jansénisme (1663-1724): Le zénith français de la querelle de la grâce* (Paris

it was not a step in a single direction, the step away from church courts' role in the regulation of credit and debt was a step away from relatively transparent community regulation of economic behavior as it pertained to salvation, a practice closely tied to late medieval works theology.

Over the course of the sixteenth century and across Europe new courts emerged and existing courts gained new procedures enabling litigants to enforce regulate proper economic behavior. By 1550 church courts were shadows of their former selves, even in Catholic countries. Efforts to 'spiritualize' the clergy, ecclesiastical jurisdiction, and ecclesiastical wealth were increasingly successful across Europe. Yet the religious language of debt persisted, manifesting the religious principle that even spoken promises were morally binding. In the sixteenth century, the principle of morally binding obligations—'*pacta sunt servanda*', '*Zusage machet Schuld*', '*on lie les bœufs par les cornes et les hommes par les mots*'[126]—passed, as Wim Decock has demonstrated, through the enormous body of sixteenth-century moral theology treating contracts and contractual relations into the spheres of economic life, state law, and international relations gradually carved out of the undifferentiated religious experience of the Middle Ages.[127] Bankruptcy was harshly and criminally punished across the continent. A new economic lexicon was emerging, along with a new soteriology and a new moral theology in place of the Mendicants' economic lexicon, late medieval theories of grace,

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2017); Charly Coleman, *The Spirit of French Capitalism: Economic Theology in the Age of Enlightenment* (Stanford 2021).

[126] Peter Landau, 'Pacta sunt servanda: Zu den kanonistischen Grundlagen der Privatautonomie', *'Ins Wasser geworfen und Ozeane durchquert': Festschrift für Knut Wolfgang Nörr*, edd. Mario Ascheri et al. (Cologne 2003) 457–474; now too Piotr Alexandrowicz, '*Pacta sunt servanda*: Canon Law and the Birth and Dissemination of the Legal Maxim,' BMCL 38 (2021) 193-210. The vernacular phrases appear in numerous seventeenth-century vernacular moral and legal texts, see Gérard Sautel and Marguerite Boulet-Sautel, 'Verba ligant homines, taurorum cornua funes', *Études d'histoire du droit privé offertes à Pierre Petot* (Paris 1959) 507-517.

[127] Decock, *Theologians and Contract Law* and *Le marché du mérite*.

and the canon law that oscillated between moral guidance and penal law. As different confessions assigned different places to freedom and necessity, Protestants came to search their behavior for evidence of election, while Catholics came to evaluate their progress toward salvation through confessors rather than through the public procedures of excommunication during the parish mass.[128]

Until the dissolution of late medieval economic lexicon, late medieval configuration of the continuum from sacramental to judicial confession, and the sense that inappropriate economic behavior might well be sanctioned sacramentally and liturgically, the demand-driven practice of denouncing excommunicated debtors during the mass as the result of the procedures of ecclesiastical tribunals manifested the principle that what touched Christ's body—real or figurative—was religious. And everything did touch Christ's body, in its broader senses as the Eucharist and as the mystical body of believers bound by at least annual reception of the Sacrament. It was therefore hard to separate credit from liturgy, economic life from salvation, as we know from studies of usury and restitution or of indulgences, prayers for the dead, and charitable foundations.[129] If we today tend to moralize the law of credit and of debt, should we be

[128] This is not to say that the prosperity Gospel is the natural end of Protestantism. Heiko Oberman long ago noted that Luther reconceived offreedom as a 'duty of charity (*officium charitatis*), as 'freedom for service' and 'freedom from: from the *liturgical ceremoniae*, from the theological *opiniones* and from the *humanae traditiones*' ('Headwaters of the Reformation: Initia Lutheri – Initia Reformationis', ed. Oberman, *Luther and the Dawn of the Modern Era: Papers for the Fourth International Congress for Luther Research* [Leiden 1974] 40-88, at 48). This is not charity as proper behavior but charity as an inner disposition manifested in proper behavior.

[129] Michele Pellegrini, 'Attorno all'"economia della salvezza": Note su restituzione d'usura, pratica pastorale ed esercizio della carità in una vicenda senese del primo Duecento', in *Fedeltà ghibellina, affari guelfi: Saggi e riletture intorno alla storia di Siena fra Due e Trecento* ed. Gabriella Piccinni (Pisa 2008) 395-446; Jean-Louis Gaulin and Giacomo Todeschini, edd., *Male ablata: La restitution des biens mal acquis, XIIe-XVe siècles* (Collection de l'École française de Rome 547; Rome 2018); Swanson, *Indulgences in Late Medieval England*.

surprised that this was the case in 1400 or 1500? Just as today calls to 'subvert your masters' and to abandon debt as a mechanism of social obligation coexist with the reflex that defaulting debtors are immoral, fraudulent shirkers, so at the end of the Middle Ages calls to reject conceiving of religious bonds—and, in radical cases, social bonds—as relationships of debt coexisted with calls to pay one's spiritual debts with alms, good works, or other spiritual currencies.[130] What does society owe us? What do we owe society? Then as now, theories of human action were arrayed along a continuum from structural determinism to absolute freedom: today, the secular predestinarianism of those who minimize human agency in the face of structures of power is opposed by the this-worldly Pelagianism of the 'choicewashing' that exaggerates individuals' freedom and rationality. New histories of late medieval economic thought, late medieval penitential practice, and late medieval liturgical practice allow us to comprehend the cultural matrix within which excommunication for debt existed, and the possible significance of its decline. Prosecuting debtors and bankrupts exclusively in civil courts does not signify the disembedding of economic activity from religious values, simply that it was no longer governed by church courts. What modern scholars have called 'moral economies' or 'the Moral Economy' remained spheres of activity saturated by religious principles and imagery.[131] To give one instance, just as Franciscan attitudes

[130] See, *inter alia*, Lentes, 'Counting Piety in the Late Middle Ages;' Bernd Hamm, *Promissio, Pactum, Ordinatio. Freiheit und Selbstbindung Gottes in der scholastischen Gnadenslehre* (Tübingen 1977), and '"Buying Heaven": The Prospects of Commercialized Salvation in the Fourteenth to Sixteenth Centuries', *Money as God? The Monetization of the Market and its Impact on Religion, Politics, Law, and Ethics*, edd. Jürgen von Hagen and Michael Welker (Cambridge 2014) 233-256; Swanson, *Indulgences in Late Medieval England*. Martin Luther is the clearest rejector of this logic of debt, but even Michel de Montaigne chafed at burdensome, open-ended *dettes d'honneur*.

[131] Thompson, 'The Moral Economy of the English Crowd'; Sharp, *Famine and Scarcity*. This is not to exclude non-religious motivations: as Kaye, Todeschini, Lenoble, and others note, the political power of urban mercantile elites was one of the causes and one of the consequences of the Franciscan economic lexicon—in fact, their power was probably why that lexicon felt

toward ascesis and management were laicized (but not secularized) by Jesuit moral theologians, so sixteenth-century theologians and jurists sacralized property rights and, indeed, theorized freedom as a sort of property right in one's self, laying the moral foundations for a society that could moralize the pursuit of merit through acquisition and market activity.[132] It may be that the sixteenth-century decline of excommunication for debt signals the beginning of the shift whereby the State replaced the Church as the organizing conceptual frame of early modern European existence.[133] But in the prior age, when the Church was the ground of existence, why should economic life not have intruded into the liturgy?

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'natural' to contemporaries. Legendre might make a similar observation about Cass Sunstein's choice architecture and the authority of bureaucratic experts.

[132] Renoux-Zagamé, *Origines théologiques du concept moderne de propriété*; Maria Sole Testuzza, *'Ius corporis, quasi ius de corpore disponendi': Il Tractatus de potestate in* se ipsum *di Baltasar Gómez de Amescúa* (Milan 2016); Decock, *Le marché du mérite*. It would be gross telescoping of historical development to note that the contributions of Todeschini, Chiffoleau, Lenoble, and others are not without relevance to Max Weber's 'inner-worldly ascesis' or Coleman, *The Spirit of French Capitalism*.

[133] Michel de Certeau, trans. Tom Conley, 'The Inversion of What Can Be Thought: Religious History in the Seventeenth Century', and 'The Formality of Practices: From Religious Systems to the Ethics of the Enlightenment (The Seventeenth and Eighteenth Centuries)', *The Writing of History* (New York 1988) 125-146 and 147-205.

Ricerche sulla cultura di Guido da Baisio

Andrea Padovani

L'erudito e la sua biblioteca

Se la biografia e la produzione scientifica di Guido da Baisio sono state ricostruite fin dai tempi di Johann Friederich von Schulte[1] e in tempi più recenti, da Filippo Liotta,[2] molto meno nota è la sua personalità intellettuale e la sua formazione culturale desumibili—come tenterò di fare nel corso del presente studio—almeno dalle sue opere principali, il *Rosarium* e l'apparato al *Liber Sextus,* entrambe consultate nelle edizioni incunabole e cinquecentine cui mi riferirò di seguito.[3] Solo in

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[1]*Quellen* 186-190.

[2]A cominciare da 'Baisio (Abaisi, Abaisio, Abaisius, Abaixi, Abaysii, Abaysio, Abbaixii, Abbaixo, Baiiso, Baisius, Baiso, Baixio, Baisio, Baypho, Baysi, Baysio, Bayso detto l'Arcidiacono) Guido da', DBI 5 (1963) 293-297; idem, 'Appunti per una biografia di Guido da Baisio Arcidiacono di Bologna', *Studi Senesi*[3]13 (1964) 7-52 fino a 'Guido de Baisio (Abaisius, Baiso, Baixio), detto l'Arcidiacono (Bologna, 1250 ca.-Borgo Val di Taro, 1312/13)', DBGI 1092-1093. Da ultimo Rafael Domingo, 'Guido de Baisio, el Arcidiácono (Guido de Baisio, l'Arcidiacono, Guido de Baysio, Archidiaconus) ca. 1250-1313', *Juristas Universales* (Madrid 2004) 1.483-485 che, a differenza di Liotta, assegna la nascita del canonista a Baisio, presso Modena. Per arricchire la biografia di Guido si v. *Les registres de Boniface VIII: Recueil des Bulles de ce Pape publiées ou analysées d'après les manuscrits originaux des Archives du Vatican*, edd. Georges Digard, Maurice Fauchon, Antoine Thomas, Robert Fawtier, 1 (Bibliothèque des Écoles Françaises d'Athenes et de Rome 2.iv; Paris 1907) 460 1284 (25.8.1296); 491 1357 (12.9.1296); 2.353 2952 (7.3.1299); *Acta Clementis P.P. V (1305-1314) e regestis Vaticanis aliisque fontibus*, collegerunt Ferdinandus M. Delorme, Aloysius L. Tâutu (Pontificia Commissio ad redigendum Codicem Iuris Canonici Orientalis 3; Fontes 7/1; Città del Vaticano 1955) 2.647 (9.6.1307); 2959 (8.8.1308); 4.4434, 4473; 6.6619; 7.8271 (8.5.1312).

[3]Per ragioni di economia in un saggio, come il presente, già abbastanza esteso. È comunque mia convinzione che il ricorso ai manoscritti, senza dubbio utilissimo—anzi necessario in questo genere di imprese—può costituire solo il passo successivo a una preliminare lettura dei testi a stampa.

questo modo—tramite la lettura diretta di scritti ormai trascurati da secoli sia per la loro estensione, sia per l'obiettiva complessità—può essere raggiunto, in prima approssimazione, l'obiettivo fondamentale di una storia della letteratura giuridica che finalmente colga l'identità scientifica di autori conosciuti per lo più 'dall'esterno' che 'dall'interno'. Dunque nel loro orizzonte ideale, nell'insieme delle loro convinzioni, nella trama delle relazioni intellettuali col mondo entro il quale vissero assorbendone inclinazioni, aspirazioni, stimoli in un confronto serrato fatto di convergenze e dissensi rispetto ad altri maestri.[4] Obiettivo, qui come altrove, per altri giuristi, di non semplice attuazione perché la mole e l'eterogeneità dei dati pazientemente raccolti non si lascia, spesso, organizzare secondo unità tematiche organiche e strettamente coerenti. Eppure obiettivo da ricercare, per tentativi, nell'onesta persuasione che la perfezione resta orizzonte ultimo ma inattingibile.

Il dato che ha immediatamente e generalmente impressionato quanti si sono accostati alle opere di Guido è la ricchezza di conoscenze dimostrata, specialmente nel *Rosarium*, riguardo agli scritti dei canonisti più antichi.[5] In verità, non soltanto di essi perché nella produzione dell'Arcidiacono figurano i nomi di autori che si segnalarono in diverse discipline,

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[4]Rinvio, a chiarimento di questa prospettiva storiografica, al mio 'Giovanni da Imola: Proposte di metodo storiografico e appunti per una nuova biografia', *Lavorando al cantiere del 'Dizionario Biografico dei Giuristi Italiani (XII-XX sec.)*', ed. Maria Gigliola Di Renzo Villata (Università degli Studi di Milano. Facoltà di Giurisprudenza. Pubblicazioni del Dipartimento di Diritto Privato e Storia del Diritto. Sezione di Storia del Diritto Medievale e Moderno 45; Milano 2013) 79-84.

[5]Già von Schulte, *Geschichte* 2.188 e poi Stephan Kuttner, 'Johannes Andreae and his Novella on the Decretals of Gregory IX', *The Jurist* 24 (1964) 393-408 a 405 rilevando la trasmissione di questa caratteristica all'allievo Giovanni d'Andrea. Della straordinaria erudizione di Guido s'era già occupato Diplovatazio: Thomae Diplovatatii *Liber de claris Iuris consultis*, pars posterior cur. Fritz Schulz, Hermann Kantorowicz, Giuseppe Rabotti (SG 10; Roma 1968) 192.

come si può accertare dall'elencazione prodotta di seguito. Gli autori citati in entrambi gli scritti sono qui evidenziati da asterisco(*).[6]

Rosarium	
Canonisti	**Civilisti**
Abbas (antiquus)	Accursio*
Alano*	Azzone*
Bartolomeo da Brescia*	Bulgaro
Bernardo Compostellano—*b. hysp*.*	Cipriano
Bert., Bertran.	Egidio Foscherari
Bonaguida d'Arezzo*	Giovanni Bassiano*
Burcardo*	Giuliano da Sesso
Cardinalis (Raimundus de Arenis)	*Guar(nerius)*—Irnerio*
Damaso*	Guido da Suzzara
Enrico da Susa (Ostiense)*	Iacopo Baldovini*
Filippo*	Martino da Fano
Gandolfo*	Martino Gosia*
Giovanni Baziano	Odofredo
Giovanni Anguissola da Cesena*	Oldrado da Ponte*
Giovanni da Ancona*	*Pe. de per(egrossis?)*
Giovanni da Faenza	Piacentino*
	Pillio da Medicina*
	Uberto da Bobbio*

[6]Ovviamente salvo errori ed omissioni, tenuto conto dell'intrico di sigle e citazioni non sempre ben comprese dagli editori delle opere a stampa. Per il *Rosarium* mi sono servito principalmente dell'incunabolo prodotto da Andrea de Toresanis de Asula (Venetiis: 14.iv.1495; ISTC ib00289000)=*Rosarium* 1495 n.n., con occasionali riscontri condotti sulle edizioni Johann Mantelin (Strassburg ca. 1473; ISTC ib00285000)=Rosarium 1473 n.n., Petrus Albignanus Trecius alias Reynaldus de Novimagio (Venetiis: 12.xii.1480) ISTC ib00287000)=*Rosarium* 1480 n.n. Per l'altra opera maggiore ho utilizzato Guidonis a Baiiso Archidiaconi Bononiensis Iuris utriusque peritissimi *In Sextum Decretalium commentaria nonnullorum doctissimorum hominum adnotationibus illustrata* (Venetiis 1577)=*In Sextum* 1575.

Giovanni da Fintona* Giovanni di Dio* Giovanni Teutonico* Goffredo da Trani* Guglielmo Durante* Guglielmo Naso* Iacopo d'Albenga* Innocenzo IV* Lapus Lorenzo Ispano Melendo Omobono da Cremona* *Pe.de.** *Petrus de Salinis* *Petrus de Sampsone** Pietro Ispano Raimondo di Pennaforte* *Rodoicus* Roffredo da Benevento* Rufino Stefano di Tournai Uguccione* Vincenzo Ispano*.	
Autori classici	**Padri della Chiesa**
Catone* Cicerone* Giulio Solino Lucano Macrobio Orazio Ovidio* Plinio il giovane Seneca* Terenzio Virgilio.	Agostino* Beda* Bernardo di Chiaravalle* Boezio Dionigi l'Areopagita, ps. Dioscoro Eusebio Giovanni Crisostomo* Giovanni Damasceno* Girolamo* Gregorio Nazianzieno

	Ilario di Poitiers Lotario dei Conti di Segni (poi Innocenzo III) Origene Remigio di Auxerre.
Enciclopedisti e grammatici	**Teologi e filosofi**
Giulio Polluce Isidoro di Siviglia* Martino il polacco* Prisciano Papias*	Alberto Magno* Alessandro di Hales Anselmo d'Aosta Aristotele Bonaventura da Bagnoregio Egidio Colonna Filippo il Cancelliere Glossa alla Sacra Scrittura Guglielmo d'Alvernia Guglielmo Redoano Monaldo Pietro Comestore* Pietro Lombardo Porfirio Tommaso d'Aquino* Ugo di San Vittore* Ugo di St. Cher.
Incerto	
Hu. cad.[7]	
Solo In Sextum	
Canonisti	**Civilisti**
Berengario Fredoli Garsia *Gena*.[8]	Alberto papiense Dino del Mugello Iacopo Buttrigari

[7] *Rosarium* 1495 ad C.32 q.4 c.9. Non si può escludere un errore nella grafia in luogo di 'Hu. card.' (Ugo di St. Cher.), come si legge in *Rosarium* 1473: 'd. Hu. Card.'.

Giovanni d'Andrea Giovanni Monaco (*Io. Cardi*.) *G. Pi.*[9] *Gof. de Ces*.[10] *Gui.* *Io. de Fer.*[11] *Pe.* Tancredi	*Io. Nich*.[12] Ricar. (Malombra?) Ugo
Classici	**Padri della Chiesa**
Ippocrate Sallustio Varrone	Ambrogio
Teologi e filosofi	**Incerto**
Ugo Panziera *P.*[13]	*Soch*.[14]

Di questa tendenza all'erudizione—tipica, ma non esclusiva dell'Arcidiacono nel contesto culturale del secondo Duecento—parlerò nelle conclusioni. Si può fin d'ora supporre, tuttavia, che al momento della stesura del *Rosarium* Guido—senza nulla togliere alle sue facoltà mnemoniche—potesse contare, a Bologna, sul sostegno di una ricca

[8]*In Sextum* 1575 ad VI 1.21.1 59^{rb} n.2. menzionato con Alano. Senza riscontro in Giovanni d'Andrea, l.c.

[9]Citato con Guglielmo Durante, *In Sextum* 1575 ad VI 5.5.2 118^{vb} n.1.

[10]*In Sextum* 1575ad VI 1.16.1 52ra n.1. Senza riscontro in Giovanni d'Andrea, l.c.

[11]Come commentatore di D.22 c.2. *In Sextum*1575ad VI 1.6.3 18va n.4. Senza riscontro in Giovanni d'Andrea, l.c.

[12]*In Sextum* 1575 ad VI 2.9.2 65^{vb} n.1.

[13]Citato con Alberto Magno e Tommaso, *In Sextum* 1575 ad VI 3.15.1 104ra n.1 Senza riscontro in Giovanni d'Andrea, l.c.

[14]Citato con Beda, *In Sextum* 1575 ad VI 1.18.2 56^{vb} n.3. Senza riscontro in Giovanni d'Andrea, l.c.

biblioteca di cui (a giudicare dal più ridotto numero di citazioni) pare avvertire la mancanza ad Avignone. Anche di questo avrò occasione di tornare più volte, in seguito.

Il metodo espositivo, per additiones *alla glossa:* Divisio textus, notabilia, quaestiones

Sulla linea di una tendenza già affermatasi da alcuni decenni presso i civilisti,[15] il *Rosarium* si caratterizza come un insieme di 'additiones' alla glossa ordinaria al Decreto redatta da Giovanni Teutonico e successivamente integrata da Bartolomeo da Brescia tra il 1234 e il 1241.[16] La frequenza della dizione 'adde... adde...' lo attesta senza ombra di dubbio. L'esposizione di ogni canone è preceduta da una 'divisio textus' che Guido trae normalmente da Iohannes de Phintona.[17] A differenza di quanto avviene tra i colleghi che si occupano del *Corpus Iuris Civilis*, presto attratti dalla forma espositiva della 'lectura/commentum', nel *Rosarium* non si rinvengono i caratteristici 'hoc dicit' che là sintetizzano il testo normativo esprimendone la 'ratio'. Quanto ai 'notabilia', essi hanno il semplice scopo di attrarre l'attenzione del lettore su

[15]A. Padovani, *L'insegnamento del diritto a Bologna nell'età di Dante* (Bologna 2021) 45.

[16]Durante il suosoggiorno a Bologna, 1210-1218: Kenneth Pennington, 'Johannes Teutonicus (ca. 1170/75-1245)', *Great Christian Jurists in German History* ed. Mathias Schmoeckel and John Witte Jr. (Tübingen 2020) 1-12 a 1-2.

[17]Cf. Guido Rossi, 'Per la storia della divisione del *Decretum Gratiani* e delle sue parti. Note e questioni con la edizione critica della inedita *Divisio Decreti* di *Paulus de Liazariis*', *Il Diritto Ecclesiastico* 3 (1956) 201-311 ora in *Studi e testi di storia giuridica medievale*, cur. Giovani Gualandi e Nicoletta Sarti (Seminario giuridico della Università di Bologna 175; Milano 1997) 315. Il Phintona è comunque citato pressoché di continuo, seppur con sigle difformi: 'Io.; Io. an.; Io. de.; Io. de f.; Ioan de fa.; Io de sint.' ecc. Cf. Kuttner, *Repertorium* 20-21 n.2; Rudolf Weigand, 'The Development of the *Glossa ordinaria* to Gratian's *Decretum*', HMCL 294-296.

certi passaggi del testo, senza proporsi come massime da tenere presenti in funzione dell'argomentazione sillogistica.[18]

Rare le 'quaestiones', quasi sempre seccamente 'determinatae': dunque prive di opposizione 'pro/contra'. Unica eccezione, la lunga esposizione al c.Si peccaverit (C.2 q.1 c.19)[19] che ricalca il modello diffuso tra i teologi e tipico, ad esempio, della *Summa* di Tommaso.[20] Per il resto e in generale, non esistono significative differenze tra l'ordine espositivo usato nel *Rosarium* e nell'apparato al *Sextus*, se non che la 'divisio partium' tende a scomparire quasi del tutto nell'opera posteriore. Da ultimo osservo che, di solito, Guido non si sofferma a commentare le *Paleae*. Con qualche eccezione, come C.27 q.1

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[18]Padovani, *L'insegnamento* 54-55.

[19]*Rosarium* 1495 ad C.2 q.1 c.19.

[20]È comunque noto che Guido da Baisio produsse 'quaestiones' autonome, a sé stanti. Si v. Liotta, 'Appunti' 22-23; Candido Mesini, 'Questioni disputate in diritto canonico nello Studio bolognese nel sec.XIII dal cod. Y.Z.I.+ Appendice Campori della Bibl. Estense di Modena', *Apollinaris: Commentarius Instituti Utriusque Iuris* 50 (1977) 484-520 a 487, 497-498, 503-505, 508-510, 513-514, 517, 519-520; Orazio Condorelli, 'Dalle *Quaestiones Mercuriales* alla *Novella in titulum de regulis iuris*', RIDC 3 (1992) 125-171 ad 170; idem, 'Note su formazione e diffusione delle raccolte di *quaestiones disputatae* in diritto canonico (secoli XII-XIV)', *Juristische Buchproduktion im Mittelalter*ed. Vincenzo Colli (Frankfurt am Main 2002) 395-430 a 410; Peter Herde, 'Antworten des Kardinals Giangaetano Orsini auf Anfragen von Inquisitoren über die Behandlung von Ketzern und deren Eigentum', *Studien zur Papst-und Reichsgeschichte zur Geschichte des Mittelmeerraumes und zum kanonischen Recht im Mittelalter* (2 Bd. Stuttgart 2005) 2.527-554 a 532; Manlio Bellomo, *Quaestiones in iure civili disputatae*:*Didattica e prassi colta nel sistema di diritto comune fra Duecento e Trecento. Contributi codicologici di Livia Martinoli in Appendice* (Istituto Storico Italiano per il Medio Evo. Fonti per la storia dell'Italia medievale. Antiquitates 31; Roma 2008) 351 (con Giovanni d'Andrea) 361. In Alberici a Rosate Bergomensis iurisconsulti celeberrimi *Dictionarium Iuris tam Civilis quam Canonici per excellentissimum i.u.d. Franciscum Decianum* (Venetiis 1573) 188^{vb} si ha notizia di una 'quaedam q. domini Gui. de Baysio que incipit statuto universitatis et est xix in libro magno quaestionum disputatarum'.

c.8 e a C.27 q.2 c.2: 'Palea est, sed bona'; 'Palea est, sed melior quam granum'.[21]

I rischi della dialettica, tra uso proprio ed improprio

L'uso della 'quaestio', seppure nei limiti cui ho accennato in precedenza, richiama la conoscenza della strumentazione dialettica. Per Guido da Baisio la tecnica che procede nell'alternanza di ragioni 'pro/contra' è sofistica. Così a D.73 c.8:[22] qui Graziano 'probat sophistice quod laici possunt et debent interesse electioni episcopi', per poi confutare, di seguito, questo assunto.[23] Lo stesso fa Agostino a C.23 q.6 c.3 dove prima 'egit ut sophista, nunc vero agit ut magister'.[24] Poiché il termine può generare confusione, Guido ritiene di dover chiarirne il significato,[25] al fine di non coinvolgere la dialettica in un giudizio negativo:[26]

> Quid ergo dicemus de dyaleticis qui disputando fere ad fallaciam semper verbis utuntur? R(espondeo) hoc non est verum. Finalis enim illorum intentio est, vel esse debet, non fallere, sed tali disceptatione veritatem rei comprehendere. Sed cum fallere sit finis sophistice, ut dicit Arist. in libro elenchorum [1. 21] ipse peccat fallacias implicando.

Lo stesso pensiero è svolto a C.23 q.6 c.3:[27]

> Disputare est diversa mentis ratione perquirere ut ad rei veritatem pervenire possit quod in sillogismorum atque locorum assignatione pertinet, quam proprie dyaleticis. Nam demonstrare est argumenta-

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[21]*Rosarium* 1495 ad C.27 q.1 c.8 e ad C.27 q.2 c.2.

[22]Ibid. ad D.73 c.8.

[23]Similmente a ibid. dictum ante C.26 q.2 c.1: 'Primo probat sophistice quod nullum est peccatum exquirere sortes tempore necessitatis' e ibid. a dictum ante C.25 q.1 c.1: 'Sed hoc in sequenti questione melius explicatur magis sophistice'.

[24]Ibid. ad C.23 q.6 c.3.

[25]Ibid. adC.24 q.3 c.32: 'Sophisma est propositio apparens et non existens' simile al 'laqueus' col quale sono catturate le bestie. 'Poniturtamen hic pro deceptione'.

[26]Ibid. ad C.22 q.2 c.4.

[27]Ibid. ad C.23 q.6 c.3.

> tionibus aut sub acutis positionibus quomodo aliud verum est ostendere, quod prophetis pertinet. Cavillare vero per quasdam consequentias deceptorias falsitatem concludere, quod pertinet sophisticis requirere in logica vel argumentis secundum Pap(iam)[28].

Se rettamente esercitata, la dialettica svolge una funzione positiva:[29]

> Secunda liberalis scientia dialetica nuncupatur, quia arguendi et opponendi pueros modum docet. Nam modus sciendi noster est ut sic nobis per congrua argumenta et per rationes debitas sit positum manifestum. *Pertanto* 'est necessaria dialetica ne in argumentando erretur directio intellectus.'

Alcuni dialettici, tuttavia, deviano dal corretto esercizio della propria arte: 'Tertius [finis quare homines addiscuntur] est ut sciant et ad hunc tendunt dialetici nimis ibi morantes, ut hic. Istorum finis est superbia. Loquuntur enim grandia et sermo eorum superbia est.[30] Al pari dei 'phisici' e dei 'legiste nolentes in paupertate vivere', il loro peccato è l'avarizia.[31]

Da parte sua Guido fa uso di argomenti topici: prevalentemente quello a 'contrario sensu' sia nel *Rosarium* che nell'apparato al Sesto; poi—ma più raramente—quello 'a maiori,[32] a minori,[33] a simili'.[34]

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[28]Papias *Vocabularium* (Venetiis: PhilippusPincius 19.iv.1496; ISTC ip00079000) ad*Sophisma-Sophistica*.

[29]*Rosarium* 1495adD.37 c.12. E subito dopo: 'Sic necessaria fuit rhetorica que est quasi quedam dialetica grossa, dicens modum argumentandi grossum et figuralem'.

[30]Ibid. ad D.37 c.3.

[31]Qui Guido da Baisio si scaglia contro il 'phisicus' che 'oculos mentis humane levat cogitando, imaginando aliquid esse ultra celum. Hoc faciunt philosophi'. Giustamente Lorenzo Ispano non aveva condannato i medici che alleviano il dolore dei malati 'sed illi quasi sophistice celum sive celestium secreta rimantur et que eos scire non oportet'. Di altre critiche ai medici si parlerà oltre.

[32]Ibid. ad dictum ante D.66 c.1; C.2 q.1 c.20; C.12 q.2 c.8.

[33]Ibid. ad D.27 c.1.

[34]Ibid. ad D.29 c.3.

La strumentazione dialettica alla prova della teologia. Prescienza divina e libertà dell'uomo

Per accertare le competenze dell'Arcidiacono nel campo delle discipline logico-dialettiche dobbiamo volgere lo sguardo altrove e precisamente alla lunga esposizione che egli conduce sul dictum post C.23 q.4 c.23.[35] Si tratta, lì, di un tema sul quale la teologia cattolica s'era impegnata almeno fin da Agostino: la prescienza divina e i suoi riflessi sulla condotta umana. Si trattava di sapere, insomma, se una completa conoscenza del futuro da parte di un Dio onnisciente ed infallibile possa conciliarsi col libero arbitrio di cui è dotato l'uomo—o viceversa, lo annulli.

Il problema, pur genuinamente di natura teologica, postulava la soluzione di questioni d'ordine logico. Come aveva già fatto Boezio, appuntando la sua attenzione—ben oltre le indicazioni offerte dal vescovo d'Ippona—sui concetti di necessità, possibilità e contingenza proposti dal *De interpretatione* di Aristotele.[36]

È proprio in questa prospettiva che l'argomento viene ripreso da Anselmo d'Aosta, principalmente nel *De concordia praescientiae et praedestinationis et gratiae Dei cum libero arbitrio*, ii e iii.[37]

Se—afferma il santo—Dio ha una conoscenza infallibile degli accadimenti futuri e se Egli sa che un atto umano avverrà, quell'atto non potrà non compiersi; se, però, esso non può non compiersi, ciò significa che è necessario e pertanto non più

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[35]Ibid. ad dictum post C.23 q.4 c.23.

[36]An. Manl. Sev. Boetii *In Librum Aristotelis de interpretatione libri duo*, PL 64, *Editio prima* 362-383; *Editio secunda seu majora commentaria* 487-518.

[37]Ma si v. pure *Cur Deus homo*, ii 17 in S. Anselmi Cantuariensis *Opera omnia*, II. Ad fidemcodicumrecensuitFranciscus S. Schmitt O.S.B. (Stuttgart-Bad Cannstatt 1984) 125. Per il *De concordia* 250-251.

libero. O si sottraggono gli atti liberi alla prescienza divina oppure si deve negare che esistano atti liberi.[38]

Così stando le cose, occorreva approfondire la nozione di necessità e il suo significato; ed è proprio di qui, dal pensiero di Anselmo, che Guido da Baisio prende le mosse:[39]

> He due necessitates dicuntur ab anselmo necessitas antecedens et consequens, ab aliis vero necessitas absoluta et respectiva sive conditionalis. Simplex, idest absoluta sine conditione proposita, sive quia nulli conditioni obligata vel quasi complicata est, vel quia talis necessitas

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[38]Sofia Vanni Rovighi, *S. Anselmo e la filosofia del sec.XI* (Milano 1949) 125; idem, 'Libertà e libero arbitrio in s. Anselmo d'Aosta', *Studi di filosofia medievale* 1 (Milano 1978) 45-60; Anselmo d'Aosta, *Libertà e arbitrio*: *De libertate arbitrii*, ed. Italo Sciuto (Firenze 1992) con bibliografia. Cf. anche Calvin Normore, 'Contingenti futuri', Ivan Boh, Sten Ebbesen, Desmond P. Henry, Simo Knuuttila, Norman Kretzmann, Alain De Libera, Calvin Normore, Gabriel Nuchelmans, Jan Pinborg, Lambertus M. De Rijk, Paul V. Spade, Eleonore Stump, Martin M. Tweedale, *La logica nel medioevo*. Presentazione di Andrzej K. Rogalski (*The Cambridge History of Later Medieval Philosophy*,edd. Norman Kretzmann, Antony Kenny, Jan Pinborg; Milano 1999) 310-313.

[39]*Rosarium* 1495. Di 'necessitas absoluta', anziché 'antecedens', parla Tommaso, *Expositio in Metaphysicam* V, lect. VI: 'Necessitas absoluta competit rei secundum quod est intimum et proximum ei: sive sit forma sive materia, sive ipsa rei essentia'. E ancora in *De principiis naturae ad fratrem Sylvestrum* c.4: 'Necessitas quidem absoluta est quae procedit a causis prioribus in viam generationis, quae sunt materia et efficiens: sicut necessitas mortis quae provenit ex materia ex dispositione contrariorum componentium et haec dicitur absoluta, quia non habet impedimentum. Haec etiam dicitur necessitas materiae. Necessitas autem conditionalis procedit a causis posterioribus in generatione, scilicet a forma et fine: sicut dicimus quod necessarium est esse conceptionem, si debet generari homo; et ista est conditionalis, quia hanc mulierem concipere non est necessarium simpliciter, sed sub conditione, si debet generari homo'. Per l'espressione 'necessitas respectiva', Joke Spruyt, 'Thirteenth-Century Discussions on Modal Terms', *Vivarium* 32 (1994) 196-226. È usata, in particolare, da Bonaventura: Doctoris Seraphici S. Bonaventurae *Opera omnia* edita studio et cura PP. Collegii a S. Bonaventura (Quaracchi-Firenze 1882) 1.675 In 1 Sent. d.38 a.2 q.1 concl. Per la 'necessitas conditionalis' si v. Fr. Matthaei ab Aquasparta OFM S.R.E. cardinalis, I. *Quaestiones de fide et cognitione* (Ad Claras Aquas, Quaracchi prope Florentiam 1903) 119 q.IV ad 4^{m}.

> sola potest dici necessitas. Altera conditio, idest conditionalis cum conditione proposita, necesse est. Istud necesse non est modus convenientis sive convenientie.

Sia nel *De concordia* ii e iii, sia nel *Cur Deus homo* ii, c.17 Anselmo ha effettivamente distinto la necessità 'praecedens' da quella 'sequens'. La prima è di tipo ontologico e ricalca l'opinione comune: è necessario, ad esempio, che per forza di natura domani sorga il sole. L'altra, invece, si riferisce semplicemente alla necessità che segue lo svolgimento di una azione. L'esempio che Guido trae dalla gl. *Quamvis* al l.c. è: 'Necessarium est Socratem ambulare cum ambulat'. L'altra proposizione discussa dall'Arcidiacono—ugualmente ripresa dalla glossa ordinaria—è: 'Si deus previdet aliquid, necessario illud eveniet'.

Entrambi gli asserti possono essere intesi in due modi diversi. In senso composto—'de dicto'—essi sono veri: se ora vedo Socrate camminare, egli cammina necessariamente; se Dio prevede un certo accadimento, è necessario che esso si produca. Le due asserzioni possono però essere comprese anche in altro modo. Così: 'Se Socrate cammina (antecedente) è necessario che Socrate cammini (conseguente)': 'Se Dio prevede qualcosa (antecedente) è necessario che ciò accada (conseguente)'. Riformulati in questo modo—'de re', o in senso diviso—entrambi gli enunciati sono falsi. Se, infatti, ora vedo Socrate camminare non è detto che lo faccia, di necessità, in un qualunque futuro. In altri termini: da una 'consequentia valida ut nunc', in un tempo determinato, non è consentito trascorrere ad una conseguenza assoluta, valida in ogni tempo.

Per altro verso, se Dio prevede qualcosa—ad esempio il concepimento di un uomo—non segue necessariamente che il concepito giunga alla maturità dell'esistenza.[40] In breve e più in

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[40] *Rosarium* 1495 ad dictum post C.23 q.4 c.23.: 'Quod autem deus possit previdere contingens apparet, quia potest previdere hominem qui non est adhuc genitus, quia non est necessarium, quia per aliquod tempus post eius generationem corrumpitur. Necessarium autem non corrumpitur quia necessarium est quod non potest aliter se habere'.

generale rispetto all'esempio prodotto da Guido: per il fatto di conoscerli, Dio non determina i futuri contingenti, gli atti che gli uomini compiono liberamente, scegliendo tra varie possibilità. Nel suo immutabile presente Egli vede tutta la storia, passata e futura; i futuri contingenti, però, non li conosce come futuri, bensì come già avvenuti e quindi divenuti necessari:[41] ciò che, precisamente, preme evidenziare a Guido e ancor prima, alla glossa ordinaria, in un'ottica teologica.

Asserti modali de dicto *e* de re. *Giovanni Teutonico e la* logica modernorum

Le tecniche logiche usate in entrambi i contesti—*Rosarium* e glossa—sono sostanzialmente comuni, anche se l'Arcidiacono, col suo commento prolisso, ripetitivo e talvolta confuso (specialmente nella parte finale, ove critica alcune affermazioni della glossa) dimostra di non essere a suo agio nelle questioni dialettiche.[42] Volgerò pertanto la mia attenzione al pensiero espresso nell'apparato ordinario, traccia fondamentale dello svolgimento esibito da Guido.

Che l'autore della gl. *Quamvis* strutturi le sue considerazioni a partire da una precisa distinzione tra frasi modali 'de dicto' (dunque di senso composto) e 'de re' (di senso diviso) è incontrovertibile. Recenti ricerche attribuiscono ad Abelardo la scoperta e la prima trattazione sistematica di quella distinzione.[43] Dopo di lui questa analisi degli enunciati modali, mediante la distinzione composito/diviso, diviene un luogo comune nei testi

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[41]Per il principio di non contraddizione: ciò che è accaduto non può non essere accaduto. Si v. Francesco Corvino, *Bonaventura da Bagno regio:Francescano e pensatore* (Premessa di Letterio Mauro; Roma 2006) 288.

[42]È probabile che Guido, nel commento, si avvalesse anche degli scritti di Giovanni di Fintona ad C.23 q.4 c.23: 'Haec est fallacia compositionis et divisionis, quia in prima dictione necessario erat modus consequendi, in hac est modus consequentis. Io. de Fin.'

[43]Irene Binini, 'Profilo di Pietro Abelardo', *Aphex: Portale italiano di filosofia analitica. Giornale di filosofia network* 24 (2021) 8-10.

di 'logica modernorum'.[44] La si ritrova in un manuale di larga diffusione presso le scuole degli 'artistae' (anche bolognesi), quale il *Tractatus* di Pietro Ispano.[45] Non a lui, però, la cui opera era già nota, in Italia, da pochi decenni, deve riferirsi Guido laddove scrive che:[46]

> Antiqui latini tales orationes vocaverunt de re, quando scilicet illud supponit non rationetotius, sedratione partis, quia pars dicti non est dictum, ideo non vocaverunt eas de dicto, sed de re

quanto, piuttosto, a certe opere di logica redatte a tale distanza di tempo da apparire, ormai, antiche. Come, appunto, i trattati di 'logica modernorum' diffusi quasi un secolo prima dalle scuole parigine che, soffermandosi sulle 'orationes de re' e 'de dicto', segnalano l'invalidità delle 'consequentiae' che non ne rispettino la specifica e distinta operatività. Ciò che Guido ribadisce a diverse riprese denunciando il rischio di incorrere nella 'fallacia compositionis' o 'divisionis'.[47]

Prima di lui, però, l'argomento era stato trattato dalla glossa ordinaria al Decreto in parallelo ad un uso—ascrivibile in origine ad Abelardo—che connetteva la semantica degli operatori modali

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[44]Simo Knuuttila, 'La logica modale', *La logica nel Medio Evo* 296 con precisi riferimenti a Lambertus M. De Rijk, Logica modernorum. I. *On the Twelfth Century Theory of Fallacies* (Assen 1962). Per le *Fallacie Parvipontane*, in particolare, Alfonso Maierù, *Terminologia logica della tarda scolastica* (Roma 1972) 516-521.

[45]Pietro Ispano (Petrus Hispanus Portugalensis), 'Tractatus' called afterwards 'Summule Logicales', *First Critical Edition from the Manuscripts with an Introduction*, by Lambertus M. De Rijk (Assen 1972) vii 71 124: 'Solent etiam huiusmodi orationes appellari de re vel de dicto. Et dicuntur de dicto quando supponit dictum pro se. Quando autem supponit dictum pro parte sui, dicuntur de re'. Una testimonianza della fortuna incontrata da tale dottrina negli anni in cui opera Guido da Baisio si coglie in Matteo d'Aquasparta, nella già cit. *Quaestio de fide* 119.

[46]*Rosarium* 1495 ad dictum post C.23 q.4 c.23. Poco prima egli parla soltanto di 'antiqui' riguardo al medesimo problema. Sulla conoscenza dell'opera di Pietro Ispano a Bologna, Padovani, *L'insegnamento* 84-87 e *passim*.

[47]*Rosarium* 1495 ad dictum post C.23 q.4 c.23.

alla riflessione teologica proprio in merito alla prescienza divina.[48]

A chi va attribuita questa operazione di notevole rilevanza culturale? Tutti i manoscritti che—per quanto ne so—esibiscono l'apparato di Giovanni Teutonico, riferiscono la glossa a *Quamvis* esattamente come appare nelle edizioni a stampa. Il ms. Biblioteca Apostolica Vaticana Pal. Lat. 624, fol.200^{rb} (196ra) a C.23 q.4 dictum post c.23, pone esplicitamente, al termine della glossa, la sigla 'Io.'.

Se, pertanto, deve escludersi l'intervento posteriore di Bartolomeo da Brescia, bisogna ammettere che già durante il suo soggiorno bolognese, entro il 1217, il Teutonico dovette essere ben informato delle novità logico-dialettiche provenienti da Oltralpe. A segno ed ulteriore conferma, per un verso, di quanto fu precoce l'influsso della 'logica modernorum' nelle scuole dei giuristi docenti nello *Studium*;[49] per altro verso, della formazione intellettuale di Giovanni Teutonico della quale, ancor oggi, sappiamo quasi nulla.

Sostanziale disinteresse per le questioni di natura speculativa

S'è appena parlato, nelle pagine precedenti, di temi al limitare tra teologia e filosofia. A differenza di quanto ho già avuto occasione di rilevare riguardo all'allievo Giovanni d'Andrea,[50] Guido da Baisio non pare particolarmente interessato a tali questioni. Certo, in tutti i suoi scritti sono numerosissime le citazioni di passi tratti dal Vecchio e dal Nuovo Testamento: ma a ben vedere essi sono esaminati più con gli occhi del 'magister in sacra pagina' che con quelli del teologo cui, ormai, dopo la radicale

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[48]Irene Binini, 'Riflessioni sul concetto di necessità nella prima metà del XII secolo', *Studi di storia della filosofia medievale e rinascimentale* raccolti da Fabrizio Amerini, Simone Fellina, Andrea Strazzoni, E. Theca, *Online Open Access Edizioni* 2019 1047.

[49]Padovani, *L'insegnamento* 57.

[50]Andrea Padovani, 'La cultura teologica di Giovanni d'Andrea', BMCL 35 (2018) 255-287.

innovazione portata da Abelardo, è divenuto familiare l'uso, nell'illustrazione dei sacri testi, degli strumenti messi a disposizione dalla filosofia.[51]

Se si esclude il fondamentale e ricorrente riferimento a Tommaso d'Aquino, in Guido da Baisio resta poco altro. I nomi degli antichi Padri della Chiesa sono invocati quasi ad ogni pagina e con ossequio, fuorché per Origene, del cui 'perversum dogma legitur in legenda petri martyris alexandrini'.[52] Complessivamente, tuttavia, i 'Patres' sono invocati come 'auctoritates' dalle quali non lievita una qualche forma di critica e approfondita riflessione. Lo stesso vale per i teologi più vicini nel tempo: che si tratti di Monaldo, di Lotario dei Conti di Segni o di Ugo di San Vittore, solo per fare pochi nomi.

Molto spesso, quando si tratta di riferire il pensiero dei teologi, essi sono passati sotto silenzio, senza precisa indicazione. Ne è un esempio quello che Guido scrive a C.23 q.5 c.11:[53]

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[51]Basti il rinvio almeno a Jean Leclercq, *Cultura umanistica e desiderio di Dio: Studio sulla letteratura monastica del Medioevo*. Prefazione di Pier C. Bori (Firenze 1988). Ampia discussione in Ferruccio Gastaldelli, 'Teologia monastica, teologia scolastica e *lectio divina*', *Studi su san Bernardo e Goffredo di Auxerre* (Firenze 2001) 281-314.

[52]*Rosarium* 1495 ad C.24 q.2 c.3. La critica al Perì Archon era già in Agostino, *Città di Dio* 11.23. Non sono riuscito a rintracciare la fonte dalla quale l'Arcidiacono trae la notizia del coinvolgimento di Origene nel martirio di Pietro d'Alessandria. So che nel *Prologus* Anastasii S.R.E. Bibliothecarii *in passionem sanctorum MCCCCLXXX martyrum*, PL 129.743-744 si legge: 'Post translatam a me ad petitionem sanctitatis tuae passionem praecipui doctoris et martyris Petri Alexandrinae urbis episcopi'. Pare che il manoscritto si trovasse a Roma presso la biblioteca di S. Croce in Gerusalemme (PL 127.13, *In Anastasium notitia historica et bibliographica*). Nessun riferimento ad Origene in Joseph Viteau, *Passions des saints Écatherine et Pierre d'Alexandrie, Barbara et Anysia publiées d'après les manuscrits grecs de Paris et Rome* (Paris 1897). Sulla vicenda si può v. Lewis B. Radford, *Three Teachers of Alexandria: Theognostus, Pierius and Peter. A Study on the Early History of Origenism and Anti-origenism* (Cambridge 1908) 58-86.

[53]*Rosarium* 1495 ad C.23 q.5 c.11.

> Sed magni theologi dicunt hoc dictum Hierony(mi) esse verum et ideo quia non potest Deus facere non fuisse quod preteriit. Sed hoc mirum, quia nullum est preteritum apud Deum licet secus sit apud homines.

Il riferimento all'eterna presenza di Dio al di sopra dello scorrere del tempo umano è spunto che rinvia a certe riflessioni di cui s'è già trattato, a proposito della prescienza divina. Qui l'Arcidiacono allude evidentemente ad una discussione ben nota, avviata da Pier Damiani,[54] che sollevò le critiche di Gilberto Porretano e Guglielmo d'Auxerre.[55]

Al crocevia tra diritto e teologia morale si pone un problema per la cui soluzione Guido da Baisio ricorre al giudizio illuminante di un magister in theologia: 'Dicebat semper Hug. de Sincera, magister in theologia, quod decime prediales debentur ex precepto, sed nisi petantur non tenentur dari'.[56] Con tutta probabilità il personaggio menzionato da Guido va identificato in Ugo Panziera da Prato[57] che l'Arcidiacono dovette conoscere e consultare durante il suo soggiorno bolognese.[58]

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[54]Rinvio almeno a Maurizio Malaguti, 'Il *De divina omnipotentia* di s. Pier Damiani: Sulla via di una ontologia del mistero', *Pier Damiani: L'eremita, il teologo, il riformatore (1007-2007)*, ed. Maurizio Tagliaferri (Bologna 2009) 158-59.

[55]Eugenio Randi, *Il sovrano e l'orologiaio: Due immagini di Dio nel dibattito sulla* potentia absoluta *tra XIII e XIV secolo* (Firenze 1986) 24. Sul punto si v. STh. 1 q.5 a. 4 resp.; *Quodlibet* 5 q.2 a.1. Articolata la posizione di Giovanni Duns Scoto: Luca Parisoli, *La philosophie normative de Jean Duns Scot* (Roma 2001) 46-54.

[56]*In Sextum* 1575 ad VI 3.13.1 101^{vb} n.1. Al l.c. Giovanni d'Andrea parla di 'Hugo de Statera'.

[57]Su di lui si v. la voce curata da Isabella Gagliardi nel DBI 81 (2014) 50-52.

[58]Si v. *Analecta Franciscana sive Chronica Aliaque varia documenta ad historiam fratrum minorum spectantia edita a patribus Collegii S. Bonaventurae adiuvantibus aliis eruditis viris t. IX. Acta franciscana e tabulariis bononiensibus deprompta* (Ad Claras Aquas, Quaracchi prope Florentiam 1927) 1.183 n.431; 189 n. 444; 212 n.489; 250 n.550; 382 n.769; 466 n.918; 471 n.928; 503 n.995 dal 5.12.1289 al 24.5.1300. Dal 1302 Ugo si reca missionario in Oriente. Muore probabilmente a Pera ca. 1330.

Molto più significativa è, infine, l'attenzione riservata da Guido al tema del diritto naturale sul quale, notoriamente, s'erano esercitati teologi, filosofi e giuristi, sia civilisti che canonisti. Sul punto la posizione dell'Arcidiacono è deludente, limitandosi a riferire, parola per parola, quanto ne aveva scritto Uguccione.[59] Altrove, riguardo all''equitas', lo 'ius iniquum' o 'minus aequum', egli si attiene al pensiero di Lorenzo Ispano.[60]Laddove, poi, si tratta di definire cosa siano 'lex' e 'ius' l'unico riferimento—di nuovo, 'ad litteram'—è alla *Summa Theologiae* di Tommaso.[61]

Maggiore attenzione per i casi pratici di teologia sacramentale e di liturgia

Come documentato dal commento al *De consecratione*, Guido da Baisio si mostra maggiormente versato sul terreno della teologia sacramentale e pratica. Riguardo alla prima e in riferimento a de poen. dictum ante C.33 d.5 c.1 (sui tempi e i modi della confessione) scrive:

> Quidam dicunt, ut frater Bonav(entura), quod ipsa decretalis (De poen. C.33 d.1 c.25) non dat licentiam differendi sed prohibet negligentiam et

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[59]*Rosarium* 1495 dictum ante D.1 c.1. Cf. Huguccio Pisanus *Summa Decretorum, I: Distinctiones I-XX*, ed. Oldřich Přerovský adlaborante Instituto Storico della Facoltà di Diritto Canonico della Pontificia Università Salesiana (MIC. Series A: Corpus Glossatorum 6; Città del Vaticano 2006) 9 da 'et dicitur ius naturale' fino a 'vel non repetere [sua]'. Lo stesso accade più avanti, 19, da 'natura, id est naturali equitate' fino a 'naturalis ratio suadet homini'.

[60]Non trovo riferimenti in Rudolf Weigand, *Die Naturrechtslehre der Legisten und Dekretisten von Irnerius bis Accursius und von Gratian bis Johannes Teutonicus* (Münchener Theologische Studien im Auftrag der Theologischen Fakultät München München 1967).

[61]*Rosarium* 1495 ad D.1 c.3 e D.1 c.1 riprendendo STh. II.II q.57 a.1 ad 1^{m}. Rinvio, per il pensiero dell'Aquinate, ad Andrea Padovani, '*Ius* e *lex* da Cicerone a san Tommaso d'Aquino e oltre', RIDC 29 (2018) 247-253 e idem, 'Thomas on *ius* and *lex*', *Thomas Aquinas and Medieval Canon Law: Historical and Systematic Perspectives*, di prossima pubblicazione.

> dilationem sicut ecclesia prohibet ne quis ultra annum in excommunicatione permaneat.

'De hoc—è detto poco oltre—plene disputat frater Bonag. (sic) super iiii sententiarum ubi videas'.[62] Citazione esatta (se si prescinde dai refusi delle edizioni incunabole) perché Bonaventura, *In quartum Sententiarum*, dist. 17 q.2 resp. si esprime effettivamente nei termini seguenti:

> Nec obstat decretalis [X 5.38.12 da Conc. Lat. IV c.21] quia non dat licentiam differendi, sed prohibet negligentiam et dilationem sicut etiam prohibet ne quis ultra annum in excommunicatione maneat.

Anche alla questione 'Quid fiet in terris in quibus nullum vinum haberi potest', Guido da Baisio dimostra una certa dimestichezza con la letteratura teologica contemporanea laddove afferma che per Alberto Magno si deve attendere la decisione, in merito, della curia romana. Si legge, infatti, nel *Liber de Sacramento Eucharistiae*:[63]

> Ad hoc autem quod quaeritur de terris in quibus nullo modo vinum possit haberi. Dicendum videtur, quod de hoc consultatio ad curiam haberi debeat quid sit agendum, tamen propter intolerabile damnum animarum quod incurritur ex sacramenti defectu, videtur mihi esse cum talibus dispensandum.[64]

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[62] *Rosarium* 1495 ad C.33, De poen. D.5 c.1. Leggo 'bona. g.' in *Rosarium* 1480, l.c.

[63] D. Alberti Magni Ratisbonensis Episcopi *ordinis praedicatorum Liber de Sacramento Eucharistiae,* D. Alberti Magni R.E. o.p. *Opera omnia ex editione Lugdunensi religiose castigata et pro auctoritatibus ad fidem vulgatae versionis accuratiorum patrologiae textuum revocata, auctaque B. Alberti vita ac bibliographia suorum operum a PP. Quetif et Echard exaratis, etiam revisa et locupletata cura et labore A. et Ae. Borgnet*, 38 (Parisiis 1899) dist. VI tract. IV.2.14.

[64] In precedenza, dist. VI tract. II.1.4, s'era così espresso: 'Sunt tamen quidam qui dicunt contra hoc dicentes quod ex quo hoc sacramentum communiter toti Ecclesiae ubique per totum orbem terrarum diffusive datum est, quod deberet habere materiam quae in toto terrarum orbe possit inveniri, nec triticum autem nec vinum communiter invenitur: quia in terris Aquilonaribus glaciali frigiditate constrictis, nec triticum nascitur, neque vinum: et sic cum in terris illis pars Ecclesiae frequenter privetur tanto sacramento, quod valde inconveniens esse videtur, ex quo in eo consistit necessarium remedium contra

Alberto è richiamato ancora[65] laddove afferma, 'sine preiudicio sententie melioris':

> Videtur quod plures sacerdotes simul esse debent nec possunt unam conficere hostiam... et quod aliquando plures sacerdotes assistunt pape hoc fit propter obsequium, non propter necessitatem.[66]

La condizione della vergine violata nella sua integrità fisica e spirituale è esaminata da Guido a C.32 q.5 c.2: 'Altisiodorensis et cancellarius parisiensis dixerunt quod aureolam habebit [virgo] si mente non fuit corrupta'.[67] Se nel 'mare magnum' della *Summa aurea* di Guglielmo d'Auxerre non ho trovato un preciso riferimento al pensiero attribuitogli dall'Arcidiacono,[68] esso appare nella *Summa de bono* di Filippo il Cancelliere, composta verso il 1225-1228.[69]

Connesso, in qualche modo, alla valutazione dell'universo femminile nella Chiesa medievale è il passo nel quale si afferma che 'Beatus linus ex precepto beati Petri constituit ut mulier in

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peccatum. Ad hoc autem quod obiicitur, dicendum quod triticum et vinum aut ubique sunt, aut de facili, aut de propinquo ad usum sacramenti adducuntur. Si autem alicubi non invenirentur, aliquando et non contemptu religionis, sed articulus necessitatis hoc efficeret, dicimus cum Augustino quod ideo Deus sacramentis suis gratiam non alligavit quin gratiam suam sacramentalem et sine sacramentis in habentibus fidem ad sacramentum operetur'. Soluzione sostanzialmente ripresa da Tommaso, STh. III q.74a. 1 ad 2[m].

[65]*Rosarium* 1495. ad De cons. D.2 c.39.

[66]Il passo si rinviene, alla lettera, in *De Eucharistia* (n.63) dist. VI tract. IV.2.16. Il punto di vista del maestro è rigettato da Tommaso, STh. III q.82 a. 2, 3:'Non videtur conveniens quod plures sacerdotes eandem hostiam consecrent.' 'Multi—infatti—sunt unum in Christo'.

[67]*Rosarium* 1495 ad C.32 q.5 c.2.

[68]Guilhermi divi Parisiensis Episcopi *Opera de fide, legibus, de virtutibus, moribus, viciis, peccatis, temptationibus, resistentiis, meritis, retributionibus et immortalitate anime* (Nuremberg: Georg Stuchs *post* 31.iii.1496; ISTC ig00708000) ccxxvi[rb] e ccxxvi[va] sulla corona.

[69]Philippi Cancellarii Parisiensis *Summa de bono ad fidem codicum primum* ed. Nicolai Wicki, II (Corpus Philosophorum Medii Aevi auspiciis Academiarum consociatarum editum. Opera Philosophica Mediae Aetatis selecta II; Bernae 1985) *De temperantia*, q.ix, *De aureola* 3.928-929 34-62.

ecclesia non nisi velato capite introiret, ut in cronica reperitur et legitur in legenda ipsius lini'.[70]

Si tratta, qui, di una fonte storica; tutti gli altri passi riferiti in precedenza dal *Rosarium* sono estratti da opere di taglio teologico. Proprio a questo proposito ritengo che sia possibile trarre una conclusione di qualche rilievo. A ben vedere, Guido da Baisio dimostra sì una buona conoscenza di autori come Guglielmo d'Alvernia, Filippo il Cancelliere, Alberto Magno: ma ad essi si riferisce per la soluzione di alcuni problemi specifici, occasionalmente, senza recepirne e valorizzarne la ricca, complessa ispirazione che caratterizza la loro produzione. Aggiungo pure: senza criticarli o confutarli, anche quando se ne poteva dare l'occasione.[71] Scelta che, nuovamente, marca la distanza rispetto al discepolo Giovanni d'Andrea, capace di esprimersi—in bilico tra Tommaso e Duns Scoto—su complesse questioni quali la natura divina, le forme dell'anima e l'eresia. Per tutto l'arco della sua produzione scientifica prevale, in Guido, l'interesse a 'casus' proponibili 'de facto' ma spesso puramente teorici, banco di prova della propria ed altrui finezza intellettuale. Il fitto ricorso alle 'auctoritates' si inserisce precisamente su questa linea di interessi.

Grammatica e lessicografia. Papia, Uguccione, Giulio Polluce e un misterioso Poliloquium

In realtà, la lettura degli scritti dell'Arcidiacono tradisce motivazioni e spinte culturali di natura diversa. Grammaticali, certo, come dimostra l'insopprimibile, diuturna tentazione di

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[70]*Rosarium* 1495 ad C.35 q.5 c.19. Si v. *Le Liber Pontificalis*: *Texte, introduction et commentaire*, ed. Louis Duchesne (Paris 1886) 1.121. Sulla disposizione gravava l'espresso tenore di I Cor. 11:1-15.

[71]Penso, in particolare, alla dura accusa rivolta da Alberto Magno ai decretisti in *Liber de Sacramento Eucharistiae* dist.III tract.III.1: 'In scientia sacramentorum non multum attendenda est sententia Decretistarum, quia pro certo multa falsa de cordibus vel talibus scribunt et dicunt, eo quod sunt homines ignari in Sacra Scriptura, nescientes originalia sanctorum, nec possunt non peccare docentes in fide catholica quae ignorant etc.'.

proporre l'etimo di molte parole. Alcune volte corretto, ma più spesso fantasioso o almeno eccentrico, come là ove ritiene che 'opida' siano 'dicta ab opere danda'[72]; 'dominus quod domui presit, vel quasi dans minas'[73]; 'pax quasi prelium arcens'[74]. Nei casi appena riferiti il testo di riferimento principale è costituito dal *Vocabularium* di Papia talvolta integrato dalle *Derivationes* di Uguccione da Pisa, come probabilmente avviene per 'laicus'—'laos lapis interpretatur, inde laicus, idest popularis vel lapideus respectu clerici' (C.12 q.1 c.7). Al testo dell'antico lessicografo pavese ('laicus popularis laos: λαοσ enim populus graece')[75]—Guido aggiunge, con le parole 'lapideus respectu clerici', uno spunto che egli pare svolgere dalla traccia di Uguccione: 'vel lapideus quasi durus et extraneus a scientia litterarum'[76] (notoriamente posseduta dai chierici). Le *Derivationes* di Uguccione sono comunque riferite con frequenza. Ad esempio, quando si tratta di spiegare l'etimo di 'sicophanta, idest comedens ficum, sycon enim grece, latine dicitur ficus, phasin idest comedere'.[77] Altrove, a C.23 q.4 c.30 Guido scrive:[78]

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[72]*Rosarium* 1495 ad C.23 q.8 c.23. Un poco diverso Uguccione da Pisa, *Derivationes* II. Edizione critica princeps a cura di Enzo Cecchini e di Guido Arbizzoni, Settimio Lanciotti, Giorgio Nonni, Maria G. Sassi, Alba Tontini (Edizione nazionale dei testi mediolatini II, s.1.6; Firenze 2004) 874 25: 'Opidum quasi dans opem vel opes'.

[73]*Rosarium* 1495 ad C.24 q.1 c.20. Uguccione, *Derivationes* 345 6 dopo 'minas' aggiunge: 'vel quasi dans munus, scilicet servitium vel quasi domus nutus'.

[74]Idem ad C.24, q.3 c.25. Ugualmente Uguccione, *Derivationes* 887 7: 'Pax quasi prelium arcens'.

[75]Papias *Vocabularium* 86$^{vb.}$.

[76]Uguccione, *Derivationes* 646 1.

[77]*Rosarium* 1495 ad C.3 q.7 c.2. Cf. Uguccione, *Derivationes* 1092 120: 'Apud Grecos sicophanta dicitur ficus comedens, a sicos, quod est ficus, et fagin, quod est comedere'. In verità si tratta non del verbo 'fagin', ma 'fainein'.

[78]*Rosarium* 1495 ad C.23 q.4 c.30.

> Dicitur anathema q. anatheca, idest superna maledictio. De hoc loquitur hic gl. [*Anathematizavi*]. Ita scripsit h(uguccio) in derivationibus suis, c. ancilla, maranatha, maran hebraice, latine amarum. Maranatha domini adventus ut hic etiam dicit gl. et dicit apostolus, i. ad corin. (i Cor. 16.22)'.[79]

Molto più interessante è quanto si legge a C.24 q.3 c.25:[80]

> Treugua componitur de tris quod est tres et eu quod est bonum et ago agis. Sic dicitur treugua quasi trium bonorum actio, quia inter tres bene agitur per treuguam, scilicet iudicem, actorem et reum. Ita describitur in poliloquio.

L'interesse risiede nel fatto che questo 'poliloquium' risulta opera ancora sconosciuta: verosimilmente uno dei tanti lessici tuttora inesplorati dagli studiosi ma di cui è testimone l'inesauribile curiosità dell'Arcidiacono.[81] Ben fondato su una solida tradizione letteraria è viceversa l'etimo di 'Israel, vir videns deum' che Guido afferma tratto da Remigio di Auxerre, pur risalendo, in verità, a Girolamo seguito da Filone d'Alessandria, Eusebio, Didimo, Agostino, Gregorio Magno, Alcuino, Rabano Mauro.[82] Altri ricercatori, con competenze superiori alle mie,

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[79]Uguccione, *Derivationes* 734 34: 'Maranatha, indeclinabile, hebreum est et interpretatur adventus Domini vel Dominus venit vel usque in adventum Domini; unde illud 'anathema maranatha' idest perditio in adventum Domini'. Non si comprende il rinvio a 'c. ancilla', dato che per quel termine Uguccione svolge ben altre considerazioni (62 1-2). Impossibile, qui, menzionare i numerosissimi passi nei quali Guido riferisce alla lettera l'opera di Uguccione. Si cf., ad esempio, *Rosarium* 1495 ad C.23 q.1 c.5 con Uguccione, *Derivationes* 426 30 1.

[80]Diversamente Uguccione, *Derivationes* 1242 1: 'Hec Treuga-ge, scriptio regalis, securitas, unde treugo-as, securare, pacificare, treugam facere'. poi seguito da Iohannes Balbus, *Catholicon* (Mainz: Johann Gutemberg? 1460-1472; ISTC ib00020000).

[81]L'opera non figura in Geoffrey L. Bursill-Hall, *A Census of Medieval Latin Grammatical Manuscripts* (Grammatica Speculativa. Sprachtheorie und Logik des Mittelalters. Theory of Language and Logic in the Middle Ages 4; Stuttgart-Bad Cannstatt 1981). L'Autore, nell'*Introduction*, 12 e 16 ribadisce che 'there is a great deal of material in many libraries that we have not been able to examine' e che'most of it awaits the scholar's scrutiny.'

[82]*Rosarium* 1495 ad C.8 q.1 c.16. Conforme Uguccione, *Derivationes* 621 1.

potranno esplorare in profondità questo particolare aspetto della cultura di Guido da Baisio.

Per evidenziare l'interesse del nostro canonista nei confronti della grammatica bastino, qui, solo pochi esempi. A C.11 q.3 c.24,[83] per segnalare una preterizione nel testo della Genesi (comunque 'subintellecta' da chi legge) egli parla di 'aposiopesis': termine già usato da Isidoro, *Etimologie* 2.21.35 e riesposto nel suo significato da Uguccione.[84] Alla metonimia—'cum ponitur continens pro contento'—l'Arcidiacono accenna nell'apparato al Sesto, VI 1.6.17.[85]

Sul confine tra grammatica e dialettica si inserisce la discussione intorno alla 'probatio' delle proposizioni indefinite[86]. In questo caso Guido non si distacca dall'insegnamento di Dino del Mugello (tuttavia non esplicitamente richiamato).[87] Di suo, egli aggiunge un interessante riferimento alla dottrina sostenuta dai logici, ma senza seguito tra i giuristi:

> Secundum logicos autem indeffinita equipollet scilicet in materia necessaria, ut homo est animal, ergo omnis homo. In materia contingenti non equipollet, ut homo currit, ergo omnis homo, non sequitur.

La necessità dell'inferenza, nella prima 'consequentia', dipende dal rapporto 'de inesse' tra 'homo' ed 'animal'. Come si esprimono Robert Kilwardby, Alberto Magno, Ruggero Bacone e Lamberto di Auxerre:[88]

> Si vero fuerit modalis de necessario cuiuscumque fuerit qualitatis et quantitatis convertitur sicut sua de inesse, ut dicit Aristoteles in libro Priorum.

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[83] *Rosarium* 1495 ad C.11 q.3 c.24.

[84] Uguccione, *Derivationes* 74 281.

[85] *In Sextum* 157531^{vb} n.3.

[86] *Rosarium* 1495 ad D.19 c.1.

[87] Cf. Padovani, *L'insegnamento* 89.

[88] Cf. Henrik Lagerlund, *Modal Syllogistics in the Middle Ages* (Studien und Texte zur Geistesgeschichte des Mittelalters 70; Leiden-Boston-Köln 2000) 25. Sulla stessa linea si porrà Giovanni Buridano: Maierù, *Terminologia* 363-364.

Ritengo probabile che quanto l'Arcidiacono riferisce riguardo a questa dottrina dovette scaturire da occasionali incontri con gli 'artistae' bolognesi. La sua formazione lo tiene lontano da considerazioni così raffinate ed altamente tecniche. Le speculazioni filosofiche e dogmatico-teologiche gli restano sostanzialmente estranee. Prigioniero, com'è, dei suoi interessi grammaticali, le evita: al punto che nel commento a VI 1.1, *De Summa Trinitate et fide catholica*, egli non procede oltre la mera definizione dei termini 'spiritus, anima, veritas'.[89]

Eppure, la sua curiosità, in campo grammaticale e lessicografico, raggiunge un culmine insospettato. Anzi, eccezionale, perché egli dimostra di conoscere, fin dai tempi di stesura del *Rosarium*, una versione latina dell'*Onomasticon* di Giulio Polluce (†177-192 d.C.) che—per quanto ne so—resta un 'unicum' nella storia della letteratura medievale, ben precedente le versioni che saranno prodotte dagli umanisti due secoli dopo.[90]La misteriosa apparizione del testo solleva questioni al

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[89]Per la quale ultima riprende la definizione di 'verum, id quod est' data da Agostino, *Soliloquia* 2.4, di seguito smarrendosi in considerazioni del tutto banali. Cf. *In Sextum* 1575 3ra n.2-4.

[90]Andrea Padovani, 'L'insegnamento' del diritto a Bologna nell'età di Dante: La riscoperta di Giulio Polluce?', *'E sarai meco senza fine cive': Temi, personaggi e fortuna della cultura politica e giuridica di Dante: Convegno internazionale di studi, Bologna 30.11-2.12.2021*, di prossima pubblicazione. Altri riferimenti a Polluce, di cui non ho tenuto conto nel saggio sopra citato, si trovano almeno in *Rosarium* 1495 ad C.26 q.15 c.12, C.2 q.6 c.18, C.2 q.6 c.28, D.29 c.3. Per il primo caso, ove si tratta della voce 'sinderesi', rinvio a Pollucis *Onomasticon* e codicibus ab ipso collatis denuo edidit et adnotavit Ericus Bethe. Fasciculus posterior lib. VI-X continens (Lipsiae 1931) a viii 151 146. I termini greci là usati furono tradotti, nella versione latina consultata da Guido, con 'sinderesi', presumibilmente in forza della suggestione di un termine ben diffuso nella cultura scolastica medievale. Cf. Odon Lottin, 'Sindérèse et conscience au XIIe et XIIIe siècles', *Psychologie et morale aux XIIe et XIIIe siècles* (Gembloux 1948) 2.103-349; Marialucrezia Leone, 'Coscienza e sinderesi in Goffredo di Fontaines', *Lexicon Philosophicum: International Journal for the History of Texts and Ideas* 5 (2017) 127-160. Polluce non parla precisamente di 'sintheresis' esprimendosi, tuttavia, con termini greci ad esso affini. Per il secondo caso ('Uti est id quod in usum venit

momento irresolubili che rinviano alla dotazione delle biblioteche emiliane. Di fatto, il testo di Polluce non sarà più menzionato nel commento al Sesto, composto ad Avignone.

Il canonista e alcuni suoi predecessori: Bartolomeo da Brescia, Bonaguida ed altri ancora

Ho già tentato di produrre, in apertura di questo saggio, un elenco (rivedibile, correggibile ed ampliabile, s'intende) degli autori citati da Guido nelle due opere principali. Qui di seguito posso solo aggiungere poche osservazioni relative ad alcuni giuristi. Della posizione privilegiata di Giovanni da Fintona, nel *Rosarium*, s'è pur già detto qualcosa. Va ugualmente evidenziata l'attenzione riservata alle *Quaestiones veneriales* (=QV) e *Dominicales* (=QD) di Bartolomeo da Brescia.[91] Per le 'dominicales', nel *Rosarium*:[92]

Sacerdos quidam, QD 30, 8$^{rb\text{-}va}$ ad D.32 c.13;
Quidam clericus cum esset, QD 10, 4$^{ra\text{-}rb}$ ad D. 32 c.13;
Clericus quidam ab officio et beneficio, QD 57, 14$^{ra\text{-}rb}$ ad C.2 q.5 c.9
Petebat quidam, QD 67, 16$^{rb\text{-}va}$, ad dictum post C.2 q.6 c.41;

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referre secundum polli.') il passo va rintracciato nell'ed. Bethe, Fasciculus prior lib. I-V continens (Lipsiae 1900) a v 136 298. Problematica—per la sua genericità—l'individuazione del terzo caso ('Proceres dicuntur quia cetere multitudini preeminent secundum pol.'). Con tutta probabilità il passo dovrebbe trovarsi all'interno del libro viii, ove Polluce tratta delle magistrature e degli ottimati. Più sicura l'identificazione di 'Collirium dicitur iunctio facta ad detergendum oculorum' di cui a Bethe iii 84 181. Concludo osservando che anche l'*Onomasticon* di Polluce, in versione latina, non appare nel *Census* di Bursill-Hall.

[91]Di qualche interesse quanto si legge, a proposito di questo canonista, in *Rosarium* 1495 ad dictum post C.11 q.1 c.9 (*Novella constitutio 'Episcopus non flagitatur'* 9): 'Dicit hic b.b. quod sic fecit fieri in causa patriarche gradensis episcopi venetorum in qua fuit assessor'.

[92]*Auree quaestiones dominicales ac veneriales necnon brocardica Bartholomei Brixiensis* (Venetiis: Baptista de Tortis 20.xii.1508). Ringrazio l'amico Kenneth Pennington per alcune segnalazioni.

Consuetudo (rectius: *Constitutio*) erat, QD 75, 18^{ra-rb} ad C.7 q.1 c.18;
Advocatus quidam, QD 69, 16^{vb} ad C.7 q.1 c.25;
Quidam scholaris (rectius: *Secularis*), QD 36, 9^{rb-va} ad C.11 q.1 c.29;
Episcopus quidam, QD 78, 18^{vb}-19ra ad C.12 q.2 c.52;
Episcopus quidam fecit alienationem, QD 78, 18^{vb}-19ra ad C.16 q.3 c.10;
Cum quedam ecclesia, QD 49, 12^{rb-va} ad C.16 q.7 c.7;
Quidam dum fugeret, QD 82, 19^{vb}-20ra ad C.17 q.4 c.29;
Sacerdos quidam fuit, QD 53, 13^{ra-rb} ad C.23 q.4 c.22;
Carceratus quidam custodi carceris, QD 37, 9^{vb} ad C.23 q.5 c.19;
Quidam sub ea conditione intravit monasterium, QD 5, 3^{ra-rb} ad C.22 q.2 c.6;
Vir mandavit uxori, QD 33, 9^{ra-rb} ad C.32 q.5 c.8;
Esto quod aliquis sit resuscitatus, QD 54, 13^{rb-va} ad C.32 q.7 c.2;
Coniugata quedam, QD 34, 9^{rb} ad C.32 q.7 c.3;
Cum quidam graviter egrotaret, QD 32, 8^{vb}-9ra ad C.32 q.7 c.23;
Duo communem domum, QD 43, 11^{ra-rb} ad de poen. C.33 q.3 c.46;
Quedam per verba de presenti, QD 80, 19^{rb-va} ad dictum ante C.33 q.5 c.1;
Quidam fecit votum eundi, QD 40,[93] 10^{rb-va} ad C.35 q.5 c.16;
Quidam sub ea conditione intravit monasterium, QD 5, 3ra ad C.32 q. 2 c.6;
Clericus quidam, QD 57, 14ra ad D. 32 c.6;
Quidam impetravit rescriptum, QD 11, 4^{rb} ad D.97 c.3;
Duo commune domum habebant, QD 43, 11ra ad C.1 q.1 c.34;
Quidam habens duas manus, QD 85, 20^{vb} ad C.1 q.1 c.47;
Cum quidam clericus, QD 42, 10^{vb} ad C.16 q.7 c.25;
Tutor cuiusdam, QD 77, 18va ad C.16 q.7 c.32.

[93]Al punto, Guido da Baisio riferisce, precisamente: ‘B(artholomeus) Brix(iensis) in sua questione dominicali 40’.

Per le *veneriales,* sempre nel *Rosarium*:

Aliquis testis, QV 14, 22^{va-vb} ad D.50 c.7;
Aliquis repellendo violentiam, QV 12, 22^{rb} ad D.50 c.16;
Esto quod eligentes, QV 23, 24ra ad D.61 c.10;
Esto quod pendente, QV 79, 30^{va-vb} ad D.81 c.3;
Queritur utrum conditio, QV 36, 25va ad C.1 q.2 c.2;
Aliquis fuit de crimine, QV 71, 29^{vb} ad C.2 q.5 c.6;
Esto quod iudex, QV 53, 28ra ad C.2 q.6 c.29;
Aliquis conveniebatur, QV 45, 26^{vb}-27ra ad C.2 q.7 c.38;
Canonicus quidam, QV 20, 23^{va-vb} ad C.2 q.7 c.42;
Sicut res ecclesie, QV 61, 28^{vb} ad C.10 q.2 c.2;
Aliquis litigabat, QV 32, 25^{ra-rb} ad C.11 q.1 c.1;
Esto quod episcopus, QV 66, 29^{rb} ad C.12 q.2 c.74;
Esto quod sententia excommunicationis, QV 42, 26va ad C.13 q.2 c.6;
Queritur utrum fideiussor, QV 74, 30^{ra-rb} ad dictum ante C.14 q.3 c.1;
Aliquis scholaris, QV 76, 30^{rb} ad C.14 q.3 c.4;
Monasterium quoddam, QV 90, 31^{vb} ad C.16 q.7 c.26;
Aliquis conveniebat, QV 11, 22^{rb} ad C.23 q.3 c.2;
Causa fuit commissa, QV 7, 21^{va-vb} ad C.27 q.1 c.19;
Quidam clericus intravit, QV 68, 29va ad C.27 q.2 c.27;
Esto quod mulier, QV 85, 31ra ad C.28 q.1 c.4;
Aliquis ex officio suo, QV 13, 22va ad C.32 q.1 c.7;
Item queritur utrum, QV 44, 26^{vb} ad C.32 q.5 c.8;
Aliquis accepit, QV 78, 30va ad C.14 q.4 c.12;
Queritur utrum morte, QV 5, 21va ad C.18 q.2 c.27;
Queritur utrum aliqui qui, QV 57, 28^{rb} ad dictum ante D.12 c.2;
Esto dominus papa, QV 22, 23^{vb} ad D.12 c.2;
Queritur utrum pater, QV 86, 31^{rb} ad D.45 c.8;
Aliquis fuit electus, QV 29, 24^{vb} ad D.54 c.20;
Queritur si appelletur a sententia, QV 58, 28va ad C.2 q.1 c.9;
Actor conveniebat, QV 30, 24^{vb} ad C.3 q.8 c.1;
Queritur utrum conditio possit apponi, QV 36, 25^{vb} ad dictum ante C.8 q.2 c.1.

Meno frequenti sono le citazioni delle medesime opere nei *Commentaria in Sextum*.

Per le *dominicales*:

Quidam episcopus cum haberet, QD 59, 4va n.1 ad VI 1.3.1;
Quidam dederunt potestatem, QD 79, 19$^{ra\text{-}rb}$ n.2 ad VI 1.6.37;
Esto quod aliquis simpliciter, QD 54, 13$^{rb\text{-}va}$ n.4 ad VI 1.14.5;
Episcopus quidam promisit auctoritate, QD 62, 15^{rb}, 88^{vb}, pr. ad VI 3.4.24;
Duo communem domum habebant, QD 43, 11$^{ra\text{-}rb}$, 122^{vb}, n. 14 ad VI 5.9.5.

Quanto alle *veneriales*:

Quod sententia excommunicationis, QV 42, 26va, 4^{rb}, n. 4 ad VI 1.2.2;
Queritur utrum morte, QV 5, 21va, 49^{vb}, n. 2 ad VI 1.14.14;
Queritur utrum in causa appellationis, QV 48, 27^{rb}, 63ra, pr. ad VI 2.4.2;
Quero utrum in causa appellationis, QV 48, 27^{rb}, 63ra, pr. ad VI 2.4.2;
Aliquis erat administrator, QV 47, 27$^{ra\text{-}rb}$, 67va, n. 1 ad VI 2.10.3;
Aliquis recipit (rectius: *accepit*), QV 78, 30va, 118va, n. 1 ad VI 5.5.2;
Vix (rectius: *Saepe*) *contingit*, QV 49, 27$^{rb\text{-}va}$, 120va, n. 1 ad VI 5.7.10.

Per il riferimento ad altri giuristi, sia nel *Rosarium* che nell'apparato al Sesto, non v'è che l'imbarazzo della scelta,[94] a

[94]La *Summa* di Giovanni d'Ancona è citata in *Rosarium* 1495 ad D.12 c.2 e C.12 q.2 c.38. Le *Cavillationes* di Giovanni di Dio (Giovanna Murano, *La tradizione delle opere di* Iohannes de Deo [Porto 2014] 51-53) sono ascritte

cominciare dall'aretino Bonaguida, 'in romana curia advocatus'.[95] Da lui Guido riprende, nella 'additio' alla glossa su C.5 q.2 c.1,[96] un passo che ricorda la sfortunata vicenda occorsagli, appunto, nel supremo tribunale pontificio:[97]

> Hic autem nota quod si iudex tibi statuit in prima citatione brevem et peremptorium terminum, in quo casu tenet appellatio, extra. de dilationibus, 2.8 c.1 (X 2.8.1) super tali appellatione litteras non

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erroneamente a Giovanni da Fintona ('Io. f. in cavillationibus suis, rub. de ap.'), *Rosarium* 1495 ad C.2 q.6 c.41; corretta la menzione delle *Quaestiones* del canonista portoghese (cf. Martin Bertram, 'Der *Liber quaestionum* des Johannes de Deo,'*Die Kunst der Disputation: Probleme der Rechtsauslegung und Rechtsanwendung im 13. und 14. Jahrhundert*, ed. Manlio Bellomo [Schriften des Historisches Kollegs herausg. von der Stiftung Historisches Kolleg. Kolloquien 38; München 1997] 85-132) di cui a *Rosarium* 1495, C.11 q.1 c.50. In generale, secondo Antonio García y García, 'El *Breviarium Decretorum* de Juan de Dios y las divisiones del Decreto de Graciano', *Estudios sobre la canonistica portuguesa medieval* (Madrid 1976) 114, il *Rosarium* riprodurrebbe alla lettera l'opera di Giovanni di Dio. Problematica l'identificazione del giurista menzionato in *Rosarium* 1495 ad C.27 q.2 c.11: 'In glo. i. ibi de futuro adde ut extra de spon., sponsam [X 4.1.8] que decr. loquitur in sponsa de futuro ut patet secundum pe. de peru. Id quod dicit si est nubili etati proxima etcet.'). 'Pe. de peru.' è indicato come 'pe. de per.' in *Rosarium* 1480. Se questa seconda lezione fosse preferibile, il personaggio dovrebbe essere identificato in Petrus Peregrossi. Fu infine ignoto allo stesso Guido da Baisio 'is qui glosavit summam fratris Ray(mundi)': *Rosarium* 1495 ad dictum ante D.69 c.1. È proprio il caso di dire che il roseto dell'Arcidiacono non manca di spine.

[95]Così a *In Sextum* 1575 ad VI 1.6.1 15^{vb} pr.

[96]*Rosarium* 1495 ad C.5 q.2 c.1.

[97]Bonaguida da Arezzo, *Summa introductoria super officio advocationis in foro Ecclesiae*, ed. Agathon Wunderlich. *Anecdota ad processum civilem spectantia. Bulgarus, Damasus, Bonaguida* (Göttingen 1841) partic. V, tit. 2 341. Guido riporta il passo in maniera tanto confusa da renderlo quasi incomprensibile. Ringrazio l'amico Martin Bertram per avermi tolto d'impaccio con i suoi preziosi suggerimenti. Guido da Baisio scrive poi, in chiusura: 'Et ibidem [de petitionibus] dicit Egidius in suo libello'. Cf. *Der* Ordo iudiciarius *des* Aegidius de Fuscarariis herausg. von Ludwig Wahrmund (neudr. der Ausgabe 1916, Aalen 1962) xcviii 169. L'episodio dev'essere datato tra il 1240 ed il 1245 per la menzione di Goffredo da Trani quale 'auditor contradictarum' in quegli anni.

> concedit. Et cum essem advocatus in causa cujusdam Senensis, litterae per vicecancellarium dilaniatae fuerunt, licet dominus Goffredus, qui tunc erat auditor contradictarum, se opposuisset dicens quod transire debebunt. Nec tunc, nec in alia causa postea eas potui obtinere.

Il ricordo di casi discussi in tribunale non è, del resto, infrequente nelle opere di Guido da Baisio. A C.10 q.3 c.6 si legge:[98] 'Ita fuit pronunciatum per dominum Ricardum cardinalem et sic tenet et servat curiam secundum Bonagratiam'. Il cardinale dovrebbe essere Riccardo Annibaldi (1239-1276), ma chi sia 'bonagratia'mi resta ignoto. Le edizioni *Rosarium* 1473 e 1480 recitano: 'secundum boñ.'. Una ipotetica abbreviazione—'boñ.' per 'bonaguida'—mi pare da escludere, dal momento che il testo edito da Wunderlich non riferisce questo passo. La questione resta al momento aperta, al pari dell'altra sollevata dall''additio' alla glossa su VI 3.4.21:[99]

> Et ita per magnum virum auditorem palatii fuit pronunciatum, a qua sententia fuit appellatum et causa ap. commissa, sed non fuit terminata. Ita de hoc vide per Ioan(nem) And(reae), infra, e. Si plures, in Cle.'.

Che l'ultimo inciso sia aggiunta posteriore è certo, dato che il commento di Giovanni d'Andrea alle Clementine fu pubblicato nel 1322, quando Guido era già morto. Nella gl. *Vacare* ad Clem. 2.2.3 l'allievo riferisce il pensiero dell'Arcidiacono in questi termini: 'Ad hoc., eodem titulo Eum qui, lib. 6 et sic dicitur per magnum virum pronuntiatum in curia'.[100]

Piuttosto radi sono i riferimenti—rintracciabili nel solo apparato al Sesto—a cause discusse alla presenza di Guido nella curia

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[98] *Rosarium* 1495 ad C.10 q.3 c.6.

[99] *In Sextum* 1575 88^{va-vb} n. 3.

[100] Ioannis Andreae *In Tertium Decretalium librum Novella Commentaria* (Venetiis 1581) 20ra n.2 ad X 3.4.15 attribuisce a Guido la menzione di una sentenza pronunciata a Bologna 'per magistros Ber. et Gerardum'. Non mi è stato possibile rintracciare il passo in nessuno dei luoghi menzionati da Giovanni d'Andrea (De cons. D.1 c.60; C.2 q.7 c.58; C.1 q.1 c.109; D.58 c.1). Schulte, *Geschichte* 2.204 n.1 seguito da Liotta, 'Appunti' 20, n.66 ritenne che Gerardus sia da identificare in Gerardo da Siena. Con le dovute cautele del caso a me pare più probabile trattarsi del maestro di Guido, Gerardo Bianchi.

papale ove,[101] presumibilmente, egli ebbe occasione di ascoltare Berengario Fredoli già, dal 1305, cardinale dei ss. Nereo ed Achille.[102]

Solo nel *Rosarium*, ad C.18 q.2 c.27,[103] Guido ricorda un giudizio da lui pronunciato a Firenze; altrimenti egli si limita ad osservare che, riguardo ad una certa interpretazione di un canone, 'sic servamus in nostro capitulo bon.'.[104]

Devozione verso i maestri e memoria dei più antichi, fino a Nicolò Furioso ed Irnerio

L'alta considerazione per la glossa, difesa dall'incomprensione di Giacomo d'Albenga ('Hoc hic tenebat iaco. de al., sed salva reverentia tanti doctoris non intellexit dictum io[hannis]'[105]), non lo trattiene, all'occorrenza, dal criticarla.[106] Incondizionata è l'ammirazione per i suoi maestri, a cominciare da quel Gerardo Bianchi, cui è dedicato il *Rosarium*,[107] fino a Guido da Suzzara[108] e a Giovanni Anguissola.[109]

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[101]Cf. *In Sextum* 1575 2^{vb}, n.2; 8$^{rb\text{-}va}$, n. 3; 17ra n.5 ad VI 1.6.1: 'Sicut dixi in Ro. Curia;' 8va, n.3 ad VI 1.3.9: 'Sicut audivi a vicecancellario' (probabilmente ad Avignone).

[102]*In Sextum* 1575 ad VI 3.7.3 94^{vb}.

[103]*Rosarium* 1495 ad C.18 q.2 c.27.

[104]Ibid. ad dictum ante D.21 c.1.

[105]Ibid. ad D.55 c.8. A Giacomo d'Albenga deve riferirsi il passo di cui in ibid. ad C.30 q.2 c.1: 'Sed alii ut Ia. de alva. et pe. dicunt contra'. Preferibile la lettura di *Rosarium* 1480 che recita: 'Sed alii ut Ia. de al. et pe. dicunt contra'. L'opinione di entrambi non è menzionata da Innocenzo IV, dall'Ostiense e Giovanni d'Andrea.

[106]*Rosarium* 1495 ad D.71 c.17: 'Non bene arguit glosa'.

[107]Ibid. ad C.16 q.1 c.12: 'Audivi a meo domino griardo episcopo sabin.'. Su questo personaggio, forse allievo di Uberto da Bobbio, Peter Herde, 'Bianchi (Albus, Blancus), Gerardo', DBI 10 (1968) 96-101. Nel marzo 1290 egli fu inviato, con Benedetto Caetani, in Francia per risolvere una questione relativa a pretesi diritti di intervento sugli affari riguardanti i beni ecclesiastici sotto Filippo il Bello. Se ne parla in *Rosarium* 1495 ad C.23 q.4 c.42: 'Hanc auctoritatem pro themate posuit dominus Benedictus cardinalis regi francie et

Fuori dalla ristretta cerchia dei suoi maestri sono gli apprezzamenti rivolti al 'dominus Odofredus iure civili dignissimus professor'[110] e a Giuliano da Sesso.[111] Memoria di 'consilia' rilasciati da giuristi di buon nome, come Egidio Foscherari e Jean Lemoine sono—se non mi sbaglio—rarissimi.[112]

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eius consilio una cum domino meo G. sabinensi episcopo quando missi fuerunt in franciam occasione gravaminum ecclesiarum galliacarum'. Cf., sul punto, Agostino Paravicini Bagliani, *Bonifacio VIII* (Torino 2003) 29-35.

[108]*Rosarium* 1495 ad C.11 q.1 c.29: 'Sic audivi a domino Gui. de Suzaria domino meo'; cf. *In Sextum* 1575 ad VI 1.15.4 51va.

[109]*Rosarium* 1495 ad D.78 c.4: 'Magister meus Io. de Ces.'. A *In Sextum* 1575 ad VI 1.6.8 22va n.1 si legge ancora: 'Hoc exponebat Io. de Ces.'. A me pare che entrambe le testimonianze sciolgano i molti dubbi relativi al magistero di Giovanni sollevati da Liotta nella voce dedicata a Guido da Baisio in DBGI 1.1092 e prima ancora in idem, 'Appunti' 17. La sola notizia certa, di lui, è l'insegnamento a Padova tra il 1275 e il 1281. Indizio troppo tenue per argomentare la presenza di Guido alle sue lezioni in quella città, come affermato da Hermann Lange-Maximiliane Kriechbaum, *Römischen Recht im Mittelalter, 2: Die Kommentatoren* (München 2007) 229. A quanto mi risulta (ma occorre tener conto dell'estremo riserbo riguardo alle vicende della propria vita), l'Arcidiacono non accenna, in nessuna delle sue opere, a cose padovane. È l'Anguissola, infine, il 'clericus pisanus' menzionato in *Rosarium* 1495 ad D.71 c.8.

[110]*Rosarium* 1495 ad C.17 q.1 c.4.

[111]Ibid. ad D.88, c.5: 'Iulianus de regio doctor legum egregius'.

[112]Il parere di Egidio fu dato a richiesta del monastero di Nonantola 'ut audivi ab antiquis monachis eiusdem monasterii' (ibid. ad C.7 q.1c.5). Ad un 'consilium d. Ioan. Mo. et sequacium' si accenna ad *In Sextum* 1575 ad VI 1.5.1 15va n.1. Per altro 'consilium', *Rosarium* 1495 ad C.5 q.3 c.1: 'Sic vidi iudicari bononie de conscilio doctorum per d. G. portuensem episcopum ap. sedis legatum'. Conforme *Rosarium* 1473 ad l.c. L'unico personaggio che pare corrispondere al cardinale qui menzionato è Bernardo Languissel (1281-1291), a patto di ammettere che Guido ne riferisse il nome secondo l'uso volgare italiano. Insomma: 'G.' per 'Guissel'. Le cronache bolognesi, tuttavia, non parlano della presenza di questo come di altri legati apostolici negli anni in cui l'Arcidiacono è presente in città.

Risalgono agli esordi dello Studio bolognese le menzioni dei più antichi maestri: 'Dicebat Lau(rentius) quod hec ca. (D.50 c.56) est contra Nicolaum Furiosum qui scripsit bigamum non posse suscipere ordinem diaconii vel presbiterii etiam si cum eo dispensaretur'.[113] L'intervento del discepolo/'*reportator'* di Giovanni Bassiano su un tema di natura canonistica dischiude nuovi orizzonti. Ma c'è altro ancora. A C.10 q.2 c.2 *Constitutio nova* (Auth. *Hoc ius* post Cod. 1.2.14)[114] Guido da Baisio, in merito alla gl. *Conflata*, sul verbo 'possunt', annota:

> Adde bene dicebat Gar. quod si contra faceret, scilicet quod venderetur, simonia committebatur.

Poco oltre, alla gl. *Sed melius*, l'Arcidiacono scrive:

> Mar(tinus) qui in hoc casu est secutus Guar.'.

Infine, a *non adversus ecclesiam*:

> Nec est curandum de eo quod hic dicitur a guar. qui quod lex concessit auferre voluit minus curialiter secundum Hu(guccionem).

Già Giovanni Teutonico, gl. *Sed melius*, aveva menzionato Irnerio:

> Hec verba non sunt de auctoritate, sed Guarnerius apposuit ea de lege C., de sacrosan. eccl., Sancimus nemini (Cod. 1.2[5].21[18]).

Altro riferimento al 'primus illuminator' si rinviene a C.27 q.1 c.41 ove, alla gl. *Suscepto*, Guido scrive: 'Ibi susceptum matrimonium, adde hec fuit expositio Gua. et La.'[115]

Nell'apparato al Sesto Guido da Baisio cita almeno due volte Irnerio, ad VI 3.20.2[116] e ad VI 4.2.1: 'Garr. aliter intelligit et male'[117] riguardo alla facoltà dei 'parentes' di 'infringere sponsalia'. L'approfondimento dei problemi posti da queste citazioni dovrà essere rinviato ad altra occasione o all'attenzione di altri studiosi. Fin d'ora, tuttavia, va evidenziato l'interesse di Irnerio (qui designato con le sigle 'Gua., Garr., Guar.' in luogo

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[113] *Rosarium* 1495 ad D.50 c.56.

[114] Ibid. ad C.10 q.2 c.2.

[115] Ibid. ad C.27 q.1 c.41.

[116] *In Sextum* 1575 ad VI 3.20.2 n.1.

[117] *In Sextum* 1575 ad VI 4.2.1 n.3.

dell'ormai più comune 'y.') riguardo a temi di carattere anche canonistico.[118] Seguito, in questa inclinazione, da Martino ma soprattutto suscitando l'attenzione e il consenso di un decretista del livello di Lorenzo Ispano.

Ancora una volta siamo ricondotti alla disponibilità di testi antichi che potevano, forse, trovarsi presso la libreria e l'archivio della cattedrale bolognese cui si riferisce, talvolta, Guido da Baisio. Così è per una lettera spedita da Innocenzo III:[119]

> cuidam mulieri quod posset esse conversa in ecclesia sancte Marie de reno bonon. diocesis et uteretur rebus suis prout vellet, quas litteras ego Guido profiteor me vidisse.

Altro caso simile riguarda la bolla *Summus orbis opifex* spedita ai frati francescani e domenicani da Innocenzo IV:[120]

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[118]Sulla incerta conoscenza delle fonti canonistiche da parte di Irnerio, Bruno Paradisi, 'Diritto canonico e tendenze di scuola nei glossatori da Irnerio ad Accursio', *Studi medievali: Per la storia della cultura in Italia nel Duecento e nel Trecento. Omaggio a Dante nel VII centenario della nascita* 6 (1965) 155-287, ora in *Studi sul medioevo giuridico* (2 vol. Istituto Storico Italiano per il Medio Evo. Studi storici 163-173; Roma 1987) 2.525-656 ad 536, 569. Di grande attualità, per quanto riferito poco sopra, è pertanto la proposta avanzata da Kenneth Pennington, 'Irnerius', BMCL 36 (2019) 107-122 (anche in versione italiana: 'Per un *Corpus Irnerianum*', RIDC 30 [2019] 29-43).

[119]*Rosarium* 1495 ad C.32 q.2 c.6. La lettera era già stata citata, secondo Guido, da Guglielmo Naso. Si tratta, probabilmente, della missiva inviata all'abate di S. Stefano e al *magister* Lanfranco canonico bolognese riguardante una innominata 'mulier'osteggiata dai canonici. Si v. *Die Register Innocenz' III. 7 Band, 7. Pontifikatsjahr 1204/1205. Texte und Indices*, ed. Othmar Hageneder bearbeitet von Andrea Sommerlechner und Herwig Weigl gemeinsam mit Christof Egger und Rainer Murauer (Österreichische Akademie der Wissenschaften Historisches Institut beim Österreichischen Kulturinstitut in Rom; Wien 1997) 46 n. 25 (18.3.1204).

[120]*Rosarium* 1495 ad C.12 q.1 c.7. *Bullarium ordinis ff. Praedicatorum sub auspiciis SS. D.N.D. Benedicti XIII Pontificis Maximi eiudem ordinis opera Reverendissimi Patris F. Thomae Ripoll Magistri Generalis editum et ad autographam fidem recognitum, variis Appendicibus, Notis, Dissertationibus ac Tractatu de consensu Bullarum, illustratum a* P.F. A. Bremond S.T.M. *Provinciae Tolosanae ordinis memorati alumno*, I, *Ab anno 1215 ad 1280* (Romae 1729) 206.185, da Lione, con data 6.12.1249 anziché 4.12.1249, come riportato da Guido. La prima data è confermata dal *Bullarium*

> Hoc quidem privilegium sic est in nostre bonon. ecclesie sacristia bulla papali conscriptum ut vidimus et testamur.

Dallo stesso deposito doveva venire, presumibilmente, non solo l'originale dei deliberati adottati nella sinodo di Piacenza del 1095[121] ma pure l'atto di Onorio III che affidava l'abbazia di Frassinoro ad un monaco benedettino bianco 'existens in curia romana' e già monaco nero.[122]

Primi esercizi di filologia giuridica

L'attenzione mostrata da Guido nei confronti dei documenti originali corrisponde, in qualche modo, all'interesse nutrito verso le fonti usate da Graziano nel Decreto. Gli esempi, in tal senso, sono piuttosto numerosi. Ne proporrò alcuni. A C.32 q.7 c.18 egli annota:[123]

> In glo. [Nubat] hoc alludit ubi abolita. Adde ista sunt verba lau(rentii) qui ita loquitur quia prece. decre. non fuit posita etiam in antiqua compilatione.

Il riferimento è al c.*Puto Christianum* (C.32 q.5 c.16) ove la gl. *Languente* recita: 'Inf. ea. q.7 quod proposuisti, contra'.[124] L'importanza delle considerazioni svolte, su questo punto, da Guido è sottolineata dai *Correctores romani*: 'Hic vide quod no.

Franciscanum 1.533. Cf. Williel R. Thomson, *Checklist of Papal Letters relating to the Orders of St. Francis. Innocent iii-Alexander iv* (Grottaferrata 1971) 82 1224.

[121]*Rosarium* 1495 ad C.1 q.1 c.17: 'Sicut hoc in originali vidi contineri'.

[122]Ibid. ad C.16 q.7 c.22. Anche qui: 'Ego vidi de facto'. Gli unici riferimenti all'abbazia di Frassinoro nei *Regesta Honorii Papae III iussu et munificentia Leonis XIII Pontificis Maximi ex Vaticanis Archetypis aliisque fontibus absolvit* Pietro Pressutti I.U.D. II (Romae 1895) sono a 149 4438 (17.7.1223) e 150 4443 (20.7.1223) e riguardano il distacco del monastero da La Chaise Dieu con la nomina ad abate di un benedettino appartenente a S. Giovanni in Parma.

[123]*Rosarium* 1495 ad C.32 q.7 c.18: 'Vel dic hoc abrogatum esse, ut dixit H.'

[124]Così proseguendo: 'Solu. Istud a falsariis dictum; istud aut haereticum esse videtur. Vel illud de desponsata tantum, istud de cognita. Vel illud reprobatum est, hoc divina auctoritate firmatum. Vel verius dic quod illud de arcta loquitur'.

supra eodem q.5 c.Puto in glossa i. Arc.'. Il c.*Puto Christianum* non figura in alcuna delle *Compilationes antiquae*.

Alla *Prima compilatio* l'Arcidiacono si riferisce altrove. A C.11 q.1 c.16 egli osserva che la palea *Nullus clericus*'quod est palea olim fuit in *Prima compilatione* de for. compet. c.ii. [1 Comp. 2.2.2] sed hodie est remotum et ibi glosabatur'.[125] A D.27 c.8, gl. *Diaconis*, Guido annota: 'Hec decretalis hodie est remota sed in prima compilatione fuit'.[126] Il c.*Quid in omnibus* (C.32 q.7 c.16) 'fuit in prima compilatione et incipit Non grandis (1 Comp. 5.26.3)'.[127]

Commentando C.5 q.1 c.2 Guido afferma che 'in antiqua compilatione l.i.' vi era una decretale che 'incipiebat Ad audientiam (1 Comp. 5.29.8), sed hodie est remota'.[128]

Resta problematico il rinvio alla prima compilazione che si legge a C.2 q.6 c.36, *Si quis episcopus*: 'In ea. glo. [*In finitima*] in fine adde ista decre. fuit in antiqua compilatione prima, sed hodie est remota et incipit cum vel ex malitia'.[129] Il canone avente lo stesso incipit (*Si quis episcopus*) che si trova a 1 Comp. 5.1.8 (poi riprodotto ad X 5.1.2) non è il medesimo esibito nel Decreto. A 1 Comp. 2.20.47 il canone di Gregorio VIII 'Vel ex malitia'—attribuendo ai 'primates' della stessa regione la

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[125]*Rosarium* 1495 ad C.32 q.5 c.16. Cf. 1 Comp. 2.2.2=X 2.2.2 *Nullus iudicum*.

[126]Ibid. ad D.27 c.8. Cf. 1 Comp. 4.6.1=X 4.6.1.

[127]Così proseguendo, di seguito: 'ubi in fine dicebatur qui adulter est propter cordis inopiam perdet animam suam. Sed ibi exponebat ala(nus) quia morietur in anima, unde sane intellige quod dicit gl. que communiter habetur falsa que allegat primum c. et secundum. Nam debet dicere c. tertium, sed istud est remotum ut supra dictum est' (*additio* alla gl. *Gravius*, *Rosarium* 1495 ad C. 32 q. 7 c. 16).

[128]Ibid.ad C.5 q.1 c.2. Cf. Antonia Fiori, *Il giuramento di innocenza nel processo canonico medievale. Storia e disciplina della 'purgatio canonica'* (Studien zur europäische Rechtsgeschichte. Veröffentlichungen des Max-Planck-Instituts für europäische Rechtsgeschichte 277; Frankfurt am Main 2013) 251-52.

[129]*Rosarium* 1495 ad C.2 q.6 c.36.

cognizione della causa mossa ad un vescovo—echeggia il dettato di C.2 q.6 c.36 almeno laddove si dice '[papa] scribere episcopis dignetur his, qui in finitima et propinqua provincia sunt, ut ipsi diligenter omnia requirant et iuxta fidem veritatis definiant'.

A C.12 q.1 c.22 *Ex his*, l'Arcidiacono rileva che in alcuni esemplari del Decreto, in luogo di 'Ex his', si legge 'Omnibus'.[130] Lezione tuttavia esclusa dai 'libri antiqui' da lui consultati. Che, in realtà, 'Ex his'—osserva Guido—sia la lezione giusta è confermato poco sotto, al c.24 ('Ex his autem, quibus indiget'). Il ricorso, di nuovo, al tenore di parecchi libri antichi serve per correggere il dictum Gratiani post C.11 q.3 c.24 ove il *magister* ha scritto:[131]'quaestione prima de poenitentia'. Le cose stanno altrimenti, 'nam sicut in pluribus libris antiquis reperi, alias est quaestione iii (cf. dictum ante C.3 q.3 c.1) et tunc videtur littera bona sine expositione'.

C.24 q.3 c.6 suona così:

> De illicita excommunicatione lex Iustiniani Imperatoris catholici, quam probat et servat catholica ecclesia, constitutione cxxiii, cap. cccli decrevit, ut nemo presbiter excommunicet aliquem ante quam causa probetur, propter quam ecclesiastici canones hoc fieri debent.

Già Friedberg[132] avvertì (sulla scia dei *Correctores*), riguardo alla lezione 'cxxiii', che:[133]

> sic est in Novella Iustiniani et in Epitome Iuliani antecessoris et in aliquot Gratiani codicibus, licet in aliis sit cxxviii. Numerum autem capitis emendatum est ex vetustis exemplaribus. Olim enim novellae per capita, non per libros divisae citabantur.

Guido da Baisio non si esprime a proposito dell'imprecisa indicazione numerica, ma ha qualcosa da dire in merito alla organizzazione del testo delle Autentiche:[134]

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[130]Ibid. ad C.12 q.1 c.22.

[131]Ibid. ad C.11 q.3 c.24.

[132]Ibid. ad C.24 q.3 c.6; Emil Friedberg, *Decretum* 990.

[133]'CXXVIII'appare anche in *Decretum Gratiani. First recension, edition in progress*, Anders Winroth 7.3.2022, https://gratian.gratian.org. 724. Consultato il 23.8.2022.

[134]*Rosarium* 1495 ad C.24 q.3 c.6.

> Io. de. [Iohannes de Phintona] dicit quod sic [per rubricas] dividebatur auctenticum antequam divideretur per collationes et credit quod sit in aliqua illarum trium collationum que non sunt in usu nostro, dicit tamen vidisse, nam in aliis non invenitur.

Ho investito della questione l'amico prof. Luca Loschiavo, oggi il maggior esperto in materia. Riferisco, dietro autorizzazione, di seguito, la sua cortese ed illuminante risposta, speditami il 29 dicembre 2021:

> Il passo offre due informazioni abbastanza precise. La prima è che la suddivisione dell'*Authenticum* in *collationes* non è originaria, bensì è opera dei glossatori.
>
> La seconda riguarda l'esistenza di una tradizione testuale che contemplava la presenza di ulteriori tre collezioni di novelle rispetto alle nove solitamente usate. Sulla base delle ricerche che ho condotto sui manoscritti dell'*Authenticum* posso dire che la prima informazione è senza dubbio vera. Nei mss. più antichi l'indicazione delle collazioni manca del tutto o è stata aggiunta posteriormente. Solo nella seconda metà del sec.xii la divisione in ix collazioni delle novelle ritenute utili (una novantina su 134) diviene standard.
>
> Per quanto invece riguarda la seconda notizia, mi pare invece di dovere escludere (ma io ho studiato solo i mss. preaccursiani) che i giuristi medievali abbiano raccolto e diviso in tre collazioni le cosiddette 'novellae extravagantes' (le novelle dell'*Authenticum* che i glossatori avevano escluso dal loro 'canone' dei libri legali e che sono, all'incirca, una quarantina).
>
> Che, però, qualcuno possa avere pensato di fare una cosa del genere è cosa che potrebbe avere un senso: confermerebbe cioè l'ipotesi di chi ha immaginato che la divisione in collazioni fosse stata fatta sul modello del *Codex* (diviso da Giustiniano in xii libri e scomposto però dai giuristi medievali in 9 + 3). Ti confesso però che non mi è mai capitato di trovare nei manoscritti indicazioni di collazioni oltre la ix (la x *collatio* è riservata già ai *Libri feudorum*, come poi sarà consolidato nelle edizioni a stampa del C.I.C.

Una 'geistlose Arbeit'?

L'attenzione rivolta dall'Arcidiacono ai problemi testuali costituisce il segnale più rilevante delle sue inclinazioni culturali. Ne dà prova, oltre che nel *Rosarium*, nell'apparato al Sesto

laddove, ad esempio, menziona una 'additio' di Innocenzo IV ad X 3.8.6:[135]

> quam pauci habent, ubi dicit quod si, tempore impetrati rescripti, impetrans bona fide non est capax beneficii, sed postmodum sit capax, potest ei conferri.

Molto più, ancora, quando segnala che alcune decretali attribuite nel *Liber Sextus* a Bonifacio VIII sono in realtà da ascrivere ad altri e precedenti pontefici.[136]

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[135]*In Sextum* 1575 ad VI 1.3.9 8^{rb} n.3. Il passo figura comunque in Innocentii Quarti Pont. Maximi *Super libros quinque Decretalium* (Francofurti ad Moenum 1570) ad X 3.8.6 374^{rb} n.3. Nella biblioteca di Giovanni Calderini sono ricordate *Aditiones Innocentii quas d. Guido de Baysio archidiaconus dicit se habuisse de libro d. Luce cardinalis in quo erat originale Innocentii* (Maria Cochetti, 'La biblioteca di Giovanni Calderini', *Studi medievali*^{3} 19 [1978] 1004 243). Il cardinale citato dovrebbe essere Luca Fieschi da Lavagna. Altrove l'Arcidiacono scrive (*In Sextum* 1575 127^{vb} ad VI 5.11.7): 'Hanc consti. ipse Innocen. aliqualiter glossavit, ut habui de suo libro originali'. Qui, come in altri casi di cui si parlerà più avanti, c'è da chiedersi quanto, della libreria di Guido da Baisio, passasse a Giovanni d'Andrea e poi al suo erede. A quanto pare, le opere trasmesse al nipote Guido, vescovo di Ferrara—come si evince dal suo testamento, redatto il 18.4.1349—sono poche: 'Decretum glosatum et additionum (!) de lectura ipsius D. Archidiaconi Guidonis de Baixio patrui nostri. Textum sexti libri cum glossis eiusdem. Decretales additionatas manu ipsius Archidiaconi. Apparatum eiusdem super sextum Decretalium' (*Memorie storiche modenesi col codice diplomatico illustrato con note dal cavaliere abate* Girolamo Tiraboschi *Consigliere di S.A.S. il Sig. Duca di Modena Presidente della Ducal Biblioteca e della Galleria delle Medaglie e Professore Ordinario nell'Università della stessa città*, t. IV [Modena 1794] 106). Lo stesso nipote è autore di una 'abbreviatio' al *Rosarium* che si legge nella Biblioteca Laurenziana di Firenze I Plut. Sin. 5. Cf. Giovanna Murano, *Opere diffuse per* exemplar *e* pecia (Fédération Internationale des Instituts d'Études du Moyen Âge 29; Turnhout 2005) 466 n.412.

[136]Così *In Sextum* 1575 ad VI 3.24.2 109ra, pr. e al titolo *De haereticis*, VI 5.2.1, 3, 5, 6, 7, 10 come avverte l'editore Friedberg che, però, richiama la *Novella* di Giovanni d'Andrea, senza menzionare Guido da Baisio al quale, invece, Giovanni normalmente rinvia. Ad ibid. VI 5.2.8, 'additio' alla gl. *Accusatus*, il discepolo osserva: 'Et dicit Arch. quod [iste canon] olim incipiebat Quod super, sed illam non vidi'. Cf. ibid. 114^{rb}.

Questo aspetto della formazione intellettuale di Guido costituirà, com'è noto, uno dei caratteri salienti del suo più grande allievo, Giovanni d'Andrea. Se, come il maestro, il discepolo non pare particolarmente versato nelle questioni logiche, questi lo supera di molto già sul terreno dell'indagine teologica.[137] Resta comunque comune ad entrambi il metodo e la struttura espositiva 'per glossas' mentre già da tempo i colleghi civilisti hanno abbracciato, com'è noto, la via del commento. Senza dire, nuovamente, della curiosità intellettuale che già aveva condotto Guido a riprendere e valorizzare gli scritti dei più antichi decretisti.[138] Così, probabilmente—ormai assorbiti in quella specie di grande raccolta (o antologia) ch'è il *Rosarium*—condannandoli ad una progressiva dispersione.

Ho già avuto occasione di segnalare l'accesso a due testi—la versione latina dell'*Onomasticon* di Giulio Polluce e l'ancora misterioso *Poliloquium*[139]—utilizzati da Guido. Di solito, tuttavia, egli cita—fuori dal recinto degli autori di opere legali—testi normalmente diffusi al suo tempo. Così è, fra i tanti che potrebbero essere menzionati, per il *De similitudinibus*[140]e per il *De quatuor virtutibus*.[141]

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[137]Padovani, *L'insegnamento* 113.

[138]Guido da Baisio trasmette al discepolo l'interesse per l'etimo dei termini. Giovanni d'Andrea utilizza anche il *Catholicon* di Giovanni Balbi. Si v., ad esempio, Joannes Andreae, *In Sextum Decretalium librum Novella Commentaria* (Venetiis 1612) 3ra n.2 ad *Prooemium, Sacrosanctae,* per 'numerus', voce estesamente trattata in Iohannes Balbus, *Catholicon* 247ra-va.

[139]Assenti nella biblioteca di Giovanni Calderini edita da Cochetti, 'Biblioteca di Giovanni Calderini'.

[140]Che Guido attribuisce ad Anselmo d'Aosta, *Rosarium* 1495 ad De poen. C.33 q.3 D.1 c. 83: 'Dicit ancelmus in libro de similitudinibus quod aliquis magis debet eligere esse in inferno sine culpa quam in paradiso cum culpa, quia innocens in inferno non sentiret penam, peccator in paradiso non gauderet dei gloriam'. In realtà, come asserito da Claus M. Kauffmann, 'New Images for Anselm's Table Talk: an illustrated manuscript of the *Liber de similitudinibus*', *Journal of the Warburg and Courtauld Institutes* 74 (2001) 87-119, il *De similitudinibus* was a popular text in the Thirteenth Century'. Il

L'eccezionalità risiede piuttosto, nel caso di Guido da Baisio, nella frequenza delle citazioni e nel loro numero complessivo, ancor più che nella qualità.

È noto che l'abbondanza dei riferimenti ad ogni genere di letteratura, giuridica e non, indusse von Schulte a vedere, almeno nel *Rosarium*, 'eine überaus fleissige, aber an sich geistlose Arbeit' il cui 'Vorbild ist das *Breviarium* von Durantis'.[142] Espressione ambigua e a mio modo di vedere, generica (senza dire del richiamo al lavoro dello *Speculator*, del tutto fuori luogo).

Per comprendere il carattere del *Rosarium* è intanto necessario soffermarsi sulla sua natura. Esso non riflette direttamente un corso di lezioni apparendo, piuttosto, come uno scritto elaborato 'a tavolino'.[143] Da nessuna parte emerge un qualsiasi colloquio con quanti assistono ad una lezione. L'accenno a chi ha 'nasum grandem', segno di 'subtilitas' lo induce una volta a criticare gli 'scholares fatui' che ad ogni costo 'volunt invenire novitates sive subtilitates'.[144] Ma non si va oltre.

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passo riferito da Guido si legge integralmente in *Opuscula beati Anselmi archiepiscopi Cantuariensis ordinis sancti Benedicti* a *De malicia et feditate peccati* (Basel: Johann Amerbach, non post 1497 cxc; ISTC ia00761000). Ugualmente in Eadmerus Monachus, *Liber de Sancti Anselmi similitudinibus*, PL 159.701. L'opera, sempre ascritta ad Anselmo, figurerà anche nella libreria di Giovanni Calderini (Cochetti, 'La biblioteca' 987 XVI e 996 176).

[141]*Rosarium* 1495 ad De poen. C.33 q.3 D.3 c.47. L'opera è, in realtà, da attribuire a Martino da Braga. Anch'essa appare nella biblioteca di Giovanni Calderini (Cochetti, 'La biblioteca' 975 65 VI).

[142]Schulte, *Geschichte* 2.188.

[143]Che Guido si rivolga ad un pubblico di lettori, non già di uditori, si rileva da *Rosarium* 1495 dictum post C.10 q.3 c.5: 'Notabis tu lector...'. Liotta, 'Appunti' 20 sostiene che 'il *Rosarium* fu concepito nella scuola e per la scuola'. Sono d'accordo sul fatto che l'opera fu concepita anche ad utilità degli studenti. L'affermazione precedente ('nella scuola') va intesa, a mio parere, nel senso che lo scritto nasce sì dall'esperienza didattica, ma a qualche distanza di tempo e nella tranquilla meditazione del proprio studio privato.

[144]Ibid. ad D. 49 c.1.

Tutto intento ad illustrare il *Decreto*, Guido pare disinteressarsi del mondo d'intorno. Se non, all'occasione, per criticare l'ignoranza dei medici che biasimano l'uso, a tavola, del formaggio o per fustigare quei 'quidam monachi trufatores' che:[145]

> dicunt sibi licere aves et pullos comedere qui ex aquis oriuntur et sic frigidi sunt' come i pesci, ammessi nella dieta quaresimale.

La menzione dello scherzo giocato a Bologna da uno studente che aveva invitato a cena il canonista Melendo senza poi mantenere fede all'appuntamento è l'unica concessione fatta al sorriso del lettore e alla vita dello *Studium*.[146] Nemmeno il ricordo di un certo Aldricus doctor decretorum hispanus che rinunciò ai suoi benefici entrando nell'ordine francescano,[147] offre lo spunto per accennare alla più grave e lancinante diatriba che allora scuote la Chiesa: quello intorno alla povertà dei minoriti.[148] Le discussioni intorno alla liceità della guerra che, almeno in Italia, è condotta senza limiti da comuni e signorie, non lo toccano—a differenza di quanto si riscontra nelle coeve *Summae confessorum*.[149] La celebre e discussa rinuncia alla cattedra di Pietro da parte di Celestino V (1294) è liquidata da Guido in poche parole.[150] Le eresie 'huius temporis dicentes non

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[145]Ibid. ad D.4 c.6.

[146]Ibid. ad C.23 q.4 c.38. L'episodio è ricordato da Diplovatazio, *Liber* 55.

[147]*In Sextum* 1575102^{vb} ad VI 3.14.2.

[148]Sul tema esiste una bibliografia estesissima. Rinvio almeno all'accurato lavoro di Andrea Bartocci, *Ereditare in povertà: Le successioni a favore dei Frati Minori e la scienza giuridica nell'età avignonese* (Pubblicazioni del Dipartimento di Scienze Giuridiche Università degli Studi di Roma 'La Sapienza' 32; Napoli 2009).

[149]*Rosarium* 1495 ad C.23 q.1 c.3; dictum ante C.23 q.3 c.1. Sul punto Andrea Padovani, 'I peccati del guerriero nelle *Summae confessorum* medievali e protomoderne', *Avant l'État: Droit international et pluralisme politico-juridique en Europe, XIIe-XVIIe siècle*, di prossima pubblicazione.

[150]*Rosarium* 1495 ad C.7 q.1 c.12: 'Papa renunciare potest ut de facto accidit temporibus nostris in persona domini celestini'. Cf. *In Sextum* 1575 40^{vb} ad VI

oportere baptizari nisi credentes et ideo non recipiunt baptismum parvulorum'[151] non offrono un appiglio per menzionare il ruolo che egli ebbe, come consulente dell'inquisitore bolognese Guido da Vicenza, nella condanna e nell'arsione di Bonigrino da Verona nel 1296—appunto negatore dei sacramenti cattolici.[152] Ci si potrebbe attendere che nell'apparato al Sesto, composto ad Avignone tra il 1306 ed il 1311,[153] l'Arcidiacono—al titolo *De haereticis*, VI 5.2—accenni alle accuse di devianza dottrinale mosse da Filippo il Bello nei confronti dei Templari che, proprio in quegli anni, mettono a rumore la Francia e tutto il mondo cristiano. Speranza frustrata: purtuttavia Guido si occupò della

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1.7: 'Sed tutius est facere coram collegio, ut fecit Celestinus'. Il tema è stato studiato da Valerio Gigliotti, *La tiara deposta. La rinuncia al papato nella storia del diritto e della Chiesa* (Firenze 2014) 139-238. La devozione di Guido da Baisio nei confronti di Bonifacio VIII (cf. Thomas M. Izbicki, 'Guido de Baisio's unedited gloss on *Clericis laicos*', BMCL 13 [1983] 64) ebbe occasione di manifestarsi anche nel *Tractatus* in difesa postuma del pontefice di cui mi occuperò tra breve.

[151]*Rosarium* 1495 ad De cons. D.4 c.139. L'accenno ai 'credentes' chiarisce che Guido intende riferirsi, precisamente, ai catari. Giovanni d'Andrea, *In Sextum Decretalium* 139va n.4 ad VI 5.2.8 rileva l'esperienza del maestro nell'ufficio dell'inquisizione: 'Arch. habuit quasdam informationes officii inquisitionis'.

[152]Per il ruolo di consulente dell'inquisitore, unitamente a Martino Sillimani, Bonincontro ed Aimerico da Piacenza, Lorenzo Paolini, *L'eresia a Bologna fra XIII e XIV secolo: I. L'eresia catara alla fine del duecento* (Istituto Storico Italiano per il Medio Evo. Studi Storici 93-96; Roma 1975) 23; idem, 'Bonigrino da Verona e sua moglie Rosafiore', *Medioevo ereticale* cur. Ovidio Capitani (Bologna 1977) 217. Le spoglie di Rosafiore furono bruciate post mortem.

[153]Come afferma lo stesso Guido, l'opera fu scritta dietro le preghiere insistenti dei dottori e degli studenti dell'Università di Bologna ai quali è dedicata ed indirizzata (*In Sextum* 1575 2ra): a segno dei continui rapporti intessuti con lo *Studium*, nonostante la distanza geografica (com'è noto, peraltro, Guido restò arcidiacono della Chiesa bolognese fino alla morte). Che l'apparato utilizzasse corsi tenuti nella città emiliana, come sostenuto da Liotta, 'Appunti' 26, resta una supposizione che non trova supporto nel testo. Nulla di nuovo dice Giovanni d'Andrea, *In Sextum Decretalium, Proemium* 2rb n.1.

vicenda nel *Tractatus super haeresi et aliis criminibus in causa Templariorum et domini Bonifacii divina providentia papa viii* presumibilmente composto verso il 1310.[154] Poiché anche Giovanni d'Andrea, nel corrispondente titolo del *Liber Extra*, come nella *Novella in Sextum*, non fa riferimento alcuno né alla vicenda dei Templari, né—più in generale—alle eresie del suo tempo (nonostante l'esperienza maturata verso il 1314 al servizio dell'Inquisizione fiorentina),[155] bisogna pur ammettere che in questo genere di letteratura esegetica—salvo rare eccezioni[156]—i giuristi tesero a sorvolare su questioni che si riferivano ad accadimenti riguardanti la vita della Chiesa sia nei suoi rapporti

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[154]Mansi 25.415-418 eliminò, dal manoscritto, la parte iniziale riguardante 'Templariorum causam... quomodo in illos iudicium instituendum, quomodo de haeresi inquirendum, apud quem causa eorum tractanda, in saecularine vel ecclesiastico iudicio: utrum saecularis princeps pro suo iure, sive potius ex commissa sibi ab ecclesia auctoritate cognoscere de Templariorum crimine illo valeat', dal momento che—a suo giudizio—'ea quae Templariorum occasione disputat auctor, cum generalia sint in omni de haeresi iudicio servanda nihilque peculiare tangant, omittenda hic censui'. A differenza di Liotta, 'Appunti' 31, per il quale lo scritto attesterebbe la partecipazione dell'Arcidiacono al Concilio di Vienne, ritengo più probabile che esso fosse redatto a partire dal marzo 1310, quando Clemente V convocò accusatori e difensori di Bonifacio VIII ad esporre le loro ragioni: Bernard Guillemain, 'Il Papato sotto la pressione del re di Francia', *La crisi del Trecento e il Papato avignonese (1274-1378)* cur. Diego Quaglioni (Storia della Chiesa 11; Torino 1994) 196. Il dibattito sulla competenza del giudizio intorno all'accusa d'eresia rivolta ai Templari, tra funzionari regi e delegati papali, era tema scottante fin dal 1307.

[155]Riccardo Parmeggiani, *L'Inquisizione a Firenze nell'età di Dante: Politica, società, economia e cultura* (Bologna 2018) 167-168. A lui erano uniti i 'professores famosi' Paolo Cospi e Pietro Cernitti. Il solo riferimento a vicende contemporanee si trova in Ioannes Andreae, *In Quintum Decretalium librum Novella Commentaria* (Venetiis 1581) 52^{vb}, pr. ad X 5.7.15: 'Dulcinistae nostri temporis'.

[156]È il caso di Baldo degli Ubaldi, come ho mostrato in 'Volenti o nolenti? Il pensiero politico dei canonisti del tardo Trecento', *Autorità e consenso*. Regnum *e monarchia nell'Europa medievale*, ed. Maria Pia Alberzoni, Roberto Lambertini (Milano 2017) 358-359.

col mondo esterno sia nei suoi assetti interni, istituzionali. In generale, la sede scelta per manifestare il proprio punto di vista in merito, senza reticenze—anzi, talvolta, con durezza—sono piuttosto i 'consilia' o, appunto, i 'tractatus'. Come accadrà nel corso dell'ultima fase del Grande Scisma, quando i più celebri maestri del tempo—abbandonato il ritegno imposto dalla costrittiva lettera dei canoni—espressero in piena libertà il loro pensiero critico.[157]

Di sé, poi—se si escludono i pochissimi riferimenti all'attività forense o didattica—l'Arcidiacono non parla mai: se non per riandare, ad Avignone, con la memoria ai tempi in cui leggeva C.10 q.2 c.2 nello Studio bolognese[158]. Quel certo festoso *Geist* che aveva animato Odofredo (pur lodato) o Roffredo Beneventano[159] (citato ben spesso), nell'Arcidiacono è del tutto assente.

Lo spirito di Guido da Baisio e le tendenze letterarie del suo tempo

Lo spirito di Guido da Baisio va, evidentemente, cercato altrove: paradossalmente, proprio là ove, per von Schulte, risiede la prova della sua mancanza.

Perché nell'intrico, nella fitta serie di citazioni tratte da ogni parte l'Arcidiacono rivela, finalmente, tutto se stesso. In primo luogo decidendo—come scrive nella dedica a Gerardo Bianchi, destinatario del *Rosarium*—di 'reddere unicuique quod suum est' apponendo 'certum signum' che attesti l'autore di 'sententie textuales', di 'glosarum communium declarationes' o 'suppletiones'. Il 'presens opus'—ribadirà in conclusione

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[157]Padovani, 'Volenti o nolenti?' 357; Orazio Condorelli, 'Antonio da Budrio e le dottrine conciliari al tempo del concilio di Pisa', RIDC 27 (2016) 99-106.

[158]*In Sextum* 1575 ad VI 3.4.33 91ra n.2.

[159]Manlio Bellomo, *Roffredo Beneventano, professore a Roma: Lectura super Codice in un Apparatus recollectus di ignoto allievo* (Studien zur europäische Rechtsgeschichte. Veröffentlichungen des Max-Planck-Instituts für europäische Rechtsgeschichte 313; Frankfurt am Main 2018) 39-45.

dell'opera—'ex multis et diversorum texturis elaboratum atque contextum' ha inteso restituire ai lettori la lezione genuina delle 'glosule' apposte dagli antichi—Uguccione, Lorenzo Ispano e Giovanni Teutonico su tutti—che altri non hanno compreso o hanno distorto. Lo stesso 'communis apparatus, in maxima sui parte' è così risultato 'corruptus'. La 'veritas textualis' è stata alterata da errori 'aliter quam se habuerit intentio componentis'. Sicché il compito che egli si è assunto ha inteso—lo ribadisce una seconda volta—ripristinare 'rei veritatem sicut debet esse et non sicut se habet communis corruptio'.

Che in questo programma—più o meno attuato, pionieristico o meno,[160] non è qui il caso di discuterne—si possano almeno intuire i prodromi di una critica testuale che altri condurranno, di lì a non molto (come non pensare a Francesco Petrarca?) ad esiti radicalmente innovativi in campo letterario, mi pare un dato di rilevante interesse e indizio di uno spirito vivace e propositivo.

Ma c'è altro ancora, che collega Guido da Baisio a certe tendenze della sua epoca. La lettura dei suoi scritti evoca l'immagine dei ricchi reliquiari, degli ostensori e degli evangeliarî che certo, come chierico, egli aveva spesso davanti agli occhi. Laddove, appunto, pietre preziose sono le 'auctoritates' che l'Arcidiacono sparge a piene mani nelle opere sue e in particolare nel *Rosarium*.

Non si tratta, in verità, di un vezzo del solo Guido, bensì di una moda che egli divide con altri, in campo letterario. Si pensi

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[160]Accenni di esercizi di filologia giuridica si rinvengono almeno in Simone da Bisignano, Schulte, *Geschichte* 36-40; Martin Bertram, 'Simon de Apulia: Randbemerkungen zu der Edition der Dekretsumme des Simon von Bisignano', *Mittelalter. Interdisziplinäre Forschung und Rezeptiongeschichte* [Jena 2017, https://mittelalter,hypoteses.org/10240] n.94, 95, 143-150.] Critiche alla redazione di Raimondo di Pennaforte si leggono in Innocentii Quarti S*uper libros quinque Decretalium Prooemium* 1ra-va n.2 e 4 riguardo a certe decretali 'corruptae' e 'secundum veram literam registri emendatae'. Si v. 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-Boston 2013) 538-543.

al *Tresor* di Brunetto Latini, che allora conosce una eccezionale fortuna e diffusione.[161] 'Tesoro' perché—scrive il letterato fiorentino (1220 ca.-1294?)—l'utilità e il valore dello scritto sono dati dall'accumulo dei gioielli più preziosi. Fuor di metafora, dai detti meravigliosi degli autori, antichi e moderni, che hanno piacevolmente accresciuto la conoscenza: 'pierres precioeuses, ce sont les mous et les enseignemens des saiges, dont chascuns vaut a la vie des homes'.[162] Per conseguire il suo obiettivo Brunetto, pochi anni prima di Guido da Baisio, ha accumulato un'estrema varietà di fonti, come già aveva fatto Vincenzo di Beauvais (1190-1260) nello *Speculum maius*: opera monumentale che abbracciava tutto lo scibile in uno sterminato zibaldone.[163]

Negli stessi anni in cui Guido compone il *Rosarium* Iacopo da Varazze porta a compimento la *Legenda Aurea*, altra opera che si regge su una generosa raccolta di eterogenei materiali libreschi a fini didascalico-pastorali. All'incrocio tra scienza del diritto, *ars dictandi*, riflessione teologico-morale s'era già posto quell'Albertano da Brescia (†post 1251) che nei suoi scritti cuce insieme—come in un '*patchwork*'—sentenze tratte da florilegi e da autori classici. Alcuni ancora rari, all'epoca, quali Seneca o Marziale; altri già diffusi (Cicerone, Virgilio, Persio, Giovenale, Orazio, Ovidio, Publilio Siro, i *Distica Catonis*) con l'immancabile Bibbia e gli scritti dei giuristi.

L'opera di Guido da Baisio si iscrive, insomma, nel gusto come nelle tendenze, entro l'ampia cornice dell'enciclopedismo tardo-duecentesco. Prossima periferia—per usare una felice

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[161]Brunetto Latini, *Tresor*, edd. Pietro G. Beltrani, Paolo Squillacioti, Plinio Torri, e Sergio Vatteroni (Testo a fronte; Torino 2007) I.1.1 5.

[162]Brunetto Latini, *Tresor* II.1.2 330.

[163]Antonio Enzo Quaglio, 'Retorica, prosa e narrativa del Duecento', *Il Duecento dalle origini a Dante*, edd. Nicolò Mineo e Emilio Pasquino (Bari 1970) I.2.335.

espressione di Cesare Segre—di quello che sarà l'Umanesimo.[164] Con la differenza, però, che le 'auctoritates'—nell'Arcidiacono, come nei suoi contemporanei—restano un dato sostanzialmente esterno, quasi di corredo, senza assurgere a fulcro ideale, a lievito o motore di nuovi e più ampi orizzonti intellettuali. Come accadrà viceversa—in parte, almeno—nell'opera di Giovanni d'Andrea.

Solo per questo limite diremo, dunque, che Guido è 'geistlos'? Troppo e troppo poco, insieme. Quanto, poi, al valore intrinseco delle sue opere giuridiche, noi moderni possiamo ancora dire pochissimo. Chi venne dopo di lui—e certo con precisa e profonda cognizione di fatto—ne apprezzò il pensiero. Al punto che, come dimostrato da Rudolf Weigand[165], sono parecchi i manoscritti di antichi decretisti che riportano *'additiones'* tratte dall'Arcidiacono. Dell'ossequio e dell'ammirazione nutrita nei suoi confronti da Giovanni d'Andrea resta testimonianza eloquente il noto esordio alla glossa sul Sesto. Infine—a tacer d'altri[166]—se posso menzionare un canonista che ho studiato a lungo, Giovanni da Imola, è ben certo che nel suo commento alle Clementine,[167] Guido da Baisio è ricordato 163 volte e in quello al primo libro delle Decretali di Gregorio IX, 120.[168]

Potrei procedere oltre, con altre aride statistiche, ma ritengo che quanto appena detto possa bastare.

Imola.

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[164] *Volgarizzamenti del Due e Trecento*, ed. Cesare Segre (Classici Italiani. Collezione diretta da Ferdinando Neri e Mario Fubini; Torino 1953) 12.

[165] *Die Glossen zum Dekret Gratians: Studien zu den früheren Glossen und Glossenkompositionen* (SG 25-26; Romae 1991) *passim*.

[166] Per l'*Extractus super toto Archidiacono* di Baldo degli Ubaldi Vincenzo Colli, 'Collezioni d'autore di Baldo degli Ubaldi nel MS Biblioteca Apostolica Vaticana, Barb. Lat. 1398', *Ius Commune* 25 (1998) 328-329.

[167] Iohannes de Imola, S*uper Clementinis* (Lugduni 1539).

[168] Iohannes de Imola *In primum Decretalium commentaria* (Venetiis 1575).

Un'opera ancora da studiare: l'*Editio Romana* del *Corpus iuris canonici**

Orazio Condorelli

Premessa. Diverse prospettive, diverse ragioni di interesse. L'Editio Romana nel quadro del sistema giuridico post-tridentino

Il titolo di questo lavoro esige una precisazione e contiene una implicita *excusatio non petita*.

La precisazione vale anzi tutto a riconoscere che l'*Editio Romana* del *Corpus iuris canonici* è tutt'altro che un oggetto ignoto alla storiografia.[1] In tempi recenti essa è stata oggetto delle ricerche di Mary Sommar, che in un volume del 2009, introdotto da uno studio di Peter Landau, si è concentrata sull'opera dei *Correctores Romani* con particolare riferimento

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*Ho presentato alcuni risultati di queste ricerche al Convegno internazionale *Il libro giuridico nell'Europa medievale e moderna: Opere e testi, autori e copisti, stampatori e lettori/Law Books in Medieval and Early Modern Europe:Works and Texts, Authors and Scribes, Printers and Readers*, Torino, 7-9 luglio 2022, Biblioteca storica della Corte d'Appello. Ricerca condotta nell'ambito del Progetto di ricerca di rilevante interesse nazionale (PRIN 2017) dal titolo 'Precetto religioso e norma giuridica: storia e dinamica di una dialettica fondativa della civiltà giuridica occidentale (secoli IV-XVII)'.

[1] Tre volumi in quattro tomi: (1, in due tomi) *Decretum Gratiani emendatum et notationibus illustratum una cum glossis, Gregorii XIII. Pont. Max. iussu editum*; (2) *Decretales D. Gregorii Papae IX. suae integritati una cum glossis restitutae. Cum privilegio Gregorii XIII. Pont. Max. et aliorum Principum*; (3) *Liber Sextus Decretalium D. Bonifacii VIII. suae integritati una cum Clementinis et Extravagantibus, earumque glossis restitutis*. *Cum privilegio Gregorii XIII. Pont. Max. et aliorum Principum* (Romae, In Aedibus Populi Romani, 1582): l'opera è disponibile on line presso la UCLA Library Department of Special Collections:
https://digital.library.ucla.edu/canonlaw.
L'edizione critica del *Corpus* è quella di Aemilius Friedberg (Leipzig1879-1881), che qui abbrevio con Friedberg I e II.

all'edizione del *Decretum* di Graziano.[2] Il volume e lo studio introduttivo offrono un esauriente panorama storiografico degli studi che, tra il secolo XIX e i nostri giorni,[3] si sono soprattutto concentrati sulle valenze critico-filologiche dell'opera dei *Correctores* quale espressione dei metodi della giurisprudenza umanistica, giungendo a valutazioni prevalentemente negative, che sono discusse e in parte criticate da Mary Sommar. Sotto questo profilo l'opera dei *Correctores* meriterebbe di essere studiata anche per le successive parti del *Corpus*, per le quali, tuttavia, non sono al momento conosciuti i protocolli dei lavori delle commissioni, che invece sono disponibili per il *Decretum*.

Ma non è questo il tema che intendo trattare in queste pagine. Parto da una constatazione nata dall'esperienza. L'*Editio Romana* del *Corpus iuris canonici* continua a essere uno strumento di lavoro storiografico per coloro che studiano il diritto canonico medievale. Il lettore bene avvertito è consapevole, tuttavia, che quanto compare al centro e sui margini del testo dell'*Editio Romana* deve essere trattato con molta cautela, e che sarebbe vano cercare un manoscritto medievale che contenga tutto quanto i *Correctores* hanno collocato a margine

[2] Mary E. Sommar, *The Correctores Romani: Gratian's Decretum and the Counter-Reformation Humanists* (Pluralisierung und Autorität 19; Zürich-Berlin 2009), con *Vorwort* di Peter Landau, IX-XXII. L'Autrice ha riassunto i risultati della ricerca nella voce 'Editio Romana', DGDC 3.535-541.

[3] Rinviando al volume di Sommar e all'introduzione di Landau, mi limito a ricordare i nomi di Aemilius Ludwig Richter, Augustin Theiner, Johann Friedrich von Schulte, Aemilius Friedberg, Alfons M. Stickler, Karl Schellhass, Stephan Kuttner, Hans Erich Troje. Ai quali occorre aggiungere, almeno, Carlos Larrainzar, 'La ricerca attuale sul *Decretum Gratiani*', *La cultura giuridico-canonica medioevale. Premesse per un dialogo ecumenico*, a cura di Enrique De León-Nicolás Álvarez de las Asturias (Pontificia Università della Santa Croce, Monografie Giuridiche 22; Milano 2003) 45-88, in particolare 62-67; Lorenzo Sinisi, 'Legislazione e scienza canonistica nell'età di Pio V', *Le carte del diritto e della fede*: *Atti del Convegno di Studi. Alessandria, 16-17 giugno 2006*, a cura di Elisa Mongiano e Gian Maria Panizza (Alessandria 2008) 23-48 (31-38); Idem, 'Prima del *Codex* pio-benedettino: Il diritto della Chiesa tridentina fra chiusura e integrazione del *Corpus iuris canonici*', *Ephemerides Iuris Canonici* n.s. 57 (2017) 525-565 (535-539).

dei testi delle norme canoniche. Chi ha familiarità coi manoscritti medievali delle glosse e dei commenti sulle varie parti del *Corpus* canonistico ha anche gli strumenti per distinguere gli 'apparatus' dai molteplici testi di corredo che i *Correctores* inserirono nel contorno delle fonti canoniche, a cominciare dai 'casus', che ancora oggi sono spesso la prima chiave di accesso verso i contenuti di testi talvolta lunghi, contenenti plurime disposizioni giuridiche, di difficile interpretazione. Oltre a questo corredo essenziale ('casus' e 'apparatus') i *Correctores* aggiunsero molte altre annotazioni tratte dagli scritti dei giuristi medievali, non sempre accompagnate da sigle che possano rappresentare un orientamento sicuro per il lettore moderno. Per fare solo un esempio, tornando indietro agli anni delle mie prime ricerche, ricordo quando, leggendo un articolo di Knut Wolfgang Nörr, appresi casualmente che i 'casus longi' apposti dai *Correctores* ai testi del *Liber Sextus* (ma anche delle *Clementinae*, anche se non sempre[4]) furono composti da Hélie

[4] Il tema è tutto da studiare. Ho fatto pochi controlli a campione, e qui mi limito a riscontrare la presenza dei *casus* di Hélie Régnier (ma il nome dell'autore non è indicato) nel titolo *de rescriptis* delle *Clementinae*. Sono frammisti a materiali tratti dai commenti di Giovanni da Imola e Francesco Zabarella. Le paternità talvolta sono chiaramente segnalate (come per esempio è specificato a margine di Clem.1.2.1 ma solo per Giovanni da Imola e Zabarella), ma i materiali sono disposti uno appresso all'altro, ciò che genera la difficoltà di discernere le parti dei rispettivi autori quando non si facciano puntuali confronti con le rispettive opere. I *casus* di Régnier sono spesso seguiti da *notabilia* di Zabarella. Ho condotto i riscontri sull'incunabolo stampato a Poitiers nel 1483 (GW M37581 e M37582), sul quale v. le pagine di Feenstra citate nella prossima nota. Le carte dell'incunabolo non sono numerate, ma faccio riferimento alla nuova numerazione: [1r] 'Incipiunt casus longi super sextum decretalium compilati in alma universitate pictaviensi'; [157r] 'Finem sumpsere casus longi super sexto libro decretalium noviter compilati in famosa tum venustissima universitate pictaviensi in eademque urbe per magistrum Johannem Stephanumque de gradibus impressi Anno domini millesimo CCCC. lxxxiii septimo kalendas iulii'; [159r] 'Incipiunt casus longi Clementinarum noviter compilati in famosa universitate pictaviensi'; Colofon [214v]: 'Expliciunt casus clementinarum reportati a domino helie regnier. Et si que (!) defectus in eis fuerint inventi: imputetur illi qui ab eo reportavit, non sibi doctori qui nunquam falsum dicit'.

Régnier, un semisconosciuto professore di Poitiers del tardo Quattrocento.[5] Ma non è nemmeno questo il tema su cui intendo soffermarmi, perché un'analisi del genere richiederebbe ben altro impegno e ancora oggi si scontrerebbe con il molto che rimane ignoto alla storiografia.[6]

Insomma, l'*Editio Romana* rimane un testo decisamente delicato e problematico da utilizzare. La sua complessità è legata a un intento originario che si collega con il più generale programma tridentino di edificare il nuovo ordine ecclesiastico su testi sicuri e approvati dalla Sede Apostolica.[7] Questo

[5] Knut Wolfgang Nörr, 'Ohne Ansehung der Person: Eine Exegese der 12. *Regula iuris* im *Liber Sextus* und der *Glossa ordinaria* des Johannes Andreae hierzu', RIDC 5 (1994) 23-42 (25-26 e n.9). L'autore è documentato tra il 1474 e il 1494: Robert Feenstra, 'Le *Casus Institutionum* de Guido de Cumis (manuscrits et éditions)' (1972), in Idem, *Fata Iuris Romani: Etudes d'historire du droit* (Leyde 1974) 260-283 (273-274); Patrick Arabeyre, 'Régnier Hélie', *Dictionnaire historique des juristes français XIIe-XXe siècle*, dirr. Patrick Arabeyre-Jean-Louis Halpérin-Jacques Krynen (Paris 2007) 658; Schulte II 374. In nessuno dei tre autori leggiamo che i 'casus' sono confluiti nell'*Editio Romana*.

[6] Per quanto riguarda i *casus* del *Decretum*, sono quelli di Bartolomeo da Brescia, che aveva rielaborato i *casus* di Benencasa di Arezzo: Kuttner, *Repertorium* 230; Schulte II 84. È il caso di segnalare incidentalmente la presenza di annotazioni (*divisiones*) da attribuire a Giovanni da Fintona (Iohannes de Phintona), che dopo il 1234 aveva scritto una *Lectura* sul *Decretum* utilizzata da Guido da Baisio. Poiché questi pezzi nelle edizioni, compresa la *Romana*, portano la sigla 'Io. de Fant.', occorre distinguere l'autore dal più tardo Giovanni Fantuzzi (†1391): Kuttner, *Repertorium* 20-21 e n.2; Andrea Bartocci, 'Giovanni di Pietro Fantuzzi e la canonistica bolognese alla fine del Trecento', *L'università in tempo di crisi. Revisioni e novità dei saperi e delle istituzioni nel Trecento, da Bologna all'Europa*, a cura di Berardo Pio e Riccardo Parmeggiani (Centro interuniversitario per la storia delle università italiane, Studi 30; Bologna2016) 63-80 (73-74).
Quanto al *Liber Extra*, i *casus* sono quelli di Bernardo da Parma, sulla cui presenza non omogenea nelle edizioni (insieme ai *notabilia* dello stesso Bernardo che si leggono in calce ai *casus*) si vedano le notizie offerte da Stephan Kuttner, 'Notes on the *Glossa ordinaria* of Bernard of Parma' (1981), ora in Idem, *Studies in the History of Medieval Canon Law* (Aldershot-Brookfield 1990) no.XIV, 86-96.

[7] Paolo Prodi, 'Note sulla genesi del diritto nella Chiesa post-tridentina', *Legge e Vangelo: Discussione su una legge fondamentale per la Chiesa*

programma fu sviluppato con la pubblicazione del Catechismo (1566), dei libri liturgici, delle Sacre Scritture (la *Vulgata* Sisto-Clementina, 1592), dei concili ecumenici (1608-1612),[8] e ovviamente dei testi del *Corpus iuris canonici*.

Il *Corpus*, nelle intenzioni della Santa Sede, doveva rimanere la base della formazione negli studi canonistici, nonché della pratica giuridica, dal momento che i decreti tridentini—che pure avevano introdotto innumerevoli innovazioni al diritto precedente—non potevano essere oggetto dell'interpretazione dei giuristi—per il pericolo di 'perversio' e 'confusio' che può sorgere dalla libera o arbitraria interpretazione dei testi—in virtù di una decisione di Pio IV contenuta già nella bolla di conferma del Concilio (*Benedictus Deus*, datata 26 gennaio 1564, ma pubblicata nel giugno dello stesso anno).[9] L'attività editoriale dei

(Istituto per le Scienze Religiose di Bologna: Testi e Ricerche di Scienze Religiose 8; Brescia 1972) 191-223; Carlo Fantappiè, *Storia del diritto canonico e delle istituzioni della Chiesa* (Bologna 2011) 175-178; Stephan Kuttner, 'The Reform of the Church and the Council of Trent', *The Jurist* 22 (1962) 123-142.

[8] *ΤΩΝ ΑΓΙΩΝ ΟΙΚΟΥΜΕΝΙΚΩΝ ΣΥΝΟΔΩΝ ΤΗΣ ΚΑΘΟΛΙΚΗΣ ΕΚΚΛΗΣΙΑΣ ΑΠΑΝΤΑ: Concilia generalia Ecclesiae Catholicae Pauli V. pont. max. auctoritate edita... Pleraque graece nunc primum prodeunt: omnia autem ex antiquis exemplaribus tum graecis tum latinis diligenter recognita* (4 vol. Romae 1608-1612). Claudio Leonardi, 'Per la storia dell'edizione romana dei concili ecumenici (1608-1612): Da Antonio Agustín a Francesco Aduarte', *Mélanges E. Tisserant* VI (Studi e Testi 236; Città del Vaticano, Biblioteca Apostolica Vaticana, 1964) 583-637; Vittorio Peri, 'Due protagonisti dell'Editio Romana dei Concili Ecumenici: Pietro Morin ed Antonio d'Aquino', *Mélanges E. Tisserant* VII (Studi e Testi 237; Città del Vaticano 1964) 132-232.

[9] Sulla riserva papale di interpretazione, affidata alla Congregazione per il Concilio (*Sacra Congregatio cardinalium Concilii Tridentini interpretum*), v. gli studi mirati di Lorenzo Sinisi, '"Pro tota iuris decretalium ulteriore evolutione": Le *declarationes* della Congregazione del Concilio e le loro raccolte dei secoli XVI e XVII fra divieti e diffusione', *Historia et Ius* 1 luglio 2020, www.historiaetius.eu - 18/2020 - paper 8, 1-40; Idem, 'Le "imprudenze" di un grande canonista della prima metà del Seicento. Agostinho Barbosa e la Congregazione dell'Indice', *Itinerari in comune, Ricerche di storia del diritto per Vito Piergiovanni* (Milano 2001) 307-386; Idem, 'The Commentaries on the Tridentine Decrees in the Sixteenth and Seventeenth Centuries: The First Remarks on a Category of "Prohibited

Correctores, pertanto, non poteva limitarsi a produrre una nuova edizione dei testi canonici medievali con il loro corredo interpretativo costituito dagli apparati di glosse e dalle addizioni tratte da opere dei giuristi medievali. Essa doveva altresì presentare un testo che tenesse conto delle modifiche introdotte dal concilio di Trento e, più in generale, offrisse un'essenziale informazione sugli sviluppi dottrinali che, nelle materie trattate nel *Corpus*, erano intervenuti nel pensiero giuridico e ancor più nel pensiero teologico. È a questo contributo dei *Correctores*, affidato a plurime annotazioni aggiunte sui margini degli apparati di glosse, che intendo dedicare queste mie brevi note. Ed è qui che si innesta l'implicita *excusatio non petita* a cui accennavo all'inizio. L'*Editio Romana* continuerà a essere un'opera da studiare, in quanto le mie sparse e rapide osservazioni valgono a indicare una via di ricerca piuttosto che a offrire risultati consolidati.

'Revidere', 'corrigere', 'expurgare': l'Editio Romana del Corpus iuris canonici e l'opera dei Correctores

Il programma di revisione dei testi del *Corpus iuris canonici* iniziò nel 1566 sotto il pontificato di Pio V e si concluse nel 1582, sotto Gregorio XIII, con la pubblicazione, *in Aedibus Populi Romani*, di quattro volumi 'in folio', i primi due comprendenti il *Decretum*, i due successivi comprendenti rispettivamente le *Decretales* di Gregorio IX e i rimanenti testi

Works"', BMCL 33 (2016) 209-228; nonché Alfonso Alibrandi, *La maîtrise de l'interprétation de la loi: L'apport doctrinal de la Sacrée Congrégation du Concile au XVIIe siècle* (Historia et Ius. Collana di Studi di Storia del diritto medievale e moderno, Monografie 9; Roma 2022). Sulla problematica connessione tra la scienza giuridica post-tridentina e la nuova legislazione, nonché sui tentativi di codificazione del diritto tridentino il riferimento è sempre a Lorenzo Sinisi, *Oltre il Corpus iuris canonici: Iniziative manualistiche e progetti di nuove compilazioni in età post-tridentina* (Università degli Studi Magna Graecia di Catanzaro, Facoltà di Giurisprudenza; Soveria Mannelli 2009); Idem, 'Un tentativo quasi riuscito di codificazione del diritto tridentino: Il *Liber Septimus Decretalium* di Gregorio XIII (1578-1585)', RSDI 88 (2015) 129-151.

del *Corpus*.[10] Nel 1584 il *Corpus* fu ripubblicato in una più maneggevole edizione in ottavo grande.

I lavori di revisione furono affidati a una commissione cardinalizia (nella quale spiccano i nomi di Guglielmo Sirleto,[11] Ugo Boncompagni, il futuro Gregorio XIII, Francesco Alciato e Antonio Carafa) alla quale si affiancò una commissione di 'doctores'.

Già due anni prima della pubblicazione, l'intera opera era stata approvata da Gregorio XIII con il breve *Cum pro munere* (1 luglio 1580). Il testo enuncia le motivazioni sottese al programma di revisione dei testi canonici, e con evidenza mette

[10] Sull'*Editio Romana* delle *Decretales* i pochi dati che conosciamo sono raccolti ed esaminati da Stephan Kuttner, 'The Date of the Constitution "Saepe", the Vatican Manuscripts, and the Roman Edition of the Clementines', *Mélanges Eugène Tisserant* (Studi e Testi 234-237; Città del Vaticano 1964) 4.427-452, ora in Idem, *Medieval Councils, Decretals, and Collections of Canon Law* (Collected Studies 126; Aldershot-Brookfield 1992[2]) no.XIII, 'Excursus B: Francisco Peña, Sixtus Fabri, and the Roman Edition of the Decretales' 450-452. Francisco Peña (1540-1612), uditore della Rota, sarebbe autore di addizioni anonime al testo (tutte? solo quelle di carattere critico-filologico?), ma non della recensione del testo. Il domenicano Paolo Constabili O.P., Maestro del Sacro Palazzo (1573-1580, †1582) sarebbe stato il principale responsabile dell'edizione delle *Decretales*. A differenza di ciò che comunemente si legge, Sisto Fabri, successore di Constabili nel ruolo di Maestro del Sacro Palazzo (1580-1583, generale dell'O.P. dal 1583 al 1589, †1614), avrebbe avuto il compito di occuparsi di parte del *Decretum* e delle collezioni postgregoriane dopo la cessazione di Constabili, ma il suo ruolo si sarebbe limitato alle funzioni di 'recognoscere' e 'approbare' il testo, come è detto nel breve *Cum pro munere* di Gregorio XIII (1580).

[11] Sulla sua partecipazione al lavoro dei *Correctores* v. Lorenzo Sinisi, 'Il cardinale Guglielmo Sirleto e il diritto canonico del suo tempo', *Il 'sapientissimo calabro': Guglielmo Sirleto nel V centenario della nascita (1514-2014). Problemi, ricerche, prospettive*, a cura di Benedetto Clausi e Santo Lucà (Quaderni di *Νέα Ῥώμη* 5; Roma 2018) 133-153 (148-151). A proposito di una questione specifica (l'uso dello *Hieronymianus* di Giovanni d'Andrea da parte di Sirleto) v. Orazio Condorelli, 'Giovanni d'Andrea e dintorni. La scuola canonistica bolognese al tempo di Petrarca', *Petrarca e il diritto*. Atti del Convegno Internazionale di Studi, Padova 10-11 marzo 2011 (Accademia Petrarca di Lettere Arti e Scienze di Arezzo, Studi Petrarcheschi, Nuova serie 28-29; Roma-Padova 2015-2016, ma 2018) 29-73 (69).

al primo posto la custodia della fede cattolica in 'tempi tanto gravi e pieni di calamità':[12]

> Cum pro munere pastorali humeris nostris iniuncto id precipue nobis propositum habemus, ut omni studio diligentiaque omnes Christifideles his presertim tam grauibus calamitosisque temporibus in recta et catholica fide continere curemus.

Come sopra ho accennato, il programma di revisione dei testi canonici si comprende e si spiega entro un complessivo programma di riordinamento delle fonti di autorità della Chiesa, che non può ridursi esclusivamente alla preoccupazione che i testi trasmettessero insegnamenti fedeli all'ortodossia cattolica. Ciò non di meno, questa preoccupazione emerge in primo piano già dalle citate righe del breve di Gregorio XIII, ed è ulteriormente specificata nel corso del testo. I compiti affidati alla commissione sono enunciati con verbi assolutamente eloquenti: 'revidere', 'corrigere', 'expurgare':

> adhibitis nonnullis ex fratribus nostris sanctae Romanae Ecclesiae Cardinalibus, adiuncto etiam aliquorum doctrina et pietate insignium uirorum studio, Decretum Gratiani nuncupatum absque glossis, necnon idem Gratiani Decretum cum Decretalibus Gregorii Papae IX. predecessoris nostri, Sexto, Clementinis et Extrauagantibus, non modo cum ueteribus glossarum auctoribus, (quibus cum uiri pii et catholici fuerint, ignoscendum uidetur, si quid uel ob errorem in illis, uel quia nondum pleraque a sacris conciliis diffinita fuerant, liberius locuti sunt,) uerum etiam cum his, que ab impiis scriptoribus tam extra in marginibus, quam etiam intra aspersa fuerant catholicae ueritati contraria, reuidendi, corrigendi et expurgandi curam demandauimus.

Il compito aveva dunque per oggetto tanto le glosse dei giuristi medievali, quanto le annotazioni aggiunte dagli 'scrittori empi' sia ai margini che all'interno dei testi canonici. Quanto agli autori medievali, essi meritavano indulgenza, poiché, pii e

[12] Il testo è premesso al primo volume del *Decretum* di Graziano, fogli non numerati; anche in Friedberg I lxxix-lxxxii. A causa del ritardo della pubblicazione, il 2 giugno 1582 Gregorio XIII emise il breve *Emendationem Decretorum* rinnovando l'ordine di stampa: è collocato appena prima della D.1, ed è riprodotto da Friedberg I lxxix-lxxx. Qui si sottolinea l'utilità dell'opera per coloro che studiano il diritto canonico: 'In quo magna ratio habita est operis ipsius dignitatis et publicae, eorum presertim, qui in hoc studio uersantur, utilitatis'.

cattolici come erano, le loro glosse potevano contenere errori su materie che ancora per la maggior parte non erano state definite dai sacri concili.

Il testo del *Corpus* approvato dal papa doveva essere riprodotto fedelmente senza modifiche o aggiunte:

> […] hoc Iuris Canonici Corpus fideliter et incorrupte iuxta exemplar hic Romae impressum a catholicis typographis, a Romano populo, siue ab eo deputatis uel pro tempore deputandis electis, imprimi possit […].

È da notare che in questo passo è esplicitamente utilizzata l'espressione 'Iuris Canonici Corpus', comprensiva dei testi normativi del diritto canonico classico che comunque sarebbero stati pubblicati nel 1582 mantenendo ciascuno il suo proprio titolo originario.[13]

Per insistere sulla finalità dell'opera dei *Correctores* presentata come primaria, il risultato è infine definito come 'Ius Canonicum sic expurgatum'.

Della particolare indulgenza di cui i glossatori medievali godettero presso i *Correctores* e i pontefici danno ulteriore testimonianza le poche righe poste a conclusione delle avvertenze al lettore anteposte al primo volume del *Decretum*—'longum ac perdifficile opus'—: in tutto cinque fogli intitolati 'Ea de quibus ad lectorem principio visum est admonere, haec sunt'.[14] I glossatori, 'autori pii e cattolici', avevano talvolta errato 'per la debolezza dell'umano ingegno'; i loro errori sono stati segnalati da annotazioni in corsivo precedute da asterisco, nelle quali i *Correctores* hanno enunciato 'che cosa debba credersi secondo la fede cattolica':[15]

> Quod ad glossas pertinet, quae pios et catholicos auctores habuerunt; quae in illis errata paulo maioris ponderis pro humani ingenii infirmitate obrepserunt, ea in margine sunt notata, et quid catholice sentiendum sit, ostensum est. Hae autem notae, quibus asteriscus affixus est, necessario posthac in omnibus impressionibus apponenda erunt.

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[13] La prima edizione a riportare nel frontespizio il titolo *Corpus iuris canonici* fu stampata a Parigi nel 1587: Sinisi, 'Prima del *Codex* pio-benedettino' 538-539.

[14] Fogli non numerati.

[15] Sul punto appena un cenno in Sommar, *The Correctores Romani* 32, che volutamente lascia da parte questo aspetto nella sua ricerca.

Un antecedente: la 'Censura in glossas et additiones iuris canonici' di Tomás Manrique (1572)

Il lavoro che i *Correctores* svolsero sugli apparati medievali di glosse rappresenta la conclusione di un processo che nei primi anni Settanta del Cinquecento aveva preso una diversa direzione. Quando il lavoro di 'emendatio' era ancora nelle fasi iniziali, la Sede Apostolica dovette confrontarsi con le recenti edizioni umanistiche del *Corpus*, in particolare con quella di Charles du Moulin degli anni 1553/1554, la cui seconda edizione del 1559 fu la base dell'edizione stampata a Venezia nel 1566/1567 e nel 1572.[16] Gli 'impii scriptores' genericamente menzionati nel breve *Cum pro munere* di Gregorio XIII prendevano il volto dell''impius Molineus', responsabile di avere contaminato il *Corpus* canonistico con annotazioni contrarie alla retta dottrina della Chiesa cattolica.[17] Di questa atmosfera censoria, che avvolgeva persino i testi fondamentali del diritto comune della Chiesa, è eloquente testimonianza la *Censura in glossas et additiones iuris canonici*, pubblicata nel 1572 per opera del domenicano Tomás Manrique, Maestro del Sacro e Apostolico Palazzo.[18] Nella sua qualità egli faceva parte della commissione

[16] Sulle edizioni del *Decretum* si vedano i lavori di Erich Will, '*Decreti Gratiani* incunabula: Beschreibendes Gesamtverzeichnis der Wiegendrücke des Gratianischen Dekrets', SG 6 (1959) 1-280; Aldo Adversi, 'Saggio di un catalogo delle edizioni del *Decretum Gratiani* posteriori al secolo XV', SG 6 (1959) 281-451.

[17] Rodolfo Savelli, *Censori e giuristi: Storie di libri, di idee e di costumi (secoli XVI-XVII)* (Per la storia del pensiero giuridico moderno 94; Milano2011) 11 e n.30, 56, 103-104, 106. Pochi cenni in René Metz, 'La contribution de la France à l'étude du Décret de Gratien depuis le XVI siècle jusqu'à nos jours', SG 2 (1954) 493-518 (502); Michel Reulos, 'Le Décret de Gratien chez les humanistes, les gallicaines et les réformés français du XVIème siècle', SG 2 (1954) 677-696 (682); Mario Turchetti, *Concordia o tolleranza? François Bauduin (1520-1573) e i 'moyenneurs'* (Genève1984) 130-132. Per un suo profilo v. Wim Decock, 'Charles Dumoulin (1500-1566)', *Great Christian Jurists in French History*, edd. Olivier Descamps-Rafael Domingo (Cambridge2019) 97-116.

[18] Savelli, *Censori e giuristi* 56-57; Alessandra Casamassima, *Controriforma, censura e libri espurgati. Spigolature cinquecentesche dal Fondo Ennio*

dei *Correctores* nel gruppo dei *Doctores*. Nella singola pagina di prefazione alla *Censura*, Manrique dà atto che il processo di revisione avrebbe dovuto produrre un'edizione annotata con la segnalazione degli errori: questo sembra essere un criterio metodologico maturato successivamente alla fissazione delle *Leges constitutae et observatae in correctione Decreti D. Gratiani*, definite dopo una riunione del 16 gennaio 1570, le quali si pronunciavano sulla questione delle glosse solo per aspetti attinenti alla ricostruzione filologica del testo di Graziano.[19] Ma nel frattempo era necessario proteggere i lettori da tutto ciò che corrompeva 'la verità della dottrina ecclesiastica'. In attesa di una 'più accurata e piena espurgazione', la *Censura* ordinava non solo la cancellazione delle addizioni dell''empio Molineo', ma *sic et simplicter* anche dei luoghi delle edizioni che contenevano 'errori perniciosi'. Per il momento erano risparmiate le glosse che, pur 'viziose', contenevano errori che non toccavano direttamente la fede cattolica:[20]

> Cum Glossae ad explicationem Iuris Canonici hactenus editae, multis in locis doctrinae ecclesiasticae veritatem corrumpant, ne earum lectio legentibus obesse possint: primum diligentiam adhibuimus, ut interim dum prodeat accuratior et plenior repurgatio, subsequens praecedat, iuxta quam ea sola deleantur loca, quae errores perniciosos continere animadvertimus, una cum additionibus impii Car. Molinaei. Deinceps,

Cortese (Biblioteca del Senato della Repubblica) (Roma 2009) 15-17 e schede 5-8.

[19] Si veda in particolare il n.V delle *Leges constitutae et observatae in correctione Decreti D. Gratiani*, pubblicate da Augustin Theiner, *Disquisitiones criticae in praecipuas canonum et decretalium collectiones seu sylloges Gallandianae dissertationum de vetustis canonum collectionibus continuatio* (Romae, In Collegio Urbano, 1836), *Appendix prima. Documenta quae Gratiani Decreto emendationem respiciunt*, 4-6, riprese da Friedberg I lxxvii-lxxviii. Analisi in Sommar, *The Correctores Romani* 42-50.

[20] *Censura in glossas et additiones iuris canonici, omnibus exemplaribus hactenus excusis, respondens. Librorum, titulorum, et capitulorum numerus, omnibus: Paginarum vero Lugdun. et Venet. Codicibus, post annum 1553 impressis, respondet* (Romae, Apud Haeredes Iulii Accolti, 1572) fol.2r: *F. Thomas Manrrique* (sic) *Sacri et Apostolici Palatii Magister Lectori*, provvedimento datato Roma 22 agosto 1572.

> qua maiori fieri poterit celeritate, omnino curabimus, ut ipsi integri Codices iuris canonici imprimantur, iis notatis erroribus, qui veram atque sanam Ecclesiae catholicae doctrinam laedere possunt... Multa consulto in ipsis glossis intacta relinquimus, non ideo quod vitiosa non sint, sed quia in alteram partem potius quam in fidem peccant...

Conformemente a quanto annunciato nella prefazione, l'opuscolo è suddiviso un due parti. La prima, più breve (2v-7v), contiene in sequenza: 'Delenda ex glossis Decreti a Gratiano editi'; 'Ex lib. Decretalium Gregorii'; 'Ex Sexto'; 'Ex Clementinis'. La seconda parte, più consistente (8r-28v), censura le aggiunte dell''empio Molineo': 'Additiones delendae, cum eae quae intra glos. insertae, tum etiam quae in marginibus additae fuerunt'. L'esordio non richiede commenti: 'Primum deleatur nomen impii Caroli Molinaei ubicunque reperiatur'.[21]

L'impeto censorio di Manrique fu però presto circoscritto perché, appena morti morti Pio V e Manrique, il successivo Maestro del Sacro e Apostolico Palazzo, Paolo Costabili, pubblicò nel 1573 una nuova *Censura* che risparmiava le glosse e colpiva solo le addizioni di du Moulin:[22]

> Verum quia veteres glossarum auctores pii ac catholici viri fuerunt, si quid vel ignorantia peccaverunt, vel quia nondum diffinita erant, liberius sunt locuti; cum in nova impressione iuris canonici, quam sanctissimus fieri curabit, in antiquis glossis, quae errorem aliquem continent,

[21] Kuttner, 'Notes on the *Glossa ordinaria* of Bernard of Parma' 92-93 osserva che in alcuni casi i *Correctores* mantennero nell'*Editio Romana* alcune annotazioni di du Moulin, mentre al contrario cancellarono, in qualche caso, glosse di Bernardo là dove la *Censura* aveva comandato di cancellare solo l'annotazione di du Moulin (89).

[22] La prefazione della *Censura* di Costabili è edita, dopo quella di Manrique, da Theiner, *Disquisitiones criticae* xv-xvi: *Censura in additiones marginales textuum iuris canonici omnibus exemplaribus hactenus excussis respondens. De mandato S.D.N. Gregorii XIII. edita. Numerus paginarum Lugduni et Venetijs post annum 1573 [recte: 1553] impressis respondens* (Romae, apud heredes Antonij Bladij, impressores camerales, senza data, ma 1573). Non ho potuto vedere la prima edizione, ma solo la successiva del 1602: *Censura in omnes Additiones, seu Adnotationes marginales Dam. mem. Impii Caroli Molinaei* (Romae, Ex Typographiae Camerae Apostolicae, 1602), nella quale manca la pagina indirizzata *Lectori*. Anche dopo la pubblicazione dell'*Editio Romana* continuavano a circolare le vecchie edizioni 'corrotte': Savelli, *Censori e giuristi* 57-60.

> notationes sint apponendae, Sanctissimus Dominus Noster concedit impressos iuris canonici sine ulla ablatione, aut deletione antiquarum glossarum haberi posse, quousque praefata nova impressio edetur: ac tum etiam qui volent veteres libros retinere, id facere poterunt, modo in glossis antiquis eas notationes adscribant, quae in praefata nova editione apponerentur.

Questo indirizzo, definito dunque nel 1572/1573, fece sì che l'*Editio Romana* potesse offrire un testo affidabile delle glosse, senza cancellazioni, e fu l'esito di un bilanciamento in cui la comprensione storica della fonte nel contesto in cui era stata prodotta prevalse sulle esigenze di offrire un testo immune da errori: gli errori o le imprecisioni furono mantenuti, ma le annotazioni marginali avrebbero ricondotto il lettore alla comprensione 'cattolica' delle varie questioni giuridiche o teologiche in discussione.

Spigolature tra le annotazioni dei 'Correctores' alle glosse sul 'Corpus iuris canonici'

Nelle pagine seguenti presento qualche risultato di ricerche sulle addizioni dei *Correctores* alle glosse sul testi del *Corpus* canonistico. Si tratta solo di sporadiche spigolature, condotte senza alcuna pretesa di compiere un'analisi sistematica dell'*Editio Romana*. La breve selezione di materiali mira a dare un saggio del metodo di lavoro dei *Correctores*, con specifica attenzione al modo in cui essi trattarono le glosse che, pur composte dagli autori 'pii e cattolici' del Medioevo, meritavano correzioni, precisazioni o integrazioni. È necessario pertanto lasciare da parte ogni prospettiva di approfondimento dei temi di volta in volta in questione.

Diritto, natura, vangelo, ragione

Nel celebre *dictum* con cui apre la *Concordia discordantium canonum* Graziano afferma che il genere umano si regge su due pilastri, il *ius naturale* e i *mores*, e sintetizza il nucleo essenziale del diritto naturale nel principio evangelico che ordina che ciascuno faccia agli altri ciò che 'vuole' ('vult') sia fatto a se stesso:

> *dictum ante* D.1 c.1: Humanum genus duobus regitur, naturali uidelicet iure et moribus. Ius naturae est, quod in lege et euangelio continetur, quo quisque iubetur alii facere, quod sibi uult fieri, et prohibetur alii inferre, quod sibi nolit fieri. Unde Christus in euangelio: 'Omnia quecunque uultis ut faciant uobis homines, et uos eadem facite illis. Haec est enim lex et prophetae'. Hinc Ysidorus in V. libro Ethimologiarum [c.2.] ait...

La glossa ordinaria si interroga—a partire dalla consapevolezza delle debolezze umane—su cosa significhi 'volere che qualcosa sia fatto a sé', e nel contesto della risposta ipotizza che il comando evangelico ('iubetur') di fare agli altri ciò che uno vuole sia fatto a sé possa in effetti essere un consiglio:

> Glossa in *dictum ante* D.1 c.1, s.v. *vult*:
> Sed nonne ego volo quod alter det mihi rem suam, non tamen ego volo ei dare rem meam? Expone ergo, vult, id est debet velle, et sic exponitur ibi, Habe charitatem, et fac quod vis…vel expone, iubetur, id est consulitur [...]

L'annotazione dei *Correctores* corregge con decisione la glossa riportando le parole evangeliche al loro significato di precetto, e spiega che il retto volere che qualcosa sia fatto a sé è quello che discende dal *dictamen* del diritto di natura, non già dalle perturbazioni del desiderio:[23]

> *Additio* alla parola *consulitur* della glossa:
> Consulitur, et male, quia omnino praeceptum est: sed expone, vult ex eodem naturali dictamine, non autem ex perturbatione concupiscentiae.

[23] Su questa annotazione dei *Correctores* cfr. Larrainzar, 'La ricerca attuale' 54-55, che però non ha notato l'originaria paternità di du Moulin.

Non senza sorpresa notiamo che la paternità di questa annotazione non è dei *Correctores*, bensì proprio dell''empio Molineo': essa non si legge ancora nell'edizione del 1553-1554,[24] ma compare in quella del 1559[25] e poi nelle edizioni veneziane.[26] Nella versione originale l'annotazione si concludeva, dopo la parola 'concupiscentiae', con un rinvio a un celebre trattato dell'autore:

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[24] *Decretum Divi Gratiani, universi iuris canonici Pontificias constitutiones, et Canonicas brevi compendio complectens, una cum glossis et thematibus prudentum, et doctorum suffragio comprobatis: resectis vero nothis, absurdis, difficilibus, iisdemque inutilibus Hypotheseon ad rem minime pertinentium, ineptarumque Summarum, et Annotationum pseudographiis. Textu denique suae integritati reddito, et glossis receptis a vitio repurgatis. Opera et censura doctissimorum hominum et prece, et precio conducta* (Lugduni 1554 [nel colofone: Lugduni, Excudebat Ioannes Pidaeius, 1553], Cum privilegio regis).

[25] *Decretum D. Gratiani, universi iuris canonici pontificias constitutiones, et canonicas, brevi compendio complectens. Una cum Glossis et Thematibus prudentum, et Doctorum suffragio comprobatis: resectis vero nothis, absurdis, difficilibus, iisdemque inutilibus hypotheseon ad rem minime pertinentium, ineptarumque Summarum, et Annotationum pseudographiis. Textu denique suae integritati reddito, et Glossis receptis a vitio repurgatis. Opera et censura doctissimorum hominum et prece, et precio conducta* (Lugduni 1559 [nel colofone, Lugduni, Excudebat Iohannes Ausultus], Cum privilegio regis). La copia che ho visto è conservata nella Biblioteca Nazionale Vittorio Emanuele II di Roma ed è stata digitalizzata da Google. È interessante perché presenta le cancellazioni indicate dalla *Censura* del 1572. L'addizione in questione è cancellata con inchiostro per intero, e non solo nell'ultima parte come disposto nella *Censura* del 1572.

[26] Ho potuto vedere una copia dell'edizione veneziana del 1567 scampata alla censura, oggi conservata nella Biblioteca dell'Università di Padova, Istituto di Diritto Romano, Storia del Diritto e Diritto Ecclesiastico: *Decretum D. Gratiani, universi iuris canonici pontificias constitutiones, et canonicas brevi compendio complectens. Una cum Glossis et Thematibus prudentum, et Doctorum suffragio comprobatis: resectis vero nothis, absurdis, difficilibus, iisdemque inutilibus hypotheseon ad rem minime pertinentium, ineptarumque Summarum, et Annotationum pseudographiis. Textu denique suae integritati reddito, et Glossis receptis a vitio repurgatis. Opera et censura doctissimorum hominum et prece, et precio conducta* (Venetiis, Franciscus Franciscius, et socii, 1567). Disponibile online: https://phaidra.cab.unipd.it/detail/o:396546?mycoll=o:356696. Su questa edizione v. Savelli, *Censori e giuristi* 103-104.

Vide quae not. tract. de usur. q.II.

Così si legge in una copia dell'edizione veneziana del 1567 scampata alla censura. In effetti la *Censura* di Manrique aveva ordinato che fossero soppresse solo queste ultime parole dell'annotazione,[27] che rivelavano la paternità di un testo il cui contenuto, peraltro, era evidentemente stato ritenuto conforme alla dottrina cattolica:[28] tanto conforme che fu riproposto nella versione riveduta, corretta e purgata del *Corpus*. Questo dato testimonia, almeno in un caso, di una scelta del *Correctores* basata su criteri obiettivi e non su pregiudizi. Per altro verso esso dà ragione all'opinione di un poco noto giurista francese del Seicento, Gabriel du Pineau (1573-1644), secondo il quale du Moulin nelle sue annotazioni aveva mischiato loglio e zizzania con il seme buono.[29]

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[27] Manrique, *Censura* (1572) fol.8r: 'Pag. ead. (=1) Add. in marg. num. 2 Consuluit, et male et c. ibi, Vide quae not. et c. Deleantur haec verba usque in finem'.

[28] Le annotazioni del 1553 e 1559 sono raccolte col titolo *Caroli Molinaei Annotationes ad ius canonicum, et primum Annotationes in Decretum*, in *Caroli Molinaei... Omnia quae extant opera*, IV (Parisiis, Sumptibus Antonii Dezallier, 1681) 1-295. La raccolta è curata da François Pinsson, che inserì anche le addizioni di Gabriel du Pineau, *Senator Andegavensis*. L'annotazione in questione è a p. 2, e dopo la parola *concupiscentiae* prosegue: 'Vide quae dixi in tract. Usur. quaest. II. C.M.'. Segue un *monitum* di Pinsson: 'Haec annotatio retenta ab emendatoribus Romanis, et margini suae inscripta, suppressis his verbis, *Vide quae dixi in tract. Usur. quaesti. II.* quae Carolum Molinaeum notabant, ut in plerisque aliis locis, de quo te monitum volui'. Sul giurista v. Brigitte Basdevant-Gaudemet, 'Pinsson (Pinson) François' (1612-1691), *Dictionnaire historique des juristes français XIIe-XXe siècle*, dirr. Patrick Arabeyre-Jean-Louis Halpérin-Jacques Krynen (Paris2007) 626-627. Sulle annotazioni del Molineo v. Kuttner, 'Notes on the Glossa ordinaria of Bernard of Parma' 92-93.

[29] Nella *praefatio* di Gabriel du Pineau, inserita da Pinsson all'inizio delle *Annotationes*, p.1, egli scrive del Molineo come 'Ecclesiae Catholicae per Baptismum Alumnus, eb eius sinu Novatorum ereptus infausta seditione'. Delle *annotationes* du Pineau dice: 'vere laudandas, alias ex libito, quasdam incogitanter, quasdam odiose in Romanam Curiam, sed et in Ecclesiam ipsam acriori stilo rubicantes, quasi lolium et zizaniam semini bono superseminans...'. Sul giurista v. Sylvain Soleil, 'Dupineau (Du Pineau) Gabriel' (1573-1644), *Dictionnaire historique des juristes français* 284.

Altre volte i *Correctores* mostrano di aderire senza riserve alle rappresentazioni teoriche elaborate dai giuristi medievali. Riportando un frammento delle *Etymologiae* di Isidoro, Graziano distingue tra *divinae* e *humanae leges*:

> D.1.c.1: *Diuinae leges natura, humanae moribus constant.* Omnes leges aut diuinae sunt, aut humanae. Diuinae natura, humanae moribus constant, ideoque he discrepant, quoniam aliae aliis gentibus placent. § 1. Fas lex diuina est:ius lex humana. Transire per agrum alienum, fas est, ius non est.

La glossa ordinaria, raccordando questo passo ad altri del *Decretum*, si domanda in quale senso un campo ('ager') possa essere 'alienus', dal momento che per diritto naturale 'tutte le cose sono comuni':

> Glossa in D.1.c.1, s.v. *alienum*:
>
> Sed nonne iure naturali omnia sunt communia, ut infra cap. Ius naturale, et infra dist. 8 Quo iure? Non ergo aliquis ager alienus est, ideo expone, alienum, id est, qui est alienus modo.

A margine, un'annotazione dei *Correctores* in forma di 'notabile' coglie il principio che:

> omnia sunt communia iure naturali.

In altre parole, lo stile di questa annotazione mostra che il principio è qui accolto senza contestazione o necessità di precisazione.

Altrettanto avviene in relazione al testo isidoriano che definisce ed esemplifica il concetto di diritto naturale:

> D.1 c.7: *Quid sit ius naturale.* Ius naturale est commune omnium nationum, eo quod ubique instinctu naturae, non constitutione aliqua habetur, ut uiri et feminae coniunctio, liberorum successio et educatio, communis omnium possessio et omnium una libertas, acquisitio eorum, quae celo, terra marique capiuntur; item depositae rei uel commendatae pecuniae restitutio, uiolentiae per uim repulsio. § 1. Nam hoc, aut si quid huic simile est, numquam iniustum, sed naturale equumque habetur.

La glossa ordinaria aveva spiegato l'affermazione di Isidoro relativa al 'comune possesso di tutte le cose' nel senso che secondo il diritto divino nulla è di proprietà privata, ma poi la glossa aveva ripiegato verso una ulteriore interpretazione, ossia

che tutti i beni devono essere messi a disposizione dei bisognosi in tempo di necessità:[30]

> Glossa in D.1 c.7, s.v. *communis omnium possessio*:
> Id est, nihil erat proprium alicui iure divino. Vel dic communis, id est, communicanda tempore necessitatis, ut 47 dist. Sicut...

I *Correctores* da un lato rilevano che l'opinione della glossa è concorde con l'idea, scaturente dal Digesto di Giustiniano, che la proprietà privata ('dominia distincta') abbia avuto origine nel *ius gentium*:

> *Additio* alle parole *iure divino* della glossa:
> Concor. tex. in l. Ex hoc iure, cum ibi not. ff. de iustitia et iure (Dig.1.1.5).

E poco più sotto, al modo di *notabile*, i *Correctores* osservano che:

> Tempore necessitatis omnia sunt communicanda.

Questo principio avrebbe contribuito alla definizione dell'idea di 'destinazione universale dei beni', idea che sarebbe divenuta fondamentale nella dottrina sociale della Chiesa elaborata a partire dagli ultimi decenni del secolo XIX.[31]

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[30] Sul tema Rudolf Weigand, *Die Naturrechtslehre der Legisten und Dekretisten von Irnerius bis Accursius und von Gratian bis Johannes Teutonicus* (München1967) 307-335. Sul tema della proprietà privata cfr. anche il *dictum ante* D.8 c.1 e il c. *Dilectissimis*, C.12 q.1 c.2, che contiene 'pericolose' affermazioni in tema di *uxorum communio* sulle quali discussero i glossatori medievali e i *Correctores*: sull'argomento Stephan Kuttner, 'Gratian and Plato' (1976), ora in Idem, *The History of Ideas and Doctrines of Canon Law in the Middle Ages* (Collected Studies 113; Aldershot-Brookfield 1992[2]) no.XI, in particolare 102 n.54, 103, 117-118 sul lavoro dei *Correctores*.

[31] Concilio Vaticano II, cost. *Gaudium et spes* (1965) n.69; Leone XIII, enc. *Rerum novarum* (1891) n.6-7; Pio XI, enciclica *Quadragesimo anno* (1931) n.44-52; Giovanni XXIII, enciclica *Mater et Magistra* (1961) n.11, 106-109; Giovanni XXIII, enciclica *Pacem in terris* (1963) n.10; Paolo VI, enciclica *Centesimus annus* (1967) n.22; Giovanni Paolo II, enciclica *Laborem exercens* (1981) n.14; Giovanni Paolo II, enc. *Sollicitudo rei socialis* (1987) n.7, 42; Giovanni Paolo II, enciclica *Centesimus annus* (1991) n.30-43; *Catechismo della Chiesa Cattolica* (1994) n.2401-2406; Benedetto XVI, enciclica *Deus caritas est* (2005) n.20; Benedetto XVI, enciclica *Caritas in veritate* (2009); Francesco, enciclica *Laudato si'* (2015) n.93-95; Francesco, enciclica *Fratelli tutti* (2020) n.118-120; Pontificio Consiglio della Giustizia e della Pace,

Nella dottrina isidoriana e grazianea delle fonti del diritto la *ratio*—parola dal significato così denso che solo imperfettamente può essere tradotta con 'ragione'[32]—assume un posto centrale quale fondamento basato sul diritto naturale, anima e giustificazione della norma giuridica, sia essa legge o consuetudine:

> D.1 c.5: *Quid sit consuetudo*. Consuetudo autem est ius quoddam moribus institutum, quod pro lege suscipitur, cum deficit lex. § 1. Nec differt, an scriptura, an ratione consistat, quoniam et legem ratio commendat. § 2. Porro si ratione lex constat, lex erit omne, iam quod ratione constiterit, dumtaxat quod religioni congruat, quod disciplinae conueniat, quod saluti proficiat. § 3. Vocatur autem consuetudo, quia in communi est usu.

Nel passo di Isidoro la 'ratio' è individuata come condizione necessaria per la sussistenza di una norma giuridica che sia congruente con i precetti della religione, adeguata alla retta disciplina delle relazioni sociali, utile per la salvezza delle anime.

Tali concetti avevano dato occasione a una serie di affermazioni del glossatore sulle relazioni tra la 'ratio' e le finalità che Isidoro aveva assegnato alla legge:

> Glossa in D.1 c.5, s.v. *quod religioni conveniat*:
> Multa enim sunt contra rationem, tamen congruunt religioni, ut virginem peperisse.

L'affermazione riguardante il parto della Vergine suonò alle orecchie dei *Correctores* quanto meno imprudente, se non potenzialmente foriera di errori dogmatici.[33] Occorreva precisare—con annotazione che per il suo particolare rilievo è

Compendio della dottrina sociale della Chiesa, III Edizione, 2004, Cap. IV, III, n.171-184.

[32] Ennio Cortese, *La norma giuridica: Spunti teorici nel diritto comune classico* (Ius Nostrum, 6.1-2; Milano1962-1964) *ad indicem*; Andrea Padovani, *Perché chiedi il mio nome? Dio natura e diritto nel secolo XII* (Il Diritto nella Storia 6; Torino1997) *ad indicem*.

[33] La *Censura* di Manrique (1572) comandava che questa e la successiva glossa fossero cancellate: 'Dist.1. c.5. Consuetudo. gl. ver Quod religioni conveniat, ubi ait: Multa enim sunt contra rationem, tamen congruunt religioni, ut Virginem peperisse. Deleantur omnia haec verba. Ibidem infra gl. ver. Quod saluti proficiat, ubi ait: Licet ratio sit quod homo debeat persequi inimicum, tamen non proficit hoc ad salutem. Deleantur omnia haec verba'.

scritta in corsivo e segnalata da asterisco—che fatti come la maternità della Vergine Maria

> **Proprie non sunt contra rationem, sed supra rationem.*

La glossa aveva anche notato che la *ratio*, in sé e per sé, non garantisce il compimento di azioni proficue per la *salus animarum*:

> Glossa in D.1 c.5, s.v. *quod saluti proficiat*:
> Licet ratio sit quod homo debeat persequi inimicum, tamen non proficit hoc ad salutem.

I *Correctores*, in fondo, concordavano con l'idea che la ragione umana possa indurre comportamenti che non conducono alla salvezza delle anime:

> **Est ratio vel depravata, vel infirma, cum non proficit ad salutem.*

In questo senso i *Correctores* riconoscevano implicitamente che il passo isidoriano si riferiva propriamente alla *recta ratio* quale fondamento della norma giuridica.

Libri apocrifi e libri canonici

A partire dalla D.15 Graziano comincia a parlare dell'autorità dei concili e dei canoni. Nella D.16 egli discute dei *Canones apostolorum*: la loro autorità era stata negata da Isidoro di Siviglia (D.16 c.1), tuttavia essi avevano avuto una cospicua tradizione all'interno delle fonti canoniche della Chiesa latina.[34] Graziano stesso riteneva, a differenza di Isidoro, che essi non fossero da ricomprendere tra le fonti apocrife (*dictum post* D.16 c.4).

> D.16 c.1: *Apostolorum canones apostolica reiciuntur auctoritate.* Canones, qui dicuntur apostolorum, seu quia eosdem nec sedes apostolica recipit, nec sancti Patres illis consensum prebuerunt, pro eo quod ab hereticis sub nomine apostolorum compositi dignoscuntur, quamuis in eis inueniantur utilia, auctoritate tamen canonica atque apostolica eorum gesta constat esse remota atque inter apocrifa deputata.

Nello spiegare il senso della parola *apocrypha*, il glossatore aveva rivolto l'attenzione ai libri delle Sacre Scritture.

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[34] Peter Landau, 'Die "Canones Apostolorum" im abendländischen Kirchenrecht, insbesondere bei Gratian', *Folia Canonica* 3 (2000) 27-42; Szabolcs A. Szuromi, 'The *Canones apostolici* as a common disciplinary source for the Eastern and Western Church', RIDC 19 (2008) 269-279.

Glossa in D.16 c.1, s.v. *atque inter apocrypha*:

> Id est sine certo auctore, ut Sapientia Salomonis, liber Iesu filii Sirach, qui dicitur Ecclesiasticus, et liber Iudicum, et Thobiae, et liber Machabeorum: hi apocryphi dicuntur, et tamen leguntur: sed forte non generaliter.

L'affermazione della glossa attirò la riprovazione dei *Correctores* in una annotazione, in corsivo e preceduta da asterisco, che intende ricondurre i lettori alle decisioni prese dal Concilio di Trento:

Additio alle parole *sine certo auctore* della glossa:

> **Quinimmo libri isti non apocryphi, sed canonici sunt, quamvis olim quidam etiam catholici de illis dubitaverint. Conc. Triden. sess. 4 de can. scrip.* (Conc. di Trento, sess. IV, 8 aprile 1546, *Decretum primum: recipiuntur libri sacri et traditiones apostolorum*, COD 663-664).

Papa e concilio ecumenico

Alcuni testi di Graziano e le relative glosse di Giovanni Teutonico rimasero per secoli primarie fonti di riferimento nelle discussioni sulle relazioni tra papa e concilio ecumenico.[35] In particolare, alcune affermazioni del glossatore alimentarono le 'teorie conciliari' che postulavano, sia pure in modo differenziato, una superiorità del concilio sul papa. Questa teoria raggiunse l'apice nel concilio di Costanza con il decreto *Haec sancta* (1415), che diede modo al concilio di risolvere lo scisma che aveva dato alla Chiesa due e poi tre papi contemporaneamente. La ricostituita unità della Chiesa latina restituì forza alle posizioni 'papaliste', che ebbero una prima riaffermazione con il decreto *Laetentur caeli* del concilio di Firenze (1439), che sancì l'unione della Chiesa greca con quella latina. Questi sviluppi non spensero il dibattito teologico e giuridico sulla questione, che d'altro canto sarebbe giunto a un punto d'approdo solo nel concilio Vaticano II, con la costituzione

[35]Brian Tierney, *Foundations of the Conciliar Theory: The Contribution of the Medieval Canonists from Gratian to the Great Schism* (Cambridge Studies in Medieval Life and Thought, n.s. 4; Cambridge1955) 23-105, *passim*; ristampa con una Introduzione dell'Autore contenente aggiornamenti tematici e storiografici (Studies in the History of Christian Thought 81; Leiden-New York-Köln 1998).

Lumen Gentium, n.22. Ma nei decenni post-tridentini, ed entro l'orizzonte della riforma cattolica, non solo non vi era spazio per riconoscere legittimità alle tesi conciliariste, ma era necessario, per così dire, depurare dai potenziali effetti antipapali le *auctoritates* dottrinali medievali che avevano alimentato l'idea della superiorità del concilio sul papa.

Una glossa di Giovanni Teutonico aveva ravvisato che nel *Decretum* di Graziano vi erano canoni suscettibili di condurre a conclusioni opposte, e ne aveva tentato una sintesi:

> Glossa a *dictum post* D.17 c.6, s.v. *iussione Domini*:
> Habet ergo Romana ecclesia auctoritatem a conciliis, sed Imperator a populo... Contrarium huic signatur 21 dist. Quamvis et 22 dist. Omnes, ubi dicitur quod Romana ecclesia habet primatum a Domino, et non a conciliis. Sed dic, principaliter habuit a Domino, secundario a conciliis.

Anche questo era un luogo che, a giudizio dei *Correctores*, meritava una chiara precisazione:[36]

> **Concilia proprie non dederunt primatum Romane ecclesiae, sed explicarunt datum a Domino.*

Un'altra celebre glossa aveva apertamente enunciato la superiorità del concilio, comprendente il papa, sul solo papa in materia di fede:

> Glossa in D.19 c.9, s.v. *concilium*:
> Videtur ergo quod papa tenetur requirere concilium episcoporum: quod verum est ubi de fide agitur: et tunc synodus maior est Papa, ut 15. dist. Sicut in fine. Arg. ad hoc 93 dist. Legimus.

Qui la reazione dei *Correctores* è più circostanziata:

> *Additio* alle parole *synodus maior* della glossa:
> **Synodus simul cum papa (de qua nunc glossa loquitur) est maior papa solo extensive, non intensive. Vide Caietanum Apologia parte 2 c.13 ad 6 et Turrecrematam summa de ecclesia li. 3 c. 64. Nec textus citati, si quid faciunt, aliud concludunt.*

La portata conciliarista della glossa di Giovanni Teutonico è sterilizzata in duplice modo. Da un lato i *Correctores* affermano che, a ben guardare, i passi del *Decretum* allegati dalla glossa

[36] La *Censura* di Manrique (1572) comandava che questa glossa fosse cancellata: 'Dist.17 c.6. Concilia. gl. ver. Iussione, ubi ait: Habet ergo Romana ecclesia authoritatem a Conciliis. Deleantur haec verba, una cum margine e regione posita, quae ait: Papa a conciliis etc.'

non danno effettivo sostegno alla conclusione della glossa stessa. Dall'altro i *Correctores* rinviano agli scritti di due tra le più sicure autorità della teologia cattolica, entrambe appartenute all'ordine dei Domenicani: in ordine cronologico, Juan de Torquemada (1388-1468), la cui *Summa de ecclesia* fu ripubblicata nel 1561 durante il concilio di Trento;[37] e Tommaso de Vio, il Gaetano (1469-1534), con la sua *Apologia de comparata autoritate Pape et Concilii*. In particolare, è in Tommaso de Vio che leggiamo la distinzione tra *potestas intensiva* e *potestas extensiva*. La prima è maggiore nel papa, che può fare da solo quello che potrebbe fare insieme al concilio. La seconda è maggiore nel concilio comprendente il papa, a causa della compresenza di una 'moltitudine universale di *sapientes in fide*'.[38]

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[37] *Summa de Ecclesia d. Ioan. de Turrecremata Tituli Sancti Sixti presbyteri Cardinalis, una cum eiusdem apparatu, nunc primum in luce edito, super decreto pape Eugenii IIII. in Concilio Florentino de Unione Graecorum emanato* (Venetiis, apud Michaelem Tramezinum, 1561) 352v-354r, Libro III, Cap. LXIV, *Cuius iudicio standum sit: si in concilio universali contingat patres a papa vel eius legato dissentire*. Fu una delle figure apicali della teologia del primato papale: 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) 113-124, 163-175; Antonia Fiori, 'Juan de Torquemada e la 'Nova ordinatio' del Decretum di Graziano (1451)', RIDC 29 (2018) 119-144; Eadem, 'Primato pontificio e fonti del diritto in Juan de Torquemada', RIDC 33 (2022) 209-231.

[38] *Tractatus secundus Thomae de Vio, Caietani Cardinalis S. Xysti, de Comparata autoritate Pape et Concilii Apologie pars prima et secunda*, in *Opuscula omnia Thomae de Vio Caietani, Cardinalis tituli Sancti Xysti, In tres distincta Tomos* (Lugduni, apud Gulielmum Rovillium, 1588), *Apologiae pars secunda*, cap. XIII, p.41: 'Concilia enim non propter potestatem intensivam, sed extensivam, et propter discussionem et collationem cum multitudine universali sapientum in fide, et propter indubitabiles et acceptatos ab omnibus iudices omni exceptione maiores, congregantur in materia fidei... licet papa solus tantae intensivae sit autoritatis, quantae ipse cum residuo: non tamen tantae extensivae, non tamen tantae sapientiae, non tamen tantae acceptationis indubitatae ab omnibus... non tamen tantae solennitatis... non demum tantae bonitatis et gratiae coram Deo: quae apud multitudinem hominum multum valet ad persuadendum quod a Spiritu sancto regitur, errare

Un altro caso interessante riguarda l'annotazione dei *Correctores* alla glossa in C.24 q.1 c.1. Giovanni Teutonico aveva applicato al papa un principio affermato da Graziano, ossia che un eretico è 'minor' rispetto a un cattolico:[39]

Glossa in C.24 q.1 c.1 s.v. *in heresim*:

> […] si papa hereticus est, in eo quod hereticus est, est minor quolibet catholico.

L'affermazione è incidentale e non giunge ad alcuna conclusione, ma sembra lasciare intendere che un papa eretico possa essere giudicato dalla Chiesa, o che *ipso iure* decada dalla carica.

I *Correctores* accostano un'annotazione alle citate parole della glossa:

> Idem To. Aquin. in 4. sent. distin. 19. Gabriel Biel in cano. Missae fol. 180 col.2. Philip. Deci. c. Cum venissent col. 3 de iudi. et in consi. 151 nu.4.

Le citazioni valgono a rafforzare il principio affermato dalla glossa, ma sorprende che a Tommaso d'Aquino[40] e Gabriel Biel[41] sia imprudentemente accostato un autore 'pericoloso' come Filippo Decio (1454-1535), con un passo dei *Commentaria*

non potest. Oportet enim ea quae totam Ecclesiam tangunt in singulis sic fieri, ut acceptabilia facillime omnibus sint: et ad hoc multum valent universalia concilia a probis precipue prelatis celebrata'. La distinzione tra prima e seconda parte della *Apologia*, alla quale fanno riferimento i *Correctores*, non è presente nella prima edizione: *Apologia R.P. fratris Thome de Vio Caietani S. Theo. professoris et Ordinis Predicatorum generalis Magistri de comparata auctoritate Pape et ecclesie* (Impressum Rome per Magistrum Iacobum Mazochium IIII. Ianuarii MDXIII) fol.22r. Per un suo profilo v. Wim Decock, 'Thomas Cajetan (1469-1534)', *Law and the Christian Tradition in Italy: The Legacy of the Great Jurists*, edd. Orazio Condorelli and Rafael Domingo, foreword by John Witte, Jr. (Law and Religion; Abingdon-New York 2020) 230-244.

[39] Orazio Condorelli, 'Il papa deposto tra storia e diritto', *Ephemerides Iuris Canonici*, n.s. 56 (2016) 5-30 (18).

[40] Cfr. Tommaso d'Aquino, *Super Sent*., lib. 4 d. 19 q. 2 a. 2 qc. 3 ad 1.

[41] Gabriel Biel, *Sacri canonis missae lucidiss. expositio* (Brixiae, apud Thomam Bozzolam, 1576) *lectio* 74, *De correctione fraterna, et eius ordine*, p.721.

sulle *Decretales*[42] e ancor più con il *consilium* 151. Ancora una volta constatiamo che si tratta di un'annotazione di Charles du Moulin, già colpita dalla *Censura* di Manrique (1572),[43] ma qui ripresa dai *Correctores* con la sola cancellazione delle quattro parole finali che ne dichiaravano la paternità:[44]

> ubi dixi in annot.

Le parole cancellate rinviano infatti alle annotazioni dell''empio'du Moulin ai *Consilia* di Decio,[45] che furono causa di un'ampia campagna di espurgazioni che colpì, oltre alla raccolta dei *Consilia*, anche i *Commentaria* sulle *Decretales* del giurista milanese. Proprio del *consilium* 151, scritto in difesa del 'conciliabolo' di Pisa (1511/12), la *Censura* pubblicata da Tomás Manrique nel 1570 aveva disposto la completa cancellazione.[46]

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[42] Filippo Decio, *Commentaria* in X 2.1.12, c. *Cum venissent* [*Philippi Decii Mediolanensis... In Decretales Commentaria diligentissime emendata...* (Venetiis, Franciscus Franciscius et socii, 1576) fol.206rb-207ra], in particolare ai nn.38-41, dove riporta il principio che il papa eretico è 'minor quolibet christiano'. Sull'autore v. il profilo di Maria Gigliola di Renzo Villata, 'Decio, Filippo', DGI 1.729-731.

[43] Manrique, *Censura* (1572) fol.13v: 'Pag. ead. (=905) Add. in marg. nu. 6. Minor. Idem Thom. et c. ibi, in fine, ubi dixi et c. deleantur haec verba'.

[44] Così nella citata edizione veneziana del 1567 che scampò alla censura. Si legge anche in Dumoulin, *Opera omnia*, IV, p.54, dove Pinsson però non rileva che l'annotazione era stata riprodotta nell'*Editio Romana*. Cosa che invece egli rileva a proposito di una precedente annotazione (inc. 'Istam glossam dicit esse singularem Abbas...', riferita alla glossa a *dictum ante* C.24 q.1 c.1, s.v. *Qui vero*), dove dice: 'Hoc Molinaei subnotatum ab emendatoribus usurpatum, et margini suae admixtum. F.P.'.

[45] Le annotazioni ai *Consilia* di Filippo Decio sono raccolte in *Caroli Molinaei... Omnia quae extant opera...* 3 (Parisiis, Sumptibus Nicolai Pepingue, 1681) p.753-830 (*In Consilia Philippi Decii Annotationes*). Alle p.770-771 l'annotazione sul *consilium* 151, parzialmente diversa da quella sopra citata: 'v. Minor: Idem Dec. c. cum venissent, col. 3 de iudiciis. Thom. Aquinas, Rich. de S. Vict. in sentent. distinct. 18. Gabriel Biel in can. lect. 74'.

[46] Sul punto v. Savelli, *Censori e giuristi* 53-54, a proposito della *Purgatio consiliorum Alexandri de Imola, et Philippi Decii* (Mediolani, apud Pacificum Pontium, 1570) pubblicata da Tomás Manrique. Ma il *consilium* non è cancellato dappertutto, perché la cancellazione non è imposta dagli indici di Anversa (1571) e di Madrid (1583) (Savelli, *Censori e giuristi* 118).

Ritengo che i *Correctores* non si siano accorti che il n.151 dell'annotazione riguardava il famigerato *consilium* condannato dalla Sede Apostolica, che permaneva cancellato nelle vecchie edizioni,[47] ma fu espunto in quelle purgate, ciò che fece mutare la numerazione dei *consilia*.[48] Non di meno, ancora una volta notiamo che la paternità del Molineo, agli occhi dei *Correctores*, non era in sé e per sé segno della presenza di 'perniciosi errori'.

Il papa, la legge e il diritto divino e umano

Interessanti interventi dottrinali dei *Correctores* si leggono a proposito del ruolo del papa come legislatore e della sua soggezione alle leggi ecclesiastiche. Come sempre, si tratta di annotazioni estremamente sintetiche, ma che rinviano a un amplissimo e plurisecolare dibattito dottrinale attraverso la citazione di autori di sicura impostazione cattolica.

Il titolo *de constitutionibus* del *Liber Extra* si apre con un canone del Concilio di Meaux (845) che in modo netto afferma:

> X 1.2.1.Canonum statuta [*sine praeiudicio*] custodiantur ab omnibus, et nemo in actionibus vel iudiciis ecclesiasticis suo sensu, sed eorum auctoritate ducatur.

La glossa ordinaria aveva specificato che l'obbligo di osservare le leggi riguarda tutti i sudditi, ma non il papa e l'imperatore, entrambi qualificati con la categoria del 'princeps' che, secondo il celebre frammento di Ulpiano tramandato dal Digesto (Dig.1.3.31), è 'legibus solutus':

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[47] Philippi Decii patricii Mediolanensis, Iureconsulti clarissimi, *Consiliorum pars prima* (Lugduni 1550), disponibile sul sito della Biblioteca Europea di informazione e cultura, www.beic.it. Qui, fol.122rb, il *consilium* 151 (Inc.: 'Divino implorato presidio, maximo ponderis est presentis casus materia') è totalmente cancellato a inchiostro. Si estendeva fino a fol.126r, ma i fogli 123-125 sono stati tagliati via.

[48] *Consiliorum sive responsorum praestantissimi Iurisconsulti Philippi Decii Mediolanensis, Tomus Primus. Nunc summo studio recognita, et expurgata; Adnotationibus multis, quae antea pium Lectorem, ac vere Christianum offendebant, sublatis, opera Nicolai Antonii Gravatii...* (Venetiis, Franciscus Franciscius et Socii, 1575) fol.162va. Qui il n.151 (inc. 'In causa exemptionis, quae Romae agitatur') corrisponde al n.152 dell'edizione citata nella nota precedente.

Glossa in X 1.2.1, s.v. *ab omnibus*:

> Sic et leges ab omnibus sunt servande, ut C. de legibus et constitutionibus l. Leges 1 et C. de iuris et facti ignorantia Constitutiones. Et dic ab omnibus, scilicet subditis. Nam papa et imperator legibus non constringuntur, ff. de legibus Princeps et 9 q.3 Cuncta. Tamen legibus se velle vivere profitentur, C. de legibus Digna vox et C. de testamentis Ex imperfecto et ff. de legatis 3 Ex imperfecto, et Inst. quibus modis testamenta infirm. § ultimo et 2. q.7 Nos si incompetenter.

Alla mancanza di un obbligo—aveva precisato il glossatore—supplisce la volontà del 'princeps', che in una celebre costituzione di Teodosio II si professa 'legibus alligatus' (Cod. 1.14.4).

La profondità del dibattito dottrinale su questo tema centrale del problema della sovranità[49] è sintetizzata dai *Correctores* nella citazione di due autori, il cui accostamento potrebbe sembrare azzardato ed è certamente insolito, Burcardo di Worms e Domingo de Soto:

Additio alle parole *non constringuntur* della glossa:

> Quoad vim coactivam. Leges tamen servare debent. Sotus lib. 1 de iustitia et iure q.6 arti. 7 et Burchardus lib. 15 decre. cap. 42.

L'affermazione della glossa—affermano i *Correctores*—è vera solo quanto alla 'vis coactiva' della legge.[50] L'accostamento di Burcardo a Domingo de Soto appare meno strano se constatiamo

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[49] Cortese, *La norma giuridica* 2.217-239; Idem, *Il problema della sovranità nel pensiero giuridico medievale* (Roma1966) 137-145; Kenneth Pennington, *The Prince and the Law, 1200-1600:Sovereignty and Rights in the Western Legal Tradition* (Berkeley-LosAngeles-Oxford 1993) 76-118; Diego Quaglioni, 'Dal costituzionalismo medievale al costituzionalismo moderno', *Annali del Seminario Giuridico dell'Università di Palermo* 52 (2007/2008) 55-67; Orazio Condorelli, '*Ius* e *lex* nel sistema del diritto comune (secoli XIV-XV)', *Lex und Ius: Lex and Ius. Beiträge zur Begründung des Rechts in der Philosophie des Mittelalters und der Frühen Neuzeit*, edd. Alexander Fidora, Mathias Lutz-Bachmann, e Andreas Wagner (Politische Philosophie und Rechtstheorie des Mittelalters und der Neuzeit. Abteilung II: Untersuchungen, 1; Stuttgart [Bad Cannstatt] 2010) 27-88 (39-53).

[50] Nella *Censura* di Manrique (1572) era stabilito che le parole in questione fossero cancellate: 'De constitutionibus. Lib.1 c.1. Canonum. gl. ver. Ab omnibus, ubi ait: Nam Papa et imperator legibus non constringuntur. Deleantur haec verba'.

che la citazione del vescovo di Worms riguarda in effetti un passo scritto da uno dei padri della sapienza medievale, l'Isidoro di Siviglia che in una delle *Sententiae* aveva affermato:[51]

> Iustum est, principem legibus obtemperare suis. Tunc enim iura sua ab omnibus custodienda existimet, quando et ipse illis reverentiam praebet. Principes legibus teneri suis, ne in se posse damnare iura, quae in subditis constituunt. Iusta enim vocis eorum auctoritas, si quod populis prohibent, sibi licere non patiantur. Sub religionis disciplina seculi potestates subiectae sunt.

La citazione del *De iustitia et iure* di Domingo de Soto[52] permette al lettore di risalire i rami della tradizione teologica fino a Tommaso d'Aquino.[53] Il 'princeps' non è sottoposto alla 'vis coactiva' della legge, perché non vi è nessuno che possa giudicarlo sulla terra. Ma egli è soggetto alla 'vis directiva' della legge ('lex omnis directiva est actuum humanorum', I^{a}-II^{ae} q.95 a.1 arg.3), in relazione alla quale egli rimane sottoposto al giudizio divino. Il 'princeps', in conclusione,

> debet voluntarius, non coactus, legem implere (I^{a}-II^{ae} q.96 a.5 ad 3).

Sul piano dell'obbligo morale e religioso si ricompone la distinzione tra 'vis coactiva' e 'vis directiva', nella direzione di una necessaria e dovuta obbligatorietà della legge anche per il sovrano.

Una annotazione dei *Correctores* sulla decretale *Quanto personam* di Innocenzo III (X 1.7.3) è particolarmente interessante: letta in connessione con l'annotazione sopra esaminata, essa rivela l'attenzione della scienza post-tridentina per una equilibrata comprensione della funzione del Romano

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[51] Burcardo, *Decretum* 15.42, tratto da Isidoro di Siviglia, *Sententiae* 3.51.1-3 (PL 83.723).

[52] *Dominici Soto Segobiensis, Ord. Praed. Theologi praeclarissimi, et Caesareae Maiestatis Caroli V. quondam a sacris confessionibus, De iustitia, et iure, libri decem* (Venetiis, Apud Minimam Societatem, 1594), Libro I, quaestio VI, *de potestate legis humanae, S. Thom. 1.2. quaest. 96*, *Articulus* VII, *Utrum omnes subiiciantur legi*, p.65b: tratta il tema dopo aver mostrato che la legge è *regula actionum directrix*, come tale dotata di *vis directiva*, ma possiede anche una *vis coercitiva*. Nella *conclusio* riguardante il punto che ci interessa: 'Princeps quantum ad vim coercitivam non subditur legi. Conclusio est aperta: quoniam coactio eiusdem ad seipsum esse non potest'.

[53] *Summa theologiae* I^{a}-II^{ae} q. 96 a. 5 ad 3.

Pontefice in relazione al governo della Chiesa e alle leggi divine e umane. Le decretali di Innocenzo III hanno fortemente contribuito alla edificazione teorica della monarchia papale. Il linguaggio innocenziano esalta le prerogative del papa, sfruttando pienamente una terminologia maturata nel corso dei secoli precedenti. Il linguaggio teologico e canonistico di Innocenzo III alimentò le intepretazioni dei giuristi del diritto canonico classico: essi definirono teoricamente i profili della potestà papale di giurisdizione e le modalità attraverso le quali l'azione del papa può incidere nel sistema giuridico.

La decretale *Quanto personam* (1198) riguarda il caso di Corrado di Querfurt. Corrado era vescovo di Hildesheim, ma era stato eletto dal clero di Würzburg come proprio vescovo, e si era trasferito nella nuova sede senza il permesso del papa. Fin dai secoli dell'alto medioevo il rapporto tra il vescovo e la propria Chiesa particolare era stato assimilato a un matrimonio: 'coniugium spirituale'. Il trasferimento di un vescovo da una sede a un'altra era considerato come una rottura di questo 'coniugium spirituale'. La legislazione canonica aveva cercato di limitare i trasferimenti, o comunque di regolamentarli in modo rigoroso. La storia mostra, tuttavia, che trasferimenti episcopali avvenivano con frequenza: spesso essi erano privi di una giustificazione (*utilitas ecclesiae*), ma erano, piuttosto, dettati dall'ambizione. Con le sue decretali Innocenzo III vuole affermare il potere del papa di controllare tale fenomeno: il trasferimento di un vescovo da una sede a un'altra deve essere disposto o approvato dal papa.[54] Nella decretale *Quanto personam* Innocenzo esprime, fra l'altro, questi concetti: Pietro è vicario di Cristo; i successori di Pietro sono vicari di Cristo, in forza del principio della successione petrina; il pontefice romano, successore di Pietro, fa le veci non di un semplice uomo (Pietro),

[54] Il tema è stato accuratamente studiato da Kenneth Pennington, 'Innocent III and the Divine Authority of the Pope', in Idem, *Popes, Canonists, and Texts 1150-1550* (Collected Studies Series 412; Aldershot 1993); è la rielaborazione del Cap. I di Kenneth Penningon, *Pope and Bishops: The Papal Monarchy in the Twelfth and Thirteenth Centuries* (The Middle Ages; Philadelphia 1984).

ma del vero Dio: 'Romanus Pontifex, qui non puri hominis, sed veri Dei vicem gerit in terris'. A margine di queste parole i glossatori disegnarono i tratti della *plenitudo potestatis* del papa. La glossa di Bernardo da Parma raccoglie e arricchisce le precedenti intepretazioni di Lorenzo Ispano, Tancredi, Vincenzo Ispano, Giovanni Teutonico:

> Glossa in X 1.7.3, s.v. *veri Dei vicem*:
>
> Unde dicitur habere celeste arbitrium, C. de summa trinitate l. I in fine. Et ideo etiam naturam rerum immutat, substantialia unius rei applicando alii, arg. C. communia de legatis l. II. Et de nullo potest aliquid facere, C. de rei uxorie actione l. unica in principio et de consecratione dist. II Revera. Et sententia que nulla est, facit aliquam, III q. VI Hec quippe. Quia in his que vult est pro ratione voluntas, Instit. de iure naturali § Sed quod principi placuit. Nec est qui ei dicat, 'cur ita facis?', de pen. dist. III § ex persona, alias est c. Quamvis. Ipse enim potest supra ius dispensare, infra de concessione prebende c. Proposuit. Idem de iniustitia potest facere iustitiam corrigendo iura et mutando, infra de appellationibus c. Ut debitus et infra de consanguinitate et affinitate c. Non debet. Et plenitudinem obtinet potestatis, II q.VI c. Decreto.

Il linguaggio della glossa è retorico e iperbolico. Occorre distaccarsi dalla prima impressione per comprendere che il giurista non dipinge l'immagine di un 'sovrano assoluto', cioè libero da ogni vincolo. Una puntuale analisi dei testi allegati nelle glosse non è oggetto della presente esposizione. Tale analisi, comunque, mostrerebbe che la *plenitudo potestatis* del papa si esplica massimamente nel campo del diritto positivo: in ogni caso, la giurisdizione del papa, e quindi la sua potestà legislativa, devono rispettare i vincoli che discendono dal diritto divino (naturale e positivo) e ovviamente dai principî della fede cattolica (limite della 'laesio fidei'). In questa sede mi limito a riproporre in successione l'impressionante serie di affermazioni che si leggono nella glossa: 'Perciò si dice che il papa ha una volontà celeste, divina'; 'Perciò il papa muta anche la natura delle cose, applicando a una cosa gli elementi sostanziali di un'altra cosa'; 'E dal nulla il papa può trarre qualcosa'; 'Il papa può convalidare una sentenza nulla'; 'Poiché nelle cose che vuole, la volontà tiene il posto della ragione'; 'E non vi è chi dica: perché fai questo?'; 'Infatti il papa può dispensare dal diritto'; 'E lo stesso papa può fare giustizia dall'ingiustizia,

correggendo o mutando le leggi'; 'E il papa ha la pienezza del potere (*plenitudo potestatis*)'.

Con i *Correctores Romani* ritorniamo nel cuore della esperienza giuridica post-tridentina. Una annotazione molto acuta avverte il lettore che la glossa deve essere compresa al di là delle espressioni retoriche e iperboliche che contiene.[55] A ben guardare, l'ambito in cui il papa può esercitare i suoi poteri 'creativi', così estesi come la glossa aveva messo in rilievo, è quello del diritto positivo umano, cioè delle leggi tradizionalmente qualificate come *leges mere ecclesiasticae*.

Additio alla glossa s.v. *veri dei vicem*:

> Tota haec glosa vix aliquid explicat propriis verbis: quod si bene intelligatur, vera astruit. Nam de nihilo aliquid facere est ius novum condere; et de iniustitia iustitiam, intellige per constitutionem iuris; et immutare substantiam rerum accipi debet in his que sunt iuris positivi. Et ita loquuntur iura que citantur.

I *Correctores*, insomma, guidano i lettori meno avvertiti alla corretta comprensione della glossa. Questa contiene affermazioni che non erano invenzioni dei glossatori, ma erano tratte dalle fonti di volta in volta allegate, o testualmente o per interpretazione. Se la glossa viene bene compresa—osservano i *Correctores*—essa afferma cose giuste:

> Infatti creare qualcosa dal nulla significa stabilire nuovo diritto; fare giustizia dalla ingiustizia deve essere inteso con riferimento alla produzione del diritto; e mutare la sostanza delle cose deve essere intepretato riguardo alle cose che sono di diritto positivo. E questo dicono le norme che sono allegate.

Imperium e sacerdotium

Un'altra celebre decretale di Innocenzo III, la *Novit ille* (1204), era divenuta una classica 'sedes materiae' per discutere delle relazioni tra 'sacerdotium' e 'imperium', potere ecclesiastico e potere secolare. Nella decretale, che riguardava un conflitto tra il

[55] Il particolare interesse di questa annotazione è stato segnalato da Brian Tierney, *Origins of Papal Infallibility, 1150-1350: A Study on the Concepts of Infallibility, Sovereignty and Tradition in the Middle Ages* (Leiden 1972) 27.

re di Francia Filippo il Bello e il re d'Inghilterra Giovanni Senza Terra, si legge la seguente affermazione:[56]

> X 2.1.13. Novit ille… Non ergo putet aliquis, quod iurisdictionem aut potestatem illustris regis Francorum perturbare aut minuere intendamus, quum ipse iurisdictionem et potestatem nostram nec velit nec debeat etiam impedire... Non enim intendimus iudicare de feudo... sed decernere de peccato.

Il glossatore Bernardo da Parma aveva tratto dalla decretale l'idea che la potestà della Chiesa in materia temporale non fosse *directa*, ma piuttosto 'indirecta', da esercitare 'ratione peccati':

> Glossa in X 2.1.13, s.v. *iudicare del feudo*:
> directe scilicet, sed tantum ratione peccati, et inducendo ad penitentiam.

La questione più delicata riguardava una controversia teorica con notevoli implicazioni pratiche, ossia se la Chiesa possedesse in radice tanto il 'gladius spiritualis' quanto il 'gladius temporalis'. Le parole di Innocenzo III inducevano Bernardo da Parma a ritenere che la Chiesa avesse solo il gladio spirituale:

> Glossa in X 2.1.13, s.v. *iurisdictionem nostram*:
> Per hoc quod dicitur hic, patet quod ecclesia non habet utrumque gladium... Imperium enim et sacerdotium ab eodem principio processerunt...

Queste affermazioni potevano apparire pericolose nei decenni successivi al concilio di Trento, un'epoca tormentata da permanenti conflitti tra Stati e Chiesa e permeata dalla diffusione delle ideologie variamente denominate come 'giurisdizionalismo', 'regalismo', 'gallicanesimo'. I *Correctores*, dunque, indicano al lettore (la formula è imperativa: 'tene') quale dottrina è necessario professare in questa materia.

> *Additio* alla glossa in X 2.1.13:
> De materia huius glossae tene quod declaravit Bonifacius octavus in extravaganti Unam sanctam et vide Turrecrematam in summa de ecclesia lib. 2 c.113 et 114.

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[56] Cfr. Orazio Condorelli, 'Gli accordi di pace (*foedera pacis*) e il principio 'pacta sunt servanda'*:* Note di ricerca nel pensiero dei giuristi dei secoli XII-XV (con un postludio su Grozio)', *Der Einfluß der Kanonistik auf die europäische Rechtskultur*. VI. *Völkerrecht*, a cura di Orazio Condorelli, Franck Roumy, e Mathias Schmoeckel (Norm und Struktur 37.6; Köln-Weimar-Wien 2020) 39-85 (66-65) e letteratura ivi citata.

Il riferimento è anzitutto alla bolla *Unam sanctam* di Bonifacio VIII (1302) (*Extravagantes Communes* 1.8.1), correntemente considerata una manifestazione apicale del pensiero ierocratico, seguito dalla citata *Summa de ecclesia* di Juan de Torquemada.[57]

Questioni e processi matrimoniali

Il libro quarto delle *Decretales* gregoriane, dedicato al diritto matrimoniale, è costellato di moltissime annotazioni dei *Correctores*, che rimandano alle novità legali introdotte dal concilio di Trento e agli sviluppi teologici e giuridici della dottrina sul matrimonio. Mi limito a due citazioni.

Il terzo titolo del libro quarto, *de clandestina deponsatione*, riguardava un tema sul quale il decreto tridentino *Tametsi* aveva introdotto una decisiva innovazione al regime tradizionale della celebrazione del matrimonio, imponendo, a pena di nullità, che il matrimonio fosse celebrato di fronte al parroco e a due testimoni.

Additio a X 4.3, *de clandestina deponsatione*:

> Clandestinas desponsationes et coniugia novissime irrita fecit et annullavit concilium Tridentinum sessione 24 de reformatione matrimonii cap.1 (11 nov. 1563, cap. *Tametsi*, COD 755-757) unde cessant de hac re veterum altercationes interpretum.

Un altro caso. La decretale *Consultationi tuae*, posta nel titolo *de sponsalibus et matrimoniis* (X 4.1.28), concerne le ipotesi di difetto del consenso e di consento estorto con violenza morale o per timore grave ('metus qui potest cadere in constantem virum'). Onorio III aveva stabilito che

> de illato metu est cum diligentia inquirendum.

La glossa ordinaria, prendendo spunto da questa affermazione, concludeva che le cause matrimoniali devono essere affidate solo a persone esperte di diritto:

Glossa in X 4.1.28, s.v. *cum diligentia*:

> Nota, quod dicit, cum diligentia... unde cause matrimoniales non sunt committende nisi iurisperitis, et qui potestatem habeant iudicandi...

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[57] Juan de Torquemada, *Summa de Ecclesia*, fol.260v-265v, lib. II Cap. CXIII, *De iurisdictione quam Romanus pontifex habet in temporalibus*, e fol.265v-269v, Cap. CXIV, *In quo exponitur qualiter Romano pontifici iure principatus sui competat iurisdictionem habere temporalium in toto orbe Christiano*.

I *Correctores* aggiungono una precisazione, necessaria in ragione di una inequivocabile prescrizione del concilio di Trento che escludeva in radice la possibilità che le cause matrimoniali fossero giudicate da giudici secolari:

> *Additio* alla glossa in X 4.1.28, s.v. *nisi iurisperitis*:
> Per iurisperitos non intelligas laicos, sed eos qui habent notitiam utriusque iuris, et theologiae: nam causae matrimoniales iudicibus ecclesiasticis sunt committendae, Concilium Trident. sessio. 24 de sacramento matrimonii canone 12 (11 nov. 1563, COD 755: 'Si quis dixerit, causas matrimoniales non spectare ad iudices ecclesiasticos, a.s.').

Questioni di diritto sacramentale

La definizione tridentina della dottrina dei sacramenti richiedeva che il lettore delle glosse fosse informato su errori dogmatici ivi contenuti o comunque fosse messo in condizione di interpretare correttamente le opinioni dei giuristi medievali.

Vediamo due esempi.

La decretale *Vir autem*, posta nel titolo *de secundis nuptiis* (X 4.21.3), stabilisce che il secondo matrimonio non deve essere benedetto da un sacerdote, perché la moglie o il marito sono stati previamente battezzati, e pertanto

> eorum benedictio iterari non debet.

Il glossatore prese spunto da queste parole per ampliare il discorso, e pronunciò una affermazione in materia di estrema unzione che fece trasalire i *Correctores*:[58]

> Glossa in X 4.21.3, s.v. *iterari*:
> Sacramenta enim iterari non debent... Tamen penitentia bene iteratur... Fallit etiam secundum quosdam in extrema unctione. Quid enim impediret hanc iterari, cum non sit sacramentum, sed oratio super hominem [...].

In primo luogo, i *Correctores* precisarono che il principio che i sacramenti non devono essere reiterati vale solo per quelli che 'imprimono un carattere':

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[58] La *Censura* di Manrique (1572) comandava che le parole contenenti l'affermazione eretica fossero cancellate: 'De secundis nuptiis. lib. 4. c.3. Vir autem. gl. ver. Iterari, ubi ait: Quid enim impediret hanc iterari, cum non sit sacramentum, sed oratio super hominem. Deleantur haec verba'.

Hoc verum de sacramentis imprimentibus characterem.

Non solo questo non era il caso dell'estrema unzione, ma era necessario correggere l'affermazione della glossa che essa non fosse un sacramento. Il concilio di Trento si era pronunciato in modo definitivo:

Additio alle parole *cum non sit sacramentum* della glossa:

Immo est unum de septem ecclesiae sacramentis; et contrarium asserere est haeresis demum damnata in concilio Tridentino sessione 7 de sacramentis canone 1 (3 marzo 1547, *Decretum primum*, *Canones de sacramentis in genere*, can. 1, COD 684), et sessione 14 de sacramento extremae unctionis cap. 2 et ibidem eodem tit. canone 1 (25 nov. 1551, *Doctrina de sacramento extremae unctionis*, cap. 2, COD 710, e *Canones de sacramento extremae unctionis*, can. 1, COD 713). Adde Sotum lib. 4 Sententiarum dist. 23 q.1 art. 1, ubi plenissime. Adde Lindanum lib. 4 c.28 Panopliae evangelicae.

Oltre alle norme tridentine e alla più usuale citazione di Domingo de Soto, nell'annotazione si segnala la menzione della *Panoplia evangelica* del teologo e vescovo olandese Wilhelmus Lindanus (Willem Damaszoon van der Lindt, 1525-1588), un arsenale teologico scritto, come affermato nel titolo, 'adversus infesta Catholice Christi Iesu Ecclesie hostium tela, et arietationes'.[59]

Un altro caso. Due *regulae iuris* del *Liber Sexus* di Bonifacio VIII (VI 5.[13].4 e 5) riguardano il rapporto tra peccato, pentimento, correzione e assoluzione del peccatore, con le relative implicazioni in materia di 'restitutio' dei 'male ablata'. La prima *regula* recita: 'Peccatum non dimittitur nisi restituatur ablatum', la seconda: 'Peccati venia non datur nisi correcto'. La materia è particolarmente spinosa, perché coinvolge in un

[59] *Panoplia evangelica, sive de verbo Dei evangelico libri quinque, quibus ex scriptura prophetica et Apostolica illius eruitur, et declaratur indoles atque natura... Denique verbum Dei non scriptum, sed traditum, adversus infesta Catholice Christi Iesu Ecclesie hostium tela, et arietationes omnes defenditur...* Nel frontespizio l'autore è indicato come *Vuilhelmus Lindanus Dordracenus S.D. Eccl Ruremund. Episcopus, Catholicae atque Apostolicae Christi Iesu Ecclesiae...* (Coloniae Agrippinae, excudebat Maternus Cholinus, 1575). Ma in realtà l'autore tratta dell'estrema unzione al c.96 del libro IV. Così anche nell'ed. 1559, edita nello stesso luogo dal medesimo tipografo. Su Lindanus v. Petrus T. van Beuningen, *Wilhelmus Lindanus als inquisiteur en bisschop: Bijdrage tot zijn biografie (1525-1576)* (Assen1966).

intreccio inestricabile questioni di teologia sacramentale, teologia morale e diritto.

Il glossatore Giovanni d'Andrea aveva fatto un volenteroso tentativo di formulare affidabili indicazioni ai lettori per la comprensione della seconda delle due citare 'regulae':

Glossa in VI 5.[13].4, s.v. *peccati venia*:

> [...] Ad huius regulae evidentiam scire debes, quod peccator non solum delinquit in Deum, set etiam in ecclesiam: per contritionem autem, que contritio virtus vocatur, deletur peccatum quoad Deum, per penitentiam susceptam a sacerdote ostenditur deletum quo ad ecclesiam […]

Giovanni d'Andrea, per la verità, non aveva detto nulla che contrastasse con la dottrina cattolica; semplicemente, nella glossa aveva omesso di precisare che l'assoluzione sacramentale dei peccati deve passare attraverso la confessione. Su questo punto i *Correctores* invitano i lettori a leggere 'con cautela' la glossa:[60]

Additio alle parole *ostenditur deletum quoad ecclesiam* della glossa:

> Caute intellige hoc dictum glosse, nec inde inferas non esse necessarium confiteri: nam quantumvis quis sit contritus, si habeat copiam sacerdotis, tenetur debito tempore ei confiteri; et virtute sacramenti tam attrito quam contrito dicuntur dimitti peccata. Vide concilium Tridentinum sessione 14. de sacramento paenitentiae, cap.4 et 5 et canone 9 (25 nov. 1551, *Doctrina de sanctissimis poenitentiae et extremae unctionis sacramentis*, cap. 4 *de contritione* e 5 *de confessione*, COD 705-707; e can. 9, COD 712). Et B. Thomam lib. 4 sent. dist. 17 q.3 art.1 q.1 et seq.

Sul tema della confessione dei peccati altre affermazioni che potevano disorientare i lettori si leggevano nella glossa sul *Decretum*.[61]

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[60] La *Censura* di Manrique (1572) comandava che le parole contenenti l'affermazione suscettibile di indurre i lettori in errore fossero cancellate: 'De regulis iuris. reg. 5 Peccati venia. gl. ver Peccati venia, ubi ait: et per paenitentiam susceptam a sacerdote ostenditur deletum quoad ecclesiam. Deleantur haec verba'.

[61] E infatti la *Censura* di Manrique (1572) fol.3r, aveva ordinato la cancellazione della glossa alla quale mi riferisco più sotto nel testo: 'Ibidem (=D.25 c.3) gl. ver. Quia facile. ait: Quia etiam laico possumus ea confiteri, quamvis habeat copia sacerdotis: sed mortalia non confitebimur nisi sacerdoti, dummodo possit haberi eius copia, alias laico possumus ea confiteri. Deleantur omnia haec verba, una cum marg. e regione posita, quae ait:

Nel *dictum post* D.25 c.3 Graziano introduce il tema dei requisiti dei candidati all'ordinazione, scanditi attraverso il riferimento alle prescrizioni paoline della prima Lettera a Timoteo (3.1-13), e della Lettera a Tito (1.5-9), nella quale si legge che il vescovo deve essere 'sine crimine'. Graziano si sofferma sul significato di *crimen* (§4), cominciando col dire che in senso largo esso comprende 'omne peccatum, quod ex deliberatione procedit'. E Graziano prosegue citando un frammento del commento di Beda sulla Lettera di Giacomo (5.16), che aveva esortato i fedeli a confessare i peccati gli uni agli altri. A proposito dei peccati veniali commessi 'ex ignorantia, vel ex infirmitate humana', Giovanni Teutonico aveva concluso che essi possono essere confessati a un laico, sebbene vi siano sacerdoti a disposizione; diversamente, i peccati mortali devono essere confessati solo ai sacerdoti, ma eventualmente anche a un laico qualora non ci siano sacerdoti a disposizione:

> Glossa in *dictum* post D.25 c.3, s.v. *quia facile*:
> Quia etiam laico possumus ea confiteri, quamvis habeatur copia sacerdoti: sed mortalia non confitebimur nisi sacerdoti, dummodo possit haberi eius copia: alias laico possumus ea confiteri [...].

I *Correctores* sono costretti a precisare che solo il sacerdote è il ministro della confessione sacramentale, con riferimento al solito Tommaso d'Aquino ma, stranamente, senza citare le deliberazioni del concilio di Trento:[62]

Confiteri laico possumus'. La glossa fu mantenuta, ma con l'annotazione dei *Correctores*, mentre il *notabile* 'Confiteri laico possumus' fu cancellato.

[62] Concilio di Trento, Sess. XIV, 25 nov. 1551, *Doctrina de sanctissimis poenitentiae et extremae unctionis sacramentis*, cap. 5 *de ministro huius sacramenti et absolutione*, COD 707-708. Nella stessa pagina dell'*Editio Romana* si leggono anche altre addizioni dei *Correctores* alla glossa in tema di confessioni e penitenza. Sul tema Orazio Condorelli, 'Dalla penitenza pubblica alla penitenza privata, tra Occidente latino e Oriente bizantino: Percorsi e concezioni a confronto', *La disciplina della penitenza nelle Chiese orientali*: *Atti del simposio tenuto presso il Pontificio Istituto Orientale, Roma, 3-5 giugno 2011*, a cura di Georges Ruyssen, S.J. (Kanonika 19; Roma 2013) 29-88 con la letteratura ivi citata, in particolare Amédée Teetaert, *La*

Additio alla glossa, s.v. *etiam laico*:

**Nec venialia nec mortalia possumus confiteri sacramentaliter, nisi sacerdoti, vide B. Th. 4 dist. 17. q.3 art.4 q.1.2 et 3.*

Usura e rapporti contrattuali

Il divieto canonico delle usure costituì un nucleo tematico intorno al quale, lungo molti secoli, ruotarono le discussioni intorno alla giustizia nelle relazioni contrattuali e nei rapporti economici. La materia era tradizionalmente un terreno di confronto fra giuristi e teologi morali, e non sorprende che in questo campo le annotazioni dei *Correctores* sollecitino i lettori a comprendere i problemi e cercarne le appropriate soluzioni attraverso una lettura convergente delle opere dei giuristi e dei teologi. Questo indirizzo metodologico emerge con chiarezza da una annotazione generale posta all'inizio del titolo *de usuris* del *Liber Extra* (X 5.19):

De materia huius tituli plurima canonistis valde necessaria tradit B. Thomas 2.2. q.78.

La stessa impostazione metodologica è riprodotta a margine delle singole decretali. Per esempio, nella decretale *In civitate* (X 5.19.6) Alessandro III aveva trattato la questione se fosse lecito un contratto di vendita con pagamento differito di un prezzo maggiore di quanto il bene valesse al momento della vendita. I *Correctores* rinviano il lettore a diffusissime opere di teologi morali quali Tommaso de Vio col suo commento alla *Summa Theologiae*, Silvestro da Priero con la *Summa summarum* altrimenti nota come *Sylvestrina*, Domingo de Soto col *De iustitia et iure*:

Additio a X 5.19.6:

De ratione huius decretalis vide plenissime per Caietanum apud B. Thomam 2.2. q.78 ad 7 argumentum, et per Sylvestrum verbo usura 2.q.2 et Sotum citatum infra eodem titulo in c. Naviganti (*a margine del quale è citato de iustitia et iure, libro VI, q.4 art2*.).

Come spesso accadeva, la glossa poteva contenere affermazioni corrette sotto il profilo giuridico ma erronee nella

confession aux laïques dans l'Eglise latine depuis le VIIIe jusqu'au XIVe siècle (Wetteren-Bruges-Paris 1926).

valutazione della teologia morale. Per esempio, che per i contraenti sia lecito ingannarsi reciprocamente:

> Glossa in X 5.19.6, s.v. *comparant*:
>
> non decepti in iusto pretio, sed scienter plus emerunt propter dilationem solutionis; si enim decepti essent, quia darent ultra pretium iustum, non haberent speciem usure: quia licet contrahentibus sese ad invicem decipere... (*con sigla finale di Alanus Anglicus*).

Ancora una volta, il rinvio alle opere dei teologi serve per insegnare ai lettori che diversa è la valutazione della 'lex divina':[63]

> *Additio* alle parole *sese ad invicem decipere* della glossa:
>
> Hoc lege civili permittitur, sed lege divina non licet. Ceterum de hoc dicto vide plene per B. Thomam 2.2. q.77. art.1 ad primum argumentum et Dominicum Sotum lib. 6 de iustitia et iure q.3 ar.1 ad 1. arg.

Lo spirito degli interventi dei *Correctores* in questa materia emerge con evidenza in un'annotazione posta a margine di una glossa al c. *Conquestus* (X 5.19.8). La decretale di Alessandro III aveva dato al glossatore occasione di enumerare una serie di casi che non costituirebbero usura anche quando una persona percepisca qualcosa oltre il capitale ('ultra sortem recipiendo').[64] I *Correctores* avvertono il lettore che in questa materia il rischio di sbagliarsi è notevole, ma può essere evitato consultando i teologi. I nomi citati rimandano ai più autorevoli e diffusi maestri: Tommaso d'Aquino col suo commentatore Tommaso de Vio, Domingo de Soto, Martín de Azpilcueta con il suo *Manuale confessariorum*, Silvestro da Priero e gli altri summisti:

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[63] Nella *Censura* di Manrique (1572) era stabilito che le parole contenenti l'affermazione contraria alla *lex divina* fossero cancellate: 'De usuris. lib. 5. c.6. In civitate. gl. ver. In civitate. ubi ait: Quia licet contrahentibus sese ad invicem decipere. Deleantur haec verba'.

[64] Glossa in X 5.19.8, s.v. *de feudo*. Sul dibattito medievale sul c. *Conquestus* v. Orazio Condorelli, 'Sul contributo dei canonisti alla definizione del concetto di interesse: Frammenti di ricerca (metà sec. XII-metà sec. XIII)', *Der Einfluß der Kanonistik auf die europäische Rechtskultur*: V, *Das Recht der Wirtschaft*, edd. David von Mayenburg, Mathias Schmoeckel, Orazio Condorelli, e Franck Roumy (Norm und Struktur 37.5; Köln-Weimar-Wien 2016) 23-60, *passim*. Wim Decock, *Le marché du mérite: Penser le droit et l'économie avec Léonard Lessius* (Bruxelles 2019) 59-81, documenta come questi problemi teorici e pratici fossero compresi e risolti in età moderna.

Additio alla glossa in X 5.19.8, s.v. *de feudo*:

> In hac glossa continentur multi articuli de quibus dubitatur, an sint usurarii necne, et ob id ne quis facile labatur, praeter canonistas hic consulat theologos. B. Thomam, et ibi Caietanum 2.2. q.78 per totum. Sotum lib. 6 de iustitia et iure q.1.2 et seq. Navarrum in Manuali confessariorum, c.17. Sylvestrum et summistas verbo, usura.

Conclusione. Invito a un'indagine

Questi pochi saggi di ricerca sulle addizioni dei *Correctores* alle glosse al *Corpus* canonistico mostrano un approccio differenziato verso i testi dei glossatori medievali. Era necessario avvertire i lettori quando le glosse contenevano affermazioni erronee o che comunque richiedevano di essere precisate; era necessario indicare le innovazioni legislative scaturite dal concilio di Trento; era utile offrire suggerimenti di lettura con rinvii alle opere di autori di provata fede cattolica. Tali autori—almeno nei testi qui selezionati—sono prevalentemente scelti all'interno della letteratura teologico-morale, a partire dall'onnipresente Tommaso d'Aquino per giungere ai teologi, ai giuristi e ai teologi-giuristi del secolo XVI. Come leggiamo nell'ultima addizione sopra citata, il duplice sguardo della teologia e del diritto era per il lettore una garanzia contro l'errore o il disorientamento: 'ne quis facile labatur, praeter canonistas hic consulat theologos'. Per questi aspetti (e per molti altri aspetti ancora) l'opera dei *Correctores Romani* merita di essere indagata come una preziosa testimonianza dei metodi e dei contenuti della scienza canonistica post-tridentina.

Università di Catania.

The Judicial Function of the Bishop in the Church of the First Centuries

Piotr Gałdyn

Introduction

The exercise of judicial power by the bishop throughout history. This is a topic to which we return, and which was the subject of many scientific interests, especially in 2015, when Pope Francis reformed the procedural law of marriage. The task of the reform was primarily to simplify the procedure for annulment of marriage in the canonical court process, and consequently to guarantee even greater just justice within the limits of the decision. At the same time, it is necessary to renew the principles of synodality in the pastoral service of justice and to indicate the central place of the bishop in the exercise of judicial power.[1] Massimo del Pozzo calls the new regulation a reform 'nella continuità storica' and points out that the fundamental elements of the renewal carried out by Pope Francis already existed before in the different proposals of the Supreme Legislators of the Church and doctrine.[2]

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[1] Francisco, *m. p. Mitis Iudex Dominus Iesus*, AAS 107 (2015) 958-967, Preamble, III: 'In order for the teaching of the Second Vatican Council to be finally translated into practice in an area of great importance, it has been established to make evident that the same Bishop in his Church, of which he is constituted pastor and head, is by that same judge among the faithful who have been entrusted to him. . . . And do not leave the judicial function in matrimonial matters completely delegated to the offices of the curia. Although there is the possibility of delegating this function and its exercise through others, but the reform is based on raising the personal exercise of the bishop of this legal-pastoral service as "the closest court"'. And in the Preamble, IV is added: 'It is precisely for this reason that I wanted the bishop himself to be constituted a judge in such a process, who by virtue of his pastoral office is with Peter the greatest guarantor of Catholic unity in faith and discipline'. Cf. also *the fundamental pillars of the reform,* in *Application Subsidy* 9-12.

[2] See Massimo Del Pozzo, *Il processo matrimoniale più breve davanti al Vescovo* (Roma 2016) 41; on the historical development of the elements of the reform cf. Del Pozzo, *Il processo* 41-52; Joaquin Llobell, *Los procesos*

We will attempt to analyze the most direct and reliable testimonies presenting the bishop's judicial activity. This reality appears in the ancient world as a completely new event, born in the Church and dominant in its history between antiquity and the early Middle Ages. It is above all the bishops who participate in the development of legal life as legislators. They exercise their legislative and judicial power in various possible ways. Be it as individual legislators, or in synods or councils, as a broad legislator—that is, a member of the assembly. Finally, as judges within the limits of their powers (canonical processes). The jurisdiction of the bishop in disputes between Christians was born and developed in the Church for three centuries, and his action is even more important because no one was more prepared and fit than the bishop to resolve the dispute and restore harmony.

The Time of the Apostles

Since their presence the successors of the Apostles have exercised judicial power.[3] Indeed, Christ very clearly teaches how judicial ministry is to be exercised.[4] The Church is the recipient of the power to judge. Therefore, the twelve must carry out the task of judging their brothers, that is, together with their role of guide and pastor, they perform the role of judge in internal conflicts of the community.[5] The most famous passage in which Christ entrusts the power to Peter is that of Mt 16: 18-19.[6]

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matrimoniales en la Iglesia (Madrid 2014) 35-37; Juan Goti Ordeñana, *Tratado de derecho procesal canónico* (Madrid 2001) 92.

[3] Cf. Javier Salegui Urdaneta, 'La potestad judicial en la diócesis', *Cuadernos doctorales. Derecho canónico, derecho eclésiastico del Estado: Excerpta e dissertationibus in iure canonico* 23 (2009) 53-94 at 54.

[4] Cf. Mt 5:21-26.

[5] Javier Belda Iniesta, '*El ministerio judicial del Obispo hasta el surgimiento de la Lex Christiana (ss. I-IV)*', *Anuario de Derecho Canónico* 4 (2015) 387-401 at 390; Cf. Mt 28, 20; Acts 20: 25-27; 2 Tm 4, 6s; 1 Tm 5. 22; 2 Tm 2, 2; Tit 1, 5; LG 20.

[6] 'Now I tell you: you are Peter, and on this rock, I will build my Church, and the power of hell will not defeat it. I will give you the keys to the kingdom of

The great expansion of Christianity in Europe caused, in a broad sense, changes in different spheres of life. The presence of a new society in the Roman world created the need to adapt both realities that coexisted in a common political and cultural space.[7] It must be borne in mind that Christians of diverse origins not only needed to accommodate themselves within a great Empire, but also had to proceed to an internal organization, in which the administration of justice is a basic element.[8] In building that system, Christians looked to God's Word for help and inspiration:[9]

> If your brother sins against you, rebuke him while the two of you are alone. If he listens to you, you have saved your brother. If he doesn't listen to you, call another or two others, so that the whole matter is confirmed by the mouth of two or three witnesses. If you don't listen to them, tell the community, and if you don't even pay attention to the community, consider them as a pagan or a publican.

Evidently both the theological and legal character of this passage resonate. 'Fraternal correptio' is not intended to punish or heal the effects of the brother's negative behavior; rather, it is about the rehabilitation of the sinner through the proper action of the Church.[10] With such a resolution we will be, above all, in the sphere of fraternity and charity. However, it should be noted that each sin carries with it consequences that influence public life. All of this requires a special form of justice.

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heaven; whatever you bind on earth will be bound in heaven, and whatever you lose on earth will be loosed in heaven'.

[7] Iniesta, 'El ministerio judicial' 388; Ignacio Manuel Castaños-Mollor, *La secularidad en los autores cristianos de los primeros siglos* (Pamplona 1981) 474.

[8] Ibid. 389.

[9] Mt 18:15-17.

[10] Luca Loschiavo, 'Non est inter vos sapiens quisquam, qui possit iudicare inter fratrem suum? Processo e giustizia nel primo cristianesimo dalle origini al vescovo Ambrogio', *Ravenna capitale: Giudizi, giudici e norme processuali in Occidente nei secoli IV-VIII*, edd. Gisella Bassanelli Sommariva, S. Tarozzi, and P. Biavaschi (Sant'Arcangelo di Romagna 2015) 67-106 at 68.

The Pauline Precept

The Pauline text 1 Cor 6: 1-7 is the starting point of the bishops' intervention to resolve conflicts between members of their own community:

> Is there anyone among you who, having a dispute with another, dares to bring him to trial before the wicked and not before the saints? Have you forgotten that the saints will judge the universe? Well, if you are going to judge the world, will you not be at the height of judging minutiae? Remember that we will judge angels; how much more, matters of ordinary life. So, to judge ordinary affairs you give jurisdiction to people who do not count in the Church. Aren't you ashamed? Is it that there is no understanding among you who is capable of arbitrating between two brothers? No sir, a brother has to be in dispute with another and also between Gentiles. From any point of view, it is already a ruling that there are lawsuits between you. Wouldn't it be better to suffer injustice? Wouldn't it be better to let yourself be robbed?

Paul recommends that conflicts and disputes between Christians should not be brought before pagan judges but be resolved by the authority of the elders of the ecclesial community itself and of the bishops.[11] Since then, the bishop has the power to settle the controversy between his diocesans, and later, those that arose between Christians and pagans. Prof. Rodríguez-Ocaña presents two positions on judicial action in the first ancient Christian communities. According to some authors, the Pauline text is a pericope in which we can find the basis for the existence of the judicial organization in the Church where Saint Paul presents

[11] Beatriz García García, 'La *Episcopalis Audientia* posclásico-justinianea y la jurisdicción episcopal de Alonso de San Martín, hijo de Felipe IV (1642-1705), REDC 27 (2014) 49; Loschiavo, 'Non est inter' 73-74: 'L'apostolo è anzitutto chiarissimo nell'escludere che scandalo delle liti tra cristiani possa essere portato alla cognizione di giudici esterni alle comunità . . . egli fa evidente riferimento a un semplice membro della comunità che, oltre a partecipare della fede in Cristo, sia dotato delle necessarie competenze per svolgere il ruolo di giudice-arbitro nelle liti tra i propri compagni di fede . . . che doveva consentire ai cristiani di non litigare di fronte ai giudici pagani, in quel medesimo personaggio che si stava affermando come il punto de riferimento "naturale" per ogni comunità: il sommo sacerdote e, allo stesso tempo, il custode cui era affidato il gregge, in una parola, l'*epíscopos*'.

himself as a member of the community who performs the role of mediator or arbitrator between the parties in conflict.[12] Other authors, on the contrary, maintain that this New Testament fragment refers to a specific case that arises among the faithful and neither could any court be founded.[13] Only the bishops were prepared to intervene and resolve the conflicts that arose between the members of the community. By the spirit of charity, encouraged by the bishop, he was able to heal the difficult situation himself and get the parties to agree. The faithful, to the bishops who carried out the function of the head of their own particular Church, give them confidence in the field of the administration of justice.[14]

It must be borne in mind that disputes between Christians were not voluntary, and that the parties could not present the lawsuit before a civil court; thus, Devoti explains:[15]

> Therefore, the judgment of Christians was not involuntary in the controversies of other Christians, and because it depended on the discretion of the litigants, but not necessary since the judges themselves were prohibited from seeking outside the Christian republic.

The bishop becomes an arbitrator in all aspects, both spiritual and disciplinary, of the life of the members of his own community.[16] Therefore, it should be noted that the bishop, as

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[12] Cf. Rafael Rodriguez-Ocaña, 'Compete a los fieles reclamar y defender los derechos que tienen en la Iglesia', *Ius Canonicum: Escritos en honor de Javier Hervada* (1999) 337-366 at 338.

[13] Ibid.

[14] Giulio Vismara, *La giurisdizione civile dei vescovi* (Milano 1995) 7-8: 'Nessuno più del vescovo era preparato e adatto per decidere una lite e ristabilire tra fratelli, a motivo della conoscenza che il capo religioso della Chiesa locale aveva delle persone, dei loro interessi e delle loro questioni. Al vescovo conferivano autorità lo spirito di carità che lo animava, e la fiducia e la stima che i fedeli gli riconoscevano'.

[15] Joannis Devoti, *Institutionum canonicarum* 3 (Matriti 1819) 14: 'Itaque Christianorum iudicium in aliorum Christianorum controversiis non voluntarium erat, quodque a litigantium arbitrio pendere, sed necessarium, quoniam ipsi extra Christianam rempublicam judices quaerere prohibebantur'.

[16] Loschiavo, 'Non est inter' 76.

the head of a Christian community, has the duty to intervene in all matters.[17]

The Early Church and the First Christian Communities

The documents of the first centuries of the Church present the exercise of judicial power by the Superiors of the Christian community in spiritual matters. Saint Clement Roman in a Letter to the Corinthians tries to abandon the schism and obey the bishop.[18] Also, Saint Cyprian in his epistles speaks of the *auctoritas* of the bishops and presents it as a mission entrusted by Christ to the Apostles to correct, teach, exhort, establish norms and precepts, and finally excommunicate from the community.[19]

There are many judicial interventions by the popes.[20] Various synods, in Alexandria, Rome, Antioch, Elvira, Carthage,

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[17] Francisco Jose Cuena Boy, *La Episcopalis Audientia* (Valladolid 1985) 3: '. . . en los primeros siglos de la Iglesia no debía existir una neta separación entre las diversas materias de las que conocía el obispo, sino que, en virtud del principio general, formulado por San Pablo, que impedía a los cristianos acudir ante los tribunales paganos, y en virtud también de su posición como jefe de cada comunidad cristiana, el obispo debía intervenir en toda clase de cuestiones'.

[18] Cf. Clemente Romano, *I ad Corinth.* 59, in Adolphe Tanquerey, *Synopsis Theologiae dogmaticae fundamentalis* (Parisiis 1949) 483; Wacław Abramczyk, 'Rozwój jurysdykcji sądów kościelnych do 1234 roku', *Studia Płockie* 2 (1974) 79-105 at 80.

[19] San Cipriano, *Carta* 67, 4, 1 in Jose Antonio Del Camino, *Obras de San Cypriano obispo y martir* (Valladolid 1807) 311: 'Pues para eso ha recibido el poderío de elegir á los dignos, y desechar á los indignos. Ello es una disciplina que trae su origen de la misma divina autoridad, que el obispo sea escogido en presencia y á vista de todo el pueblo, y que le califique por apto é idónea el público testimonio de la gente, ... A la faz de todo el pueblo manda Dios que sea creado el sumo sacerdote, dándonos á entender que las ordenaciones de los obispos no deben hacerse en otra forma, para que hallándose todos presentes, se descubran las costumbres de cada uno, los vicios de los malos, y las virtudes de los buenos, y se acredite de justa y legítima la que ha merecido los sufragios, y la aprobación de todo'. Cf. Luis Javier Garrote Bernabé, 'Existencia y ejercicio de la potestad de jurisdicción del obispo en los siete primeros siglos', *Cuadernos Doctorales* 16 (1999) 258-318 at 276-277.

[20] As, for example, Pope Ceferino, who made the decision to exclude the Montanists from the Church, Pope Esteban, when he judges a bishop of

and Cartagena, make decisions that presuppose the existence of the *potestas iudicialis.*[21]

In the post-apostolic age,[22] around the year 70, appears one of the oldest sources of ecclesiastical legislation *Doctrina*

Alexandria accused of favoring a Sabbath heresy: cf. Abramczyk, 'Rozwój jurysdykcji' 80.

[21] Synod of Antioch (a.341), canon 15: 'Si quis episcopus de certis criminibus accusatus condemnetur ab omnibus episcopis eiusdem provinciae, cunctique consonante reandem contra eum formam decreti protulerint, hunc apud alios nullos modo iudicari, sed firmam concordantium epis coporum provinciae manere sententiam': Pericles-Pierre Joannou, *Discipline genérale antique (IIe-IXe s.)*(Rome 1962) 116; Synod of Cartagena (419), canon 122: 'A iudicibus autem, quos communis consensus elegerit, non liceat provocare; et quisquis provocatus repertus fuerit per contumaciam nolle obtemperare iudicibus, cum hoc primae sedis episcopo fuerit probatum, det literas, ut nullus ei communicet episcoporum donec obtemperet': Joannou, 'Discipline' 394; Several councils of Alexandria, celebrated between a.231 to 633 take judicial decisions on various heresies, disobediences and other crimes, until punishing with the penalty of excommunication. In the year 231 the Council Fathers summoned by Bishop Demetrio met to excommunicate Origen; in the council of the year 321, Arius was condemned; in the year 430 the pontifical admonition to Nestorius was proclaimed, contained in the letter of Pope Celestine I: cf. Francisco Joseph Xavier Receveur, *Historia de la Iglesia* (Madrid 1842) 364-365. In the year 251 S. Cipriano convenes the council in Carthage where, in addition to dealing with other issues, the cases against Felicissimo and five priests who were accomplices of the schism were resolved. The culprits after presenting their defense had been sentenced to excommunication. This council also establishes the system of dealing with causes one by one, examining peculiar elements of each situation and the rules that must be applied in concrete cases: cf. Receveur, 'Historia' 238-240.

In the year 252 the II Council of Carthage is celebrated; Meanwhile, the excommunicated Bishop of Lambeso in Numidia had presented himself before the Council Fathers to have his cause reviewed: cf. Receveur, 'Historia' 259-261.

The III Council of Carthage condemns the Bishops of Spain Basilides and Marcial for acts of idolatry: cf. Ibid. 269-270.

Pope Cornelius convokes a council in Rome in 251 where the doctrine of Novatian is condemned; All the regulations of Carthage were also approved, since they were apostates, and the canon on the reception of Bishops after their penance was recognized: cf. Ibid. 246-247. The council of Elvira (a. 305) with the disciplinary canons and their provisions: cf. Ibidem 361-362; Abramczyk, 'Rozwój jurysdykcji' 81.

duodecim apostolorum.[23] *The Lord's Instruction to the Gentiles through the Twelve Apostles*, also called *Didachè*, presents and regulates the life of the early Christians in the second century. The whole of the work is made up of moral, liturgical, and disciplinary norms and instructions. Among the broad moral and liturgical provisions, the work provides a brief set of disciplinary norms.[24] Although conflicts between Christians can appear in daily life, the admonition of the brothers must always be carried out on the evangelical basis. Any admonition must unfold in peace and bear good fruit for the whole community. Therefore, in the sphere of fraternity and charity, the 'fraternal correptio' is applied.[25]

Saint Hippolytus of Rome, among his various writings, places the *Traditio Apostolica* as the most important text of antiquity.[26] Although in the West the work did not have great influence, nevertheless, in the East it becomes a great source for various ecclesiastical constitutions. Directly the text says nothing about the prosecution of the bishop, but the deal with the hierarchy and presenting the rules of episcopal ordination, among

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[22] Another source from this time that comes from the year 141 to 155 is the famous *Shepherd* of Hermas, which in its content also presents the state of the Roman Christian communities in the second century. The main objective of the play is admonition and invitation to penance. The social and moral life of the Christian-Roman community is carried out by Christians of all kinds, good and bad, presented in a vision like the stones that build the church-tower. Among them we find, at the same time, deacons, priests, and bishops who carry out their proper functions for society, even those who do wrong. Therefore, the penitential doctrine of the *Pastor* underlines the universal character of forgiveness, that is, everyone must repent in order to be saved. The work appears as a guide for those who commit sins or crimes, explaining penance as an immediate act that produces amendments.

[23] *Doctrina duodecim Apostolorum*, Franz Xaver von Funk, *Patres Apostolici*, (Tübingen 1901) 1.3-37 (hereinafter, *Didachè*).

[24] *Didachè* 15.3: 'Arguite autem vos invicem, non in ira, sed in aequanimitate, sicut habetis in evangelio; and if you want adversus alium deliquerit nemo loquatur cum eo, neque apud vos audiat, donec paenitentiam egerit'.

[25] Vismara, *La giurisdizione* 16.

[26] Hipólito de Roma, 'La Tradición Apostólica', *Cuadernos Phase* 75 (1996) 23-49.

others lists the functions of the '*episcopus*'.[27] Implicitly we can deduce that, by virtue of the supreme power of Christ, the bishop in his community exercises full power as, 'per analogiam', the power given to the apostles, among which is also the 'potestas judicialis'. The bishop being the pastor of the particular Church and the first priest is presented by Hippolytus as someone who has authority in all the realities of the Christian community.

The best source that informs us about the bishop's performance as judge is the *Didascalia Apostolorum*.[28] The document had probably been drawn up by a bishop around the year 230 in Syria or Palestine. The author proposed a regulation on the performance of persons endowed with the judicial ministry in their own community. The text presents a development of judicial activity in the first centuries. Any legal action is based on charity and must be exercised with great mercy.[29] The objective of the *Didascalia Apostolorum* is to apply evangelical justice,[30] and the search for reconciliation by the judge between the confronted.[31] The author explains that administrators of justice, to do it well, must practice peace and harmony. Those who exercise the judicial ministry 'anticipate in the judgment of God, and if anyone acts unjustly, God will play him in the same way'.[32]

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[27] Ibid. 3.25.

[28] Cf. Franz Xaver Funk, *Didascalia et constitutiones Apostolorum* (Paderborn 1905) (hereinafter, *Didascalia Apostolorum*).

[29] Cf. *Didascalia Apostolorum* 142.

[30] *Didascalia Apostolorum* 144: 'Et scito decere episcopum cum presbiteris iudicare caute, sicut salvator noster dixit nobis ipsum interrogantibus: Quoties, si frater meus in me peccaverit, dimittam ei usque septies? Ipse autem, Dominus noster, docuit nos dixitque nobis: Non septies tantum, dico vobis, sed usque septuagies septies'.

[31] Cf. *Didascalia Apostolorum* 152-154. Loschiavo, 'Non est inter' 77: 'Nell'azione del vescovo che interviene a riportare la pace tra i fratelli è non tanto il fine di censurare e punire, e nemmeno quello di attribuire il torto e la ragione tra i litiganti. Piuttosto, il vescovo, anche quando è chiamato senz'altro a giudicare, dovrà anzitutto favorire la pacificazione e perseguire la riconcilazione fra i fedeli e quindi il ritorno della concordia nella porzione di gregge a lui affidata'.

[32] Iniesta, 'El ministerio judicial' 397.

The *Didascalia Apostolorum* notes:[33]

Therefore, O bishop, hurry up and be clean by works, and know your place, for you are set in the power of the Almighty, observing the likeness of Almighty God. Sit, then, in the church, making the word, as if you had the power to judge in the name of God those who have sinned, because it has been told to you, bishops, by the Gospel.

However, it is clear, in this text, that the person who has the function of judging is the bishop.[34] Although the possibility of going to the bishop or not was a matter of conscience, however, appearing before another court would mean apostatizing.[35] The regulations establish the days of the process,[36] who should assist the bishop[37] and equality between the parties to the dispute.[38] The bishop should be guided by the spirit of conciliation without favoring or offending any of those who come to court. Because he was chosen by 'popular decision, he is admired and even venerated by his community, which considers him a just and

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[33] *Didascalia Apostolorum* 46: 'Propterea igitur, o episcope, festina, et mundus sis operibus, et agnosce locum tuum, quoniam in omnipotentis virtute positus es, observans similitudinem Dei omnipotentis. Et ita in ecclesia sede verbum faciens quasi potestatem habens iudicare pro Deo eos, qui peccaverunt, quoniam vobis episcopis dictum est per Evangelium'.

[34] Ibid. 122-124: '. . . Episcopis vero potestas data est iudicandi . . .. Decet igitur episcopum, ut instar eius qui probat argentum, dicernat mal et eos, qui prorsum mali sunt, reprobet et reiciat, eos autem, qui duri sunt et ob aliquam causam imperfecti, tanquam imperfectos relinquat in fusura'. Loschiavo, 'Non est inter' 81; Iniesta, 'El ministerio judicial' 398.

[35] Ibid. 124: 'Además, toda autoridad viene de Cristo, que actúa directamente en los tribunales presididos bajo su autoridad, por lo que acudir a otro tribunal podría ser, de algún modo, considerado como apostatar del único Juez que el creyente puede reconocer': Iniesta, 'El ministerio judicial' 398; 'Laico autem non licet iudicare proximum neque onus in se suscipere, quod non est ipsius; nam pondus huius oneris non laicorum est, sed episcoporum'.

[36] Ibid. 142: 'Primum iudicia vestra fiant secunda sabbati, ut, si quis exsurgat adversus sententiam verborum vestrorum, vobis spatium sit usque ad sabbatum, ut negotium componatis et dissentientes inter se pacificetis ac concilietis die dominica'.

[37] Ibid.: 'Ergo assistant omnibus iudiciis presbyteri ac diaconi cum episcopis'.

[38] Ibid.:'. . . recte eis auditis edite verbum suffragii et operam date, ut eos in caritate conservetis, priusquam sententia in eos evadat, ne in aliquem ex eis, cum frater sit . . .'.

wise man, suitable to guide them, both spiritually and socially'.[39] The bishop must avoid all situations that can provoke injustice:[40]

> Therefore, let it be in your hearts, bishops, that you do not hasten to sit quickly in court, lest you be compelled to condemn anyone; but before they come and appear before the court, admonish them, and make peace between those who have a mutual judgment and dispute.

The bishop's task was to reconcile, as far as possible, the parties. The trials began on Monday so that, in case of any incompatibility, the parties had time to complete the faults and finish the controversy until Saturday.[41] The legal action began at the initiative of both parties, or by one that acted as the accusing party. In the latter case, the judge was obliged to investigate the plaintiff's moral qualifications and the reason for the trial.[42]

Apart from that, St. Cyprian of Carthage in his epistles recognizes the idea of the local Church, which as a portion of the people of God is led by a pastor. This gathers in his hands the power to govern the faithful. One of the emanations of these *potestas* is the presence of the bishop-Pastor institution and at the same time implicitly the bishop-judge:[43]

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[39] Pere Maymó i Capdevila, 'La episcopalis audientia durante la dinastía teodosiana: Ensayo sobre el poder jurídico del obispo en la sociedad tardoromana', *Actas del Congreso Internacional La Hispana de Teodosio I*, edd. Ramón Teja and Césareo Pérez González (Salamanca 1997) 165-170. Cf. Iniesta, 'El ministerio judicial' 397.

[40] *Didascalia Apostolorum* 150: 'Itaque vobis cordi sit, episcopi, non festinos esse sedendi in tribunali celeriter, ne cogamini aliquem condemnare; sed priusquam veniunt et ante tribunal stant, admonete eos et pacem facite inter eos, quibus est iudicium invicem ac lis, et docete eos primo non decere hominem irasci, quia dixit Dominus: Omnis, qui irascitur fratri suo, reus erit iudici'.

[41] Cf. Ibid. 142.

[42] Ibid. 144: '. . . et investigate caute ac diligenter de controversiam ac litem inter se habentibus. Et primum de accusatore inquirite, an et adversus ipsum accusatio existat aut an non adversus alios quoque incriminationem intulerit, et rursus an non forte ex aliqua inimicitia priore aut ex litigatione aut ex invidia orta sit eius accusatio, et qualis sit conversatio eius, an humilis neque irascens nec calumnias . . .'. Cf. Abramczyk, 'Rozwój jurusdykcji' 83.

[43] Guilelmus Hartel, *S. Thasci Caecili Cypriani Opera Omnia* (CCL 3.2; Vindobonae 1868) 683: 'Nam cum statutum sit ab omnibus nobis et aequum sit pariter ac iustum ut uniuscuius which causes illic audiatur ubi est crime admissum, et singulis pastoribus portio gregis sit ascripta quam regat

> Because since it has been established by all of us, and it is equally fair and equitable, that each of the causes be heard where the crime was committed, and to each shepherd is allotted a part of the flock to each of which governs and governs the nature of his actions to the Lord to give an account of the practice by which he will not break under his cunning and deceitful rashness, but to conduct his case where both the accusers and the witnesses to his crime may have.

When creating the 'forum commissi delicti' it is indicated that only the bishop of the diocese exercises judicial power over his subjects.[44] At the same time, Cipriano emphasizes that the judicial action of the bishops is not something new and that it has been present for a long time in Africa.[45] The same reference makes Eusebio de Cesárea.[46] The authors explain the importance of the processes and, at the same time, the competence of the bishops as judges, assisted by the priests and deacons. Ignatius of Antioch highlights the authority and responsibility of the bishop and emphasizes his obligatory presence in the decisions made in the community.[47] Saint Jerome, in the commentary on the New

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unusquisque et gubernet rationem sui actus Domino redditurus praxis quibus noncurrees neusc circumusc neusc noncurusc neusc circumusc episcoporum concordiam cohaerentem sua subdola et fallaci temeritate conlidere, sed agere illic causam suam ubi et accusatores habere et testes sui criminis possint'.

[44] Ibid.

[45] Cipriano de Cartago, *Letras* (Madrid 1998) 14.272-273.

[46] Eusebio de Cesarea, *Historia Eclesiástica* (Barcelona 2008) 7.235: 'A éste es al que Dionisio escribe la primera carta suya sobre el bautismo, ya que por entonces se había suscitado un importante problema, a saber, si había que purificar de nuevo con el bautismo a los que se convertían de una herejía cualquiera. Había prevalecido una costumbre antigua al menos: usan con estas gente únicamente la oración con imposición de manos. Cipriano pastor de Iglesia de Cartago . . . creía que no había que admitir más que a quienes primeramente habían sido purificados del error mediante el bautismo. Pero Esteban, por su parte, juzgando que no había que añadir innovación ninguna contraria a la tradición que había prevalecido desde principio, se enojó mucho con él'.

[47] Ignatius of Antioch, *Epistula ad Trallianos* 2, Funk, *Patres* 243-245. Ignatius of Antioch, *Epistula ad Philadelphenses* 7, Funk, *Patres* 271: 'Cum enim Episcopo subiecti sitis ut Iesu Christo . . .. Sine Episcopo nihil agatis': 'Episcopo oboedite . . .'. Ignatius of Antioch, *Epistula ad Smyrnaeos*, Funk, *Patres* 283: 'Omnes episcopo obtemperate, ut Iesus Christus patri . . .'.

Testament, refers to the administration of justice by the diocesan Bishops, and writes:[48]

> The bishop must also be just and holy, so that he exercises justice among the people he presides over, giving each one what corresponds to him; But between the laity and the bishop there is a difference between justice. That a layman may appear only in a few, but a bishop may exercise justice in as many matters as he has.

In the fourth century, a large work called *Contitutiones Apostolorum* was circulated, which among other parts includes aspects of a disciplinary and liturgical nature of early Christianity. The eighth book that collects the elements of the aforementioned Apostolic Tradition sets out in detail the rigor for sacred ministers, including also for Bishops. Within the norms that organize daily, pastoral, and sacramental life, we can find judicial rules that are applied in penalized cases, as in n.74 of chapter 47 of the same book.[49]

The causes of the crimes committed by the bishops require the intervention of the other member of the episcopal order. It is the bishop who decides on the imposition of the sentence on the accused and on the end of the litigation

The work called *Canones apostolorum et conciliorum veterum selecti* compiles several conciliar texts.[50] Both *Orientalia* reconcile as African and Hispanic, and open up a real picture of the 'actio judicialis Episcopi'. It must be taken into account that the synodal institution at this time performed the function of an instrument of control and judgment, especially in

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[48] Saint Jerome, *Commentarium in epistolam ad Titum* 7 n.703, 569 PL 26.569: 'Justus quoque et sanctus Episcopus esse debet, ut justitiam in populis quibus praeest, exerceat, reddens, unicuique quod meretur: nec accipias personam in juicio. Inter laici autem et episcopi justitiam hoc interest. Quod laicus potest apparere justus in paucis, episcopus vero in tot exercere justitiam potest, quot et subditos habet'.

[49] *Didascalia Apostolorum* 587: 'Episcopum ab hominibus fide dignis ac fidelibus de crimine accusatum in ius vocari oportet ab episcopis; si quidem occurrerit ac responderit fueritque convictus, poena decernatur'.

[50] Hermann Theodor Bruns, *Canones Apostolorum et conciliorum veterum selecti* (Berlin 1839).

disciplinary matters.[51] We find that there was a reorganization of the local Church and of the division of competences among the pastors. The compilation of various regulations made in this work not only organizes the daily life of the Christian community, but also establishes legal principles on which the relations between different ecclesiastical provinces will have to be enforced. Therefore, the judicial ties are also organized among them.

The *Sardicense Concilium* (a. 347), like the *Carthaginense Concilium III* (a. 397), in their respective canons establishes the way of proceeding in the criminal situations of the sacred ministers and in the controversies arising between them, giving, at the same time, prevalence to the first episcopal see as court of appeal.[52] The *Concilium Carthaginense IV sive Statuta Ecclesiae Antiqua* (a. 398) regulates the elements of judicial procedure whose absence may cause the nullity of the episcopal sentence:[53]

> That the bishop cannot hear the cause of anyone without the presence of his clergy otherwise the sentence of the bishop will be null unless the presence of the clergy is confirmed.

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[51] Cf. Orazio Condorelli, *Ordinare-Iudicare: Ricerche sulle potesta dei vescovi nella Chiesa antica e altomedievale (secoli II-IX)* (Rome 1997) 80.

[52] *Concilium Sardicense* c.3, Bruns, *Canones Apostolorum* 91: 'Quod si in aliqua province aliquis Episcopus contra fratrem suum episcopum litem habuerit, ne unus e duobus ex alia province advocet episcopum cognitorem'. *Concilium Sardicense* c.7, Bruns, *Canones Apostolorum* 93: '. . . ut si episcopus accusatus fuerit et judicaverint congregati episcopi regionis ipsius et de grad suo eum décerint, si appellaverit qui dejectus est et confugerit ad episcopum Romanae ecclesiae . . .; et si decreverit mittendos esse, qui praesentes cum episcopis judicent . . .'. *Concilium Carthaginense III* c.8, Bruns, *Canones Apostolorum* 124: 'Reliquorum autem causa etiam solus episcopus loci agnoscat et finiat'. *Concilium Carthaginense III* c.26, Bruns, *Canones Apostolorum* 127: 'Ut primae sedis episcopus non appelletur princeps sacerdotum aut summus priestdos aut aliquid hujusmodi, sed tantum primae sedis espiscopus'.

[53] Bruns, *Canones Apostolorum* 144: 'Ut episcopus nullius causam audiat absque praesentia clericorum suorum, alioquin irrita erit sententia episcopi, nisi clericorum praesentia confirmetur'.

In 419 the canons that are part of the *Codex Canonum Ecclesiae Africanae* are approved. Among others, it is proposed in can. 28:[54]

> so that the priests . . . in the cases that they have had, if they have complained about the judgments of their bishops, that the neighboring bishops listen to them with the consent of their bishop.

The *Concilium Toletanum decimum tertium* (a.683) also confirms the norms to regulate the causes and the competent instances to present the litigation.[55] Although the prevalence of the episcopal courts and their actions is noted, at the same time a certain collaboration and 'complementarity' of the civil and ecclesiastical courts is underlined. In business cases arising between the clergy, it is required to go first not to the episcopal court but to the civil one; if the dispute arises, on the other hand, between the cleric and the layperson, the petition is directed to the civil court with the consent and permission of the bishop.

Conclusion

The normative tradition of the first centuries undoubtedly allows us to see that the bishops exercising their full episcopal power in each community, at the same time fulfill their judicial dimension. As shepherds of a specific portion of God's people, they continue to be the natural judges, to be able to resolve disputes that arise between their subjects and apply penalties when necessary. The judicial activity of the bishop recognized before increases from the year 318 and reaches its maximum expansion with the recognition by the civil authority of episcopal decisions in civil affairs. Until the eighth century, the bishops participated

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[54] Ibid. 164: 'ut presbyteri . . . in causis quas habuerint, si de judiciis episcoporum suorum questi fuerint, vicini episcopi eos cum consensu sui episcopi audiant et inter eos definiant . . .'.

[55] *Concilium Toletanum XIII* c.12 Bruns, *Canones Apostolorum* 346: 'Quicumque ex clericis . . . causam contra proprium episcopum habens ad metroplitanum suum causaturus accesserit, non ante debet a proprio episcopo excommunicationis sententia praedamnari, quam per judicium metropolitani sui . . . possit agnosci'.

judicially in civil matters, therefore, their presence covered all areas of life, including procedural ones. Its decisions have the final force, so there is no room for any appeal. The personal administration of justice by the bishop is also contemplated by Gratian's *Decretum*. He recognizes the judicial service as a legal response to the criminal behavior of clerics. These situations require, at the same time, the imposition of appropriate sanctions. The bishop, when inflicting harsh penalties, such as anathema, excommunication, did so in a very solemn way, often with the participation of the clerics or the synod. This important personal role of the bishop in the function of the judge continues to develop almost until the Tridentine period where the exclusive Ecclesiastical jurisdiction over marriage is recognized. In effect, it is determined that matrimonial causes are reserved for the examination and jurisdiction of the bishop, for which the prerogatives of so-called authorities inferior to the bishop are suppressed.

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Charles Dumoulin's Annotations in a Lyon Edition of the *Decretum*[1]

Thomas Izbicki

In 1554 Ioannes Pidaeius, a printer in Lyon, published an edition of Gratian's *Decretum*. The most notable aspect of this edition was the addition of marginal annotations by the jurist Charles Dumoulin (Carolus Molinaeus) on both the text and the *Ordinary Gloss*. Dumoulin also numbered the canons, but not the *paleae*, in the *Decretum*.[2] Dumoulin's annotations, signed 'C. M.', combined history, jurisprudence and Gallican ecclesiology. They also showed signs of a sympathy for Reformed theology, which the author had developed by 1540.[3] The author of the notes participated in efforts to correct Gratian's text, but he also used history to undermine papal power in the church.[4] Dumoulin's controversial opinions led to the edition being placed on the Index together with orders that those annotations be obliterated. As has been noted, efforts to remove these annotations were not universally successful.[5] Scholarship on Dumoulin has not treated these marginal notes systematically, nor has it given adequate

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[1] Annotations covered with paper or paint were read by shining a light through the opposite sides of pages in the author's own copy.

[2] Aldo Adversi, 'Saggio di un catalogo delle edizioni del *Decretum Gratiani* posteriori al secolo XV', SG 6 (1959) 281-451 at 331-322, 412-413; Charles De Clerq, 'Notes sur quelques éditions du *Corpus Juris Canonici* de 1547 à 1580', SG 9 (1966) 145-52 at 146; René Metz, 'La contribution de la France à l'étude du *Décret* de Gratien depuis XVI^{e} siè jusqu'a nosjours', SG 2 (1954) 495-518 at 502-503.

[3] Jean-Louis Thireau, *Charles Du Moulin (1500-1566): Étude sur les sources, la méthode, les idées politiques et économiques d'un juriste de la Renaissance* (Travaux d'humanisme et Renaissance 176; Geneva 1980) 32.

[4] Donald F. Kelley, '"*Fides Historiae*": Charles Dumoulin and the Gallican View of History', *Traditio* 22 (1966) 347-402; Michel Reulos, 'Le *Décret* de Gratien chez les humanistes, les gallicans et les réformés français du XVI^{e} siècle', SG 2 (1954) 679-96.

[5] Franz Heinrich Reusch, *Der Index der verbotenen Bücher* (Bonn 1883) 1.442-444; Thireau, *Charles Du Moulin* 204; Stephan Kuttner, 'Notes on the *Glossa ordinaria* of Bernard of Parma', BMCL 11 (1981) 86-93 at 92.

attention to the inclusion of the annotations in the seventeenth-century editions of his *Opera*.[6]

The controversial opinions of Dumoulin were not new to this edition of the *Decretum*. His annotations refer to earlier writings and editions. The writings were: *Commentarii in consuetudines Parisienses* (begun in 1539);[7] *De usuris* (1547);[8] *Commentarius ad edictum Henrici secondi contra parvas datas et abusus Curiae Romanae* (1550); *Commentarius analyticus in regulas Cancellariae Romanae hactenus in regno Franciae receptas* (1552).[9] The editions were of the *Consilia* of Alexander of Imola (1543) and the works of Philippus Decius (1553). (Decius was a jurist who had supported the effort of the 'conciliabulum' of Pisa [1512-1517] to depose Pope Julius II).[10] In addition, Dumoulin had contributed annotations to a 1553 edition of the *Liber extra* or *Decretals of Gregory IX*.[11]

Careful study of a copy of the Lyon 1554 edition, reveals more than just censorship of Dumoulin's signed notes. Texts

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[6] Carolus Molinaeus, *Opera quae extant omnia* (3 vols. Paris 1624) col.637-668. Kuttner, '*Glossa ordinaria* of Bernard of Parma' 87 n.5 suggests that the annotations in *Opera* III were posthumously extracted and republished.

[7] Marie S.-H. Kim, 'Charles Dumoulin, *Commentarii in consuetudines Parisienses*', *the Formation and Transmission of Western Legal Culture: 150 Books that Made the Law in the Age* of *Printing*, edd. Serge Dauchy et al. (Cham 2016) 82-85. Dumoulin also mentioned the parlements of Paris and Toulouse (listed as senates) at: *Decretum Gratiani* (Lyon 1554) [cited hereafter as Lyon] p.663a, C.12 q.2 c.50 in Gloss s.v. *tenere*; Lyon p.749b, C.16 q.3 c.10 inscription s.v. *concilio*; Lyon, p.105a, D.32 c.4 s.v. *missam*.

[8] Rodolfo Savelli, 'Diritto romano e theologia reformata: Du Moulin di fronte al problema dell'interesse del denaro', *Materiali per una storia della cultura giuridica* 23 (1993) 291-324.

[9] In 1548, Dumoulin had published notes on Dino del Mugello's commentary on the *Regulae iuris* in the *Liber sextus*; see Wim Decock, 'Charles Dumoulin (1500-1566)', *Great Christian Jurists in French History*, edd. Olivier Descamps and Rafael Domingo (Cambridge 2019) 97-116 at 100.

[10] For the dates of these works, see Thireau, *Charles Du Moulin*, 31-35, 204-208. Dumoulin also cited the tract of the Paris theologian Jacques Almain supporting the Pisan assembly, see Lyon p.715a; and he referenced the councils of Constance and Basel, see Lyon p.40b 'concilio basilien.', Lyon p.204b, 'concilia Constantiense & Basiliense'.

[11] Kuttner, 'Notes on the *Glossa ordinaria* of Bernard of Parma' 92-93.

signed ‘C. M.’ occasionally were ignored, and wrongly attributed notes (as will be seen) were censored. In addition, Dumoulin's notes were inserted where there already were summaries or glosses signed with the sigla of earlier canonists. (Those authors most often cited were Laurentius Hispanus, Huguccio of Pisa, Guido de Baysio (archdeacon of Bologna and known as the Archdeacon rather than as Guido de Baysio) and Johannes de Fantutiis.) In addition, the references in the Paris *Opera* can be incomplete because of omissions or incorrect, citing as Dumoulin's texts not attributable to him.

How Dumoulin's annotations were inserted alongside earlier materials can be shown by looking at the glossed text to *Si papa* [D.40 c.6], which dealt with the legal vulnerability of a pope who fell into doctrinal error. Earlier editions of the *Decretum* provided brief notes concerning the contents of the canon’s glosses by Johannes Teutonicus. The Paris 1539 edition of the *Decretum* provides an example of such notes:[12]

p.44va: ‘Prelati tacere non debent. Papa iudicatur a nemine’, a note to Johannes Teutonicus’ gloss s.v. *A nemine*.

p.44va: ‘Papa an de crimine accusari possit’, also attached to *A nemine*.

p. 44va: A note that was an addition to Johannes Teutonicus’ gloss *A nemine* s.v. *dicitur heresis*: ‘Dic quod hereticus dicitur pluribus modis: vt nota. xxiiii. q. iii. Inter (C.24 q.3 c.26) et extra. de here. Firmissime (X 5.7.3)’.

p.44va: Also an addition to Teutonicus’ gloss s.v. *Si peccauerit in te frater tuus*: ‘vt ii. q. i. si peccauerit’.

p.44va: Also an addition to Teutonicus’ gloss s.v. *esset denunciatio*: ‘Sub. etiam denunciatio fit ad correctionem ad quam compelli non potest cum superiorem non habeat. Arc.’ citing a text of Guido de Baysio on D.40 c.6.[13]

p.44va: A comment on the end of Teutonicus’ gloss but without a lemma: ‘Imperator pro quo peccato deponi potest’?

The Lyon 1554 edition inserts a note by Dumoulin after these marginal comments on p.131a: ‘Prelati tacere non debent. Papa iudicatur a nemine’.

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[12] Paris 1539 p.44va-b.

[13] Guido de Baysio, *Rosarium* (1495) unfoliated to D.40 c.6: ‘In eadem glossa ibi denunciatio adde sub. Nam denunciatio fit ad correctionem ad quam compelli non potest cum superiorem non habeat’.

> p.131a-b: D.40 c.6 s.v. *A fide deuius*: *Deuius*. Sed quomodo non deuiat à fide, qui fructus fidei non ostendit, Iacobi 2, Qui cum fructus contrarios edit? Nonne Christus dicens à fructibus eorum cognosceris eos, discrimen facit fidelium et infidelium? Quorsum ergo hic texus supposititius? Dices loqui de fide historica. Sed eam habet diabolus et eius minister Antichristus, cuius fauore factum est hoc capitulum. Sed quid quando fit Epicureus? En in quae portenta labuntur, qui plus hominibus quam uerbo Dei tribuunt. C. M.[14]

The editions of the *Decretum* revised in 1582 and promulgated by Pope Gregory XIII resumed using the brief marginal notes but eliminated Dumoulin's annotation.

The annotations signed with C. M. begin in Distinction 10 c.9 [Lyon p.22A], but they cease with C.17 q.3 c.2 [Lyon p.773b]. Thereafter, none are signed, although many of the Lyon edition's unsigned notes appear in volume 3 of the Paris *Opera omnia*. The last annotation, treating the *De consecratione*, is found at column 668 of the Paris edition.[15] This leads the reader of the Lyon text to problems of identifying unsigned annotations by Dumoulin while dealing with sigla of older jurists mistaken for Dumoulin's opinions, being covered over with paper or paint to censor them. One example of an unsigned note covered over as if Dumoulin's refers to communion:[16]

> Lyon p.439a: C.2 q.4 c.19 in marg.: Eucharistia gladiatoribus non est danda [covered with paper].

Attempted censorship of Dumoulin's annotations is done in three ways. Perhaps the earliest version shows a few lines drawn through marginal notes in ink. A second set of cancellations was done by putting paper over Dumoulin's texts The third set was done by painting over the annotations in white. Occasionally, both later types of censorship appear on the same page. Some notes may

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[14] The Munich copy of the Lyon edition, found on Europeana, shows part of the cover over the text on p.131a worn away and evidence of a removed covering (a lighter shade of paper holding the text) at p.131b. The paper covering a portion of this annotation at Lyon p.131b in the author's copy has become detached. See also detached paper on Lyon p.132b, D.41 a.c.12 in the author's copy.

[15] This annotation in *Opera* III 668, matches the Lyon edition at p.1327B.

[16] See also Lyon p.730a, C.16 q.1 c.42 s.v. *Theodosius*: 'C. de sacrosanctijs eccles. l.v. [Cod.1.3.5]'.

simply have been covered over because they are signed 'C. M.'[17] Others were more controversial. For example, Dumoulin endorsed the oath the Council of Basel wished to impose on a new pope:

> Lyon p.40b: D.16 c.7 s.v. *professio*: Professio. Id est iuramentum solenne quod papę dant in sua initiatione innouatum in concilio basilien. sessione 37. Sed vt puto debet servari, alias Papae à solenni periurio inceperint. C.M.

Likewise, Dumoulin underlined the promise of the power to forgive sins made to all the apostles in John 20, treating the promise of the keys to Peter found in C.24 q.1 c.6 as given to the church 'in persona Petri', replicating a favorite argument of the conciliarists. Here he made the comment to the text of the *Decretum*, not to the gloss:[18]

> Lyon p.61b: D.21 c.2 s.v. *primo*: Primo. Imò post resurrectionem omnibus simul datae sunt. Ioan. xx. [Jn. 20:22] Accipite spiritum sanctum quoruncunque remiseritis, etc. Quod autem prius promisserat ipsi ecclesię in persona Petri promissum erat. c. quodcunque xxiiij. q. j. [C. 24 q. 1 c.6]. C. M.

In another annotation to the text of the *Decretum*, Dumoulin used an argument unfavorable to the Roman pontiffs, recording the use of violence by Damasus I to attain the papacy, an action recorded by the historian Ammianus Marcellinus:[19]

> Lyon p.69a: D.23 c.1 s.v. *tempestas*: Tempestas. A data quae in prin. tex. vide quindiu bellum pro papatu, imo etiam à Damaso primo coeptum est, anno 368. Ammia. Marcell. lib. 17. C. M.

Also unfavorable to the popes was an annotation saying the apostles knew no distinction between bishops. This gloss is

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[17] For example, an annotation identifying Pope Gelasius I was covered over: see Lyon, 35B D.15 c.3 inscription s.v. Gelasius: Gelasius. Scilicet primus, circa annum Domini. 496. C. M.

[18] Thomas M. Izbicki, 'A Papalist Reading of Gratian: Juan de Torquemada on c. *Quodcunque* [C.24 q.1 c.6]', *Proceedings Syracuse 1996* 603-634.

[19] See Ammianus Marcellinus, *Res Gestae a fine Corneli Taciti* 27.12: 'Damasus et Ursinus supra humanum modum ad rapiendam episcopi sedem ardentes, scissis studiis asperrime conflictabantur, ad usque mortis vulnerumque discrimina adiumentis utriusque progressis, quae nec corrigere sufficiens Viventius nec mollire, coactus vi magna, secessit in suburbanum'.

another example of Dumoulin commenting on the text of the *Decretum*:[20]

> Lyon p.322a: D.99 c.2 at s.v. *apostoli*: Imò apostoli nunquam nouerunt Primates, vel Patriarchas nec maiores epis. Vt patet apud sanctum Ignatium sancti Ioannis discipulum, & dixi in tractat. contra abusus papar. gl. 15. C. M.

The obliteration of pro-Gallican notes ceased with the omission of signed references 'C.M.' after Lyon p.773b. This makes it desirable to look for references to fifteenth- and sixteenth-century authors, especially when they also appear among the annotations signed C.M. earlier in the Lyon edition. Examples of these citations, some signed and covered but others unsigned, include mentions of the *Dialogus* of William of Ockham in his annotations to the *Decretum*.[21] Two of these references are signed 'C.M.' in the earlier *Causae*. Thereafter eight notes appear, unsigned but similarly phrased, in the later *Causae* and the *De poenitentia*. These are examples of how writers later than Ockham's day could use the *Dialogus* to support their own opinions.[22] However, the edition of the *Corpus Iuris Canonici*

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[20] Dumoulin also cited Ignatius of Antioch to show that the apostles had wives and daughters, see Lyon p.102b D.31 c.9 s.v. *ab eis*: 'Imo facilius ali poterat certo loco manens, et communis sensus hanc argutiam refellit, imo etiam text. beati Ignatij qui scripsit plures apostolos non solum vxores secum duxisse, sed etiam generasse & filias nuptum dedisse. C.M.'

[21] E.g. Lyon p.440b C.2 q.6 c.2 s.v. *Immo duo sufficiunt* in Teutonicus' gloss: 'Duo. Idem Panormitanus. c. At si clerici in prin. col.j. de iudiciis [X 2.1.4] vbi hanc glossam singularem dicit. Et sic haec capitulum non obseruantur: idem Guli. Occam dialog. lib 6. part.1 ca. 26. in fin. Philipus Decius in dicto capitolo At si clerici, in princ. Dixi in c .Cum in distribuendis de tempori. ord. super tex. [X 1.11.12] C. M.' Dumoulin's comment on Bernardus Parmensis' gloss in *Decretales Gregorii noni* (Lyon 1558) p.158a, X 1.11.12 s.v. *nisi pluribus testibus*: 'Pluribus. Non servatur etiam in papa. Panormitanus, Decius c.At si clerici, in principio de iudic. Occam Dialogus lib.vi part.i. ca. xxvi. C.M.' This edition of the *Decretales* has many additions by Dumoulin.

[22] For conciliarists and papalist uses of Ockham, see *Conciliarism and Papalism*, trans. J. H. Burns and Thomas M. Izbicki (Cambridge 1997), 146, 149-50, 175-177, 181, 185-186, 245, 266. Izbicki, 'Tarring Conciliarism with the Brush of Heresy', *Religion, Power, and Resistance from the Eleventh to the Sixteenth Centuries: Playing the Heresy Card*, edd. Karen Bollerman, T. Izbicki and Cary J. Nederman (New York 2014) 139-151.

prepared for Gregory XIII omits references to Ockham's work, adding instead (in italics) references to more acceptable writers.

Dumoulin cited other authors as authorities supporting his opinions. One of the most important writers he used in his annotations was Desiderius Erasmus.[23] That scholar's works were employed to correct Gratian's attribution of individual canons to earlier authors. For example, Dumoulin cited Erasmus to reject the attribution to Augustine of Hippo of an excerpt from a sermon:

> Lyon p.642b: C.12 q.1 c.10 inscription s.v. *Item Augustinus*: Sermo. 52. ad fratres in heremo, Sed illi sermones sunt suposititij diu post à monachis confectis, vt censet Eras. C. M.

Although Erasmus provided Dumoulin with material to use in correcting the *Decretum*, one of his most substantial annotations blames monks and popes for the creation of hierarchic distinctions between bishops without mention of another author:

> Lyon p.65b-66a: D.22 c.2 inscription s.v. *Anacletus*:[24] Anacletus. At qui in toto paparum catalogo nullus esse potest Anacletus, nisi is quem quidem praetendunt quartum post Petrum auno domini 102, eodemque anno mortuum. Sed Eusebius hunc non ponit in catalogo, adhuc dicunt eum Graecum; sed Graeci semper auersati sunt hunc primatum. Tunc eo anno qui erat 68 a Passione Christi, nec diu post post questio fuit de Primatu episcopi Romani. Imò in hoc capitulo narratur de Patriarchalibus sedibus, quod nunquam fuit inuentum nisi post Constantinum magnum, qui obijt anno 340. Tum in tempore tam vicino apostolis non ignorabatur Cepham significare saxum, et non caput. Tum sub Traino non potuisset haec ambitio caput attollere, vt sit manifestum hoc capitulo vt alia pleraque **multis postea seculis à monachis vel Papis conficta esse**. C.M. [emphasis mine].

Other references to writers later than Guido de Baysio and Johannes de Fantutiis abound. Among the canonists, these references include Franciscus de Zabarellis, Nicholas de Tudeschis, Ludovicus Romanus (Ludovicus Pontanus), Felinus Sandaeus, Ludovicus Gomez. Other notes cite Roman-law jurists: Cino da Pistoia, Bartolus de Saxoferrato, Albericus de Rosate, Baldus de Ubaldis, Bartholomaeus Cepolla, Iason de Maino. Among these were two humanist jurists, masters of the historical

[23] Thireau, *Charles Du Moulin* 33.
[24] Ibid. 206.

approach to law known as the *mos gallicus*: Guillaume Budé and Andreas Alciatus.[25]

A third group includes theologians, historians and men of letters. Theologians: Augustinus Triumphus; Jean Gerson; Alphonso Tostado de Madrigal; Gabriel Biel. One author belonged to the Reformed tradition: Wolfgang Musculus. Two of the historians were cited: Andreas Tiraquel (historian of law); Bartolomaeus Sacchi (writer on the popes).[26] Men of letters included: Giovanni Pico della Mirandola;[27] Beatus Rhenanus; Claude de Seyssel.

Finally, Dumoulin cited his own works, especially his editing of the *Consilia* of Alexander de Imola[28] and his *Commentarii in consuetudines Parisienses* and *Commentarius ad edictum Henrici secondi contra parvas datas et abusus Curiae Romanae* [For these works of Dumoulin, see p. 2 above]. He also referred to the works of Philippus Decius.[29]

It is important to note there are many signed annotations of Dumoulin found in the Lyon edition but not in the *Opera*. These omissions raise the question how assiduous the workers on the *Opera* were in hunting down Dumoulin's annotations in Lyon 1554.

Dumoulin became a public apologist for the Gallican cause when King Henry II, angered by papal policy, which included reconvening the Council of Trent, and by papal favor for the Hapsburgs, threatened to withdraw consent from the pope. The jurist argued the royalist Gallican case in his *Commentarius ad edictum Henrici secondi contra parvas datas et abusus Curiae Romanae* (1550). However, Henry came to terms with Julius III by 1553, with the pope suspending meetings of the council. This left

[25] Ibid. 145-146.
[26] Ibid. 144.
[27] Ibid. 33.
[28] Alexander de Imola, *Primus liber consiliorum*, ed. Carolus Molinaeus (Lyon 1556).
[29] Philippus Decius, "In tit. ff. de regulis iuris. Cum additionibus D. Hieronymi Chucalon Hispani. et cum recente & perutili auctario, & annotationibus analyticis Caroli Molinaei. Loca etiam amplius mille, quae partim mutila" (Lyon 1545).

Dumoulin vulnerable to his domestic enemies, whom he identified with the Sorbonne. (He had rejected their opinions, because he supported the superiority of general councils and communion of the laity under both species, bread and wine.[30]) Those enemies, however, could not touch Dumoulin, because he already had left for Basel, a Reformed stronghold, in 1552.[31]

The move to Basel was just a first step in Dumoulin's progress from post to post, teaching at Geneva, Strasbourg, Marburg, Tübingen, Montbéliard and Dole. He also changed religious affiliation from Catholic to Lutheran to Reformed, to Lutheran again. After a final return to France in 1564, he died as a Gallican Catholic in 1566. In these wanderings, Dumoulin followed his own lines of thought, even when they were unpopular.[32] Small wonder that Dumoulin, who never was secretive about his legal and religious opinions, was seen in Rome as a heretic and who faced censorship in the Lyon edition of Gratian with his annotations.

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[30] Several examples: Lyon p.434a, C.2 q.5 c.10 to Teutonicus' gloss s.v. *concilio*: 'glossa falsa et haeretica, secundum Sorbonicos. C. M.' Lyon p.361a-b, C.1 q.1 c.93 s.v. *sanguinem domini populis*: 'Ergo etiam foeminis et laicis in vtraque specie iuxta verbum Dei, etiam tempore Hieronymi, et adhuc diu post eum et sic mentiuntur sophistae illi Parisien. qui mihi obiecerunt quod c. Comperimus de consecr. di. (De cons. D.2 c.12) loquitur de sacerdotibus tantum quia imo de omnibus. C. M.' See also a reference to Dumoulin's involvement in a controversy over the authority of papal decretals: Lyon p.51b, D.19 c.1 s.v. *authoritate*: 'O deplorenda supinitas: Deus enim testimonium hominis non accipit, Ioan. 5. Sic nuper argutabat Theologaster Sorbonicus, male reiici decretales, quia non inuenitur, quod Papa approbauerit fidem nostram Catholicam, nisi in illis. C.M.' [31] Thireau, *Charles Du Moulin* 35-38.

[32] Decock, 'Charles Dumoulin (1500-1566)', 97, 102, 103-109. When Catholic forces seized Paris in 1566, Dumoulin's house was plundered and his library trashed; see ibid. 102. See also Thireau, *Charles Du Moulin* 46-50.

The Complicated Case of Paolo Vigerio, Son of Cardinal Marco Vigerio, O.F.M.

Nelson H.Minnich and Ugo Taraborrelli*

In his 1995 study of the registers of the *Sacra Penitenzieria*, Filippo Tamburini called attention to the case of Paolo Vigerio, 'scolaris Romanus'. Paolo, who was described as the son of a bishop and a nun, perhaps professed, turned to the Penitentiaryfor a dispensation from illegitimacy, to be able to receive holy orders and an ecclesiastical benefice. Tamburini proposed two persons as candidates for the bishop in question: Cardinal Marco Vigerio (†1516)[1] or his successor as bishop of Senigallia, Marco Quinto Vigerio (†1560). He speculated that it was more likely that the cardinal was the father. Because the dispensation was granted with no fees attached, Tamburini suspected that Paolo was someone known in the Roman Curia. And because the document granting the dispensation was not given to Paolo on 7 March 1513, the date of the dispensation, but in May of 1514, the delay was due to waiting until Paolo became of canonical age.[2]

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[1] Cardinal Marco Vigerio was related to Sixtus IV (Francesco della Rovere, whose niece Nicoletta Grosso married Urbano Vigerio, Marco's parents), and a distant cousin of Julius II (Giuliano della Rovere). He was appointed bishop of Senigallia by Sixtus IV in 1475, made a cardinal by Julius II on 1 December 1505. He resigned his see to his nineteen-year old nephew Marco Quinto in 1513—Konrad Eubel, *Hierarchia catholica medii et recentioris aevi* (2nd ed. rev. Münster 1923) 3.10, 3.298; Joseph Hergenröther, *Leonis X. Pontificis Maximi Regesta e tabularii Vaticani manuscriptis* (2 vol. Freiburg im Breisgau1884-1891) 1.148 nr.2528 (dated 9 May 1513).

[2] Filippo Tamburini, *Santi e peccatori: Confessioni e suppliche dai Registri della Penitenzieria dell'Archivio Segreto Vaticano (1451-1586)*, presentazione di Attilio Agnoletto ['Il Sestante': Testi e Fonti di Storia Religiosa] (Milan1995) 65-66, 93 nr.54, and 227 nr.54 (transcription of the register entry).

With the help of new sources, this contribution would like to present new details on the case of Paolo Vigerio and, through it, shed light on the complex bureaucratic procedures and documentary practices of the Roman Curia in the early sixteenth century.

Let's start from the beginning.The entry in the Penitentiary register[3] reported by Tamburini, dated 'Nonis martii' [1513], gives the name of the procurator in this case as Gonini,[4] and states that the dispensation was granted to Paolo without a fee due to the favor of the 'scriptor Intinus' ('gratis intuitu domini Intini scriptoris').[5] The diocese of the supplicant is Rome. The entry is very short and includes only the particular details concerning the supplicant, as it is usual for the supplications registered under the title *de defectu natalium*. It states that:

> Paolo Vigerio, a Roman student,[6] born of a bishop and an unmarried woman, seeks for himself to be dispensed in simple form. Mercurius Vipera, the regent, grants it by a special mandate. The dispensation is

[3] Vatican City, Archivio della Penitenzieria Apostolica, Reg. Matrim. et Divers. 58 fol.274r—See below, Appendix doc.1.

[4] The procurator Gonini is listed as Gomini/Gemini by Ludwig Schmugge, 'I procuratori della Penitenzieria Apostolica: La cerniera fra Roma e le *partes*', *L'Archivio della Penitenzieria Apostolica: Stato attuale e prospettive future: Atti della Giornata di studio: Roma, Palazzo della Cancelleria, 22 novembre 2016*, edd. Krzysztof Nykiel and Ugo Taraborrelli (Vatican City 2017) 57-117, here 74 nr.12 (Gomini is present as a procurator in the registers of Julius II with 368 German clients). According to Schmugge (p. 62) the solicitors/procurators formed a corporation of twenty-four members with their own chaplain. Entrance into the corporation was by a written and oral examination on knowledge of canon law and on the practices of the office and by the payment of a fee—in 1514 the office cost 1200 ducats, according to Thomas Frenz, *Die Kanzlei der Päpste der Hochrenaissance (1471-1527*) (Tübingen1986) 232.

[5]No information was found on his account.

[6] Hergenröther, *Regesta*, 1.114 nr.2002: 'Mag. Paulum Vigerium cler. Romanum Sedis Ap. notarium creat'. (1 April 1513). Given the three weeks between Paolo being describe as 'scolaris' and then as 'magister', it is doubtful if he earned the academic title in the meantime, but styled himself honorifically as master. The University of Rome in this period did not grant masters'degrees. As a layman of nine years of age he probably did not study in one of the mendicant 'studia' in the city. See Paul F. Grendler, *The Universities of the Italian Renaissance* (Baltimore 2002) 172-173, 354-357.

committed to the bishop of Modrus currently resident in the Roman Curia. Mercurius so lets it be.

The dispensations in simple form (*in prima forma*) allowed illegitimate men affected by a defect of birth (*defectus natalium*), as in the case of Paolo Vigerio, to receive holy orders and to hold one ecclesiastical benefice with cure of souls.[7] The approval formula in such cases was 'Fiat de speciali'. That means that this type of grace was reserved to the pope and was delegated to the officials of the Penitentiary by a special papal mandate.[8] Once the supplication was approved, moreover, the procedure required the redaction of 'litterae in mundum' on parchment destined to be delivered to the beneficiary.

In the case of Paolo, the grant was signed by the regent—the dean of the Rota Mercurius Vipera[9]—, i.e. the deputy of the

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[7]About the authority of the Penitentiary in illegitimacy matters, see Ludwig Schmugge, *Kirche, Kinder, Karrieren: Päpstliche Dispense von der unehelichen Geburt im Spätmittelalter* (Zürich 1995).

[8]Emil Göller, *Die päpstliche Pönitentiarie von ihrem Ursprung bis zu ihrer Umgestaltung unter Pius V*. (Bibliothek des königlich-preußischen historischen Instituts in Rom 3, 4, 7, 8; Rome 1907-1911) here 2/2, 101: 'De speciali ea signantur, que specialiter pape vel communiter reservantur, et super quibus speciale mandatum habet officium penitentiarie vel persona maioris penitentiarii commissionem specialem ex indulto vel privilegio'. About the approval formula for the dispensations 'de defectu natalium in prima forma', see Göller, *Die päpstliche Pönitentiarie* 1/2, 90.

[9]About the regent Mercurius Vipera, see Göller, *Die päpstliche Pönitentiarie* 2/1, 58. Originally of Benevento, Vipera was also Rota auditor from 1505 and dean of the Rota from 1511. See Emmanuele Cerchiari, *Capellani Papae et Apostolicae Sedis: Auditores Causarum Sacri Palatii Apostolici seu Sacra Romana Rota ab origine ad diem usque 20 Septembris 1870* (4 vol. Rome 1919-1921) here 1.293; 2.83-84. On 23 March 1523, Vipera was appointed bishop of Bagnoregio—see Eubel, *Hierarchia catholica* 3.128—but maintained his office in the Penitentiary. He died in Rome on 24 June 1527, in the riots of the Sack (Cerchiari, *Capellani Papae*2.83: 'In excidio Urbis fuit captus et extinctus'.). Thomas Frenz, *Repertorium Officiorum Romanae Curiae* [RORC] on-line edition:
(https://www.phil.uni-passau.de/passau.de/fileadmin/dokumente/fakultaeten-/phil/lehrstuehle/frenz/RORC/littera_M.pdf), 'sub voce' 'Mercurius de Vipera'.

cardinal Major Penitentiary, having the faculties to approve and sign the petitions in the cardinal's absence. The Major Penitentiary, Leonardo Grosso della Rovere (1511-1520),[10] was participating in the conclave following the death of pope Julius II (March 4 to 11).

Based on the registers of Penitentiary, Ludwig Schmugge has calculated that approximately 38,000 people turned to this office during the years 1449-1533 to obtain a dispensation from illegitimacy.[11] And the number appears certainly underestimated.[12] But the evidences concerning bishops' children are scarce: Schmugge listed only 117 cases for that period, i.e., 1.4 per year.[13] Therefore, Paolo's supplication can be considered quite uncommon.

According to the Penitentiary's practice, the obtained grace of dispensation from illegitimacy was committed for execution to a bishop.[14] The task of such a commissioner was very important. He had to verify the correctness and the truthfulness of the facts given by the supplicant and contained in the letter of the Penitentiary. If everything was found correct and in accordance with the law, then

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[10] See Göller, *Die päpstliche Pönitentiarie* 2/1, 11; Walther von Hofmann, *Forschungen zur Geschichte der kurialen Behörden vom Schisma bis zur Reformation* (2 vol. Bibliothek des königlich- preußischen historischen Instituts in Rom 11,13; Rome 1914) 2.97, XVII, nr.1; Filippo Tamburini, 'Per la storia dei Cardinali Penitenzieri Maggiori e dell'Archivio della Penitenzieria Apostolica: Il trattato *De antiquitate Cardinalis Poenitentiarii Maioris* di G.B. Coccino (†1641)', RSCI 36 (1982) 360-380 at 373-374. He was a relative of Paolo whose grandmother was Nicoletta Grosso della Rovere. In addition, Paolo's uncle (Marco's brother) had married the sister of Cardinal Leonardo—see Hergenröther, *Regesta* 148 nr. 2527 (dated 9 May 1513).

[11] Schmugge, *Kirche, Kinder, Karrieren* 33.

[12] See the remarks proposed in *Entering a Clerical Career at the Roman Curia, 1458-1471*, edd. Kirsi Salonen and Jussi Hanska (Church, Faith and Culture in the Medieval West; Farnham 2013) 41-42.

[13] Schmugge, *Kirche, Kinder, Karrieren* 182-183, 214-226.

[14] See *Regule et bona notabilia et utilia pro commissariis penitentiarie de commissionibus et commissariis, quibus littere penitentiarie committi debent et consueverunt*, edited by Göller, *Die päpstliche Pönitentiarie*1/2, 70-77. The dispensations 'super defectu natalium in prima forma' are precisely among the letters committed 'episcopis diocesanis vel ex causis rationabilibus aliis episcopis dumtaxat' (73-74).

he could proceed to the execution of the grace by virtue of the received commission. At the end of the procedure, a public instrument drawn up by a notary attested to the judging process and the execution of the grace with the requisites formalities.

In the case of Paolo, a friend of his father, Cardinal Marco, was conveniently on hand to be deputized as executor of the dispensation granted on 7 March 1513. He was Simun Begna Kožičić (ca. 1460-1536), bishop of Modrus, who in 1512 had been commissioned by Cardinal Marco to organize his personal library and who had penned the preface to Cardinal Marco's treatise *Controversia de excellentia instrumentorum Dominicae Passionis*, published in Rome by the press of Marcello Silber in 1512. Begna had apparently come from Croatia to Rome to attend the Lateran Council and so he was present in Curia at that time.[15]

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[15] Bratislav Lučin, 'Šimun Kožičić Benja',*Christian-Muslim Relations: A Bibliographical History* 7: *Central and Eastern Europe, Asia, Africa, and South America (1500-1600)*, edd. David Thomas and John Chesworth *et al.* (Leiden 2015) 174-188, here 174; Michele Lodone, 'Vigerio della Rovere, Marco', DBI 99.230-232, here 232; Nelson H. Minnich, 'The Participants at the Fifth Lateran Council', AHP 12 (1974) 157-206, here 182 nr.32 (Begna attended the first six sessions of the council, preached at the sixth on 27 April 1513, and was appointed to the conciliar reform deputation); Nelson H. Minnich, 'Concepts of Reform Proposed at the Fifth Lateran Council', AHP 7 (1969) 163-251, here 185-189. On 9 May 1513, Begna was appointed one of three executors of Cardinal Marco's resignation of his see of Senigallia in favor of his nephew Marco Quinto—see Hergenröther, *Regesta* 148 nr. 2526. Begna entered the service of Cardinal Tamás Bakócz who left Rome on 28 October 1513 with many prelates in his retinue to return to Hungary on a legation—in the report of the bishop of Teramo, Francesco Chierigato, from Rome to Duke Alfonso d'Este of Ferarra of 29 October 1513, he noted: 'El R[everendissi]mo Car[dina]le di Strigonia si parte heri et va in ungaria legato di epsa et di polonia et boemia. Conduce gran numero seco di prelati et molti doctori valenthuomini per voler conquistar quelli Boemi a la fede n[ost]ra de la quale sono prolapsi', see Mantua, Archivio di Stato di Mantova Archivio Gonzaga busta 861, fol.324v; Nelson H. Minnich, 'The Closing of the Fifth Lateran Council (1512-17)', AHC 45 (2013) 17-59, here 32 n.53. Begna was no longer in Rome when the reform subcommission headed by Cardinal Vigerio to which he had been assigned began its work at the end of October—see Nelson H. Minnich, 'Lateran V and the Reform of the Roman Curia', BMCL 37 (2020) 135-196 at

The registration of the note (i.e., the minute) of the 'instrumentum' attesting to the execution of the dispensation obtained by Paolo is still preserved in the registers of the *Archivium Romanae Curiae* and is now kept in the Archivio Storico Capitolino in Rome.[16] According to that minute,[17] the instrument (processus dispensationis) was requested by the notary Jacobus domini Raphaelis Gabrielis de Marinis[18] in the presence

141. On August 15, 1514, Cardinal Bakócz called Simun de Begna his vice-delegate, sending him to Modrus–see Nemes Gábor, 'Oluf Hansen Bang, Bakóc Tamás dán jegyzője', *Turul* 93 (2020) 58-62, here 60 n.26. Begna had returned to Rome by 5 November 1516 when he delivered a speech before Leo X on the devastation of Croatia, urging its defense. Cardinal Vigerio had died on 18 July 1516.

[16] On 1 December 1507, with the constitution *Sicut prudens paterfamilias* (ed. *Bullarium Romanum* vol.5 [Augustae Taurinorum: Seb. Franco et Henrico Dalmazzo Editoribus, 1860] 458-464), Pope Julius II established the College of Scriptors of the Archive of the Roman Curia (*Collegium Scriptorum Archivii Romanae Curiae*), consisting of 101 officials acting as public notaries. One of the main tasks of this office was to collect and transcribe in special registers the notes (*notae*)—i.e., the minutes—of all notarial documents rogated by curial notaries, which were to be brought each month to the archive by them, in order to protect the rights of interested people and to prevent fraud—See Jean Lesellier, 'Notaires et Archives de la Curie Romaine (1507-1625): Les notaires français à Rome', *Mélanges d'Archeologie et d'Histoire* 50 (1933) 250-275; Maria Luisa San Martini Barrovecchio, 'Il collegio degli scrittori dell'Archivio della Curia romana e il suo ufficio notarile (secoli XVI-XIX)', *Studi in onore di Leopoldo Sandri* (3 vols. Rome 2015) 3.847-872; Laurie Nussdorfer, *Brokers of Public Trust: Notaries in Early Modern Rome* (Baltimore 2009)115-117.'Nota' was the term for the paper sheets on which notaries copied the minute of theirs acts, generally from their personal registers. 'Nota' had to be deposited in the Archive no later than eight days after the *rogitus* and registered within the month of acceptance—Corinna Drago Tedeschini, 'I *libri instrumentorum* della sezione LXVI dell'Archivio notarile generale urbano', *Nuovi Annali della Scuola Speciale per Archivisti e Bibliotecari* 32 (2018) 29-52: 31 n.9; Lesellier, 'Notaires et Archives de la Curie Romaine' 266.

[17] Rome, Archivio Storico Capitolino, Archivio notarile generale urbano, Sez. below, Appendix doc.2.

[18] Not to be confused with Stephanus Gabrielis Marinus, who was canon of Cordova (Cordubensis), a solicitor in 1499, notary since 1504, minor abbreviator in 1510, and scribe in 1511 (Frenz, *Die Kanzlei* 446, nr.2120); nor with Gabriel Merinus, a *scriptor* of the Chancery 1511-1513 (Frenz, *Die Kanzlei* 336, nr.813). The location of the benefice of the notary Jacobus de

of two witnesses—Agostino Ruffo,'sacre theologie professor', and Jacobus de Roselis, a Genoese cleric[19]—and is dated 8 March 1513, i.e. the day after the dispensation granted by the Penitentiary. It certifies that bishop Simun, 'comissarius et executor unicus auctoritate apostolica specialiter deputatus' by virtue of the charge received by the Penitentiary, effectively dispensed Paolo from the 'defectus natalium' so that he could receive holy orders and obtain an ecclesiastical benefice, at the same time imparting to him his first tonsure and consequently conferring on him the status of cleric. On 16 June 1513, his father Cardinal Marco resigned to Paolo his 'commenda' on the monastery of Santa Cristina in Milan.[20]

Had it ended here, Paolo's story would have been no different from that of so many other illegitimate sons who in those same years entered the ecclesiastical career having benefited from the apostolic dispensation. But, as we shall now see, his case underwent further developments because of some anomalies that drew the attention of the pontiff himself.

In fact, further information is found in the Penitentiary's register. Later corrections appear mostly in the margin: e.g., 'perhaps a professed nun' insertedby Nicolaus Gladiatoris,[21] the

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Marinis—who in another document, as will be seen, is described as canon of Curzola (now Korčula, in Croatia)—may suggest a relationship with the bishop of Modrus, the executor of the dispensation.

[19]Agostino Ruffo was certainly related to Paolo Vigerio, as he figures among the witnesses in a document of attestation by Paolo on 28 August 1516. There he is identified as a friar of the Franciscan order and of the Gravina diocese—See below, Appendix doc.3. The friar is different from another similarly named Agostino Ruffo who had died by 10 August 1514 and whose various benefices in the diocese of Caserta (canonry, prebend, parish, and chapel) were conferred on another—Hergenröther, *Regesta* 676, nr.10,860. That Jacobus de Roselis was a cleric of the diocese of Genoa suggests a connection with Cardinal Marco Vigerio who was also a Ligurian.

[20] Hergenröther, *Regesta* 1.187 nrs.3215-3217.

[21]Nicolaus Gladiatoris, cleric of the French diocese of Châlons, was 'scriptor' and 'sigillator' of the Penitentiary already under Alexander VI. Under Hadrian VI he began to function as a procurator with twenty-eight German clients. He continued to function as such until at least 1527. In the 1527 census he was

sealer, 'on a mandate of the regent, without prejudice, in the month of May 1514, as is stated in the bull expedited by the Penitentiary and contained in the registers of the scribes deputated for that month, namely of Petrus Suares[22] and Pamphilus de Pamphiliis'.[23] This means that more than a year after the approval of the dispensation, the case was reopened and the sealer of the Penitentiary intervened to amend the register regarding the status of Paolo's mother: not an unmarried woman, but a nun, perhaps professed. Apparently out of fear that the original bull was invalid and hence the resignation of the 'commenda' to Paolo was also flawed, Cardinal Marco on 24 April 1514 had the original conferral of the 'commenda'confirmed.[24]

What had happened in the meantime, between March 1513 and May 1514?

Another document, this in the Vatican Apostolic Archive, unkown to Tamburini, sheds further light on the case of Paolo Vigerio, confirming some of Tamburini's speculations and correcting others.[25] Its author is unidentified, its date is after the death of Cardinal Vigerio (†18 July 1516), and its addressee is Pope Leo X who has ordered an investigation of the dispensation.

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living in Rione Ponte. See Schmugge, 'I procuratori' 76 nr.23 and 89 n.30; Göller, *Die päpstliche Pönitentiarie* 2/1, 188 nr.9 and 11; Frenz, RORCon-line edition:
(https://www.phil.uni-passau.de/fileadmin/dokumente/fakultaeten/phil/lehrstuehle/frenz/RORC/litter a_N.pdf), 'sub voce''N. Gladiatoris'.

[22]Hergenröther, *Regesta* 1.195 nr.3337: 'Mag. Petro Suares cler. Hispalen. lit. Poenitentiariae scriptori et fam. suo'. Frenz, RORC on-line edition:
(https://www.phil.uni-passau.de/fileadmin/dokumente/fakultaeten/phil/lehrstuehle/frenz/RORC/litter a_P.pdf), 'sub voce'.

[23]See Göller, *Die päpstliche Pönitentiarie*, 2/1, 88 nr.10. Frenz, RORC, on-line edition:
(https://www.phil.uni-passau.de/fileadmin/dokumente/fakultaeten/phil/lehrstuehle/frenz/RORC/litter a_P.pdf), 'sub voce'.

[24] Hergenröther, *Regesta* 1.515 nr.8155.

[25]Vatican City, Archivio Apostolico Vaticano, A.A., Arm. I-XVIII, nr.5041 fols.36r-v.—See below, Appendix doc.5.

It calls the pope's attention to irregularities in the issuing of the dispensation.

The anonymous report reconstructs in detail the bureaucratic process of the affair, enriching with new details the information already known on the basis of the documents examined so far.

First of all, the Vatican report confirms what we already know, namely that during the 'Sede vacante' following the death of Pope Julius II, the 'scolaris Romanus' Paolo Vigerio—here explicitly recognized as the son of the late cardinal of Senigallia, Marco Vigerio—obtained from the Penitentiary the faculty to be dispensed from the 'defectus natalium' (7 March 1513).

Afterwards, barely a day after the Penitentiary's bull, on March 8, bishop Simun Begna executed the commission given to him and dispensed Paolo from illegitimacy, also conferring on him clerical character (the first tonsure). A public notary, a certain Jacobus Raphaelis Gabrielis de Marinis, also canon of Curzola (now Korčula, in Croatia), had drawn up the instrument related to Paolo's dispensation (processus dispensationis), a term that is consistently employed at the same time to refer both to the legal proceedings presided over by the bishop of Modrus and to the notarial instrument.

Moreover, as required by the law, a 'notula' of such 'processus dispensationis' was delivered by the notary Jacobus to the Archives of the Roman Curia and there duly registered, as we have ascertained, the 'instrumentum in mundum' being instead delivered to Paolo.

There were mainly two anomalies on which the inquiry ordered by Pope Leo focused.The first issue to be resolved is whether the dispensation was granted in two bulls (duae bullae) or in one that was revised. Tamburini claims that there was only one document that was physically corrected. The Vatican report states that an initial bull included the claim that the bishop had his affair with an unmarried woman. The dispensation was drawn up and delivered to Paolo to be executed by bishop Begna, as in fact it was. A second bull revised the identity of the woman, she is now a nun, perhaps professed. According to the testimony of Mario

Maffei, the 'corrector' of the Penitentiary questioned in the investigation, the second bull was released later (ex intervallo et multo post), although it bore the date of the original bull:[26]

> quare reperiuntur duae bullae expeditae per Poenitentiariam sub dicta data Nonis Martii, in quarum altera vere expedita Nonis Martii exprimitur quod Paulus est genitus ex episcopo et soluta, in alia vero expedita sub eadem data Nonis Martii ex intervallo et multo post [...] exprimitur quod dictus Paulus est genitus ex episcopo et forsan moniali professa.

From the addition in the register's margin, it is clear that the correction was made by the sealer of the office, Nicolaus Gladiatoris, on a mandate of the regent, in the month of May 1514. Nevertheless, as the Vatican report states, the second bull reported the same date of 7 March 1513 as the first one.

How was it possible that the two bulls, released more than a year apart from each other, bore the same date? According to Mario Maffei, that was the ordinary praxis of office in such cases, i.e. in case of correction of a previous document. It is for this reason that the anonymous author of the Vatican report believed that, 'si ita esset', the investigated and probably incarcerated 'scriptor' of the Penitentiary (dominus Intinus? Or one between Petrus Suares and Pamphilus de Pamphiliis?) should be considered not guilty.What was unusual, however, and which was probably one of the reasons that prompted the pope to start the investigation, is that the second bull was delivered to the petitioner without the first being destroyed as it should have been. But this was not done, the first bull was delivered to him unaltered, perhaps at the request

[26] Mario Maffei, or *Marius de Vulterris*, held various officies in the Penitentiary since 1493: minor penitentiary and dean of the minor penitentiaries, scribe of the Penitentiary, *corrector,* and *viceregens*. See *Repertorium Poenitentiariae Germanicum*, edd. Ludwig Schmugge *et al.*, vol. 8/1 (Berlin 2012) XXIX; vol. 9/1 (Berlin 2014) XXIII; vol. 10/1 (Berlin 2016) XVII-XVIII. Frenz, *Die Kanzlei* 406, nr.1620. In the reform proposal from 1497, he is listed as one of two correctors whose job it was to check that the documents were correctly drawn up—Göller, *Die päpstliche Pönitentiarie* 2/2, 102. See also Stefano Benedetti, 'Maffei, Mario', DBI 67 (Rome 2006) 245-249. Mario's worldly private life left much to be desired—see Alessandro Ferrajoli, *Il ruolo della corte di Leone X*, ed. Vincenzo de Caprio ('Europa delle corti': Biblioteca del Cinquecento 23; Rome 1984) 380-387.

of Cardinal Marco (sed hoc casu forsan intuitu Cardinalis fuit sibi dimissa etiam prima illesa).

The second issue at the center of the papal investigation concerns the role of the notary Jacobus Raphaelis Gabrielis de Marinis. We have examined the minute of the instrument attesting to the execution of the dispensation preserved in the registers of the *Archivium Romanae Curiae*, and there is no mention there of the status of Paolo Vigerio's mother. However, as the formularies in use at that time also show,[27] the 'instrumentum in mundum'(i.e, the 'processus dispensationis') compiled in all its parts should almost certainly have included within it the text of the bull of the Penitentiary granting the bishop commissioner the faculties to dispense Paolo. But, according to the investigation's author, on the 'instrumentum in mundum' the notary Jacobus should have made the correction about the status of Paolo's mother once the second bull was sent one year after the first but with the same date of 7 March 1513.[28]

The Vatican report appears inclined to clear the notary of suspicions of forgery, not seeing in his behavior the intent of willful misconduct. Moreover, the anonymous writer does not fail to provide the pope with a veiled negative judgment on the work of the notaries, who often limited themselves exclusively to

[27] We refer in particular to the 'formulae' for the *Processus dispensationis super defectu natalium* and the *Processus super legitimatione bastardi per summum penitentiarium* collected in the *Formularium instrumentorum ad usum Romanae Curiae*. That collection is attributed to Antonio de Grassi and was one of the most successful works of legal practice, printed several times between 1474 and 1589—See Lawrence D. Green and James J. Murphy, *Renaissance Rhetoric Short-Title Catalogue 1460-1700* (Aldershot 2006) 21.

[28] See below, Appendix doc.5: 'Si inspiciatur processus tunc fulminatus liquido constabit de rasura et correctione, quia cum in prima bulla originali esset expressum quod ipse Paulus esset genitus ex episcopo et soluta et illa esset inserta in processu, necesse est ut in processu de quo ipse notarius rogatus fuit diceretur quod esset genitus ex episcopo et soluta. Et cum fuisset postmodum expedita secunda bulla eiusdem datae et tenoris, exceptis verbis loco "et solute""forsan ex moniali professa", directa eidem iudici, ostensa eidem notario, correxerit processum suum secundum bullam eiusdem datae, ex intervallo tamen postmodum expedita'.

signing the 'processus', entrusting other collaborators with the task of materially transcribing the text of the acts and the bulls inserted therein.[29] But—he concludes prudently—the judge will decide in that case.

Another thing to note is the chronology of the case. The initial dispensation occurred during the 'Sede vacante' between the death of Julius II (21 February 1513) and the election of Leo X (9 March 1513). Did Cardinal Marco, who was also a Franciscan with a vow of chastity, want to keep his illegitimate son secret from his papal relative and patron? With no pope on the throne, the case could go quietly through the Penitentiary. And with no finger prints on the dispensation, for Cardinal Marco Vigerio was away in the conclave, as was his cousin the Major Penitentiary, Cardinal Leonard Grosso della Rovere (d.17 September 1520).

As an alternative—or in addition—to that, it is also plausible that Cardinal Marco, due to the unexpected death of Julius II, suddenly found himself deprived of his greatest protector and decided to take advantage of the vacant see to obtain a dispensation from illegality for his son Paolo, not being able to foresee the predisposition of a new pontiff towards him.

A final aspect is highlighted by the Vatican report. Bishop Simun Begna of Modrus performed the tonsure ceremony as soon as the dispensation was granted. Evidence for this is in the Capitoline register (8 March 1513—See Appendix doc.2) and also in a document dated 1 April 1513, only three weeks later, that describes Paolo as a Roman cleric and creates him a notary of the Apostolic See.[30] The papacy tried to require that only a designated bishop could confer orders in Rome. Begna was not the one officially entrusted with the task, the Penitentiary's letter

[29]The unreliability of notarial practice in Rome had already been explicitly lamented by Julius II in his bull *Sicut prudens pater familias* and motivated the creation of the *Archivium Romanae Curiae*, established by the pope precisely to re-establish the 'publica fides' of documents and prevent the loss of records and documentary forgeries. On the notary profession in Early Modern Rome, in addition to the already cited Nussdorfer, *Notaries*, see also Maria Luisa Lombardo, *Il notaio romano tra sovranità pontificia e autonomia comunale (secoli XIV-XVI)* (Milan2012).

[30] See Hergenröther, *Regesta* 1.114 nr.2002.

conferring on him only the faculty to dispense Paolo from 'defectus natalium'. He was not commissioned to confer the clerical status on Paolo, but he did it anyway, thus raising the question of its validity.[31]

What happened between March of 1513 and May of 1514 to require the production of a new bull—and a confirmation of Paolo's appointment to a Milanese benefice—is shrouded in mystery.[32] There is no evidence that Cardinal Marco's reputation had suffered from a revelation of the affair. In fact, he was appointed on 3 June 1513 as one of eight cardinals to the conciliar deputation on the reform of the Roman Curia and its officials, a position similar to that he held under Julius II in March of 1512. His subcommission on 26 October 1513 was charged with supervising the abbreviators of the major and minor benches and perhaps the guards and notaries of the Chancellery.[33] Because of

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[31]The Capitoline document asserted that bishop Begna was authorized to confer on Paolo the clerical character—'iuxta formam et tenorem dictarum litterarum apostolicarum clericali caractare [sic] insignivit et eidem primam tonsuram clericalem contulit'. The report to Leo X denied that the prelate was so authorized: 'Unum tamen dico Sanctitati Vestrae, quod secundum fidem notarii attestatur quod dictus episcopus insignivit dictum Paulum clericali caractere vigore dictae dispensationis, cum tamen id sibi commissum non esset, et sic nulliter. Sed super hoc non est quaestio'. On ordination in the Roman Curia, see Minnich, 'Lateran V and the Reform of the Roman Curia' 152-154.

[32] On 16 June 1513 Paolo was given a 'commenda' on the Benedictine monastery of Santa Cristina in the diocese of Milan that Cardinal Marco Vigerio resigned while reserving to himself its administration and revenues until Paolo became of legitimate age; on 24 April 1514 this provision was confirmed—see Hergenröther, *Regesta* 1.187 nrs.3215-3217, 1.515 nr.8155. The level of religious observance in Milanese monasteries of nuns left much to be desired. A report of Milanese officials to the archbishop, Cardinal Ippolito d'Este, dated 21 May 1521, complained that many monasteries of nuns have declined to an abominable state with such intolerable stench and ignominy that no one can say worse things about them—see Federico Chabod, *Lo Stato e la vita religiosa a Milano nell'epoca di Carlo V* (Biblioteca di cultura storica 113; Turin 1971) 241, 377-379. What pastoral care the father and son devoted to the monastery of Santa Cristina is unclear.

[33] Carl Joseph von Hefele, *Conciliengeschichte nach den Quellen bearbeitet*, 8: *Der Fortsetzung erster Band von Josef Cardinal Hergenröther* (Freiburg im

his theological expertise, Leo X also appointed him in 1515 to a special committee of eight cardinals to advise him on how to handle the 'schismatic' Ruthenians.[34] He is depicted in the fresco 'The Oath of Leo III' in the *Stanze* of the papal apartment, painted by Raphael's disciples ca. 1517, where he is the first of the three cardinals standing to the right of the pope.[35] His reputation seems to have remained intact to his death.

How the case came to the attention of Leo X is also a mystery. Cardinal Marco was already dead. Unless an ecclesiastic had a license from the pope to make a last testament, all his wealth gained from ecclesiastical benefices was considered 'spoglia' and confiscated by the Church. Did Marco have such a license? He already disposed of some of his wealth earlier: resigning his diocese of Senigallia to his nephew Marco Quinto and his 'commenda' on the monastery of Santa Cristina in Milan to his son Paolo. We learn that he left a debt of one-thousand ducats owed to Cardinal Riario (see below). Did he make a will in which he mentioned his son Paolo as one of his heirs? Did Leo, ever eager to increase his revenues, investigate what provisions Marco had made for his estate and thereby discover the case of Paolo and his two bulls?[36] Did the surrender of the 'commenda' of the

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Breisgau 1887) Beitrage A: 'Roma: Deputationes Cardinalium pro reformatione' 810-812; Mansi 32.847C; Minnich, 'Lateran V and Reform of the Roman Curia' 140-141. Vigerio's theological expertise was recognized by his fellow cardinals who deferred to him to select the Gospel readings at the conciliar ceremonies—see Marc Dykmans, 'Le cinquième Concile du Latran d'après le Diaire de Paris de Grassi', AHC 14 (1982) 271-369, here 287, nr.842: 32 super 15.

[34] Leo X, *Sacrosancte universalis Ecclesie regimini*, Rome, 9 August 1515, printed in *Vetera Monumenta Historica Hungariam Sacram Illustrantia*, ed. Augustin Theiner, Tomus Secundus: *Ab Innocentio PP. VI usque ad Clementem PP. VII, 1352-1526*, (Rome 1860) 610-11; Minnich, 'The Closing of the Fifth Lateran Council', 37.

[35] Nelson H. Minnich, 'The Religious Culture of Rome in the First Quarter of the Sixteenth Century', *Revisiting Raphael's Vatican Stanze*, edd. Tracy Cosgriff and Kim Butler Wingfield (London-Turnhout 2022) 60-80 at 70.

[36] Barbara McClung Hallman, *Italian Cardinals, Reform, and the Church as Property, 1492-1563* (UCLA Center for Medieval and Renaissance Studies 22; Los Angeles1985) 80-94. For an example of Leo X ignoring a prelate's last testament to confiscate his goods, see Minnich, 'Alexios Celadenus: A Disciple

twelve-year old Paolo Vigerio, with the family name of the recently deceased Cardinal Marco, into the hands of Leo X to be then conferred on Cardinal Leonardo Grosso della Rovere raise questions in the pope's mind?

The death of Cardinal Marco on 18 July 1516 led to the production of two documents: the first dated 28 August 1516 sheds additional light on the case of Paolo's dispensation.[37] This document (see below, Appendix doc.3) reveals that the cardinal left behind a debt of one-thousand ducats owed to Cardinal Raffaele Riario.[38] The Roman clerical brothers, Paolo Vigerio, an apostolic protonotary, and Urbano Vigerio,[39] both in their minority, sons of a Roman noble woman named Camilla Vigerio, their guardian[40]—the father's name is significantly silenced here, unlike what we read in the cited Vatican report—admit that they

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of Bessarion in Renaissance Italy', *Historical Reflections/Réflexions Historiques* 15 (1988) 47-64, at 54 n.8.

[37] Rome, Archivio Storico Capitolino, Archivio notarile generale urbano, Sez. II, Filza 61, fols. 64v-65r—See below, Appendix doc. 3.

[38] Raffaele Sansoni Riario (1460-1521), born in Savona, from which the Vigerio family also came, was grand-nephew of Pope Sixtus IV and second cousin of Cardinal Giuliano della Rovere, future Pope Julius II. He was created Cardinal on 10 December 1477, when he was sixteen years old, and was named administrator of several dioceses. In the Papal Court he held for a long time the important office of 'camerarius' (1483-1521). He died in Naples on 9 July 1521—Michele Camaioni, 'Riario Sansoni, Raffale', DBI 87.100-105.

[39] No information was found on his account. He is in any case not to be confused with other homonymous members of the Vigerio family: Urbano Vigerio (†28 August 1508), governor of Fano between 1503 and 1508—see Aurelio Zonghi, *Repertorio dell'antico Archivio comunale di Fano* (Fano 1888) 280; Pietro Maria Amiani, *Memorie istoriche della città di Fano* (2 vols. Fano 1751) 91, 344—and Urbano Vigerio (†1570), coadjutor bishop (1550, when he was 27 years old) and then bishop (1560) of Senigallia—Eubel, *Hierarchia catholica* 3.298.

[40] The identity of 'nobilis domina Camilla de Vigeriis Romana, eorum mater et tutrix' is problematic. There is little doubt that she is the mother of Paolo, the illegitimate son of Cardinal Marco Vigerio. In the earlier documents his mother is described as either'soluta' or 'forsan moniali professa', but here she is a noble Roman laywoman, bearing her husband's family name of Vigerio.

are liable for its repayment and promise to satisfy the debt within ten months.

The second document,[41] dated 30 August 1516, suggests how Paolo came up with this large sum. Paolo, who is identified as being about twelve years of age, surrendered into the hands of Pope Leo his 'commenda' on the monastery of Santa Cristina and the pontiff now confers it on Cardinal Leonardo Grosso della Rovere, Major Penitentiary and Paolo's great uncle, who has rights to all its revenues. The cardinal is not an administrator for the underaged Paolo, but holds the 'commenda' himself. When Cardinal Leonardo resigns his 'commenda', Paolo has the right of regress and pacific corporal possession of the 'commenda'. It would thus seem that Cardinal Leonardo provided Paolo with the one-thousand ducats to pay the debt owed to Cardinal Riario. Cardinal Leonardo also received the revenues from the *commenda* to pay him back for the money given to Paolo. These documents indicate the Pope Leo learned soon after Cardinal Marco's death that he had at least two illegitimate sons who were Roman clerics.

How this case was resolved also remains unknown. Paolo Vigerio apparently settled his father's debt to Cardinal Riario and had a regress on the 'commenda' on the monastery of Santa Cristina in Milan. Mario Maffei, the Penitentiary's 'corrector', was not punished for failing to catch and correct any irregularity, but instead he was appointed bishop of Aquino on 5 November 1516 and remained in the favor of Leo X.[42] Leonardo Grosso della Rovere remained as Major Penitentiary and Mercurio de Vipera as his regent. It is doubtful if the minor officials involved, such as the sealer, notary, or scribe, were ever punished. Cardinal Marco Vigerio had died. Leo X apparently let him and his reputation rest in peace.

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Città del Vaticano.

[41] Vatican City, Archivio Apostolico Vaticano, Reg. Vat. 1114 fol.108r-108v—See below Appendix doc.4.
[42] Eubel, *Hierarchia catholica* 3.114.

Appendix

Document 1—Mercurius Vipera, regent of the Apostolic Penitentiary, grants Paolo Vigerio the dispensation from defect of birth (Rome, 7 March 1513).

[Vatican City, Archivio della Penitenzieria Apostolica, Reg. Matrim. et Divers. 58 fol.274r].

Sequuntur materie de illegitimis expedite Sede vacante per obitum felicis recordationis domini Julii pape II 1513.

(…)

<*Above the text of the petition*> Gonini[43] gratis intuitu domini Intini scriptoris[44].

<*In the left margin*> Nonis martii.

<*In the right margin*> Roman.

Paulus Vigerii scolaris Romanus de episcopo genitus et ~~soluta~~[45] petit secum dispensari in prima forma tantum. Fiat de speciali, M(ercurius) regens[46].

Et committatur episcopo Modrusiensi ad presens in Romana Curia residenti. Fiat, M(ercurius).

Document 2—Bishop Simun Begna of Modrus, commissioner deputated by the Penitentiary, dispenses Paolo Vigerio from the defect of birth and confers on him the clerical status (Rome, 8 March 1513).

[Rome, Archivio Storico Capitolino, Archivio notarile generale urbano Sez.LXVI, Reg. 24 fol.18v].

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[43] See above n.4.

[44] No information was found on his account.

[45] The word 'soluta' was expunged and corrected in the right margin 'Forsan moniali professa. Cor(rectum) per me N(icolaum) Gladiatoris sigillatorem de mandato regentis sine preiudicio de mense Maii 1514, dico 1514, prout constat in libris dominorum scriptorum de tali mense deputatorum in bulla desuper expedita contentorum, videlicet domini Petri Suares et domini Panphili de Pamphiliis'.

[46] See above n.9.

<*In the left margin*>Paulus Vigerii.
<*In the left margin*> Io(hannes Copis).[47]

In Dei nomine amen. Reverendus pater dominus Simon Dei et Apostolice Sedis gratia episcopus Modrusiensis[48] ad presens in Romana curia residens, comissarius et executor unicus auctoritate apostolica specialiter deputatus vigore litterarum apostolicarum ex parte reverendissimi in Christo patris et domini domini Leonardi miseratione divina tituli Sancte Sussane presbiteri cardinalis summi penitentiarii[49] sub datum Rome apud Sanctum Petrum sub sigillo offitii Penitentiarie nonis[50] martii anno a Nativitate Domini millesimo quingentesimo tertiodecimo Apostolica Sede pastore carente, ad petitionem et instantiam honorabilis domini Pauli Vigerii scolaris Romani,eundem dominum Paulum servatis servandis et iuxta formam et tenorem dictarum litterarum apostolicarum clericali caractare [*sic!*] insignivit et eidem primam tonsuram clericalem contulit ac eum militie clericali agregavit et ascripsit et cum eodem super defectu natalium quem patitur quod ipso et aliis insupradictis litteris apostolicis contentis non obstantibus ad omnes etiam sacros et presbiteratus ordines promoveri et benefitium ecclesiasticum etiam si curam habeat animarum obtinere auctoritate apostolica sibi commissa ut supra iuxta earumdem litterarum vim et tenorem misericorditer dispensavit. Ita tamen quod dictus dominus Paulus, ut requirit onus benifitii quod eum post dispensationem huiusmodi obtinere contigerit, se faciat a iure statutis temporibus ad omnes ordines promoveri et personaliter resideat in eodem, alioquin dispensationis gratia quo ad benefitium ipsum nullius sit momenti

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[47] See below n.55.
[48] See above n.15.
[49]We know that Paolo's supplication was approved by the regent of the Penitentiary, Mercurius Vipera. However, the instrument makes reference to Cardinal Major Penitentiary Leonardo Grosso della Rovere. The cardinal's mention is due to the formulary of the Penitentiary's letters, which were always entitled to the head of the office, even in cases where it was the regent who approved the supplication.
[50]'Nonis'with -is expunged, second rod of the -n- prolonged below and abbreviative sign added above.

et omnia alia fecit inpremissis que et pro ut per dictum dominum penitentiarium maiorem commissum extitit. De quibus omnibus et singulis premissis prefatus reverendus dominus episcopus et executor ac dominus Paulus sibi a me notario infrascripto rogaverunt scribi atque confici publicum seu publica instrumentum et instrumenta. Actum fuerunt hec Rome, in domo habitationis[51] prefati reverendi domini episcopi et executoris, sub anno a Nativitate Domini millesimo quingentesimo tertiodecimo[52] inditione prima die vero octava mensis martii Apostolica Sede pastore carente, presentibus ibidem reverendo patre domino Augustino Ruffo sacre theologie professore et discreto viro Jacobo de Roselis clerico Ianuensis diocesis testibus ad premissa vocatis specialiter atque rogatis.[53] Jacobus domini Raphaelis Gabrielis de Marinis notarius rogatus. Io(hannes) / Is(nardus) Turronus[54] / Copis.[55]

Document 3—The brothers Paolo and Urbano Vigerio, both in their minority, in the presence and with the consent of their mother and legal guardian Camilla de Vigeriis, promise to satisfy within ten months the debt of 1.000 ducats that the

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[51]'h(ab)itationis'added in the left margin with a return sign by the 'corrector Iohannes Copis'.

[52] Preceded by 'tertiodecimo' expunged.

[53] For both witnesses see above, n.19.

[54] The 'scriptor Isnardus Turronus' is among the 101 officials appointed by Julius II in the bull *Sicut prudens* and retained the office until 1526—Frenz, RORC on-line edition: (https://www.phil.uni-passau.de/fileadmin/dokumente/fakultaeten/phil/lehrstuehle/frenz/Forschung/littera_I.pdf),'sub voce'.

[55]The signature of the 'corrector Iohannes Copis' frames that of the 'scriptor'. He also initials the accomplished correction of the registration by placing his own abbreviated name in the left margin Io(hannes) (see Drago Tedeschini, 'I libri instrumentorum', 31).'Iohannes Copis' was a prominent curia official and bishop of Terracina from 1522 to 1527—See Frenz, RORCon-line edition (https://www.phil.uni-passau.de/fileadmin/dokumente/fakultaeten/phil/lehrstuehle/frenz/Forschung/littera_I.pdf) 'sub voce''Johannes Copis'; Eubel, *Hierarchia catholica* 3.310.

late Cardinal Marco Vigerio owed to Cardinal Raffaele Riario (Rome, 28 <August 1516>).

[Rome, Archivio Storico Capitolino, Archivio notarile generale urbano, Sez.II, Filza 61, fols. 64v-65r].

<*In the left margin*> Obligatio heredum bone memorie domini cardinalis Senogaliensis.

<*Above the text*>Die XXVIII[a] eiusdem.

Cum sit quod alias reverendissimus dominus Raphael cardinalis Sancti Georgii[56] bone memorie Marco tituli Sancte Marie Transtiberim cardinali Senogaliensi die XXV[a] februarii 1510 summam quingentorum ducatorum auri de Camera et successive die XXV[a] octobris anni 1515 alios quingentos ducatos similes mutuaverit gratiose, prout latius per duas apochas manu prefati domini cardinalis Senogaliensis scriptas et suo parvo sigillo sigillatas, ad quas quatenus opus <sit> relatio habeatur, plenius dicitur contineri, dictusque cardinalis Senogaliensis ante restitutionem dictorum quingentorum ducatorum[57] ut Deo placuit vitam cum morte commutaverit, idcirco nobiles domini Paulus Vigerius prothonotarius apostolicus et Urbanus Vigerius[58] eius frater, clerici Romani, minores etate, in presentia tamen nobilis domine Camille de Vigeriis Romanae,[59] eorum matris et tutricis, ac de eiusdem licentia, consensu et auctoritate, renunciando primitus cuilibet privilegio minoris etatis predicte, non vi, dolo etc., volentes et desiderantes conscientiam prefati reverendissimi domini cardinalis Senogaliensis exonerare ac prefato reverendissimo domino cardinali Sancti Georgii satisfacere, certificati etc. de privilegiis minorum etatum, summaque, pecunia et debito predicto, qui scientes etc., sponte etc., iidem domini Paulus et Urbanus in mei notarii etc. constituti confessi fuerunt se teneri et obligati esse eidem reverendissimo domino cardinali

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[56] Cardinal Raffaele Riario (1471-1521). See above n.38.

[57] Cardinal Vigerio's debt should be understood to be not 500 ducats, as here erroneously indicated, but 1000 ducats, as expressed earlier in the text and reiterated below.

[58] See above n.39.

[59] See above n.40.

Sancti Georgii in dictis mille ducatis, quos restituere promiserunt infra decem menses proximos a die presentium computandos dicto reverendissimo domini Cardinali aut eius legitimo procuratori seu agenti pro eo, etiam una cum dampnis etc. de quibus etc. pro quibus etc. iidem fratres sese etc. in antedicta forma Camere Apostolice cum clausulis solitis obligaverunt. Rome, in domo prefate domine Camille, presentibus domino fratre Augustino de Ruffis ordinis Minorum professore, Gravinensis diocesis,[60] ac Angelo de Sinibarbis cive Romano[61] et Petro Vulpino Veronensi utriusque iuris doctore[62] testibus etc.

Io(hannes) de Lauda notarius[63] pro nota subscripsit.

Document 4—Pope Leo X grants Paolo Vigerio, Roman cleric and apostolic notary—who had renounced the *commenda* of the Benedictine monastery of Santa Cristina, in the diocese of Milan, then assigned by the same Pontiff to Cardinal Leonardo Grosso della Rovere—the faculty of regaining that *commenda* as soon as it became vacant again (Rome, 30 August 1516).

[Vatican City, Archivio Apostolico Vaticano, Reg. Vat.1114 fol.108r-108v].

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[60] See above n.19.

[61]The Sinebarbis family was related to the della Rovere—and thus also to the Vigerio—See Rodolfo Lanciani, *Storia degli scavi di Roma e notizie intorno le collezioni romane di antichità,*1: *A. 1000-1530* (Rome 1902) 120. A certain Antimus de Sinebarbis is recorded as a 'scriptor' of the Penitentiary between 1493 and 1519—See Frenz, RORC on-line edition (https://www.phil.uni-passau.de/fileadmin/dokumente/fakultaeten/phil/lehrstuehle/frenz/RORC/litter a_A.pdf), 'sub voce''Antimus de Sinebardis'; *Il liber decretorum dello scriba senato Pietro Rutili: Regesti della più antica raccolta di verbali dei consigli comunali di Roma (1515-1526)*, ed. by Andreas Rehberg (Rome 2010) 279.

[62]No information was found on his account.

[63]Notary Iohannes de Lauda appears to have rogated documents in Rome between 1505 and 1522—See *Repertorio dei notari romani dal 1348 al 1927 dall'Elenco di Achille Francois*, ed. by Romina De Vizio (Rome 2011) 47, 122, 128, 132.

<*In the left margin*> Phi(lippus) de Roma.[64]

Leo etc., dilecto filio magistro Paulo[65] Vigerio clerico Romano, notario nostro, salutem etc. Romani Pontificis providentia circumspecta ecclesiis et monasteriis singulis, ne diutine vacationis exponantur incomodis, gubernatorum utilium fulciantur presidio, prospicit diligenter, et personis ecclesiasticis, presertim grata sibi et Apostolice Sedi devotionis obsequia impendentibus, ut in suis oportunitatibus aliquod suscipiant relevamen, de subventionis auxilio providet oportuno. Cum itaque hodie tu, qui monasterium Sancte Cristine ordinis Sancti Benedicti Mediolanensis diocesis ex concessione et dispositione apostolica in commendam nuper obtinebas, commende huiusmodi in manibus nostri sponte et libere cesseris, nosque cessionem huiusmodi admittentes monasterium predictum huic certo modo quem pro expresso haberi volumus vacans dilecto filio nostro Leonardo titulo Sancte Susanne presbitero cardinali per eum quoad viveret tenendum, regendum et gubernandum per alias nostras litteras commendaverimus, prout in illus plenius continetur, nos tibi, qui ut asseris in duodecimo vel circa tue etatis anno constitutus existis, ne ex cessione huiusmodi nimium dispendium patiaris, de alicuius subventionis auxilio providere ac specialem gratiam facere volentes, teque a quibusvis excommunicationis, suspensionis etc. fore censentes, necnon omnia et singula beneficia ecclesiastica cum cura et sine cura, que etiam ex quibusvis apostolicis dispensationibus obtines et expectas ac in quibus et ad que ius tibi quomodolibet competit,

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[64]The indication refers to the papal secretary who prepared the document—see Thomas Frenz, *I documenti pontifici nel medioevo e nell'età moderna*, seconda edizione italiana a cura di Sergio Pagano (Vatican City 1998) § 77. On the papal secretary Philippus de Roma, see Frenz, *Die Kanzlei der Päpste der Hochrenaissance* nr.1981; Frenz, RORC on-line edition (https://www.phil.uni-passau.de/fileadmin/dokumente/fakultaeten/phil/lehrstuehle/frenz/RORC/litter a_P.pdf),'sub voce'.

[65]'Paulo' added in the right margin with a return sign by Hippolitus de Cesis. On him, see Frenz, *Die Kanzlei der Päpste der Hochrenaissance* nr.995; Frenz, RORC, on-line edition:
(https://www.phil.uni-passau.de/fileadmin/dokumente/fakultaeten/phil/lehrstuehle/frenz/RORC/litter a_H.pdf),'sub voce'.

quecumque quotcumque et qualiacumque sint, eorumque fructuum, reddituum et proventuum veros annuos valores ac huiusmodi dispensationum tenores presentibus pro expressis habentes, tibi quod dicto Leonardo cardinali cedente vel decedente seu monasterium predictum alias quomodolibet dimittente vel amittente seu comenda huiusmodi cessante aut monasterio predicto vacante quovismodo, etiam apud Sedem predictam, liceat tibi ad illud, etiam si de eo consistorialiter disponi consueverit, liberum habere regressum, accessum et ingressum, illiusque corporalem possessionem per te vel alium seu alios propria auctoritate libere apprehendere, et illud, tam presentium quas vim valide et efficacis commende ad vitam tuam habere decernimus, quam prioris tue commende vigore, absque alia tibi desuper facienda commenda ut prius retinere in omnibus et per omnia perinde ac si cessionem huiusmodi minime fecisses auctoritate apostolica tenore presentium de specialis dono gratie indulgemus. Quocirca venerabili fratri nostro episcopo Asculano et dilectis filiis vicariis venerabilium fratrum nostrorum archiepiscopi Mediolanensis et episcopi Papiensis[66] in spiritualibus generalibus per apostolica scripta mandamus quatenus ipsi vel duo aut unus eorum per se vel alium seu alios faciant auctoritate nostra te facultate iuris regrediendi, accedendi et ingrediendi et in eventum regressus, accessus et ingressus huiusmodi dicti monasterii possessione pacifice frui et gaudere, non permittentes te per quoscumque desuper quomodolibet indebite molestari, contradictores etc., non obstantibus constitutionibus et ordinationibus apostolicis ac monasterii et ordinis predictorum iuramento, confirmatione apostolica vel quavis firmitate alia roboratis, statutis et consuetudinibus contrariis quibuscumque, aut si aliquibus communiter vel divisim ab eadem sit Sede indultum, quod interdici, suspendi vel excommunicari non possint per litteras apostolicas non facientes plenam et expressam ac de verbo

[66]Girolamo Ghinucci, bishop of Ascoli Piceno (Eubel, *Hierarchia catholica* 3.119); Cardinal Ippolito d'Este, archbishop of Milan (Eubel, *Hierarchia catholica* 3.240]; and Cardinal Antonio Maria Ciocchi del Monte, administrator of Pavia (Eubel, *Hierarchia catholica* 3.269).

ad verbum de indulto huiusmodi mentionem, et qualiter alia dicte Sedis indulgentia generali vel speciali cuiuscumque tenotis existat, per quam presentibus non expressam vel totaliter non insertam effectus huiusmodi gratie impediri valeat quomodolibet vel differri, et de qua cuiusque toto tenore habenda sit in nostris litteris mentio specialis. Nos enim ex nunc irritum et inane decernimus si secus super hiis a quoque quavis auctoritate scienter vel ignoranter contigerit attemptari. Nulli etc. nostre absolutionis, indulti, mandati et decreti infringere etc. Si quis etc. Datum Rome, apud Sanctum Petrum, anno etc. millesimo quingentesimo sextodecimo, tertio kalendas septembris, pontificatus nostri anno quarto.

LXXXX.[67]
Ciprianus.[68]
W(illelmus) de Enckenvort pro comp(utatori).[69]
P(etrus) Marciaci.[70]
Collat(um).Hip(politus)de Cesis.[71]

Document 5—Anonymous report to Pope Leo X concerning the dispensation of Paolo Vigerio (after 18 July 1516—before 1 December 1521).

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[67] The amount of the tax due for the document's expedition.—Frenz, *I documenti pontifici* §77.

[68] The name should refer to Cyprianus Numanus, 'scriptor Cancellariae' from 1512 to 1520.—Frenz, RORC on-line edition (https://www.phil.uni-passau.de/fileadmin/dokumente/fakultaeten/phil/lehrstuehle/frenz/RORC/littera_C.pdf), 'sub voce'.

[69] The Dutch Willem van Enckevoirt (1464-1534) appears among the Curia officials from 1489 and holds numerous positions. Elected bishop of Tortosa (1523-1534) and later archbishop of Utrecht (1529-1534), in 1523 he is also created cardinal by Pope Adrian VI.—Frenz, RORCon-line edition (https://www.phil.uni-passau.de/fileadmin/dokumente/fakultaeten/phil/lehrstuehle/frenz/Forschung/littera_G.pdf),'sub voce''Guillermus de Enckenvoirt'.

[70] Frenz, RORC, on-line edition:
(https://www.phil.uni-passau.de/fileadmin/dokumente/fakultaeten/phil/lehrstuehle/frenz/RORC/littera_P.pdf), 'sub voce'.

[71] See above n.65.

[Vatican City, Archivio Apostolico Vaticano, A.A Arm. I-XVIII, nr.5041, fols. 36r-v].

Pater Sancte.

Cum Sanctitas Vestra mandaverit sibi referri quae gesta reperiebuntur circa dispensationem super defectu natalium Pauli Vigerii tunc scholaris romani filii bonae memoriae Cardinalis Senogallinensis.

Reperitur quod, vacante Sede per obitum felicis recordationis Julii pape II praedecessoris vestri,[72] praefatus Paulus obtinuit per officium Poenitentiariae mandari episcopo Modrusiensi[73]ut secum dispensaret super defectu natalium quem se pati dicebat de episcopo genitum et soluta ut ad omnes etiam sacros ordines se promoveri facere posset et beneficium ecclesiasticum obtinere valeret. Nonis Martii anni M.CCCCC.XIII.[74]

Secundo, est exhibita fides ex officio Archivii quae fuit portata per Jacobum Raphaelis Gabrielis de Marinis canonicum Curculensem, notarium publicum,[75]qui fuit rogatus de processu fulminato per episcopum Modrusiensem. In qua fide seu notula quam ipse notarius dedit officio Archivii narrat quod Simon episcopus Modrusiensis deputatus executor in supradictis litteris dispensationis sub dicta data Nonis Martii ad petitionem dicti Pauli iuxta formam dictarum litterarum eum clericali caractere insignivit, secumque ut ad omnes ordines praedictos se promoveri facere posset et beneficium huiusmodi obtinere valeret dispensavit. Non est dubium, Pater Sancte, quod notarius qui fuit rogatus de processu huiusmodi dispensationis inseruit in processu bullam, in qua narrabatur quod Paulus erat natus ex episcopo et soluta. Quare reperiuntur duae bullae expeditae per Poenitentiariam sub dicta data Nonis Martii, in quarum altera vere

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[72] The 'Sede vacante' lasted from 20 February 1513 (death of Julius II) to 9 March 1513 (election of Leo X)—Eubel, *Hierarchia catholica* 3.9, 3.13.

[73] Simun Begna Kožičić (ca. 1460-1536), bishop of Modrus in Croatia (1509-36)—See supra n.15.

[74] Nonis Martii 1513 is 7 March 1513.

[75] See above n.18.

expedita Nonis Martii exprimitur quod Paulus est genitus ex episcopo et soluta, in alia vero expedita sub eadem data Nonis Martii ex intervallo et multo post, prout fatetur dominus Marius de Vulterris,[76]exprimitur quod dictus Paulus est genitus ex episcopo et forsan moniali professa. Et sic necessario concluditur quod processus factus per episcopum, de quo fuit rogatus dictus Jacobus notarius die octava eiusdem mensis Martii cuius septima die est data dictae dispensationis, fuit factus super bulla dispensationis in qua narratur quod dictus Paulus est genitus ex episcopo et soluta. Et res ipsa patet ad oculum ex his quae deponit dominus Marius corrector Poenitentiariae.

An autem potuerint expediri duae bullae sub eadem data cum diversis narrativis? Idem dominus Marius deponit quod per dictum officium Poenitentiariae poterat corrigi dicta bulla in qua fuerat expressum quod dictus Paulus erat natus ex episcopo et soluta et cassare haec verba et loco illorum ponere quod esset genitus ex episcopo et forsan moniali professa, vel dare novam bullam cum secunda dicta expressione et lacerare primam; sed hoc casu forsan intuitu Cardinalis fuit sibi dimissa etiam prima illesa.Et quod liceat dare diversam bullam sub eadem data in similibus casibus etiam ex intervallo, dicit plane constare ex registris eorum. Quod si ita esset, scriptor detentus non esset in aliqua culpa et veniret relaxandus et ideo Sanctitas Vestra poterit committere auditori ut, si ita esse repererit, iusticia id exigente eum relaxet.

Circa notarium, Pater Sancte, credo quod si inspiciatur processus tunc fulminatus liquido constabit de rasura et correctione, quia cum in prima bulla originali esset expressum quod ipse Paulus esset genitus ex episcopo et soluta et illa esset inserta in processu, necesse est ut in processu de quo ipse notarius rogatus fuit diceretur quod esset genitus ex episcopo et soluta. Et cum fuisset postmodum expedita secunda bulla eiusdem datae et tenoris, exceptis verbis loco ‘et soluta’‘forsan ex moniali professa’, directa eidem iudici, ostensa eidem notario, correxerit processum suum secundum bullam eiusdem datae, ex intervallo tamen postmodum expedita. An autem ex hoc dici possit notarium puniri debere tamquam falsarium, videat ipse iudex. Hoc tamen

[76] See above n.26.

dicam pro informatione Sanctitatis Vestrae, quod cum notarii sunt rogati de processibus bullarum quae in ipsis processibus inseruntur, qui ut plurimum per copistas scribuntur, et notarii qui sunt rogati tantummodo subscribunt et restituunt bullas originales cum processu et tantum sibi reservant notulam rogitus, prout apparet in notula quam iste portavit ad officium Archivii, in qua dicit quod episcopus dispensavit iuxta formam et tenorem litterarum. Si ex intervallo dicto notario fuisset reportata bulla et sibi dictum quod copista qui scripserat processum erraverat in insertione dictae bullae scribendo quod Paulus genitus ex episcopo et soluta, cum tamen in bulla ipsa diceretur ex episcopo et forsan moniali professa, videndo bullam originalem parti restitutam, credo quod licuerit sibi corrigere processum iuxta tenorem bullae si credebat illam eandem esse quae fuit presentata episcopo qui dispensavit. Et quod ita credere potuerit et excusari debeat faciunt cum esset eiusdem datae et in manibus partis cui illam restituerat et processus scriptus per copistam et nullus ex hoc ledi poterat: quae arguunt quem in dolo, seu excusant a dolo. Iudex tamen considerabit.

Unum tamen dico Sanctitati Vestrae, quod secundum fidem notarii attestatur quod dictus episcopus insignivit dictum Paulum clericali caractere vigore dictae dispensationis, cum tamen id sibi commissum non esset, et sic nulliter. Sed super hoc non est quaestio.

d'Avray, David L. *Papal Jurisprudence, 385-1234: Social Origins and Medieval Reception of Canon Law.* Cambridge: Cambridge University Press, 2022. $99.99. Pp. 300. ISBN: 978-1-10867-143-9.

Michael Edward Moore

In this tightly woven, carefully argued book, the rise of thirteenth-century legal science is explained as the return, or the awkward persistence, of old papal law in new contexts, and the corresponding need for exposition, explanation, and decision-making to resolve complex situations in which the old laws did not readily correspond to a new historical world. This argument is not only about the 'new' situation of ecclesiastical life and jurisprudence from 1100 to 1234, but the long-enduring presence of old papal decisions from the period 400 to 500. How did the old law serve in new situations 700 years later? D'Avray contends that in considering the history of papal jurisprudence, as it flowed into the schools in the age of Johannes Teutonicus and the *Liber Extra,* the historian must account for two major ages, two key sets of problems, and two principal historical contexts: the first wave and the second wave of papal decretals. 'The main focus of this study is on the parallels and connections between the two decretal ages' (193).

Indeed, one of the strong theses of d'Avray book is the existence and mutual reflection of two decretal ages (5th century / 12th century). If the long history of papal law can be described as a structure, it has the shape of a barbell graph. These parallel phases of papal-legal history mirror one another and are also termed 'the first and second decretal waves, c.400 and c. 1200' (213). The book is not concerned to provide a detailed narrative sweeping over all those centuries. Instead, short *précis* of changing historical circumstances are presented at certain key points in order to demonstrate the dramatic changes leading up to the first and second periods of papal jurisprudence. The scaffolding of European history is somewhat in the background, but helps to explain and orient readers to legal changes. The fall

of the Roman Empire is presented as a great crash, in the strong versions of Peter Heather (106) and Julia Smith (218), rather than the current fashion for seeing continuity instead. There is Peter Brown's thesis that Christianity brought a total change of mentality about death, a re-negotiated social world and the erection of a new cosmos (4). And there is Ian Wood's view that massive transfers of wealth in late antiquity allowed for the substantial take-off of the Church (107).

The fall of Rome did not mean the fall of the City, which was able to provide an exceptional degree of intellectual and institutional continuity. In some fine passages d'Avray expresses the nature of Roman memory and continuity as embodied in building programs such as the basilica of Maria Maggiore (107-108). The letters of Pope Leo the Great are similarly described as monuments of memory and recordation (119). After the demise of Attila and the collapse of the Hunnic project, the City of Rome began to take center stage in western Europe (23-24). Carolingian history is briefly alluded to as the frame for the *Admonitio Generalis*. And so on to the rise of the Ottonian Empire and the dispersal of wealth and political power in post-millenial Europe. D'Avray's analysis of the period 1050-1150 is fascinating. The situation of the clergy had changed. No longer part of a cohesive late antique urban world, the early medieval clergy now found themselves in an agricultural countryside beset by small competing political principalities. Now they lived in the shadow of lords and castles: this was 'a world of rural parishes, utterly different from the original context'—i.e. the context of the old papal decretals regarding such matters as priestly marriage and priestly sexual activity (177). It was not the rise of towns in the early Middle Ages that accounts for the Investiture Controversy and the papal turn, but the 'ruralization of pastoral structures' (171). This caused a renewed cognitive dissonance with earlier papal canon law. Iogna-Prat, Michel Lauwers, and others have been reviving Marc Bloch's thesis of a First Feudal Age, and this illuminating section (169-188) seems compatible with that trend. D'Avray moves the discussion of the eleventh century toward some new questions, going beyond the usual focus on investitures

and the actions of Leo IX. 'Canon law became one of the weapons of the revolutionary group that came to power around the pope through the election of Leo IX' (181). After centuries of grudging acceptance of royal selection of bishops, the Gregorian reformers lashed out against this practice. This surprising change was a shock, and elicited a reaction. But the backdrop for Leo's actions was not the rise of towns, but 'the de-urbanization of dioceses' (208). It is a genuine achievement of d'Avray's conceptualization to see that 'the ruralization of pastoral structures…led to the contrasts with early papal jurisprudence' and thence to the papal turn (171).

These historical vignettes lend weight to the idea that d'Avray has a structural perspective on legal history. '*Longue durée* patterns and transformations are not the only ways out of the prison of periodization' (12), he writes, as he considers J.G.A. Pocock's mode of intellectual history. What he means by the 'prison of periodization', I think, is that periodization hides the fact that history can jump, or veer, or crash. 'Periodization enables but constrains research' (19). More importantly, it seems that d'Avray is opposed to historicism. He does not think that understanding the historical context is the ultimate path of interpretation. The historian must also make room for agency and individuals (199), which is to say, human freedom. At the core of this book is a kind of jump—a recognition of disruptive changes—in about 400 and in about 1050. This leap from one era to another might be called, to use a legal term, a *saltus*.

While admiring Fernand Braudel and his illustrious progeny in the field of history, the author argues that 'it is possible to combine the study of continuity and contexts' (11) and this excellent precept is followed throughout the flow of this book, as the *longue durée* of papal legal history is shown to be punctuated by drama and change. Early papal law acted in its own time and was reactivated at a later time.

The early papal decretals were preserved in several brilliant time-capsules: the *Dionysiana* collection (c.500) (109), the *Quesnelliana* (c.500), and Cresconius (mid-6th century), then most luxuriously and seductively in the 'high papalism' of the late-

Carolingian *Pseudo-Isidorean Decretals* (157). These time-capsules were opened again in the eleventh century. At that point they had to be grappled with as the eleventh and twelfth centuries experienced a complete reengagement with, and renascence of, old papal law. The early papal decretals, covering some major territory such as the selection of bishops, the proper arrangement of ecclesiastical hierarchies, and the question of clerical marriage, were still authoritative law, ringing with papal authority, even if their significance was somewhat perplexing and had to be argued about. These occurrences are one aspect of 'the expansion of meaning in the course of reception' (2), a concept that Gadamer called *Wirkungsgeschichte*. D'Avray attributes 'the concept of texts' meaning expanding through time' to Gadamer, as one of his 'conceptual sources' (300). However, he does not take up Gadamer's concept of tradition. D'Avray thinks of tradition as something desiccated and lifeless (13). He prefers to describe the flow of ideas over time as a 'conversation', as a 'communication string', or as a 'discussion string' (13). Jaroslav Pelikan would have suggested that this view describes *traditionalism* rather than tradition, which is, in contrast, something flexible and living. This may help us understand why *Papal Jurisprudence* does not adopt a narrative approach to ongoing changes in the papal tradition and its historical contexts over the centuries. He is intrigued by the methods of Max Weber's sociology, and the possibility of identifying ideal types in historical developments—at least for the purposes of thought-experiments (179, 229).

Thus far, I have perhaps over-emphasized the theoretical issues that are raised in this text, partly because my own interests made me alert to them, and partly because of their intrinsic interest. But d'Avray does not want them to stand in the way of his readers: this is made clear in his Appendix D, which essentially aims to de-theorize the book. 'A completed empirical structure should be able to stand without theoretical support' (300) although he acknowledges that he was helped by certain sociologists and philosophers. He draws on an extensive bibliography which appealingly encompasses both old classic texts and the latest research. D'Avray draws attention to this by praising Maitland,

Caspar, and Maassen. More importantly, the empirical core of canonical texts is presented in a series of appendices so that the reader can easily consult the original sources in very fine translations. These will often be consulted by historians of canon law, and are a kind of continuation of d'Avray's earlier volume of canonical texts entitled *Papal Jurisdiction c.400: Sources of the Canon Law Tradition* (Cambridge 2020). The prequel?

The main theses of the book are stated boldly from the outset; the rest is demonstration. The most important have been briefly stated above: that there were two great 'decretal ages' both of which arose in periods of social disjunction, c.400 and c.1200 (2). Both periods experienced great political and social change, which led to confusion of ecclesiastical roles and questions about the church calendar, baptism, and other burning questions. The two ages were parallel and existed in some of the same circumstances of perplexity and complexity. Both periods led to an elevation of the papacy as a source of law that could resolve conflict and provide guidance: there was a first decretal age and a decretal age *bis*. It has to be said that most historians are wary of looking for parallels among different periods—for example the Fall of Rome and the fall of the Incan Empire, or historical lessons, whether of the Peloponnesian War, or Weimar Germany.

In late antiquity it became fairly common for clerics in the West to write letters to Rome, or to travel to see the pope, hoping to receive clear answers. The complexity of local situations led to questions directed toward Rome, and in reply, the popes sent letters that were frequently accepted as settled law. These papal answers returned as letters were on the model of imperial rescripts. This argument seems incontrovertible. The gathering and preservation of decretals in various collections is detailed: the *Dionysiana*, the *Quesnelliana*, Cresconius, the *Dionysia-Hadriana*, the *Dacheriana*, Pseudo-Isidore, Burchard's *Decretum*, Gratian, the *Collection in 74 Titles*, the *Liber Extra*. These form the skeleton of the book, and provide the causal chain that leads from 400 to 1200. Each is given a vivid level of analysis. As d'Avray argues, a second period of disruptive change occurred in the period 1050-1150, and was the stage on which Bernard of

Pavia made his appearance. He played a role in the 'second decretal age' like that of Dionysius Exiguus in the 'first decretal age' (189). This prepared the way for a new kind of legal dominance for the papacy as more and more business flowed to Rome. The *Liber Extra* resolved a host of complexities, since just as in the first age of decretals—'we find the bishops sending whole shopping lists of problems to the popes' (205). And still the antique canons continued to serve as lamps guiding the feet of popes and other bishops.

Complexity, d'Avray avers, is the key to his interpretation of the entire structure of the first age of decretals c.400, and the second, revived age of decretals, c.1200. 'Complexity and uncertainty are key elements for analysis' (13). For clerics of the fifth century, the world had just been shaken to its roots, and the Church structures were now flush with money, prestige, and the potential for inter-clerical conflict. This was the first period in which decretals were sought so eagerly, and carefully collected in the work of Dionysius and the *Quesnelliana*. Churchmen grappled with a number of areas of confusion and complexity. How to coordinate monastic and secular hierarchies in the Church (42)? How could the clergy reconcile various determined views of important authors about the nature of marriage and the specific areas of legitimacy of clerical marriage—and with whom, when, and how often could they have sex (40)? As Zosimus was asked to consider: shouldn't a cleric move with deliberate slowness through various stages of advancement, following a *cursus* of ecclesiastical achievement until they reach the highlands of the episcopacy? 'The apostolic see was asked for answers and gave them with confident authority' (81-82). Papal solutions to such questions were issued in decretal letters (which Rome archived, to some extent), which 'were then embodied in canon law collections' (71). These collections survived, were copied, were entered into ever larger collections over time—most spectacularly in Pseudo-Isidore. This work was so influential because it included such a desirable collection of genuine and bogus decretals, just right to solve all sorts of complexities of the ninth century. This collection helped to nail down the legal and authoritative position of the bishop of Rome

Rome as a source of law—as a source of answers! This deserves to be called what it is: a wonderful exposition and a fine line of thinking.

Second, this book offers determined views about the nature of law. D'Avray wants to avoid that the history of canon law be absorbed by general Church history. For this reason, 'we ought not think too holistically about "late Roman Christianity"' (21). Canon law properly so-called was at times mingled with theological questions and answers. Early Christians may well have taken pride in their theological achievements, as they worked out complex problems about the nature of Christ and human destiny, with the help of Greek philosophical concepts and vocabulary (125). The historian of canon law should not take her eye off the ball, but keep a sharp lookout for actual law, actual legal interpretation, and legal decision making. As the author argues, the decretal of Gelasius and the *Dionysiana* both observe this distinction, by and large. They 'anticipate the boundary that would eventually separate canon law from theology' (133). Gregory N. Dunn does not think that papal letters, such as those by Innocent I, were true law, but only proffered advice (tea and sympathy?) to his correspondents. D'Avray, in contrast, states that 'letters were akin to law' (56). In the sequel it becomes clear that he thinks the letters were accepted as actual law. The popes built on earlier law and on fourth-century conciliar legislation, and 'the letters of Siricius and his immediate successors had definitely become laws' (57). To become law, the decisions of decretals had to be distinguished from theoretical questions about the truths of religion. This argument about the nature of law and its relation to the history of dogma or theology is another strong thesis in the book. As time unfolded, the distinction between law and theology widened. A major example of this is the gift by Pope Hadrian I of the Dionysio-Hadriana to Charlemagne and his court scholars. At this point, A.D. 774, 'a tradition of canon law as a system unblended with what became known as theology' (152) could clearly be seen. As for law without admixture, Charlemagne and his advisors 'have a concept for it: *canonica instituta*'(155). The first 59 chapters of the *Admonitio Generalis* contain nothing but

law and the remainder contain nothing but theology, thus giving rise to 'the system of an unblended canon law: law unmixed with theology' (155).

The distinction had already been realized in the fifth century, as 'Leo I reiterated, reinforced, and developed the first papal jurisprudence, which was a model for responses to recurrent questions that kept on coming to Rome' (239). Jurisprudence is unlike theology which addresses 'Christology and suchlike true/false questions' (239). D'Avray offers us a deep reflection on the nature of law and its situation in the history of the Church during two key periods. In doing so, he has illuminated nicely the origins of papal dominance and its legal character in late antiquity and in the early Middle Ages, during the papal turn and the rise of canon-law jurisprudence and interpretation after 1050. I can end with some appreciation of the author's style. He makes his rather intense statements in distinctive and unforgettable language. To mention just a few instances: in the eleventh and twelfth centuries, 'canon law changed partners, from theology to Roman law' (192). Papal jurisprudence moved through time by means of: 'capillary action through small collections' (109). The Pauline Privilege is 'the brainchild of a very intellectual lawyer' (213). One brilliant point is made in terms that will be utterly convincing to anyone who has studied canon law: 'Individual canons are like chameleons in that their colour changes according to what is around them' (135). The clarity of d'Avray's exposition is not well represented by my dense, somewhat forest-like review, but it will be appreciated by his readers.

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Condorelli, Orazio, and Rafael Domingo, edd. *Law and the Christian Tradition in Italy: The Legacy of the Great Jurists*. London: Routledge 2021. Pp. xiii, 468. $178.00. ISBN: 978-0-36750-871-5.

Schmoeckel, Mathias, and John Witte Jr., edd. *Great Christian Jurists in German History*, Tübingen: Mohr Siebeck 2020. Pp. xiv, 410. €74.00. ISBN: 978-3-16-158346-9.

Stephan Dusil

To report critically on both anthologies on 'Great Christian Jurists' poses a challenge to the reviewer, as he may choose different perspectives to present these volumes. First, one could present the biographical sketches including remarks on most important works, or second, one could assess the overall structure of these two volumes including its general approach. The second perspective is taken here.

The starting point of both volumes—and possibly of the whole series—is a deep lament of the editors: The question of religion is—according to Schmoeckel and Witte— 'often deliberately ignored' (ix), 'the existence of a specified Christian tradition in Germany' even denied (ix). The editors seek to avoid such a 'misrepresentation of history' in which religion does not play any role, although it played an important role in history. They intend to demonstrate in their volume on 'Great Christian Jurists' the other story, namely the Christian one. A similar approach characterizes the volume on the 'Great Italian Jurists'. Condorelli and Domingo 'share the conviction that the Western world cannot but be said to be Christian' (1); that's why they unearth the (hidden or not so hidden) Christian influences on law in Italian history by presenting a 'gallery of greats jurists' (1). In this respect, both volumes share the same approach and fit quite well into the 'Great Christian Jurist' series edited by John Witte, Jr., Director of the Center for the Study of Law and Religion at the Emory University.

One may or may not share their viewpoint that the importance of Christianity in the past is today denied—this reviewer remains

more relaxed than the four editors, as he does not share the conviction that the remembrances of Christianity and its importance in the past is already lost or will be lost. This is, however, a question of convictions and not of methodology. The main methodological question is whether their approach to demonstrate the pivotal role of Christianity was well-chosen. In order to demonstrate the legacy of Christianity in European legal culture, the reviewer would not have presented biographies but chosen a different, more dogmatic approach to point to the (undoubtedly huge) footprints of Christian ideas in current legal systems in Europe. Legal principles such as *pacta sunt servanda* in contract law, the concept of a will-based marriage in family law, possession d'état, company law, theory of law, etc., are all—some more, some less—based on ideas of the Christian past.[1] Why not elaborate on this question? Why not shed light on the hidden (or not so hidden) Christian influences on our current legal system? Quoi qu'il en soit, the approach of the editors was different. The editors opted for 26 biographical sketches each. The sketches reach from jurists in the High Middle Ages to those of the twentieth century; authors of the first millennium—even if 'German' or 'Italian'—are covered elsewhere.[2]

The German volume starts with a medieval jurist of the *Ius commune*, namely Johannes Teutonicus (Kenneth Pennington), the early thirteenth-century compiler of the *Glossa Ordinaria* to the *Decretum* of Gratian. It also deals with Germanic law-experts such as Eike von Repgow (Tilman Repgen) and Johann von Buch (Mathias Schmoeckel). The former authored the *Saxon Mirror*, the latter a commentary on the *Saxon Mirror* in which he combined the learned tradition of the *Ius commune* and the Germanic law. It is surprising to find a contribution on Albertus Magnus (Sven Lichtmann and Hannes Möhle), the important German theologian, included in this anthology. No doubt, his theology and philosophy

[1] See, for such an approach, the series 'Der Einfluß der Kanonistik auf europäische Rechtskultur' edited by Mathias Schmoeckel et al.

[2] Philip L. Reynolds, ed., *Great Christian Jurists and Legal Collections in the First Millennium* (Cambridge Studies in Law and Christianity; Cambridge 2019.

dealt with basic aspects such as right and reason as well as the various forms of law, and he elaborated on the transformation of antique Aristotelian concepts of justice into a Christian medieval world. However, should Albertus Magnus be considered as a jurist? By the same token, the German reformator Martin Luther could also be listed among 'Great Christian Jurists'—but he is missing. So, the basic question is: what makes a jurist a jurist? The editors avoid the answer which is at the heart of their choice of contributions.

The anthology continues with authors of the Early Modern period, namely with Conrad Peutinger (Gero Fuchs), an early humanist who worked on economical questions such as monopolies, and Johann Oldendorp (John Witte Jr.), a Lutheran protestant. The choice of the ensuing jurists is in line with what one would expect: Andreas Gail (Wolfgang Forster) was an estimed judge at the 'Reichskammergericht' and authored an influential book on 'practical forensic observations'; Matthew Wesenbeck (Heiner Lück) taught law and worked as practitioner at Wittenberg; Johannes Althusius (Cornel Zwierlein), a Calvinist, is well-known for his political theory; Dominicus Arumäus (Pascal Förster) taught Roman law at Jena. Furthermore, Benedict Carpzov the Younger (Mathias Schmoeckel) combined the *Ius commune*-heritage and the Saxonian tradition in a period often labelled as *Usus modernus*. Samuel von Pufendorf (Robert von Friedeburg) was a famous teacher of nature law and Gottfried Wilhelm Leibniz (Steffen Schlinker) a polymath who also contributed to legal evolutions among other. Christian Thomasius (Christoph Strohm) and Carl Gottlieb Svarez (Sebastian Michels), a father of the Prussian codification of 1794, round out the Early Modern period.

The presentation of jurists continues with a 'legal giant', as he is called in the preface by the editors (x), namely Friedrich Carl von Savigny (Joachim Rückert). The intellectual father of the 'Historical School' is followed by another jurist and legal historian, Karl Friedrich Eichhorn (Steffen Schlinker). Although Sylvester Jordan (Hans-Georg Hermann) is often forgotten today, he was an influential jurist and politician during the 'Vormärz'

who contributed to the Hessian constitution of 1831 and studied the state-church-relationship. Moritz August von Bethmann-Hollweg (Hans-Peter Haferkamp) is today remembered both as member of the 'Historical School' and for his contribution to legal philosophy and the problem of 'freedom'. Another influential thinker of the nineteenth century was the convert Friedrich Julius Stahl (Heinrich de Wall) who worked on the state-church-relationship from a conservative perspective as well as on the 'rule of law' ('Rechtsstaat'). The Catholic Max von Seydel (Malte Becker) contributed especially to public law from a Bavarian stance.

At the transition of the nineteenth to the twentieth century stands Rudolph Sohm (Andreas Thier) who is well-known for his studies on the character of the church and its relation to the state. The broad range of university jurists is interrupted by Konrad Adenauer (presented by Konrad Adenauer, his grandson), practitioner in the administration and later first Chancellor of the German Republic. Hans Nawiasky (Werner Schubert) contributed both to the Bavarian contribution in 1946 and to the Federal Constitution of 1949, whereas Eugen Bolz (Joachim Rückert), a politician in Württemberg, resisted National Socialism and was decapitated after the failed putsch against Hitler in 1945. The last jurist to remember is Stephan Georg Kuttner (Kenneth Pennington), a convert who contributed much to research on medieval canon law.

The volume on the German jurists thus encompasses a broad range of biographies regarding time, confession, legal topics and approaches, and fame. The volume on Italy is similarly structured. It starts with a focus on medieval law, namely jurists primarily working on Roman law such as Irnerius (Andrea Padovani), Azo and Accursius (Emanuele Conte), as well as canonists such as Gratian (Atria A. Larson), Sinibaldo Fieschi (Kathleen G. Cushing), and Enrico da Susa (Kenneth Pennington), well-known as Hostiensis. As in the German volume, it is surprising that Thomas Aquinas (Charles J. Reid Jr.) is included but can be justified with his contribution to the basics of law. Despite Thomas' merits for legal theory, is he a jurist?

The following biography deals surely with a jurist, Cino Sinibuldi da Pistoia (Giuseppe Speciale), professor of civil law in Siena and also known as poet. Giovanni d'Andrea (Peter D. Clarke) and Niccolò dei Tedeschi (Richard Helmholz), well-known as Panormitanus, were famous canonists in the Late Middle Ages; the first commenting on the *Liber Sextus* and the *Clementinae*, the latter on decretals in general. In contrast to both, Bartolo da Sassoferrato (Orazio Condorelli), Baldo degli Ubaldi da Perugia (Julius Kirshner), and Paolo di Castro (Susanne Lepsius) were their counterparts in civil law, on a par with the contributors to canon law.

The volume pursues the list of jurists with Early Modern jurists such as Thomas Cajetan (Wim Decock) and the great humanist jurist Andrea Alciato (Alain Wijffels), teacher at Bourges and elsewhere. Biographies of a leader of the Counter-Reformation, Robert Bellarmine (Lorenzo Sinisi), Alberico Gentili (Giovanni Minnucci), and the allegedly greatest jurist of the seventeenth century, Giovanni Battista De Luca (Italo Birocchi), follow. Giambattista Vico (Marco Nicola Miletti) and the famous Cesare Beccaria (Maria Gigliola Di Renzo Villata), the author of 'On Crimes and Punishments' are hereafter presented.

The editors then switch to the modern era with a great variety of jurists: Pietro Gasparri (Alberto Lupano), the mastermind of the 1917 *Codex Iuris Canonici*, as well as the legal historian Contardo Ferrini (Rafael Domingo). Biographies are dedicated to a politician of the earlier twentieth century, Luigi Sturzo (Romeo Astorri), and the counterpart of Konrad Adenauer, the Christian political leader Alcide De Gasperi (Olivier Descamps). Furthermore, the volume covers the civil proceduralist Francesco Carnelutti (Giovanni Chiodi), and two jurists close to the Catholic church: Arturo Carlo Jemolo (Carlo Fantappiè) who elaborated on the state-church-relation and Giovanni Battista Montini (Jean-Pierre Schouppe), the later Pope Paul VI.

In general, the choice of the editors is well-made in both volumes. They comprise jurists of different centuries, different legal fields, and confessions. Nonetheless, three more general remarks on their choice remain.

First, the chosen jurists. This gallery of jurists stands of course pars pro toto, as one could easily prolong this list. John of Legnano (1320?-1383) could have been a candidate for the Italian volume; Ulrich Stutz one for the German. But this is just a side remark, more severe is another lacuna: women. They are missing in both volumes. Their omission is of course based on the fact that for centuries no women became jurists, but is this also true for the twentieth century? Was there no Christian female jurist worth mentioning? The reviewer has in mind Elisabeth Selbert (1896-1986), one of the rare 'mothers' of the German constitution of 1949 who fought successfully for the fundamental article 3: 'Men and women shall have equal rights'. Digging deeper may unearth more German and Italian female jurists with a Christian background. This is an unfortunate omission.

Second, the definition as 'jurist'. The chosen jurists belong to academics, practitioners, and politicians; they worked on current law as well as legal history and were engaged in civil, penal, and public law. The editors worked with a quite broad definition of 'jurist'. Furthermore, Albertus Magnus and Thomas Aquinas are also presented, although surely no jurists. As the definition of 'jurist' remains shadowy, the broad range of persons underlines the importance of Christians for the legal system rather than the influence of Christian jurists.

Third, the temporal focus. The choice of both editor-groups reveals a certain understanding of their own, national history. The Italian volume encompasses twelve medieval jurists, the German just four; whereas jurists in the nineteenth century are almost completely missing in the Italian volume (just two: Gasparri and Ferrini), the German includes many more, namely seven. Do these differences mirror the real ups and downs in legal culture, or rather does it reflect the self-perception of contemporary jurists on their own history? If the latter is true, Italians believe in their contribution to law in the Middle Ages, Germans in theirs in the nineteenth century.

Aside from these remarks on the choice of persons, one last reflection on the contribution of the volumes as a whole remains. The subtitle of the book on Italian jurists promises the 'legacy' of

the great jurists; to some extent, this promise remains unfulfilled. The importance of these Christian jurists and their influence is proven by each chapter, no doubt; but the picture of how Christian jurists influenced law remains fragmentary, even if the editors Condorelli and Domingo try to justify their choice in the preface and to introduce to the different legal eras (5-20). It is therefore up to the reader to compare and to combine, to draw red lines and to explore the differences between jurists their contributions, and approaches. In this regard, both volumes do not fully fulfill what the prefaces promise. Apart from this critique, the volumes contain finely-written, bio-bibliographical sketches of important jurists that are worth reading.

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Müller, Wolfgang P. *Marriage Litigation in the Western Church, 1215-1517*. Cambridge: Cambridge University Press 2021. Pp. viii, 270. $99.00. ISBN: 978-1-10884-542-7.

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A little more than fifty years ago the late Michael Sheehan published an article in *Mediaeval Studies* devoted to the church's matrimonial law as it was applied in English practice. His article was based upon evidence he had found in fourteenth century court records from the diocese of Ely. It was something new—an experiment—and a successful one. A flood of scholarly studies like the one he initiated have come into existence during the years that followed. This would probably have been a surprise to him. The prevailing attitude among scholars then was that the law of the church was fully stated in the *Corpus iuris canonici*. Cases from the courts were regarded simply as examples of the results the formal law required. They were of no special significance. Today this attitude among scholars has changed. Studies of the history of marriage and divorce derived from medieval record sources have multiplied, and they have come from many European lands. By my count, the bibliography of secondary sources in the book under review contains 235 scholarly books and articles devoted to the history of the canon law of marriage. Of that number only nineteen predate Sheehan's article, and virtually all of them were studies of the formal canon law.

What a change! How should we account for it? There is certainly more than one plausible explanation. Perhaps the initial revelation that there was a divergence between formal law and law in practice itself encouraged further research. Once it had been recognized, scholars changed their mind about the sufficiency of the older and more formal approach to the subject. Or perhaps it was the Anglo-American assumption drawn from common law that encouraged further study drawn from court records. No common lawyer would draw a legal conclusion without looking at the relevant case law. Why should the church's law be an exception? Or maybe it was the fact that the voices and the

interests of women came to the fore in matrimonial disputes in a more direct way than they did in disputes over tithes or ecclesiastical benefices. Paying attention to matrimonial disputes was itself may have been spurred by the greater numbers of women entering the academy during the past fifty years. Or perhaps it was just something new and different. Novelty is a path to tenure. Is there a correct answer to the question? I can only guess.

What I can say with more confidence is that the comparative approach does prove appropriate for this subject, and indeed that, once undertaken, it has proved to be a healthy development. It was time, therefore, that someone should undertake a large and more general comparative view of the subject. Müller's work is the first book length work to undertake a Europe-wide approach to this subject, and it is a good development. Of course, this approach is not an invention. Prior scholarship from the pen of Charles Donahue has demonstrated what can be learned from taking a comparative approach. His two edited volumes in *Comparative Studies in Continental and Anglo-American Legal History* that were published by Duncker & Humblot in 1989 and 1994 have also encouraged a wider approach by calling attention to the contents of ecclesiastical archives in many lands. However, no one has attempted anything as ambitious as Müller's monograph. It is drawn from record evidence found in French, German, English, Italian and Spanish archives, and it opens up the subject in useful ways by taking this geographical scope.

Most fundamental of the results is the author's conclusion that a real divide existed between the South (Italy and Spain) and the North (England and Germany). The former adopted a notarial culture; the latter did not. This meant that most marriage contracts in the South were entered into and their full terms put into writing by notaries public rather than being contracted orally before a few witnesses or none at all, as is shown to have been the more common practice north of the Alps. The marriage of Shakespeare's Romeo and Juliet, though set in Verona, was actually more typical of what occurred in England. The results of this practical difference turned out to be significant. It meant that

fewer instance causes (suits begun to establish the existence of a valid marriage) were brought in the South than in the North, because there was less need for proof that a marriage had taken place. A notarial document settled that. There was also less room for drawing fine distinctions between 'verba de praesenti' and 'verba de futuro' and other such verbal variations. In the South, there was less need for the uncertain use of witnesses who could meet the requirements of reliability built into the *ius commune*. The prevalence of notarial contracts in the South also left more room for negotiation in which the families of young men and women had a say in the setting the terms of their entry into marriage. None of these characteristics depended upon differences in the substantive canon law. The same formal law applied on both sides of the North/South divide. But they did matter in fact. This is a bold conclusion, one that may be challenged or modified by further research, but the value of its statement is impossible to doubt.

What else? Not all the local differences depended upon this geographical divide. Variations existed within the two regions—between Castille and Catalonia, for example, in the kinds of documents prepared as part of entry into marriage. This book also discusses several other characteristics that varied from place to place despite the claims of the church to exclusive jurisdiction over legal questions on this subject. An important example of variation is the existence of what can be called 'quasi matrimonial relationships' between men and women. They were particularly prevalent in Spain—in the 'intimate partnerships' known as *barragana*. The subject of clerical unions, which appear to have been marriages except for the fact of their illegality, is also raised and usefully discussed in Müller's book. So are variations in the use of monetary fines in 'ex officio' cases. Men and women guilty of the sexual offences were more often allowed to compound as penance for having committed adultery or fornication in some places than in others. It was comparatively rare in England, for example, where the performance of public penance was the norm, but what look more like fines than penances seem to have been comparatively frequent just across the English Channel.

A word about what might have been added to the book under review. The opinion of lawyers like the present reviewer will probably always differ from that of historians. That admitted, the one deficiency that stands out to this reviewer is the author's lack of interest in the law of evidence. The jurists of the medieval *ius commune* adopted a complex system for weighing the probative value of witness testimony. It was unlike today's system of free evaluation, the adoption which allows finders of fact to put aside most of the fine distinctions and personal disqualifications characteristic of the medieval *ius commune*. The older system, in force in the cases discussed in the book, made a significant difference in matrimonial litigation. Many of the things required to make the church's system satisfactory did not lend themselves to proof by witnesses in marriage litigation. Proof of sexual relations most obviously, but also proof of the words used in contracting marriage—words that determined the outcome of matrimonial litigation—had to be determined, and proving them was subject to the vagaries of human memory and even to manipulation by those involved in disputes involving marriage. This deficiency came to the fore in many disputes, particularly in the northern courts when one person sued another to establish the existence of a verbal marriage contract. When proof failed—and it easily might—the party being sued was declared free to marry whom he or she chose, but the party who raised the matter in the first place was 'dismissed to his (or her) conscience'. That meant that the unsuccessful party would have been told it might be wrong to marry someone else. What happened in the 'internal forum' of confession we do not know, but the situation is certainly an advertisement for the solution adopted by the decree *Tametsi* adopted at the Council of Trent. It held that valid marriages required the presence of the parish priest. This was a large change, but if we accept the validity of the South's habitual use of notaries in marriage contracts, it is at least thinkable that adoption of this new regime would have been encouraged by what Müller's work has identified as normal medieval practice in southern Europe. The participation of the 'parochus' was simply being added to (or substituted for) that of the notary.

Saccenti, Ricardo. *La ragione e la norma: Dibattiti attorno alla legge naturale fra xii e xiii secolo.* Turnhout: Brepols, 2019. Pp. xi, 358. €65.00. ISBN: 978-2-503-58654-0.

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In English, the title of Ricardo Saccenti's monograph translates as *Reason and the Norm: Debates on Natural Law between the Twelfth and Thirteenth Centuries*. More specifically, the book deals with the concept of natural law in its various manifestations (*lex naturalis*, *lex naturae*, *ius naturale*, *ius naturae*) between the second half of the eleventh and the second half of the thirteenth centuries (ix). Significantly, the disciplinary ambit is wide, since the scope of the book covers texts of Roman law, canons of the Church, the writings of the Patristics, the works of philosophers, and Scripture—in short, a multidisciplinary approach that does not distinguish between legal and theological disciplines (x). As Saccenti acknowledges, this book is the 'fruit' of work done previously, such as in his bibliographical survey *Debating Medieval Natural Law: A Survey* (Notre Dame 2016). As will be seen in this review, the book under review is considerably different in scope and scale to that earlier work.

Saccenti's book contains a short preface, an introduction, six substantive chapters, and a conclusion (chapter 7); there is also an extensive bibliography and three indices—one each for manuscripts, medieval and ancient names, and modern names. It is an impressive piece of research and scholarship. It is a pity that it will not reach some readers who do not read Italian.

The main purpose of this review, therefore, is to outline the contents of the work so that readers not familiar with Italian will nevertheless be able to follow its arguments and make use of it to the extent that they are able. The descriptive nature of this review is also aimed at capturing something of the idiom of Saccenti's prose, which is not always easy to understand. I do apologise in advance, however, for the lack of elegance or fluency in the quotes and paraphrases that my crude Italian entails.

The short preface acknowledges an article by Gianfranco Fioravanti on Vittorio Sainati and medieval philosophy in *Teoria* 25 (2005), which placed importance on the theme of natural law and the manner in which it was said to be dealt with between the twelfth and fourteenth centuries (ix). The topic of *lex naturalis* and its use in a plurality of disciplinary ambits and in the philosophical and theological writings from the age of the Scholastics remains a promising terrain of research' (ix). This book, the author reveals, is an attempt to approach this issue and 'locate the many veins of cultural development that this theme reveals on the culture of Latin Europe' (ix).

The introduction, with the title 'The Normativity of Nature', is lengthy and sets out in detail the many and varied scholarly, literary, and historiographical contexts, as well as the methodological challenges that the book faces in six sections. Saccenti begins the first section of the introduction ('Critical Nodes and Historiographical Supports on a Medieval Notion' 1-4) with an acknowledgment of Remi Brague's *La loi de dieu: Histoire philosophique d'une alliance* (Paris 2005). Brague's thesis was that the modern separation between secular and divine law is illusory since the two were never truly separated. Brague suggested this thesis by tracking the history and practice of divine law in Judaism, Christianity, and Islam, and surveying the alliances and links with divine law in the different Abrahamic traditions—what he calls the 'theo-practical' problem. The apogee of this alliance between divinity and law, for Brague, occurred in the medieval works of such authors as Maimonides, al-Ghazali, and St Thomas Aquinas. With Aquinas and other theologians, as well as jurists, Brague 'underscored the function of historical links represented by the reflections of jurists and theologians of the Europe in the Latin Middle Ages' (ix).

Saccenti links Brague's indivisibility thesis to the several intellectual, scholarly, and historiographical strands on natural law or *lex naturalis* (1). One of these is the interest by Catholic intellectuals in the Middle Ages on discourses on natural rights, beginning with 'masters' of the Catholic church, including Pope Leo XII and his 1888 encyclical *Libertas praestantissimum*, as

well as the more recent teachings of Pope John Paul II and Benedict XVI. In addition to considering medieval notions of natural law as the basis for moral and ethical teachings, such scholarship dealt with natural law as the site for a critical rupture that separated the pre-modern from the modern and the secular, exemplified in the works of William of Ockham.

This study of natural law links the two disciplinary traditions of history and theology which Saccenti does in the second section of the introduction ('Theology versus History?' 4-9). For Saccenti, Brian Tierney's *Origins of Papal Infallibility 1150-1350* (Leiden 1982) raised 'the delicate question' of the connection between these two disciplines, which ensued in his debates with Alfons Stickler (5). Saccenti notes that, when applied to the same object of study—here the history of the notion of natural law—the two disciplines might assume 'quite diverse points of view'; yet 'the complexity of the rapport between them renders it necessary to break through the limits and the characteristic epistemologies of the disciplines' (5). History, Saccenti explains, considers 'a reality that is signalled by continuity and discontinuity yet also by specificity that in a determined context, the terms *lex naturalis* (or *lex naturae*) and *ius naturale* come to mean by reason of their particular cultural categories and by their relationship to the culture and history that defines an age or an epoch' (5-6). Saccenti explains this problem further (6):

> The history of natural law during the period of the so-called Middle Ages flows, in fact, against multiple problematic nodes and is interwoven with tendencies and events that happened between the twelfth and fourteenth centuries amid constant change in the cultural, religious, and political frames of reference. An historical fluidity that is reflected in the lexicon that revolves around the normative value of 'natura'.

This period, from the Gregorian Reform of the eleventh century to the fourteenth century, saw constant change in the 'forma ecclesiae', notes Saccenti citing the work of Yves Congar, in a 'process of progressive monarchical verticalization of the role attributed to the bishop of Rome' (6). The impact of this process on the construction of the notion of natural law, 'as a pivot of a legal system that aspired to be universal', is highlighted in Harold Berman's book *Law and Revolution* (Cambridge, MA 1983) (6).

Berman's thesis of the papal-driven revolution that precipitated legal culture into prominence in the period from the mid-eleventh to the twelfth century also, observes Saccenti, interwove concepts of *ius naturale* and *lex naturale* with the role of the Roman pontiff as *vicarius Christi* and the repository of 'an authority that proclaimed itself as universal' (7). At the same time, Saccenti adds, the relationship between the history of the concept of natural law and ecclesiology did not have a 'univocal character': assuming natural law as a pivotal concept in a normative sense also influenced how it was understood in an ecclesiological sense, i.e., in respect of the 'forma ecclesiae', especially determined by the language with which the Church used the same terms in a specific historical fragment (7).

In addition to what he describes as this 'religious history', Saccenti next notes the cultural and intellectual histories of the twelfth and thirteenth centuries that focused on the transition from the monastic schools as sites of learning to the early universities. In these histories, which 'underlined the emergence of multiple paradigms of both doctrine and models of culture' (7), the book became central, as exemplified in the works of Richard Southern on 'scholastic humanism' and Charles Homer Haskins, among others, on the twelfth-century 'renaissance'. The book became the site of the great cultural traditions in this period, according to Saccenti: 'the scientia legum' and the 'scientia canonum', the knowledge of the 'philosophi' and the 'scientia' in the 'sacra pagini' of the theologians' (7). Further, Saccenti suggests, the story of natural law is also that of specific texts that dominated scholarly activity and spanned across the literary, legal, philosophical, and theological divides: the Justinianic corpus, the *Concordia discordantium canonum* of Gratian, and the *Glossa ordinaria* of Scripture (8). Masters compiled, read, and commented on these texts in which they found the words *ius naturale*, *ius naturae*, *lex naturalis*, and *lex naturae* 'disintegrating in a plurality of senses and re-ordering in multiple syntheses' (8).

Saccenti's introduction then turns to the specific historiographical paradigm of 'philosophia christiana' or Christian philosophy, a line of academic works that sought to analyse

medieval philosophical and theological ideas as part of a Christian tradition that culminated in the works of Aquinas in a third section ('Historiographical Paradigms: The "Christian Philosophy"' 9-11). Such authors as Martin Grabmann, Odon Lottin, and Etienne Gilson in the 1920s and 1930s saw a common cultural background—a 'Christian philosophy'—that united theology with law and philosophy in the works of Gratian and Peter Lombard, Huguccio of Pisa, and Thomas Aquinas; this was 'characterised by a series of authoritative texts and a shared conceptual vocabulary' (10). Marie-Dominique Chenu also saw in these diverse traditions 'a plurality of conceptions of nature' that were 'difficult to synthesise in a prospective univocity' (10). In the history of law, George de Lagarde first and then Michel Villey highlighted the significance of natural law as central to 'the construction of a unitary ethical and legal system that in the *Summa* of Thomas Aquinas saw its clearest and most coherent formulation' (11). But, for these authors, this notion was 'deformed' in the fourteenth-century works of Ockham on the notion of individual rights arising from *lex naturalis*.

In the fourth section of the introduction Saccenti considers a further approach to natural law, in addition to those already considered above, which he links to 'the neo-Thomist tradition', namely that of natural law and 'constitutional' history ('Natural Law and "Constitutional" History' 11-16). This line of scholarship began with Otto von Gierke's work *Das deutsche Genossenschaftsrecht* (*German Law of Associations*) (4 vols. Darmstadt 1868-1913), notes Saccenti. Gierke's work was a reaction to positive law traditions by Savigny and others that explained the history of 'Deutsche recht' in individualistic notions from Roman law; instead, Gierke identified origins of German legal history in the medieval doctrines of *ius naturale* or *lex naturalis*, and with notions of the state, together with other legal bodies, such as family, corporations, local authorities, and the Church, operating together in a relationship of reciprocity that saw a 'pluralism of legal subjects' (12). Part of volume 3 of Gierke's monumental work, *Die publicistischen Lehren des Mittelalters*, was translated into English with an introduction by Frederic W.

Maitland as *Political Theories of the Middle Ages* (Cambridge 1900). According to Saccenti, although Gierke broke with this notion of 'Deutsche recht', the subsequent multi-volume work by the Carlyles, *A History of Political Theory in the West* (Edinburgh 1903-), took this further in their fifth volume: they identified in the notion of 'natural law' a characteristic trait of medieval thought, attributed to canonists and theologians, as a principle of the limitation of the exercise of 'potestas' that later founded modern constitutionalism (13). Such an interpretation, notes Saccenti, was taken by John N Figgis in his work on political thought from Gerson to Grotius.

Some years later in the early 1920s Ernest Troeltsch returned to the work of Gierke, and put forward the idea of natural law as one of the constituent and universal elements of Western democracy that was opposed to the German positivist and 'modern' idea of law. The years between the World Wars, continues Saccenti, saw German legal culture was dominated by the positivism of Hans Kelsen. From that time, but particularly following the Second World War, Catholic intellectuals returned to the medieval notion of natural law as an alternative to the positivism that had permitted totalitarian regimes to exist; such authors included Jacques Maritain, Heinrich Rommen, and Alessandro Passerin d'Entrèves.

To the works of de Lagarde and Villey, who hold 'prime position' in debates on natural law that saw in its 'subjective' understandings the beginnings of modernity—usually associated with the Ockhamism of the fourteenth century or the conciliarism of Gerson and others between the fourteenth and fifteenth century—Saccenti adds as 'second position' the name of Francis Oakley (16). Continuing from Figgis, Saccenti adds (16):

> Oakley underlined the pivotal role of conciliarism, between the fourteenth and fifteenth centuries, in the construction of an ecclesiological and religious paradigm that was destined to transmit to the modern political discourse some of the principal elements characterising constitutionalism. And which, according to his study, *lex naturalis* and *ius naturale* were re-elaborated, becoming the indication of a limit placed on the exercise of a 'potestas'.

In the fifth section of the introduction ('The Sources and their Study' 16-20), Saccenti turns to his sources, first of all acknowledging the ground-breaking work in collating and editing from the manuscripts of the legal and theological texts done by Paul Fournier and Gabriel Le Bras's *Histoire des collections canoniques en Occident depuis les fausses decretales jusqu'au Décret* (Paris 1932) and Stephan Kuttner's *Repertorium der Kanonistik* (Vatican City 1937). Following from these works, Rudolf Weigand compiled and examined the way in which *ius naturale* came to be approached in the various glosses to the Decretum, many of them anonymous, composed in the 'Classical Age' of canon law. Weigand also linked the Roman jurists to the canonists of the twelfth century, making clear their contribution to the development of this concept. Saccenti notes also the contribution of Brian Tierney, whose attention to historiographical questions and whose philologically rigorous approach to the canon lawyers of the twelfth and thirteenth centuries cast new light on their understanding of *ius naturale*—specifically as an 'objective meaning of law and a subjective meaning of right' (18). In more recent times, Tierney has applied the same method to the study of the notion of the 'permissive natural law', showing how its medieval elaboration determined a meaning of natural law that influenced its subtle development towards a Kantian philosophy of rights. Rounding out this aspect of authors who have considered these sources under the theme of *ius naturale*, Saccenti refers to the work by Kenneth Pennington on both these civilian and canon law traditions in the twelfth and thirteenth centuries and the work of Francesco Calasso and Ennio Cortese.

Saccenti turns, in the sixth and final section of the introduction ('Methodology of Historical Research on Natural Law in the Medieval Period' 20-27), to the methodology of historical research on natural law in the medieval period. In light of the outline he has provided, there is an opposition between Christian thought exemplified in the work of Thomas Aquinas and a secular modernity that begins in the movement of Ockhamist voluntarism. Additionally, there are diverse approaches to natural law in the twelfth century from different disciplinary perspectives.

To these, Saccenti adds two diverse epistemological approaches relevant to the history of culture: one is the history of ideas, modelled on the works of scholar Arthur Lovejoy and his work *The Great Chain of Being* (Cambridge, MA 1936); the other is the 'Begriffsgeschichte' or 'conceptual history' in the works of scholars such as Reinhardt Koselleck, Otto Brunner, and Werner Conze (20).

Saccenti draws attention to the multivalent meanings of natural law in the relevant period, both in the diverse understandings arising from different disciplinary approaches, to the different disciplinary bases of the sources themselves. But he notes that the terms *lex naturalis* and *ius naturale* were part of the development of a 'scholastic' culture, which 'represents the common substrate to diverse disciplinary ambits' (24). The discourse on natural law, Saccenti observes, 'takes substance and is developed within what Jacques Le Goff has called 'medieval civilization', whose essential characteristic is nevertheless the very doctrinal plurality mentioned previously' (24). For Saccenti, this 'represents in fact one of the clearest expressions of the fluidity of the religious, political, and intellectual dynamic that comes to involve diverse subjects: the pope and emperor, the ecclesiastical hierarchy and the religious order, the school and the university with their corporations of masters and students' (24). 'This common historical frame permits one to examine the multiple orientations by collating either the specificity that links them, against an accurate sieve of sources' (24).

Saccenti contrasts the approach that he will take in this book to those historiographical orientations that search 'for grand syntheses, the construction of a complete and exhaustive fresco' since they risk 'reducing the story of the notion of natural law to search for a unitary and univocal meaning' (25). Instead, Saccenti prefers an approach that begins with 'an evaluation of the sources considered in their specific identity and then as witness of themselves' (25). Here he cites as influential the method of Arsenio Frugoni in his *Arnaldo da Brescia nelle fonti del secolo XII* (Rome 1954). Saccenti explains the methodology of Frugoni that he applies in the book under review (25):

> In the pages that follow, this starting point is applied to a chapter of the history of ideas, in a manner that allows the emergence of a plural context, multi-faceted and at times conflicting in motives, whether from the diversity of contexts and cultural levels touching on the question of natural law, or by the diversity and originality of elaborated doctrine. The history in this way retains a coherence with the documentary data that, against the diverse intellectual, political, and religious angles that it restores, allows a glimpse at the comprehension of multiple discourses on *lex naturalis* and *ius naturale*, in their interweaving and their diversity.

Saccenti continues that this 'logic guides the internal articulation' of the research in the book that:

> seeks to examine the sources while upholding the need to respect their characteristics, their belonging to a specific ambit or literary form, and their extraction from the horizontal history of the political, religious, and legal relations that they have produced (25-26).

I now turn to the substantive chapters of Saccanti's book and their contents. Chapter 1, 'The Invention of *lex naturalis*', has as its aim 'the investigation of how the terms 'lex', 'ius', and 'natura' were used and combined in the literature of the first civilians and the canon lawyers between the eleventh and twelfth centuries' (26). This chapter begins with Distinction 1 of Gratian's *Decretum* and focuses on its treatment of the terms 'ius' and 'lex' (29-38). Three sections then follow. The first section ('The First Canonistic Compilations' 38-50) retreats chronologically back in time to the pre-Gratian canonical collections of Deusdedit, Anselm of Lucca, and Ivo of Chartres. The second section ('*Lex naturae* according to Irnerius and the First Civilians' 50-61) examines how the Roman law glossators dealt with these concepts. Saccenti then concludes the first chapter with a third and final section ('A Common Cultural Background' 62-63), which observes that an exegetical model exemplified by St Augustine of Hippo in his *De doctrina christiana* came to be used for its 'logical-dialectical rigour' as a means of understanding texts and constituted 'a common epistemological plane' for the diverse disciplinary perspectives on natural law (62), a segue to the next chapter. Saccenti observes of the works of Irnerius and his disciples that they used the terms *lex naturalis* and *ius naturale* beyond this logical-dialectical methodology to have recourse to a culture that for a time collected and reconsidered patristic texts, especially of

Augustine, and of their association with the great Ciceronian ethical-political syntheses. In this way, Saccenti adds, *ius naturale* revealed an objective legal system linked with the 'ordo' of Creation inside of which existed the *ius gentium* and the *ius civile* (62-63). Further, the Irnerian tradition gave natural law a metaphysical character (63). The *Decretum*, on the other hand, Saccenti concludes, focused on the term *ius naturale* understood as a normative ordering that in a certain sense regarded man as a rational agent, based on the substantially similarity of *lex naturalis* and *lex divina* (63).

In chapter 2 (''Fulfilling through Nature Those Things Prescribed by Law': The Bible and the Law of Nature in the Twelfth Century'), Saccenti specifically links the concepts of natural law as interpreted in these legal texts to the works of the masters of the schools of Laon, Paris, and Chartres, in their commentaries on Scripture, which culminated in the *Glossa Ordinaria* to the Bible. He begins this chapter by observing that the 'classical' biblical passage dealing with the notion of natural law was Paul's letter to the Romans 2:14, which was crucial for interpreting the term *lex naturalis* between the twelfth and thirteenth centuries (65). The *Glossa Ordinaria* on the Bible was developed from patristic sources, particularly those from St Ambrose and St Augustine, and on the term 'lex' as it appeared in Romans 2:14 to delineate the people of Israel who had received the Mosaic law and the gentiles who had not. Saccenti's chapter 2 then proceeds with eight sections, in the first of which Saccenti provides the context to these biblical commentaries in the Gregorian reforms of the second half of the eleventh century ('The Bible and the Schools' 68-72). Here he outlines the emergence of the schools, especially those in such centres as Bec, Laon, and Paris, in which developed dialectical methods of biblical exegesis. Particularly characteristic of the pedagogical and exegetical model of these school was the *De doctrina christiana* of St Augustine, which Saccenti explains 'was presented programmatically as a true and proper manual of biblical exegesis' (72). In the second section ('Scripture as a Parameter of Interpretation of Nature' 72-79), Saccenti provides a close analysis of the *De doctrina*

christiana and its exegetical use, observing that the term *lex naturae* (or *lex naturalis*) was used by Augustine in explaining the relationship between Scripture and nature to indicate the prescription to preserve and fulfil the 'ordo naturalis' that governed the relations between the diverse realities represented by 'signum' and 'res' (75). In this way, Augustine's text approached Scripture 'as a parameter for interpreting nature', as Saccenti puts it (72).

Saccenti then turns in the third section to the biblical exegeses taught by the masters in these schools, Anselm of Laon and William of Champeaux, on Romans 2:14 and their articulation of the notion of *lex naturalis* ('The Biblical Articulation of the Notion of *Lex naturalis*' 80-95). For these masters, Saccenti suggests, the Pauline passage suggested a multiplicity of meanings of *lex naturalis*: one relevant to the link between Scripture and 'lex' and the problem of power and its legitimacy; another relevant to ethics, problematising the link between natural law, human reason, and works of grace (80). Saccenti examines each of these themes across a number of works representative of these schools, including the *Liber pancrisis* (linked with the teaching of Anselm of Laon), the Anonymous Laudunensis's *Super epistolam ad Romanos*, William of Champeaux's *Sententiae*, the *Sententiae Laudunenses*, and the *Sententiae Atrebatenses*.

Saccenti then turns his attention in the fourth section (95-102) to Peter Abelard and his school, focusing on Abelard's treatment of *lex naturalis* and *lex scripta* in his *Commentaria in epistulam Pauli ad Romanos*, *Collationes*, and *Ysagoge in theologiam.* The works of Hugh of St Victor, namely his *Quaestiones in epistulam Pauli ad Romanos* and *De sacramentis christianae fidei*, are the next object of analysis in the fifth section that Saccenti labels 'Natural law and the story of salvation'. The chapter continues its analysis of other authors in subsequent sections, including Gilbert of Poitiers' *Expositio in epistolam Pauli ad Romanos* and *Expositio in Boecii librum Contra Euticen et Nestorium*; Robert of Melun's *Questiones theologice de epistola Pauli ad Romanos*, his *Quaestiones de epistola ad Romanos*, and his *Sententiae;* and

Peter Lombard's *Collectanea in epistolam Pauli ad Romanos* (117-127).

Saccenti concludes the second chapter with an eighth section ('The *Glossa Ordinaria* as Synthesis of a Theology of *Lex naturalis*' 127-129) with an observation that the *Glossa Ordinaria* was highly dependent on the Lombard's exegesis on the Pauline Epistles to the Romans and, as such, the Lombard's views became influential on subsequent exegesis and theology. In these views, the Lombard linked 'lex', 'natura', and 'lex scripta' by explaining that 'the gentiles could understand the contents of the Mosaic law through natural reason illuminated by grace and in virtue of such illumination 'made that which is itself law,' namely belief in Christ and in God (125).

Saccenti sets chapter 3 ('"Natura", "potestas", "auctoritas": The Construction of a Legal and Political Lexicon/Vocabulary') in the context of the mid-twelfth-century intellectual and cultural ferment. The syntheses provided by Gratian's *Decretum* and by the *Glossa Ordinaria* on the Bible just described provided 'men of culture' a new lexicon that offered them the potential to develop 'wholly new discussions' on the 'evangelism' and the simultaneous concentration of power with terms such as 'potestas', 'auctoritas', 'lex', and 'ius' (131). These 'men of culture', Saccenti explains, began to specialise in the separate disciplines of the 'sacra pagina' and the study of the canons of the Church. This process coincided with the centralisation of power. On the one hand, the *Decretum*'s parallel between the contents of Scripture and natural law invested legitimacy in the 'potestas' of the Church, and in the pope in particular as the *vicarius Christi*. On the other hand, the plurality of meanings in the terms *lex naturalis* and *ius naturale* tended to construct a scene in which the entire legal 'ordo' found a certain unity among canonists and legists in restoring imperial 'potestas' to the Hohenstaufen. But, for Saccenti, nature was intended as the foundation of 'potestas', whether in respect of 'regnum' or 'sacerdotium'; nature was 'the terrain of confrontation' between these two diverse visions of 'christianitas' (133). The 'question of the normativity of nature assumed an even more central value in discussions on the *ordo* of

law and of norms' (132). The chapter then proceeds by means of six sections.

In the second section of chapter 3 ('*Leges divinae* and *Leges naturale*' 137-147), Saccenti identifies in the figure of Rolandus Bandinelli an exemplar of this connection between the doctrinal, theological, and legal developments amid the surge of ecclesiastical and cultural renewal. As Pope Alexander III, he was the first 'magister' to become pope. Although recognising that modern scholars have now distinguished Bandinelli from the Master Rolandus who authored a *Summa* on the *Decretum* and a theological *Sententia*, Saccenti described Bandinelli as 'testimony of that mixture between law and Scripture' in the second quarter of the twelfth century that characterised the culture of Europe (138). Another example of this phenomenon whom Saccenti observes is Gandulph of Bologna. Analysing some of his papal letters on marriage and on the Christological nihilianism controversy, Saccenti observes that, despite the terms *lex naturalis* or *ius naturale* not being explicitly used in these 'legislative works', Bandinelli understood those terms from the first distinction in the *Decretum* as having a 'paradigmatic value' in defining the foundation of papal power as well as fixing its limits (145-146). Saccenti separates the concept of nature from law, as he did in concluding the previous chapter, adding: 'Just as in a similar efflorescence of law and canon law in particular, the question of nature as a foundational element of the normative ordering assumed a position of absolute centrality' (146).

The third section of this chapter ('The First Bolognese "Magistri"' 147-155) turns to the students and immediate successors of Gratian, such as Paucapalea, the anonymous *Summa 'sicut vetus testamentum'*, Rolandus Bandinelli, Gandulph of Bologna, Rufinus, and Iohannes Faventinus. They were most attentive to the relationship between the 'secular' Ulpian definition of natural law against the 'divine' Isidorian one referred to in D.1 c.7 of the *Decretum*, both captured by the term *ius naturale*. Saccenti concludes that these masters provided the intellectual and cultural foundation of the form and prerogative of 'sacerdotium' and, at the same time, 'a willingness to hold firm to

the polarity between "sacerdotium" and "regnum"'—secular and ecclesiastical power (155). The next generation of decretists whom Saccenti subjects to analysis focused on the various meanings of *ius naturale* in D.1 of the *Decretum*, among them Stephen of Tournai, Simon of Bisignano, Master Honorius, Ricardus Anglicus, the anonymous *Summa Animal est substantia,* the anonymous *Tractatus de iure naturali,* and Huguccio's *Summa Decretorum.* Saccenti concludes that these decretists elaborated a perspective of *ius naturale* that (168):

> acquired a central role in discourse relating to the foundation of power and to the definition of its characteristics and its limits. The examination of this notion unfolded from the background of the distinction between 'sacerdotium' and 'regnum' and attempted to show this binary in terms of a dualism between 'auctoritas' and 'potestas' that intended to confer to the former a clearly pre-eminent role. In the first place, the decretists tended to assume the term *ius naturale* had the meaning of the rational law of nature for created humankind, distinguishing it from the Ulpian statement espoused by the civilians. The term *ius naturale* to which the commentators of Gratian held was the capacity to be human and to capture the contents of the Golden Rule and then to receive and include that which was transmitted *in Lege et Evangelio* through revelation. Following these doctrinal developments it is clear that this is the notion that the canonists predominantly held, which tends to reduce the Ulpian definition to a principle of natural philosophy, equivalent to the Platonic *iustitia naturalis* that rules the Cosmos and its internal relations to which no value can be attributed morally or prescribed legally.

Thus, in these works, *ius naturale* denoted the limits of temporal 'potestas', configured on human law and its mutability, but founded on the role of papal and Church 'auctoritas', developed in Scripture and contained in natural law.

In the fifth section of chapter 3 ('The *Ius naturale* in Civilians of the Twelfth Century' 169-176), Saccenti explains that the canonists' position identifying *ius naturale* with 'ratio' just described was worked out to an extent in the face of contrary positions expressed by the civilian glossators. As with the canonists, the civilians developed a discourse on natural law in which they made reference to the 'dictum' of Ulpian, according to which natural law is that which nature teaches all animals. It is this, adds Saccenti, on which the civilians based the system of law and imperial rule and therefore the same imperial 'potestas' (170).

Further, Saccenti's analysis of civilian authors reveals that they insisted on a different 'equivalence' to the canonists, namely one between *ius naturale* and 'aequitas'; the latter term also linking to the imperial and judicial concept of 'iudex' (170). The glosses that Saccenti reviews come from a number of these texts, including Rogerius's *Quaestiones super Institutiones*, Irnerius's *Glossae*, the anonymous *Fragmentum Pragense*, Odofredus's *Commentarium in Digestum*, Magister Iohannes's *Lectura in Digestum*, Accursius's *Glossa*, Placentinus's *Summa Institutionum*, and the anonymous *Rhetorica ecclesiastica.* Two passages summarise Saccenti's findings on natural law among the civilians. In the first, he states (174-175):

> The civilians thus gave form to a legal system in which the natural 'ordo' assumed a normative value on both a legal and political level. Nature, understood in the divine term of 'natura naturans', became the foundation of the whole legal system. Yet further, it imposed this political and juridical paradigm by reason of the principle of 'aequitas' that guides and rules the Cosmos and is translated into the laws of the *ius gentium* and of the *ius civile* that imperial authority imposes and applies. The reflection of the philosophical order underlying this perspective, which is drawn from the cultural inheritance of the Platonic *Timaeus*, on one side, and from Stoicisim, on the other, was arranged in a stage in which there was constantly the search for a foundation of 'potestas' and imperial 'auctoritas' that was autonomous and unleashed from the legitimacy of religious nature that the pope may, however, tend to claim, in an increasing manner, as his own exclusive prerogative.

Then Saccenti adds below this (175):

> The intention of the civilians seems to be that of including in the genus of *ius naturale* the species of the *ius gentium* or of the *ius civile*, giving unity to the imperial normative 'corpus', which is presented as the application of this 'aequitas' that rules a natural law understood as 'ratio' and that finds confirmation in Scripture, since it is the divine law that God reveals to men either transmitted by reason or through the two Testaments, according to the Pauline paradigm of the Letter to the Romans.

The sixth and last section of chapter 3 ('Criticism of the Notion of "Potestas": The Paris Theologians at the End of the 12th Century' 176-182) turns to the reception of these ideas by the Parisian theologians in the circle of Peter the Chanter in the second half of the twelfth century. These masters, among them Peter Comestor, Stephen Langton, and Peter the Chanter, were students of Peter Lombard and theologians who interpreted Scripture,

rather than the canons or the Justinian 'corpus'. Their works became the site of a further discourse on *ius naturale,* in particular the distinction they drew between 'sacerdotium' and 'regnum'. Based on a passage from Peter the Chanter and the work of Philippe Buc, Saccenti observes that Peter opposed the identification of 'potestas' with the will of the sovereign (proffered by civilians) and put forward an alternative model of 'potestas' as subordinate to 'sacerdotium'. This 'paradigm of royal 'potestas' was founded on four axes: 'doctrina', 'humilitas', 'ratio', and 'consilium'… The model is that of the royalty of Christ and, more directly, of the Biblical royalty of the great 'just' sovereigns such as David, Solomon, and Josiah' (179). Saccenti observes from this that the *ius naturale* of which Paul spoke in his Letter to the Romans was here interpreted as 'strictly linked to "ratio". Thus, "ratio" is one of the definitions that was offered by the various "magistri", together with "ductus rationis e liberum arbitrium"' (179). This natural law, qualified by 'ratio', was linked to the Biblical Golden Rule, which Saccenti illustrates with examples from Stephen Langton on the baptism of infants and from Peter Comestor on the Good Samaritan.

Chapter 4 ('The Lexicon of Nature and the "Ordines"'), takes 'another point of view on nature and its normativity', namely 'that nourished by the reception of the philosophical sources, especially of the Platonic *Timaeus*, which involved important schools such as that of Chartres or that which flourished with the beginning of the teaching of Gilbert of Poitiers', in which 'nature is considered as "ordo"' (26). Beginning with the various readings of 'natura' and *ius naturale* given by Huguccio of Pisa in his *Derivationes* and his *Summa Decretorum*, Saccenti observes that these reveal in the last decades of the twelfth century 'a peculiar aspect of the history of the law of nature in the Middle Ages', namely that the 'discussion around the meaning of terms such as *lex naturalis* and *ius naturale* unravels in parallel with the notion of "natura"' (184). For Saccenti, Huguccio represents 'a point of synthesis' of the preceding canon law and civilian commentaries (186) in understanding *ius naturale* as having a 'plurality of meanings that rendered the concept fluid' (187). The next sections of the chapter

indicate the competing authorities on understanding the term 'natura' in the twelfth and early thirteenth centuries: in essence, the relationship between Scripture and nature. In the first section ('Nature as Metaphor and the Inheritance of Classical Culture' 190-200), Saccenti relates the exegetical method of Augustine from the *De doctrina christiana* as two-fold: first, using diverse grades or levels of understanding 'res' and 'signum' in the sacred text, such as the literal, moral, and allegorical 'senses'; and, second, the role of culture in interpreting the text. In respect of the latter, Saccenti refers to the cultural expression in the twelfth century associated with a 'recourse to nature together with symbols that refer back to a spiritual sense' in interpreting the Bible (192). Saccenti pursues examples of this symbolic conception of nature in the works of Peter Damian and Manegold of Lautenbach, and in the methodologically distinct approach of the school of Chartres; the former taking an 'anti-dialectic' approach and the latter a dialectical approach based on the 'liberal arts' teaching in those schools (197).

The second section ('Nature and Creature: The School of Chartres and its "Political" Implications' 201-208), deals with authors such as Bernardus Silvestre, Thierry of Chartres, and William of Conches, in whom there was evident 'a relationship with nature in which knowledge of the autonomy of nature was combined with the centrality of dialectic' in the study of the Bible (200). Their works personified nature as divinity. In their analysis of 'natura', they also used Calcidius's commentary on the *Timaeus*, which mentioned 'naturalis iustitia' as a specific topic in the dialogue with Plato, as distinct from 'iustitia positiva' in the *Repubblica* (204). Saccenti concludes that these authors applied the Augustinian criteria to use dialectic to focus on terms and their meaning, such as 'natura', as well as the use of 'signs' to reveal the divine reality as a 'simulacrum' of the divinity.

Saccenti then turns to the third section of chapter 4 which bears little obvious relevance to natural law ('Christological Debates and the Papal Statute' 208-215). He explains the link: in the school of Chartres the term 'natura' had two meanings, namely as a whole order, the 'ordo naturae', or as a 'vis innata' or innate

force that is found in all creatures (208-209). Accordingly, the term 'natura' also came to acquire significance in relation to discussions on Christology, the doctrine on the two natures of Christ, since that term was used in Boethius's *Contra Eutychen et Nestorium* and in Paul's Letter to the Philippians. Saccenti illustrates this in his discussions of the *Abbreviato Monacensis Contra Eutychen* and the works of Gilbert of Poitiers, noting the plurality of meanings in that term 'natura'. The Christological controversy was to loom large in the mid-twelfth-century.

The fourth and final section of chapter 4 ('"Machina naturae": The Natural "Potestas" of the Emperor' 215-225) argues that the term 'natura' also came to form the basis of secular power, especially as demonstrated in the *Policraticus* of John of Salisbury. Saccenti observes: 'Through John, the law of nature represents, therefore, the foundation of a political "ordo" in proportion by which the sovereign is called to govern the public weal, having as their point of reference the natural order itself' (217). And later Saccenti adds: 'Thus, "natura", with its "lex" that is "aequitas", founded the legitimacy and the necessity of power for the sovereign', citing another passage from John of Salisbury (218). Again, no univocal definition emerged of 'natura' but rather a multiplicity of senses. Thus, Saccenti asserts, the symbolic understanding of nature as exemplar, previously described, continued, for example in the *Didascalion* of Hugh of St Victor. Another subsequent exemplar was the *Liber augustalis* of Frederick II (1231), in which the term 'machina mundi' was employed as an analogical reading for 'natura' as representing the sovereign's mandate to guarantee 'aequitas' (221-222). A further example was constituted by the *Habita* (1155) and discussions surrounding it by the masters at Bologna. Accordingly, all three of the schools, ecclesiastical, and secular powers were animated and articulated with notions of 'natura'.

Chapter 5 has the title '"Principia operandi" and *universalia iuris*: Theological discourse on natural law'. It turns to the 'universitas' at Paris around 1200 and its discussions of *ius naturale*. The chapter then divides into three sections. In the first of these ('Nature as Order with a Metaphysical Foundation' 228-

248), Saccenti focuses on the figure of William of Auxerre, one of the pre-eminent masters there in the first decades of the thirteenth century and also the author of a text of natural law, the *Summa aurea*, which combined a knowledge of theology and canon law. The analysis also examines the works of Roland of Cremona, Philip the Chancellor, and Prepositinus of Cremona. Saccenti describes them in this way (229-230):

> [T]he Parisian 'magistri' chose to circumscribe their interest in the notion of natural law to that element characterising the moral subjectivity of man. The notion (of natural law) came then to be assumed as an element at the foundation of the moral life, whose 'origo' derived from that virtue that exists in every man to be in a position to improve and practise. In one of the schemes of classification of the grades of virtue that begins from the 'virtutes politicae', characteristic of all men, it then passes to the 'virtutes theologicae', and then to perfect virtue, on the basis of a model of ethical living that goes back to God and his precepts.

Thus, William and the other Parisian theologians of the early thirteenth century distinguished between political virtue and theological virtue, within the parameters of the meanings of *ius naturale* that focused on the moral life. William also, in interpreting the meaning of natural law, when examining the notion of common property, made the famous tripartite distinction between 'praecepta', 'prohibitiones', and 'demonstrationes', thus differentiating absolute precepts from permissive ones (242).

The second section of chapter 5 ('Plurality of *Leges* and *Lex naturalis*' 248-262) begins by setting out the elements of *ius naturale* that William and then Roland had established, namely the notion of *ius naturale* as distinct but not contrary to *ius divinum* (248). This was on the basis of their distinction between moral norms and precepts on the Christian life and on faith. Saccenti's analysis of the anonymous treatises *Quaestio de legibus* and *Quaestio de quatuor legibus* leads him to observe that natural law is defined in multiple forms in this theological context that nevertheless conform with the *Glossa ordinaria.* This situation was made possible by the 'plurality of possible laws' (254), for instance *lex naturae*, *lex Moysi*, *les fidei*, and *lex carnis* 'each of which understood and made known what is good and what is evil' (255). Two other notions came to be associated with *lex naturalis* in the theological analyses of these masters: the philosophical

notion of 'habitus', the disposition identified in Aristotle's *Nicomachean Ethics* to know good and evil, and 'conscientia', which is discussed in respect of synderesis and other 'res' present in the soul of man (260). The chapter concludes with the third section ('The Object of a Theological Discussion' 262-265) which emphasises the difference in the nature of the discussions treated in this chapter from those of the civilians or canonists discussed in previous chapters: whereas for the lawyers the question of natural law was placed in the context of legitimising a normative system that could be translated into the exercise of temporal or spiritual power, the theological discourse in this chapter focused on the foundation of the moral life of the human being.

The last substantive chapter, chapter 6 ('*Lex naturalis* between the Mendicant Orders and Epistemological Innovation'), examines some of the works of the masters in the faculty of theology on natural law in the university at Paris between 1235 and 1245. Saccenti describes the context for these works as a 'phase of change in epistemological reference' (268), in which the question was asked whether theology was a 'science'. The term science here meaning accordance with the epistemology of the Aristotelian *Analecta Posteriora*, whose Latin translation had begun to circulate in the university from the beginning of the thirteenth century. This method of knowledge involved moving from a first premiss and then arriving, through a demonstrated process, at a rigorous conclusion; it was the model for all disciplines, including those in the faculties of theology. According to Saccenti, this development rendered the study of natural law 'rigorous and analytical' (268). The chapter contains four sections, which I outline below.

The first of these sections ('The Diverse Articulations of a Concept' 268-275) focuses on the anonymous *Quaestio de lege naturae* edited by Odon Lottin. This was a 'quaestio' that gave to the notion of natural law its own 'autonomy and specificity' (268) in asking of it a series of questions, namely (268): 1) what is natural law 'secundum rem', namely in what does natural law consist?; 2) what is its 'diffinitio'; and 3) to what kind of reality does it belong, 'habitus' or 'potentia'? The anonymous author then

proceeded, via a number of arguments pro and contra, to arrive at a 'solutio'. This text offered, for Saccenti, a level of greater theological study than the preceding treatments and so formed the model to be followed by all theologians dealing with the theme of natural law from 1240 onwards. Another anonymous text, following the same theme and structure as this *Quaestio de lege naturae*, was the *Quaestio de lege naturali*, which is an example of the first theological production by Franciscans at Paris and had as its point of reference Alexander of Hales and John of La Rochelle. The *Quaestio de lege naturali* dealt with four questions, namely: 1) the problem of the definition of natural law; 2) which identification of 'res' applies to the term *lex naturalis*; 3) the problem of the relationship between natural law and other laws; and 4) what does 'habitus innatus' mean with reference to natural law, that is does that term indicate a reality that is identifiable with a faculty of the soul or not (276). The third section of chapter 6 ('*Lex naturalis* in the Doctrinal Elaboration of John of La Rochelle' 285-297) moves on to the decade 1240 to 1250, in which one of the students of Alexander of Hales, John of La Rochelle, produced a long treatise on the diverse meanings of law. John was one of the first Franciscans to have the title of 'magister' of the university at Paris. His work, *Quaestiones de legibus et praeceptis,* was composed in a context in which masters at the university were preoccupied with drawing a distinction between the disciplines of theology and exegesis of Scripture, on the one hand, and philosophy, on the other (286). Nevertheless, John advocated the need for attaining knowledge of the writings of Aristotle and the other philosophers so as to acquire the argumentative tools necessary to understand Scripture and to use it in defence of the faith (287).

The fourth and final section of chapter 6 ('The *Quaestio de iure et lege naturali* of Albertus Magnus' 297-310) deals with the treatise of Albertus Magnus, *De bono*, which was contemporaneous with John's work. In this work, Albertus provided an analytical discussion of the 'good' in relation to the theme of natural law in a 'quaestio' that appeared after the fifth treatise dedicated to justice. The *De bono* was a treatise on the virtues, and so treated

justice as one of the cardinal virtues. Similar to the *Summa aurea* of William of Auxerre, it treated *ius naturale* as part of 'political' virtue, that is part of natural virtue (298). Taking philosophical, theological, and legal understandings of the term from the major commentaries preceding him, Albertus considered the multiple meanings of the term *ius naturale* (five) and of the various senses of the word *natura* (three). The solution adopted by Albertus for dealing with these diverse meanings of terms was to use a concept already adopted by the anonymous author of the *Quaestio de quatuor legibus*, namely that of *universalia iuris*. According to Saccenti, this *universalia iuris*:

> indicated the general principles of the moral and legal order. They were principles that oriented humankind from error and doubt and their value, as explained by the adjectival 'universal' (299).

Such a rule of common application to humankind was codified in the Golden Rule, according to Albertus, and such a norm was inscribed in humankind such that this 'scientia iuris':

> regarded the universal principles of law and of the moral life itself in terms of a 'habitus' that consisted in this knowledge of the first principles that are 'insita' and 'impressa' in the nature of the human soul in an absolute way' (299).

Yet, as Saccenti explains, Albertus linked these explanations to the realities of authority by reference to the possible 'dispensatio' from the precepts of natural law by the 'vicarius' of God: the latter was a reference to the pope and to the kind of authority he exercised, specifically to interpret the norms of natural law such that he would allow dispensation only in certain situations of utility or necessity but never with precepts that were 'essentialiter' (308). In this way, Saccenti concludes, the intention was to attribute to the pope an authority to dispense and to determine acts that were within or outside natural law by mediating between 'principia iuris' and 'principia iuris' (309). This conceptualisation of natural law was particularly significant in the conflict between Pope Innocent IV and Emperor Frederick II around the Council of Leo I in the year 1245.

Saccenti concludes his monograph with a very short four-and-a-half-page long chapter 7 called 'Concluding observations on the multiple senses of *ius naturale*' (311-315). Beginning with the

sixteenth-century *Dictionarium iuris tam civilis uam canonici* of Albericus de Rosate and his synthetic attempts to define the term 'natura', Saccenti summarises the findings of the preceding chapters in several short but rich paragraphs. The term *ius naturale*, Saccenti concludes, demonstrates 'a plurality of semantic value that emerged between the twelfth and thirteenth centuries and was handed down to authors of the succeeding decades and generations' (312). This diversity is reflected in the different perspectives in which it applied, he continues (312):

> For the civilians, 'natura' was 'natura naturans', that is God as Creator fixing precise norms as ruler of the Cosmos and defining the right conduct. In contrast, canonists saw the term 'natura' as the synonym for 'ratio', therefore natural law joined with moral psychology and with its specific problems. As well, theology, although influenced by the 'philosophia naturalis' of Aristotle that came to be discovered in the same decades in the Latin tradition, developed its own reflections on natural law moving from the conviction that the worldly order was a creation of God to one in which the system of norms that rules it can be called divine law.

Saccenti ends with an appeal to the value of his work: '*Ius naturale* became in this way one of the principal notions that determined the moral life of humankind and at the same time founded the discourse on the legal order and its value' (313).

It is appropriate to end this review with some observations on the usefulness of Saccenti's *La ragione e la norma* for scholars of medieval canon law. First, the sheer scope and range of sources that Saccenti deals with on the concepts of *ius naturale* and its cognates is a significant addition to the scholarship on what Kuttner and others have called the 'classical' age of canonistic sources. Saccenti's position is that regard must be had not just to legal sources and concepts, but theological and philosophical-/epistemological ones too. Second, despite the emphasis given to the objective versus subjective divide within notions of 'ius' by Brian Tierney and others, this aspect does not feature significantly in Saccenti's study, which instead takes a broader understanding to natural law and its different contexts. Tierney's studies of *ius naturale* did call for more work to be done on theological sources, a call taken up more recently in Thierry Sol, *Droit subjectif ou droit objectif?* (Brepols 2017). But Saccenti's book takes this a step further altogether with his 'polyhedral' approach using Remi

Brague's methodology. Third and finally, despite the richness of the introductory montage setting out the scholarly and intellectual context in which Saccenti's study is grounded, the book itself does not further engage with this material or the broader secondary material on rights in drawing together the findings of its substantive chapters. How does Saccenti himself see his work as contributing to these well-known scholarly debates? This will be for readers to judge. Or it may be that Saccenti's book is so uniquely on its own trajectory that it does not need to engage with this material and requires a new wave of scholarship to engage with it.

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The volume offers a critical edition, a detailed factual commentary, evidence of biblical quotations, ecclesiastical and Roman law, theological and classical templates, and provides the decree transfer of the letters. It contains 242 letters from the papal office. Topics include the Saracen War in Spain, the efforts for a new crusade to the Holy Land and the fight against heresy in southern France. Further letters deal with the political and ecclesiastical relations from southern Italy to Scandinavia, marriage and property issues, privileges and protection for dioceses and monasteries, diocesan affairs and legal decisions of various kinds, controversial elections and disciplinary questions, insights into the big and everyday problems of the church and the laity.